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Tax Alert

May 2020

Loss carry back rules – fine in theory, but watch for fish hooks

By Robyn Walker and Veronica Harley

On 30 April 2020, the Government fast tracked new legislation to introduce further tax changes in response to the impacts of the COVID-19 outbreak. The key tax component of the COVID-19 Response (Taxation and Other Regulatory Urgent Matters) Act 2020 is a temporary tax loss carry-back measure. Broadly, this will allow businesses that anticipate being in a loss for the 2020 or 2021 tax years, to carry some or all of the loss back to the preceding year to enable an immediate cash refund of prior tax paid.

To be eligible, a taxpayer must have made or anticipate they will make a loss in either of the 2020 or 2021 tax years. The taxpayer must have a profit in the year prior to the loss year. This means:

- Losses from the 2020 year may be carried back to the 2019 year; or
- Losses from the 2021 year may be carried back to the 2020 year.

Taxpayers can claim a tax refund for provisional tax paid by re-estimating 2020 provisional tax where the 2020 return is not yet filed, or by amending their 2019 tax return to factor in the loss carry back. The rules will apply to companies, trusts and individuals (other than those deriving only PAYE income) and those that operate through partnerships and look-through companies.

In this issue:

Overall, this is a very positive initiative, and one the Government should be commended for. However, because of its rushed implementation, it's not perfect, not necessarily as straightforward as it seems and will not suit all businesses. Each business will have different circumstances and each will need to consider whether this mechanism is the right option for them. Inland Revenue's systems went live in early May with the changes so taxpayers can make elections to carry back losses via the "I want to" section of MyIR.

A few considerations and scenarios below to reflect on are outlined below:

1. **Beware UOMI:** Most business will be looking to use this mechanism in relation to a loss incurred in the 2021 year and carry this back to the 2020 income year which may still be profitable given COVID-19 may have only affected the last quarter of this year. A business that needs cash urgently will want to elect to carry back its anticipated loss as soon as possible; however, a business will need to be fairly confident of the level of loss and think carefully about how the rest of the year will play out. This is because, if a business over estimates its 2021 loss which results in tax payable, use of money interest (UOMI) will apply from 28 August 2019 (for a March balance date taxpayer), which is the first instalment date of 2020 provisional tax. Further, it will not be possible to apply for relief from UOMI imposed under the remission rules recently enacted.

   To minimise potential exposure to UOMI, the business might want to take a conservative position initially given we are only one month into the new tax year and re-estimate the loss later or as the year progresses. However, holding off, may not provide the much needed cash now which could force some businesses to take some risks in this regard. Timing of electing, filing the return and monitoring losses will be key. It will be possible to re-estimate the 2021 loss to carry back at any time prior to the earlier of the date the 2020 return is filed or the due date for filing.

2. **Pattern of income and losses:** The rules require the immediately preceding year to have taxable income. There will be some companies where the pattern of income and losses is such that the carry-back mechanism won't be much, or any benefit. For example, taxable income in the 2019 year might have been high under normal trading conditions and so 2020 provisional tax paid to date is based on residual income tax for this year. Taxable income in the 2020 year (particularly if it is a late balance date) might have dropped, but may have only dropped to a lower taxable income and so it not yet a loss. Even if there are large losses anticipated in 2021, these will only be able to be carried back to the extent of the lower taxable income in the immediately preceding year, which may not release that much tax paid. Likewise a company with a small loss in 2020 and a larger loss in 2021 will be constrained to only being able to use the smaller loss in 2020 to amend only the 2019 tax return, such that the company is unable to carry back the larger loss incurred in 2021.

3. **Refunds might be limited or trapped:** For taxpayers that are companies, any refunds will be limited to the credit balance in its company imputation credit account at the date of the most recently ended tax year (i.e. 31 March 2020 although some timing exceptions apply). Therefore if a company has been in the habit of paying most of its profits as dividends to shareholders and attaching imputation credits, it may find access to cash refunds is limited. The policy rationale for this rule is that the company's tax has been paid to shareholders already via imputation credits. Any trapped refunds may be applied to income or provisional tax liabilities, if any will exist.

4. **Shareholder salaries:** If the company has traditionally paid out its profits for the year as shareholder salaries, the company won't have any taxable income to carry future losses back to. The shareholders and not the company in this case have paid the provisional tax. Therefore an option might be for the shareholders to estimate 2020 provisional tax to nil and have the company elect to not pay any shareholder salaries for the 2020 tax year if losses are forecast for 2021 if this is possible. However, this could then expose the company to an FBT liability if there are outstanding current accounts, so care is required. Other options may be feasible in this scenario. The important point to note is that companies will need to do some work and determine what the approach to paying shareholder salaries should be in light of these rules.

Overall, this is a very positive initiative and one the Government should be commended for. However, because of its rushed implementation, it's not perfect, not necessarily as straightforward as it seems and will not suit all businesses.

5. **Anti-avoidance measures:**
   The new Act contains an anti-avoidance measure, which could apply if shares in any company have been subject to an arrangement so that a loss company falls into the rules if the purpose of the arrangement is to defeat the intention of the rules. It is possible any cute "tax planning" of this nature to deliberately take advantage of the rules would be scrutinised down the track..

6. **The legislation is complex:**
   We acknowledge the Government has brought these rules in under urgency to provide assistance for businesses in need of cash flow. It has endeavoured to strike a balance of giving the much-needed assistance, accommodating the need for part year and grouping rules, while still maintaining some integrity measures. Unfortunately, doing all these things inevitably leads to complex legislation. It's possible, issues will come to light post enactment that are not clear or that will need a remedial fix. Already we have seen an amendment introduced via a supplementary order paper post enactment to ensure the rules do not adversely affect associated persons' provisional tax interest treatment.

   Given the rushed legislation, it is hoped that Inland Revenue apply the rules in the spirit that they were intended. Particularly since the request to re-open returns for reassessments is subject to the Commissioner's discretion.

   This mechanism could be described as a "be kind" temporary measure, which will be replaced in the longer term with more robust rules for the 2022 income year onwards.

Conclusion

The decision to use this mechanism will be heavily fact dependent on each business's circumstances. There are policy design features that mean the rules will not be that useful to some of the SME businesses targeted. It is clear it will not be the panacea for every business and could in some cases expose a taxpayer to significant UOMI or other taxes unless care is taken.

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COVID-19: Employment tax updates for a remote workforce

By Robyn Walker, Andrea Scatchard & Jess Wheeler

While New Zealand has moved to Alert Level 2 and more employees are now back on the job, a considerable number of workers remain at home and working under conditions which are outside of the norm. With working from home potentially becoming the new normal for many employees for an extended period (either because adequate social distancing is not possible at the employers workplace to have all workers return permanently, or because a particular employee is classed as 'at risk' under Ministry of Health guidelines); it is worth considering any employment tax issues which can arise from these working conditions.

The issues employers might be grappling with include:

- If employees have been allowed to take employers office equipment home, does this create any issues?
- If an employer has reimbursed employees for purchasing home office equipment does this create any issues?
- If an allowance is paid to employees for working from home, is this taxable?
- If an employee has been provided with a motor vehicle but is no longer travelling to work, is there a fringe benefit being provided?

Inland Revenue has released some guidance to assist with answering these questions, including issuing Determination EE002: Payments to employees for working from home costs during the COVID-19 pandemic. This Determination aims to reduce compliance costs for businesses who are currently paying, or who are intending to pay, an allowance or reimbursement to employees for furniture and/or equipment, telecommunication usage plan costs and other expenditure. It applies only to payments made between 17 March and 17 September 2020.

Inland Revenue also issued some comment in relation to FBT and the availability for private use of motor vehicles during the lockdown period.

Home office set ups

For many employees, preparing to work from home before the lockdown period meant setting up a home office. Practically, this may have happened in one or more of the following ways:

1. The employee may have taken home office equipment belonging to the employer; or
2. The employee may be reimbursed for the cost of buying new office equipment which will belong to the employer; or

3. The employee may be reimbursed for the cost of buying new office equipment which will belong to the employee; or
4. The employee may use existing home office equipment they already own.

Employer owned equipment

Under the first two options above, where the employer owns the office equipment, no adverse tax implications should arise. Reimbursement by the employer for the cost of new office equipment can be made tax free to the employee. GST can be claimed by the employer in the usual way provided a valid tax invoice is provided by the employee. This is because the employee has acted as an agent of the employer in incurring the cost. It is acceptable for the tax invoice to be made out in the employee's name.

The cost to the employer will be deductible up front if the value is under the low value asset threshold. This has been increased to $5,000 for the period from 17 March 2020 to 16 March 2021, when it will reduce to $1,000. Incidental private use of the office equipment by the employee will not be subject to FBT provided the assets are business tools used primarily for work purposes and cost less than $5,000 including GST.

Employee owned equipment

Reimbursement of the cost of new or existing office equipment that is owned by the employee is not so straightforward. The tax treatment may vary depending the level of work versus private use of the assets, the cost of the assets and the date they are/were acquired. Recognising that employers could face significant compliance costs in making such assessments, Determination EE002 has been issued to provide some safe harbour options for employers. It is important to note that applying Determination EE002 is optional - employers can use other methods to determine the tax free amount of payments to employees provided they are reasonable and supported with evidence.

The 'safe harbour' option allows employers to treat an amount of up to $400 paid to an employee for furniture and/or equipment costs as exempt income. No evidence is required to be kept regarding the payment, what was purchased or the expected degree of personal use of the equipment. Where an employer selects this option, it cannot treat any other allowance or reimbursement payment for furniture or equipment as exempt income.

Under the 'reimbursement' option, an amount paid by an employer will be either wholly or partially exempt income where it is for new or existing furniture or equipment purchased by the employee, provided it is equal to, or less than, the deduction the employee could have claimed for the depreciation loss on the asset (but for the employment limitation).

How much of this payment is exempt income under the reimbursement option will depend on the extent to which the employee uses the asset as part of their employment. If the asset is used exclusively for employment purposes, reimbursement of up to 100% of the depreciation loss of the asset (or cost if it is a low-value asset) will be exempt income of the employee. If the asset is used principally for employment purposes, only reimbursement of up to 75% of the depreciation loss or cost will be exempt income. Finally where the asset is not principally used for employment purposes, only reimbursement of up to 25% of the depreciation loss or cost is exempt income.

Where the reimbursement option is selected, employers will need to know the cost of the asset and the relevant depreciation rate (if using depreciation loss).

They will also need determine the extent to which the asset is used for employment purposes. A written statement such as an email or expense claim from the employee will be sufficient evidence of the level of employment use.

In these scenarios, no GST should be claimed by the employer as the employee has not acted as agent for the employer, even if the employee provides a tax invoice in support of their expense claim.

Example:
Infinity Limited is a software development company. When its employees started working from home due to COVID-19, a number of them realised that they did not have suitable chairs for use at home. The employees were able to purchase new chairs during Level 4 Lockdown as they are essential items. Infinity Limited agrees to reimburse the employees for the cost of the chairs acquired and that the employees will retain ownership of the chairs. Each employee submits an expense claim, with the cost of the chairs ranging from $150 to $300. No other equipment related claims are made by the employees.

