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Tax Alert

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New Zealand makes BEPS announcements

By Robyn Walker

On the 5 month anniversary of the release of 3 Base Erosion and Profit Shifting (BEPS) consultation papers in March this year, the New Zealand Government announced its considered position on what initiatives will go forward to become legislation.

Taxpayers may be disheartened by reading the media statement from the Ministers of Finance and Revenue which stated: "For the most part, the proposals will proceed as originally devised..."; however due to the consultation process there have been some pleasing refinement and targeting of the proposals, particularly around interest limitation rules.

The final proposals

Between now and the end of the year when legislation will be introduced into Parliament there will be some further consultation on some of the finer details

of these proposals which are generally intended to apply to income years beginning on or after 1 July 2018.

Interest limitation rules

Submitters on the March proposals were almost unanimous in their disapproval of the proposal to cap interest rates on related-party cross-border debt. We are pleased that the Government has amended this proposal, although as readers will see from the list of proposed reforms below, the final position will still be a material change from the current rules, and given the 1 July 2018 application date, impacted taxpayers should start thinking now about how the changes could impact on interest deductibility.

- A new "restricted transfer pricing rule" will apply to set the level of interest rate applying to inbound related-party loans. This rule will follow transfer pricing principles, while ignoring all surrounding circumstances, terms and conditions that could result in an excessive interest rate, and includes a rebuttable presumption that the borrower would be supported by its foreign parent. This announcement replaces the previously proposed "interest rate cap" approach; albeit a taxpayer will be able to use its parent's credit rating as a safe harbour under the restricted transfer pricing rule. Disputes about interest rates would be subject to the Mutual Agreement Procedure under New Zealand's Double Tax Agreements (DTAs).

- When undertaking thin capitalisation calculations, non-debt liabilities (e.g. trade creditors etc) will be subtracted from the asset value. Further consultation will be undertaken on whether deferred tax liabilities should be included in this adjustment amount.

- Taxpayers with less than $1million of interest deductions may be eligible to be carved out of the thin capitalisation rules.

- Certain infrastructure projects funded entirely with third party limited recourse loans will be exempted from the thin capitalisation rules.

- Prescriptive rules will be developed allowing taxpayers to value assets for thin capitalisation purposes in a manner different from the basis used in their financial accounts (i.e. it may be possible for assets to be independently valued).

- Taxpayers will be able to continue to perform thin capitalisation calculations on the basis of year end positions (rather than undertaking daily or quarterly calculations), but a new avoidance rule will target taxpayers repaying loans just before year end.

The above changes are expected to net $80-$90million in additional tax per year on an ongoing basis.

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An application date of income years beginning on or after 1 July 2018 is considered appropriate as it is believed that related party transactions are "more easily altered compared with transactions with third parties", and as thin capitalisation calculations are undertaken at the end of the year, taxpayers will have until at least 30 June 2019 to alter debt and asset levels.

Taxpayers who have entered into Advance Pricing Agreements (APAs) with Inland Revenue before 1 July 2018 will have those agreements honoured for the full agreed term.

Transfer pricing and permanent establishment (PE) avoidance

Following consultation, the Government has decided to introduce the majority of reforms to the transfer pricing and PE rules that were recommended in the March consultation papers, with some amendments. Changes will include:

- A new PE avoidance rule that will apply to large multinationals that structure their businesses to avoid having a PE in New Zealand. There will be further consultation on how to best achieve this.

- New rules to deem certain amounts to have a New Zealand source if New Zealand has the right to tax that income under any applicable DTA.

- A new anti-avoidance source rule.

- Amendments to the life insurance source rules.

- Amendments to the transfer pricing rules so that:

  - Legal form is disregarded if it does not align with the economic substance of a transaction.
  - Inland Revenue can reconstruct transfer pricing arrangements which differ from those that third parties acting in a commercially rational manner in similar circumstances would have entered into.
  - The rules specifically refer to arm's length conditions and the OECD guidelines.
  - They codify the need to comply with the OECD's country-by-country reporting requirements.
  - The time bar is increased from four years to seven years.
  - The burden of proof for demonstrating that a taxpayer's transfer pricing position aligns with arm's length conditions is shifted from Inland Revenue to the taxpayer.
  - The rules also apply when non-resident investors are "acting in concert" to effectively control a New Zealand entity, such as through a private equity manager.

- Strengthening Inland Revenue's investigation powers when it comes to multinationals with global revenues of at least €750million (NZ$1.1billion) if they do not cooperate with Inland Revenue. Initiatives include: more readily being able to assess taxpayers based on information held; collecting any unpaid tax from other wholly-owned group members; being able to issue information requests to offshore entities; being able to deem income to be allocated to a New Zealand group member if information requests are not adequately responded to; and imposing a civil penalty of up to $100,000 for failing to provide requested information.

