



Connecting you to the topical tax issues

Tax Alert

May 2019

Beware of common FBT pitfalls during FBT season

By Stephen Walker & Amreen Ukani

With the fourth quarter fringe benefit tax (FBT) return for the year ended 31 March 2019 due by 31 May 2019, it's time to get it right. We have provided a handy countdown of the top 10 errors seen by Deloitte when reviewing client FBT returns.

10. Treatment of employee contributions towards fringe benefits

The taxable value of fringe benefits are reduced to the extent contributions are made by the employee towards the benefit. Even where this results in a reduced FBT

liability of nil, employers are still required to file a nil FBT return as fringe benefits have been provided.

9. Employers applying the maximum FBT rate across the board

Even if you have chosen to pay FBT at the standard rate of 49.25% per quarter rather than the multi-rate of 43%, all is not lost as employers are still able to replace the fourth quarter calculation with a full year attribution calculation, based on FBT rates linked to the total value of

In this issue:

Beware of common FBT pitfalls during FBT season

What is next for the tax system?

Shareholder/employees: Be careful how you pay yourself

Chatfield Court of Appeal decision

Permanent Establishment anti-avoidance guidance finalised

Snapshot of Recent Developments

cash remuneration and fringe benefits per employee.

Our experience shows employers can and do save material amounts when going through the full attribution exercise. At the very least, rather than perform the full attribution calculation, employers should consider whether it is possible to "pool" eligible benefits and tax these at the lower pooling rate of 42.86%.

8. GST Inclusive Employee Benefits

All fringe benefits need to be calculated on a GST inclusive basis. Therefore when calculating FBT, it is important to ensure that the cost base for each benefit is correct. This means not only ensuring that the original cost is correct, but also that the GST component has been accounted for. If you are relying on a general ledger amount to determine the taxable benefit, remember it will be a GST exclusive amount and will need to be grossed up for GST if applicable.

7. FBT vs PAYE vs Entertainment

There is often confusion about whether something is subject to PAYE or FBT, and how the FBT regime interacts with the entertainment rules. If in doubt, seek help from your friendly Deloitte tax advisor.

6. Income protection insurance – not subject to FBT

Employer contributions to income protection insurance premiums are not considered fringe benefits as any policy payments made to employees as a result of a claim will be assessable income to the employee. Contributions are therefore deductible to employers as an employee related cost.

5. Insurance premiums – subject to FBT or PAYE?

Where an insurance policy is taken out by an employee, but the employer pays the premiums on the employee's behalf, the premiums should be subject to PAYE. FBT will not apply because the policy, and the obligation to make payment under the policy, belongs to the employee. Where the insurance policy is taken out by the employer for the benefit of the employee, premium amounts paid by the employer should be subject to FBT.

4. Annual filing threshold

Small employers have the option of filing FBT returns annually. The threshold for filing an annual return is where an employer's total gross PAYE and ESCT contributions for the previous year were less than \$1,000,000. However in order to file annually an election needs to be made with Inland Revenue. A common error we see is that elections are not made or renewed by the 30 June deadline (or the end of the first quarter of the FBT year in

which fringe benefits arise). If an election has not been made by this date, a small employer that has already registered as an employer with Inland Revenue before 30 June 2019 will still be required to prepare quarterly returns for the 2020 FBT year, even if they have not yet registered for FBT.

3. Applying the de-minimis exemption for unclassified benefits

Unclassified benefits are exempt from FBT where the taxable value of the benefit provided to each employee is \$300 or less per quarter per employee and the total taxable value of all unclassified benefits provided by the employer over the past 4 quarters is \$22,500 or less. This calculation is a rolling quarterly calculation and includes the current quarter. In practice we find this opportunity is missed completely or the rolling quarterly calculation of the threshold is not done correctly.

Further, these threshold figures apply across all associated entities and not just on an entity-by-entity basis (i.e. if together two companies in the group exceed the \$22,500 threshold, then both companies are unable to make use of this exemption, even if one of them is under the threshold in isolation). A risk arises where one group company does not review the availability of the de-minimis exemption in the context of the total value of all unclassified benefits provided across the group. This is a particular risk where there is limited or no information sharing between entities.

