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Tax Alert

February 2019

In this issue:

Payday reporting is just around the corner

By Emma Faulknor and Susan Wynne

It is not long until payday reporting will apply to most employers and intermediaries when the rules become compulsory from 1 April 2019. To help with the transition, employers and intermediaries have had the opportunity to apply the new rules prior to 1 April 2019. We have set out a few common questions that have arisen as the compulsory application of these new rules approaches.

A quick recap

Employers and intermediaries will be required to digitally file employment information, instead of the current employer monthly schedule, within two working days of payday. This will impact most employers, including those with shadow payrolls or who make schedular payments.

Employers who withheld less than $50,000 of PAYE and ESCT in the previous year can choose to submit their payroll information on paper within ten working days of payday. Paper filers can also choose to adopt deemed paydates of the 15th and end of the month for simplicity and file within 10 working days of these dates.

Employers will also have to provide additional information to Inland Revenue about new and departing employees before the next payday.

Practically, employers and intermediaries will be able to file via their MyIR login direct from compatible software, through onscreen data entry or file upload from compatible software.

There is no change to the due dates for PAYE or other deductions payable to Inland Revenue.

What is a working day?

With reporting to Inland Revenue due within two working days of payday it is important to understand what is a working day. The income tax legislation defines the meaning of a working day and the key points to note are:

- A working day is Monday to Friday.
- The days between 25 December and 15 January are excluded from the definition of working days for tax purposes. Payroll reporting information for a payday that falls within that period will instead be due on 17 January at the earliest (assuming 16 and 17 January are working days).
- While New Zealand's national public holidays (Good Friday, Easter Monday, Queen's Birthday, Anzac day, Waitangi day and Labour day) are not working days for tax purposes, regional holidays (Anniversary days) are working days and must be included when determining when the payday reporting information falls dues.

In a recent training session with Inland Revenue they advised that there was no time cut-off for a working day. Employers will have until midnight that working day to file online.

On a related note, a payday means the day an employer makes a PAYE income payment to an employee. If this is via a bank transfer the payday is the date the employer instructs the bank to make the funds available.

Can information be filed in advance of payday?

It will be possible to file payroll information in advance of payday, provided payroll information has been completed. This may be necessary around big holiday periods, such as the recent summer break many enjoyed, or when payroll staff will be away. If any errors do occur, it will be possible to amend the filed returns.

What if a return is nil?

There is no requirement to file payday information when it will be a nil return, nor does the electronic payday reporting system allow nil returns to be filed. Inland Revenue has provided assurance that their software will be able to distinguish between an unfiled return and a return that hasn't been filed because it's a nil return. Irregular filers will also be recognised and recorded as such in the Inland Revenue system. As a result of the systems in place to analyse filing patterns Inland Revenue expects to be able to determine when late filing penalties should be imposed.

Keeping track of how much to pay Inland Revenue?

There is no change to the current due dates for PAYE and other deductions payable to Inland Revenue. Despite employers filing payday information much earlier Inland Revenue is recommending that employers continue to pay as they currently do. The total payable at the usual due date will need to be tracked so that payment can be made to Inland Revenue as it may no longer match to one employer monthly schedule. If payroll software is used the software may display the total due, however Inland Revenue has noted that they are working on making the total payable visible in MyIR.

When can you register?

You can register now via Inland Revenue's MyIR system. However, once registered you're in and you'll have to comply with all the payday reporting requirements and won't be able to go back to the old system, whether or not 1 April 2019 has passed.

Payday filing starts at the beginning of the following month after you've opted in, unless it's after 1 April 2019 when it becomes compulsory. For employers who will only be adopting payday reporting from 1 April 2019, it is worth considering registering from 1 March 2019 to provide time to familiarise yourself with the new system. Registering in March will only make payday reporting applicable from the compulsory start date of 1 April 2019.

Once registered, only the owner of the MyIR account will have access to the payday filing functions so it will be necessary for that person to delegate access to users. This is similar to the process that arose when GST filing switched to MyIR.

After registering for payday filing the final IR348 and IR345 returns, for the previous month, will need to be filed using payroll returns in MyIR.

For employers who will only be adopting payday reporting from 1 April 2019, it is worth considering registering from 1 March 2019 to provide time to familiarise yourself with the new system

Are you ready?