The above changes are expected to net $50million per year in additional tax on an ongoing basis.

It is worth noting that a Diverted Profit Tax was considered but not recommended.

As with the interest limitation rules, these new rules will apply to income years beginning on or after 1 July 2018, with grandparenting applying to APAs in place before this date. The Regulatory Impact Assessment document accompanying these announcements states that "We consider the planned application date of 1 July 2018 (for most of the measures) to be sufficiently prospective when compared with the date of the discussion document release, which is when taxpayers should be regarded to be [sic] have been notified

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of the Government's intention in this area, and the scheduled date of introduction of the relevant tax bill."

Hybrid mismatch arrangements

The final set of changes are to the complex area of the tax treatment of hybrids. Hybrids are entities or instruments that are treated differently in two different jurisdictions, allowing mismatches between those two jurisdictions to be exploited (for example, a deduction for an expense is available in one jurisdiction but there is no matching taxable income in the second jurisdiction). The main highlights of the new rules are:

- Rather than tackling only hybrid arrangements which have been observed in New Zealand, New Zealand will comprehensively adopt the OECD recommendations related to hybrid mismatch arrangements. It is acknowledged that this will involve considerable complexity, but the intended outcome of this complexity is taxpayers choosing simpler debt and equity funding structures.
- Some concessions will be made to the OECD recommendations where it is appropriate in a New Zealand context. For example, simple foreign branch structures will generally not be caught.
- Foreign trusts will be caught within the rules in circumstances where their treatment outside of New Zealand means income of the trust is not included in a tax calculation anywhere in the world.

The rules are generally intended to apply from 1 July 2018, with some aspects slightly delayed.

The above changes are expected to net $50million per year in additional tax on an ongoing basis, subject to taxpayer behaviour modifying after the implementation of the rules.

What next

Between now and October 2017 there will be further consultation on aspects of the proposals. This is expected to be in the form of exposure drafts containing draft legislation. This will provide an initial opportunity to consider the workability of the announcements and to identify any major issues.

Following this process, it is intended to introduce legislation into Parliament and to start the Parliamentary process before the end of the year. The last parliamentary sitting date in 2017 is 14 December. The legislation will need to be enacted by 30 June 2018.

New Zealand has a General Election on 23 September 2017. There is general cross-party support to take action against BEPS and therefore these proposals are likely to proceed regardless of the make-up of the next New Zealand Government, albeit depending on the outcome of the election there may be more BEPS measures to come.

A new PE avoidance rule will apply to large multinationals that structure their businesses to avoid having a PE in New Zealand. There will be further consultation on how to best achieve this

2017 BEPS Global Survey

Deloitte has recently completed its fourth OECD BEPS Survey (full results available here and more information available here). The annual survey is conducted to gauge the views of multinational companies regarding the Global Tax Reset and the OECD's BEPS initiative, and the expected resulting impact on their organisations.

The 2017 survey focused on understanding how multinationals' perspectives on BEPS have changed since the BEPS recommendations went into effect. The survey notes that it will be important that companies take a strategic and multi-disciplinary approach when it comes to addressing the Global Tax Reset. Some of the key findings include:

- **Substantial change is fully expected and being prepared for**: 86% of organisations have assessed the potential impact of the BEPS changes to their organisation and 54% have developed additional corporate policies and procedures in relation to this. Further, 50% have changed the way they conduct tax planning for cross-border transactions to address proposed BEPS changes and expected increased scrutiny related to corporate taxation.

- **Major impact on compliance burden**: As a result of the OECD BEPS recommendations, 94% of respondents believe that the additional transfer pricing reporting requirements will substantially increase their compliance burden and 66% believe that the increase in the number of foreign permanent establishments will substantially increase their compliance burden.

- **Double tax**: 80% believe that double tax will occur as a result of unilateral tax law changes and 75% believe that double tax will arise from some of the BEPS changes even without unilateral legislative changes.

- **Consistency**: Only 19% agree that tax administrations will interpret the proposed changes to the transfer pricing guidelines in a consistent manner.

- **Greater scrutiny being placed on companies**: 91% of respondents agree that tax structures are under greater scrutiny by tax administrations than a year ago (and 93% believe there will be more tax audit assessments). 53% agree that tax authorities are becoming increasingly aggressive in tax examinations.

- **Foreign permanent establishments (PEs)**: 66% of respondents expect the tax compliance burden to substantially increase as a result of an increase in the number of foreign PEs resulting from BEPS recommendations.

