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Our ref: KPMGSubmissionSeptember22TaxBill

The Chair
Finance and Expenditure Committee
Parliament Buildings
Wellington

2 November 2022

Dear Madam Chair

KPMG submission - Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Bill (No 2)

We welcome the opportunity to make a submission on the Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Bill No 2 (referred to hereafter as "the Bill").

We have split our submission into general comments on key matters raised in the Bill and our more detailed submissions on specific measures.

Given the wide range of matters covered, of both a policy and remedial nature, in the Bill, we have not had an opportunity to consider every amendment. Therefore, where we have not explicitly commented on a particular amendment, this does not necessarily signal our support (or lack of support) for the change.

KPMG participation in the tax policy and legislative process

By way of background, KPMG spends many hours engaged in the Generic Tax Policy Process ("GTPP"). We provide submissions on Government discussion documents and Taxation Bills, engage with Officials and Members of Parliament and present to Select Committees. We respond to many requests for feedback from Inland Revenue on proposed policies, operational guidance and interpretations.

Fundamentally, we consider that good tax law is key to the functioning of our economy. Good tax law includes the policy, the legislation and its application by taxpayers, Inland Revenue and the Courts.

We engage in the GTPP because we can offer:

- A potentially different perspective to that of Officials and Government and can challenge some of the thinking around a particular policy or policy issue; and
- Practical experience of how tax law applies and therefore how a change may actually apply and be implemented.

We believe our involvement, and that of other advisors and professional bodies, produces better tax law and policy.

Our perspective and experience is based on involvement with the tax system and with business. We see how both operate. That informs our approach. We recognise that not all of our submissions are or will be accepted. However, even so, that they are considered does help improve the outcome.

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We therefore have no interest in poor tax policy or law. It creates uncertainty which is inimical to business interests. It is frustrating for our clients. We bear that frustration when we are unable to provide clear and certain answers. Practically, our clients do not like to pay for non or unclear advice. It also creates risk for us. Accordingly, when we disagree with a policy, we still make submissions to make the outcome as clear and workable as possible. Hopefully that is apparent from some of our submissions on the Bill.

Summary of our key submission points on the Bill

We summarise below our key submission points.

- We have concerns about the implementation of the OECD reporting framework from a compliance cost perspective for New Zealand-based platform operators. We recommend the Committee confirm with Officials that the alternative, that foreign tax authorities may seek to impose their own information reporting from 1 January 2023, is a genuine risk as it seems to be a critical driver of implementation.

- We have raised a number of practical issues in relation to the application of the GST rules to marketplaces for accommodation and transportation services.

- We broadly support the cross-border worker reforms, including the proposed 60-day grace period for remedying non-compliance and the “safe harbour” from New Zealand employer tax obligations for non-resident employers. Again, we have raised a number of practical issues with the operation of these measures and suggested improvements (including the ability to receive IRD numbers). We do have concerns with shifting the taxing obligations to employees in certain circumstances, due to the accompanying cash flow implications (which employees may not be in a position to fund).

- We also welcome the changes to ameliorate domestic tax law issues (such as the inability to maintain an imputation credit account or be part of a tax group) that can arise when companies become dual resident. We have some concerns with the application of the proposed integrity measures, including the corporate migration rules where the dual residence risk is with Australia (due to our understanding of proposed Australian domestic law tax changes that are likely to result in this risk abating).

- We have commented on various aspects of the Build-to-rent (“BTR”) land definition for exemption from the interest limitation rules. These submissions reflect our view that the definition needs to be sustainable over time.

Our detailed submissions are attached as an appendix to this letter.

Further information

We would appreciate the opportunity to discuss our submission with the Committee. Please contact us – Darshana on 09 367 5940 or Rachel on 09 363 3535 – if you require any further information on our submission.

Yours sincerely

Darshana Elwela
Partner

Rachel Piper
Partner

Detailed submissions on the Bill

Platform economy

Information Reporting

Issue: OECD reporting framework

The Bill proposes to implement, with effect from 1 January 2024, the OECD's information reporting and exchange framework (the "OECD reporting framework") for New Zealand-based digital platform operators that allow sellers to offer:

- Certain types of accommodation;
- Personal services;
- The sale of goods; and
- Vehicle rentals.

Submission

While we acknowledge the drivers, we have concerns about the implementation of the OECD reporting framework from a compliance cost perspective. It will have broad application to New Zealand platform operators (as it covers the sales of goods, via the platform, as well as provision of certain services). It is not clear to us the overall net benefit justifies New Zealand's implementation at this stage, when a number of other countries have yet to signal their intentions to adopt these rules.

As we understand a key driver is Officials' concern around requests from other tax authorities (particularly in Europe) if New Zealand does not implement the OECD reporting framework, the Committee should seek assurances that this is a genuine risk.

Comment

We acknowledge the growing size and importance of the gig and sharing ("platform") economies and ensuring New Zealand's tax settings remain fit for purpose. We also recognise global digital economy concerns which have prompted the development by the OECD of a set of standardised reporting rules for platform operators.

The OECD reporting framework will, however, impose potentially significant compliance costs on New Zealand-based digital platform operators from having to perform additional due diligence procedures. This will include collecting sellers' NZ and foreign tax identification numbers and, importantly, having to determine their tax residence based on address information, as well as reporting this and other information (such as their sales via the platform) to Inland Revenue in a prescribed format each year. There will be penalties for non-compliance and/or not taking reasonable care (up to a maximum of NZ$100,000 for each reportable period).

New Zealand-based digital platform operators, regardless of their size, will need to comply to demonstrate that reasonable care has been taken (to avoid application of penalties). For example, a platform operator would still need to apply the due diligence procedures even if the platform does not actively seek to host non-resident sellers.

The OECD reporting framework is modelled on the Common Reporting Standard ("CRS") for reporting of customers' financial account information by financial institutions. Our experience

with the CRS regime is instructive – it can impose significant costs regardless of the size and sophistication of the organisation.

The Commentary notes that, as an alternative, Inland Revenue (and other tax authorities) could request the information directly from New Zealand digital platform operators using existing information gathering powers. This would appear to allow specific targeting of those platform operators that are likely to be of interest. We also understand that, other than the EU and select other countries, there does not seem to be, at present at least, widespread adoption of the OECD reporting framework. So, any reciprocal benefit to New Zealand may be limited.

We understand that a key driver to implement the OECD reporting framework is to prevent other jurisdictions requesting information about their sellers, and from as early as 1 January 2023. We recommend the Committee confirm with Officials that this is a genuine risk, as it seems to be a critical driver of implementation and the implementation time frame.

GST – marketplace rules for accommodation and transportation services

Issue: Services provided by the electronic marketplace and definition of listed services

Submission

KPMG submits that the inclusion in new section 8C(7) of the definition of listed services is too broad and may capture services that are not provided by the underlying supplier. We suggest that an additional paragraph is included in subsection (7) that would require the "closely connected services" to be provided inside New Zealand.

Comment

The current wording of new section 8C(7) will include within the definition of listed services, services that:

- Are closely connected to the listed service supplied by the underlying supplier; and
- Are advertised, listed, or otherwise made available through the electronic marketplace.

The Commentary indicates that the intention of this provision is to also treat services that are incidental to taxable accommodation or transportation services as subject to GST and the example is given of a cleaning service that is paid for via an electronic marketplace when booking accommodation.

In some cases, there will be services provided directly by an electronic marketplace to a customer that are not part of the services provided by the underlying supplier or provided inside New Zealand. An example of this would be a "fix currency fee" that is charged by the electronic marketplace directly to the customer that enables the customer to fix the overall cost in a foreign currency. This is a service provided by the marketplace to the customer and the underlying supplier is not a party to this service. However, under the current definition of "listed services" it is arguable that these services would be included as they are "closely connected" to the accommodation or transport services (e.g., the currency fee is only payable because services to be supplied by the underlying supplier) and the services are made available by the electronic marketplace.