As the payment is under $400 per employee, each reimbursement can be treated as exempt from tax. The payment will be deductible to the employer, but no GST can be claimed.

Reimbursing employees or paying an allowance to cover household expenses

With employees home throughout the day working, it is expected that many will see an increase in their utility bills from running heating and lighting during the day when they would normally be at work. Employees may also experience other additional costs, such as tea and coffee and light snacks that would ordinarily be provided at work. Some employers are looking to pay their employees an allowance to assist with the increase in their household expenses while working from home.

Under Determination EE002, an employer can pay its employees up to $15 per week to cover these expenses, and this will be treated as exempt income.

Employers will not be required to collect any evidence as to what the employees use these payments for; albeit an allowance can only be paid tax free if an employee is actually working from home on a more than minor basis. The payments do not have to be paid weekly, and can instead be made fortnightly or monthly to align with the employees' regular payday (i.e. $30 per fortnight or $65 per month). These payments can be combined with the de minimis payments (as set out in Determination EE001) of up to $5 per week for employees who use their telecommunications devices or usage plans (e.g. laptops, mobile phones etc.) for both business and private use.

Inland Revenue released guidance last year (Determination EE001) in relation to telecommunication allowances or reimbursements paid to employees for using their own devices or usage plans. The starting point is that if the allowance/reimbursement only covers the business use of the device, then the payment will be fully exempt. If the payment covers both business and personal use then the Determination sets out three categories for allocating the cost of these payments between business and private use:

- 75% exempt (Class A), if the device/usage plan is principally used in employment. (Businesses need to demonstrate reasonable judgement in determining whether the principal use is for employment. This can be based on time spent or signed declarations from employees confirming principal use);
- 25% exempt (Class B), if the device/usage plan is not principally used in employment but still required; and
- 100% exempt (de minimis Class C) where the amount reimbursed is $5 a week or less (maximum of $265 a year).

As with payments for employee owned equipment, no GST should be claimed by the employer on reimbursements or allowances for telecommunication or other working from costs as the employee has not acted as agent for the employer, even if the employee provides a tax invoice in support of their expense claim.

Examples:
Sarah is working full time from home, Sarah is required to be contactable at all times and estimates that she is spending 60% of her working day on either Skype or Zoom video calls, the remainder of her working day is spent connected to the internet. Her monthly broadband bill is $100, of which her employer, Blue Skies Ltd, has agreed to contribute $10 towards each week she is working from home. In this instance the broadband connection is being principally used for business purposes and Sarah falls within Class A. Because the amount of the employer contribution is actually less than 75% of the costs incurred by Sarah the full amount of the payment is treated as tax exempt.

Isobel is working from home during the lockdown and her employer, Rolling Hills Ltd, pays her an allowance of $20 a week to cover the increased costs she has incurred working from home. Isobel does not ordinarily work from home and her house is usually empty during standard working hours. Rolling Hills Ltd is paying this as a tax exempt allowance of the basis that the $20 is made up of a $5 a week Class C telecommunications payment to go towards her broadband bill and the remaining $15 is to pay the increased power bill to account for the extra heating and lighting Isobel is using being home all day.

In both of these examples the cost will be deductible to the employer, but no GST can be claimed.

If you are considering paying an allowance or reimbursement to your employees, we recommend getting in touch with your usual Deloitte tax advisor.

FBT on motor vehicles

With the March 2020 quarter return due to be filed with Inland Revenue at the end of May, a common question we have been asked is what effect the lockdown will have on the FBT payable on motor vehicles provided to employees. We put this question to Inland Revenue and had been hopeful that the 6 Level 4 Lockdown days to 31 March could be treated as exempt days where the vehicles had been parked at employees' homes.

The table below is taken from Determination EE002 and is a useful summary of the rules:

What is the payment for?	How much is treated as exempt income?	When can I use this option?	What evidence do I need to keep?
Furniture or equipment	Up to $400 maximum ("safe harbour")	The safe harbour amount is the only amount paid for furniture and equipment	No evidence required
	25percent of cost of item*	Item is used at least partly for job	• Evidence of the employee's costs • Evidence that the item is used for the employee's job
	75percent of cost of item*	Item is used mainly for job	• Evidence of the employee's costs • Evidence that the item is used **mainly** for the employee's job
	100percent of cost of item*	Item is used exclusively for job	• Evidence of the employee's costs • Evidence that the item is used **exclusively** for the employee's job
Telecommunication usage plan costs	Up to $5 per week	Plan used for job	No evidence required
	25percent of employee's costs	Cost is at least partly for job	• The employee's costs • Evidence that the cost is for the employee's job
	75percent of employee's costs	Cost is mainly for job	• The employee's costs • Evidence that the cost is **mainly** for the employee's job
	100percent of employee's costs	Cost is exclusively for job	• The employee's costs • Evidence that the cost is **exclusively** for the employee's job
Other expenditure	Up to $15 per week	The $15 per week amount is the only amount paid for other expenditure	No evidence required

Unfortunately a favourable response has not eventuated.

Inland Revenue's position is that unless there are valid restrictions on private use imposed on the employee, motor vehicles remained available for private use and FBT remains payable even during Level 4 lockdown when employees may only have been able to use the vehicle for essential trips. The rationale for this is that FBT is based on availability for private use, not actual private use. This outcome is in line with the position where an employee leaves their work vehicle at the airport when away on a family holiday. FBT is payable in this case because the employer has not done anything to remove the ability for the employee to use the vehicle privately.

However Inland Revenue has provided some hope – indicating that there is a possibility of legislative change that may provide some FBT relief; however the timelines on this are not clear. If you have company cars that are subject to FBT and these were parked at employee's homes during the Level 4 Lockdown, we recommend you file on the basis of the vehicles being available. It will be possible to put through a self-correction in the FBT return for the quarter ended 30 June if it becomes more apparent that the law will be retrospectively changed. If you believe that your employees have severely limited opportunity to use their work vehicles for private purposes in the short term you could consider imposing private use restrictions to minimise your FBT liability.

For completeness, we also note that Inland Revenue released specific guidance in respect to the treatment of pool vehicles, home as a place of work and other available exemptions. An overview in respect of these positions is below:

- Pool vehicles – If the vehicle was 'subject to a genuine private use restriction' during lockdown, no FBT will need to be paid. However FBT is required to be paid on the day the vehicle was brought home and the day it was returned to work, other than where the employee's home is also a workplace.
- Home as a place of work – Given that many people's place of work has been their home during the level four lockdown (and beyond), the Commissioner has stated that she will accept that home to work travel 'such as driving a pool vehicle home before level 4 and returning it when the employee can go back to work' is not subject to FBT. She has stated however that there needs to be a genuine private use restriction in place for this to apply.

- Exemptions – An FBT liability may not arise if one of the normal exemptions applies; e.g. emergency calls and business trips.

While not covered in Inland Revenue's comments, some employers may have required company cars that are otherwise available for private use to be left on site for the duration of the Level 4 Lockdown. Where this is the case, the employer has removed the availability for private use for the duration and FBT will generally not be payable except on the first and last days of the period.

FBT tips

In the current environment it is particularly important for businesses to be considering their tax costs and taking advantage of available exemptions from FBT and considering how their FBT liability is calculated. For example:

- Ensure your employees are claiming all available exempt days for all motor vehicles provided; don't just pay FBT on 90 days every quarter if there was not actually full availability for private use;
- Review your motor vehicle policies; are there any options here to reduce the availability of vehicles for private use?
- Are there any vehicles being provided which could be work related vehicles (and exempt from FBT) but are not currently being treated as such?
- Ensure you are structuring your employees' arrangements correctly to fall within FBT rather than PAYE if there is a possible exemption in the FBT regime which is not replicated for PAYE purposes;
- Consider the application of the de minimis rule (which allows unclassified fringe benefits of up to $300 per employee per quarter and $22,500 to all employees over the current and previous three quarters to be exempt from FBT) - can you manage your fringe benefits to fall within these rules? Remember that the $22,500 threshold must be assessed at a group level;
- Are you attributing fringe benefits to your employees? While undertaking an FBT attribution is more time consuming than paying FBT at a flat rate of 49.25%, there are potentially tax savings to be made;
- If you don't want to do an attribution calculation, do you have benefits that can be pooled and taxed at the pool rate of 42.86%?

For more information about FBT or any topics in this article please contact your usual Deloitte advisor.

The content of this article is accurate as at 1 May 2020, the time of publication. This article does not constitute tax advice. If you wish to understand the potential tax implications of current events for your business or organisation, please contact your usual Deloitte advisor.

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What impact will COVID-19 travel restrictions have on your company's tax residence?

By Ian Fay & Hamish Tait

COVID-19 and the various measures implemented to fight it, have significantly disrupted how many taxpayers do business across the globe, including the ability for directors, management, and staff to work and travel in the usual way.

This disruption might justifiably give taxpayers cause for concern in relation to the tax residence of companies, particularly when considered in light of the seemingly increased focus on this topic of late (e.g., the increased dual residency risk for New Zealand companies with certain connections with Australia, and the changes to tax treaties as a result of the Multilateral Instrument, including but not limited to the New Zealand-Australia treaty).

Against that backdrop, it is reassuring to see the recently released public statement and associated Q&A document on COVID-19 tax residence issues from New Zealand Inland Revenue (IR). The Q&A document covers a number of issues and is a living document that is frequently updated.

This statement is complemented by OECD guidance on tax treaties which was released in early April 2020. This guidance covers treaty issues (relating to tax residency and permanent establishments) that may arise as a result of COVID-19. In addition to this, for those dealing with Australia, the Australian Tax Office released similar guidance in March.

This guidance collectively addresses potential issues in applying the following New Zealand corporate income tax concepts:

- Company tax residence; and
- Fixed and permanent establishments.

We have commented on each of these below.

The IR statement also covers the tax residency consequences of the COVID-19 travel restrictions for individuals.

Company tax residence

IR guidance on New Zealand domestic rules

Under New Zealand's domestic tax rules, a company is considered a New Zealand tax resident if the company:

1. Is incorporated in New Zealand;
2. Has its head office in New Zealand;
3. Has its centre of management in New Zealand; or
4. Director control is fully or partially exercised in New Zealand.

IR's guidance seems to focus on the director control test, in the scenario where directors of a nonresident company (e.g., a foreign subsidiary of a New Zealand headquartered group) are not able to leave New Zealand due to COVID-19 travel restrictions. The guidance states that a factual consideration of how a company is managed in reality is necessary, and that the fact that the directors are stranded in New Zealand will not change where the "real business" of a company is carried on. Therefore, a company will not be a tax resident in New Zealand, provided that the director control exercised in New Zealand is only "occasional."

The guidance does not specifically comment on, for example, company executives being stranded in New Zealand and/or the centre of management test.

However, we would hope that similar principles would be applied by IR.

Dual residence risk

One topic on which IR's guidance (quite reasonably) does not comment is the reverse scenario, i.e., directors of a New Zealand incorporated company attending board meetings from overseas, which could potentially give rise to overseas tax residence for the company (depending on the relevant tax residence tests in the particular overseas jurisdiction). Where the company is resident overseas in addition to being resident in New Zealand, this is referred to as dual residence (i.e., becoming tax resident under the tax laws of more than one country).

