Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill

Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill

March 2016

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CONTENTS

Residential land withholding tax

NEW TAX TYPE: RESIDENTIAL LAND WITHHOLDING TAX

No clause

Issue: RLWT concept

Submission
(EY, PwC)

In general terms, we accept the idea of an RLWT on certain disposals of residential land in New Zealand by offshore persons and are pleased to see that a number of our submissions and others on RLWT have clearly been taken into account in drafting the bill. *(EY)*

We support the concept of RLWT, the approach by officials to keep the calculation both simple and broadly representative of the final tax liability, and agree that it should not be a final tax. *(PwC)*

Recommendation

That the submissions be noted.

No clause

Issue: RLWT should not be introduced

Submission
(Chartered Accountants Australia and New Zealand)

The proposed RLWT should not be introduced, because the compliance and administrative costs are likely to significantly outweigh the amount of revenue collected. There is no evidence that the Commissioner's current tools (including the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, double tax agreements, and tax information exchange agreements) are ineffective or ineffective enough to warrant the introduction of the proposed new regime. The enactment of the Land Transfer Amendment Act 2015 and Tax Administration Amendment Act 2015 have significantly bolstered the Commissioner's ability to collect tax from not only the bright-line rule but also other land taxing rules, including the intention test.

Comment

In the regulatory impact statement *Options for optimising the effectiveness of the bright-line test,* officials noted that a key objective of the proposed RLWT is to support the integrity of the bright-line test as part of the wider tax system.

In addition, the introduction of RLWT would also ensure that the tax system retains coherence and fairness, as New Zealand imposes withholding taxes in relation to other forms of income in similar circumstances (that is, when a payee is likely to have a tax liability and where there

could potentially be enforcement or evasion concerns) – including employment income, investment income, and income received by non-resident contractors. It is also consistent with international norms (that is, many countries that impose tax on sales of certain property also require tax to be withheld upon the sale).

Officials acknowledge that there will be additional compliance costs incurred in determining whether a vendor is subject to RLWT and paying the required amount of RLWT to the Commissioner, and additional administrative costs for Inland Revenue.

However, officials do not agree with the submitter's statement that the conveyancing agent for every residential land transaction will be required to determine whether the vendor is an offshore person. Officials consider that the offshore status of the vendor should only need to be determined if it has first been determined that the sale occurs within two years of acquisition. As the majority of transactions are sold outside the two-year period, the offshore status of the vendor will not need to be determined in most cases. Further, where the transaction has occurred within a two-year period, for individuals who are New Zealand citizens and present in New Zealand at the time of sale, proving that they are not an offshore person should be relatively straightforward.

Other aspects of the rules (such as calculation of the RLWT amount) are intended to be as simple to apply as possible, while maintaining the integrity of the withholding tax.

Recommendation

That the submission be declined.

Clause 2

Issue: Introduction of RLWT should be deferred

Submission
(Chartered Accountants Australia and New Zealand, EY, KPMG)

The introduction of the proposed RLWT should be deferred until there is more information about the effect of the information requirements and bright-line test on enforcement and collection. The Committee should undertake a full review of the property reforms, preferably before the RLWT is implemented. *(Chartered Accountants Australia and New Zealand)*

The implementation of the proposed RLWT should be deferred as there will be a very short timeframe between enactment and coming into force. Conveyancers will need to review their client engagement approaches, processes, and systems in order to meet their obligations as soon as the RLWT rules come into force. The RLWT rules will create a need for conveyancers to identify affected transactions at early stage in the process, not just at the final settlement date. *(EY)*

We acknowledge the Government's rationale, but we do not support the implementation of an RWLT at this stage at least because the cost of the RLWT will significantly outweigh the revenue collected and protected. It should be delayed to allow the wider land information requirements to be bedded in and tested for their impact on, and compliance with, the bright-line

test. A deferral would also allow time for Inland Revenue's Business Transformation programme to establish a more efficient process for the withholding tax. (*KPMG)*

Comment

In the regulatory impact statement *Options for optimising the effectiveness of the bright-line test,* officials considered whether it would be preferable to first assess compliance with the bright-line test (using data collected under the Land Transfer Amendment Act 2015 and Tax Administration Amendment Act 2015) before a regulatory response (the proposed RLWT) is introduced. That option was not preferred, because if there are low levels of compliance, the Commissioner will need to rely on her existing tools and powers to remedy the non-compliance in the period prior to the review.

Inland Revenue has been working with representatives from the Auckland District Law Society, New Zealand Law Society and the New Zealand Society of Conveyancers to design and implement a product that would work for both Inland Revenue and the conveyancers and solicitors involved in the RLWT process.

If the legislation is enacted, Inland Revenue will work closely with these professional bodies to ensure that their members are informed of and understand their RLWT obligations before 1 July 2016.

In addition, it is unlikely that many transactions will require RLWT withholding when RLWT is first implemented. This is due to the fact that only residential land acquired on or after 1 October 2015 will be potentially subject to RLWT. Thus, in July 2016, only residential land disposed of within nine months of acquisition will be covered.

Officials will monitor the implementation of the new rules and report to the Ministers of Finance and Revenue if concerns with the effectiveness of the rules are identified.

Recommendation

That the submissions be declined.

No clause

Issue: Reporting of information on RLWT collected and refunded

Submission
(Chartered Accountants Australia and New Zealand)

The Committee should require Inland Revenue to collect and report information on the amount of RLWT collected and refunded following the filing of interim and final income tax returns to determine the fiscal effect and effectiveness of the proposal.

Comment

Officials consider that RLWT needs to be as simple as possible for withholders to apply and difficult to avoid. A trade-off arising from this approach is that the RLWT collected will only

be an approximation of the ultimate tax liability. To mitigate the impact of this on cashflow when the ultimate tax liability is likely to be less or nil, it is proposed that the RLWT system has an interim return process.

Given the policy objectives of simplicity and integrity, information on the amount of RLWT collected and refunded may not give an indication on the effectiveness of the proposal. However, officials will monitor the implementation of the new rules and report to the Ministers of Finance and Revenue if concerns with the effectiveness of the rules are identified.

Recommendation

That the submission be noted.

No clause

Issue: Compliance costs

Submission
(Auckland District Law Society, PwC)

The imposition of "paying agent" status will add significant costs and increase lawyers' exposure to risk and thus professional indemnity insurance premiums. *(Auckland District Law Society)*

The design of this tax should be carefully considered to ensure that compliance costs do not outweigh the revenue raised, as that would go against New Zealand's general tax policy principles. *(PwC)*

Comment

Officials acknowledge that requiring conveyancers and lawyers to act as paying agents for the purposes of the proposed RLWT will increase compliance costs and potentially insurance premiums. However, the proposed RLWT has been designed so that conveyancers and lawyers will not be considered true withholding agents in the sense that they will not be held liable for the underlying amount of RLWT when RLWT has not been withheld. This should assist in limiting the potential increase in professional indemnity insurance premiums.

As noted in *Issue: RLWT should not be introduced*, a key objective of the proposed RLWT is to support the integrity of the bright-line test as part of the wider tax system, not just to raise revenue.

Recommendation

That the submissions be noted.

No clause

Issue: Transitional measures

Submission
(EY)

Transitional measures should be included in the legislation to exclude land disposals where the bright-line date occurs before the RLWT rules come into force.

Comment

The legislation proposes that RLWT will apply when a vendor acquires residential land on or after 1 October 2015 and disposes of the land within two years of acquisition, and that vendor is an offshore person. However, RLWT will only apply when a "residential land purchase amount" is made on or after 1 July 2016. Generally, a "residential land purchase amount" will be payment that equates to 50 percent or more of the purchase price and will occur upon settlement.

The payment of a "residential land purchase amount" will not always coincide with the vendor's "bright-line date". (The vendor's "bright-line date" will in most cases is the date that the vendor enters into an agreement to dispose of the land.)

There may be instances when the vendor has entered into an agreement to dispose of their residential property before to 1 July 2016, but settlement does not occur until after 1 July 2016. If the vendor originally acquired the property on or after 1 October 2015 and has disposed of it within two years, there is likely to be an income tax liability and RLWT should apply as long as a residential land purchase amount is made on or after 1 July 2016. It should not matter whether the contract to sell is entered into before or after 1 July 2016.

Officials consider that the lead-in time before the introduction of RLWT on 1 July 2016 is sufficient enough not to warrant a transitional measure such as that proposed by the submitter.

Recommendation

That the submission be declined.

Clauses 41, 43 and 44

Issue: Due dates for RLWT

Submissions
(Auckland District Law Society, EY)

It is not clear that payment of RLWT on a basis other than a monthly one is permitted. Proposed sections RL 5 and RA 15 should be amended. It would be preferable to delete

proposed section RL 5(2) and to insert into section RA 15(2) that the 20th of the following month is the due date by which RLWT amounts need to be remitted to IRD. *(EY)*

Provision for payment at time of settlement or monthly to IRD would be appreciated. *(Auckland District Law Society)*

Comment

Section RA 15(2) provides the due dates for different types of tax payments and is dependent on the length of the payment period. When the payment period is a month, it provides that the amount is due *by* the 20th of the following month.

Section RA 15(3) provides further information as to the specific payment period for each tax type. A proposed amendment to section RA 15(3)(b) provides a signpost that the payment period for RLWT will be monthly and refers the reader to proposed new section RL 5, which also provides that payment is on a monthly basis. This follows a similar structure to the other tax types covered by section RA 15.

While the draft legislation provides that the payment basis for RLWT is monthly, the due date is *by* the 20th of the following month. This means that an RLWT paying or withholding agent will not be precluded from remitting RLWT to the Commissioner earlier than the 20th of the following month or in batches. Officials consider that no further amendment is necessary, but will clarify the issue in guidance.

Recommendation

That the submissions be noted.

WHO RLWT APPLIES TO

Clause 45

Issue: Definition of "offshore person" is inconsistent with the Tax Administration Amendment Act 2015 definition

Submission
(Chartered Accountants Australia and New Zealand, EY, KPMG, New Zealand Law Society)

The definition of "offshore person" is inconsistent with the definition introduced into the Tax Administration Act 1994 for the purposes of the information requirements. The definition for RLWT purposes should be consistent. We do not understand why they are different and no explanation has been provided. It will be costly and difficult to comply with and enforce. *(Chartered Accountants Australia and New Zealand)*

The definition should be the same as or consistent with the definition introduced in the Tax Administration Amendment Act 2015. There should be as little scope as possible for confusion and uncertainty on the part of conveyancers and persons involved in the land transaction. It is not obvious from a policy perspective why a different approach should be taken. *(EY)*

The definition is wider than the definition for the land information rules. We see no reason for the inconsistency as it will cause confusion when there are different results for RLWT and land information. We recommend that the definition of "offshore person" under the RLWT rules be consistent with the land information definition. *(KPMG)*

The disparity between the definition proposed in the bill and the definition used for the purposes of the land information tax statement rules may cause confusion for conveyancers with a resulting increase in compliance costs. If the difference is to remain, Inland Revenue should ensure that conveyancers are alerted to the differences in any subsequent explanation of RLWT and that any confusion caused by the differences is taken into account in considering the imposition of penalties for non-compliance. *(New Zealand Law Society)*

Comment

The Tax Administration Amendment Act 2015 introduced a new concept of an "offshore person". This concept is used for two purposes. First, offshore persons must obtain a New Zealand bank account in order to apply for an IRD number. Secondly, offshore persons must generally always provide their IRD number when they are transferring property (that is, the main home information exemption is not available to them).

For individuals, the Tax Administration Amendment Act 2015 provides that an individual will be an offshore person, if they are not a New Zealand citizen and they do not have a residence-class visa. A New Zealand citizen or a holder of a New Zealand residence-class visa will be an offshore person if they are not present in New Zealand, and they have not visited New Zealand within the past three years (in the case of a New Zealand citizen) or 12 months (in the case of a residence-class visa holder).

For non-individuals (a company, trust, partnership, or other body of persons), the definition in the Tax Administration Amendment Act 2015 broadly follows the test contained in the Overseas Investment Act 2005.

The offshore person definition in the Tax Administration Amendment Act 2015 that applies for individuals is the same as the offshore person definition for individuals for the RLWT. However, in the bill as introduced the definition for offshore persons who are non-individuals is not the same.

The offshore persons definition for RLWT, for both individuals and non-individuals, was initially proposed in the officials' issues paper *Residential land withholding tax* in August 2015 as being identical to the definition contained in the Tax Administration Amendment Act 2015.

However, submitters to the issues paper raised a number of concerns in relation to the offshore persons definition for non-individuals.

RLWT requires an assessment of whether a person meets the criteria of an offshore person by a withholder – usually the vendor's conveyancer. The withholder will need to obtain sufficient information about the offshore person in order to make that assessment. In contrast, taxpayers self-assess whether they meet the criteria for an offshore person for the purposes of the bank account requirement and the land information. This meant that certain features of the Tax Administration Act 1994 definition of offshore persons for non-individuals, while appropriate in the context of the bank account requirement and main home information exemption, may be more complex or difficult to comply with in the context of a withholding tax regime.

Further, some questions were raised about how the Tax Administration Act 1994 definition applied in the context of trusts when there are discretionary beneficiaries.

The definition of "offshore person" for non-individuals (as introduced in this bill), was changed to make the rules clearer for withholders while still maintaining integrity. As submitters have noted, this resulted in the offshore person definition applying in a wider range of situations than was initially proposed in the issues paper.

It is acknowledged that as a result, some people will not have a tax liability and will therefore have tax incorrectly withheld. These are generally individuals or trusts who have the main home exemption available to them or people who are in a loss situation. The interim claim mechanism was intended to ameliorate the effect of this incorrect withholding. It is noted that if officials' comments in relation to certificates of exemption are also accepted, then the impact of a wider definition applying is reduced for those with a main home or those who are in the business of being a developer.

However, officials note that apart from these groups, almost all persons caught under the offshore persons definition as proposed in the bill will, prima facie, have a tax liability under the bright-line test (and if not under the bright-line test, then under another land taxing provision).

As discussed below, some changes are being made to the proposed definition for non-individuals. These will make the definition more consistent with the thresholds in the Tax Administration Amendment Act 2015 and the Overseas Investment Act 2005. As noted below, we also agree that the term "offshore person" should be changed to reduce confusion.

Recommendation

That the submissions be noted.

Clause 45

Issue: Definition of "offshore person" is too broad for non-individuals

Submissions
(Auckland District Law Society, Chapman Tripp, Chartered Accountants Australia and New Zealand, EY, KPMG)

The definition of "offshore person" is too broad for non-individuals (companies, trusts, and partnerships).

The definition should just look at the shareholding percentage. The current proposal is overly cautious, as all subsidiaries of foreign businesses would be "offshore persons". *(Chartered Accountants Australia and New Zealand)*

The definition should have a 25 percent control aspect like the Tax Administration Act 1994 definition and Overseas Investment Act 2005. It is excessive that a New Zealand-incorporated and tax-resident company could be an "offshore person" just because one of its members, directors or executives is an offshore person. *(EY)*

There is a strong argument for limiting RLWT application to individuals who do not live in New Zealand, and non-resident entities. Alternatively, the bill should define an offshore entity as a New Zealand company, trust or partnership that does not have at least one New Zealand shareholder, trustee, or partner. If this submission is not accepted, we recommend that a New Zealand incorporated company and/or established trust/partnership should only be an offshore person if the majority are offshore persons. It should not apply when the entity is majority owned or controlled by non-offshore persons. *(KPMG)*

The definition is too wide-ranging in relation to trustees and non-natural persons. *(EY)*

The definition of "offshore person" is likely to capture a large number of family trusts, which is likely to significantly increase compliance costs for family trusts. *(Chapman Tripp)*

Comment

As noted above, the definition of "offshore person" for non-individuals was amended to make the rules clearer for withholders, while still maintaining integrity. As submitters have noted, this has resulted in the offshore person definition applying more widely than initially proposed in the issues paper.

It is acknowledged that as a result, some people will not have a tax liability and will therefore have tax incorrectly withheld. These are generally individuals or trusts who have the main home exemption available to them, or people who are in a loss situation. The interim claim mechanism is intended to ameliorate the effect of this incorrect withholding.

However, officials note that apart from these groups, almost all persons caught under the offshore persons definition as proposed in the bill will, prima facie, have a tax liability under the bright-line test if they have disposed of residential land within two years of acquisition (or under another land taxing provision depending on the circumstances).

After discussing the issue with the independent specialist tax advisor to the Finance and Expenditure Committee, officials agree that some modifications to the definition of "offshore person" for non-individuals would be appropriate. Officials consider that these modifications still ensure that the rules are relatively simple to comply with, while maintaining integrity of the rules.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Companies – directors

Submission
(Auckland District Law Society, Chartered Accountants Australia and New Zealand, EY, New Zealand Law Society)

It is unclear why one executive or director that is an offshore person should be sufficient to make the entity an "offshore person". Many New Zealand incorporated companies should be regarded as offshore for RLWT purposes. The requirement should be for the majority of directors to be New Zealand residents, rather than all of them. *(New Zealand Law Society)*

The requirement for directors should be limited to a requirement for the majority of the directors to be New Zealand-based in order to not be an offshore person. There will be some companies that are clearly domiciled in New Zealand and are New Zealand taxpayers, but that may have an offshore director. *(Auckland District Law Society)*

The test should be whether the majority of directors are "offshore" persons, or whether control is exercised offshore. *(Chartered Accountants Australia and New Zealand)*

It is excessive that a New Zealand-incorporated and tax-resident company could be an "offshore person" just because one of its members, directors, or executives is an offshore person. *(EY)*

Comment

In the bill as introduced, a company with at least one offshore director would result in an entity being an "offshore person" and subject to RLWT, if they have disposed of residential land within two years of acquisition. Officials note that almost all companies that dispose of land within two years, prima facie, will have a tax liability under the bright-line test (or another land taxing provision depending on their circumstances). It was expected that the requirement for all directors not to be offshore persons would be relatively simple to determine and would provide a higher degree of integrity.