The move to payday reporting raises a number of important requirements, such as:

- Reviewing all payroll function requirements to check current processes will support the increased frequency of reporting that will be required.
- Engaging with your payroll software provider to determine their development roadmap and timeline for release of enabled software.
- Identifying your MyIR account owner and making sure they are prepared to review and relink MyIR payroll function delegations/access/authorisations upon opting into or on registration for payday filing.

In addition to checking your payroll software or provider is up to scratch, employers should be comfortable that they are getting it right too. Our article from October 2018 provides some guidance to employers and intermediaries.

Inland Revenue has also published useful information to help ensure that payroll systems are payday reporting ready and this is available on the Inland Revenue website.

Conclusion

The key point is to be prepared before the payday reporting requirements are compulsory. The changes can seem arduous but the intention behind them long term is to make processing easier and less time consuming for employers. We certainly hope to see the benefits sooner rather than later. For further guidance on payday reporting and other tax issues please contact your Deloitte tax advisor.

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Guidance on tricky provisional tax issues released

By Veronica Harley

In mid-December 2018, Inland Revenue issued two draft Questions We've Been Asked on provisional tax and use of money interest implications (PUB00336). The introduction of the use of money interest concession rules as they apply to provisional tax with effect from the 2018 income year, while welcome, has given rise to some uncertainty in a couple of scenarios.

One of these is in relation to new provisional taxpayers who meet the definition of having an "initial provisional tax liability" because the interest concession rules do not apply in this case. Persons with an initial provisional tax liability are broadly those who start a new taxable activity and have residual income tax (RIT) of $60,000 or more in their first year. While new provisional taxpayers have no obligation to pay provisional tax because their RIT for the preceding tax year is $2,500 or less, they are nonetheless still exposed to use of money interest (UOMI) from their first instalment. The number of instalments a person has in their first year will depend on when the business commenced in that first year. This has caused advisors to look at these rules more closely in terms of whether a person has an initial provisional tax liability or not.

The first QWBA is Income Tax – Provisional tax and use of money interest implications for a person in their first year of business. This focusses on the meaning of taxable activity, and what level or type of activity is sufficient to mean a taxpayer is "deriving income from a taxable activity" for the purposes of the initial provisional tax liability definition. The conclusion is that the start of a taxable activity is a concept well understood in the GST context and it also applies to the provisional tax rules. It includes anything done in connection with the beginning of a taxable activity as well as any activity carried on continuously or regularly, irrespective of profit, involving or intended to involve the supply of goods and services. For the purposes of the provisional tax rules, a taxable activity includes GST-exempt supplies and applies to persons who are not GST registered. For example, the receipt of passive interest income on capital raised in the year prior to the commencement of the business in the following year, would be treated as being "something done in connection with the beginning of a taxable activity". If the interest income was such that it resulted in RIT of more than $60,000, the taxpayer will have an initial provisional tax liability in that year.

The second QWBA, Provisional tax – impact on employees who receive one-off income without tax deducted, deals with the scenario that a salary and wage earner receives a one-off lump sum (e.g. from an employee share scheme) which has not had any tax deducted at source. Where it results in RIT that is over $2,500, it makes them liable to pay provisional tax for that year (section RC 3(1)).

The statement clarifies the interaction of subsections RC 1(1) and (3) of the Income Tax Act 2007. In the Commissioner's view, the fact that the prior year's RIT may be less than $2,500 does not "remove them from the provisional tax rules as they continue to retain their status as a provisional taxpayer under the Tax Administration Act 1994 by being "liable" to pay provisional tax under section RC 1(1) of the TAA, despite having no obligation to pay provisional tax under section RC 3(3) of the TAA".

The statement also confirms that if a provisional taxpayer has no RIT assessed in a prior year, or their RIT was less than $2,500, their instalment payments using the standard method will be zero on each occasion. They can top up the instalment at P3 to ensure they pay the entire RIT for the current year on that final instalment date in order to minimise UOMI. Bear in mind that because they have had RIT that is over $2,500 in a tax year, a person will be required to pay provisional tax the following year. If they elect to use the standard method, this will result in payments being made in the subsequent year of at least 105% of the prior year's RIT.