In the context of Australia, it is worth noting that Australian Taxation Office guidance (see Deloitte's comments on this here) indicates that temporary changes arising from COVID-19 travel restrictions should not cause a company to become Australian tax resident in the absence of any other change in circumstances. This may help to mitigate Australia/New Zealand dual residence concerns during the crisis. We would also expect that tax authorities elsewhere could take similarly pragmatic views.

Nevertheless, given the potential for COVID-19 to change the way in which directors and management carry on business, this possible risk is something that should continue to be closely monitored. Where control of a company is being exercised from overseas (e.g., directors are attending board meetings overseas, or where senior management is located in different countries) it will continue to be as important as ever to ensure that any adverse tax consequences of dual residence are able to be managed.

OECD guidance on tax treaty "tie breakers"

In the event that a company is resident in both New Zealand and another country, an applicable tax treaty may provide a "tie breaker" test. Depending on the tax treaty, this could be a mutual agreement procedure between two tax authorities, or could also be a factual "place of effective management" test.

In either case, the OECD's guidance (which would presumably generally be followed by IR and other tax authorities) is that regard should be had as to how the company was usually managed, and not only the circumstances relating to "an exceptional and temporary period such as the COVID-19 crisis."

This means that if there is a temporary change in the way a business is managed during the crisis, this may not impact on the application of tax treaties.

Fixed establishments

A related issue is how the COVID-19 disruption might impact on the "fixed establishment" test.

Under New Zealand's domestic tax rules, an entity that carries on business in New Zealand through a "fixed establishment" (i.e., a taxable presence) in New Zealand may be subject to tax on the profit attributable to that fixed establishment.

IR's guidance states that having a presence in New Zealand for only a short period of time during the COVID-19 disruption will not cause a nonresident entity to become subject to tax in New Zealand. The guidance notes that the following requirements must be met for an entity to have a fixed establishment:

- There must be a degree of permanency, i.e., not of a purely temporary nature; and
- The business must be carried out there on a regular basis and partly or wholly undertaken at that fixed place.

IR goes on to state that whether there is a fixed establishment is determined having regard to the facts and circumstances of each case, meaning that it will be relevant if the company did not have a presence in New Zealand prior to COVID-19 and if the presence of employees in New Zealand is only short term due to the current travel restrictions.

Permanent establishments

IR's statement also refers to (and therefore appears to endorse) the OECD's similarly pragmatic views on the creation of a permanent establishment (PE) due to COVID-19 restrictions. PEs are a related concept to fixed establishment, and are relevant for allocating taxing rights between countries under New Zealand's tax treaties. The OECD's guidance broadly concludes that temporary changes to the location of employees or the manner in which business is carried on will not give rise to a PE. The guidance specifically states that:

- Temporarily using a home office/working from home in a different country will not create a PE, either because it is not sufficiently permanent or because the business has no access or control over that one employee's home office – and, further, the business provides an office available in "normal circumstances;" and
- Temporarily concluding contracts in a different country due to a travel restriction or requirement to work from home will not be sufficient to give rise to an "agency PE" because it will not be "habitual."

Inland Revenue's statement notes that Inland Revenue competent authority assistance is available if other countries are not applying this guidance in the same way.

Comment

The release of the guidance is welcomed. It is pragmatic and helpful for taxpayers and provides a degree of certainty as to how the corporate residence and fixed and permanent establishment tests are likely to be applied in the context of the COVID-19 disruption.

However, although the guidance provides some flexibility for taxpayers, some caution will still be required. The over-arching theme of the guidance is that only minor or temporary changes in the way businesses manage their operations will be disregarded (e.g., IR's statement on tax residence indicates that the control of a foreign company by directors stranded in New Zealand must still only be "occasional"). There is also still a level of uncertainty in that it is hard to predict when – or whether – the ability to travel internationally will return to normality, and how this will impact on the way businesses operate going forward. For instance, it may be that in future it is increasingly less practical for directors to travel internationally to attend board meetings, or that cross-border remote working practices for employees will become more common and directors refuse to travel. Therefore, although we would hope that Inland Revenue will continue to be pragmatic, there is likely to only be limited "wiggle room" within the current rules. This means that in many cases, tax residence and fixed (or permanent) establishment issues will still need to be carefully considered and monitored.

Some of the corporate tax residence issues arising as a result of the COVID-19 disruption may also be worth broader consideration from tax policy officials. For instance, it could be argued that in an era when directors might be spread across the world, the director control test has become out of step with modern corporate governance practices and the ability to attend board meetings remotely. In the meantime, however, taxpayers will need to take care to ensure that they are aware of the consequences under the current tax rules of having directors, management, or staff in different locations around the world.

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Practical relief from consequences of COVID-19 travel restrictions for individuals

By Stephen Walker

The restrictions placed on the movement of people during the global COVID-19 pandemic may result in some unintended, and in some cases unfavourable, outcomes for some individuals from a personal tax residency perspective. This could be through no fault of their own.

Whilst the OECD has recently released guidance as to how the various treaty tax residency provisions should be interpreted in the context of COVID-19 as tax residency is initially determined based on domestic law and its application, it seems appropriate that COVID-19 travel restrictions should be taken into account when assessing domestic tax residency. However, without guidance from tax authorities, any interpretation of domestic residency tests in a COVID-19 context outside a plain reading of the relevant legislation would not be without risk.

It is pleasing, therefore, to see the New Zealand Inland Revenue release a public statement and Q&A document that deals with a number of individual New Zealand domestic tax residency issues that can arise inadvertently as a result of travel restrictions in place due to COVID-19.

The guidance now released by Inland Revenue addresses potential issues in applying the following New Zealand individual tax concepts:

- Individual tax residency;
- Employment income relating to short term business visits to New Zealand (i.e., the 92-day exemption rule);
- Transitional residency;
- Nonresident contractors tax; and
- Student loan repayments.

Individual tax residency

Under ordinary circumstances, a person will become resident of New Zealand if they are present in New Zealand for more than 183 days in a rolling 12-month period.

Inland Revenue is aware that, due to COVID-19 travel restrictions, some people may be unable to leave New Zealand before they breach this day-count threshold and so may inadvertently become a New Zealand tax resident, despite their plans to leave New Zealand. Therefore, Inland Revenue have stated that individuals will not become resident of New Zealand purely by reason of the day count as long as they leave New Zealand within a reasonable period of time after no longer being practically restricted in travelling. Extra days spent in New Zealand due to COVID-19 can essentially be disregarded when applying New Zealand's day-count residency test.

This approach will also provide relief for any individuals who have to date been successfully managing their days in New Zealand so as not to trigger their one time opportunity to be a transitional tax resident.

If they are currently stranded in New Zealand, without this concessionary treatment, they might otherwise inadvertently trigger the start of their transitional resident exemption period.

Short-term business visits to New Zealand

Ordinarily, there is a 92-day test that provides a tax exemption. Income tax is not payable and therefore PAYE does not need to be withheld for individuals who are present in New Zealand for less than 92 days and who are performing personal or professional services for a nonresident employer, provided their employment income is subject to tax in their home country.

Inland Revenue is aware that the current travel restrictions may mean that these individuals are inadvertently present in New Zealand for longer than 92 days. Without any form of dispensation, this could cause either the employer, or the individual, to have New Zealand income tax obligations in relation to the individual's employment income, especially where there is no tax treaty to be applied.

In a COVID-19 context, where short-term visitors are stranded in New Zealand, Inland Revenue has indicated that, as long as the individuals leave New Zealand within a reasonable time after they are no longer practically restricted in travelling, then any extra days when the individuals were unable to leave and that are in addition to the 92 days will be disregarded.
As a result, income tax liabilities should not arise for nonresident employers of employees deployed on short-term visits to New Zealand that are unable to leave within the 92-day window.

Transitional residents

First-time tax residents, and repatriating Kiwis who have been nonresidents of New Zealand for 10 years or more, and who have not previously been transitional residents, are able to be treated as transitional residents as from the date they trigger New Zealand tax residency. Transitional residency lasts for 48 months from the date an individual triggers one of the two New Zealand domestic tax residency tests, whichever is earlier.

Inland Revenue have acknowledged that some transitional residents may have planned to leave New Zealand before their 48-month transitional residency period ends, but they are now unable to leave New Zealand due to COVID-19 travel restrictions. The guidance issued by Inland Revenue suggests that such individuals should not be regarded as having lost their transitional residency status just because they are stranded in New Zealand. Similar to the residency test above, providing the individuals leave New Zealand within a reasonable time after they are no longer practically restricted in travelling, then any extra days spent in New Zealand when they were unable to depart will be disregarded.

Nonresident contractor's tax

There is an exclusion from having to withhold nonresident contractor's tax on payment to nonresidents where individuals haves been in New Zealand providing their services for less 92 days. This rule aligns with the 92-day short-term business visitor rule for employment income, as outlined above.

If COVID-19 travel restrictions mean that this day count is reached, Inland Revenue again have indicated that, if the individuals leave New Zealand within a reasonable time after they are no longer practically restricted in travelling, then any extra days when they were unable to leave and that are in addition to the 92 days will be disregarded for the purposes of applying the 92-day exemption from nonresident contractors tax.

Student loans

There is a 184-day test for student loan repayment obligations whereby days in excess of 184 outside of New Zealand will cause borrowers to incur interest on their student loan. Inland Revenue has stated that persons who are stranded outside New Zealand due to COVID-19 travel restrictions and who cross the 184-day threshold will not be subject to these repayment obligations as long as they return to New Zealand within a reasonable period after they are no longer practically restricted in travelling.

Deloitte view

It is pleasing that Inland Revenue have released guidance on the above individual tax matters, which appear largely consistent with the OECD announcements on treaty interpretations in light of travel restrictions imposed on individuals. However, as with all guidance, it does not cater to all circumstances and so judgement will need to be exercised in applying these statements from Inland Revenue to your personal situation.

Inland Revenue have not provided guidance as to what a reasonable period of time is or what "practically restricted" means from a travel perspective. These are obviously subjective tests, and so some degree of judgement will need to be exercised when applying them. This will likely require taxpayers looking to rely on this guidance to weigh up the situation in both New Zealand and their normal place of tax residency or intended destination. This may involve, for example, taking into account travel restrictions in New Zealand and the overseas destination, and travel demand and flight availability. What is unclear is how these rules might apply to individuals with, for example, a compromised immune system, who may not want to travel to their home country if the COVID-19 situation there means they are at greater risk, even though they may be able to physically travel there. We are seeking further guidance from officials as to what a reasonable time period would be, and what "practically restricted" means in the context of COVID-19.

Also, the guidance does not explicitly contemplate the impact of an extended stay on subsequent visits to New Zealand within a 12-month period. Whilst one could read the guidance to mean that additional days spent in New Zealand now due to COVID-19 could be disregarded when assessing day counts in relation to future visits, there is a degree of uncertainty around this interpretation, which would be good to clarify. We will monitor future announcements to see if this position is clarified by officials.