The independent specialist tax advisor to the Finance and Expenditure Committee has suggested that instead of requiring all directors not to be offshore persons, the company should be "offshore" only if more than 25 percent of directors are offshore. This would be consistent with the approach taken in the Overseas Investment Act 2005, which identifies overseas persons for screening purposes.

Officials note that this would result in more situations when RLWT will not apply even though the entity has a liability under the bright-line test if they have disposed of residential land within two years of acquisition (or under another land taxing provision depending on the circumstances). However, officials agree that a 25 percent threshold, combined with certification of this fact by a New Zealand director, would provide an acceptable level of simplicity and integrity.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Companies – shareholders

Submission
(KPMG)

A company should be an offshore person if it does not have at least one New Zealand shareholder. If this submission is not accepted, it should only be an "offshore person" if the majority of shareholders are offshore persons.

Comment

Officials note that almost all persons caught under the offshore persons definition as proposed in the bill will, prima facie, have a tax liability under the bright-line test if they dispose of residential land within two years of acquisition (or under another land taxing provision depending on their circumstances).

Further, the 25 percent threshold for shareholding reflects that contained in the Overseas Investment Act 2005. Officials consider that this is also appropriate for RLWT.

Recommendation

That the submission be declined.

Clause 45

Issue: Companies – certification of shareholders

Submission
(Auckland District Law Society)

Many companies will have a plethora of shareholders and it may be impossible for a lawyer to assess whether 25 percent threshold has been breached. How will a lawyer determine this?

Could they rely on certifications of directors, or on the residential addresses registered at the Companies Office to make that determination, or a combination of the two? There should not be any comeback for the lawyer if they have made their best efforts to ascertain this.

Comment

Officials acknowledge that it would be difficult to require lawyers and conveyancers to identify all shareholders and determine whether they are offshore persons, particularly in the case of indirect shareholders.

It was envisaged that by requiring all directors of a company not to be offshore persons themselves, the offshore status of the company could be determined by requiring all of the directors to certify the relevant shareholding of the company. This would enable appropriate follow-up action by Inland Revenue to be easily taken in the event that the information provided by the directors proved to be incorrect.

After discussion with the independent specialist tax advisor to the Finance and Expenditure Committee, officials agree that only one New Zealand director should be required to certify the shareholding of the company, rather than all directors. This still maintains a reasonable degree of integrity but would more appropriately reflect commercial reality. The withholding agent would be able to reasonably rely on this certification by the director.

The requirement to certify the shareholding should be clarified in the legislation.

Recommendation

That the submission be accepted, subject to officials' comments.

Clause 45

Issue: Companies – New Zealand incorporation or registration

Submissions
(Chapman Tripp, New Zealand Law Society)

A company incorporated or registered in New Zealand should not be an offshore person – it should be sufficient to rely on these companies returning tax owing in the ordinary income tax return process. *(Chapman Tripp)*

It should be clarified whether a company incorporated outside New Zealand that is registered as carrying on business in New Zealand will be an "offshore person" and if so, it is unclear why it should be so regarded given its New Zealand business presence. It should be clarified whether a company incorporated in New Zealand and registered as doing business in another jurisdiction will be an offshore person and if so, it is unclear why it should be so regarded given its New Zealand incorporation and hence New Zealand tax residence. *(New Zealand Law Society)*

Comment

It would not be appropriate to exclude all New Zealand incorporated or registered companies from being an "offshore person" as this could undermine the application of RLWT by encouraging companies to incorporate or register in New Zealand in order to avoid RLWT.

Recommendation

That the submission be declined.

Clause 45

Issue: Companies – fixed establishment

Submission
(Chapman Tripp)

A company engaged in business in New Zealand through a fixed establishment should be excluded from the definition of "offshore person". The conveyancing agent should be able to reasonably rely on the written representations of the vendor as to whether it has a fixed establishment in New Zealand.

Comment

The "fixed establishment" is a tax concept that depends on the facts and circumstances. Officials do not consider that this test is sufficiently clear for an RLWT agent to apply at the point of withholding.

Recommendation

That the submission be declined.

Clause 45

Issue: Limited partnerships

Submission
(New Zealand Law Society)

As a partnership also includes a limited partnership, we recommend that if an entity approach is to be taken to partnerships, a percentage test should be adopted in the same way as it is for companies.

Comment

Officials agree that the percentage test should apply to limited partners in the partnership in the same way as it is for shareholdings in companies. The requirements that apply to directors of companies should similarly apply to general partners of limited partnerships.

Recommendation

That the submission be accepted.

Clause 45

Issue: Partnerships

Submissions
(Chartered Accountants Australia and New Zealand, KPMG, New Zealand Law Society)

It is not appropriate that the test is based on whether one partner is an offshore person. It should be a control or majority partnership share test. Otherwise a partner with a 1 percent share could make a partnership an "offshore person". *(Chartered Accountants Australia and New Zealand)*

A partnership should be an "offshore person" if it does not have at least one New Zealand partner. *(KPMG)*

It should be clarified whether a non-natural person such as a partnership that is constituted outside New Zealand and is registered as carrying on business in New Zealand will be an "offshore person" and if so, it is unclear why it should be so regarded given its New Zealand business presence. *(New Zealand Law Society)*

It should be clarified whether a tax transparent partnership will be treated as entity to which the RLWT rules apply if at least one partner is an offshore person, or whether the RLWT rules will only apply to the offshore partner(s). If an entity approach is taken, it is unclear why one offshore "member" should be sufficient to render the partnership an "offshore person", whereas a 25 percent holding of shareholder decision-making rights are required for a company. *(New Zealand Law Society)*

Comment

In relation to partnerships, officials were concerned that income could be streamed to an offshore partner. The definition of "offshore person" for non-individuals as introduced was intended to make the rules clearer for RLWT agents, while still maintaining integrity.

The independent specialist tax advisor to the Finance and Expenditure Committee has suggested that the test be amended so that a partnership will be an offshore person only if more than 25 percent of the partners are themselves offshore persons. Further, to address officials' concerns in relation to the misuse of partnerships, she recommended that a partnership should also be an "offshore person" if more than 25 percent of the voting interest, or income interest, is allocated to the offshore partner(s).

Officials note that this would result in more situations when RLWT would not apply, even though the entity would likely have a liability under the bright-line test if they have disposed of residential land within two years of acquisition (or under another land taxing provision depending on the circumstances). We consider the rule as originally proposed would have a greater level of robustness and simplicity. However, we agree that a 25 percent threshold for both the number of partners and interests in partnerships would provide an acceptable level of simplicity and integrity.

In the case of a company, a New Zealand director would be required to certify the shareholding percentage (or the general partner, in the case of a limited partnership). However, in the case of a standard partnership, there will be no equivalent to a director. Officials consider that in this situation, one of the New Zealand partners would be required to make the certification.

Officials note that it would be consistent for the same approach (a 25 percent threshold, a restriction on streaming interests in the property and certification by a New Zealand co-owner) to apply in the case of co-owners of a property.

The independent specialist tax advisor to the Finance and Expenditure Committee has raised concerns in relation to the RLWT implications of changes in partners in the partnership as this will normally be a taxable event for the outgoing and incoming partners. Officials note that this may be an issue for existing withholding taxes, but accept that these issues may arise more frequently as a result of the introduction of RLWT. Officials agree that Inland Revenue should develop guidance on this matter.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Trusts – definition of "settlor"

Submissions
(Auckland District Law Society, Chartered Accountants Australia and New Zealand)

The definition of "settlor" in the Income Tax Act 2007 is so wide so these criteria are far-reaching. A settlement on trust from an overseas relative would result in the trust becoming an "offshore person". (*Chartered Accountants Australia and New Zealand)*

Determining the status of "settlor" could be difficult – they may be impossible to track down. *(Auckland District Law Society)*

Comment

Following discussion with the independent specialist tax advisor to the Finance and Expenditure Committee, officials agree that the reference to settlors should be replaced by a person who has the power to appoint trustees or amend the trust deed.

This would mean that a person who has no effective control over the trust would not affect its offshore status.

Officials note that Inland Revenue should monitor this situation to ensure that there is no abuse.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Trusts – trustees and settlors

Submissions
(Chartered Accountants Australia and New Zealand, KPMG, New Zealand Law Society)

A trust should only be an "offshore person" only if the control of the trust is exercised offshore or alternatively, if the trust does not have either at least one settlor or at least one trustee who is not "offshore person". (*Chartered Accountants Australia and New Zealand)*

A trust should be an "offshore person" if it does not have at least one New Zealand trustee. If this submission is not accepted, an established trust should only be an offshore person if the majority are offshore persons. *(KPMG)*

It is not explained why merely having a co-trustee or settlor that is an offshore person should be sufficient to bring the trust within the RLWT net. *(New Zealand Law Society)*

Comment

The independent specialist tax advisor to the Finance and Expenditure Committee has suggested that the test be amended so that a trust will be an "offshore person" only if more than 25 percent of the trustees or persons with the power to appoint trustees or to amend the trust deed are offshore persons themselves. This is consistent with the Overseas Investment Act 2005.

Officials note that this would result in more situations when RLWT would not apply, even though the entity would likely have a liability under the bright-line test if they have disposed of residential land within two years of acquisition (or under another land taxing provision depending on the circumstances).

However, we agree that this proposal would provide an acceptable level of simplicity and integrity.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Trusts – beneficiaries

Submissions
(Auckland District Law Society, Chartered Accountants Australia and New Zealand, New Zealand Law Society)

Discretionary beneficiaries have no entitlement to trust monies and so their tax status should be irrelevant. Regarding the six year rule – do they have to have been offshore at the time the distribution was made? What if they were onshore when the money was paid out? Will lawyers have to look at six years of trust accounts? *(Auckland District Law Society)*

In relation to a beneficiary who receives a distribution within six years: this test is not appropriate and should be removed. If not, timeframe should be reduced and/or the scope of distributions should be considered. (*Chartered Accountants Australia and New Zealand)*

The explanation for treating a trust as an offshore person if a beneficiary who is an offshore person has received a distribution within the last six years is flawed. There are numerous situations when an offshore beneficiary can receive a distribution of funds that are completely unrelated to the sale of land. Such an approach is not necessary to realise the goal of ensuring that the gain on disposal of residential land does not escape tax by being transferred to an offshore beneficiary. *(New Zealand Law Society)*

Comment

The intention was that trusts that own the family home should not be an offshore trust solely because some of the beneficiaries were offshore (for example, adult children working overseas). On the other hand, officials have concerns with the possible misuse of trusts to evade payment of RLWT.

The rule as proposed would mean that an offshore beneficiary who has received any distribution in the last six years would result in the trust being an offshore trust. After discussion with the independent specialist tax advisor to the Finance and Expenditure Committee, officials agree this should be amended to situations when an offshore beneficiary has received $5,000 or more from the trust in any one year during the past four years.

However, officials consider this $5,000 per year threshold should be restricted to "natural person" beneficiaries. There should be no minimum threshold in the case of non-natural person beneficiaries, such that a trust would constitute an offshore person if a non-natural person beneficiary has received a distribution from the trust during the past four years. This would mean that a small annual distribution of dividends paid to a beneficiary of a family trust, for example, would not result in the trust becoming an offshore person, but a distribution to an offshore company would.

In addition, this distribution rule should apply to all beneficiaries including discretionary beneficiaries. However, as other parts of the definition for trusts refer to both beneficiaries and discretionary beneficiaries, and the current drafting of the distribution rule does not refer to discretionary beneficiaries, the distribution rule could be read as not applying to a discretionary beneficiary. An amendment will need to be made to ensure that discretionary beneficiaries are covered.

It would not be necessary to determine whether the offshore beneficiary (discretionary or otherwise) was an offshore person at the time of each distribution. The test would look at whether a beneficiary or discretionary beneficiary who is currently an offshore person has received a distribution from the trust within the past four years. In the case natural persons, the test would look at whether a natural person beneficiary or natural person beneficiary who is currently an offshore person has received $5,000 or more from the trust in any one year during the past four years. This will be clarified in further guidance material.

Further, to maintain the integrity of the trust aspect of the "offshore persons" definition following the narrowing of the distribution rule, a trust should be an offshore person if a beneficiary (discretionary or otherwise) is an offshore person and the trust has disposed of residential land within the four years immediately before the relevant disposal of residential land for RLWT.

To summarise, if officials' recommendations regarding the definition of "offshore persons" in this issue, *Issue: Trusts – trustees and settlors*, and *Issue: Trusts – definition of "settlor"* are accepted, a trust would be an offshore person if any of the following criteria apply:

- More than 25 percent of the trustees or persons with the power to appoint trustees or amend the trust deed are offshore persons themselves;
- All natural person beneficiaries and all natural person discretionary beneficiaries of the trust are offshore persons;
- All beneficiaries and all discretionary beneficiaries of the trust are offshore persons;
- A beneficiary or discretionary beneficiary that is not a natural person and is an offshore person has received a distribution from the trust within the last four years of a relevant disposal of residential land;
- A natural person beneficiary or natural person discretionary beneficiary that is an offshore person has received from the trust distributions of $5,000 or more in any one year of the past four years prior to the relevant disposal of residential land;
- A beneficiary or discretionary beneficiary of the trust is an offshore person and the trust has disposed of residential land

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Trusts – foreign trusts and trusts with a New Zealand resident trustee

Submission
(New Zealand Law Society)

If the vendor is a foreign trust with a qualifying resident foreign trustee, the RLWT measures should not apply, given the trustee's obligation to satisfy the income tax liability of the trust. If

the trust is not a foreign trust and has a New Zealand-resident trustee, the RLWT should not apply. That would reduce compliance costs where a trust was concerned.

Comment

As noted above, officials have concerns with the possible misuse of trusts to evade payment of RLWT. Officials note that some of the recommendations outlined above in relation to the criteria for trusts will reduce the scope of the trust criteria.

Recommendation

That the submission be declined.

Clause 45

Issue: Corporate trusts

Submission
(Chartered Accountants Australia and New Zealand)

Corporate trustees should not have to meet both trust and company criteria.

Comment

Officials consider that as corporate trustees are companies, and also trustees of a trust, both criteria should apply. Officials note that some of the issues raised above will reduce the scope of both the company and the trust criteria.

Recommendation

That the submission be declined.

No clause

Issue: Australian citizens

Submission
(EY)

Australian citizens may be regarded as holding residence-class visas granted under the Immigration Act 2009 while they are physically in New Zealand. In their individual capacities they may therefore fall out of the "offshore person" definition if they are physically present in New Zealand on any critical date. Presumably their presence or absence could change the offshore status of any company. The proposed definition could be unworkable for some vendors. If there is no legislative clarification, the Commissioner should provide comprehensive clarification as to the treatment of Australian citizens as offshore persons or

otherwise both in their individual capacity and also the implications for any other body or entity that they are connected to.

Comment
An Australian citizen is generally automatically provided with a resident visa (one of two types of residence-class visas – the other type being the permanent resident visa) upon arrival in New Zealand. Officials understand this resident visa generally expires when the person leaves New Zealand and another one will be issued if they return.

Where an Australian citizen is committed to a life in New Zealand, they may apply for permanent residency or New Zealand citizenship. In this case, they will be required to show that they have held a resident visa continuously for two years and meet certain physical presence tests. As an Australian citizen's New Zealand resident visa normally expires upon departure from New Zealand, officials understand it is possible to endorse the visa with travel conditions to prevent it from expiring upon departure.

An Australian citizen holding a resident visa endorsed with travel conditions, a permanent resident visa, or New Zealand citizenship will be able to meet the standard offshore person test looking back at the previous 12 months or three years depending on the circumstances. However, other Australian citizens (those whose resident visas expire upon departure) will need to be physically present in New Zealand on the day of the residential land purchase amount to satisfy the requirement.

Officials do not consider any legislative clarification is required, but agree that further guidance on the issue would be appropriate.

Recommendation

That the submission be noted.

Clauses 44 and 45

Issue: Different term should be used for "offshore person"

Submission
(Chapman Tripp)

Different definitions of "offshore person" are necessary for the tax statement and RLWT, but it should be renamed – for example, "overseas vendor".

Comment

Officials acknowledge the submitter understands that the definition of "offshore person" for the purposes of the tax statement is not appropriate in the context of RLWT. The reason for the different definitions is that when the definition of "offshore person" was first created for the purposes of land information requirements it was not envisaged that it would also be used in the context of a withholding tax.

Officials agree that use of the same term could create confusion and if the definition is different to that used for land information purposes, a different term should be used.

Recommendation

That the submission be accepted, and the matter referred to drafters.

Clause 45

Issue: Non-individuals – use of the terms "member" and "executive"

Submissions
(Chapman Tripp, Chartered Accountants Australia and New Zealand, New Zealand Law Society)

"Member" and "executive" should be defined. They are not technical terms and it is not appropriate to use non-technical terms in this context. *(Chartered Accountants Australia and New Zealand)*

The use of the term "executive" is unusual in the New Zealand context and it is not clear what persons are intended to be captured by the term. The term "authorised person" should be used instead. *(Chapman Tripp)*

It should be clarified whether the concept of a "member" applies in the context of a company and if it includes a shareholder. It is assumed, but should be clarified, that "member" does not include a shareholder, executive or director, given clause (c)(v) and (vi) of the proposed definition. *(New Zealand Law Society)*

Comment

The term "member" was intended to capture partners in a partnership and other similar arrangements. It is not intended to capture a shareholder, executive or director of a company. Officials agree that the legislation should be amended to clarify this.

The term "executives" was intended to capture persons who held a similar role to directors. This should be clarified in the legislation.

Recommendation

That the submissions be accepted, subject to officials' comments.