We suggest that an amendment be made to the definition of listed services to exclude services that are wholly performed outside of New Zealand.

Opt-out agreements

Issue: Definition of "large commercial enterprise"

Clause 130(4) provides a definition of a large commercial enterprise that will apply to accommodation providers who will be able to opt out of the new platform operator rules and continue accounting for GST on their own behalf.

The current definition indicates that a large commercial enterprise will be one that has at least 2,000 nights of accommodation listed as available on the electronic marketplace in a 12-month period (or a reasonable expectation that they will meet this threshold). Alternatively, an accommodation supplier will be able to obtain a determination from the Commissioner taking into account certain factors.

Submission

KPMG submits that in determining whether an enterprise is a large commercial enterprise, consideration should also be given to whether the enterprise is part of a group of companies (that won't necessarily be GST grouped) that would meet the 2,000 nights of accommodation threshold. In some large hotel groups, each individual hotel will be owned by a separate legal entity and while most entities would meet the 2,000 night threshold, there may be instances where an individual entity within the group does not. From an administrative perspective, it would be more practical if the large commercial enterprise test could be considered from a group perspective.

Flat-rate credit schemes

Issue: GST registration status of underlying suppliers

As part of the new proposed section 60H, underlying suppliers will be required to notify the operator of the electronic marketplace of their name and tax file number and their GST registration status as well as any changes in their GST registration status. Once notified, the operator will be entitled to rely on the information provided by the underlying supplier.

Notwithstanding this, it would be useful if a public register of GST registered entities was established by Inland Revenue. Such a register is available in many overseas jurisdictions and would provide a way for electronic marketplaces to:

- Establish a control and some assurance that the information held in their systems is correct as to the GST registration status of suppliers is correct; and
- Assist with ensuring their customers are complying with their GST obligations (e.g., if an underlying supplier indicated they were not GST registered but were listed as GST registered on the public register, the electronic marketplace could recheck that status with underlying suppliers).

While a public register of GST registrations should not change the proposed section 60H, it would provide some additional checks and controls for both electronic marketplaces and Inland Revenue. In addition, a public register would also be useful for other purposes such as ensuring suppliers are GST registered when entering into buyer created tax invoice arrangements and for land transactions to provide assurance that suppliers/recipients are GST registered.

Submission

A public register of GST registrations should be established to assist in checking that the GST registration status of underlying suppliers is correct.

Cross-border workers

Flexible PAYE, FBT and ESCT arrangements

Issue: 60-day grace period – adjustment to employment income information

The Bill introduces new section CE 1F(3B) to (3E) to allow a 60-day grace period for reporting certain payments made to cross-border employees to Inland Revenue.

Submission

KPMG welcomes the inclusion of a grace period to apply where the employer could not reasonably foresee an employee could be taxable in New Zealand (e.g. due to an exemption creasing to apply).

We recommend that guidance be provided in relation to situations when the breach occurs over multiple income years and specifically address the ability for taxpayers to recognise income in the correct income years.

Comment

We understand that the expectation would be that the income is returned in the following employment income information filing (i.e. as opposed to re-opening prior payroll periods). While we agree that this would be the easiest method to action this, we suggest that guidance is provided in relation to where the breach occurs over multiple income years as well as how to adjust the income in the correct income years without the need to prepare and file a voluntary disclosure (recognising the resources required by Inland Revenue to assess these).

We note that, given the application of marginal tax rates, it could have a detrimental effect on individual taxpayers should all preceding income need to be returned in a single income year. Inclusion of a lump sum amount of multi-year income within a single employment income information filing would not correctly reflect the timing of when the income is earned. As such, we recommend that consideration be given to a mechanism to recognise the income in the correct tax year.

Issue: 60-day grace period – IRD numbers

Submission

We submit that the 60-day grace period may be difficult to meet for some employees based on the current procedure for obtaining IRD numbers.

Comment

We note that the current procedure for an individual to obtain an IRD number can be challenging for some, particularly with attendant time delays in the issuance of an IRD number. These difficulties include the following:

- Critical Purpose Visa numbers being unable to be entered into the online application system.
- Cases where Work Visa numbers are also unable to be entered into the online application system.
- Individuals being refused service from Post Shops when they are going to apply in person for an IRD number.

- Offshore individuals being refused an IRD number application prior to receiving a Visa (notwithstanding their intention to move to New Zealand, maintain a New Zealand bank account and wanting to correspond with Inland Revenue on tax matters).
- For an offshore IRD number application where the individual does not have a New Zealand bank account or other due diligence undertaken, the requirement that the individual have information certified under the laws of the country of residence. We note that given these certifications generally are required to be done in person, it is not always possible when the individual is based in a different country at the time.

Further, in our experience, employers and taxpayers are reluctant to submit employment income information filings in the absence of an IRD number due to the timing and cashflow implications of the non-declaration tax rate.

To support compliance with the employer obligations associated with offshore workers, we submit that the IRD number application system should be streamlined to make the process easier. In some cases, the inability to get an IRD number in a timely manner can be prohibitive and, depending on when the issue is identified, it could cause delays on the ability to report within the proposed grace period.

Issue: 60-day grace period – calculation of PAYE

Submission

When the amount relating to previously earned income is reported to Inland Revenue, this should be returned at the annualised tax rate for the employee (i.e. taking into account the effect of marginal tax rates).

Alternatively, there should be the ability to make a payroll adjustment later in the year, or via a bespoke PAYE arrangement.

Comment

We understand that the current expectation is that the PAYE on the income previously earned by the employee should be included as a lump sum extra pay in the period that it is returned to Inland Revenue.

While we appreciate that the extra pay rates are the easiest rates for Inland Revenue to implement from a systems perspective, we are concerned that this could result in an unfavourable outcome for either the employee or employer, depending upon who ultimately bears the cost of the PAYE, particularly in temporary situations of dual taxation.

In our experience, cross-border employees will typically remain on their home country payroll for an extended period (particularly where there is uncertainty regarding New Zealand tax obligations) and have taxes withheld on their earnings in their home country. In such circumstances, it is not uncommon for the employee to be expected to fund their PAYE. This could then result in an employee being subject to double tax withholding for a period. If cross-border employees have breached the Double Tax Agreement threshold by exceeding 183 days presence in New Zealand, it would be highly unlikely that a rate other than 39% would apply as the extra pay rate.

In contrast, if the employer funds PAYE and relies on a refund through employees' tax returns to recoup this additional cost, this could result in an additional burden on the employer. In the case that the employee does not file New Zealand tax returns or refuses to refund the amount to the employer (i.e. if the employee has left the employer's organisation) the employer could be liable to gross-up the additional PAYE funded to the employee. We, therefore, suggest that it would be appropriate for a bespoke PAYE arrangement to be made available to employers

and/or for Inland Revenue to allow a payroll adjustment to be made in the final employment income information form. This would allow the employer to apply an annualised rate rather than the extra pay rate and for the refund to go to the employer (we note that this would result in a negative adjustment which we understand the Inland Revenue system is not currently able to process, so some systems changes would be required).

Issue: 60-day grace period – employee share scheme income

Submission

Clarity should be provided in relation to the reporting obligations for employee share scheme income.

Comment

We note that employee share scheme income that the company choses to withhold PAYE from (under section RD 7(1)(bb)) is included in the definition of extra pay.

Under the current legislation, any employee share scheme income is subject to the deferral date, being 20 calendar days after the share scheme taxing date. It should be clarified how these provisions are intended to work together and whether there would be differing timing for employee share scheme income that has, or does not have, PAYE deducted.

Issue: 60-day grace period – trailing bonuses

Submission

We also request clarity in relation to the treatment of trailing bonuses.