The problem is that an employee in receipt of a one-off amount of income without tax deducted will not be expecting to derive any further income of this nature in the subsequent year. As a result, they may choose to adopt the estimation method and estimate their provisional tax at nil and then make no payments at each instalment in that subsequent year. However, if they choose the estimation method, they are exposed to UOMI on any shortfall at each instalment date. This is because the UOMI concession rules do not apply if the estimation option is selected for instalments due prior to the final instalment. Consequently, if the employee adopts the estimation method for the succeeding year, they need to understand these risks when making that choice should it turn out that their RIT is more than $2,500.

The new UOMI concession rules were intended to simplify provisional tax for taxpayers but, in some respects, they did anything but as new boundaries have emerged as a result. The provisional tax rules can be very complicated in some scenarios and so it's good to have this guidance. If taxpayers are ever in doubt about provisional tax, we suggest seeking advice because there are a few tricks within these rules which could prove costly if mismanaged.

Both statements have a feedback submission date of 8 February 2019. If you would like to discuss these, please contact your Deloitte tax advisor.

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Tax reform bill progresses

By Mark Chapple

New tax legislation, much of which applies from 1 April 2019, has progressed in Parliament, and will soon be passed into law. The Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill, sometimes referred to as the ARMTARM Bill (the **Bill**), was reported back by the Finance and Expenditure Select Committee on 16 January 2019.

The Bill contains significant proposals to change and reduce the end of year filing obligations for individuals and the way that they interact with Inland Revenue. The changes reflect the increased level of information employers and payers of interest and dividends have to provide to Inland Revenue in respect of "reportable income" (salary, wages, interest & dividends and employee share scheme income). The changes also rely heavily on automated processes being made possible by Inland Revenue's new computer system. These new rules will apply for the tax year ending 31 March 2019, so taxpayers should expect a new experience when dealing with their personal taxes this year.

You can read our August 2018 Tax Alert for detail on the changes as originally proposed.

We outline below the key changes that have been made by the Select Committee. A number of these changes follow submissions on the Bill from taxpayers and other interested parties, but there are also some changes made as a result of two Supplementary Order papers from the Minister, and in response to suggestions of Officials.

You can see further detail on the Bill as reported back in the Officials' report.

If you are interested in how particular changes might affect you, we recommend that you contact your usual Deloitte tax advisor for further information.

Main changes made at Select Committee:

There are a number of taxpayer favourable changes made as a result of submissions:

Proposed thresholds for the write-off of tax debts for individuals will be further simplified. Write-offs will apply for "qualifying individuals", those with only "reportable income", that have tax owing of $50 or less. The write-offs are expected to affect approximately 580,000 individuals each year.

In response to a number of submissions, new Subpart 3B of the Tax Administration Act 1994 will allow "qualifying individuals" to correct or add to information held by Inland Revenue up until their terminal tax date without being subject to interest or penalties. It will not be necessary to ask Inland Revenue to exercise discretion under section 113 of the Tax Administration Act 1994. These changes should significantly reduce the compliance burden for taxpayers, and eliminate interest or penalties concerns for them.

The changes should also reduce the administrative burden for Inland Revenue.

Other individuals i.e. those with income other than "reportable income", or with expenses, will need to make changes to the information held by Inland Revenue by the due date for their return (7 July, or later if the person has an extension of time).

- The threshold for a taxpayer being able to apply for a short-process ruling will be increased from turnover of $5 million to turnover of $20 million, provided that the tax at stake remains less than $1 million. This should make the regime accessible to many more taxpayers.
- Technical amendments will be made to the bright-line test for residential land to fix legislative anomalies affecting land that was purchased off the plans, and for freehold estates converted from leases with a perpetual right of renewal.
- Changes will be made to reduce compliance obligations for fire and emergency volunteers that are reimbursed for their loss of income when they attend a training course. Until now the volunteers have had to lodge income

tax returns to account for the taxable reimbursements, which have been subject to withholding tax as schedular payments. The proposed change would treat the reimbursement payments as "salary and wages", and therefore subject to PAYE rules, so volunteers would no longer need to file annual tax returns specifically for these payments.

- The Bill removes the five year lock-in period for people who join KiwiSaver after age 60, so that they will be able to access their contributions at age 65. As originally introduced the Bill would have enabled this only for over 60 year olds that joined KiwiSaver after July 2019. This will be amended so that, effective from 1 April 2020, all people who joined KiwiSaver, when over 60, regardless of when that was, will be able to access their contributions at age 65

Changes as a result of Supplementary Order papers from the Minister, or at the suggestion of Officials:

The following changes relate to 'other' aspects of the Bill, rather than to tax-filing obligations. The GST changes were covered in a Tax Alert in September 2018.