Clause 45

Issue: Offshore persons – individuals

Submission
(New Zealand Law Society)

The end date which sets the antecedent three-year and 12-month periods for individuals needs to be specified. It is not clear whether it is the three-year or 12-month period immediately preceding the entry into the contract to sell, the receipt of the first payment relating to the disposal or the receipt of a residential land purchase amount.

Comment

Officials consider that because the RLWT obligation will be triggered when there is a residential land purchase amount, it will need to be determined at the time of payment of the residential land purchase amount whether or not the vendor is an offshore person. This means that the three-year (for New Zealand citizens) or 12-month (for holders of residence-class visas) period immediately preceding the payment of the residential land purchase amount will be the relevant period.

Recommendation

That the submission be noted.

WHEN RLWT APPLIES

No clause

Issue: Exemptions

Submission
(Auckland District Law Society, Chapman Tripp, EY)

Developers will suffer serious cashflow consequences which may discourage offshore developers from going to market if there is no exemption from RLWT. A bank bond system could be used to secure payment of RLWT at a later date and registered on the titles of unsold properties. *(Auckland District Law Society)*

We acknowledge that the RLWT needs to be easy for the conveyancing agent to calculate. Over-withholding will lead to increased compliance costs as taxpayers will frequently want to prepare and file interim returns to apply for refunds. This will also include Inland Revenue's administrative costs in processing the interim returns. RLWT may act as a disincentive to foreign-owned developers and investors who might otherwise undertake residential property development in New Zealand. This may be an unwanted outcome at a time when residential development, particularly in Auckland, is desperately needed. Vendors should be able to apply for a certificate of exemption on an enduring basis similar to the certificate of exemption rules for resident withholding tax (RWT), and potentially automatically where the vendor already holds a certificate of exemption for RWT (that is, where the taxpayer does not present a risk of non-collection). Or it could be on a one-off basis when they post a low risk of non-collection and RLWT would result in gross over-withholding. This would be consistent with international norms (for example, the United States.) *(Chapman Tripp)*

New Zealand tax residents Taxpayers should be able to apply for an exemption, nil or reduced rate certificates on an annual or indefinite basis. It would provide appropriate flexibility for the Commissioner to deal with unusual situations which have not been foreseen or anticipated. *(EY)*

Comment

The interim claim process was designed in lieu of a certificate of exemption facility to mitigate the cashflow issues for people whose tax liability is likely to be lower than the amount of RLWT withheld.

Having in place either a certificate of exemption process *or* an interim claim process would provide similar benefits in terms of revenue integrity as Inland Revenue has the ability to review the situation when a taxpayer has claimed that they have a reduced or no tax liability (before the transaction, in the case of the certificate of exemption, or after the transaction, in the case of the interim claim process). The compliance and administrative costs and benefits of each approach are mixed and there are costs associated with both.

An important part of the policy design was that where possible the RLWT rules should avoid delaying the sale of property.

Given that the certificate of exemption would need to be issued prior to the sale of a property and that this would involve assessment by Inland Revenue of whether the person satisfies the

criteria for the certification of exemption, there may be potential for some sales to be delayed if the vendor needs to wait for the certificate of exemption to be issued. It was for this reason that an interim claim system was considered, overall, to be more appropriate.

However, officials recognise that increasing housing supply is an important issue and the imposition RLWT should not further inhibit housing development, but RLWT in its current form could create major cashflow concerns for developers.

Officials agree that a certificate of exemption process would alleviate some of the concerns raised by submitters, but consider that it should be limited to taxpayers who are in the business of developing land, dividing land into lots, or erecting buildings, and have a good tax compliance history in New Zealand. In this case a certificate of exemption could be provided on an enduring basis. The criteria for whether a taxpayer is in the business of developing land, dividing land into lots, or erecting a building would be based on the existing principles in the land tax rules.

Officials consider that a certificate of exemption should only be provided in bona fide cases where the taxpayer is increasing housing supply, not simply renovating and/or speculating.

As the certificate of exemption could be provided on an enduring basis (for example, one year), there would be additional compliance and administrative benefits, in addition to alleviating significant cashflow concerns. This is because Inland Revenue would only need to consider one exemption certificate application for a particular taxpayer in lieu of processing potentially dozens of interim claims. We note that a certificate of exemption system would also be expected to reduce the volumes of interim claims overall.

In addition, there is an existing provision in place in the Tax Administration Act 1994 that allows taxpayers to provide security to the Commissioner to secure the performance of a tax obligation, subject to other certain requirements. Where a taxpayer would not be able to qualify for a certificate of exemption from RLWT because they do not yet have a good New Zealand tax compliance history (for example, if they have only recently entered the market), officials consider that this provision could be used to allow the vendor to supply a bank bond similar to the Auckland District Law Society submission. Officials are investigating whether it would be administratively possible for developers (and those in the business of subdividing land into lots or erecting buildings) with a good tax compliance history who already hold a certificate of exemption for other tax purposes (for example, a RWT exemption certificate), to use that exemption certificate for RLWT.

Officials consider that in the rare situation where a vendor is eligible for the main home exception under the bright-line test, they should be able to apply for an RLWT exemption certificate. As a certificate of exemption in this case would generally only be issued on a transaction basis, the same compliance and administrative benefits as in the case of developers are unlikely to arise. However, the effect on cashflow could be amplified as it is expected that in most of these cases, proceeds from the sale of a main home would be used to purchase a new main home.

This exemption certificate approach is consistent with the existing legislative rules for certificates of exemption that can be issued to non-resident contractors. Like other certificates of exemption, the Commissioner would have the ability to cancel an RLWT exemption certificate.

The proposed interim claim process would still be available for taxpayers who do not meet the requirements for or have not been issued with an RLWT exemption certificate.

Recommendation
That the submissions be accepted, subject to officials' comments.

Clause 44

Issue: RLWT should not apply if the disposal is taxable under other provisions

Submission
(EY)

RLWT should be restricted to offshore persons whose land disposal is taxable only under bright-line rules. It should not apply to New Zealand tax residents who are offshore persons if the relevant land disposal would also be taxable under other Income Tax Act 2007 provisions. *(EY)*

Comment

The bright-line test was introduced as an objective test to buttress other land taxing provisions. It is possible that a vendor who sells their residential land within two years of acquisition may be taxable under the intention test, for example. In this case, the vendor will have an income tax liability.

In such a case, RLWT should still apply – an offshore person should not be able to avoid the RLWT simply because another taxing provision applies to the transaction. This is because difficulties arise in collecting tax from foreign investors, regardless of which provision applies to impose the tax liability. This intent was articulated in the bill *Commentary* and the earlier officials' issues paper, *Residential land withholding tax*, but the drafting in the bill currently does not achieve this intent due to how the bright-line legislation is worded.

An amendment is required to ensure that the proposed RLWT applies when the offshore vendor is disposing the residential land within the two-year bright-line period, regardless of whether another taxing provision also applies. This will ensure that the RLWT cannot be easily circumvented by the vendor telling the RLWT that they are taxable under a different provision when they have no intent of fulfilling their tax obligations.

Recommendation

That the submission be declined, subject to officials' comments, and the matter be referred to drafters.

No clause

Issue: Guidance on the meaning of "residential land"

Submission
(Chapman Tripp)

There should be guidance on mixed-use assets – for example, lifestyle blocks in rural areas. Otherwise conveyancers and lawyers will need to make a factual determination and if mistaken, they would be liable for penalties.

Comment

The meaning of "residential land" follows the definition used in the bright-line test. Further discussion of the meaning of "residential land" in this context can be found in the special report available on the Inland Revenue tax policy website and in the February 2016 issue of the *Tax Information Bulletin.*

Inland Revenue will provide additional guidance material to conveyancers and lawyers involved in the RLWT process.

Recommendation

That the submission be accepted.

No clause

Issue: Property relationship agreements

Submission
(EY)

There should be a specific exclusion for transfers in relation to property relationship agreements. Section CB 6A(5) specifically excludes relevant disposals by a deceased person's personal representative or beneficiaries described in section FC 1(1)(b), but section CB 6A does not contain any similar exclusions for property relationship agreements as there is no income, because new section FB 3A treats such transfers as disposals and acquisitions at cost. This could feed into the calculation of RLWT resulting in nil RLWT to be withheld, but this is indirect and there should be a specific legislative provision.

Comment

Officials do not consider a specific provision relating to property relationship agreements is necessary for the purposes of RLWT as it may raise questions about the application of the income tax provisions regarding property relationship agreements in other areas. However, officials consider further guidance in this area would be useful for conveyancers and lawyers required to administer RLWT.

Recommendation

That the submission be declined.

No clause

Issue: Main home exception

Submission
(KPMG)

The main home exception should be included. It is possible for someone who works in New Zealand and who is not a New Zealand citizen or permanent resident to have bought residential property, lived in it as a main home and therefore not be subject to tax under the bright-line test when they dispose of it.

Comment

Officials consider that the criteria that must be met for RLWT to apply must be kept as objective as possible, and easily verifiable for conveyancers and lawyers. For this reason, officials do not consider a main home exception to be appropriate in the context of RLWT as it would be easy to circumvent RLWT by claiming the main home exception when it may not actually be available.

However, people eligible for the main home exception will be able to lodge an interim claim once the RLWT has been paid to Inland Revenue and receive a refund. As noted in *Issue: Exemptions*, officials consider a better approach to be a certificate of exemption system for vendors who are offshore persons and eligible for the main home exception. This would mean that the RLWT agent would not be required to assess whether the main home exception applies and instead the vendor would make an application to Inland Revenue for a certificate of exemption from RLWT. The vendor would then provide this certificate of exemption to the RLWT agent.

Recommendation

That the submission be declined.

No clause

Issue: Precise tests in legislation

Submission
(Auckland District Law Society)

The legislation should include precise tests to determine whether or not RLWT is applicable, because offshore vendors will try to convince their lawyer that the tax does not apply. The legislation must set out the mechanics of the process to minimise any discretion.

Comment

Officials agree that the tests should be made as objective as possible to minimise the potential for pushback from vendors and to reduce compliance costs.

Where appropriate, the legislation should prescribe what tests must be satisfied, and in some circumstances, how these tests should be satisfied. However, it is not always appropriate to provide the desired level of detail in legislation. In many circumstances (not necessarily specific to RLWT), the legislation refers to information prescribed by the Commissioner or in a form prescribed by the Commissioner.

Regardless, guidance will be published on what information is acceptable and what must be provided to satisfy a particular requirement.

Recommendation

That the submission be noted.

No clause

Issue: Avoidance techniques

Submissions
(Auckland District Law Society, New Zealand Law Society)

The legislation does not deal with techniques that will be used to avoid RLWT – for example, option fees, parallel agreement, and separate chattels agreements with inflated value. The legislation needs to specifically address these techniques if it is to retain its integrity. *(Auckland District Law Society)*

The bill should address chattels and option fees. *(New Zealand Law Society)*

Comment

Officials consider that the new rules should be monitored to ensure that RLWT obligations are not evaded or avoided. Data from the new information requirements contained in the Land Transfer Amendment Act 2015 is likely to assist in this area.

Officials note that under current legislation, option fees are included in the definition of "an interest in land" and would be captured by the proposed RLWT.

Further guidance will be provided on this.

Recommendation

That the submissions be noted.

Clause 44

Issue: Meaning of "purchase price"

Submissions
(Chapman Tripp, EY)

Clarification is required where there is a transfer of trust property between trustees and where the purchase price is not cash-settled. In the case of associated persons, there will just be a transfer – possibly below market value or nil value. *(Chapman Tripp)*

RLWT should be limited to amounts paid or payable in money and should not include non-cash consideration. RLWT should not apply when the Income Tax Act 2007 deems an amount of consideration to be paid but a lesser or no amount is actually paid pursuant to the relevant transfer agreement. At the least, there should be (statutory) clarification on how the RLWT rules apply in relation to all other income tax rules that treat property as disposed of for a certain amount of consideration. *(EY)*

Comment

The RLWT rules apply to money or money's worth. Further, the obligation to report to the Commissioner amounts that should be subject to RLWT would still apply to RLWT agents, even if RLWT agents are unable to withhold due to no cash being exchanged. When an RLWT agent has been unable to pay RLWT because the purchase price has not been settled in money and has reported the incident to Inland Revenue, officials consider that the RLWT agent should not be penalised. Further guidance on the issue will be provided by Inland Revenue to RLWT agents.

Inland Revenue considers this area should be monitored, particularly for situations when the transaction may involve a transfer of personal property or other non-land assets. Data from the new information requirements contained in the Land Transfer Amendment Act 2015 is likely to assist in this area.

Recommendation

That the submissions be noted.

No clause

Issue: Clarification of "disposal of land"

Submission
(Chapman Tripp)

The definition of "disposal" should be clarified in situations when there is no Agreement for Sale and Purchase or registration of title – for example, company share arrangements and unregistered perpetual leases.

Comment

Officials note that these issues are not unique to RLWT and are relevant in the context of land disposals more generally, but agree that Inland Revenue should provide guidance and examples in relation to such matters.

Recommendation

That the submission be noted.

No clause

Issue: Liquidation and receivership

Submission
(Chapman Tripp)

Schedule 7 of the Companies Act 1993 provides priority of payments to creditors when the taxpayer is in liquidation and section 30 of the Receiverships Act 1993 applies, the taxpayer is in receivership. RLWT should not apply where the vendor is in liquidation or receivership.

Comment

Officials agree that RLWT should be treated the same as other withholding taxes on income (such as RWT and NWRT) in situations of liquidation or receivership.

Recommendation

That the submission be accepted.

Clauses 44 and 45

Issue: Part-payments aggregating more than 50 percent of total purchase price

Submission
(EY)

Clarification is required for the intended treatment in situations where the aggregate of deposits and part-payments is at least 50 percent of the purchase price – it is implicit in the bill, but there is no further explanation. Statutory clarification is required.

Comment

The intent for RLWT is that there should only be one RLWT liability per land disposal and this should arise when the 50 percent threshold is first exceeded.

However, there may be situations when there are a number of part-payments beyond the 50 percent threshold and none of these part payments individually would be sufficient to satisfy the RLWT liability for the entire transaction. In this case, the RLWT agent should retain or withhold RLWT from each part-payment beyond the 50 percent threshold to the extent that they are able to until the RLWT liability has been fulfilled. Amendments to the legislation are required to ensure appropriate due dates and credits are provided in this situation.

Recommendation

That the submission be accepted and the matter be referred to drafters.

PERSON REQUIRED TO PAY RLWT

Clause 44

Issue: Associated persons – scope

Submission
(EY, New Zealand Law Society)

The proposed associated persons provision is too wide. There should be clarification as to which associated persons definition should apply. *(EY)*

Currently the definition of "associated persons" in section YB 1 of the Income Tax Act 2007 does not provide for section CB 6A to be included in the definition of the "land provisions" as defined in section YA 1. The definition of "associated persons" for the purpose of RLWT is presumably also not to be limited to the same extent as it is for the land provisions, but this should be clarified. *(New Zealand Law Society)*

Comment

The land provisions use a narrower version of the "associated persons" definition to prevent association in unnecessary situations. For example, two siblings fall within the broader definition of associated persons, but one sibling should not be considered to be in the business of developing land or erecting buildings, just because the other person sibling is, and so a restricted definition applies for the land provisions.

However, in the context of RLWT, this restriction is not appropriate and the broader definition of associated persons should apply.

In the proposed RLWT rules, RLWT will, in most circumstances, not be a true withholding tax in that the payer will not be held liable for the underlying amount of RLWT. This is because it would not be appropriate to hold a conveyancer or solicitor liable for RLWT if they did not withhold it since they are just an intermediary in the process.

When the purchaser and vendor are associated persons, RLWT will be regarded as a true withholding tax, but it will be the purchaser who is liable for the underlying RLWT, as there may be an increased risk of mischief. As with other withholding taxes, the purchaser may use the services of an agent (for example, a conveyancer or solicitor in this case) to fulfil their withholding obligations.

Recommendation

That the submissions be noted.

Clause 44

Issue: Associated persons – separate bank account

Submission
(EY, PwC)

Requiring a separate bank account for RLWT when the purchaser and vendor are associated persons may require the purchaser to use a conveyancer. *(PwC)*

The requirement to hold RLWT in a separate bank account for the benefit of the Commissioner is excessive, impractical and unnecessarily costly for purchasers. *(EY)*

Comment

Officials agree that this requirement is unnecessary and would not add any extra protection for the Commissioner.

Recommendation

That the submission be accepted.

Clause 44

Issue: Associated persons – amounts treated as received

Submission
(New Zealand Law Society)

When the purchaser and vendor are associated persons and the purchaser is required to withhold, proposed section RL 3 should be amended to ensure that the amount of RLWT payable is treated as being received and derived by the vendor, similar to what is provided for in proposed section RL 2(7).

Comment

In most cases, RLWT as proposed in this bill is not a true withholding tax in that the RLWT paying agent will not generally be held liable for the RLWT.

When the purchaser and vendor are associated persons and the purchaser is required to withhold RLWT, standard withholding tax rules apply. Section RA 9, which applies to withholding taxes, will also apply when the purchaser and vendor are associated persons. It provides that an amount of tax withheld (RLWT in this case) from a payment is treated as received by the payee (vendor).

However, section RA 9 does not automatically apply when the purchaser and vendor are not associated persons, because RLWT is not a true withholding tax in that case. Proposed section

RL 2(7) is therefore required in that circumstance, to ensure that the amount of RLWT payable is still treated as being received by the vendor.

Recommendation

That the submission be declined.

Clause 44

Issue: Associated persons – trigger date

Submission
(New Zealand Law Society)

It is not clear at what point in time the test for associated persons is to be applied. As the obligation to withhold RLWT is triggered when a residential land purchase amount is paid, it should be that date that the test of association is applied, rather than the date the Agreement for Sale and Purchase is entered into. It is often the case that between the date of the agreement and settlement, the purchaser will nominate another person or entity to complete settlement and take title to the land.