2. Motor Vehicles – the calculation of exempt days

Recent guidance issued by Inland Revenue concerning the claiming of exempt days means that the days where an employee drives to the airport and returns from the airport are no longer counted as exempt days, nor are days where the employee is away on holiday without the vehicle. Inland Revenue's view is that the vehicle is still being made available for private use on these days and so an FBT liability arises. We often see clients still treating these days as FBT exempt. In addition, where the calculation of taxable value is being performed manually in excel, we often find errors in the calculation. It pays to get the calculation reviewed by your friendly Deloitte tax advisor to ensure it is correct,

or better still, talk to us about potential FBT return software solutions that might be more suitable.

1. Motor Vehicles – Work related vehicle (WRV) exclusion

Not all business vehicles are work-related vehicles for FBT purposes. To qualify, the vehicle will generally have to be a ute, van or a truck that isn't principally designed to carry passengers. It also needs to be permanently and prominently sign-written with the company logo. The WRV exclusion can only apply when the employee is required to take a WRV home for business reasons and when they do so, private use of the vehicle, other than incidental private use on the journey to and from home, is prohibited. The operation of the exemption is also dependent on checks being undertaken and record-keeping to establish that a vehicle is not being made available for private use. A material shortfall in FBT can arise where WRVs have not been subject to FBT and they fail to meet all of the WRV requirements.

Hopefully the above is useful 'food for thought', but if you have any questions or concerns regarding your upcoming FBT return, please don't hesitate to contact us.



Stephen Walker
Associate Director

Tel: +64 9 303 0892

Email: stwalker@deloitte.co.nz



Amreen Ukani
Senior Consultant

Tel: +64 9 952 4204

Email: aukani@deloitte.co.nz

What is next for the tax system?

By Robyn Walker



On 17 April 2019, the New Zealand government [announced](#) the decisions it had made on the 99 recommendations of the Tax Working Group (TWG). At the heart of the TWG recommendations was the introduction of a capital gains tax (CGT), with the government categorically ruling this recommendation out.

With the central pillar of the TWG recommendations ruled out, some commentators have been quick to label the whole TWG process as a waste of time and money. However this is not the case, as we are still left with valuable insights as to the health of the tax system and areas for improvement (outside of CGT). Even the work on a CGT is not wasted, as the report provides a real insight into the extent and complexity of the issues that a CGT would have to address, which would be useful reading for anyone that may, at some future time, raise the CTG question again.

More importantly, however, is that outside of the CGT question the TWG had made a wide range of recommendations, and we are fortunate that the government has been very decisive in responding to all of the recommendations. We now have a clear view on what is or is not expected to progress and now we will likely see a bit of jostling for prioritisation of the remaining recommendations. Obviously without a new major revenue source, the ability to introduce tax cuts, concessions, or improvements with a significant fiscal cost is impeded.

What are we likely to see progressing in the near term?

Of the TWG recommendations, the government put them into five buckets:

1. Endorse the TWG recommendation – essentially these were things where the TWG said something was working well already; i.e. no change required

2. Agree nothing further needs to be done
3. Note that work is already underway – these are things where perhaps there was an overlap with existing policy work or where work had begun to progress regardless of the TWG outcome
4. Consider for work programme – these are things that will be considered when developing the next tax policy work programme in mid-2019, or the work programme of other government agency
5. Consider as a high priority for work programme – these are the things that we may be more likely to see included on the work programme

Of these categories, we would expect to see work continue on items in 3, expect work to start on items in 5, and hope to see work on items in 4 but perhaps on a longer time horizon.



So what falls in each bucket? We outline below some of the key items. The full set of recommendations is available on the Inland Revenue [website](#).