- Amendments to require non-profit bodies to return GST on supplies of goods and services if they have received GST deductions on those goods and services.
- The original Bill contained clauses that would have given the Commissioner of Inland Revenue the power to make minor changes to tax legislation to remedy legislative anomalies by recommending a regulation be made, by making a determination, and/or by undertaking an administrative action. These clauses have been removed from the Bill. This appears to be at the instigation of Officials rather than as a result of submissions, which were largely positive. Officials' have said that the removal of this proposal reflects a cautious approach to ensure that Parliament's law-making authority is appropriately respected, will allow time for further consideration with the Legislation Design and Advisory Committee, and that redrafted provisions may be reintroduced in a future tax bill.
- The extension of depreciation roll-over relief provisions for the Canterbury earthquakes for a further five years, to the end of the 2024 income year. In addition, the introduction of roll-over relief for owners of land and buildings that are revenue account property, which were affected by the November 2016 Hurunui/Kaikoura earthquake (replicating relief provided in relation to the Canterbury earthquakes).
- Amendments to give effect to the Government's policy of encouraging new investment in bloodstock breeding. These will allow for tax deductions on the cost of high-quality horses acquired for breeding (with minor amendments to SOP 135 released on 16 October 2018).
- A clause ensuring that information sharing with the Police is able to be extended to Police employees that are not sworn constables. The explanatory comments note that many officers in the Police Financial Intelligence Unit are not sworn constables.
- Fixing a technical flaw in relation to disregarded hybrid payments in the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 (with minor amendments to SOP 74 released on 14 August 2018). A number of other remedial fixups have been made to Base Erosion and Profit Shifting rules.

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Inland Revenue goes back-to-basics with a new standard practice statement on the voluntary disclosure regime

By Campbell Rose and John Lohrentz

Taxpayers who find they have slipped up will need to be aware of a new draft statement released in December 2018, on how Inland Revenue assesses whether a voluntary disclosure has been made.

Making a voluntary disclosure can result in full elimination or a significant reduction of shortfall penalties that might otherwise apply – so it's important to understand Inland Revenue's view on what constitutes making a full voluntary disclosure of the details of a tax shortfall.

The draft standard practice statement (SPS ED0201) sets out the factors that the Commissioner of Inland Revenue will take into account. The statement takes a back-to-basics approach and is focused on clarifying some of the more complex aspects of the voluntary disclosure regime that arise in practice. It largely demonstrates a pragmatic approach being taken by Inland Revenue, which is reflective of encouraging voluntary compliance including through voluntary disclosures.

This article covers some of the key issues addressed by the draft SPS, and our initial comments. Submissions on the draft SPS closed at the end of January 2019, so it will be interesting to see if further improvements are made in the course of finalising the SPS.

The voluntary disclosure regime

To encourage voluntary compliance under New Zealand's self-assessment system, Inland Revenue applies shortfall penalties against taxpayers taking an incorrect tax position, which range between 20% (for lack of reasonable care) through to 150% (for evasion) of the amount of the tax shortfall.

The 'carrot' to Inland Revenue's 'stick' is found in the voluntary disclosure regime, which allows for these penalties to be reduced or eliminated if taxpayers voluntarily provide information to correct a tax position before an investigation is notified or begins. The draft SPS notes that "low value" unprompted disclosures will not be liable to a shortfall penalty at all (meaning whether there has been a voluntary disclosure is largely moot) – in this respect it is worth noting that "low value" is necessarily a relative concept: what is low value should presumably be considered in the context of a taxpayer's overall business and tax function's nature, size, complexity and so on.

Is there a tax shortfall, and do you believe that the disclosure you are making is correct?

The first essential element of a voluntary disclosure is that there must be a tax shortfall. If there is no shortfall and the taxpayer wants to amend a return in another way (for example to pay less tax), then the taxpayer has to follow a different process. In addition, the taxpayer has to be proposing that the tax position be changed to one that is correct – a voluntary disclosure is not a "negotiation". This is in response to what the Commissioner sees as an increasing trend for taxpayers to make a voluntary disclosure to merely propose a (potential/future) tax position, or as a prelude to disputing a tax position, or where a taxpayer seeks to place conditions on the disclosure – though a taxpayer remains free to legitimately change their mind later.