Practically speaking, transitional residents who had planned to leave New Zealand but can't due to COVID-19 and who are wanting to rely on this guidance will likely need to have been planning and have been ready to leave New Zealand during the lockdown period and have been physically prevented from doing so due to the travel restrictions in place. Any transitional residents with a planned departure several months away who may now be delayed due to other commercial factors as a result of COVID-19 (i.e., not travel related) may be unable to rely on this guidance to effectively extend a person's transitional residency period beyond what the current legislation permits.

One option to provide certainty for your tax position could involve seeking a short process ruling in relation to your situation and the application of New Zealand's domestic tax rules in the context of COVID-19.

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COVID-19 – Customs considerations for exports and imports

By Jeanne du Buisson, Jonathan Doraisamy and Robert Sheetz

The current unprecedented times have forced many businesses to reconsider their supply chain, including rethinking their import and export strategy to meet customer demands. Businesses who are familiar with the tariff concessions available under many free trade agreements are benefiting from the duty-saving opportunities when switching between manufacturing countries or changing shipping routes.

However, changes to the supply chain can create additional complexities for trade compliance, particularly the valuation of products.

For Exporters

Inland Revenue has provided an extension to the standard period for zero-rating of exported goods. Generally, a supply of goods is only zero-rated for GST if the goods are exported by the supplier within 28 days of the time of supply.

However, businesses affected by COVID-19 will have a three month extension to the 28-day period for export without needing to make an application to Inland Revenue. The three month extension starts on the day the 28-day period expires, and applies to a supply of goods up to and including 31 July 2020.

NZTE also has a dedicated website that provides information to help exporters mitigate the impacts of the COVID-19 pandemic.

For Importers

The Government has approved two tariff concessions for products critical in the fight against COVID-19 (soap and COVID-19 testing kits). Also, if importers are unable to pay customs duty and/or GST on time due to the impact of COVID-19, there may be some relief available. Customs will consider options for importers on a case-by-case basis.

Where an importer is altering or considering altering its supply chain, consideration should be given to the changes introduced by the New Zealand Customs and Excise Act ("CEA") that were effective 1 October 2018. Some of those more notable changes include which sale should be valued for customs purposes (where there are multiple transactions in a supply chain), and how to treat changes to the value of imported goods.

Changes to the 'price paid or payable' used for valuation purposes can change due to a number of reasons, including:

- Royalties paid in relation to the imported goods before or after the import of goods;
- Details of freight and warehousing costs not being available at the time of import;

- Additional commissions paid or rebates received in relation to the imported goods after the import of goods;
- Transfer pricing adjustments that would adjust the value of the imported goods.

Provisional Value Scheme (PVS)
The PVS applies to importers who operated under the previous uplift programme or to importers who cannot determine the customs value of imported goods at the time of importation or expect that the customs value will change after importation.

If an importer is not enrolled in the PVS, and later discloses a revised customs value (whether voluntarily or not), the importer may be at risk of being exposed to penalties and compensatory interest (even if only GST applies).

PVS registration
Importers need to determine if the provisional value scheme is appropriate for their circumstances. If so, importers will need to determine if they automatically qualify and therefore only need to notify Customs, or whether the importer needs to apply in order to use the scheme.

PVS compliance
If you are enrolled in the PVS, you must provide Customs with a "final value" within 12 months of the end of the financial year in which your provisional values were made. For example, if you have a year-end of 31 March 2020, you have up to 31 March 2021 to declare your final Customs value for all of your imports made for that income year. The duty balance is then paid or refunded and no compensatory interest is charged on the difference between provisional duty and the final duty.

What to do if you think you need to register for the PVS?
If you are an importer and you make post-importation adjustments to your Customs values or you cannot accurately determine the customs value of your goods at the time of import, you will likely need to enrol in the PVS.

If you have any questions about the PVS enrolment, please get in touch with the authors or your usual Deloitte advisor.

However, changes to the supply chain can create additional complexities for trade compliance, particularly the valuation of products.

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Information is key: The proposed tax-related amendments to the Overseas Investment Act 2005

By Matthew Scoltock and James Hickey

Introduction

After extensive and thoughtful consultation between Government and industry in 2019, the Overseas Investment Amendment Bill (No. 2) (the "Bill") was introduced to the House on 19 March 2020. At its core, the Bill included a suite of proposed amendments to the Overseas Investment Act 2005 ("OIA") that were targeted at significantly reducing the complexity and cost of Overseas Investment Office ("OIO") consent for foreign ownership or control of "sensitive New Zealand assets."

As an important part of the Government's short-term response to COVID-19, the Bill has since been withdrawn and (in substance) split in two. Some tax-related features of the Bill are now included in the Overseas Investment (Urgent Measures) Amendment Bill (the "Urgent Measures Bill"), which is comprised of the most time-sensitive proposed amendments to the OIA that "... the Government considers need to be put in place urgently to mitigate the economic effects of COVID-19," and which the Government is hoping will be in force by mid-June 2020. The other tax-related features of the Bill have been included in the Overseas Investment Amendment Bill (No. 3) (the "Other Measures Bill"). The Government does not believe the Other Measures Bill to be critical to its response to COVID-19, and it is therefore likely to have a slightly more lenient timeframe for scrutiny.

The proposed amendments to the OIA represent a potentially seismic shift, not only for the OIO consent process, but also for the M&A lifecycle - including in relation to tax. As it stands, the statutory "investor test" does not explicitly contemplate tax. While a foreign investor's history of tax compliance is no doubt inherent in demonstrating "good character" (or lack thereof), and may be taken into account by the decision-maker, it is not a mandatory consideration in relation to a foreign investor's potential "entry" into New Zealand (and, in our experience, is rarely considered). As a result of the Urgent Measures Bill and the Other Measures Bill, that is about to change - and in a material way.

Overview of the Bills (as they relate to tax)

A key aspect of the Urgent Measures Bill is a "new" investor test. The Explanatory Note to the Urgent Measures Bill states that the new investor test "...applies for almost all overseas investments. The new section [18A] clarifies that the purpose of the test is to determine whether investors are unsuitable to own or control any sensitive New Zealand assets, by assessing whether they are likely to pose risks to New Zealand, based on factors relating to their character and capability." As set out in the proposed section 18A(4) of the OIA, a foreign investor's tax compliance history is an explicit consideration under the new investor test.

In particular, under section 18(4)(e), the new investor test asks whether or not the "relevant overseas person" (i.e., the foreign investor), or any foreign individual with "control" of the relevant overseas person (if the relevant overseas person is not an individual), has in the last 10 years been liable to penalties in respect of an "abusive tax position" or "evasion" under sections

141D or 141E of the Tax Administration Act 1994, or under an equivalent enactment in any other jurisdiction. In addition, under section 18A(4)(f), the new investor test also asks whether or not the relevant overseas person, or any foreign individual with control of the relevant overseas person, has outstanding unpaid tax (including interest and penalties) of New Zealand $5 million due and payable in New Zealand, or an equivalent amount due and payable in any other jurisdiction, at the time of its application for OIO consent.

A significant clause of the Other Measures Bill is the proposed section 38A of the OIA, pursuant to which the Governor-General may, by Order in Council, make regulations that require a foreign investor to:

"... provide information that the Commissioner of Inland Revenue considers necessary or relevant for any purpose relating to—

(a) the administration or enforcement of an Inland Revenue Act (within the meaning of the Income Tax Act 2007):

(b) the administration or enforcement of any matter arising from, or connected with, a function lawfully conferred on the Commissioner."

Initial observations

Section 18A(4)(e) and (f) is reasonably "black and white," and does not - on its face - appear to be particularly burdensome.

However, we understand that, in the OIO's view, penalties for an abusive tax position or evasion may be taken into account under the new investor test once they have been "imposed" by Inland Revenue or a foreign tax authority, whether or not they have been litigated in court. We understand the OIO's view is that such penalties must only be disregarded by the decision-maker once they have been overturned by a court. This view does not appear to be controversial with respect to penalties that have been agreed (e.g., by way of a settlement with Inland Revenue or a foreign tax authority). However, it is concerning that penalties may be taken into account under the new investor test if they are being contested (e.g., by way of a formal dispute resolution process with Inland Revenue or a foreign tax authority, or before a court), and may ultimately be proved to be unfounded. In our view, section 18A(4)(e) ought to be refined to only allow penalties to be taken into account if they are final (e.g., agreed to by the foreign investor, ordered by a court, etc.).

If a foreign investor has never been subject to penalties for abusive tax positions or acts of evasion, or does not have outstanding unpaid tax of New Zealand $5 million or more, it is difficult to envisage any form of disclosure or enforcement other than the foreign investor being required to certify its history before the OIO. It is certainly our hope that a common-sense approach to section 18A(4)(e) and (f) is adopted (provided, of course, that certification is made in good faith), and that the burden of proof with respect to a foreign investor's tax history is minimised - particularly if it is envisaged that the Government can request information from foreign tax authorities (under New Zealand's network of tax treaties or tax information exchange agreements) in the event that the decision-maker is, say, sceptical of the information that a foreign investor has disclosed.

The section 38A regulations, however, have the potential to be tremendously broad in their application. The Explanatory Note to the Other Measures Bill states that "... the Bill strengthens how the [OIA] manages risk by... **requiring investors to disclose information relating to their proposed investment structure and tax treatment to Inland Revenue**, to support the integrity of New Zealand's tax system (**once regulations are made**)..." [emphasis added].

The OIO has provided a helpful (albeit high-level) list of the tax information disclosure that is expected to be prescribed by the section 38A regulations, such as: (a) a description of the foreign investor's "plan" for the New Zealand asset (or assets) over the next three years, including any significant capital expenditure; (b) the jurisdiction (or jurisdictions) in which the foreign investor, its immediate parent, and its global ultimate parent are resident for income tax purposes; (c) debt funding, equity funding, or the use of a "hybrid" legal entity or instrument to fund the investment; and (d) the nature and extent of anticipated cross-border related-party transactions (e.g., sales and purchases of goods or services, interest or guarantee fees, royalties, etc.).

The disclosure of such tax information was indicated as one of the potential amendments to the OIA during the Government's consultation in 2019. The Government has said that any tax information that is required to be provided to the Commissioner under the section 38A regulations will not be considered by the decision-maker in consenting (or not consenting) to an OIO application. Rather, we understand that it will be used by Inland Revenue to monitor the foreign investor's subsequent compliance with New Zealand's tax laws, and to inform broader audit and policy decision-making. Presumably, though, the need to disclose an investment structure upfront - and the fact that such disclosure may be used by Inland Revenue in the future - will influence design and spur more conservative behaviour (i.e., less "aggressive" tax planning) than might otherwise be the case.

This is a significant change, and one that is likely to disrupt the traditional M&A lifecycle. The investment structure is, in some circumstances, not considered in great depth until an M&A deal is well-advanced (e.g., due diligence is complete, the sale and purchase agreement is being negotiated (or has even been signed), etc.). It will be critical going forward that the investment structure is designed much earlier than is now often the case, with the relevant tax information being pro-actively compiled and reviewed, so that OIO consent (and, therefore, completion) is not unduly delayed - that is, so that tax does not risk becoming the "tail that wags the dog."