Items that will continue to be worked on

- A large number of items under environmental and ecological outcomes are already under active consideration by non-tax agencies
- Ensuring international tax rules are taxing multinationals appropriately, including participating in OECD discussions and consulting on digital services tax (a consultation document is expected in May)
- Work to ensure that self-employed workers are aware of, and complying with, tax obligations, and work on extending withholding taxes in order to increase compliance
- A review of charities and non-profit organisations

Items to consider as high priority for the tax policy work programme

- Allowing deductions in some form for seismic strengthening work
- Developing a regime that encourages investment into nationally-significant infrastructure projects

- A review of loss-trading
- Tightening rules around closely-held companies, including where tax debts are owed
- Consider taxing vacant land held by land-bankers; this would be a local government initiative rather than central government
- Repeal aspects of the land sale rules that negatively impact on land supply
- Increase IRD number disclosure requirements when selling any residential property

Items to consider for the tax policy work programme

- An exemption from fringe benefit tax for public transport
- A review of specific concessions for farming, forestry and petroleum mining to ensure there are not concessions for activities that harm natural capital and to consider concessions that could enhance natural capital
- Extend the 17.5% tax rate that applies to Māori authorities to subsidiaries and consider technical refinements to the rules
- Change the loss continuity rules to support the growth of innovative start-up firms

- Reform the treatment of "blackhole" expenditure to allow spreading of deductions over five-years and a NZD 10,000 de minimis rule for automatic deductions
- Consider restoring depreciation deductions for certain buildings
- Consider a range of 18 options to reduce business compliance costs
- Consider the additional tax concessions recommended by the TWG that will be considered as part of the work the government already is doing on KiwiSaver enhancements
- Explore options to widen the gap between the company tax rate (28%) and the top personal tax rate (33%); noting that the government endorsed the recommendation of the TWG to not lower the company tax rate
- Consider a truncated disputes process for small taxpayers
- Consider limiting the GST concessions that apply to not-for-profit organisations

Comment

CGT invoked very passionate responses either for or against it, and some will be very pleased to see this policy ruled out. Whatever one's view on CGT, what is of most value is that we now have very clear guidance on where tax policy resources likely will be spent going forward. Now we can get on with the business of consulting on the remaining proposed changes, rather than continuing to speculate.



Robyn Walker
National Technical Director
Tel: +64 4 470 3615
Email: robwalker@deloitte.co.nz

Shareholder/employees: Be careful how you pay yourself

By Emma Marr



A recently reported decision of the Taxation Review Authority (TRA) emphasises the need for shareholder/employees to carefully document financial transactions with their own companies, to be clear about what those amounts are paid for, and to ensure they pay tax when required. Failing to do so lead to a large tax bill for one particular taxpayer.

The case, *Disputant v Commissioner of Inland Revenue* [2018] NZTRA 9, concerned a taxpayer who received amounts from, or had her personal living expenses paid by, three separate companies over a period of years. She maintained that all amounts were paid to her, or on her behalf, as repayments of loans she had made to the businesses in earlier years. The Commissioner of Inland Revenue maintained that the amounts were either dividends, wages or simply income under ordinary concepts, and the taxpayer should have paid tax on the amounts.

The Commissioner also imposed shortfall penalties for gross carelessness for the unpaid tax. The taxpayer disputed the assessments and the case went to the TRA, which found for the Commissioner. The taxpayer had to pay both overdue tax and shortfall penalties.

The key problem for the taxpayer was that the onus is on taxpayers in such circumstances to establish, on the balance of probabilities, that the Commissioner's assessment was wrong. The taxpayer simply didn't have any evidence to show that she had made the advances to the companies she said she had made, or that the payments made to her or on her behalf by the companies were made to repay those advances. In the absence of any such evidence, the TRA had no choice but to uphold the Commissioner's assessments.

The taxpayer was either a shareholder in, or was associated with someone who was a shareholder in, the three companies. One company imported goods, another sold those imported goods, and the third company ran a fish and chip shop. Over the relevant income years:

- The first company paid the taxpayer regular amounts of money that were described in the bank statements of both the company and the taxpayer as "drawings". The Commissioner assessed the taxpayer on the basis that these amounts were taxable dividends, or alternatively, that they were taxable as income under ordinary concepts.
- The second company's bank account was used to pay for a number of the taxpayer's personal expenses, such as insurance, groceries, gym memberships and clothing. In addition the company regularly paid the taxpayer amounts of



capital and not taxable but she was unable to prove that they were loan repayments.