Comment

Officials agree that the appropriate time for the associated persons test to be triggered is the date on which a residential land purchase amount is made and the RLWT is to be retained from that payment. This is already provided for in the legislation as the RLWT rules apply to a residential land purchase amount paid in relation to a disposal, rather than the disposal itself.

Recommendation

That the submission be noted.

Clause 44

Issue: Seller's conveyancer or solicitor to be paying agent

Submissions
(Chartered Accountants Australia and New Zealand, KPMG)

We welcome the decision to provide as the default position that the vendor's conveyancing agent will be the RLWT paying agent. Imposing the obligation on the purchaser's conveyancing agent would increase compliance costs and create additional risk of non-compliance. *(Chartered Accountants Australia and New Zealand)*

If the RLWT proceeds, we support the deduction obligation arising principally on the vendor's conveyancing agent. *(KPMG)*

Comment

The officials' issues paper *Residential land withholding tax* invited submitters to comment on whether they would prefer the purchaser's conveyancing agent or vendor's conveyancing agent to be the paying agent for the purposes of RLWT. The majority of submitters expressed the preference that the vendor's conveyancing agent should be the paying agent, with compliance costs and availability of information being major factors.

Officials note that this is not the norm for withholding taxes, both in terms of New Zealand's other withholding taxes and property-related withholding taxes overseas. Normally the payer (that is, the purchaser) or their agent will be the withholding agent as they are seen as having the least incentive not to comply.

Requiring the vendor's conveyancer or solicitor to retain/withhold RLWT is a departure from this norm and it is important that necessary safeguards are put in place to ensure that the integrity of the tax system is not undermined.

Recommendation

That the submission be noted.

No clause

Issue: Transfers between trustees

Submission
(Chapman Tripp)

The bill should clarify that transfers between trustees should not be caught.

Comment

In general, a transfer between trustees of the same trust would not be considered a disposal of residential land and therefore would not be subject to RLWT.

Officials consider that this does not require legislation clarification, but will provide further guidance on the issue to RLWT agents.

Recommendation

That the submission be noted.

CALCULATING RLWT

Clause 44

Issue: GST component of purchase price and acquisition price

Submissions
(Auckland District Law Society, Chapman Tripp, Chartered Accountants Australia and New Zealand, EY, KPMG, PwC)

The "current purchase price" and "vendor's acquisition cost" used to calculate RLWT should be net of any GST, if any.

Comment

The draft legislation is currently silent on whether the prices used to calculate RLWT are inclusive or exclusive of GST, when GST has been charged.

As the RLWT is designed to be a collection mechanism on account of a person's income tax liability, officials consider it appropriate that the prices used to calculate RLWT should be net of GST since that is how their final income tax liability will be calculated.

Recommendation

That the submission be accepted.

Clause 44

Issue: Priority – support

Submission
(Chartered Accountants Australia and New Zealand, KPMG)

We welcome the third calculation method for New Zealand bank and non-bank deposit taker mortgages, otherwise there is potential for RLWT to delay or derail settlements. *(Chartered Accountants Australia and New Zealand)*

We support the ability to offset the amount payable under a mortgage. *(KPMG)*

Recommendation

That the submission be noted.

Clause 44

Issue: Priority/deduction for other payments

Submissions
(Auckland District Law Society, Chartered Accountants Australia and New Zealand, Chapman Tripp, KPMG, New Zealand Law Society, PwC)

There should be further amendment to allow for priority for real estate agents and lawyers to be paid from sales proceeds ahead of the RLWT if the new regime is to work. *(Auckland District Law Society)*

Certain direct expenditure should be able to be deducted – for example, real estate agents' costs, legal fees and registration costs incurred in relation to the sale should be included in calculating the vendor's gain. The vendor's conveyancing agent will know all of this because they will have to pay these costs before settlement. If the legislation specifies they are deductible, there should not be additional compliance costs. *(Chartered Accountants Australia and New Zealand)*

The position of overseas mortgages is significantly impacted. The legislation should be crafted to limit instances where this occurs. *(Chapman Tripp)*

The ability to offset the amount payable under a mortgage only captures mortgage relationships with New Zealand banks and should be redefined to include banks registered under the equivalent of the Reserve Bank Act of another jurisdiction. *(KPMG)*

The inability to include post-acquisition costs in the RLWT calculation should be reconsidered. RLWT is likely to over-tax, resulting in refunds. *(KPMG)*

The concept of a "licensed security holder" should be extended to include a person who is not an offshore person or an associate of the vendor, so as to avoid the costs involved of the current vendor possibly needing to obtain a short-term loan from a registered bank or non-bank deposit taker. *(New Zealand Law Society)*

The availability of the third calculation method should not be limited to instances when the paying agent is the vendor's conveyancer or solicitor or when the mortgagee is a New Zealand financial institution. *(PwC)*

Comment

In most situations, the withholding agent for a withholding tax is the payer of an amount and the order of priority is naturally determined as the withholding tax must be paid by the payer before the recipient obtains control over the funds.

The proposed RLWT is unusual in that the obligation to pay RLWT is not on the purchaser (the payer in this case), but the vendor's conveyancer or solicitor who is acting on behalf of the vendor. To protect the integrity of the tax system and ensure that the RLWT cannot be easily circumvented, it is important that RLWT is paid before other payments are made out of the purchase amount.

The provision of priority for mortgages held with a New Zealand registered bank or a New Zealand non-bank deposit taker licensed under the Non-Bank Deposit Takers Act 2013 was inserted in response to consultation on the original issues paper and concerns that the payment of RLWT could prevent settlement from occurring in some cases. Officials do not consider it appropriate to extend the provision to other mortgages secured by overseas mortgagees or non-associates of the vendor as it would create an increased risk of vendors gearing up prior to the sale just to avoid the payment of RLWT.

A similar risk arises in allowing other disbursements to be paid before RLWT – it would be relatively simple for offshore sellers to avoid the payment of RLWT and evade their New Zealand tax liability.

By limiting the provision to mortgages held with New Zealand registered banks and non-bank deposit takers, the Government would be able to more readily identify and react to any abuse as it is more able to monitor the regulatory environment in which the bank or non-bank deposit taker is operating.

Recommendation

That the submissions be declined.

Clause 44

Issue: Priority of local government rates

Submission
(Chapman Tripp)

Under the Local Government Act 2002, unpaid rates amount to a charge on the land which has priority ahead of any mortgage. We recommend for consistency that the obligation to satisfy all rates charges against the property is also ranked ahead of the collection of RLWT.

Comment

As noted in the discussion on *Issue: Priority/deduction for other payments*, there is a general concern about allowing other payments to be made before RLWT is paid. This is because RLWT can be easily avoided by increasing the payments to be made before RLWT. However, officials are satisfied that this potential for gaming does not apply in relation to the seller's proportion of outstanding local authority rates.

Recommendation

That the submission be accepted.

Clause 44

Issue: Default method where information unavailable

Submission
(KPMG)

There should be a default rule for the case when the paying agent does not have the information required to determine the lowest of the three formulae. In this case, RLWT should be deducted at 10% of the current purchase price. The formula in section RL 4(4) should not be available if the vendor has not complied with requests for information from their conveyancing agent.

Comment

The *10% x current purchase price* formula for calculating RLWT is the simplest of the three formulae. The other two formulae rely on information about the vendor's acquisition cost or the value of a New Zealand bank or non-bank deposit taker mortgage.

Officials intended that if information about the vendor's acquisition cost or New Zealand mortgage is unavailable, the default rate would be *10% x current purchase price*. This is because the values for the unavailable information will be zero, and calculation would simply become the lowest of *10% x current purchase price*, *33% (or 28%) x current purchase price* (for the vendor's gain approach, where no acquisition cost is available), and the current purchase price (if no value for a New Zealand mortgage is available).

Recommendation

That the submission be noted.

Clause 72

Issue: Verification requirement for vendor's acquisition cost

Submission
(KPMG)

The legislation is silent on how a conveyancer is required to verify that the vendor's acquisition price is correct. Unless the conveyancer knows the information to be false, the conveyancer should be able to rely on the acquisition price as notified by the vendor and should not have to independently verify the information to ensure that the RLWT amount is correct. If an artificially inflated price is provided by the vendor they should be subject to knowledge offence penalties under the Tax Administration Act 1994.

Comment

Information about the vendor's acquisition cost is available from Quotable Value, a state owned enterprise. The RLWT agent should be able to rely on information obtained from Quotable

Value, unless the vendor is able to provide sufficient evidence of a different acquisition price. This could include providing the RLWT agent with the original acquisition contract.

Recommendation

That the submission be noted.

Clause 44

Issue: Calculation method when there is no conveyancer or lawyer

Submission
(Chartered Accountants Australia and New Zealand)

When neither party has a conveyancer or lawyer, only the 10% rate should be available to avoid additional compliance costs and the risk of error.

Comment

Officials do not consider it appropriate to restrict the availability of the vendor's gain method in this situation. While it may be preferable to restrict the availability of certain methods (for example, the New Zealand mortgage calculation) to prevent abuse or gaming, officials do not consider that there is such a risk here.

Recommendation

That the submission be declined.

No clause

Issue: RLWT will be more than tax owed

Submission
(Auckland District Law Society)

The actual RLWT in every situation will be more than the actual tax owed, if any. This is because the RLWT calculation does not allow for cost of acquisition, costs of disposal, any improvements or any existing losses. Or, in the case of a resident co-owner, they may not be liable for the tax at all. There is no reason why the tax could not be allocated on a percentage of ownership basis. This would save all the extra costs of recovering the refund, not to mention the opportunity cost of the use of the money.

Comment

We understand that the submitter has two concerns. First, that there is too much tax withheld because it does not allow for the deduction of costs related to the acquisition, costs of disposal etc, which necessitates refunds.

Officials note that the calculation of the RLWT is intended to be as simple as possible in order to reduce compliance costs while retaining integrity. Allocating tax on a percentage of ownership basis would require RLWT agents to undertake a more complicated calculation and would require the RLWT agent to collect more detailed information. The interim claim process was intended to mitigate some of the effects of over-withholding.

Second, the submitter is concerned that there is too much tax withheld in the case of a resident co-owner who may not be liable for the tax at all. Officials note that if the property is not the main home of the resident co-owner, the resident co-owner will generally have a tax liability of their own. Where there is a main home, the person will not be liable for tax, and again the interim claim process is intended to mitigate this situation.

Recommendation

That the submission be declined.

INFORMATION REQUIREMENTS

Clauses 44, 45 and 72

Issue: Consistency with the Privacy Act 1993

Submission
(Office of the Privacy Commissioner)

The proposed RLWT changes do not raise any concerns from a privacy perspective and the Privacy Act 1993 will continue to apply to any information collected by RLWT agents.

Recommendation

That the submission be noted.

Clause 72

Issue: Information requirements – retention when the paying agent is not a professional conveyancer

Submission
(PwC)

When the paying agent is not a professional conveyancer (that is, the purchaser), they will not be aware of their obligations. It may be more appropriate to have all relevant information provided to the Commissioner in this circumstance when the RLWT is paid, removing the record keeping requirement from the paying agent (that is, the purchaser).

Comment

Officials agree that when the paying agent is not a professional conveyancer or solicitor and is just the purchaser themselves, it may be more appropriate for the paying agent to provide the information provided to them by the vendor under proposed section 54C of the Tax Administration Act 1994 to the Commissioner at the time they return the RLWT payment. In this case the paying agent should not be required to retain the information for seven years under section 54C(5).

Recommendation

That the submission be accepted.

Clause 72

Issue: Information requirements – retention for seven years

Submission
(Chartered Accountants Australia and New Zealand)

The requirement to retain records for seven years is excessive and imposes an undue burden on conveyancing agents and on purchasers required to deduct RLWT. This should be reduced to four years since IRD has access to information about land sales in real time and devotes specific resource to auditing of property transactions.

Comment

The seven-year retention requirement is a standard feature of record-keeping requirements and officials do not consider it to appropriate to impose a different requirement here.

Recommendation

That the submission be declined.

Clause 72

Issue: Provision of information by seller

Submission
(Chapman Tripp)

The compliance costs for sellers could be passed onto the buyer. The conveyancing agent has to undertake a number of tasks, or risk penalties. The vendor's conveyancing agent will have to investigate certain information in all cases, not merely those where the RLWT actually applies, and further investigations where it looks like RLWT will apply. A simpler solution would be to put the onus on the seller to provide the relevant information, provided that the vendor's conveyancing agent is entitled to rely on that information.

Comment

Officials consider that the onus should be on the withholding agent (usually the conveyancing agent), as they will be able to apply the tests in an objective manner. Otherwise, there is a risk to the integrity of the rules.

However, for certain questions, the conveyancing agent should be able to reasonably rely on information provided by the vendor. This includes the requirement that a New Zealand director (or in the case of a limited partnership, the general partner, or the equivalent of a director in other cases) provides a statement about shareholding by offshore persons. As this would be information provided in relation to a tax law, the New Zealand director or general partner

providing the statement would be subject to criminal penalties if they knowingly provide false information.

Recommendation

That the submission be declined, subject to officials' comments.

Clause 72

Issue: Information requirements – certification of information

Submissions
(Chartered Accountants Australia and New Zealand, EY, KPMG)

For compliance cost reasons, the information requirements should be simplified or reduced in scope. Requiring vendors to provide certified copies of documents is excessive. "Certified copy" has a specific meaning and requires a qualified lawyer to sight the original and verify a copy. In most cases the paying agent will be a qualified lawyer and intimately involved in the land sale transaction – it would be simpler and more efficient for the Commissioner to accept a copy of the document taken by the agent at the time the prescribed form is completed. Alternatively, the form could include an acknowledgement by the agent's lawyer (for example, a tick the box) that they have seen the relevant supporting information. *(Chartered Accountants Australia and New Zealand)*

The requirement for certified copies of relevant documents to be provided and obtained is excessive and should be deleted. *(EY)*

An alternative approach is to apply information requirements only to vendors who are liable for RLWT rather than to all vendors who are subject to the two-year bright-line period. *(Chartered Accountants Australia and New Zealand)*

The bill is silent on how a conveyancer is required to certify information required to be provided by vendors under new section 54C of the Tax Administration Act 1994. It is unclear which information will require certified copies of supporting documents to enable the conveyancer to verify. Unless they know the information to be false, the conveyancer should be able to rely on information provided by the vendor. *(KPMG)*

Comment

Officials agree that the requirement to provide certified copies of documents could be excessive in many circumstances.

As noted in *Issue: Provision of information by seller*, officials consider that while the onus should be on the RLWT agent to determine whether RLWT applies, the conveyancing agent should be able to reasonably rely on information provided by the vendor in relation to certain questions – for example, regarding the shareholding in a company or limited partnership. In the case of a company, there will need to be a New Zealand director who gives a statement as to the proportion of offshore shareholding in the company. In the case of other entities or

arrangements, the equivalent of a New Zealand director would provide the statement – for example, the general partner in a limited partnership.

It may be difficult to provide evidence of the offshore status of all shareholders in some situations, but a statement by a New Zealand director, for example, would provide integrity as this statement would be information provided in relation to a tax law, which means that the New Zealand director would be subject to criminal penalties, if they knowingly provide false information.

However, to be able to provide the statement, the director (or director equivalent in the cases of entities that are not companies), will need to prove to the RLWT agent that they themselves are not an offshore person. They could satisfy this requirement by meeting with the RLWT agent and providing their New Zealand passport, for example. However, in some cases it may not be possible to do this and providing a certified copy may be more appropriate. As such, officials consider that requiring certified documents to be provided isn't necessary and should be removed from legislation.

Recommendation

That the submissions be accepted, subject to officials' comments.

No clause

Issue: Information requirements – duplication of information required

Submissions
(Auckland District Law Society, KPMG)

Vendors have to provide information to their conveyancer, however the bulk of this information is already required as part of the land transfer tax statement. The current land transfer tax statement should be updated to capture any additional information needed for RLWT purposes rather than require the information to be provided by the vendor to their conveyancer. *(KPMG)*

It would be helpful if certifications by vendors under this legislation were included in the tax statement so that there is not further paperwork for information a conveyancing agent is relying upon for certification. *(Auckland District Law Society)*

Comment

We understand the submitters are concerned about potential duplication of information provided to Land Information New Zealand and Inland Revenue.

Under current law, in the majority of land transactions, buyers and sellers need to provide their IRD number unless it is their main home. This information is provided to Land Information New Zealand upon transfer of property. When the person has a conveyancer, this step is done by the conveyancer.

This bill proposes that in situations when there has been a sale of residential land within two years, vendors will be required to provide additional information for RLWT purposes to the

RLWT agent who is, in most cases, the vendor's conveyancer. This information, along with the payment of RLWT, is sent to Inland Revenue. Some of this information (such as IRD numbers) will be useful in completing the land transfer statement.

Officials do not think that it would be beneficial to amend the land transfer tax statement to require additional information about RLWT to be sent to Land Information New Zealand rather than sending this information directly to Inland Revenue. It would lead to unnecessary data risks and administrative costs and does not appear to reduce compliance costs.

Recommendation

That the submissions be declined.

Clause 72

Issue: Information requirements – should be expressly restricted to land acquired after 1 October 2015

Submission
(EY)

The information requirements in section 54C should be expressly restricted to situations where a vendor would have come under section CB 6A in relation to land acquired after 1 October 2015 and the RLWT rules may apply. As presently worded in the bill, section 54C would appear to apply to any disposal of residential land within the bright-line period as defined in the bright-line rules, regardless of whether those rules apply. We consider imposing the proposed information, certification and retention requirements in all such cases is excessive and unreasonable.

Comment

The RLWT applies only in respect of residential land acquired on or after 1 October 2015. Officials agree that the corresponding information requirements in the Tax Administration Act 1994 should also be restricted to residential land acquisitions after 1 October 2015 as the current wording could require information to be provided in relation to residential land acquired before 1 October 2015.