Given the possible breadth of the section 38A regulations, it may be helpful to look to Australia as a guide for what is to come.

The Australian experience

In February 2016, Australia's Foreign Investment Review Board ("FIRB"), in consultation with the Australia Taxation Office ("ATO"), published a very detailed checklist of the tax information that must be included with every application for consent (except in relation to residential real estate). Among other things, a foreign investor must disclose to the FIRB its proposed debt and equity funding mix, including the interest rate on any cross-border related-party debt to be issued - requiring transfer pricing analysis and a self-assessed risk rating.

As an important part of the FIRB consent process, the ATO will provide a "low," "medium" or "high" risk rating for each proposed transaction, and issue qualitative advice on the likely risk to tax revenue and the integrity of the tax base. A high risk rating will be influential to the FIRB's overall assessment; and, in theory, it is possible for tax to be the reason that a proposed transaction is "blocked". Alternatively, the ATO might agree with an application subject to certain "tax conditions" in relation to the foreign investor's post-completion tax compliance. These ordinarily range from requiring basic compliance with Australia's tax laws and co-operating with the ATO (e.g., by regularly providing to the ATO certain routine information in a complete/timely manner), to requiring a foreign investor to negotiate (in good faith) an advance pricing agreement or request a binding ruling.

Our experience to date in Australia has suggested that the disclosure of tax information has not been a significant "pain point" in the FIRB consent process - or for M&A activity in general. We understand (anecdotally) that the requirement to disclose tax information has not, in general, resulted in tax playing a larger role in the M&A lifecycle than it otherwise might; provided, of course, that it is considered early and comprehensively. Therefore, we believe that the key learning from Australia is that upfront management by both of the parties (i.e., the purchaser and the OIO) ought to minimise undue complexity or delay downstream.

Where to from here?

The Government's 2019 consultation document, Reform of the Overseas Investment Act 2005: *Facilitating productive investment that supports New Zealanders'* wellbeing, states that "[t]he OIO generally imposes a condition on consent holders that individuals with control will continue to satisfy good character requirements, and this could include tax compliance." With each foreign investor's history of tax compliance becoming an explicit consideration under the new investor test, it will be interesting to see if the "tax conditions" that are often imposed in Australia become characteristic of foreign investment in New Zealand, and whether or not (and how) ongoing compliance with "good character" will become a focus of due diligence in the future.

If the Other Measures Bill is enacted during the current Parliamentary term, the next step for the Government (in relation to tax, at least) will likely be to decide the exact ambit of the section 38A regulations. The detail in which an investment structure is required to be disclosed will be particularly significant. Will the section 38A regulations reflect the granularity currently required in Australia (e.g., will it be necessary for a foreign investor to have performed transfer pricing analysis to set an arm's-length interest rate on cross-border related-party debt so far in advance)? Or, will they be more macro in nature (requiring, for example, only very high-level disclosure of debt, equity or "hybrid" funding)? As the Explanatory Note to the Other Measures Bill puts it, "... the [OIA's] purpose [is] that it is a privilege for overseas persons to own or control sensitive New Zealand assets." The Government will clearly need to strike a balance between protecting the integrity of New Zealand's tax base and ensuring that the requirement to disclose tax information is not so onerous that quality foreign capital is discouraged, and New Zealand's reputation as a friendly place to do business is therefore compromised.

Encouragingly, as we have seen in Australia, heightened consideration of tax early in the M&A lifecycle does not appear to be overly burdensome, or necessarily result in greater cost for the foreign investor than might otherwise be incurred.

It will be essential, however, that any requirement to disclose tax information is unambiguously framed and carefully considered. It will also be critical that every foreign investor engage with its New Zealand tax advisor as early as possible to ensure that the most tax-efficient investment structure can be finalised before applying for OIO consent. If an investment structure is not well considered, such that it needs to be revised, the OIO consent process may be delayed.

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There's more to overseas rental properties than meets the eye

By Stephen Walker & Nick Cooke

On 13 March 2020, Inland Revenue released two draft Interpretation Statements and a Currency Conversion Approval for public consultation, which have been drafted to address a range of tax issues that tax resident individuals may face if they own overseas rental properties. You're probably wondering why Inland Revenue have drafted guidance on the taxation of overseas rental properties as they're no different to New Zealand rental properties, right? Well, not quite. Read on to find out more.

Back to basics

Before we explore the tax issues that arise on owning overseas rental properties, it's worth recapping when overseas rental properties and any associated income will fall into the New Zealand tax net. New Zealand imposes tax on the basis of the tax residence of a person and the source of the income that they earn. Tax residents are, in the first instance, subject to tax on their worldwide income.

For a New Zealand tax resident, this means any income earned or deemed to accrue in relation to an overseas rental property will be taxable in New Zealand. This is irrespective of whether the country in which the property is physically located will tax the same income.

Overseas rental income

Overseas rental income must be calculated according to New Zealand tax laws. This means a person cannot simply take the overseas net income/loss and report this amount in their New Zealand tax return. Instead, New Zealand's tax rules regarding calculation of gross income, depreciation and allowable expenditure must be applied. As New Zealand's tax rules will differ to the laws of the overseas country, the taxable income in New Zealand and the overseas country are unlikely to be the same.

Furthermore, New Zealand's standard balance date is 31 March which differs to the balance date of other countries. For example, Australia's balance date is 30 June, while in the US it is 31 December and in the UK it is 5 April. This means that in performing the calculation of taxable income, you may not be considering income and expenditure derived or incurred over the same period. To make things easier, an individual can elect to return overseas rental income in the New Zealand tax year in which the overseas balance date falls. Note however that this election is not available to individuals who have net overseas income of more than NZD 100,000.

Even where such an election is made, individuls must still ensure that income and expenditure is calculated according to New Zealand tax laws.

Conversion of foreign currency into New Zealand dollars

Income earned and expenses incurred in a foreign currency must be converted to New Zealand dollars for the purposes of calculating your New Zealand tax liability. This conversion must be completed using the close-of-trading spot rate on the date the amount is required to be measured or calculated. However, Inland Revenue will allow alternate currency conversation methods such as the "annual" or "monthly" method. Under each of these methods, instead of converting foreign currency amounts on a daily basis, amounts are aggregated and converted either at the end of the income year or month using an annual or monthly foreign exchange rate respectively.

Annual and monthly exchange rates are published by Inland Revenue on their website and these must be used wherever possible. However if you need to convert foreign currency for which rates are not published by Inland Revenue, you can use exchange rates from other reputable sources such as the Reserve Bank of New Zealand.

Whichever conversion method or exchange rate source you decide to use, you must ensure that the same rate sources are used for all properties and all future conversions.

Foreign loans

Many people will have borrowed money from an overseas bank to fund the purchase of the overseas rental property. But these individuals may be unexpectedly caught out by the Non-Resident Withholding Tax (NRWT) and Financial Arrangement (FA) regimes. Both regimes add further complexity, time and cost to owning an overseas rental property, making ownership of an overseas rental property less attractive than you may think.

Obligation to withhold Non-Resident Withholding Tax (NRWT)

Where a New Zealand tax resident individual pays interest to a non-resident, the individual may be required to withhold NRWT and pay this to Inland Revenue which applies irrespective of whether the individual uses overseas funds to make the payment or not. This requirement doesn't exist if the overseas bank has a branch in New Zealand, which applies to most, but not all, Australian banks.

The standard rate of withholding is 15% although this may be reduced by a double tax agreement with the overseas country. In light of such obligations, it may be beneficial for the individual to register under the Approved Issuer Levy (AIL) regime, which effectively reduces the rate of withholding to 2% of the amount of interest paid.

Financial Arrangement regime

If a person has borrowed money in a foreign currency from an overseas bank to fund the purchase of the overseas rental property, the financial arrangement rules have to be considered.

Under the financial arrangement (FA) regime, prescribed spreading methods are used to calculate the accrued interest and unrealised foreign exchange gains or losses arising on the foreign currency loan, which must be returned each year.

Any accrual income will be assessable income, while accrual expenditure will be deductible. A Base Price Adjustment (BPA) must then be completed upon disposal of the loan. This is essentially a wash-up calculation bringing into account any further income or expenditure.

Certain individual's will qualify as "cash basis persons", in which case, they can instead return income and expenditure on a realised only basis. Although, a person must ensure that they satisfy the cash basis criteria every year which can be a complicated and time-consuming exercise.

Sale of the property

The sale of an overseas rental property may be caught by New Zealand's "bright line-test" which effectively taxes gains on the sale of residential investment properties which are bought and sold within five years. This rule can apply irrespective of whether tax is payable in the overseas country.

Where any gain is also taxed in the overseas country, a foreign tax credit may be available to reduce double tax. However, obtaining a foreign tax credit to reduce or eliminate double tax can be troublesome. For example, to get a foreign tax credit the foreign tax paid must be substantially the same nature as New Zealand income tax. This may be challenging if the overseas country operates a capital gains tax system.

What else?

We're not able to go into all of the tax issues arising from overseas rental properties, there's just too many! However, the above illustrates some of the issues and tax regimes that need to be considered. If you have an overseas rental property, we recommend you contact your regular Deloitte advisor for further information or assistance.

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Employee or independent contractor?

By Andrea Scatchard

This is a question that we are often asked, and it is an area where there are no clear tax legislative guidelines. Rather the answer to the question needs to be found by examining the particular circumstances and considering the principles drawn from what are usually non-tax related rulings and decisions.

Organisations seek to engage with individuals as independent contractors, as opposed to as employees, for a number of reasons which are usually unrelated to tax. If an individual is ultimately found to be an employee though, the employer is not only subject to the various obligations imposed by employment law but is also required to account for PAYE, KiwiSaver and other associated taxes to Inland Revenue. This can increase the overall cost of engaging with the individual, especially if Inland Revenue seeks to upset the tax treatment of past payments to the individual.

The status of the individual will also impact which party is eligible to apply for the COVID-19 Wage Subsidy.

Approach taken by the courts

Over the years the Courts have evolved a series of tests which are used to assess whether an individual is an employee or an independent contractor. In our experience there will usually be factors pointing to each side of the argument, and the end result will be a balancing of the competing factors.

The tests can be summarised as follows:

- **Intention test** – looks at the intentions of each party towards the agreement as to the nature of the relationship.
- **Control test** – examines the degree of control the employer or principal exerts over the manner in which the work is done.
- **Independence test** – examines the level of independence the person engaged to perform the services exerts over their work.

- **Fundamental test** – considers whether the person engaged to perform the services is doing so as a person in business on their own account.
- **Integration test** – looks at whether the person engaged to perform the services is integrated into the business or is an accessory to it.

Parcel express decision

An employment court ruling was made on the 7th of May, determining a courier driver (Mr Leota) was an employee despite signing a contract that referred to the driver as an 'independent contractor'.