Comment

In our experience, there are a number of cross-border workers who, when they return to their home country, receive an annual bonus that relates to a period while they were in New Zealand. On that basis, a portion of the bonus received will be taxable in New Zealand. The timing of trailing bonus payments can be significantly delayed and it is not unusual for payments to be made 18 months following the departure date. At that stage, the employees would no longer be on the New Zealand company payroll and given the amounts would either not be recharged to the New Zealand entity, or recharged at a later stage, often these payments would not be reported through the New Zealand entity's payroll.

While we appreciate that the PAYE liability would fall on the employee, if it is not met by the non-resident employer in accordance with the proposed section CE 1F(3), it is not practical for the employee to (re-)register as an IR56 taxpayer at that time to return a single bonus payment.

Therefore, we recommend such amounts be able to be included in individual's income tax returns. While we agree that, for the most part, the employer deducting PAYE would be the better approach, there could also be an alternative which is similar to the 'former employee' procedure that currently exists for employee share scheme income. This procedure transfers responsibility for reporting the income to the employee if they no longer work for the New Zealand entity but does not require the employee to register as an IR 56 taxpayer.

Issue: 60-day grace period – reasonable measures

Submission

We note that the grace period will only apply where the employer has taken "reasonable measures" to manage their employment-related tax obligations. Guidance as to what constitutes reasonable measures needs to be provided.

Comment

The proposal requires employers to take reasonable measures in meeting their New Zealand employer tax obligations. Guidance is needed on when Inland Revenue considers reasonable measures have been taken.

We understand that these are likely to relate to the employer having received tax advice, tracking employee travel and/or actively trying to manage their tax programme.

The guidance should also cover when reasonable measures have not have been taken and where a voluntary disclosure would be expected by Inland Revenue.

Issue: amounts treated as derived 20 days after payment

Section CE 1F(2) is being inserted to treat amounts as derived 20 days following payment when the employer choses to deliver their employment income information under section 23J(3).

Submission

We agree with the proposal to align the date of reporting by the employer to the date that the employee is treated as deriving the income.

Comment

We appreciate the need for alignment, however, in our view a better outcome would be for the alignment to be with the actual payment date rather than the reporting date.

This is to avoid confusion and the requirement for an additional tax return when an employee leaves New Zealand in March. (This was a common issue during March/April 2020 given the significant travel restrictions in that period due to COVID. We appreciate that this is unlikely to be as a significant issue in future years.)

Issue: application for bespoke PAYE arrangements

Where 'special circumstances exist', an employer of a class of cross-border employees may apply to the Commissioner of Inland Revenue for a bespoke PAYE agreement that the tax due for a PAYE income payment may be made by 31 May following the end of the tax year.

Submission

We welcome the amendment to section RA 15 to allow an employer of a class of cross-border employees to apply for the PAYE income payment to be made by 31 May where 'special circumstances' exist. Clarity is needed on the types of special circumstances that will be considered for bespoke PAYE arrangements.

Comment

We consider that special circumstances should include situations like where employees are travelling to New Zealand on an irregular but reasonably frequent (or infrequent) basis where extensive work can be required to determine the taxable amount for a particular pay period.

This may also be useful for a New Zealand resident employee who would expect to have foreign tax credits for the majority of their income and would generally apply for a Special Tax Code Certificate under the current legislation.

We believe that, in some cases that, rather than paying PAYE using the 60-day grace period, a bespoke PAYE arrangement may be preferable. For example, in the case of trailing bonus payments or, alternatively, where paying tax under the grace period would result in significant cashflow implications for the employee or employer.

PAYE, FBT and ESCT integrity measures

Issue: safe-harbour arrangements for non-resident employers

A safe harbour is proposed for non-resident employers who do not have sufficient presence in New Zealand.

Submission

While KPMG welcomes the safe harbour proposal, the two employee limit needs to be increased and the requirement for employers to have communicated with all employees or persons should be removed.

Comment

The number of employees should be increased given the size of many organisations operating cross-border and their ability to keep track of all employees. We would recommend that the number of employees is increased to at least 5 or fewer employees.

Further, we believe that the requirement for the employer to have communicated with affected employees (as well as any other persons who may be impacted) to be a high bar. This safe harbour should only provide for the situation that the company has sufficient knowledge of New Zealand legislation in order to meet that obligation.

Issue: transfer of FBT and ESCT obligations to employees

Where a non-resident employer does not have PAYE obligations, proposed section CE 1F(3) clarifies that the obligation to report and pay PAYE, FBT and ESCT transfers to their employees.

Submission

While KPMG agrees that employees of non-resident employers should not be treated differently to employees of New Zealand employers, from a tax perspective, we question whether shifting the tax deduction obligations (particularly FBT) to employees is appropriate.

We also note that sections RD 62B and RD 71B appear to only apply where the employee is performing services in New Zealand. It would be helpful for clarification to be provided that the transfer of tax obligations should not apply to New Zealand residents performing services outside of New Zealand (we appreciate some Double Tax Agreements would limit the ability for FBT to be incurred in New Zealand).

Comment

As a matter of principle, we agree that New Zealand resident employees of non-resident employers should have the same tax obligations as those employed by New Zealand resident employers.

However, we have concerns with whether the obligations could be met by all employees. This concern is in relation to an employee needing to understand the tax legislation to determine which amounts PAYE and FBT should apply to (i.e. what is exempt and taxable, etc).

Further, even if the employee has the knowledge to comply, we would expect that they could have difficulty in obtaining all the relevant information from their employer in order to comply (i.e. for instance the taxable value of fringe benefits that the employee may receive), particularly in a short time frame.

We also note that funding the gross up of non-cash benefits, for tax, is likely to fall on employees in many cases (the proposed sections refer to the discrepancy being paid by the individual). This proposed change therefore has the potential to impose a high compliance burden, as well as funding costs, on employees, particularly as the benefits received will by definition not be cash. This could disproportionately affect those who do not have sufficient cash income to fund the additional tax obligations.

It should be clarified that where the employee is incurring these amounts personally, that the PAYE rates would apply rather than FBT rates (i.e. no gross up should apply in these situations).

We also query how this proposed change would interact with other policies, such as student loans, *Working for Families* tax credits, child support and KiwiSaver contributions.

Flexible NRCT payment arrangements and withholding thresholds

We support the proposals to:

- Introduce a 60-day grace period for a payer to meet or correct their non-resident contractors' tax ("NRCT") obligations; and
- Apply a 'single payer' view when consideration the application of the exemption criteria (such as presence in New Zealand) to a non-resident contractor.

We note however, that these changes will not have effect until 1 April 2024, due to Inland Revenue system design constraints.

Reporting requirements for payers of NRCT

Issue: Frequency of reporting for NRCT payers

Proposed section 23R introduces a new reporting requirement for persons who make schedular payments to a non-resident contractor.

Submission

Reporting schedular payment information described in Schedule 6B is likely to be administratively burdensome for payers. We submit that monthly is too frequent and suggest that reporting only be required on a quarterly basis.

Comment

The requirement to collect all of the information contained in Schedule 6B and report by the 15th of the month following is likely to be burdensome where there are a number of non-resident contractors working for short periods of time. To reduce compliance costs, we recommend that the reporting be required on a quarterly rather than a monthly basis.

Employer contributions to foreign superannuation schemes

Issue: Cash flow impacts

Currently, employer contributions to foreign superannuation schemes are treated as fringe benefits. The proposed amendment would instead treat these amounts as being subject to PAYE instead.

Submission

We are concerned that employees will be taxable on non-cash benefits and that this will create significant adverse cashflow implications for some employees. We recommend that the deduction obligation remain with the employer where possible.

Comment

Whilst we appreciate Inland Revenue's concerns with fairness within the system and the challenges associated with collection of the tax, we have concerns that by shifting the tax treatment of such amounts from FBT to PAYE payments, this will result in employees having an additional tax without necessarily the corresponding cash to satisfy the obligation. While there is an ability for employers to gross-up payments to employees to address this burden, we anticipate that such gross-ups will generally be on an ad hoc and limited basis.