In terms of the payments described as “wages”, the taxpayer maintained they were only described that way because the accounting software used by the company didn’t have a drop-down box for loan repayments. She also gave evidence that the description of the amounts as wages was to reflect the amount of time she spent in the business so their accountant could properly value the business by “factoring in true wages costs.” The TRA noted it was unlikely that an accountant would advise or agree to a company coding amounts that were loan repayments as wages, and that it was more likely the characterisation of the amounts as wages reflected the fact that they were payments for work she actually did for the business. Further, the TRA noted that other amounts paid to the taxpayer were described as “drawings”, which didn’t reconcile with the taxpayer’s evidence that the only way to describe the amounts was as “wages”.

The TRA concluded that all the Commissioner’s assessments were correct, that the amounts paid were either wages, dividends (being amounts of value transferred to a shareholder due to that shareholding), or income under ordinary concepts.

The Commissioner had also imposed shortfall penalties for gross carelessness. The TRA considered case law on this penalty, which provides some additional commentary on the circumstances in which the penalty should be imposed. The case law establishes that “gross carelessness” includes situations where:

- the position taken has been taken with a complete or high level of disregard for the consequences (ie, that the correct amount of tax won’t be paid);
- the taxpayer displays conduct which creates a high risk of a tax shortfall occurring, when a reasonable person would have foreseen that happening;
- the taxpayer was reckless.

money that were described in the bank statements of both the company and the taxpayer as “wages”. The Commissioner assessed these amounts as wages. Additional amounts paid by the company to the taxpayer were assessed as taxable dividends, or alternatively, taxable as income under ordinary concepts.

- The third company paid for personal expenses, including groceries, on behalf of the taxpayer. The Commissioner assessed the taxpayer on the basis that these amounts were taxable dividends or, alternatively, that they were taxable as income under ordinary concepts. Other deposits that could be seen in the taxpayer’s bank accounts, but for which company bank statements couldn’t be found, were assessed by the Commissioner as wages.

The taxpayer maintained that every amount paid to her, or paid on her behalf, was a loan repayment by the company concerned.

There were a number of difficulties with the taxpayer’s evidence. The first was that none of the company documents that the taxpayer produced, including the financial statements that were available (which were only in draft and did not cover all the years in question) showed amounts owing to the taxpayer that corresponded

to the amounts she maintained she was owed. In some circumstances, in the years in question, the recorded shareholder balances increased rather than decreased, which contradicted her evidence that the payments she received were to reduce the loans. The taxpayer didn’t produce any other company documents, such as loan agreements, board minutes or resolutions, journals or ledgers that supported the loans she described. She also didn’t produce any personal documents or accounting records to support the existence of the loans.

The taxpayer maintained she couldn’t get all the records she needed because all of the companies had either been in receivership at relevant times or had since been liquidated. However it was also not disputed by the taxpayer that she had made no effort to get the records from the receivers or liquidators.

Further, the taxpayer’s evidence was that she had asked her accountant whether a loan repayment should be treated as capital to her or income, and that he had advised it would be a capital amount, so not taxable. The TRA did not dispute the correctness of that advice, but noted that it didn’t resolve the question of the character of the payments she had received. If they had been loan payments they would be

In addition, tax legislation provides that an “acceptable tax position” cannot amount to gross carelessness. An “acceptable tax position” is one that is as likely as not to be correct. The TRA considered the taxpayer’s actions in light of these tests and concluded that the taxpayer had been grossly careless. The TRA found it was highly relevant that the taxpayer had not kept any records evidencing her position, namely that she had made loans to the three companies, and that the payments to her or on her behalf were repayments of those loans. She had made no effort to get records from those who might have them, or keep her own personal records. The taxpayer had shown a high level of disregard for the consequence of her actions in failing to disclose the income she had received and pay tax on those amounts.

The TRA also found it was notable that the taxpayer took the relevant tax positions when she was already under audit. In those circumstances deciding to completely omit the payments from her tax returns was a fairly high-risk position to take, and the TRA considered that any taxpayer under audit should take particular care with filing their tax returns

Ultimately, the taxpayer was found to have underpaid tax of around \$70,000, and was liable for shortfall penalties of nearly \$14,000 (after a 50% reduction for previous good behaviour). The TRA summarised the case by saying:

*The obligation was clearly on the disputant to be able to produce **contemporaneous documentary evidence** to show that amounts paid by her to the companies were loans, and that the amounts paid to her, or on her behalf, were in fact repayments of those loans, and therefore non-taxable. [Emphasis added]*

Shareholder/employees need to carefully document financial transactions with their own companies, to be clear about what those amounts are paid for, and to ensure they pay tax when required.