- **Concern over reputational risk and increasing interest in tax**: 76% of respondents are concerned about the increase in media, political and activist group interest in corporate taxation. 61% agree that tax planning in their organisation has become a corporate responsibility issue, not just a legal issue.

- **Additional resources due to BEPS**: 29% of respondents indicated they were planning on securing additional resources / headcount wholly or partly as a result of the anticipated changes arising from BEPS initiatives.

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Election 2017

By Emma Marr

Every three years New Zealand enters a hectic, whirlwind general election campaign, in which our elected representatives and those who aspire to take their place throw themselves on the mercy of the electorate by touring the country, delivering speeches, making promises, shaking hands and kissing babies. On 23 September 2017, it will all come to an end and the country will go to the polls, cast a vote, and then retire to a bar, living room, or cool dark room to await what happens next.

But in the meantime, who is running the country? What happens to Parliament? And what happens to all the Parliamentary business that was going on when all this election business kicked off? For answers to all this and more, read on.

Countdown to an election

Elections must be held in New Zealand every three years – Parliament ends three years after the result of the last election was formally returned, but usually in New Zealand the Parliamentary term is formally bought to a close by the Governor General dissolving Parliament. Once Parliament has dissolved (22 August this year), it's game on and the election campaign can begin in earnest.

Early votes can be cast from overseas from 6 September, and local advance voting starts from 11 September. You can elect

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to enrol until 22 September, and polling day is 23 September this year (always on a Saturday), and no election advertising is allowed that day. Election results are released progressively after polling booths close at 7pm on election day, and usually by late evening the outcome of the vote is known. Whether that means we all go to bed knowing who will form the new government is another matter, and if there is no party with a clear majority it may take a few days or weeks for a coalition government to be formed.

Who runs the show in the meantime?

As fun as it is to imagine that there is a vortex of power while the election campaign is going on, in fact the government of the day continues to have executive power, and to make any necessary decisions. By convention major decisions are deferred until a new government is formed, and the public service continues to provide all the normal government-run services.

What about all the Parliamentary business that didn't get finished?

Whenever Parliament is dissolved there will be bills in the middle of the legislative process, and various other business ongoing. Everything lapses when Parliament is dissolved, meaning that the new government can start with a clean slate. It can, however, choose to re-instate bills at the same stage as they were when Parliament dissolved, rather than starting them all over again.

The current tax bill, the Taxation (Annual Rates for 2017-18, Employment and Investment Income, and Remedial Matters Bill) (introduced April 2017) was at the Select Committee state when Parliament dissolved. This bill includes reforms on the disclosure of investment income information, reforms to the PAYE rules, the taxation of employee share schemes and various other reforms (see our April 2017 Tax Alert for more detail). The Finance and Expenditure Select Committee has received written and heard oral submissions on the bill, and is expected to report back late 2017. This will depend on whomever forms the next government deciding to re-instate the bill and commence the process

at the point at which it was left before the election. The same goes for all other Parliamentary business underway when Parliament dissolved.

BEPS reforms announced by the current government in August (see our article New Zealand makes BEPS announcements in this edition of Tax Alert) are at an earlier stage, having only been the subject of discussion papers on which the Government had sought submissions. It will be up to the new government whether the proposals announced by the current government will continue unchanged after the election. The current timetable is that draft legislation on those proposals will be introduced in late 2017, with the legislation passing in 2018 and taking effect from income years starting after 1 July 2018. Whether this timetable will be met depends on how quickly this program of work is progressed after the election. A new and different government may simply continue with the planned reforms, or may wish to reconsider them and change the timetable.

Forming a new government

A party with a majority of seats in Parliament will be invited by the Governor General to form a government. If there is no clear majority, parties will seek to form a coalition government, which can

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take days or weeks. In the meantime, the old government will be a 'caretaker government', making only necessary decisions. The Governor General will summon Parliament within six weeks of the election result being formally returned and, by convention, the first business of the new Parliament will generally be to take a vote of confidence in the new government, or rather, for the opposition to move a vote of 'no confidence', which the newly formed government must defeat in order to get underway with governing the country.

What tax reform can we expect from the next government?

At the time of writing the tax policies of the main parties may not have all been released, so the below is a summary of what we're aware of, with the caveat that this election campaign has been full of surprises and there may well be more to come.

National Party

- No major changes to policies already announced. These include those announced in the 2017 budget, including tax cuts from 1 April 2018 (for more information refer to the Deloitte analysis of the 2017 budget here).
- No changes to the corporate tax rate.
- Tighter foreign trust rules.
- Possible tightening of rules around tax on buying and selling property, but no details yet.
- BEPS reforms on interest limitation, thin capitalisation, transfer pricing and PE avoidance, and on hybrid mismatch arrangements (refer to our article in this edition of Tax Alert).