We note, in particular, the impact of the additional cost to inbound employees where they remain on their home country superannuation scheme.

We also note that there will be those individual who work outside of New Zealand but who remain New Zealand tax resident. These individuals will typically be required to participate in a foreign superannuation scheme. For instance, when working in Australia on a fly-in and fly-out basis, employees are still likely to become members of the Australian superannuation regime with associated employer contributions on their earnings made to this scheme. To the extent it is intended that these employees are to be covered by this section, the additional New Zealand tax on contributions, is likely to impose a significant cash burden.

There are also ancillary considerations including the impact on calculation of ACC levies and family tax credit entitlements, which will also need to be considered.

We recommend that there is instead an option to apply PAYE, rather than FBT. We suggest that the responsibility to deduct should be with the employer where possible.

Dual resident companies

Issue: Corporate tax residence generally

While we understand that the proposed changes have been driven by the Australian Taxation Office's ("ATO's") change in interpretative approach in relation to the central management and control test for corporate tax residence under Australian tax law, we observe that corporate residence issues have become more prevalent in recent years.

The increasing use of video-conferencing and other communication technologies post-COVID has shown that directors and management are able to undertake decision-making activities remotely with minimal impact on businesses. However, this has also created uncertainty as to how the current tax residence tests will apply, and risks requiring company directors to travel to New Zealand so that they are physically present when decisions are made. We view that outcome as economically inefficient and inconsistent with the Government's emission reduction objectives.

Submission

In our view, NZ's domestic corporate tax residence rules (as interpreted in the Commissioner's interpretation statement IS 16/03 *Tax residence*) have not kept pace with changes in the commercial and environmental context and should be reconsidered as a matter of priority. We appreciate, however, that this is likely to be beyond the scope of the current Bill.

Issue: Clarity on timing of a tax residence change

We note that the changes generally require that taxpayers establish a date on which a company is no longer resident in NZ, either under domestic law or a Double Tax Agreement ("DTA").

In practice, determining a specific date is likely to be difficult and potentially arbitrary.

Submission

We recommend that Inland Revenue issues guidance on this aspect.

Loss grouping, consolidation, and imputation credit rules

As a general comment, we are supportive of the changes to ameliorate a number of the issues that can arise under New Zealand's domestic tax law, where a company becomes dual resident and/or ultimately non-resident under a DTA.

Issue: Imputation credit account retention for companies that tie-break to countries other than Australia

The Bill contains a proposal that will deem a New Zealand resident company that tie-breaks its tax residence to Australia to automatically be an Australian imputation credit account ("ICA") company, allowing imputation credit balances to be retained.

Submission

While we support the proposal, the ability to retain ICA company status for a dual resident New Zealand company should not be limited solely to companies that become Australian tax resident.

Comment

The proposal is designed to ensure that imputation credits are not lost when a New Zealand resident company (for example, due to incorporation here) becomes Australian tax resident,

under the corporate tax residence tie-breaker test in the DTA. (The tie-breaker test in the Australian DTA requires an agreement between the two tax authorities as to the jurisdiction of tax residence.)

The amendment will not apply where a New Zealand resident company becomes tax resident in any country other than Australia. There is no justifiable tax policy reason for limiting the retention of ICA company status to when a company tie-breaks its residence to Australia. The loss of imputation credits can create significant challenges in managing dividend distributions on an ongoing basis.

Issue: application of hybrid-mismatch rules

The proposed change to allow dual resident companies to offset losses and join consolidated tax groups is likely to result in an increased need to consider the application of New Zealand's hybrid mismatch rules.

Submission

Inland Revenue guidance on the application of the hybrid mismatch rules would be helpful, particularly as those rules will apply to structures with NZ consolidated groups and loss offsets.

Integrity issues with dividends and corporate migration rules

Issue: corporate migration when a company tie-breaks residence to Australia

The Bill proposes that the corporate migration rules should apply when a New Zealand resident company becomes a DTA non-resident company.

Submission

The corporate migration rule should not be triggered where a New Zealand resident company becomes resident in Australia under that DTA's tie-breaker test.

Comment

The proposal will the treat loss of corporate tax residence under a DTA as a taxable event under the corporate migration rule (i.e. this will result in a deemed liquidation, disposal of assets and distribution to shareholders for tax purposes).

While we understand the rationale for applying the corporate migration rules as an integrity measure, we consider that these rules should not apply where a company becomes DTA resident in Australia.

This is because of the ongoing uncertainty about the status of the proposed Australian law change to reset its domestic law corporate tax residence settings to the pre-*Bayswater* position.

Once enacted, the Australian law change is likely to result in what would currently be a dual resident company scenario (including one that could tie-break to Australia) no longer being so, in which case the application of the corporate migration rules will over-tax.

Issue: domestic dividend rule

We consider that the two-year period, within which the dividend recipient's DTA residence can be restored to New Zealand without an NRWT liability being imposed, should be extended. We observe that the proposed two-year period may not allow sufficient time to identify and remedy inadvertent and unintended DTA residency changes. As an alternative, the rules could allow for the two-year period to be extended at the Commissioner's discretion.

Issue: operation of integrity measures

Under proposed section FL 3, there will be a deemed corporate migration under domestic law where one of the four proposed triggering events takes place. In relation to the triggering events:

- We consider that derivation of income that is eligible for relief under a DTA while the company is DTA non-resident should only be a triggering event if the income exceeds a de minimis level. This should ensure that the integrity objectives are achieved but that companies can still remedy inadvertent changes in residence where the income not subject to tax in NZ does not present a material risk to the NZ tax base.

- Except for a company whose residence tie-breaks to Australia, and assuming the ICA proposal proceeds, imputation credits will be lost immediately where a company becomes DTA non-resident. As such, it appears possible that any dividend paid by a company (other than an Australian ICA company) while it is DTA non-resident is likely to be unimputed. Consistent with our submission above, this is a further reason to consider an extension of the ICA proposal to allow companies tie-breaking to jurisdictions other than Australia to retain their ICA balances.

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GST apportionment

Issue: The option to apply the "principal purpose" test for costs under $10,000 should be made available for a wider group of taxpayers

Based on the Bill as it is currently drafted, the option to apply the "principal purpose" test for costs under $10,000 may not be available to some small business operators, simply because they are members of an industry association who already an agreed apportionment method with Inland Revenue (e.g., fund managers who are subject to the 10% GST apportionment rule). This does not achieve the intended purpose of the amendment which is to provide compliance relief.

Submission

We submit the option to apply the "principal purpose" test for costs under $10,000 is made available to more small business operators (e.g., businesses who are under certain materiality threshold.

Comment

Clause 116(9) of the Bill proposes to allow a registered person to claim a full input tax deduction for a supply of goods and services acquired for $10,000 or less (excluding GST) for the principal purpose of making taxable supplies. If the principal purpose is not taxable, the registered person would not be able to claim any GST in relation to the supply.

Based on the proposed drafting, the option to apply the "principal purpose" test is not available for taxpayers who are subject to an agreed apportionment method, including a method based on an agreement between Inland Revenue and an industry association. Many small business operators who are members of an industry association (i.e., a small fund manager who is a member of the Financial Services Council) may wish to benefit from the "principal purpose" test option.

Given the proposal is mainly intended to provide compliance relief, we suggest the scope of the option is extended to cover any taxpayer who has an annual turnover below a certain threshold, regardless of whether they are party to an industry agreement, or not.

Issue: The "principal purpose" test could be difficult to apply for small taxpayers

The "principal purpose" test may be difficult to apply in certain situations. This could increase the compliance costs for small taxpayers.

Submission

We submit a prescriptive rule be introduced to deem the principal purpose test to be met for small taxpayers (which could be determined based on a materiality threshold).