Analysis

The draft SPS goes beyond the current standard practice statement, SPS 09/02 (which states that a disclosure must be unconditional), by clarifying the Commissioner's practice in various situations where a taxpayer is not committed to the "all cards on the table" approach of the voluntary disclosure regime. From a policy perspective the Commissioner's approach is difficult to argue with, and is not surprising given Inland Revenue's view that some taxpayers use the risk review process to "wait and see" if errors might be uncovered, at which point a voluntary disclosure is made before any audit/investigation formally commences. The draft SPS takes a pragmatic approach to changes in circumstances (e.g. new facts become available, or a court decision changes the position etc), although the timing of making a revised/new disclosure may impact the amount or availability of penalty reduction. The draft SPS also implicitly clarifies that disputing the category of shortfall penalty applicable does not make a voluntary disclosure 'conditional'.

Does your disclosure set out all the details of a tax shortfall?

The second essential element of a full voluntary disclosure is that it provides a clear statement of sufficient details of a tax shortfall to enable the Commissioner to reassess the tax. A tax shortfall is the difference between the tax effect of the tax position taken by a taxpayer and the correct tax position, if that difference results in an increase in the tax payable by the taxpayer (or a decrease in a tax benefit, such as a loss).

The Commissioner's practice is to see a tax return as comprising a number of tax positions so that a single return can have multiple "incorrect tax positions" requiring separate disclosures. Similar logic is applied to different tax years and to different tax types.

The voluntary disclosure must: explain the facts and circumstances leading to the tax shortfall; set out the calculation of the tax shortfall; and include basic information identifying the taxpayer, the tax period and type, and any further relevant information.

Analysis

Importantly, the draft SPS confirms that a "full" voluntary disclosure is made where a taxpayer "attempts to quantify the amount of the tax shortfall to the best of their ability" and then fully co-operates with the Commissioner to determine the correct amount in a timely manner. Therefore where additional detail is required, the disclosure can still be considered "full" from the time it was initially submitted – this should presumably also be the case if (for example) a particular item is inadvertently omitted in the initial disclosure where multiple positions/years/tax types (and so a significant amount of data/information) are concerned. It clarifies that the disclosure rules only apply to tax types covered by the audit notification (where relevant), which is helpful.

While largely consistent with previous guidance, the focus on quantification provides additional clarity on the practical steps involved in making a "full" disclosure. The draft SPS supports taxpayers making genuine efforts to quantify disclosures and work with the Commissioner. This approach makes sense – the regime should encourage voluntary compliance and the commencement of a dialogue between taxpayer and Inland Revenue as early as possible. Hopefully Inland Revenue will make only reasonable requests of taxpayers in terms of their co-operation and timing, where a staged/"drip-feed" approach is adopted – and will not unreasonably capitalise on the making of a voluntary disclosure to (for example) commence an audit/investigation into other tax types or periods etc.

Consequential adjustments

The draft SPS accepts that a disclosure is still a "full" voluntary disclosure if the Commissioner has to notify a taxpayer of consequential adjustments to the disclosure (e.g. requesting that the disclosure be updated to reflect the impact of an income tax position correction on a GST return) – if the relevant details were inadvertently omitted and the taxpayer provides the additional information required in a timely fashion. It is positive to see this voluntary compliance-focussed approach from Inland Revenue in the draft SPS.

Does your disclosure reveal new information?

The third essential element is that the disclosure uncovers new information to the Commissioner. Because taxpayers cannot actually know everything that the Commissioner knows, the test is whether it is reasonable for the taxpayer to believe the information is unknown to the Commissioner. If a taxpayer is objectively "clearly aware" that the Commissioner already knows about a tax shortfall, it won't be a voluntary disclosure. A taxpayer can be considered to be "clearly aware" if:

- The Commissioner has expressly advised the taxpayer of the shortfall, or
- The taxpayer can clearly infer that the Commissioner knows based on the "facts and circumstances" of their interactions.