Labour Party

- Introduce a diverted profits tax (similar to that introduced in the UK) on multinationals.
- No increase to top individual top tax rate of 33%
- Increasing bright-line test on property sales from two to five years, set up working group to consider further capital gains tax (exempting family home), banning foreign speculators from buying existing New Zealand homes, and ring-fencing losses on rental properties so that losses cannot be offset against other income.
- Regional fuel tax at 10 cents per litre.
- Introduce royalties for bottled water, irrigation schemes and other commercial uses.
- Introduce a $25 levy on international visitors to New Zealand on top of the present border levy of $22 to raise money for the Tourism and Conservation Infrastructure Fund.

NZ First

- Lower corporate tax rate to 25%.
- Exempt "basic essential food" from GST.
- Give GST paid by tourists to the region in which it was spent.
- Give 25% of royalties and taxes collected for mining, petroleum and water to the provinces from which they came.
- Deductions for professional expenses incurred when starting a new business.
- "Crack down" on black economy and multinationals.

Green Party

- Implement a capital gains tax on property (exempting the residential home).
- Exempt electric vehicles and public transport passes from FBT.
- Implement a "water levy" of 10 cents per litre on sales or exports of water.
- Reduce bottom tax rate to 9%, and implement top tax rate of 40% on income over $150,000.
- Introduce a tourist tax of $20 by raising border charges for international visitors to raise funds for the Department of Conservation.

Do your contracts comply with the new Transfer Pricing Guidelines?

By Bart de Gouw and Nandita Rao

The new Transfer Pricing Guidelines (2017) on the arm's length principle will have a far-reaching impact on multinationals. Inland Revenue is more focussed than ever on the conduct of multinationals operating in New Zealand, and this pressure will only increase in the near to medium-term.

If your business has cross border arrangements and you don't have intercompany contracts in place, now is the time to get them underway. If you do, you need to consider whether they comply with the new guidelines. It's not enough to simply have intercompany contracts in place – they also need to adequately set out the functions and risk allocations of the parties and ensure that the contracts are aligned with the conduct of the parties.

As there are increased reporting requirements in the form of the master file and local file that require copies of the intercompany contracts, these will be scrutinised by tax authorities in ever more detail.

However, there are practical steps that companies can undertake to ensure that their intercompany transactions are appropriately documented and supported. The risk of not aligning contracts and conduct is the exposure of the transactions to challenge and potential reconstruction by tax authorities.

Why are contracts important?

Under OECD guidance, transactions are assessed by assessing the functions performed and the risks assumed by the parties to the transaction.

Contracts are the starting point that should ideally define in detail the functions and risks undertaken by the parties and the expected outcomes at the time of entering into a transaction. Therefore the contract will be assessed first when analysing the appropriate allocation of profit between parties.

Consideration of risks

Under the new guidance issued by the OECD, companies will have to perform an expanded functional analysis of risks associated with each entity.

As risk is inherent in business activities, identifying risks is an integral part of a functional analysis.

In assessing and responding to risk associated with commercial activities, there must be consideration for the following three elements:

1. Whether there has been a contractual allocation of economically significant risks;
2. Whether the entity assuming the risk has control over the risks. There is updated and detailed guidance from the OECD on what "control" means in this context; and
3. Whether the entity has financial capacity to bear the risks.

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There is detail behind each of these three elements that must in turn be considered to ensure the functional analysis is correctly carried out. In an ideal scenario, there will be consistency, meaning the entity which has been allocated the risk in the contract has actual control over the risk and also the financial capacity to bear the risk.

If the conduct differs to what it is in the written contract tax authorities may seek to reallocate profit between the parties. Clearly such a situation produces a level of uncertainty that most taxpayers would seek to avoid.

Practical considerations

We have set out below steps for companies to follow in getting intercompany contracts "BEPS ready" in an efficient and cost-effective manner.

1) Determine if there are any significant intercompany transactions for which there are no contracts in place. These will be of greatest risk to challenge by tax authorities. Implementing a contract that aligns with the conduct will remove uncertainty.

2) Determine which existing contracts or transactions should be analysed. The focus should be on higher risk contracts that allocate risks such as contract R&D or limited risk distributors.

3) Identify the significant functions and risks (including the control and capacity to fund those risks, as discussed above).

4) Compare the contractual allocation and the function and risk analysis to the intended characterisation of the entity. For example, if the entity has been characterised as a limited risk distributor, the results of the function and risk analysis should support this characterisation.

5) Determine if any changes to the contract or conduct are required to support the intended characterisation of the entity.