Comment

It is proposed that the "principal purpose" test is intended to have the same meaning in proposed new section 20(3CC) as the reference to principal purpose used in the pre-2011 GST Act definition of "input tax".

As established by case law, the word "principal" does not necessary mean more than 50% taxable use. It needs to be determined based on a number of factors, on the stated purpose of the taxpayer as well as their actions. In many situations, there could be short term objectives as well as long term goals, each pointing to a different use of the asset. There are many situations where the "principal purpose" of an acquisition may not be clear cut.

As the proposed GST changes are intended to provide compliance relief, we submit a prescriptive rule is introduced to deem the "principal purpose" test to be met for small taxpayers.

For example, for small taxpayers with turnover under $500,000 (i.e., as an example of a materiality threshold), the principal purpose test could be deemed to be met where the total exempt supplies made in the last financial year is less than 50% of their total supplies for the same period.

Issue: The scope of the proposed exemption for goods not principally used for making taxable supplies is unclear

The Bill proposes to insert a new section 14(4) to allow registered persons to treat the supply of goods that were not acquired or used for the principal purpose of making taxable supplies as being exempt from GST. The Commentary states that the new exemption does not apply if GST has been claimed on capital assets forming part of the goods (e.g. for substantial improvements). However, for dwellings, it is not always clear what is a "substantial improvement" as opposed to repair and maintenance.

Submission

We submit a more objective threshold should be introduced to allow taxpayers to claim GST input tax on capital assets with some certainty that the GST claim would not trigger any GST liability in the future. For example, a cap could be introduced to allow some GST input tax to be claimed up to the capped amount, regardless of whether it is operating costs or capital improvement. The cap could be based on a percentage of the current Capital Value assessed by a Local Council for rating purposes.

Comment

Under proposed section 14(4)(a), a supply of goods is deemed to be exempt only if the registered person making the supply of goods has not previously claimed a deduction on the goods.

The Commentary states that: "*the registered person would still be able to satisfy section 14(4)(a) if they claim input tax deductions for overheads or operating that do not become an integral part of the goods"* (see page 83). For dwellings, the Commentary also indicates that the exemption does not apply if GST has been claimed on "substantial renovations" done on the dwelling (see example 26 on page 84).

Based on the above, a taxpayer would need to consider if they should be claiming GST on any expenditure that could be considered to be forming part of the goods. In many cases, this is not clear cut. Example 26 of the Commentary refers to a substantial renovation: replacing all windows, carpet and blinds. In this case section 14(4)(a) would not apply. However, the scale required here to be considered "substantial" is unclear. Is it all windows and carpet or at least half of the windows or carpet? The difference in the outcome could be significant, as a small scale renovation may not trigger a future GST liability, but a substantial renovation would.

As the new exemption is intended to apply to situations where private dwellings are subject to a minimal level of taxable use, affected taxpayers will need more certainty on situations when GST can be claimed without triggering future GST liabilities when the dwelling is sold.

Issue: Deeming the disposal of an asset to be a taxable supply could be difficult to apply

Deeming the disposal of an asset to be a taxable supply could be difficult to apply if the taxpayer no longer holds the records on how the asset was treated for GST purposes at the time of acquisition.

Submission

We submit a time limit should be introduced to limit the scope of section 5(16C) to assets on which an input tax deduction was claimed in the last 7 years. The 7-year time limit references the general record keeping requirements for business records.

Comment

The Bill proposes to insert a new section 5(16C) which would deem a disposal of an asset to be taxable if GST input tax has been claimed on the asset, and no output tax adjustment has been made to return the GST claimed. However, in many situations, the taxpayer may not be able to confirm if GST was claimed on an asset on acquisition, or if any nominal GST adjustment was made.

The lack of records could be caused by many reasons, including that the Tax Administration Act only requires the tax records to be kept for a minimum of 7 years and taxpayers changing their accountants and tax advisers over time. Therefore, it is not uncommon to have situations where the taxpayer is unable to confirm if GST was claimed on a particular asset at the time of acquisition of that asset. To deal with this uncertainty, we recommend aligning to the time limit for business records.

Issue: Compliance costs associated with the repeal of the mixed-use apportionment rules

The repeal of the mixed-use apportionment rules under section 20(2JB) and 20G requires the taxpayer to change their apportionment method. There may be significant compliant costs involved in changing their GST apportionment method.

Submission

We submit taxpayers should be given the option to continue using the apportionment method determined under the mixed-use rules by deeming such a method to be "fair and reasonable" under the general apportionment rules. Further, if a percentage change in the actual use calculated under section 21A is caused by the change of the apportionment method, such change should be ignored for the purpose of calculating the GST wash-up calculations under sections 21 and 21A.

Comment

The Bill proposes to repeal sections 20(3JB) and 20G containing the mixed-use apportionment rules. For any adjustment period that begins on or after 1 April 2024, a taxpayer is required to use the ordinary adjustment rules in sections 21 and 21A.

Under section 21(4B), a registered person may choose a fair and reasonable method for calculating their annual GST wash-up adjustments. Therefore, if a taxpayer is to change their apportionment method for mixed-use assets, they will need to determine if the new method will satisfy the "fair and reasonable" requirement.

Further, an unintended GST adjustment may arise because a change of apportionment method could result in a change in the GST recovery rate. That is, the percentage change in the actual use calculated under section 21A could be attributable to the change in the apportionment method, rather than a change in the underlying use of the asset. We therefore submit that to the extent the percentage change is attributable to the change in the apportionment method, no GST adjustment should be required.

Other policy items

Build-to-rent exemption from interest limitation

To ensure that the proposed exemption from the interest limitation rules for the Build-to-rent ("BTR") asset class achieves its intended purpose, we believe that it is important that the BTR definition is appropriate.

Issue: Tenure length requirement

The requirement for a 10-year tenancy agreement to be offered could result in restrictions on a BTR owner's ability to re-finance or sell the property with such onerous lease terms in place.

Submission

As a matter of tax policy, there should not be a requirement for a BTR owner to offer a fixed term tenancy of any particular period to the tenant, as the tax system should not be imposing onerous lease terms.

Alternatively, if the tenure length requirement is retained, the landlord should have the ability to terminate the fixed-term tenancy with a reasonable notice period (for instance, six months) if the dwelling no longer satisfies the BTR land definition, or if the BTR land definition is repealed.

Comment

We understand the tenure length requirement is intended to provide certainty of long-term tenure to tenants and is a particular feature of the BTR asset class as compared with other residential tenancies. However, a 10-year tenancy agreement is likely to be problematic as it will place severe restrictions on the BTR owner's ability to re-finance or sell the property with such onerous lease terms in place.

In our view, from a tax policy perspective, there should not be any requirement for a BTR owner to offer a fixed term tenancy of a particular period. Instead, a BTR owner should have the flexibility to offer an appropriate fixed term at their discretion. It is not appropriate for tax legislation to be used as a mechanism to lock landlords into tenancy agreements for such a long term.

The requirement to offer a 10-year tenancy will be particularly onerous for owners in the event that there is a subsequent breach of one or more of BTR land definition requirements, or if the interest limitation rules are repealed at some stage during the lease period.

This 10-year tenancy requirement means the landlord is committing to a 10-year tenancy in circumstances where the ability for the landlord to terminate early is extremely limited, if such an event occurs.

Alternatively, the landlord should have the ability to terminate the fixed-term tenancy with a reasonable notice period (for instance, six months) if the dwelling no longer satisfies the BTR land definition, or if the BTR land definition is repealed.

Issue: 56-day notice requirement

There is a risk that the ability for tenants to terminate a tenancy with 56 days' notice could be open to misuse.

Submission

The tenure length requirement should be amended to include a minimum 12-month period where tenants are unable to terminate the tenancy, except in certain limited circumstances.