However, the proposed section 54C information requirements should also apply where the vendor would have come under the bright-line test, but for the application of another land taxing provision (the bright-line test applies only if another land taxing provision does not). This would align with the proposed scope of RLWT.

Recommendation

That the submission be accepted, subject to officials' comments.

Clause 72

Issue: When information must be provided to the conveyancer

Submission
(New Zealand Law Society)

The seller should be required to provide information relating to RLWT to the RLWT agent prior to a residential land purchase amount being made, rather than "before the disposal is completed", because the point of disposal will be too late for RLWT purposes.

Comment

The bill, as currently drafted, provides that the seller must provide the required information regarding their IRD number and whether or not they are an offshore person. The bill provides that this information must be provided "before the disposal is completed", which may not coincide with the payment of a residential land purchase amount. From a practical perspective, the conveyancer would need the information to determine whether RLWT needs to be withheld or retained from a residential land purchase amount before the residential land purchase amount is passed on to the seller. For consistency, the seller should therefore be required to provide the required information to the conveyancer before a residential land purchase amount is made.

Recommendation

That the submission be accepted.

Clauses 44 and 72

Issue: Prescribed list of information required

Submission
(New Zealand Law Society)

The Select Committee, in considering the RLWT regime, should be provided with a full list of the information that the Commissioner intends to prescribe so that the Committee can fully understand the extent of the information to be collected and certified in order to gain a full appreciation of the compliance costs that RLWT measures will impose on all residential land transactions. There are difficulties with electronic passports as they will not show that a person is an offshore person and a New Zealand-resident vendor may not have a passport.

Comment

The information that will need to be provided by vendors to prove that RLWT will not apply will depend on the final design of the proposed RLWT. However, officials are able to provide an indicative list of the information required and how the tests may be satisfied, as follows.

RLWT will only apply if all three of the following conditions have been met: the land being disposed of is residential land, the land is being disposed of within two years of acquisition, and the vendor is an offshore person. It will not be necessary to check the remaining conditions if the vendor would be outside the scope of RLWT on one of the conditions.

The legislation does not stipulate which condition should be checked first. In some cases, it will be easiest to first determine the residential land requirement, in some cases, the two-year disposal requirement, and in other cases, whether the vendor is an offshore person.

For example, it may be straightforward if the vendor is a natural person, they are able to sit down with their RLWT agent in New Zealand and they show the agent their New Zealand passport. This would be sufficient to prove that the vendor is not an offshore person and the RLWT agent would not be required to check the remaining conditions.

When the vendor is not a natural person (for example, in the case of companies, partnerships, and trusts,) an appropriate person (such as a New Zealand director, partner or trustee) would be required to provide a statement as to the status of the entity or arrangement. In the case of a company, a New Zealand director (that is, a director who is not an offshore person) would need to state that no more than 25 percent of the shareholders are offshore persons. As noted in *Issue: Information requirements – certification of information* and *Issue: Provision of information by seller*, the director would still need to prove to the RLWT agent that they are not an offshore person (and are therefore eligible to provide the certification). When a statement is provided by a New Zealand director, the RLWT agent should be able to reasonably rely on the statement. Because the information is provided in relation to a tax law, the New Zealand director would be subject to criminal penalties, if they have knowingly provided false information.

As noted in *Issue: Verification requirement for vendor's acquisition cost*, the RLWT agent will be able to rely on information obtained from Quotable Value on regarding the vendor's acquisition cost for the purposes of calculating RLWT. If the vendor does not believe this is the correct acquisition price, they would need to provide the RLWT agent sufficient evidence of a different acquisition price – for example, the original acquisition contract.

Recommendation

That the submission be noted.

WHEN RLWT OBLIGATIONS ARE NOT MET

Clause 44

Issue: What penalties will apply

Submission
(Auckland District Law Society, New Zealand Law Society)

It is unclear what penalties will apply if the paying agent gets it wrong. How will conduct be assessed and what standard of inquiry is expected. Offshore vendors will try and avoid paying the tax; this will place extreme pressure on the conveyancer or solicitor to determine whether the tax is applicable. *(Auckland District Law Society)*

It is also critical that the nature of the possible penalties is clarified. The bill *Commentary* refers only to "general penalties", instancing late filing penalties. (*New Zealand Law Society)*

Comment

In general, the existing penalties under Part 9 of the Tax Administration Act 1994 will apply to the paying agent, as they would to other withholding taxes. However, late payment penalties will apply only in the case when the paying agent has retained the RLWT but has not passed it onto the Commissioner.

Civil penalties

The main civil penalty that may apply will be shortfall penalties. A paying agent may be liable for shortfall penalties if they take a tax position that is inaccurate and satisfies one of the following:

- not taking reasonable care;
- gross carelessness;
- abusive tax position; or
- evasion.

The penalty increases in proportion to the seriousness of the breach.

These penalties apply across different tax types, and official guidance and interpretation is available on how the Commissioner applies each type of shortfall penalty. In addition, there are provisions which determine to what extent taxpayers may be eligible for a reduction in the shortfall penalty.

Where a paying agent has retained an amount of RLWT but not passed it onto the Commissioner, they may be subject to late payment penalties. However, late payment penalties will not be applied where the paying agent has not retained the RLWT. This is because they would be unable to rectify their late payment once the settlement funds have left their hands.

Late filing penalties are a type of civil penalty and they are important in the context of RLWT because if an RLWT agent's statement is not received by the due date, it may negatively affect a taxpayer's ability to use their RLWT credit to offset their income tax liability arising from the disposal of residential land and obtain a refund from Inland Revenue. The possibility of having late filing penalties imposed will encourage agents to provide RLWT statements by the due date. However, an amendment to the drafting is required to ensure that late filing penalties can be applied.

The bill as currently drafted provides that Part 9 of the Tax Administration Act 1994 will apply to RLWT as a withholding tax. However, the section relating to late filing penalties only applies in specific circumstances – to tax types when the timely provision of information to the Commissioner is important (for example, employer monthly schedules and annual imputation credit account (ICA) returns) and does not apply to withholding taxes such as RWT and NRWT as that information is not required until 31 May in the following year.

In this sense, officials consider the provision of RLWT statements to be more akin to employer monthly schedules and that an amendment should be made so that the late filing penalty that applies to employer monthly schedules will also apply to RLWT. This will allow for the timely matching of RLWT data, thereby reducing the amount of time a taxpayer will need to wait for the interim claim to be processed.

Criminal penalties

The paying agent may also be liable for criminal penalties. These are applied by a court of law. Criminal penalties include absolute liability offences, such as failing to keep documents required to be kept under the Tax Administration Act 1994.

Information about the different types of penalties can be found on the Inland Revenue website. However, further guidance will be provided to RLWT agents to ensure they are aware of the consequences for not fulfilling their obligations as RLWT agent.

Recommendation

That the submissions be noted, and the matter raised by officials accepted.

No clause

Issue: Guidance on what constitutes "reasonable care"

Submission
(Auckland District Law Society, Chapman Tripp, New Zealand Law Society)

The bill should include precise tests so that a lawyer can decide whether the tax is applicable without having to obtain an expert tax opinion. This process should be clearly set out in legislation so that discretion on the lawyer's part is minimised. (*Auckland District Law Society)*

The bill does not contain explicit wording as to what amounts to "taking reasonable care" by the conveyancing agent when determining whether the vendor is an offshore person and the

applicability of RLWT. Guidance is needed on what will constitute "reasonable care" and therefore absolve a conveyancing agent from liability under section 141A. *(Chapman Tripp)*

We suggest a standard of reasonable reliance – for example, the provision of a statutory form that the vendor must fill out to certify to their conveyancing agent that they are or are not an offshore person. Requiring higher levels of inquiry behind a vendor's representations would be complex and involve high compliance costs, and be potentially difficult for the conveyancing agent to get right. *(Chapman Tripp)*

Section RL 2(6)(b) should be amended to clarify that the paying agent has no liability for a penalty if it was reasonable, on the basis of the certified information provided by the vendor, for the paying agent to consider that RLWT was not payable. Proposed section 54C of the Tax Administration Act 1994 would require the vendor to provide certified information, but the section does not oblige the potential paying agent to undertake an independent verification. *(New Zealand Law Society)*

Comment

Where possible the bill has included tests that should be relatively straightforward to apply in the majority of cases.

Officials agree that a standard of "reasonable reliance" is appropriate and this should be clarified in the legislation. For example, the test of whether a person is not an offshore person would be satisfied by the person meeting the conveyancer in person and providing their New Zealand passport. The conveyancer would be entitled to assume that this person is not an offshore person, unless there are reasonable grounds for doubt – for example, if it appears that the passport has been altered.

More guidance will be provided on how reasonable reliance will apply in the context of RLWT.

Recommendation

That the submission be accepted.

No clause

Issue: Penalty regime – penalties should be civil not criminal

Submission
(Auckland District Law Society, New Zealand Law Society)

It is critical to lawyers that any penalties imposed are deemed to be "civil" penalties rather than "criminal". If the penalty is deemed to be criminal it is likely to impact on the lawyer's ability to continue to practice law. *(Auckland District Law Society)*

The bill does not expressly state that agents may be liable for criminal penalties but as currently drafted makes that at an option. Introducing a criminal penalty would increase professionals' exposure to risk and thus increase professional indemnity insurance premiums, with a consequent increase in the overall cost of conveyancing services. *(New Zealand Law Society)*

Comment

Civil and criminal penalties play an important role in protecting the integrity of the tax system. The proposed penalties for RLWT simply follow the existing penalties regime.

The vast majority of penalties are civil penalties, while criminal penalties are relatively rare and are court imposed.

It is important to note that all taxpayers face the possibility of being subject to civil and criminal penalties, including withholding agents for other withholding taxes, and it would not be appropriate to provide an exemption from criminal penalties for RLWT agents.

Recommendation

That the submission be declined.

No clause

Issue: Duty to investigate mechanisms used to avoid RLWT

Submission
(Auckland District Law Society)

It is unclear whether the lawyer has a duty to investigate or take into account any mechanisms which are used to reduce the purchase price. The legislation should deal with these issues and clarify whether there is a duty for a lawyer to inquire behind certified statements, including when they have either knowledge or a suspicion that a certified statement may be incorrect.

Comment

Officials consider that if the conveyancer knows or suspects that a statement or other information is incorrect, then they are required to withhold RLWT. For example, if a person provides a statement to the effect that they are not offshore when the conveyancer knows that they are offshore, the conveyancer must withhold tax.

Inland Revenue will use its existing powers to monitor situations where there are likely to be evasion or avoidance concerns.

Recommendation

That the submission be noted.

Clause 44

Issue: Liability of agent for underlying RLWT

Submission
(Chartered Accountants Australia and New Zealand)

We support the proposal to exclude the paying agent from joint and several liability in relation to the vendor's RLWT debt. The funds do not belong to the withholding agent and exposing the withholding agent to liability for the underlying tax could lead to increases in the cost of professional indemnity insurance and thereby increases in conveyancing costs.

Recommendation

That the submission be noted.

Clauses 39 and 44

Issue: When RLWT has been deducted but not paid

Submission
(Chartered Accountants Australia and New Zealand, KPMG, PwC)

When the paying agent has deducted withholding tax, but does not remit this to Inland Revenue, Inland Revenue's recourse should be with the paying agent and the vendor should still receive the credit for the RLWT. *(KPMG)*

It is unduly harsh to pursue the vendor rather than the paying agent when the paying agent has withheld money but has not passed it onto the Commissioner. The bill *Commentary* notes this, but the legislation is currently silent, so it should be strengthened in the legislation. It would be harsh if the vendor is not able to claim a tax credit when RLWT has been withheld but not passed onto the Commissioner as the vendor is deemed to have received full consideration. The RLWT regime should be consistent and either operate wholly on a withheld basis or a paid basis. Proposed section RL 2(7) should also be amended so that it only applies if the money has been passed onto the Commissioner. *(PwC)*

The Committee should ask the Commissioner to issue guidance on circumstances in which a vendor is unable to get a refund or credit because the conveyancing agent or purchaser has withheld RLWT but not paid it to the Commissioner. The vendor should not be denied the credit or refund. *(Chartered Accountants Australia and New Zealand)*

Comment

Officials agree that the vendor should be able to get a refund or credit if the conveyancer has withheld RLWT but not paid it to the Commissioner. This is consistent with other withholding taxes, where the Commissioner will investigate the failure to pay, provide the tax credit to the affected taxpayer, and recover the debt from the withholding agent.

To protect the integrity of the tax system and decrease the risk for fraud, RLWT will generally need to be received by the Commissioner before an interim claim will be released. If there are concerns that an RLWT agent has retained an amount of RLWT and has not paid this to the Commissioner, this will be investigated by Inland Revenue as currently occurs with other withholding taxes, such as PAYE.

In the case of other withholding taxes, the withholding agent is liable for the underlying amount of withholding tax. In the case of RLWT, the draft legislation provides that the RLWT agent is not jointly and severally liable for the vendor's RLWT debt. This is the correct outcome in the situation when the paying agent has not retained RLWT from the settlement amount before paying the funds to the seller. This is because the RLWT paying agent will not be able to recoup the debt from the seller if the paying agent is held liable for the underlying RLWT debt.

The exception to this is when a RLWT paying agent has retained an amount of RLWT from a residential land purchase amount, but has not paid this to Inland Revenue. In this case, the Commissioner should be able to hold the RLWT agent liable for that debt and recover the funds from the agent. Officials consider that further consideration needs to be given to the drafting to ensure that Inland Revenue would have sufficient recourse in this situation and be able to take action against the RLWT agent.

Officials do not consider that proposed section RL 2(7) should be amended as per PwC's submission. Proposed new section RL 2(7) provides that the vendor is deemed to have received both the amount withheld and the net proceeds. This follows other withholding taxes. The standard procedure for other withholding taxes when an amount has been withheld but not paid to the Commissioner is to provide the taxpayer with the tax credit, not to reduce the amount of income deemed to have been derived by the person.

Recommendation

That the submissions be noted, the PwC submission be declined, and the matter be referred to drafters.

Clause 73

Issue: Penalty regime – disclosure to professional bodies

Submission
(Chartered Accountants Australia and New Zealand)

We support the proposed amendment to section 81 of the Tax Administration Act 1994 to allow the Commissioner to provide details of RLWT paying agents to their professional bodies when they have failed to meet their RLWT obligations. We agree that this measure will support the integrity of the RLWT.

Comment

Officials note that this feature of the proposed RLWT plays an important role in protecting the integrity of RLWT, because of the proposal to exclude the RLWT paying agent from having joint and several liability for the RLWT.

Recommendation

That the submission be noted.

Clause 73

Issue: Penalty regime – disclosure to professional bodies needs clarification

Submission
(EY)

There needs to be clarification as to the legislation's intent in relation to possible reporting by the Commissioner to professional bodies of conveyancers' failings to comply with the RLWT rules.

The mere existence of a provision may encourage IRD personnel to report any and all failures – we would expect this only in egregious cases of repeated or deliberate failure but would appreciate acknowledgement as to the legislation's intent. No similar provision applies to any other failure. Provisions as currently drafted are not straightforward, and different definitions of offshore persons could create uncertainty and confusion. As conveyancers are not tax specialists, the 1 July commencement date does not allow much time for finalisation.

Comment

Officials agree that Inland Revenue should report a person only when there are repeated or deliberate failures. This will be clarified in guidance.

Recommendation

That the submission be accepted.

Clauses 41, 42 and 44

Issue: Penalty regime – equity of proposal

Submission
(Chartered Accountants Australia and New Zealand)

We support the decision not to impose late filing penalties on a paying agent who has not retained the amount of RLWT from the residential land purchase amount but to impose late

payment penalties on a paying agent who has retained an amount of RLWT but has failed to pay it to the Commissioner. The proposal is equitable.

Recommendation

That the submission be noted.

No clause

Issue: Penalty regime – fixed penalty regime would be more appropriate

Submission
(Chapman Tripp)

We accept that there needs to be some penalty regime as penalties play an important role in ensuring that taxpayers, including withholding agents, have an incentive to comply with their tax obligations. However, imposing a penalty on a conveyancing agent that is based on a percentage of the unpaid RLWT would seem unduly harsh. The conveyancing agent is merely an intermediary in the process of collecting RLWT. The penalties may be disproportionate to the level of offending and may vary based on the underlying RLWT rather than the offending conduct.

Comment

The level of a penalty should be commensurate to the level of offending in order to prevent perverse incentives from arising.

In the context of RLWT, there will generally be more pressure on the RLWT agent not to withhold when the amount of RLWT to be withheld is large (for example, $100,000) compared with a small amount (for example, $1,000). This is because there may be more to gain when there are large amounts at stake. The role of a variable penalty is to diminish this effect by introducing an equivalent downside to not fulfilling their obligations.

A fixed penalty would generally have a greater effect on incentivising RLWT agents to withhold and pay RLWT when the amount of RLWT is small (for example, the penalty is $200 when the amount of RLWT is $1,000), but will generally not have the same effect when the amount of RLWT is much larger (for example, the same $200 penalty when the amount of RLWT is $100,000).

Withholding taxes normally make the withholding agent jointly and severally liable for the amount of withholding tax, which substantially diminishes the incentive not to withhold. This is not a feature of the proposed RLWT, so variable penalties will play a key role in incentivising RLWT agents to correctly withhold when there are large amounts of funds at stake.

Recommendation

That the submission be declined.

ADMINISTRATIVE ISSUES

No clause

Issue: Assistance for RLWT agents

Submission
(Auckland District Law Society)

Will there be dedicated resources within Inland Revenue to provide support to paying agents who are making assessments and require assistance?