Disclosure requirements

The increased disclosure required under the OECD's master file and local file requirements will highlight any discrepancy between contracts and conduct. There are a number of specific requirements of the master file and local file directly relating to the provision of contracts and the respective functional analysis.

Additionally, NZ Inland Revenue have released proposals that propose to shift the burden of proof from Inland Revenue to the taxpayer in a dispute.

It is important that companies have robust and aligned contracts in place as any discrepancy may be challenged.

If you need advice in considering whether you comply with the new Transfer Pricing Guidelines, or you need assistance in compiling or updating your intercompany contracts or master or local file, contact your usual Deloitte advisor.

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Inland Revenue Targeting FBT – Are you ready?

By Sarah Kennedy and Erika Horlor

Inland Revenue has increased its activity in the FBT space and we have seen substantially more FBT risk reviews than in previous years. This highlights Inland Revenue's focus areas from an FBT perspective. Gone are the days of assuming having a small FBT obligation meant being out of the firing line. In addition to large employers we have also experienced small employers who provide a couple of vehicles and Christmas gifts to employees being targeted by Inland Revenue.

Having your FBT in order before a risk review pays off

We have found that providing more detail than requested by Inland Revenue Investigators upfront meant the risk reviews were cleared quickly.

We had substantially less questions from Inland Revenue where we were able to provide the Investigator with a covering letter outlining an overview of what benefits were being provided and being upfront with any issues we had identified. This meant less time commitment from clients.

Make sure your documentation is up to scratch

In our experience of FBT risk reviews, Inland Revenue requests detailed documentation. For example, in relation to motor vehicles, Inland Revenue wanted to see documentation such as restriction of use policies to substantiate unavailability for private use, log books, and proof of internal checks to ensure the employer was actively monitoring the use of the vehicles provided to employees. It is important to have this documentation in place before Inland Revenue come calling.

Inland Revenue will use external sources of information

Inland Revenue are also using other resources to assist their data collection. For example, vehicles on which FBT was returned were compared against not only client provided fixed asset registers but also NZTA registration records. This demonstrates that reviews of vehicle ownership and a reconciliation to FBT paid is a process that should be undertaken regularly.

Get your calculations right

We have seen Inland Revenue re-calculate day availability, re-compute the fringe benefit value calculations to check the accuracy of the underlying calculations, and then seek to re-assess FBT returns over, in some cases, minimal amounts of tax. Make sure you are giving thought to the calculations and being mindful of the precision of record keeping to support the underlying calculations. Errors in excel spreadsheets are more common than anyone would like to admit. The risk of error is reduced with the use of FBT software, but the output is only as good as the quality of information inputted.

Make sure you get the PAYE / FBT distinction right

We found a number of instances where there was a misunderstanding of whether compensation provided to employees should be taxed through payroll, or should be subject to FBT.

The general rule is that if the employee is contractually obliged to pay for something but the cost is met by the employer (excepting genuine business expense reimbursements), it is subject to PAYE.

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Generally where the employer is obliged to pay for the item provided to the employee, then this will be subject to FBT.

This is particularly important for employers not returning any tax on the basis that the benefit is excluded from FBT under the FBT de minimis threshold. Examples of this included a provision of health and wellbeing benefit via an expense claim mechanism, and reimbursement of private taxi/Uber expenses. In both of these examples, clients thought these benefits were subject to FBT and under the de minimis threshold, but they should have been subject to PAYE, as the contractual obligation for these expenses was with the employee.

This issue is not limited to situations where tax is going unpaid. We expect increasing focus on tax being paid under the correct tax type as Inland Revenue moves through business transformation and focuses more on the accuracy of payroll information. This means it is important the contractual arrangement of each benefit provided to, or paid on behalf of, employees is understood by the business's FBT return preparer and payroll preparer respectively.

FBT on motor vehicles is a tricky area

FBT on motor vehicles is difficult to get right. In addition to having the correct documentation, two key points to note were:

- **Holidays and availability for private use**: The general rule is that where staff go on holiday and park the car at the long-term airport parking, the vehicle is considered to be still available for private use. This is contrasted with the situation where an employee takes a vehicle on a business trip, and the vehicle is not considered to be available for private use during this time.

- **Cost base of vehicles**: Make sure you check the calculation for the FBT value of vehicles is correct. For example if using the cost option, make sure you use the GST inclusive cost base for the taxable value. Additionally it is worth checking whether there is the opportunity to decrease the amount of FBT payable by switching older vehicles to the tax book value methodology, but make sure you don't go below the minimum taxable value of $8,333.

STOP PRESS

Inland Revenue has finalised the Interpretation Statement 17/07 Fringe Benefit Tax – Motor Vehicles which is available here.