Comment

There is a risk that tenants could potentially misuse the 56-day notice period and stay for relatively short periods of time (and notwithstanding the short tenancy, due to the personalisation policy requirement for BTR, this could result in significant make-good costs to the landlord).

This could impede the development of the community aspects of a BTR development and have the potential to impose additional costs on landlords.

Issue: Same person requirement

There is a risk that the narrow requirement that the land is owned by the same person will limit the ability to use typical investment structures for the ownership of BTR developments.

Submission

The "same person" part of the BTR land definition should be deleted. Alternatively, the definition should be expanded to include the "same group of persons".

Comment

Under the proposed BTR land definition, the land, together with any other contiguous land, must be owned by the same person. The Commentary states that the "same person" can include any natural person or legal entity (for instance, a company). The definition as currently drafted does not seem to contemplate joint ownership structures, such as an unincorporated joint venture or a limited partnership. There is a risk that the narrow requirement that the land is owned by the same person will limit the ability to use typical investment structures for the ownership of BTR developments.

Given the other requirements of the BTR land definition (and in particular that there are at least 20 dwellings on the land, together with any contiguous land) there is no logical reason for the requirement for having the land owned by the "same person".

Issue: Personalisation policies

As currently drafted, the requirement for a personalisation policy presents a risk that the BTR land definition may not be satisfied, due to a lack of clarity regarding what is required in relation to tenant personalisation. In addition, it is not clear what would constitute a "penalty" for the purposes of this requirement.

Submission

Further clarification or guidance is required regarding what would constitute tenant personalisation, as the current drafting is not sufficiently clear and is likely to lead to uncertainty for BTR owners.

The definition of "without penalty" should also be clarified to ensure there is certainty regarding what is intended by these words. In addition, "make good" provisions should be specifically allowed in respect of tenant personalisation policies.

Comment

The proposed BTR land definition requires that the tenancy allows, without penalty, tenant personalisations for the dwelling. As currently drafted, this presents a risk that the BTR land

definition may not be satisfied, due to a lack of clarity regarding what is required in relation to a tenant personalisation policy.

If tenant personalisation is allowed, there should also be the ability for the BTR owner to include a 'make good' clause in the tenancy agreement that would require a tenant to either reinstate the property to its original condition, in the event that there had been personalisation, or to pay the reinstatement cost that the BTR owner incurs, without the "make good" being viewed as a penalty.

In some instances, tenant personalisation, such as painting walls, can result in substantial costs to rectify at the end of the tenancy. The ability for tenants to make personalisations should not result in unreasonable costs being imposed on the BTR owner. Given the tenant will have the ability to terminate the tenancy on 56 days' notice, there is a risk that the BTR owner could incur substantial costs rectifying a tenant personalisation for a tenancy of a reasonably short period of duration.

Issue: Contiguous land requirement

In some instances, a landlord may choose to unit title a development to provide current or future flexibility. It is possible that the landlord could own 20 or more dwellings in a single complex, but if these apartments are not adjacent to each other, the "contiguous land" definition may not be satisfied, as each apartment would be on its own title.

Submission

Further consideration should be given to the impact of unit titles on the requirement for the land to be contiguous.

Comment

As long as 20 or more dwellings are owned by the landlord, dwelling (e.g. apartments) that are in the same complex but on different unit titles should qualify as BTR land, even if they are not immediately adjacent to each other in the complex.

Issue: Interaction with the Residential Tenancies Act

BTR owners need to have the ability to resolve potential instances of anti-social behaviour and rent arrears (and other potential situations that may arise) under a fixed-term tenancy.

Submission

There should be provisions for termination by the landlord similar to those permitted for a periodic tenancy, for instance, where there are rent arrears (under section 55) or anti-social behaviour (under section 55A).

Comment

The proposed BTR land definition requires the landlord to offer a tenant a fixed-term tenancy under the Residential Tenancies Act. The rules applying to fixed-term tenancies are more prescriptive than periodic tenancies in relation to matters such as rent arrears and the enforcement of anti-social behaviour. Landlords need to be able to deal with tenancy issues so that the ongoing features of the BTR community are maintained.

Issue: Continuous use requirement

We consider that BTR owners need certainty that they have satisfied the BTR land definition on a ongoing basis.

Submission

There should be an annual certification process or confirmation so that BTR owners do not find themselves in the position where they cannot provide certainty to a potential purchaser that the land meets the definition of BTR land due to a "one time only" notification process.

Comment

Given that the BTR land definition is tagged to the land, any subsequent potential purchasers or financiers of a BTR asset will likely seek assurance that the land hasn't ceased to be BTR land in order to determine the price they will pay for the asset. Without this assurance, through the due diligence process, it is likely that a potential purchaser will not take into account the potential value of the future interest deductions available in perpetuity if the asset qualifies as BTR land or will discount the price to take into account the risk that the BTR land definition may not have been satisfied on a continuous basis.

Issue: Compliance requirements

It is not clear whether it will be Inland Revenue or the Ministry of Housing and Urban Development that will have responsibility for monitoring ongoing compliance with the BTR land definition.

Submission

The rules need to be clear regarding which Government agency will be responsible for monitoring and auditing compliance with the BTR land definition.

Comment

As currently drafted, clause 100 of the Bill requires the Chief Executive of Te Tuapapa Kura Kainga – Ministry of Housing and Urban Development ("HUD"), to provide a valid notice to the Commissioner of Inland Revenue that the land meets the definition of BTR land, and that notice has not been revoked.

However, it is not clear whether it will be Inland Revenue or HUD that has responsibility for monitoring ongoing compliance with the BTR land definition. Clarity is required regarding the involvement of HUD and/or Inland Revenue in the ongoing monitoring of compliance with the BTR asset definition.

FBT exemption for certain public transport fares subsidised by employers

Issue: Application of the FBT exemption in practice

The Bill and Commentary provide little guidance on how this exemption is intended to operate in practice.

Submission

Practical guidance on the operation of the rules should be provided by Inland Revenue (either in an operational statement or the Tax Information Bulletin on the enacted legislation).

It should be made clear that employers are not required to track actual usage of employer-provided subsidised public transport fares. Rather, they should be able to rely on a clear policy to confirm whether the exemption applies.

Comment

KPMG supports the proposed FBT exemption for employer subsidised public transport fares.

The proposal will require subsidised fares to be provided mainly for the purpose of an employee travelling between their home and workplace.

However, there is no detail on how this is intended to apply in practice. If an employer provides an employee with a subsidised public transport fare card, will they need to track actual usage on the card to verify that the employee has only (or mainly) used the fares for travel between home and work? How is "mainly" intended to be interpreted? For example, will an employee stopping off somewhere on their way home, or on the way to work, break the required nexus? Left unresolved, these issues are likely to place significant compliance costs, and/or create uncertainty, which could make the proposal potentially unworkable in practice.

Therefore, detailed guidance (either in an operational statement or a Tax Information Bulletin) is needed to assist with the practical application of the exemption.

We consider that as long as the employer has clearly notified (e.g. by way of an employment policy or other communication to the relevant employee(s)) that subsidised fares should be used for travel to and from work, that should be sufficient to discharge the onus of proof for the FBT exemption to apply.

Issue: non-application to reimbursements and other scenarios

There is no equivalent tax exemption when employers reimburse public transport fares incurred by their employees or where the employee owns the fare card (and the employer helps to tops it up).

Submission

To ensure consistency, there should be an equivalent exemption for reimbursement of public transport fares or where an employer contributes towards an employee's own fare card.

Comment

The proposal does not extend to reimbursement of public transport fares (this is said to be on the basis that reimbursement of car parking costs is currently taxable) or where an employer makes a contribution to an employee's existing public transport fare card by helping to "top up" the card (where there is no arrangement with the public transport operator for the employer to be charged directly for this).

These exclusions will significantly reduce the benefit of the proposal. It will mean the tax system is directing how employers should provide support to employees, when the end outcome for the employee is identical.