The key is to create and retain contemporaneous documentary evidence, which reconciles with the facts, and is properly disclosed when taking a tax position. It is also important to note that there are options available, when you wish to take a particular tax position, that will allow you to protect yourself from penalties if the Commissioner disagrees with the tax position taken.

If you have any questions about how to correctly document your own business transactions and/or protect yourself from penalties, please speak to your usual Deloitte tax advisor.



Emma Marr
Associate Director

Tel: +64 4 470 3786

Email: emarr@deloitte.co.nz

Chatfield Court of Appeal decision – a triumph for Inland Revenue masquerading as a win for the taxpayer?

By Virag Singh and Jeremy Beckham



On 28 March 2019, the Court of Appeal delivered its judgment in *CIR v Chatfield & Co Ltd* [2019] NZCA 73. The case was an appeal by the Commissioner of Inland Revenue against a High Court decision where Chatfield successfully challenged the Commissioner's decision to issue notices under section 17 of the Tax Administration Act 1994 (TAA) (section 17 notices). The section 17 notices were issued following an exchange of information request (EOI request) from the Korean National Tax Service (NTS). The Court of Appeal upheld the decision of the High Court to quash the section 17 notices.

While this was a rare win for the taxpayer in a judicial review context, a careful reading of the decision sets a low bar for our competent authority to lawfully discharge their obligations when considering an EOI request. Taxpayers will take little comfort from this decision and what it means for EOI requests going forward.

The facts

Chatfield is a firm of accountants and the registered tax agent for several NZ companies associated with Mr Huh, a Korean national with NZ residency. The NTS commenced a tax investigation in Korea into the affairs of Mr Huh and made an EOI request under Art 25 of the New Zealand-Korea Double Tax Agreement (the NZ-Korea DTA). The EOI request was received by Mr Nash who has held the position of competent authority in terms of NZ's DTA network since March 1994 and is responsible for exchanges of information with NZ's treaty partners. In response to the EOI request, Ms Forrest (an IRD investigations team leader) subsequently issued section 17 notices to Chatfield requesting the production of various documents and records.

Chatfield commenced review proceedings challenging the decision to issue the section 17 notices. It was accepted by

the parties that the Commissioner's sole purpose in issuing the section 17 notices was to obtain information requested by the NTS for possible exchange under Art 25 of the NZ-Korea DTA. No NZ tax revenue was at issue.

In the High Court, Wylie J was not satisfied that appropriate inquiries were made by Mr Nash to ensure compliance with the requirements under the NZ-Korea DTA for an exchange of information. Our previous Deloitte Tax Alert Article on the High Court decision can be found [here](#).

The Court of Appeal decision

The Court of Appeal determined that there were six issues that it needed to resolve. Of these six issues, probably the most important concerned what is lawfully required by Inland Revenue when responding to EOI requests. In relation to the other issues, the Court of Appeal agreed with Wylie J's conclusions in a number of important areas. These include that the decision to issue the section 17 notices was in fact justiciable (i.e. suitable for a court to resolve) and that a correctness standard should apply to the intensity of review (i.e. what does the DTA actually require of the decision-maker).

The core issue was whether Mr Nash lawfully discharged his obligations as competent authority when considering the EOI request under the NZ-Korea DTA. Art 25 of the DTA requires that the information requested is "necessary" for carrying out the provisions of the DTA. The OECD model convention in 2005 replaced the word "necessary" with the words "foreseeably relevant", although this change was not

carried through in the NZ-Korea DTA.

In the High Court, Wylie J accepted the submission that it was incumbent on Mr Nash to be satisfied “by clear and specific evidence” that all of the information requested by the NTS was needed or required in relation to an investigation, or other action, being taken by the NTS against a Korean taxpayer. In this regard, Wylie J noted that the evidence provided by Mr Nash in an affidavit was all “relatively vague” and it “suggests there has been no hard inquiry into the necessity for any exchange”.