The Interpretation Statement seeks to combine a number of Inland Revenue publications on FBT on motor vehicles. There is an emphasis on the concepts of availability for private use, and it also provides a useful case study type illustrative example throughout the document.

Conclusion

If you think your business could be due for an FBT health check or you require assistance with a specific FBT matter, please contact your Deloitte tax advisor.

Get your GST matters right before settlement

By Sam Hornbrook and April Wong

It is no secret that GST can be complicated when it comes to land transactions. Over the past two months, we have seen two cases where parties have brought their issues to court over their sale and purchase agreement. The vendors lost in both cases. Given the substantial values involved, having certainty on the correct GST treatment of land is crucial. Parties should therefore understand explicitly what they have agreed to in their sale and purchase agreement well before settlement. Failing to do so can result in significant commercial implications. It is interesting to note in the two cases considered below, Inland Revenue were not at risk of losing out on GST under any outcomes and were not named parties to the cases. These cases were commercial disputes but had GST issues at their core.

Zero-rating of land transactions

To remove the risk to Inland Revenue from so-called "phoenix schemes", the compulsory zero-rating rules came into effect in 2011 to treat certain supplies of land between GST-registered persons as zero-rated. A purchaser is required to notify the vendor of their GST position by completing a schedule to the written sale and purchase agreement. Vendors and purchasers are often happy to rely on the standard clauses contained in the standard Auckland District Law Society (ADLS) agreement for sale and purchase of land, but they can still lead to GST issues. In addition, we note that parties often neglect to fill in the accompanying schedule (Schedule 2, or Schedule 1 in auction cases) to this agreement, even though this may cause them grief come settlement time.

Case studies

Y&P New Zealand Ltd and Wang & Zhang (Wang & Zhang case)

In *Wang & Zhang*, the vendor agreed to sell four adjoining properties for $2,430,000 "plus GST (if any)". The purchaser had initially completed Schedule 2 on the basis that they were not GST registered, meaning that GST at 15% would be charged on the sale. The parties had not made any changes to the standard GST clauses. In particular, clause 14.5 of the agreement was left as standard, which required a purchaser to notify the vendor two working days in writing before settlement should their GST position change after signing the agreement and obliges the vendor to act upon that notification.

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One day before settlement, the purchaser's lawyers informed the vendor that they were now registered for GST. On the same day, the vendor's lawyers proceeded to issue the purchaser's lawyers an amended settlement statement showing the transaction at 0%. However, the vendor resisted settling and proceeded to cancel the sale of the properties altogether on the grounds that they wanted to settle at 15% GST. We note sometimes vendors may wish to not settle if other commercial factors have changed, as from a GST perspective, it would make no material difference to the vendor if the sale price showed GST at 15% or 0% in a "plus GST" contract. The purchaser took the issue to court and lodged caveats against the vendor's four properties. On three occasions, the High Court, Court of Appeal and Supreme Court ruled in favour of the purchaser and agreed that the amended settlement statement constituted a "waiver" of the vendor's rights to rely on the purchaser's original statement that they were not GST registered.

YL NZ Investment Ltd v Ling (Ling case)

In the *Ling* case, we see the GST complexity arise because the vendor made a warranty that they were not registered for GST and this was subsequently challenged by Inland Revenue (who considered that the vendor was deemed to be GST registered). This denied the purchaser the ability to claim a second-hand input tax credit on the purchase price of $3.5 million (inclusive of GST).

The High Court held that the vendor had breached the warranty in clause 14.1 of the sale and purchase agreement by indicating that she was not GST registered at the time. The correct interpretation of clause 14.1 is not only whether the vendor is GST registered, but whether they are liable or deemed to be registered. As the vendor was liable / deemed to be GST registered at the time the sale and purchase agreement was signed, indicating otherwise on the agreement constituted a breach of the warranty in clause 14.1. The High Court therefore gave the purchaser judgment against the vendor for the amount equal to the GST second-hand input tax credit that would be otherwise claimable.

The devil is in the detail

A lesson to be learned from both these cases; it is not only crucial for parties to scrutinise what is included or excluded from the standard GST clauses included in the ADLS agreement for sale and purchase of land, but for parties to understand in depth what they are agreeing to.

Things could have gone very differently for the vendor in the *Wang & Zhang* case had the vendor's lawyers stuck to their guns and not issued a revised zero-rated settlement statement. There was no contractual requirement for the vendor to accept a change in the purchaser's notified GST status only one day before settlement for the vendor per clause 14.5. However, as the vendor's lawyers had issued the amended settlement statement, the protection given by clause 14.5 was waived.