Housing remedial items

Rollover relief – bright-line test and interest limitation

Issue: Application of rollover relief for inherited property

KPMG supports the expansion of the rollover relief rules as well as the remedial amendments contained in the Bill. A number of issues we have encountered in practice (e.g. in relation to the "original settlor" requirements) are being addressed with retrospective effect, which is welcome.

However, we consider that the rollover relief rules do not operate as intended in relation to inherited property. If a person inherits residential land, their disposal of the land is not subject to the bright-line test (regardless of how long they hold the land). However, if that person transfers the inherited property to a rollover trust and then the rollover trust disposes of the property within the relevant bright-line period, the disposal will generally be taxable to the trust. The same is true of other entity types for which rollover relief is available, e.g. partnerships and and look through companies.

Submission

The rollover relief rules should be amended to ensure that a rollover trust (or other entity for which rollover relief exists) holds the residential land subject to all the same tax settings as the original owner, including that a disposal by the rollover entity should not be subject to the bright-line test where the original owner inherited the land. As with the other rollover relief remedial amendments in the Bill, these changes should have retrospective effect for disposals to rollover entities occurring on or after 1 April 2022.

Comment

Rollover relief under the bright-line test is intended to ensure that certain transfers of residential land are not taxed at the time of transfer, but rather the recipient "steps into the shoes" of the original owner. The intention is that the recipient should hold the land subject to the same tax settings as the original owner, including taking the original owner's cost and bright-line start date.

Due to an oversight in the rules as enacted in March 2022, a recipient does not currently take the original owner's acquisition date for the purposes of determining which bright-line test applies (e.g. a 2-year, 5-year or 10-year test) nor the version of main home exclusion which applied for the original owner. These issues have been addressed in the Bill (with retrospective effect) as it is acknowledged that a recipient does not fully "step into the shoes" of the original owner without these remedial changes.

However, a similar issue arises in relation to inherited property and this problem has not been addressed in the Bill.

Since its introduction in 2015, the bright-line test has excluded amounts derived by beneficiaries who inherit land from tax under the bright-line test when they sell the inherited property. A specific policy decision was made that the bright-line test should not apply in these situations. Mechanically, the exclusion operates by providing that a disposal by beneficiaries who inherit land is excluded from application of the bright-line sections of the Income Tax Act 2007 (see ss CB 6A(2B) and CZ 39(7)).

Taking rollover relief for transfers to a trust as the primary example, the current rollover rules treat the trustee(s) of a qualifying rollover trust as having the original owner's bright-line acquisition date and original cost. The remedials in the Bill will ensure the trust also is treated as

having acquired its first estate or interest in land on the date the original owner acquired it (the date the first estate or interest was acquired determines which bright-line settings apply).

However, the rollover trust is not treated as having the benefit of the exclusions in sections CB 6A(2B) or CZ 39(7). Therefore, the rollover trust does not fully step into the shoes of the original owner and hold the property subject to all of the same tax settings, which we consider should be the case.

It is not uncommon that a person who inherits land may choose to transfer the land to an existing or newly established family trust. It is well publicised that inherited property is not subject to the bright-line test and we would expect many people would assume this extends to property transferred into rollover trusts using the new rollover relief rules. It may come as a surprise that by transferring the property into the trust the person who inherited the property has inadvertently "turned on" the bright-line test (for the trust). We do not imagine this was Parliament's intention and consider this issue needs to be fixed.

Issue: Rollover relief for resettlements of family trusts should be retrospective

The remedial amendments providing rollover relief for resettlements of family trusts is currently proposed to apply from Royal Assent.

Submission

The remedial amendments providing rollover relief for resettlements of family trusts should apply for transfers occurring on or after 1 April 2022.

Comment

Proposed remedial amendments in the Bill provide that rollover relief would be available where residential land or disallowed residential property ("DRP") held in a qualifying family trust (the head trust) was resettled onto another family trust (the sub trust) where certain conditions are met. These rules apply in respect of the rollover rules for both the bright-line test and the interest limitation rules.

The application of rollover relief to trust resettlements was raised in submissions on the Taxation (Annual Rates for 2021–22, GST, and Remedial Matters) Bill which introduced rollover relief for trusts. In the Officials' Report on submissions on the Bill, Officials accepted the submission that rollover relief should apply to resettlements of a trust where certain conditions were met. It was noted that taxpayers can achieve the same result through two legal transfers (rollover relief would apply for a transfer out of the trust to the original settlor and then again for the transfer from that settlor to a second trust).

In its Special Report on the new legislation, Inland Revenue stated that it is intended that rollover relief should be available for trust resettlements and that an amendment should be included in the next available Bill. This acknowledged that it was an oversight that rollover relief was not included in the previous legislation enacted in March 2022 (in line with Officials' recommendation).

Given this, we would have expected the trust resettlement remedial amendment in the Bill to apply to transfers occurring on or after 1 April 2022 (when the rollover rules were introduced). We note it is possible some taxpayers may have proceeded with transactions in the current year on the basis rollover relief would be retrospectively available to such resettlements, in reliance on Inland Revenue's commentary in the March 2022 Special Report.

We consider it would be a poor tax policy outcome for resettlements occurring between 1 April 2022 and the date of Royal Assent to not receive rollover relief while resettlements occurring on

or after Royal Assent would receive such relief, particularly as (in the way noted above) this outcome could be achieved currently through two legal steps rather than one.

Issue: Rollover trust criteria and charitable beneficiaries

In order to qualify as a rollover trust, the trust cannot have any charitable beneficiaries other than charities registered under the Charities Act 2005.

Submission

Consideration should be given to expanding the scope of permissible beneficiaries to include charities beyond those registered under the Charities Act 2005 and potentially other not-for-profit organisations.

Comment

Charities registered under the Charities Act 2005 are currently the only class of not-for-profit entities which are permitted to be beneficiaries (discretionary or otherwise) of a family trust without disqualifying the trust from being a rollover trust.

In our experience, it is very common for trust deeds, particularly older trust deeds, to include a wider class of not-for-profit beneficiaries, for example large and reputable overseas charities or other not-for-profits such as local sports clubs in New Zealand. This means that persons who want to take advantage of the rollover relief rules potentially have to amend their family trust deeds to exclude such organisations. Others may run afoul of the rules inadvertently. We question whether this is an appropriate policy outcome and suggest that Officials give further consideration to expanding the scope of these rules.

Residential Land Withholding Tax (RLWT)

Issue: Cross-reference error in RLWT as a result of redrafting

The RLWT rules include a cross-reference error that has apparently arisen as a result of redrafting the bright-line provisions in section CB 6A.

Submission

In section RL 1(2)(a) of the Income Tax Act 2007, the reference to section CB 6A(13) should be replaced by section CB 6A(1A).

Comment

The bright-line test in section CB 6A only potentially applies if none of sections CB 6 to CB 12 apply. This rule is currently contained in section CB 6(1A). Prior to the re-write of section CB 6A which introduced the 10-year bright-line test in March 2022, the same rule appeared in section CB 6A(13).

For the purposes of applying RLWT, that rule is ignored. This is contained in section RL 1(2)(a). However, due to an apparent oversight section RL 1(2)(a) was not properly updated in conjunction with the re-write of section CB 6A and there is presently a cross-referencing error. This should be corrected with retrospective effect.

GST remedial items

Modernising information requirements for GST

Issue: SCI – Commissioner's discretion to allow certain particulars to be omitted

Clause 187(15) of the Bill proposes to give the Commissioner discretion to allow the omission of certain particulars from taxable supply information ("TSI"). There is no equivalent provision allowing such discretion to be exercised for supply correction information ("SCI").

Submission

We submit the Commissioner should be given discretion to allow SCI to be not required to be issued, or to allow the omission of certain particulars from SCI, like the proposal under clause 187(15) for TSIs.