In addition, there are several problem scenarios that require addressing before the RLWT comes into effect. What happens if there are joint vendors and only one vendor is an offshore person? What if a property is being sold with one purchase price but includes more than one certificate of title, and some titles do not have houses on them? How will a lawyer apportion the value of a purchase price when the land has been subdivided and sold as separate lots, particularly if one lot has a pre-existing house on the land and others are bare sections? Inland Revenue should answer these questions and provide extensive examples of how other different scenarios should be treated.

An online calculator will need to be created for the 1 July 2016 implementation date.

Comment

These questions and full examples will be addressed in guidance material issued by Inland Revenue for RLWT agents. Additional resources will be available to assist RLWT agents in fulfilling their RLWT obligations, including an online calculator.

Recommendation

That the submission be noted.

No clause

Issue: Written confirmation of RLWT from Inland Revenue for overseas tax returns

Submission
(Auckland District Law Society)

Written confirmation should be provided by Inland Revenue of the amount of RLWT received in relation to the taxpayer so this can be provided to offshore clients for offshore tax returns they will need to comply with in their respective tax jurisdictions. Paying agents should be able to issue the RLWT certificates for their clients.

Comment

RLWT will be on account of a person's income tax liability and may not reflect the final income tax paid by the person in relation to the disposal at the end of the income year. Providing a certificate of the RLWT paid would not be appropriate when the person's income tax for the year has not been finalised. It could lead to the person's home jurisdiction providing a tax credit when the person is not entitled to the credit – for example, when their final income tax liability for the disposal is less than the amount of RLWT paid or if the overseas tax authority provides a credit for both RLWT and income tax paid, not realising that RLWT is on account of income tax.

Recommendation

That the submission be declined.

No clause

Issue: Guidelines for purchaser and purchaser's agent

Submission
(Chapman Tripp, PwC)

There should be clear guidance for people who do their own conveyancing – that is, where the buyer is the RLWT agent. *(Chapman Tripp)*

Communication strategies should be put in place when the RLWT agent is the purchaser's conveyancing agent or the purchaser themselves as they may not be aware of their obligations. *(PwC)*

Comment

Officials understand that land transfers involving no conveyancer or lawyer make up a very small minority of all land transfer transactions, so it will be unlikely that the purchaser will be the RLWT agent but it is possible that the RLWT agent will be the purchaser's conveyancer or lawyer. However, appropriate guidance will be available to people with RLWT obligations and communication strategies will also be put in place.

Recommendation

That the submission be noted.

Issue: Legislating for interim claims

Submission
(EY, PwC)

Statutory clarification is necessary to provide consistency between the Tax Administration Act 1994 and Income Tax Act 2007. We are not aware of any general statutory authority for taxpayers to file their returns on an interim or early basis. *(EY)*

Specific legislation is required to enable a vendor to prepare and file an interim tax return. *(PwC)*

Comment

The Tax Administration Act 1994 already provides for special returns in specific circumstances, including early returns when the taxpayer no longer has an enduring relationship with New Zealand and will not derive any further income that will be taxed in New Zealand.

Officials consider that a specific legislative provision in the Tax Administration Act 1994 to provide for the interim claim process is necessary. While there are general provisions in sections 79 and 80 of the Tax Administration Act 1994 allowing the Commissioner to require the furnishing of annual returns and other returns in addition to those already prescribed, officials consider that due to the uniqueness of the proposed interim claim process, a specific legislative provision outlining the concept would be beneficial.

Recommendation

That the submission be accepted, and the matter referred to drafters.

No clause

Issue: Process for filing an interim return

Submissions
(KPMG, PwC)

The formulae are likely to result in over-taxation and refunds often take longer than required to be processed. Refunds are a key feature of RLWT and implementation needs to be taken into consideration. There needs to be efficient reimbursement of overpaid tax. It is unclear what remedy will be available to the vendor in situations when RLWT has been over-deducted or deducted in error. *(KPMG)*

We query how a taxpayer would file an interim tax return and final tax return in practice, and what the format of the interim return would be. *(PwC)*

Comment

As noted above in *Issue: Legislating for interim claims* specific legislative authority will be required in the Tax Administration Act 1994 to provide for the interim claim process.

In general, the interim claim process will be available when the vendor has had too much RLWT deducted relative to the income tax liability from the sale *and* they have no outstanding tax debts. However, other requirements will also be necessary to protect the integrity of the tax system. For example, RLWT will generally need to be received by the Commissioner before an interim claim is processed and there may be some verification of deductions.

If the RLWT proposals in this bill are enacted, detailed guidance will be provided on how the interim claim process will work and in what circumstances a taxpayer will be able to file an interim claim.

Recommendation

That the submissions be noted.

No clause

Issue: Assurance of systems capability

Submission
(EY, KPMG)

Detail is required on the interim claim and the RLWT payment processes. The Inland Revenue system will need to be able to identify RLWT deductions at a taxpayer level in real time, meaning that RLWT returns filed by conveyancers will need to itemise the tax paid by each vendor. It is not clear that this requirement has been included by Inland Revenue in its own administration costs. *(KPMG)*

The Commissioner should provide assurance that Inland Revenue's systems will be able to process and release such refunds promptly before the end of the relevant tax year. It would be disappointing if IRD's systems could not refund the excess RLWT because the tax year has not yet ended. *(EY)*

Comment

Inland Revenue's processing systems will be able to cope with releasing funds under an interim claim before the end of a tax year. However, whether funds are released early will depend on a number of factors, including whether the taxpayer meets the requirements for an interim claim, the RLWT has been received by the Commissioner, and sufficient evidence has been provided.

Officials have engaged with representatives from the conveyancing and legal professions to design the reporting and payment process for RLWT, as these agents will likely not have acted as withholding agents before. This will help to streamline the RLWT payment process.

The implementation of RLWT is staggered in that the first payments of RLWT will be made only in relation to residential land acquired on or after 1 October 2015 and disposed of on or after 1 July 2016. This means that at first, RLWT will only apply to disposals of residential land made within nine months of acquisition rather than two years. This will relieve a significant amount of pressure for both RLWT agents and Inland Revenue in relation to a 1 July 2016 implementation date.

Recommendation

That the submissions be noted.

No clause

Issue: ICA credits

Submission
(EY)

The ICA provisions should be amended to expressly recognise RLWT credits and to provide for the timing of such credit for vendors that are ICA companies.

Comment

New Zealand-resident companies are able to maintain an imputation credit account (ICA). A company has imputation credits for income tax or provisional tax paid. These are then attached to dividends paid by the company to reduce the amount of tax payable on those dividends by their shareholders.

Given that the proposed RLWT would be paid on account of income tax, amending the ICA provisions to expressly recognise RLWT credits would lead to double counting.

Recommendation

That the submission be declined.

Clauses 38 and 39

Issue: Tax credits

Submission
(EY)

Clarification is required as to the availability of RLWT credits when there are a number of co-owners, look-through-companies, limited partnerships, trustees and nominee legal owners.

Comment

This is an area that will require further guidance. However, officials' intent is that the availability of RLWT credits in circumstances when there is not a single owner should follow the procedure for other types of withholding taxes.

The treatment of RLWT credits will be clarified in guidance on the RLWT such as the special report and the relevant *Tax Information Bulletin item*. Further guidance will also be provided to RLWT agents, where appropriate.

Recommendation

That the submission be noted.

MINOR DRAFTING ISSUES

Clause 44

Submission
(KPMG)

Proposed new section RL 1(2) should read "by a person (the vendor) to another person (the purchaser)".

Recommendation

That the submission be accepted.

Clause 42

Submission
(KPMG)

The proposed amendment to section RA 10(1)(b) should read "RLWT for a residential land purchase amount". This would appear to leave proposed new section RA 10(1)(c) redundant.

Comment

The submitter refers to the amendment in section RA 10(1)(b), but the correct section reference is section RA 10(1)(a).

The need for both the proposed amendment to section RA 10(1)(a) and the proposed addition of section RA 10(1)(c) arises from the fact that in the majority of circumstances, RLWT will not be a true withholding tax when the purchaser and vendor are not associated persons. Section RA 10(1)(a) begins with "a person liable to withhold an amount of tax for…", which would only apply where the purchaser and vendor are associated persons.

The proposed addition of section RA 10(1)(c) is necessary for all other circumstances when the conveyancer or solicitor (or purchaser themselves, if neither party has a conveyancer or solicitor) is simply a "paying agent" and the vendor remains liable for the RLWT.

Recommendation

That the submission be declined.

Clause 44

Issue: References to tax rates

Submission
(Chartered Accountants Australia and New Zealand, EY)

The tax rates in the RLWT formula should refer to the appropriate clauses in schedule 1 to the Income Tax Act 2007, rather than the numerical rates themselves.

Comment

The RLWT formula as currently drafted refers to 33% and 28%, the top individual marginal tax rate and the company tax rate. The norm is to refer to the clause in the appropriate schedule so that if the tax rate changes, there is no requirement to also update references to that tax rate in the Income Tax Act 2007.

Recommendation

That the submission be accepted.

Clause 45/No clause

Issue: RLWT should be included in the list of tax credits in the definition of "residual income tax"

Submission
(EY)

RLWT should be included in the list of tax credits in the definition of "residual income tax".

Comment

The definition of "residual income tax" is used for the purposes of determining whether a taxpayer should fall within the provisional tax rules.

Generally, a taxpayer will be in the provisional tax rules if they have a residual income tax liability of more than $2,500 in the previous income year. Residual income tax is the amount that remains after subtracting from a person's income tax liability certain tax credits that are listed in the definition of "residual income tax". These tax credits include a number of withholding taxes (for example, non-resident withholding tax, resident withholding tax and PAYE) and ensure that taxpayers who have had tax paid on their behalf at the correct rate throughout the income year do not fall into the provisional tax rules.

Officials consider RLWT to be similar to other withholding taxes in this respect, because RLWT is intended to be a collection mechanism for taxpayers' income tax liabilities arising under the bright-line test, and therefore should be listed as a tax credit in the definition of "residual income

tax". This would ensure that taxpayers will be less likely to fall into the provisional tax rules merely because of an income tax liability arising from the disposal of residential property when RLWT has already been paid on their behalf.

Recommendation

That the submission be accepted.

Clause 44

Issue: Reference to "associated persons" in defined terms

Submission
(New Zealand Law Society)

The relevant RLWT provisions in the bill should include "associated persons" in the list of defined terms.

Recommendation

That the submission be accepted.

Clause 45

Issue: Offshore persons – individuals

Submission
(New Zealand Law Society)

It is not clear whether presence in New Zealand for just one day (or part of one day) is sufficient for the vendor not to be considered an offshore person. The legislation should be clarified.

Comment

It is intended that presence in New Zealand for part of one day would satisfy the requirement not to be an offshore person. This would be consistent with day-count tests in New Zealand's tax residence rules. However, this is specifically provided for in the tax residence rules, so officials consider that a legislative amendment is required to achieve this.

Regarding the submission that it is not clear that presence in New Zealand for a single day would satisfy the test, officials consider the current drafting to be sufficient. The current wording reads "have not been in New Zealand within the last three years" and "have not been in New Zealand within the last 12 months". This should be interpreted as any physical presence in New Zealand during the previous three years or 12 months, rather than continuous presence in New Zealand for three years or 12 months. This point will be clarified in guidance.

Recommendation

That the submission be accepted, subject to officials' comments.

Clauses 35, 36 and 44

Issue: Persons described in sections RL 2 and RL 3

Submission
(EY)

The proposed amendments in sections BE 1 and BF 1 refer to persons "described in" sections RL 3 and RL 2, respectively. We query whether such wording may cause uncertainty or difficulties where a person may meet the description but not be subject to those provisions.

Recommendation

That the submission be noted and the matter be referred to drafters.

Clauses 44 and 45

Issue: Restriction of security discharge amount to situations where vendor or vendor's conveyancer must pay RLWT

Submission
(EY)

We suggest the words "if the relevant person who must pay RLWT is the vendor or the vendor's conveyancer", which are currently contained in the proposed section RL 4(7)(b) definition of "security discharge amount", would be more appropriately included in section RL 4(6). Otherwise, it seems implicit there should be another "security discharge amount" definition applying where purchasers or their conveyancers have RLWT obligations.

Recommendation

That the submission be noted and the matter be referred to drafters.

MATTERS RAISED BY OFFICIALS

Clauses 38 and 39

Issue: RLWT payment and income tax liability may arise in different tax years

Submission
(Matter raised by officials)

Sellers should get a tax credit for RLWT paid in relation to a disposal of residential property in the tax year in which the disposal occurs.

Comment

The bill as currently drafted provides that the taxpayer receives a credit for RLWT in the tax year it is paid. It may be possible for a taxpayer's income tax liability in relation to a residential property disposal to arise in one tax year and the RLWT paid in relation to the disposal to occur in a later tax year. This is because in most cases, the income tax liability under the bright-line test will arise when the person enters into the agreement of the disposal of residential land, but the RLWT obligation will not arise until settlement.

For example, Jo enters into an agreement to sell her property to Scott on 14 March 2017 (during the 2017 tax year), and settlement, along with the payment of the residential land purchase amount, occurs on 10 April 2017 (during the 2018 tax year). As currently drafted, Jo's disposal would be taxable in the 2017 year, but she would not receive an RLWT credit until the 2018 year. It would be possible to allocate the RLWT to the 2017 year, but this would not be possible until Jo's income for the 2018 year has been finalised.

The bill should be amended so that when a payment of RLWT is received by Inland Revenue, the seller receives a tax credit for the amount of RLWT paid in relation to a disposal of residential property for the tax year in which the disposal occurs. In the case of Jo's disposal, she should receive an RLWT credit for the 2017 year.

Recommendation

That the submission be accepted.

No clause

Issue: Use of tax credits when paying agent or withholding agent has underpaid RLWT

Submission
(Matter raised by officials)

Where an RLWT agent has underpaid RLWT, and has other tax debts and tax credits for overpayment on file, those credits should be used once any non-resident withholding tax (NRWT) debt has been paid and before the agent's GST debts.

Comment

In the Income Tax Act 2007, when a taxpayer has a refundable credit, the Commissioner may apply the amount of the refund to satisfy a liability that the taxpayer has under the Inland Revenue Acts. If a taxpayer has more than one tax type in debt, the payment priority order list sets out which tax types are credited first. The order of some of the tax types is set by reference to statutory guidelines, while the order of other tax types is set by operational decision.

The statutory framework for setting the payments is found in schedule 7 of the Companies Act 1993 and in section 274 of the Insolvency Act 2006.

Officials consider that because RLWT will be a type of withholding tax it should sit near other withholding taxes on the payment priority order list. The list currently places resident withholding tax (RWT) on interest, dividend withholding tax, and NRWT (in that order) behind child support, KiwiSaver, student loans (employer), and PAYE. GST is immediately behind NRWT and is the last tax type that is set by reference to statute.

As the RLWT as proposed in the bill is a type of withholding tax, officials consider that it should feature after NRWT and before GST.

Note that in the contrasting situation when an RLWT agent has overpaid RLWT in a given period, the resulting RLWT credit should not be used to offset the RLWT agent's other tax debts. This is because the RLWT payment would have been made from a trust account, which means that the overpayment originates from funds held on trust for someone other than the RLWT agent and should not be used to satisfy the RLWT agent's other tax debts.

Recommendation

That the submission be accepted.

Clause 44

Issue: No negative value for RLWT amount

Submission
(Matter raised by officials)

The amount of RLWT should not be negative, when the amount of RLWT payable is reduced to ensure that a New Zealand mortgage can be fully repaid.

Comment

In some situations, the amount of RLWT payable may be reduced if it would otherwise mean that a mortgage secured over the property issued by a New Zealand bank or non-bank deposit taker could not fully be repaid.

In this case, the amount of RLWT would be the agreed sales price minus the mortgage to be repaid. It may be possible for the seller's mortgage to exceed the agreed sales price, resulting in a negative amount of RLWT. Officials consider that when the amount of RLWT calculated would be a negative number, it should instead be zero. A zero limitation already applies to other RLWT calculation methods.

Recommendation

That the submission be accepted.

Clause 72

Issue: Information about zero amount of RLWT

Submission
(Matter raised by officials)

When a vendor is subject to RLWT, but no RLWT is paid because the vendor has made a basic loss on the sale or the mortgage exceeds the sale price, information about the transaction should still be provided to Inland Revenue.

Comment

The bill as currently drafted provides that a person that must make a payment of RLWT must give a statement of their RLWT obligations to the Commissioner. It is possible that "must make a payment of RLWT" excludes a vendor who is subject to RLWT because they are an offshore person and are disposing of residential land within two years of acquisition, but the amount of withholding is nil because of the way in which RLWT is calculated.

Officials consider that information about such transactions should still be provided to the Commissioner to allow for more efficient data matching with information obtained from Land Information New Zealand on the tax statement.

Recommendation

That the submission be accepted.

OTHER MATTERS

No clause

Issue: Timeframe and process

Submission
(Chartered Accountants Australia and New Zealand)

We recognise this bill is being enacted as Government priority outside the norms of the Generic Tax Policy Process. Nevertheless this approach runs a real risk that the speed in which the proposals will be enacted will impact the quality of the legislation.

Comment

The Generic Tax Policy Process has been followed for the proposals and an officials' issues paper on the RLWT proposals, *Residential land withholding tax* and a government discussion document on the GST proposals, *GST: Cross-border services, intangibles and goods*¸ were released in August 2015. The RLWT and GST proposals were finalised following the standard consultation process on the officials' issues paper and government discussion document.

Officials will monitor the implementation of the proposals and report to the Ministers of Finance and Revenue if concerns with the effectiveness of the rules are identified.

Recommendation

That the submission be noted.