Things could have also gone differently for the purchaser in the *Ling* case. Though the High Court ruled in favour of the purchaser, being more proactive leading up to settlement could have saved the purchaser significant time and costs in having to seek legal recourse. The issue in the Ling case could have been avoided had the purchaser sought advice and introduced some non-standard GST clauses expressly dealing with the intended second-hand goods credit claim.

As there are many traps along the road to achieving a successful property settlement, we strongly urge you to contact the Indirect team at Deloitte for assistance with any upcoming land transactions prior to signing.

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Survey shows room for improvement in the way New Zealand taxes business

In collaboration with BusinessNZ, Deloitte New Zealand has published a survey which captures what the biggest New Zealand companies' CEOs think about a range of tax issues, including corporate tax rates, deductibility, depreciation and incentives for investment. The report broadly concludes that there is room for improvement and some-fine tuning required to ensure that New Zealand's tax system is performing optimally and that New Zealand's economy remains competitive.

The themes in the survey include the need for tax authorities to:

- Provide certainty;
- Eliminate black hole expenditure;
- Help to strengthen buildings;
- Restore depreciation for industrial buildings;
- Maintain an internationally competitive corporate tax rate;
- Encourage research and development;
- Put New Zealand's interests first;
- Allow taxpayers some flexibility;
- Treat commercial information like personal information; and
- Determine policy based on realities.

There is room for improvement in NZ's tax system to ensure that we remain competitive globally

The survey and its results are not focused on reducing tax on large companies. Rather, its focus is on adjusting certain specific tax settings to drive appropriate policy and administrative outcomes that are also relevant to a much wider group of taxpayers.

Click here to access the full survey.

A snapshot of recent developments

Multilateral Convention tabled at Parliament

The Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting was tabled in Parliament on 8 August 2017. Minister of Revenue Judith Collins notes that tabling the Multilateral Convention is "another step forward" in New Zealand's fight against BEPS and stopping multinationals from exploiting tax rules. Click here for Parliament's press release.

Negotiations for a tax treaty between Croatia and New Zealand

Croatia and New Zealand have agreed to negotiate a double tax agreement. Two way trade between the countries is not currently significant, with trade only being NZ$4.8m in 2014. Click here to find out more.

New Zealand and China undergoing treaty revision

The Government has welcomed a second round of negotiations between China and New Zealand's tax officials to update the Double Taxation Relief (China) Order 1986. Minister of Revenue Judith Collins notes that the "aim is to agree to a new treaty, adopting modern treaty language and concepts, including agreed measures to deal with base erosion and profit shifting."

New Zealand to strengthen double tax agreements with India and San Marino

On 8 August 2017, Minister of Revenue Judith Collins announced that New Zealand's tax agreements with India and San Marino have been updated to allow for the effective exchange of information. The Third Protocol to New Zealand and India's tax agreement has a new article relating to the collection of taxes. Similarly, New Zealand's tax information exchange agreement with the Republic of San Marino implements the current international standard for exchange of information between the two countries.

New Trusts Bill

On 1 August 2017, Minister of Justice Amy Adams introduced the Trusts Bill into Parliament. The Bill represents the first significant change in New Zealand trust law in over 60 years. With around 300,000 to 500,000 trusts operating in New Zealand today, Ms Adams says that "the Trustee Act 1956 is out of date and in need of a refresh."

The proposed changes in the Bill are largely founded on the Law Commission's recommendations in 2013 and the exposure draft of the Bill released in November 2016. Ms Adams hopes that the "Trusts Bill will provide better guidance for trustees and beneficiaries, and make it easier to resolve disputes." The Bill will come into force 18 months after the date on which it receives Royal Assent. The Bill is expected to be enacted before the September election. The Bill has received notable media attention and widespread concern from corporate law firms (see here).

Inland Revenue releases draft Interpretation Statement on tax avoidance

On 7 August 2017, Inland Revenue released PUB00305: Review of Interpretation Statement on Tax Avoidance, a review on the current Interpretation Statement on tax avoidance. We note that it is not the purpose of the review to undertake a fundamental reconsideration of the Commissioner's approach, but the Commissioner accepts that it may be possible to refine the approach in the statement in light of further consideration, experience, and other cases and judicial comment.

The deadline for comment is 15 September 2017.

Inland Revenue report on tax secrecy tabled in Parliament

On 15 August 2017, an Inland Revenue report was tabled in Parliament. The report reviews the current exception to the tax secrecy rules to allow Inland Revenue more flexibility in disclosing information to other government agencies. The aim of the report is to increase Inland Revenue's administrative efficiency and reduce the need for individuals to provide duplicated information to multiple agencies.