Mr Leota was employed by Parcel Express as an independent contractor. Many of the terms of the arrangement appear to be ones which we would typically consider indicate that the arrangement is one of an independent contractor. Mr Leota was required to purchase his own van and pay for the signwriting of it. He was unable to take more than 20 days' holiday a year without approval from Parcel Express. Any time he did wish to take off required him to give notice in advance. He was also required to make approved arrangements for a replacement driver during any time he took off. He was expected to be GST registered, although he was not.

Despite these factors, the Chief Judge, Christina Inglis, considered that the relevant aspects of control and integration included in the contract undermined and overrode the assertion that Mr Leota was an independent contractor. Some of these factors included:

- Mr Leota's delivery run was predetermined by Parcel Express - the company could change the run at any time and did not need Mr Leota's approval;
- He was responsible for completing the run full-time, Monday to Friday;
- He could only pick up from, and deliver to, the customers identified by Parcel Express;
- Parcel Express did not allow Mr Leota to change his days of work and he was required to be back at the depot at three specified times during the day.

While accepting the some degree of control may be inevitable to ensure the efficient operation of both parties' businesses, the Chief Judge felt in this case that Mr Leota did not exercise any real degree of autonomy over his work and had no real opportunity to grow his own business. Mr Leota did not have spare time to engage in client-building exercises, the customers were Parcel Express customers and he was effectively building 'their' business. It was clearly stated in his agreement that in the event of him leaving the company, Mr Leota was unable to take the business with him.

As a result of these facts, the Chief Judge ruled that Mr Leota was an employee of Parcel Express due to the level of control and inability for Leota to grow his own business. The Chief Judge stated that, "I do not have any difficulty concluding that Mr Leota was not in business on his own account". She also makes the point that, "Whether a particular worker is an employee is an intensely fact-specific inquiry. There is no presumption that whole categories of workers are independent contractors".

The key point to take from this is that while common industry practice may be relevant in assessing a person's status, this case reinforces that the specific facts of each individual must be considered as they could diverge from the usual practice.

What next?

This decision, which may yet be appealed, is obviously highly significant to the courier industry in particular. But it has relevance to all situations where independent contractors are engaged in circumstances where that line between employee and contractor may be blurred.

We know that this is an area where Inland Revenue has been fairly active in recent times, and regardless of the outcome of any appeal we think it is likely that Inland Revenue will renew its focus here when its investigative staff are directed.

If you engage with independent contractors, or maybe you are one yourself, now is a good time to consider the correctness of this treatment. Please contact your usual Deloitte adviser you would like to discuss the implications of this case.

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COVID-19: Common questions in relation to the Wage Subsidy Scheme, the Extended Wage Subsidy Scheme and the Small Business Cashflow Loan Scheme

By Robyn Walker and Blake Hawes

Budget 2020 saw the announcement that the Wage Subsidy Scheme (WSS) would be extended, with a few twists. In this article we set out some common questions in relation to both the current WSS and the new Extended Wage Subsidy Scheme (EWSS). As the Small Business Cashflow Loan Scheme drives off the eligibility for the Wage Subsidy, the information below is also relevant for businesses who have (or will) apply for this the loan scheme.

Budget 2020 enhancements

- From 10 June, businesses will be able to apply for the Extended Wage Subsidy Scheme (EWSS).
- The EWSS will provide payments of $585.80 for a full time worker and $350 for a part-time worker for a period of 8 weeks. This equates to $4,686.40 and $2,800 for a full-time and part-time worker respectively.
- To be eligible for the EWSS, a business must have experienced a 50% reduction in revenue in the 30-day period prior to the application date versus the nearest comparable period in 2019.
- High growth and new businesses will be able to compare revenue to a comparable period within 2020.
- Businesses which are pre-revenue research and development start-ups will now also be eligible for the current WSS as well as the EWSS if they are recognised by Callaghan Innovation and can demonstrate a reduction in actual or projected income from capital raises.

Callaghan Innovation is assessing eligibility for this extension through an online application process.

Common questions about the wage subsidy scheme

Below are some common questions we have received about the current WSS. Unless indicated otherwise, it is expected that the EWSS will apply in the same manner (further details of the EWSS are not expected until closer to the 10 June start date for applications).

Can I apply for the Wage Subsidy simply because I expect to have a reduction in revenue?

No. The WSS has several other eligibility criteria that must be met before an application is made under the scheme. Broadly speaking the other criteria are:

- Your business is registered in and operating in New Zealand;
- You have taken active steps to mitigate the financial impact of COVID-19 (the extent of the active steps varies depending on the date you made the application, see below);

You will use the subsidy to:

- retain the employees named in your application for the entire 12 week period you receive the subsidy;
- use your best endeavours to pay the employees named in your application 80% of their normal salary/wages (if this is not possible you must at a minimum pass on the full value of the subsidy, or the amount the employee ordinarily earns if this is less).

You also must agree to a number of other information sharing consents and agree that you will repay the subsidy amount where you are no longer eligible.

The eligibility criteria and other requirements are listed in the relevant declarations made when an application is submitted. As the WSS was amended on Friday 27 March 2020, applications made before 4:00pm, Friday 27 March 2020 are subject to the first declaration and applications made on or after 4:00pm, Friday 27 March 2020 are subject to the second declaration.

How do I measure a 30% reduction in revenue?
Under the WSS a business must experience a minimum 30% decrease in actual or predicted revenue over a 30 day period during 2020 when compared to the same 30 day period during 2019, and that decrease in revenue must be attributable to the impacts of COVID-19. Separate rules exist for new, high growth, and R&D start-ups.

A "new business" is one that has been operating for less than 1 year at the date the application is made. A "high growth" business has not been defined by any part of the government for the purposes of the WSS and therefore is open to interpretation. In the instance you think your business is "high growth" we recommend the justification for this is clearly recorded and documented in the event your application is reviewed/audited (covered below).

Under the WSS a "high growth" or "new business" must also experience a minimum 30% decrease in actual or predicted revenue but may compare a 30 day period during 2020 to an earlier 30 period during 2020 when calculating the decrease in revenue. Similar to the regular business requirement the decrease in revenue must be attributable to the impacts of COVID-19.

As noted above, Budget 2020 included an announcement that pre-revenue research and development "start-up" businesses will be eligible to treat a 30% fall in in projected capital income as a result of COVID-19, as a fall in revenue for the eligibility of the WSS. To be eligible these employers must:

- be research and development intensive 'start-up' businesses;
- be 'seed' or 'venture' backed;
- be Callaghan Innovation affiliated as of 17 March 2020;
- have no other revenue other than government support and seed or venture capital.

The EWSS requires a 50% decrease in revenue across a slightly different comparison period, which is covered in further detail below.

What time period should I look at?
The comparative 30 day period does not need to be a calendar month. For example the period 26 March 2020 to 24 April 2020 could be used as this is the immediate 30 days following the first day of the Alert Level 4 Lockdown. This would then be compared to 26 March to 24 April 2019.

For the EWSS, the 50% revenue loss should be measured for the 30 days prior to the application and compared to the 'nearest comparable period' in 2019.

I am self-employed, how should I measure a decline in revenue?
When your self-employed revenue varies between months, this can cause uncertainty. The revenue comparison could take a 30 day period in 2020 and be compared against the previous years' monthly average to determine whether a 30% decrease has occurred. Where an approach like this is taken, it should be clearly recorded and documented.

If I applied on the basis of an expected revenue drop and this has not eventuated, do I need to repay the Wage Subsidy?
If you have made a Wage Subsidy claim on the basis of anticipated revenue decrease (that would meet the requirements set out above) and the decrease in your businesses revenue over the projected period turned out to be less than the required 30% threshold, then you are required to repay ***the full wage subsidy received***.

If you think this might apply to you, information of repaying the subsidy can be found here and the link to complete the form to make the repayment can be found here.

How do I determine whether my employee is part-time or full-time?
A full-time employee for the purposes of the WSS is a person that works 20 hours or more per week.

A part-time employee for the purposes of the WSS is a person that works less than 20 hours per week.

Where an employee's hours vary from week to week, to determine whether they are full-time or part-time for the purposes of the WSS their weekly hours for the last 12 months should be averaged and considered against the two statements made above.

What do I need to pay my employees?
For the employees named in your application you must make your best endeavours to pay those employees at least 80% of their usual salary or wages for the entire 12 week period you receive the wage subsidy.

Similar to the question immediately above, where an employee's salary/wages varies from week to week their weekly gross (before tax) pay for the last 12 months should be averaged and used as the basis of their "usual" salary/wages.

Where it is not possible to pay the named employees at least 80% of their usual salary or wages, at minimum the wage subsidy amount received must be passed onto the named employees (this is $585.50 per week for full-time employees and $350

per week for part-time employees), unless the employee ordinarily earns less than these amounts.

My employee has been on ACC or Parental Leave, what do I do with the Wage Subsidy payment in relation to them?

Paid parental leave

Employees that are receiving paid parental leave entitlements are not eligible to be named on an application under the WSS. If you have made an application under the WSS for an employee receiving paid parental leave you will have to repay to MSD the amount that relates to this employee. If you made an application under the WSS and did not include an employee who was receiving paid parental leave but that employee has since returned to work, you are eligible to make a second application in respect of this employee.

ACC payments

Similar to the analysis above, if an employee is receiving weekly compensation payments from ACC they are ineligible to be named on an application under the WSS. If an employee receiving weekly compensation payments from ACC returns to work you are eligible to make a second application in respect of this employee.

If an employee is injured and starts receiving ACC compensation payments after you have made an application under the WSS, you must declare the Wage Subsidy to ACC as income and their weekly compensation may be altered accordingly.

I have seasonal workers and/or fixed-term contract workers, what happens when their season or fixed-term contract comes to an end during the Wage Subsidy period?

If you have made an application for employees whose employment relations will cease and you proceed to stop paying them during the 12 week period you have received the subsidy, you will be in breach of your declaration made to pay all named employees for the duration you have received the subsidy.

Where the employee's fixed-term contract or seasonal work has ended and you will not continue to pay the named employee you should notify MSD of this change in circumstance and repay the remaining amount of the subsidy to MSD.

In the instance of a fixed-term employee, the employer and employee may renegotiate terms to extend the fixed term period to the end of the 12 week wage subsidy period for that employee to receive the full benefit of the subsidy.

I've had to make an employee redundant, what do I need to do?

If you have made an employee redundant and they were named on your application under the WSS you will be in breach of your declaration made to retain your employees named in your application.

You are able to use the wage subsidy amount to pay the employee any "notice period" obligations arising from the redundancy and the remaining balance must be repaid to MSD (i.e. total amount received, less amounts paid to the employee for weeks employed and less notice period obligations).

You cannot use the Wage Subsidy to make any contractual redundancy payments to an employee.

My employee has voluntarily left, what do I need to do?

If an employee resigns during the Wage Subsidy period you must inform MSD of the updated circumstances. However, the remaining Wage Subsidy amount does not need to be repaid to MSD. The additional amount should be used to subsidise the wages of other employees.

What happens if my business is placed into receivership or liquidation?

If your business is liquidated or a receiver/liquidator sells your business during the subsidy period, and the new owners do not take on the employees named in the WSS application, then the business will not have met their obligation to retain staff and they must repay any amount of the Wage Subsidy remaining for these employees.