GST on cross-border supplies of remote services

CROSS-BORDER SUPPLIES OF REMOTE SERVICES TO NEW ZEALAND-RESIDENT CONSUMERS

Clauses 46 to 68

Issue: Support for the proposal

Submission
(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Deloitte, EY, KPMG, Miles and Associates Limited, Retail NZ, PwC, New Zealand Racing Board, Software Finance & Tax Executives Council, Trade Me)

Submitters support in principle the proposal to apply GST to remote services and intangibles supplied by offshore suppliers to New Zealand-resident consumers.

Recommendation

That the submission be noted.

Issue: Alignment with international guidance and overseas regimes

Submission
(Chartered Accountants Australia and New Zealand, KPMG)

The submitters support the fact that the proposed rules are consistent with the Organisation for Economic Co-operation and Development (OECD) guidance, and take into account similar GST rules in other jurisdictions, while also still being mindful of the New Zealand context. This should help avoid double taxation or double non-taxation in the international trade of services and intangibles as well as minimising compliance costs for overseas suppliers.

Recommendation

That the submission be noted.

Issue: Requiring financial institutions to return GST on transactions involving cross-border remote services

Submission
(Miles and Associates Limited)

The submitter states that officials should further review the feasibility of requiring financial institutions to return the GST on credit or debit card transactions involving services and intangibles purchased from offshore suppliers.

Further analysis is required before this option can be discarded because there are significant opportunities to be gained from:

- additional tax revenue available through greater (effectively mandatory) compliance;
- the ability to reduce thresholds without adding significant operational or administrative costs;
- simplification of collection and administration of GST from online consumers; and
- future cross-government agency efficiency gains as the GST net on cross-border purchases widens to include small value physical goods.

Comments

Requiring financial institutions to charge and return GST on cross-border supplies of services and intangibles was considered by officials during the development of the proposed rules. The Regulatory Impact Statement (RIS) prepared by officials for the introduction of these rules contains an assessment of this option.

As outlined in the RIS, while this collection option has the potential to automate the collection process, thus minimising the cost of collection as well as collecting GST on physical goods, it was considered to be unworkable in practice.

In order to apply GST to remote supplies of services any system must be able to determine whether a service supplied by a non-resident would be consumed in New Zealand. International guidance suggests proxies for this that differentiate between:

- **"on-the-spot" services** (such as hairdressing, accommodation and restaurant services) being services that are physically performed at a certain location and typically consumed at the same time and place as they are physically performed. In this case the place of physical performance generally determines the place of consumption.
- **"remote" services** (such as e-books, music, videos, and software purchased from offshore websites) being services when the recipient is not generally required to be in the same location as the supplier in order for the service to be performed). In this case the place of consumption is the country of residence of the recipient.

Deviating from the above principles may result in double taxation or double non-taxation in the international trade of services and intangibles. Therefore, in order for financial institutions to correctly apply GST to services through credit or debit card transactions, they would need to have the necessary information to determine whether the service being supplied was a "remote" or "on-the-spot" service. For example, a New Zealand resident purchasing hotel accommodation online for an overseas holiday should not be charged New Zealand GST because the service is consumed outside of New Zealand and the financial institution would need to know this.

Officials' assessment is that in a number of situations the necessary information would not be available to a financial institution to be able to apply GST correctly. This is particularly so when the recipient of the service is purchasing through a payment intermediary, in which case the financial institution may have very little information about the underlying purchase. Furthermore, if it became apparent that only certain payment methods could be relied on by the

financial institutions (such as the use of a New Zealand credit card), consumers would have an incentive to use other means of payment and potentially avoid the imposition of GST.

Therefore, the risk of over- or under-taxation is considered too great to further develop this collection option. Furthermore, this collection option has not been implemented in any other country in part because financial institutions do not consider it to be viable. Further, there is no international experience on how well this option would work, what practical difficulties could arise, and what compliance and administration costs would be involved.

Recommendation

That the submission be declined.

Issue: Extending the offshore supplier registration model to imported goods

Submission
(Deloitte, Retail NZ, New Zealand Law Society)

Currently, GST is not charged on imported goods that fall under the *de minimis* threshold of $60 of duty (which is roughly equivalent to goods valued at $400, if GST is the only duty that applies). This incentivises consumers to buy from foreign competitors and as a result is seriously impacting New Zealand businesses, towns and communities. In principle, there should be no difference in the tax treatment of services and goods. All purchases should be treated the same way for consumption tax purposes regardless of what they are or where they are bought.

The bill should be amended to require offshore suppliers of goods to New Zealand to register and return GST on their supplies, at the same time that these proposed rules for remote services come into effect. This would prevent Parliament from having to consider the same issues again in the short- to medium-term. Suppliers of goods could be expected to comply with the rules, as suppliers of services are expected to comply with the proposed amendments. Firms that choose to comply with the registration requirements could have a streamlined flow of goods across the border. *(Retail NZ)*

Close consideration should be paid to proposals in Australia with non-resident suppliers who supply goods over the GST registration threshold to domestic customers to register and charge GST on all their sales, regardless of the value of the individual sale. *(Deloitte)*

Comment

The proposed amendments would apply GST to cross-border remote services (such as e-books, music, videos and software purchased from offshore websites) by requiring offshore suppliers to register and return GST when their supplies to New Zealand consumers exceed the registration threshold. The bill does not propose to extend this offshore supplier registration system to supplies of imported goods.

Currently, GST is not collected on imported goods when the total duty value (including GST, tariffs and other duties) is less than $60. This roughly equates to goods with a value of $400, if

GST is the only duty that applies. This *de minimis* threshold is intended to ensure that the cost of collecting GST on low-value goods does not outweigh the benefits of doing so.

New Zealand Customs Service (Customs) is leading work on options to improve the collection of GST on low-value imported goods. Customs officials are currently testing several approaches to changing the *de minimis* threshold and streamlining the collection of duty on imports with key stakeholders, and plan to release final proposals for public consultation in April 2016.

The non-collection of GST on imported low-value goods gives rise to similar concerns as imported services, as domestic suppliers consider that the current tax settings place them at a competitive disadvantage when compared with offshore suppliers. However, different considerations arise in relation to imported goods, as they must cross the border to enter New Zealand, rather than being remotely or digitally delivered to customers. Any option to improve the collection of GST on imported goods must be integrated with existing processes to collect GST at the border.

It may be possible, in the future, to extend an offshore supplier registration system to suppliers of imported goods. There may be some advantages to this approach, as GST would not need to be paid by the importer when the goods reach the border, which could result in goods being shipped faster to the customer. Offshore suppliers who make supplies of both goods and services (for example, books and e-books) could use the same system and charge GST on both types of supplies.

However, there would be significant implementation hurdles to overcome in applying this model to imported goods, particularly in relation to the compliance costs for offshore suppliers and the administrative impacts for Customs and Inland Revenue. While an international consensus has developed around the use of the offshore supplier registration model for cross-border services, no other country has implemented similar rules in relation to imported goods. It is difficult to assess the success of the model in this context. As a relatively small market in the global economy, some caution is needed in considering whether New Zealand should adopt such a model ahead of further international developments in this area.

Recommendation

That the submission be declined.

Issue: Support for not extending the rules to imported goods

Submission
(Chartered Accountants Australia and New Zealand)

The submitter supports the decision not to extend the proposed rules to imported goods. A new regime for goods should have regard to international best practice, and New Zealand should not become a leader or outlier in introducing new rules for offshore supplier registration in regard to imported goods.

Recommendation

That the submission be noted.

Issue: Narrow the scope of the rules

Submission
(New Zealand Law Society)

The scope of the rules should be narrowed with subsequent amendments being made to increase the scope of the tax over subsequent years once any issues arising from the initial introduction of the tax are addressed and as the international framework for imposing VAT/GST on remote services becomes more mature.

Comment

The rules as proposed are broadly consistent with OECD guidelines and the rules that apply in other countries, as well as similar proposed rules in Australia. The broad application of the rules is consistent with New Zealand's broad-based GST system.

A departure from the guidelines and the New Zealand broad-based GST system to narrow the scope of the proposed rules would likely result in double non-taxation in the international trade of services. Therefore, the competitive distortions the current rules create would not be fully addressed. Where possible, the rules that apply to domestic suppliers should be consistent with the rules that apply to offshore suppliers to ensure that domestic and offshore suppliers compete on a level playing field.

Recommendation

That the submission be declined.

Issue: Claiming New Zealand input tax

Submission
(Chartered Accountants Australia and New Zealand)

An offshore supplier should be allowed to claim input tax without the supply being received being attributed to a particular taxable supply in New Zealand.

Comment

In April 2014 new cross-border business-to-business neutrality rules were introduced to allow non-resident businesses to register for New Zealand GST and claim back any New Zealand GST cost they may incur. Only those businesses that do not make taxable supplies in New Zealand are eligible to register under these rules. As GST is intended to be a tax on final consumers

rather than businesses, the rules are intended to allow non-resident businesses to register and claim deductions in a broadly similar manner to a comparable New Zealand-resident business.

The 2014 rules are designed to address the submitter's concern. However, officials understand that there could be situations when non-resident businesses may not be eligible to register under these rules as they make taxable supplies under the ordinary rules or the proposed rules outlined in this bill. In these situations, any GST costs they incur that do not relate to a particular taxable supply in New Zealand cannot be recovered.

Since this issue relates to provisions that are not in this bill, it should be considered outside the scope of the bill. Officials will discuss this issue with the submitter in order to better determine to what extent the problem exists in practice.

Recommendation

That the submission be declined, subject to officials' comments.

ADMINISTERING THE RULES

Clauses 46 to 68

Issue: Administrative guidance

Submission
(Chartered Accountants Australia and New Zealand, PwC)

Guidance on how the rules are intended to apply as well as how the regime will operate in practice should be issued several months before the introduction of the new regime on 1 October 2016. *(Chartered Accountants Australia and New Zealand)*

Additional guidance material needs to be issued by Inland Revenue to support the resulting legislation. The guidance material is required to provide certainty and clarity to offshore suppliers. *(PwC)*

Comment

Officials understand the importance of providing clear guidance to offshore suppliers to ensure these newly imposed obligations are well understood. Detailed guidance material on the operation of the new rules will be provided soon after the legislation has been enacted in the form of a *Tax Information Bulletin* and a special policy report. Further practical guidance will follow.

Recommendation

That the submission be noted.

Issue: Enforcement of the rules

Submission
(Trade Me, New Zealand Law Society)

The lack of enforcement processes outlined in the bill remains a significant concern, as a clear and robust enforcement regime is essential to the regime's success. It is important that government collects GST from all suppliers once they reach the proposed registration threshold, and not just larger suppliers who provide an easy target, or face greater reputational pressure. If government fails to ensure these businesses comply, it risks putting an ineffective tax regime in place, or forcing an electronic marketplace to act as a de facto regulator. If offshore suppliers fail to comply with their GST obligations, any enforcement is best dealt with by government. *(Trade Me)*

The Law Society is concerned that insufficient weight is being placed on the prospect that New Zealand taxpayers may be charged amounts on account of GST by offshore suppliers, in circumstances where Inland Revenue has no effective means to monitor the charging of those amounts or collect the tax charged. There is a risk that New Zealand taxpayers will be charged

GST, but this amount is never remitted by the offshore supplier. This results in a net outflow of wealth from New Zealand, arising from the difficulties in monitoring and enforcing the obligation on offshore suppliers to charge and account for GST. *(New Zealand Law Society)*

The overreach inherent in the bill will also undermine the integrity of the tax system by effectively encouraging non-compliance with New Zealand laws. There is no benefit to New Zealand in passing legislation that cannot be enforced, and which in practice, is likely to be ignored. *(New Zealand Law Society)*

Comment

The experience in jurisdictions that have implemented similar rules is that offshore suppliers have demonstrated a willingness to comply. This is to a large extent because the tax is passed on to the New Zealand consumer and any cost is administrative only. Also, for many of these suppliers, failure to comply with their obligations would pose a significant risk to their reputation.

The proposed amendments have been designed to support voluntary compliance, as they are aligned with similar rules in other jurisdictions and contain features that are intended to provide flexibility and reduce compliance costs. The rules will be complemented by simplified registration and return processes, and by the release of clear and helpful guidance that will be easily accessible to offshore suppliers. Setting a relatively high registration threshold (NZ$60,000) in comparison with other jurisdictions should also help to maximise compliance, as only suppliers that make supplies over the registration threshold to New Zealand consumers will be required to register.

As these suppliers are based outside New Zealand, enforcing compliance with the rules will require different strategies to those for New Zealand suppliers, although offshore suppliers will be subject to the same penalty and interest regime as domestic suppliers if they fail to meet their tax obligations. New Zealand has mechanisms for mutual co-operation, information exchange and assistance with many jurisdictions under both bilateral agreements and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("the Convention"). These agreements establish an extensive network of jurisdictions from which New Zealand can request, collect and provide information, assist in the service of documents, and collect unpaid GST.

The OECD envisages countries cooperating and sharing information to ensure that suppliers comply with registration requirements in different jurisdictions. The OECD is therefore working on further guidance for effective exchange of information and other forms of mutual assistance between tax authorities in the field of GST or VAT.

Recommendation

That the submission be noted.

APPLICATION DATE AND TRANSITIONAL RULES

Clauses 2 and 46 to 68

Issue: Commencement date of the rules

Submission
(Deloitte, KPMG, EY)

Implementation of the proposed legislation should be aligned with the implementation of similar rules in Australia (being 1 July 2017). This should help increase the global awareness of the changes and allow suppliers to amend their computer systems at the same time to comply with similar rules in both countries. (*Deloitte)*

The commencement date should be deferred to allow offshore suppliers to become more familiar with the details of the enactments and to be able to design and implement any process and system adjustments needed to comply with their obligations. There may also be language difficulties, particularly for non-residents other than high profile multinational groups. *(EY)*

A later implementation date (of either 1 April 2017 or 1 July 2017) would give offshore suppliers more time to understand the new rules and amend their systems in order to comply with the new rules. Even if the bill is enacted by the end of March 2016, there is a risk that the lead time will not be sufficient for non-residents to adapt their systems to comply with the new rules (*KPMG).*

Comment

The proposed implementation date (being 1 October 2016) should allow close to six months from enactment of the bill to the implementation of the new rules (provided the bill is enacted in April as planned). Offshore suppliers have indicated that this would give them sufficient time to understand the new rules and amend their systems in order to comply with them.

While an extended implementation date would give more time to offshore suppliers to comply with the new rules, this needs to be balanced against the negative impacts resulting from a delay, such as the continued competitive distortions the current GST treatment creates and the delay in receiving the new revenue stream.

Recommendation

That the submission be declined.

Issue: Application of the registration threshold

Submission
(EY)

The rules should be expressed as applying only in relation to supplies made after the commencement date and any liability to register should be based on supplies made or expected to be made after that time.

Comment

Under section 51 of the Goods and Services Tax Act 1985 (the GST Act), non-resident suppliers of remote services will be required to register for GST if the total value of their supplies made in New Zealand:

- in the past 12 months exceeded NZ$60,000 (unless the Commissioner of Inland Revenue is satisfied that their supplies in the next 12 months will not exceed this threshold); or
- in the next 12 months is expected to exceed NZ$60,000.

These are the same rules that apply to domestic suppliers. In practice, as of 1 October 2016, the date the rules would apply from, the threshold will be forward-looking only for offshore suppliers of remote services and therefore an offshore supplier's requirement to register will be based on its expected supplies over the following 12 months.

This is because under the GST Act, pre-1 October 2016 supplies are not "supplies made in New Zealand". It is only as a result of these amendments, that from 1 October 2016, remote supplies of services and intangibles to New Zealand resident consumers will be regarded as "supplies made in New Zealand". This achieves a sensible outcome in practice because offshore suppliers cannot be expected to keep track of supplies to New Zealand residents before the introduction of these rules.

Recommendation

That the submission be noted.

Issue: Transitional rules

Submission
(Chartered Accountants Australia and New Zealand, EY, New Zealand Law Society)

Transitional provisions will be necessary for supplies of on-going or part-provided services under arrangements which already exist as at the commencement date *(EY)*

Specific transitional rules are required for insurance contracts that span the date of introduction, similar to those that were introduced at the time of the GST rate change in 2010. *(Chartered Accountants Australia and New Zealand, EY)*

The continued application of the current rules should be maintained for any claims, recoveries and payments made under pre-1 October 2016 insurance contracts, regardless of whether the relevant periods of cover continue past that date or have expired by that date. *(EY)*

Transitional provisions similar (if not the same) as those applying for the introduction of GST and increase in the GST rate should apply to non-resident suppliers who become liable to account for GST. *(New Zealand Law Society)*

Comment

Officials agree that for some fixed term contracts (such as contracts of insurance), that span the implementation date, it may be administratively difficult to adjust the consideration for the supply if periodic payments are made and the new rules would require those payment made after the implementation date to be subject to GST.

Therefore, officials consider it appropriate to provide a transitional provision for fixed-term contracts entered into before the implementation date. Officials propose a similar transitional provision to section 78AA(10) and (11), which was provided for the GST rate change in 2010. The provision would apply:

- to contracts entered into before 1 October 2016;
- to periodic payments made under the contract, and consequently section 9(3)(a) would apply to treat these payments as successive supplies;
- if the consideration for the supply is set or reviewed for periods of 396 days or less during the term of the agreement (a year and one month should account for contracts that are entered into during a month and end a year later at the end of the month); and
- if the offshore supplier elects that the transitional provision apply.

The transitional provision would allow the supplier to treat periodic payments under the contract as not being successively supplied under section 9(3), and therefore, those payments made after 1 October 2016 would not be subject to GST. This transitional rule would only apply for the term of the agreement or up to 396 days from the date the contract was entered into, whichever is earlier. After that time (for example, contracts that are for a period of more than a year), section 9(3) would apply and treat periodic payments as being successive supplies when the payments become due or are received, whichever is earlier.