New privacy information sharing agreement between Inland Revenue and Ministry of Social Development

A new information sharing agreement between Inland Revenue and the Ministry of Social Development signed in July has come into effect on 31 August 2017. The new agreement brings together current information sharing arrangements into one agreement, and enables sharing of information for targeted housing assistance and verifying income for student allowance entitlements. For more information, see the Order in Council, the text of the agreement and the regulatory impact statement.

Business Transformation update

Inland Revenue (IR) has published their latest Business Transformation update. IR are currently in the process of getting ready for the release of Stage 2 in its Business Transformation plan which will be phased in around April 2018. Stage 2 involves moving FBT, Gaming Duty, AEOI, FATCA reporting and withholding tax onto IR's new system. Changes taking place from April 2018 include collecting PAYE information within IR's system which will allow the pre-population of income tax returns to begin.

From April 2019, employers and payroll intermediaries would no longer be required to file an employer monthly schedule. Instead, they will have to file every payday. The Government will also reduce the electronic filing threshold from $100,000 of PAYE and ESCT to $50,000 a year. The release of Working for Families will also be brought forward to 2019 to coincide with the processing of income tax for the 2018/19 tax year. IR has also announced that they are on track with implementing the new provisional tax calculation method, "Accounting Income Method" in April 2018.

Certain remedial payments are considered "extra pay" for the purposes of PAYE

On 18 August 2017, the Income Tax (Employment-related Remedial Payments) Regulations 2017 (LI 2017/241) came into force. The regulations declare a remedial payment made to correct the underpayment of employment-related entitlements (such as annual holiday pay) as "extra pay" for the purposes of the Income Tax Act 2007. Under the PAYE rules, employers are required to use a different method to calculate the amount of tax they must withhold from a payment that is classified as "extra pay", than for a payment of salary or wages. The Commissioner has also clarified that a backdated remedial payment of holiday pay is an employment-related remedial payment and is treated as extra pay for the purposes of PAYE (CS 17/02: Tax treatment of backdated remedial payment of holiday pay)

Options to trim employer PAYE costs proposed

On 9 August 2017, Minister of Revenue Judith Collins welcomed the release of *PAYE error correction and adjustment*, an officials' issues paper targeted at reducing the costs to employers incurred in administering PAYE information. The proposals in this paper allow employers to make adjustments consistent with their payroll practices, and give employers the ability to use their payroll software to make corrections to returns already filed via myIR, or in certain circumstances, make corrections in a subsequent return. The proposals are not intend to remove the current ability for employers to correct their errors non-digitally, i.e. on paper.

Submissions on the paper close on 15 September 2017.

Foreign trusts and financial statements

The Tax Administration (Financial Statements – Foreign Trusts) Order 2017 will come into force on 2 October 2017. The Order prescribes minimum requirements for preparing financial statements and will apply when a foreign trustee is required to furnish a tax return to Inland Revenue on behalf of the foreign trust.

2017-18 Public Rulings Work Programme

The 2017-18 Public Rulings Work Programme has been finalised. The programme for this year includes a review of Inland Revenue's Interpretation Statement on tax avoidance, and a number of new GST, property and items from the PIB Review Project.

SPS 17/01: Income equalisation deposits and refunds

Inland Revenue has finalised SPS 17/01: Income equalisation deposits and refunds. The item sets out the Commissioner's statutory discretionary powers to accept income equalisation deposits for a tax year outside the specified period, and accept refund applications for a tax year outside the specified period. The finalised item does not differ substantially to its draft version.

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2016-17 Income Year) Order 2017

On 3 August 2017, the Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2016–17 Income Year) Order 2017 prescribed the deemed rate of return used to calculate the return on attributing interests in foreign investment funds at 6.28% for the 2016-17 income year. The prior year's rate was 6.77%.

PUB00258: Income tax – whether full or partial disposal where a person contributes an asset to a partnership as a capital contribution

On 16 August 2017, Inland Revenue released a draft Question We've Been Asked for consultation. The Commissioner's view is that, where a person contributes an asset to a partnership as a capital contribution, this would constitute a full disposal. This includes revenue account property, trading stock, and depreciable property disposals.

The deadline for comment on this item is 27 September 2017.

Tax Information Bulletin – August 2017

The August 2017 edition of Tax Information Bulletin has been published. This edition covers the latest tax developments in CRS, QWBAs relating to key-person insurance policies, and RWT / NRWT in relation to non-cash dividends. There is also coverage of key tax cases to date.

Large Enterprises Update – August 2017

Inland Revenue has published the August 2017 edition of Large Enterprises Update. In this issue, Inland Revenue reminds us of key upcoming provisional tax due dates, and other reminders concerning a company's imputation credit account, small value loans, payments by electronic transfer and more.

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