The Court of Appeal on the other hand considered that the hard inquiry approach contemplated by Wylie J overstated the obligation on the competent authority on receipt of an EOI request. The Court generally agreed with submissions made by the Commissioner that the competent authority could not be expected to inquire into the factual assertions underlying the request, nor as to the law in the other jurisdiction. Moreover, provided that the competent authority was not put on inquiry as to some irregularity, then Mr Nash was entitled to take the statements in the request letter at face value.

Despite this difference of views, the Court of Appeal nevertheless considered that Mr Nash’s assessment of the EOI request was not lawful by reference to the requirements of Art 25 of the DTA. This was because Mr Nash in his evidence referred variously to both the “necessary” threshold and to the “relevance” threshold as having apparent application to his decision. As such, the Court was forced to conclude that “Mr Nash asked the wrong question in his application of the ‘necessary or relevant’ test”.

Deloitte comment

The Court of Appeal decision represents a significant watering down of the high benchmark test for the consideration of EOI requests that was outlined by Wylie J in the High Court. Following the High Court decision, it was hoped that Inland Revenue would re-examine its decision-making processes and put in place suitable checks and balances for responding to EOI requests. It is difficult to imagine that Inland Revenue will now feel the need to

apply the same rigour to its consideration of EOI requests following the Court of Appeal decision. The hard inquiry approach contended for by Wylie J was not accepted by the Court of Appeal, which was prepared to accept that the competent authority is entitled (absent some irregularity) to take an EOI request at face value.

The Court of Appeal judgment leaves the impression that the Commissioner’s case failed on a technicality in not applying the correct standard when considering the EOI request. Had the correct standard been applied, there was no suggestion in the judgment that the consideration of the EOI request against Art 25 of the NZ-Korea DTA was any less rigorous than it needed to be. This implies that the competent authority really does not have to do much on receipt of an EOI request, provided that the request itself states that it is necessary or relevant (as the case may be).

The decision therefore sets a concerning precedent in lowering the bar for Inland Revenue’s consideration of EOI requests moving forward. In particular:

- Given that the competent authority is more or less entitled to accept an EOI request at face value, could this lead to inappropriate scrutiny of a taxpayer’s operations in other countries if, for example, a less scrupulous revenue authority demands information that it arguably should not be entitled to in the relevant other jurisdiction?
- Will a taxpayer still be able to put Inland Revenue on notice as to some irregularity when responding to a section 17 notice and must this irregularity be considered by Inland Revenue when responding to an EOI request? Can a taxpayer have confidence in Inland Revenue to give due regard to the issues raised?

In a post-BEPS reforms world, the Commissioner has new powers to request information from multinational groups. There is also an increased expectation of EOI requests between revenue authorities to counteract BEPS activity. Without the hard inquiry approach for considering EOI requests contended for by the High Court, taxpayers will be left with little

more than hope that the competent authority will exercise due judgement and perform robust checks when responding to an EOI request. This can be balanced with the Court of Appeal confirming that Inland Revenue must show it has satisfied itself that a foreign government’s request complies with the express criteria in the relevant EOI article – and that the competent authority’s decision is reviewable notwithstanding the request has originated from a foreign government.

For more information contact your usual Deloitte tax advisor.



Virag Singh
Director

Tel: +64 9 952 4208
Email: vsingh@deloitte.co.nz



Jeremy Beckham
Manager

Tel: +64 9 303 0929
Email: jbeckham@deloitte.co.nz

Permanent Establishment anti-avoidance guidance finalised – Where to from here?

By Bart de Gouw and Young Jin Kim



Inland Revenue has recently released their finalised guidance on Permanent Establishment (**PE**) anti-avoidance rules in the [April issue](#) of Tax Information Bulletin (**TIB**). The Permanent Establishment anti-avoidance provisions were introduced last year in the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 and take effect for income years starting on or after 1 July 2018.