When employees are made redundant, the Wage Subsidy can be used to pay the notice period but cannot be used to meet any redundancy payments owed under contract and cannot be used to support other remaining affected employees.

I am not entitled to the Wage Subsidy Scheme. Is there anything available to help pay employees who are unable to work due to COVID-19?

If your business is not eligible for the WSS but your ability to support your employees have been negatively impacted due to the COVID-19 public health restrictions, you could be eligible for the COVID-19 Leave Support Scheme (LSS).

You are able to make an application under the LSS if your employee is not able to work because of the COVID-19 public health restrictions. This means they are:

- At high risk if they contract COVID-19, per the Ministry of Health guidelines.
- Have household members that are at high risk if they contract COVID-19 and the Ministry of Health recommends that employee remains at home to protect that person.
- Have been in contact with a COVID-19 positive person and must self-isolate.
- Have tested positive for COVID-19 and cannot return to work until cleared by a health professional.

The LSS is paid at the same weekly rate as the WSS ($585.80 per week for full-time workers and $350 per week for part time workers) but is paid in a lump sum for 4 weeks only. If an employee is impacted by any of the listed bullet points above for a period of more than 4 weeks you may re-apply for the same employee in the fourth week of receiving the first LSS payment.

You cannot make a claim for any employee under two different schemes at the same time. If you have made a claim in respect of any employee under the WSS and that employee cannot work due to the factors listed above, you are not able to make a claim under the LSS.

Will anyone be auditing my application?

As seen in the media over recent weeks, MSD have requested that numerous applicants of the WSS repay the subsidy amount in full. This is a result of the Government auditing applications using information available to MSD (from the application itself) and information from Inland Revenue

(for example, monthly payroll data).

If you would like your business to be "audit ready" in the event MSD or Inland Revenue review your application, please reach out to your usual Deloitte advisor. Deloitte has developed an Audit-Ready Checklist that can be used for you to gain comfort that you have made a valid claim under the WSS and that can be used as defence document in the event your application is audited.

When can I apply for the EWSS?
Full details of the EWSS have not yet been made available. However, our expectation is that you cannot make a claim under the EWSS until 12 weeks have passed from the date of your original WSS application. The earliest date the EWSS can be applied for is 10 June 2020, being 12 weeks from the first day the WSS was introduced and available.

If you did not make a claim under the WSS until, say, 30 April 2020, our expectation is that you must wait until 23 July 2020 (after 12 weeks have passed) until you can make a claim under the EWSS. We are seeking confirmation on this point from officials.

How do I measure the 50% reduction in revenue required for the EWSS?
To make an application under the EWSS, your business must experience a minimum 50% decrease in revenue for the 30 days immediately before you apply for the EWSS, compared to the closest 30 period during 2019.

Similar to the concessions available in the WSS, "new" and "high growth" business may compare the 30 days immediately before application to a period of 30 days earlier in 2020.

The EWSS is for a period of 8 weeks and our expectation is that all other eligibility criteria and declaration requirements of the WSS will largely remain the same.

Examples

High growth company

FooF Ltd is a boutique porcelain pottery company that specialises in coffee and tea mugs with fun and quirky designs. Their average monthly revenue in the 2018 and 2019 income tax year was $50,000. In October 2019 they released a new range of mugs which were seen being used by celebrities and FooF Ltd began to grow rapidly with monthly revenue from November 2019 to February 2020, averaging $150,000. To keep up with the additional demand, FooF Ltd hired ten additional employees. During March to June 2020 the monthly average revenue decreased to $75,000 per month as worried consumers did not want to spend their money on creative coffee and tea mugs due to the financial stress bought on by COVID-19.

If FooF Ltd were to compare any 30 day period during 1 January 2020 to 9 June 2020 to the same 30 day period in 2019 they would not be able to demonstrate a 30% decrease in revenue, albeit being significantly impacted by COVID-19. FooF limited are able to calculate a decrease in revenue as if they are a "high growth" business, by comparing a 30 day period in the lead up to 9 June 2020 to an earlier 30 day period during 2020. This would likely be satisfied when comparing the 30 days of April with the 30 days of February and on this basis FooF Ltd could make a claim under the WSS.

Repaying the WSS in full

Bike with Buddies Ltd ('BWB') is bike retailer that sells various high-end e-bikes, road bikes and mountain bikes and also sells bike touring packages. BWB employees a number of staff that are employed to run the retail business and operate the biking tours. As the bike tour revenue is primarily derived from sales to foreign tourists, on 30 March 2020 BWB predicted a decrease in revenue of more than 30% for the 30 days of April 2020 when compared to 2019 due to the New Zealand 4 week lockdown and international travel restrictions. On this basis BWB made an application under the WSS at that time.

During the 30 days of April, more New Zealanders realised how great biking is for exercise and socialising and sales of bikes of all types increased dramatically. As a result the increase in bike sale revenue nullified the impact of BWB not providing bike tours and BWB did not incur a 30% decrease in revenue. As a result BWB is not eligible under the WSS and must repay the Wage Subsidy amount in full.

Repaying the WSS in part

Alternatively: While bike sales did increase during April 2020, BWB was still able to demonstrate a 30% decrease in actual revenue during the 30 days of April 2020 when compared to 2019 and is eligible under the WSS.

BWB's wage subsidy application on 30 March 2020 was for 15 full-time employees and they received a total of $105,444. On 3 May 2020 it was decided that BWB would discontinue the bike touring operations and needed to make three full time staff redundant. These staff had a two week notice period in their employment contracts. BWB would be required to inform MSD of this change in circumstance and repay the portion of the subsidy that was not used.

As the redundant staff had worked, they received five weeks of the Wage Subsidy (30 March 2020 to 3 Mar 2020) and are entitled to a two week notice period. In in total, seven weeks of the 12 week subsidy will have been used on each employee and the remaining five weeks will have to be returned. As the 12 week subsidy is $7,029.60 per employee ($585.80 per week), BWB will be required to return $2,929 per each employee made redundant.

Leave Support Scheme

Fresh Fruits Ltd ('FFL') is a fresh fruit retailer that employees five full-time staff. FFL was considered an essential business during the lockdown period and continued to trade as usual. As a result the business did not make an application under the WSS. One of FFL's employees is older than 70 years of age and it has been advised that they remain at home for a period of eight weeks due to their high risk profile.

FFL can make an application under the LSS for this employee. In the fourth week following the first application, FFL can make another application for the same employee.

The elderly employee then makes the decision after six weeks to return to work as they are feeling a lot safer. The remaining two weeks of subsidy received by FFL must be returned to MSD unless FFL can use the additional funds to support in paying the salary/wages of other employees.

Small Business Cashflow Loan Scheme

The Small Business Cashflow Loan Scheme ('SBLS') opened for applications on 12 May and since then Inland Revenue has been inundated with applications, coming through at a rate of up to ten per minute initially.

To be eligible for the SBLS you need a number of criteria, including:

1. You need to be eligible for the WSS;
2. You must have 50 or fewer FTE staff (combined with any other commonly owned businesses);
3. Your business must be 'viable'.

The threshold for Full-Time Equivalent (FTE) is the same that is used for the WSS – 20 hours or more is full-time, less than 20 hours is part-time.

How much can I borrow?

The maximum amount of funding you can receive from the SBLS is a $10,000 base loan plus $1,800 per FTE employee with a maximum loan of $100,000.

A calculator to assist you in determining the amount you are eligible to apply for has been developed by Inland Revenue and can be accessed here. We note that if you have already made a claim under the WSS, the FTE employees will be determined by dividing the Wage Subsidy amount that you received by $7,029.60 and rounding up to the nearest FTE employee.

What is a 'viable' business?

To be eligible for the SBLS loan, the business needs to be viable and have a plan to ensure it remains viable.

This could include the directors or owners having good reason to believe it is more likely than not the business will be able to pay its debts as they fall due within the next 18 months. It is essential to document why the business is viable as Inland Revenue will be auditing applications. Inland Revenue suggest the following examples of evidence that business should consider keeping:

- A cash-flow forecast for the business or organisation for the short term.
- A plan for where revenue will come from in future market conditions, and a forecast of those revenues.
- Financial statements showing the business or organisation has enough resources to sustain itself when including the SBCS loan.
- Your accountant's assessment that the business or organisation is viable and ongoing.

Are there any restrictions on what the loan can be used for?

When applying for the loan, it is necessary to confirm that the loan will be used for core operating costs (e.g. rent, insurance, utilities, supplier payments), and that the loan will not be passed through to shareholders or owners of the business (as either a loan or a dividend).

What are the terms and conditions?

Anyone applying for the loan should ensure they have fully read all of the terms and conditions as there are a number of actions which could trigger an event of default (requiring an immediate repayment of the loan, and a default interest rate).

When do I have to repay the loan?

The loan term is five years. It is not necessary to make any loan repayments for the first two years; after this time Inland Revenue will advise of an instalment plan. Voluntary payments can be made at any time.

How much is the interest?

Once received, the loan is subject to interest at 3% per annum. If the loan is repaid within one year no interest will be charged. If the loan is paid off within the five year lending period but after more than one year, the 3% interest rate will apply for the entire length of the loan (i.e. will be charged on the first year also). In the event that there is a default on the loan, the interest rate is increased by Inland Revenue's use of money interest rate (currently 7%).

How do I apply?

As noted above, it is essential to ensure you understand the obligations associated with the loan, including establishing the current and ongoing viability of the business. We are here to help you with this.

Applications are currently open until 12 June. You can find out more about the application process here.

If you have any questions in relation to the issues discussed above, please consult your usual Deloitte advisor.

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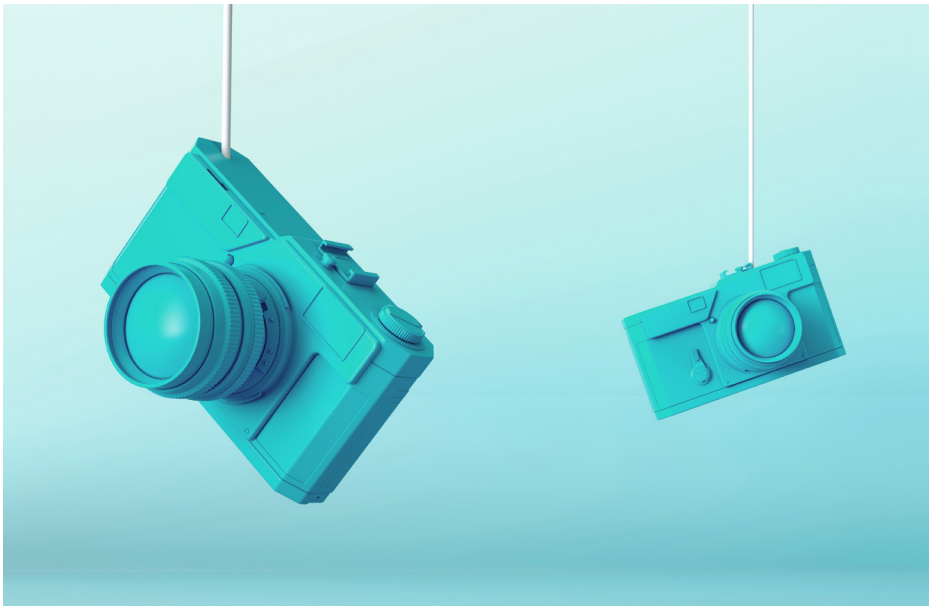
Snapshot of recent developments:



Tax legislation and policy announcements

The 2020 Budget, also known the "Rebuilding Together" budget was delivered on 14 May 2020 by the Minister of Finance, Grant Robertson. It is focused on the Government's response to COVID-19. You can view Deloitte's full coverage here.