Analysis

While the 'awareness-based-on-inference' concept is stated to be a "high bar" that will be applied only rarely, we do have some concerns that it potentially could be used by Inland Revenue to dispute the validity of a voluntary disclosure – which in turn could feed into a negotiation to settle a dispute. We would prefer that this concept is removed from the draft SPS or is more clearly defined with clear examples to ensure that the operation of the voluntary disclosure regime has a high degree of certainty and fairness.

The draft SPS includes an example of a situation when a taxpayer might make a voluntary disclosure even after Inland Revenue has been in contact about a particular tax position. However, the example goes on to note that no voluntary disclosure is made where Inland Revenue advises the taxpayer at the outset that they believe there was a tax shortfall. The example seems to be referring to a specific tax shortfall that is adjusted by assessment; but there is a potential slippery slope here. For example, is the intention that no voluntary disclosure can be made where it is objectively clear that Inland Revenue believes that there will be "a" tax shortfall (of any amount, but relating to a particular factual scenario/tax type), a tax shortfall of an approximate amount (say within the bounds of materiality), or a specific tax shortfall that equates or very closely aligns with the actual shortfall? Presumably given the "high bar", only the latter can be intended – i.e. not Inland Revenue simply raising an issue.

Are you making the disclosure voluntarily?

The fourth and final essential element is that a disclosure must actually be voluntary.

The draft SPS identifies that there are limited instances in which a taxpayer may be obliged to provide information to the Commissioner and therefore may not be making a disclosure voluntarily. Where information is provided under compulsion (e.g. in response to a section 17 notice), it remains possible to subsequently or additionally make a "voluntary" disclosure – unless the information provided to the Commissioner clearly shows the tax shortfall without further investigation being required on Inland Revenue's part. Additionally, the draft SPS notes that not all communications from Inland Revenue create an obligation – some communications may simply 'generally suggest' a course of action without an obligation (in which case a resulting disclosure would still be 'voluntary').

Analysis

We are pleased to see that Inland Revenue has fleshed out the relationship between the voluntary disclosure regime, the risk review process, and sections 17 and 15B of the Tax Administration Act 1994. The draft SPS takes a pragmatic approach in confirming that there will only be limited occasions where making a disclosure is not likely to be seen as "voluntary", and clarifies that simply filing a new or amended return will not likely on its own satisfy the requirement to provide full details of a tax shortfall.

Changes to prosecution guidance

In the previous guidance, SPS 09/02, the Commissioner committed to not considering prosecution where a pre-notification voluntary disclosure is properly made, and that "Inland Revenue may consider prosecution" for post-notification disclosures.

The draft SPS makes two changes. First, while taxpayers will prima facie not be subject to prosecution for pre-notification disclosures, the Commissioner reserves the ability to prosecute in rare cases where "voluntary compliance [is] more generally being undermined". Secondly, concerning post-notification disclosures, the Commissioner "will consider prosecution" (as opposed to "may").

Analysis

Overall these changes mean that Inland Revenue is more likely to prosecute taxpayers voluntarily coming forward to correct their tax positions. We hope that Officials will consider the underlying policy considerations reflected in the regime, especially the desire to promote voluntary compliance and ensuring the tax administration system is efficient with a high degree of certainty. The risk of uncertainty in the outcome of a disclosure will dis-incentivise the use of the voluntary disclosure regime.

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Conclusion

Overall, the draft SPS makes useful strides in clarifying some complex questions that arise in practice when a voluntary disclosure is being considered. There are still some 'fish-hooks' in making a voluntary disclosure whether before or after Inland Revenue interaction occurs – so we recommend getting in touch with your usual Deloitte adviser as soon as the need arises in this area.

New rules for companies with Australian connections

By Emma Marr

Extension of transitional period for applying ATO ruling on residence

Readers may remember the ATO's surprising decision in June 2018 to treat many companies as Australian tax residents who previously would not have been. This was covered in the July 2018 Tax Alert. Along with the initial ruling released in June 2018, the ATO released draft guidelines for interpreting the ruling and determining the central management and control of a company that may be a tax resident of Australia. The nub of the problem for many New Zealand companies was that companies that didn't have any trading operations in Australia could, under the ATO's new ruling, be treated as Australian resident.