These rules broadly apply to groups with a consolidated global turnover of more than €750m, and deem a non-resident to have a PE in New Zealand if a related entity carries out sales activities on behalf of that non-resident in New Zealand under an arrangement with a more than incidental purpose of tax avoidance. Where applicable, a PE is deemed to exist for the purpose of any applicable DTA (and therefore effectively overrides the PE definition in the relevant DTA).

The rules can apply to a multinational group where a non-resident group member has the contractual relationship with the New Zealand customers and a facilitator (being a New Zealand subsidiary, employees of a non-resident group member or an otherwise economically dependent person) helps bring about the particular supply for the non-resident group member. Once the PE anti-avoidance rules apply, the revenue derived by the non-resident group member from New Zealand customers is deemed to have a New Zealand source.

Given the adverse consequences that may result, taxpayers may wish to review the finalised guidance on PE anti-avoidance rules included in the recent TIB and compare this against the group's operating model in New Zealand to form a view on whether there is a risk of a deemed PE.

For taxpayers who desire greater certainty in respect of these new rules, the next step may be to obtain an indicative view or a private binding ruling from the Commissioner. Recent amendments to the Tax Administration Act 1994 explicitly give the Commissioner authority to make a private binding ruling on whether a person carries on business through a PE or a fixed establishment. While we have sought private formal rulings from Inland Revenue in the past on the application of the Income Tax rules (which would inherently include PE issues), these changes have confirmed that Inland Revenue are open to having specific discussions with taxpayers on PE issues and providing a ruling where appropriate.



Bart de Gouw
Partner

Tel: +64 9 303 0889

Email: bdegouw@deloitte.co.nz



Young Jin Kim
Consultant

Tel: +64 9 306 436

Email: youngjinkim@deloitte.co.nz

Snapshot of Recent Developments: May Tax Alert



Policy Developments:

Special reports on BEPS

On 29 April 2019, Inland Revenue released the [finalised special reports](#) on the base erosion and profit shifting (BEPS) measures that are now in force as a result of the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018. These are special reports on separate topics for BEPS rules including interest limitation, hybrids, transfer pricing, permanent establishment, and administrative measures. The final versions were first published in the [April 2019 Tax Information Bulletin](#) (TIB) but there have been some minor corrections made since. These changes can be found on the Inland Revenue's [Tax Policy website](#).

SOP No 204 for the R&D Bill

On 30 April 2019, a Supplementary Order Paper (SOP) was introduced in relation to the [Taxation \(Research and Development Tax Credits\) Bill](#). This SOP makes minor remedial typographic corrections and corrects a fault of expression, to ensure that Callaghan Innovation has access to necessary Inland Revenue administrative information for the administration of research and development tax credits. This bill is still on track to be enacted by the end of May 2019.

Information Release – Options for taxing the digital economy

On 3 April 2019, Inland Revenue released [policy and cabinet papers](#) on its policy website that were considered by Cabinet in February 2019 relating to the decision to proceed with a discussion document on taxing the digital economy. New Zealand considers the three OECD proposals for taxing the digital economy. In the information release, Inland Revenue comments that:

- the Digital Services Tax (DST) initially proposed would be like the one proposed by the UK;
- any DST would only be introduced if the OECD is unable to arrive at an international solution in a reasonable time-frame and a critical mass of other countries also adopt DSTs; and
- the DST would be an interim measure that would cease to apply once an international solution was fully implemented.

The papers also note that the Government sees real benefits in aligning New Zealand's position on a DST with Australia. Since these cabinet papers were released, the Australian Government has announced it will [not introduce](#) an interim DST solution but will continue to participate in the

OECD initiative. It will be interesting to see what affect this development has on the New Zealand Government's thinking. A discussion document is still expected in May 2019.

Special Reports on the ARMTARM Act now available

On 12 April 2019, Inland Revenue released two special reports providing early information on the [Taxation \(Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters\) Act 2019](#). The special reports cover the new rules for:

- [simplifying tax administration – individuals' income tax](#)
- [the taxation of bloodstock](#)

Complete coverage of the new Act will be published in the May 2019 edition of the Tax Information Bulletin.