Comment

Under section 19F of the GST Act, a registered person must keep SCI issued for a taxable supply. Further, under section 20(2)(a), any registered person claiming an input tax deduction must meet the requirements of section 19F. Based on these provisions, in the event a SCI is issued for an overpayment of GST, the Commissioner could deny the input tax deduction for the GST overpaid if the SCI does not fully satisfy the requirements under section 19E(1).

Currently under section 19N(3), a SCI is not required to be issued for certain discounts. In other cases, pursuant to section 19N(2), SCI must be issued for adjustments to a TSI that have a GST impact. There may be many circumstances in which a taxpayer may not be able to issue SCI, or fully satisfy the requirements of section 19E(1). This is discussed in further detail below.

The Commissioner should be given the discretion to allow SCI to not be required to be issued, or to allow the omission of certain particulars from the SCI.

Issue: SCI – the information identifying the taxable supply information

The Bill currently does not include any proposed changes in respect of the definition of SCI as set out under section 19E(1). Section 19E(1)(b) requires a SCI to include the information identifying the TSI. Based on the legislation as it is currently worded, it is not clear exactly what information is required to identify the TSI, or if SCI covers a number of TSI, and whether all of the TSI must be identifiable using the information. The requirement to provide information to identify TSI could give rise to significant compliance costs for many businesses.

Submission

We submit that section 19E(1)(b) is reworded so information identifying the TSI is required only upon request either by the Commissioner during an audit, or by the customer. Alternatively, Inland Revenue should provide some practical guidance on what information is required to be included in SCI to satisfy the requirement of section 19E(1)(b).

Comment

Currently, credit notes may be issued that could relate to a number of transactions that have occurred during a period. For example, quite often a commercial landlord could issue tax invoices to the tenants for the operating expenses based on a budget. At year end, when the actual operating expenses are determined, the landlord would issue a credit or debit note for the "wash-up", being the difference between the actual operating expenses and the amount charged during the year based on the budget. In the future, the credit or debit note would be replaced by SCI to correct the incorrect amount charge in the original tax invoices.

Based on the current drafting of section 19E(1)(b), the SCI will need to include information identifying each of the TSI issued during the year for the operating expenses. In this case, each SCI could potentially relate to at least 12 TSI / tax invoices (assuming a monthly invoicing practice for the charges relating to operating expenses). This is compounded by the fact that a large-scale commercial landlord could potentially have hundreds of tenants, meaning significant system changes would be required to make sure their SCI / credit notes comply with section 19E(1)(b).

The same issue exists in respect of wholesalers of consumer products who typically issue credit notes for rebates as an incentive to reward the retailers for achieving certain sales or volume of purchase targets. The credit note (or going forward SCI) could relate to tax invoices issued during a period for many different items (e.g., an annual rebate, or quarterly rebate). To identify each of the tax invoices / TSI to which that the credit note / SCI relates would require significant system changes.

Issue: TSI and Supply Information – the requirement to include "the date of invoice"

Clauses 186(2) and 187(4) propose to amend the information required for Supply Information and TSI by replacing the reference to "the date of the supply" to the "date of the invoice, or where no invoice is issued, the time of supply". As the term "invoice" is widely defined, there could be multiple dates of invoice for the same supply.

Submission

We submit the reference to the "date of the invoice" is amended to refer to the date "when all TSI relating to the supply has been provided". For most taxpayers who will be treating their existing tax invoices as TSI after 1 April 2023, this will be the date when the tax invoice will be issued. In situations where part of the TSI is not provided at the same time, it will be the date when the last piece of information required to be provided as part of the TSI is provided.

Comment

Under section 2 of the GST Act 1985, the word "invoice" is defined to mean "a document notifying an obligation to make payment". Given the wide definition of invoice, more than one invoice may be issued for the same supply (e.g., a proforma invoice, or an order confirmation could be an invoice, provided they are issued for the purpose of notifying an obligation to pay). It is unclear whether all relevant invoice dates must be provided for the purpose of the TSI.

We note this issue does not arise under the current GST legislation under section 24(3)(d), which refers to "the date upon which the tax invoice is issued". This is because the current legislation makes it clear that only one tax invoice is allowed to be issued for any taxable supply. Therefore, it can be no mistake as to when the tax invoice is issued. However, by changing the reference to tax invoice to "invoice", which is a much wider concept, there could be multiple invoices for the same supply. This begs the question of which "date of the invoice" will need to be included as part of the TSI.

Other remedial items

Provisional tax – standard uplift calculation method of the second instalment

Issue: Change not a "clarification"

The Bill proposes to "clarify" which provisional tax uplift factor (105% or 110%) must be used when an instalment date falls on a day that is not a working day and taxpayers pay that instalment on the next working day but also file their preceding year's tax return on that same day. This change will have retrospective effect to the 2017-18 income year.

Submission

There should be a savings provision for taxpayers who have filed their prior year income tax return on the following working day, to ensure their provisional tax instalment calculations are not adversely impacted.

Comment

KPMG notes that this change could have adverse consequences for some taxpayers as the date of filing of a tax return can reset provisional tax instalment calculations under the standard ("uplift") provisional tax calculation method.

As a general rule, the uplift basis is 110% of the residual income tax ("RIT") liability from two years' prior if the prior year's tax return has not been filed. The uplift factor is 105% of the RIT in the prior year, once that return is filed. The return filing date must be on or before the instalment date for the relevant calculation basis to be affected.

The problem that arises is where the instalment date falls on a non-working day. Inland Revenue's administrative practice has been to treat the payment as being due on the following working day. However, we have always understood the actual due date to remain unchanged.

By treating the following working day as the due date, this will adversely impact those taxpayers who have filed their returns on the following working day on the assumption that this is post the instalment date. This can have significant cash flow implications if the RIT for the prior year is significantly higher than the RIT from two years ago.

Because the proposed change is retrospective to the 2017-18 income year, it will potentially impact 2022 provisional tax positions. Therefore, a savings provisions is strongly recommended to safeguard those taxpayers who may be adversely impacted as a result.

Interest rate swaps held by multi-rate PIEs

Issue: Application date of the proposal

The Bill will allow the expected value method to be used when calculating taxable income/deductions in relation to interest rate swaps entered into by multi-rate rate PIEs. The proposed change will apply from the 2023-24 income year.

Submission

The proposed change should be able to be applied to interest rate swaps on a case-by-case basis (by election) for interest rate swaps entered into on or after 1 April 2022.

Comment

We support allowing multi-rate Portfolio Investment Entities ("PIEs") the option of reducing volatility in the calculation of income and deductions relating to interest rate swaps. The Bill as

introduced allows the option of applying the expected value method (Method C in Determination G27) from the 2023-24 and later income years (i.e. from 1 April 2023).

For interest rate swaps entered into prior to the start of the 2023-24 income year, which are still in place on 1 April 2023, and for which either unrealised gains or losses in the swap value have been returned to date, the appropriate treatment is unclear. This is because the expected value method ignores any and all unrealised movements over the life of the instrument (i.e. the tax position should be neutral over the life of the interest rate swap). To the extent the cumulative position to 1 April 2023 is either a net unrealised gain or unrealised loss, which has been included for PIE tax calculation purposes, the position will not be neutral.

In these circumstances, it may be preferable to allow the current taxation treatment to continue (i.e. for unrealised gains/losses on pre-existing interest rate swaps to continue to be taxed, until the swap matures). Alternatively, there would need to be a "base price adjustment"-type mechanism to square-up the position so that the starting point as at 1 April 2023 is neutral, for the expected value method to apply. Given this, the ability to apply the proposal should be on a swap-by-swap basis.

There should also be the ability to apply the expected value method for interest rate swaps entered into on or after 1 April 2022. This would allow interest rates swaps entered during the 2022-23 income year to receive this treatment from the outset. This is on the basis that the PIE tax calculations will generally not be completed until after then end of the 2022-23 income year.