In December 2018 the Australian Tax Office (ATO) released a further (and final) version of their guidance. The main update to the guidance is an extension to the transitional period in which the Australian Commissioner of Tax will not apply his resources to review or seek to disturb a foreign-incorporated company's status as a non-resident to between 15 March 2017 and 30 June 2019. Previously, the transitional period was to cease in mid-December 2018. In addition the ATO clarified aspects of the guidelines' "ongoing compliance approach" to accommodate such things as circular resolutions and listed entities themselves (in addition to their subsidiaries which were already covered).

Companies that are potentially tax residents of both Australia and New Zealand should be urgently considering the impact of the ATO ruling on their operations. Any strategic decision making presence in Australia should be carefully considered to determine if it triggers Australian tax residence, at least in the ATO's mind. This could include the existence of directors or other senior managers, board meetings, and other strategic decision making.

The result of this ruling is potentially a host of dual resident companies. This leads to the next problem we have in Australia/New Zealand tax rules...

Impact of the MLI on dual residents

Separately, the new Multilateral Convention (MLI) came into effect on 1 January 2019 for the New Zealand/Australia double tax agreement (DTA). One effect of this is that there is much less certainty about the tax residence of dual resident companies.

This is because the tie breaker test that used to apply under the DTA, which would definitively determine the residence of a dual resident company, will now no longer apply. If there is doubt about the

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tax residence of a company, instead of following a tie-breaker test, the company will have to get the agreement of the two competent authorities – the New Zealand Inland Revenue, and the ATO.

On 20 December 2018, Inland Revenue announced that it was working with the ATO to formalise a practical administrative approach for non-individual dual residents affected by Article 4(1) of the MLI. The ATO similarly posted a note on their Competent Authority determination page.

Under Article 4(1) of the MLI, which is designed to address tax avoidance arrangements, non-individual taxpayers that are dual residents need to apply to either Competent Authority for a determination of their residency for tax treaty purposes.

The administrative approach will seek to provide certainty and minimise compliance costs for non-individual dual residents that meet certain eligibility criteria. To read more see here. Once finalised this will be published together with eligibility criteria and any additional guidance.

Companies that are potentially tax residents of both Australia and New Zealand should be urgently considering the impact of the ATO ruling on their operations

Snapshot of Recent Developments: February Tax Alert

Policy Developments:

Tax Working Group

The Tax Working Group has reported to the Government its findings and recommendations regarding New Zealand's tax system. We now wait for a response from Government and the release of the group's final report. Any changes the Government proceeds with will be subject to the full generic tax policy process. We expect the legislation introducing these changes to be announced by the beginning of next year.

Finalised Inland Revenue Items:

GST— zero-rating of services related to land IS 18/07

On 21 December 2018, Inland Revenue released Interpretation Statement IS 18/07: "Goods and services tax — zero-rating of services related to land". The interpretation statement concerns amendments to the Goods and Services Tax Act 1985 that applied from 1 April 2017, and relate to the circumstances in which services related to land can be zero-rated under s 11A(1)(e) and (k).

Income tax – bright-line test – farmyard and main home exclusions – sale of lifestyle blocks QB 18/17:

On 19 December 2018, Inland Revenue released the finalised Questions We've Been Asked ("QWBA") QB 18/17: Income tax – bright-line test – farmyard and main home exclusions – sale of lifestyle blocks. This QWBA explains that lifestyle blocks sold within the bright-line period will be excluded from the bright-line test when:

- the lifestyle block is farmland; or
- the lifestyle block is residential land and is the seller's main home, and:
  - more than 50% of the area of the lifestyle block has been used for the seller's home, curtilage and residential purposes, and

the lifestyle block has been used in that manner for more than 50% of the time the seller has owned it.

Income tax – bright-line test – main home exclusion – sale of subdivided section QB 18/16:

On 19 December 2018, Inland Revenue released the finalised QWBA QB 18/16: Income tax – bright-line test – main home exclusion – sale of subdivided section.

This QWBA explains that a subdivided section sold within the bright-line period will be excluded from the bright-line test for residential land when:

- more than 50% of the area of the land in the subdivided section has been used for a dwelling that was the seller's main home; and
- the seller has used the land in the subdivided section in that manner for more than 50% of the time since the seller acquired the undivided land.

National Standard Costs for Specified Livestock Determination 2019.

On 25 January 2019, Inland Revenue released "The National Standard Costs for Specified Livestock Determination 2019".

The determination is made in terms of s EC 23 of the Income Tax Act 2007 and applies to any specified livestock on hand at the end of the 2018/19 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

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