Correction of Errors in Employment Income Information

The [Tax Administration \(Correction of Errors in Employment Income Information\) Regulations 2019](#) came into force on 1 April 2019. These Regulations are made under section 23N of the Tax Administration Act 1994 about how errors in an employer's employment income information for a payday may be corrected, including the nature and types of errors that are able to be corrected by employers and the manner in which errors may be corrected.



Finalised Inland Revenue Items:

Who can confirm an income statement of a deceased person?

On 15 April 2019, Inland Revenue released an operational statement 19/02. This lists the persons who are able to confirm an income statement of a deceased person under s RZ 15 of the Income Tax Act 2007 and who can provide information to the Commissioner to finalise a deceased person's tax account under s 22F of the Tax Administration Act 1994 where the deceased does not have a will and no executor or administrator has been appointed.

Income tax – attribution rule for income from personal services – Interpretation Statement IS 19/02

On 18 April 2019, Inland Revenue released a finalised interpretation statement IS 19/02: Income tax – attribution rule for income from personal services. This item makes minor amendments to, and replaces, IS 18/03 which provides guidance on the application of ss GB 27 to GB 29 of the Income Tax Act 2007.

Question We've Been Asked – Provisional tax – impact on employees who receive one-off amounts of income without tax deducted – QB 19/03

On 24 April 2019, the QB 19/03: Provisional tax – impact on employees who receive one-off amounts of income without tax deducted was released by the Inland Revenue. This finalised statement concerns the provisional tax and UOMI implications when an employee receives a one-off amount of income that has not had tax deducted at source. It considers the implications for the year of receipt and the following year. For more information refer our [previous article](#) on the draft version.

Question We've Been Asked – Income tax – provisional tax and use of money interest implications for a person in their first year of business – QB 19/04

On 24 April 2019, Inland Revenue released QB 19/04: Income tax – provisional tax and use of money interest implications for a person in their first year of business. QB 19/04 covers the provisional tax and UOMI implications of a person in their first year of business and considers the relevance of the definition of a “taxable activity” – a concept borrowed from the Goods and Services Tax Act 1985. For more information refer to our [previous article](#) on the draft version.



Follow us on Twitter

[@DeloitteNZTax](https://twitter.com/DeloitteNZTax)

Queries or comments regarding Alert can be directed to the editor, Emma Marr, ph +64 (4) 470 3786, email address: emarr@deloitte.co.nz.

This publication is intended for the use of clients and personnel of Deloitte. It is also made available to other selected recipients. Those wishing to receive this publication regularly are asked to communicate with:

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

Queenstown PO Box 794 Ph +64 (0) 3 901 0570, Fax +64 (0) 3 901 0571

Internet address <http://www.deloitte.co.nz>

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited ("DTTL"), its global network of member firms, and their related entities. DTTL (also referred to as "Deloitte Global") and each of its member firms are legally separate and independent entities. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more. Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities provide services in Australia, Brunei Darussalam, Cambodia, East Timor, Federated States of Micronesia, Guam, Indonesia, Japan, Laos, Malaysia, Mongolia, Myanmar, New Zealand, Palau, Papua New Guinea, Singapore, Thailand, The Marshall Islands, The Northern Mariana Islands, The People's Republic of China (incl. Hong Kong SAR and Macau SAR), The Philippines and Vietnam, in each of which operations are conducted by separate and independent legal entities. Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our network of member firms in more than 150 countries and territories serves four out of five Fortune Global 500® companies. Learn how Deloitte's approximately 286,000 people make an impact that matters at www.deloitte.com. Deloitte New Zealand brings together more than 1300 specialist professionals providing audit, tax, technology and systems, strategy and performance improvement, risk management, corporate finance, business recovery, forensic and accounting services. Our people are based in Auckland, Hamilton, Rotorua, Wellington, Christchurch, Queenstown and Dunedin, serving clients that range from New Zealand's largest companies and public sector organisations to smaller businesses with ambition to grow. For more information about Deloitte in New Zealand, look to our website www.deloitte.co.nz. This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication. © 2019. For information, contact Deloitte Touche Tohmatsu Limited.

We are introducing a new entity to our client facing structure, Deloitte Limited. From 1 June 2016, we will transition to having Deloitte Limited be the party responsible for providing our services. More information here www.deloitte.com/nz/aboutus