Items of note include the wage subsidy scheme which was allocated $3.2 billion to extend beyond the original scheme which closes on 9 June. The extension will be available to fund a further eight week period (at the existing rates) for those who can show that they have suffered a 50 percent reduction in revenue over the 30 days prior to application compared to a similar period last year. The scheme is also extended to pre-income R&D start-up firms. The revised scheme will open on 10 June and will be open for applications for 12 weeks (until early September).

As part of the direct Business Support package, the Government is launching a $150 million short-term temporary loan scheme to incentivise businesses to continue to invest in R&D programmes that may otherwise be at risk due to COVID-19, complementing the existing R&D tax credit regime. The loans will be one-off, up to $100,000, and administered by Callaghan Innovation. The details of the loan scheme are expected to be announced soon, with applications opening in early June.

While already announced, the Budget further indicated the Government's commitment to allowing deductions for black hole feasibility expenditure.

COVID-19 Response Acts passed under urgency

The Government has introduced and passed several Acts under urgency in response to the COVID-19 induced economic crisis.

- The main features of the COVID-19 Response (Taxation and Social Assistance Urgent Measures) Act 2020, introduced and passed on 25 March 2020, include the restoration of building depreciation, an increase in the threshold for low-value write-off, temporary UOMI remission rules, an increase in the provisional tax threshold and a bringing forward of the broader R&D refundability proposals, as discussed in our earlier article.
- The second bill introduced and passed under urgency on 30 April is the COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 which includes the temporary tax loss carry-back regime (see article in this issue), the Commissioner's discretion introduced and some other non-tax measures.
- On 12 May 2020, the Government released Supplementary Order Paper (SOP) No 488 to the COVID-19 (Further Management Measures) Legislation Bill which was also passed under urgency on 15 May 2020. This bill mainly include non-tax measures, but the SOP includes amendments to ensure that the Small Business Cashflow (Loan) Scheme (SBCS) works as intended. It confirms that resident withholding tax will not be withheld at source for interest under a small business cashflow loan. Further, in consideration as to what is income for Working for Families, any amounts derived from this loan scheme will not counted as income. The Supplementary Order paper also makes minor amendments to the loss carry-back regime. Most notably, section 120KBB of the Tax Administration Act 1994 has been altered to ensure that associated taxpayers will not be adversely impacted by use of the loss carry-back regime.

UOMI rates have dropped

The Taxation (Use of Money Interest Rates) Amendment Regulations 2020 came into force on 8 May 2020 and amended the Taxation (Use of Money Interest Rates) Regulations 1998 to:

- decrease the taxpayer's paying rate of interest on unpaid tax from 8.35% to 7%
- decrease the Commissioner's paying rate of interest on overpaid tax from 0.81% to 0%

A use of money credit interest rate of 0.00 per cent means that there will no longer be any credit interest paid where any credit is held with Inland Revenue. This includes KiwiSaver contributions paid to Inland Revenue before being passed on to Scheme Providers.

It is of note that in April 2020, the Taxation (Use of Money Interest Rates Setting Process) Amendment Regulations 2020 (LI 2020/35) amended the setting process for the Commissioner's paying rate from the Reserve Bank of New Zealand 90-day bank bill rate less 100 basis point to a floor of 0 per cent. This prevents the Commissioner's paying rate from being set at a negative rate if the 90-day bank bill rate drops below 1 per cent.

Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020

On 23 March 2020, the Taxation (KiwiSaver, Student Loans, and Remedial Matter) Bill received Royal Assent. The omnibus bill, originally introduced in June 2019 has three main objectives:

- To continue the Government's program of simplifying and modernising of social policy administration, specifically KiwiSaver and the student loan scheme;
- To further improve the application of New Zealand's broad-base, low-rate framework through various remedial amendments covering a wide range of issues. For more information on this see our earlier article
- To further encourage research and development expenditure by extending the refundability of R&D tax credits.

Direct credit for financial support and student loan payments

On 9 March 2020, an Order in Council was made to include refunds for excess payments of financial support and student loan deductions as tax types refundable by direct credit under section 184A of the Tax Administration Act 1994. The provisions in sections 184A and 184B require tax refunds to be paid via direct credit to a bank account nominated by the taxpayer and were introduced to benefit taxpayers by eliminating time delays associated with the postal system and costs related to cheques. The order in council came into force on 9 April 2020.

Tax relief and support for farmers

The Government announced in late March that support for farmers and growers affected by drought conditions would be expanded and extended across the country, with access to Rural Assistance

Payments (RAPS) available throughout the North Island and parts of the South Island and the Chatham Islands.

On 27 March 2020, the Government announced it will introduce legislation to ensure that farmers whose herds were culled in response to the Mycoplasma eradication programme will not face an undue tax burden. The change will be included in a future tax bill and will be backdated to apply from the 2018 income year. Further details can be found in the Inland Revenue's factsheet.

OECD releases

During April, OECD released several documents on tax policy suggestions in a response to the COVID-19 pandemic.

- On 3 April, the OECD Secretariat issued guidance on cross-border workers who are unable to physically perform their duties in their country of employment during the COVID-19 restrictions. Issues covered include the creation of permanent establishments; the residence status of a company (place of effective management); cross-border workers; and a change to the residence status of individuals. For more information, please see the article in this issue.
- On 15 April 2020, the OECD released a report Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience. The report takes stock of COVID-19 emergency tax and fiscal measures introduced by countries worldwide. It discusses how tax and fiscal policies can cushion the impact and support economic recovery.
- On 21 April 2020, the OECD published Tax administration responses to COVID-19: Measures taken to support taxpayers. The document sets out a range of measures being taken by tax administrations to ease the burden on taxpayers and to support businesses and individuals with cash flow problems, with difficulties in meeting tax reporting or payment obligations or otherwise facing hardship. It was produced to assist tax administrations and provide a reference in terms of considering domestic measures they may want to take.

Inland Revenue statements and guidance – Finalised items

EE002: payment to employees for working from home costs during the COVID-19 pandemic

On 24 April 2020, Inland Revenue issued determination to provide a temporary response covering payments to employees to reimburse costs incurred as a result of

employees working from home during the COVID-19 pandemic. This determination applies to payments made during the period from 17 March 2020 to 17 September 2020. For more information see our article in this issue.

Questions and answers for dividend stripping

Inland Revenue recently published a questions and answers sheet (RA 18/01a) to accompany RA 18/01: – Dividend stripping – share sales where proceeds are at a high risk of being treated as a dividend for income tax purposes. The Q&A includes a range of questions and answers about the Alert, for example:

- Whether to apply for a binding ruling when a restructure may pose a risk;
- Whether there can be a dividend when no cash has been received;
- Whether a restructure which is outside the four-year time bar is open to review
- Whether transactions are still considered tax avoidance if there are commercial reasons for the restructure.

2020 International tax disclosure exemption ITR31

Inland Revenue has released the 2020 International tax disclosure exemption ITR31 (the 2020 disclosure exemption. We note that this link may not work in Internet Explorer). The exemption applies for the income year corresponding to the tax year ended 31 March 2020. The scope of the 2020 disclosure exemption is the same as the 2019 disclosure exemption. The 2020 disclosure exemption removes the requirement of a resident to disclose:

- An interest of less than 10% in a foreign company if it is not an attributing interest in a foreign investment fund (FIF) or if it falls within the $50,000 de minimis exemption. The de minimis exemption does not apply to a person that has opted out of the de minimis threshold by including in the income tax return for the income year an amount of FIF income or loss.
- If the resident is not a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10 per cent if the foreign entity is incorporated (in the case of a company) or otherwise tax resident in a treaty country or territory, and the fair dividend rate or comparative value method of calculation is used.
- If the resident is a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10% if the fair dividend rate or comparative value method is used for the interest. The resident is instead required to disclose the end-of-year New Zealand dollar market value of all such investments split by the jurisdiction in which the attributing interest in a FIF is held or listed.

The 2020 disclosure exemption also removes the requirement for a non-resident or transitional resident to disclose interests held in foreign companies and FIFs.

Determination G31 – New ZealandX Milk Price Futures Contracts: an expected value approach

Inland Revenue issued a determination which provides the method that must be used by a farmer who enters into an New ZealandX MKP Milk Price Futures Contract (MKP Futures Contract) to calculate the income derived and the expenditure incurred over the term of that contract. The determination applies to a farmer who:

- enters into a MKP Futures Contract for the sole purpose of hedging the price received for all or part of their anticipated milk solids production, and
- does not use IFRSs to prepare financial statements and to report for financial arrangements under the financial arrangements rules in the Income Tax Act 2007.

A farmer to whom this determination applies must use this determination for MKP Futures Contracts they enter into, on or after 1 April 2020.

Participating jurisdictions for the CRS applied standard

On 30 March 2020, Inland Revenue released Determination AE 20/01: "Participating jurisdictions for the CRS applied standard". It updates the list of participating jurisdictions with effect from 1 April 2020.

Inland Revenue – draft items for consultation

Investment in US limited liability companies

On 6 March 2020, Inland Revenue issued five rulings and commentary (We note that this link may not work in Internet Explorer PUB00338) setting out the income tax treatment and availability of foreign tax credits for New Zealand investors in a US LLC that is taxed on a fiscally transparent basis as a partnership in the US, but as a company in New Zealand. The rulings demonstrate the different treatment depending on whether the interest in the US LLC is classified as not being a FIF, a FIF or CFC. There is also an analysis of the operation of the relevant fiscal transparency and double tax relief provisions (arts 1(6) and 22) in the New Zealand/US DTA. Submissions closed on 17 April 2020.

Goods and services tax – supplies of residences and other real property (interpretation statement)

On 6 March 2020, Inland Revenue issued a draft statement (We note that this link may not work in Internet Explorer PUB00308) which applies to situations where a private residence is included as part of a wider supply. Where this is the case, s 5(15) deems there to be separate supplies that need to be considered independently for GST purposes. Submissions closed on 17 April 2020.

Other items of interest

Extension of Time – Basic Compliance Package

On 31 March 2020, Inland Revenue extended the Basic Compliance Package or BCP filing due date (originally 31 March 2020) to the 30 June 2020 in light of COVID-19. Affected taxpayers should have received a letter from Inland Revenue confirming this.

New Tax Technical website

Inland Revenue has released a beta version of the new Tax Technical website, designed to help tax specialists find technical answers more quickly. It can be viewed at taxtechnical.ird.govt.nz (We note that this link may not work in Internet Explorer)

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