Example

Jacob insures his car for a 12-month period with a non-resident insurance provider on 15 January 2016 and he elects to pay for the insurance in monthly instalments. The non-resident insurance provider is able to treat those monthly instalments as not being successively supplied under section 9(3) and, therefore, payments made after 1 October 2016 would not be subject to GST up until the 12-month contract ended.

Jacob has an accident and damages his car on 1 November 2016. He immediately makes a claim under his insurance contract. The insurance provider is unable to claim a deduction for any insurance payment made as it relates to a non-taxable supply of insurance.

This transitional rule is intended to reduce the compliance costs associated with adjusting the consideration for fixed-term agreements that span the application date of the new rules.

Recommendation

That the submission be accepted.

Issue: Grace period for compliance

Submission
(Chartered Accountants Australia and New Zealand, EY, Corporate Taxpayer Group, Deloitte)

The draft legislation should include transitional provisions that allow a reasonable amount of time for businesses to register and de-register without penalty. There may be businesses that register as a result of these changes who should have registered at an earlier date. The legislation should explicitly state that overseas businesses have a period of time to register once these rules have been enacted. It must acknowledge that it may need to forego revenue (or simply compliance obligations) from back years in order to do so. *(Chartered Accountants Australia and New Zealand)*

Officials administering the rules should take an educational approach to the new rules, rather than an enforcement approach. In the short-term, resources would be better devoted to educating non-resident suppliers and recipients on how the new rules apply, rather than penalising them when they get it wrong. *(Corporate Taxpayer Group, Deloitte)*

It is not appropriate to launch a regime with the Commissioner of Inland Revenue perhaps turning a "blind eye" at the initial stage to others who do not immediately initiate any moves to comply. Taxpayer perceptions that the Commissioner of Inland Revenue is applying some part of the tax laws on a partial or inconsistent basis may prejudice their perceptions of the integrity of the tax system. *(EY)*

Comment

Allowing a window for offshore suppliers to register would effectively delay the implementation of the new rules as many suppliers would have an incentive to choose to register at the latest date possible. However, it is recognised that the obligations imposed on offshore suppliers under these proposals may be unfamiliar to some suppliers and will require systems changes to be implemented, which may result in mistakes being made or registration being delayed. These situations will be considered on a case-by-case basis and penalties and interest may be remitted under the Commissioner of Inland Revenue's existing discretion (see sections 183A and 183D of the Tax Administration Act 1994) when it is appropriate.

The existing discretions can be exercised when the Commissioner is satisfied that the non-compliance has been caused by an event or circumstance that provides reasonable justification or excuse for the omission, or when the Commissioner is satisfied that the remission is consistent with the duty to collect, over time, the highest net revenue that is practicable within the law (for example, when there is a genuine oversight or a one-off error).

Inland Revenue will also develop and provide tailored educational material that will be easily accessible to offshore suppliers. This is intended to ensure the obligations imposed on offshore suppliers are clear, thus avoiding simple errors and misunderstandings.

Recommendation

That the submission be declined, subject to officials' comments.

Issue: Taxpayer's historical practice

Submission
(KPMG)

It is possible that the introduction of a new registration system may bring into question the historical practices of some taxpayers, as some taxpayers may have been returning GST when they should not have or have not been returning GST when they should have been. A pragmatic approach to this issue should be adopted, where historic tax positions are not opened up. Therefore, the bill should include transitional rules that:

- allow a period after commencement of the new rules to register under the new rules, without retrospective registration under the existing rules;
- allow a period for an existing registered person to change the nature of their registration; and
- prevent retrospective de-registration.

Comment

A blanket exclusion from considering historic practice would be undesirable for fairness reasons, particularly when a taxpayer was deliberately avoiding tax or was grossly negligent. The Commissioner of Inland Revenue under section 51(4) and 52(5A) already has some discretion relating to when a taxpayer is required to register and de-register. Situations as described by the submitter can therefore be considered on a case-by-case basis and the discretion exercised when it is appropriate.

Recommendation

That the submission be declined.

PLACE OF SUPPLY RULES

Clause 49

Issue: Meaning of "physical performance"

Submission
(EY, New Zealand Law Society)

The references to places where, or times when, services are physically performed in the proposed amendments and in the existing place of supply rules, are unsuitable in many cases, especially in relation to digital services. Not all supplies of services are necessarily "physically performed" or the time or place of such performance may not be obvious or readily identifiable. Difficulties may arise for intangible services (for example, insurance cover and rights to use intellectual property) or when supplies are of an on-going nature (such as a continuing supply of electricity).

Comment

When GST was introduced in 1986, the volume of cross-border trade in services was much lower than it is today, and online digital products were not available. At this time, the place that services were "physically performed" would usually have been a readily identifiable and appropriate proxy for the place of consumption. Since then, advances in technology have enabled consumers to access digital services and intangibles from anywhere in the world, with the services often being delivered through automated processes without any manual intervention from the supplier. In the modern context, it may be more difficult to determine where an automated service, such as the provision of a right to stream a music video, is physically performed.

The existing place of supply rules draw a distinction between services that are "physically performed" in New Zealand, which are generally subject to GST, and services that are "physically performed" outside New Zealand, which are generally not subject to GST. To some extent, the new rules will reduce the emphasis on this boundary, as a service that is remotely supplied to a New Zealand consumer will be taxed, regardless of the place of physical performance.

The place of supply rules are based on the premise that all services are "physically performed" either inside or outside New Zealand, with the place of physical performance being the place where the service is actually carried out or performed, or where the effort in providing the service takes place. In many cases where the supplier has no presence in New Zealand and makes content available to a New Zealand consumer, it will be clear that the service is not physically performed in New Zealand.

Removing the concept of the place where services are "physically performed" from the place of supply rules would be a further fundamental shift in the framework for taxing services, which could inadvertently affect the current interpretation of the GST rules. The tension between traditional frameworks based on the place of performance of services and reforms that are based on the OECD principles of taxing remote services in consumers' place of residence is a challenge faced in many jurisdictions. Officials consider that the best approach would be to maintain a watching brief on international developments in this area before making further changes.

Recommendation

That the submission be declined.

Issue: Physical presence before triggering the requirement for GST to be charged

Submission
(New Zealand Law Society)

The rules should be amended so that a recipient must be both resident in New Zealand and physically present at the time the services are performed, in order to trigger the rules.

Comment

The rules as proposed are consistent with the OECD guidelines and the rules that apply in other countries. The guidelines and international practice suggest that residence is the appropriate proxy for determining New Zealand's right to tax these services.

While other proxies could be used to determine where a person consumes a cross-border service or intangible (such as the physical location of the consumer when the service is received), it is proposed that New Zealand follow international consensus. This will better ensure that cross-border services are only subject to GST/VAT in one country, thus avoiding double taxation or unintentional double non-taxation.

Importantly, diverting from international practice by requiring offshore suppliers to determine their customer's physical location, in addition to their country of residence, would likely impose very significant compliance costs on offshore suppliers and a considerable likelihood of error.

Recommendation

That the submission be declined.

DEFINITION OF REMOTE SERVICES

Clause 47

Issue: Support for definition of remote services

Submission
(Chartered Accountants Australia and New Zealand, KPMG)

The submitter supports the proposal to impose GST on cross-border remote services and intangibles and to insert a definition of "remote services" into the GST Act.

Recommendation

That the submission be noted.

Issue: Narrowing the definition of remote services to include only digital services

Submission
(New Zealand Law Society)

Since digital services are the primary focus of the rules the definition of "remote services" should be amended to include only digital services.

Comment

The proposed definition of remote services is deliberately broad and, in the context of supplies of remote services and intangibles, would include:

- digital services that are typically electronically delivered (such as digital downloads, online music and video streaming services, online gaming and other digital services), and
- traditional cross-border services supplied remotely by a person offshore (such as professional advice like legal and accountancy services).

While some countries have limited their rules to digital services only, in the New Zealand context of a broad-based system, we consider a broader definition of services would be more in line with the objective of neutrality between offshore and domestic businesses. If the rule was limited to digital services there is a risk that it could:

- Bias consumer decisions on whether to purchase digital or non-digital services. For example, the rules may create an artificial distinction between a legal opinion produced by a non-resident that is provided via email and one that is sent through the postal services. (Ideally, tax should not influence people's decisions to purchase a particular type of service or influence the delivery method of a particular service).
- Make the rules more complex and less flexible as suppliers would be required to determine whether a supply of services is "digital" and therefore subject to GST.

A broad definition of "services" is consistent with New Zealand's broad-based GST system and is also consistent with the approach recently announced in Australia and the OECD's guidelines.

Recommendation

That the submission be declined.

Issue: Services should be excluded when it is reasonably foreseeable that the service will be consumed outside New Zealand

Submission
(KPMG)

The definition of "remote services" should specifically exclude services when it is reasonably foreseeable that the services will be consumed outside New Zealand. As presently drafted, the use of a broad definition potentially captures some supplies such as vouchers or loyalty schemes, which could be ultimately consumed in a foreign jurisdiction. These remote services could be purchased and ultimately consumed in a foreign jurisdiction but subject to GST in New Zealand based on the definition of remote services, given the focus on the location of the supplier and recipient at the time of supply.

C**omment**

For many remote services the "place of consumption" is difficult to determine, instead the OECD guidelines and international practice suggest the appropriate proxy for place of consumption is the country where the recipient is resident. This is why the place of residence of the customer forms the basis for taxation under the proposed rules.

Officials understand that there may be situations when a voucher is supplied or benefits under a loyalty scheme are redeemed for an "on-the-spot" service that will be physically performed outside New Zealand. In these situations, the place of consumption is arguably outside New Zealand and therefore the service should not be subject to New Zealand GST.

Despite this, considering New Zealand's rules are similar to the rules that apply in other countries, double taxation and double non-taxation are not likely occur in practice. Amending the rules to address this issue may result in a misalignment with rules that apply in other countries resulting in double taxation and double non-taxation. It is proposed that officials monitor how the rules apply in practice as well as international developments. Further amendments can then be considered if issues arise in practice.

Recommendation

That the submission be declined, subject to officials' comments.

TELECOMMUNICATIONS SERVICES

Issue: Support for the excluding telecommunications services

Submission
(Deloitte, Chartered Accountants Australia and New Zealand)

Submitters support the proposal to retain the special GST rules that apply to telecommunication providers. The telecommunications rules are well established and operate effectively in practice so retaining the current rules is appropriate.

Recommendation

That the submission be noted.

Issue: Interaction with the telecommunication services rules

Submission
(EY)

Clarification may be desirable as to how the proposed section 60C should interact with the current GST rules for telecommunication services supplies in sections 8(6) to (9) and section 8A where services are acquired through a mobile telecommunication device.

Comment

The marketplace rules under section 60C will not apply to resident telecommunication providers as the rules only apply to non-resident marketplaces. In most instances, the rules should also not apply to non-resident telecommunication suppliers unless they supply remote services by electronic means on behalf of underlying suppliers.

It is not expected that merely transmitting a remote service through a mobile telecommunication device would require non-resident telecommunication supplier to register as an electronic marketplace. The act of transmitting a remote service through a mobile telecommunication device would not constitute the supply of a remote service, consequently, the non-resident telecommunication supplier would not meet the proposed definition of "electronic marketplace".

Recommendation

That the submission be noted.

GST REGISTRATION THRESHOLD

Issue: Support for the registration threshold

Submission
(Chartered Accountants Australia and New Zealand, Deloitte, KPMG)

Submitters support the proposed level of the registration threshold of NZ$60,000, which is consistent with the threshold that applies to domestic suppliers.

A very low threshold may have been seen as unreasonable and unlikely to be enforced, so may not have encouraged voluntary compliance. Moreover, a lower threshold would have increased costs for businesses and Government. *(Chartered Accountants Australia and New Zealand)*

Recommendation

That the submission be noted.

Issue: Increase the registration threshold

Submission
(New Zealand Law Society)

The proposed registration threshold should be significantly increased so that offshore suppliers subject to the rule can reasonably be expected to dedicate the resources necessary to comply.

Comment

The proposed rules are intended to ensure that domestic suppliers compete on a level playing field with offshore suppliers. A higher threshold than the threshold that applies to domestic suppliers would disadvantage domestic suppliers and not fully address the competitive distortion the current rules create.

Recommendation

That the submission be declined.

Issue: Registration threshold and currency conversion

Submission
(EY)

Clarification is needed in relation to the currency treatment for offshore suppliers determining whether or not their supplies have exceeded or may exceed the NZ$60,000. Given the volatility of New Zealand's currency, however, difficulties may arise if the annual amounts may or may not exceed the threshold using different conversion rates.

Comment

Officials agree that offshore suppliers whose supplies near the registration threshold may obtain different results depending on currency movements, and that there should be additional clarity on the method of determining whether the threshold is exceeded.

Under section 51(1) of the GST Act, a supplier is liable to be registered:

- at the end of any month where their total value of taxable supplies in that month and the preceding 11 months exceeds NZ$60,000 (unless the Commissioner is satisfied that the value of the supplies in the 12-month period after that month will not exceed the threshold); or
- at the beginning of any month where there are reasonable grounds for believing that the total value of their taxable supplies in the next 12-month period will exceed NZ$60,000.

To ensure the rules are flexible, officials consider that an offshore supplier should be able to use a fair and reasonable method of converting foreign currency amounts to New Zealand currency to determine whether the registration threshold has been exceeded under the first limb of this test. This would include converting amounts to New Zealand currency as at the time of supply, using the exchange rate at the time of testing the threshold, or using an average exchange rate over the period. Any of these methods would be regarded as fair and reasonable as long as they were used on a consistent basis.

The second limb of the test already relates to whether the supplier has reasonable grounds for believing that the registration threshold will be exceeded, which we would expect to be based on the exchange rate in existence at the start of the 12-month period in question.

Recommendation

That the submission be accepted, subject to officials' comments.

DETERMINING WHETHER A CUSTOMER IS RESIDENT IN NEW ZEALAND

Clause 50

Issue: Support for rules for determining whether a customer is resident in New Zealand

Submission
(Chartered Accountants Australia and New Zealand, KPMG, New Zealand Law Society, PwC)

The submitter supports the required methods for determining whether a customer is resident in New Zealand, including the discretion given to the Commissioner to allow her to prescribe the use of another method if required.

The ability of a non-resident supplier to rely on two non-conflicting indicia is an appropriate trade-off between compliance costs and capturing all transactions that could attract GST. *(KPMG)*

We support the proposal to require an offshore supplier to treat a supply to a New Zealand resident as one made to a consumer unless the recipient confirms their status as a GST-registered business. *(PwC)*

Recommendation

That the submission be noted.

Issue: Reliance on indicia to determine whether GST liability arises

Submission
(New Zealand Law Society)

The Law Society supports offshore suppliers being able to rely on the indicia to determine whether GST liability arises, however, an amendment should be drafted to ensure that there is no residual exposure to the offshore supplier when they have correctly considered the indicia.

Comment

It is intended that offshore suppliers will be able to rely on the indicia to determine whether a recipient of a supply is a New Zealand resident. It is intended that there should be no further liability on offshore suppliers if they treat a recipient as being a non-resident (and therefore the supply not being subject to GST) after relying on two non-conflicting pieces of evidence at the time of supply but the recipient is later found to be a New Zealand resident. Officials consider the current draft legislation achieves this policy.

Recommendation

That the submission be noted.

Issue: Declaration that a customer is a New Zealand-resident consumer

Submission
(Chartered Accountants Australia and New Zealand)

An offshore supplier should also be entitled to rely on a statutory declaration by the recipient that they are a New Zealand resident.

Comment

Offshore suppliers will be able to rely on a notification or declaration from the recipient of a supply that they are a New Zealand resident in terms of meeting the test under section 8B(2). For example, a notification or declaration could be in the form of a drop-down list of countries from which the recipient self-selects their country of residence. This would be considered to be "commercially relevant information" under the test in section 8B(2). However, the supplier would also be required to obtain another non-contradictory piece of evidence to establish that the recipient is a New Zealand resident, unless it is agreed with the Commissioner that another piece of evidence is not required.

It is unlikely that statutory declarations would be practical for the types of services supplied under the proposed rules (such as music and video streaming services). A statutory declaration is a legal document to allow a person to declare something to be true for the purposes of satisfying some legal requirement or regulation when no other evidence is available. It is expected that suppliers would more easily be able to obtain information about a person's country of residence, such as the recipient's billing address, IP address or bank details.

Recommendation

That the submission be declined, subject to officials' comments.

Issue: Exercise of the Commissioner's discretion

Submission
(Chartered Accountants Australia and New Zealand, Deloitte, Software Finance & Tax Executives Council)

It should be clear that the provision in proposed section 8B is for the Commissioner to exercise widely and that the legislative wording is not intended to be prescriptive or restrictive about when the discretion can be exercised. It may be that the provision could be worded more broadly to demonstrate this. *(Chartered Accountants Australia and New Zealand)*

The legislation should ensure that there is flexibility in determining the residency of customers and the use of proxies to do this. We are pleased with the inclusion of discretion for the Commissioner to determine other methods, but this area should be closely monitored to ensure that there is sufficient flexibility to allow businesses to function in an efficient manner. *(Deloitte)*

The Commissioner should be afforded authority to provide exceptions to the two pieces of evidence requirement. This would allow for one piece of evidence to be used (such as the country indicated by the billing address or a "drop-down" menu where the customer selects their country of residence). This would be used for scenarios involving high-volume, high-speed low-value supplies of remote services to consumers, and scenarios where the supplier must use less reliable indicia of the consumer's country of residence because the supplier receives no other location information from the consumer. *(Software Finance & Tax Executives Council)*

Comment

Officials agree with submitters that it is important to allow flexibility for cases when offshore suppliers are unable to apply the prescribed tests for determining whether a customer is a New Zealand resident or a GST-registered business. In each case, the Commissioner should be able to either publicly prescribe another method for a class of taxpayers or to agree with a particular taxpayer on a method that is tailored to their circumstances.

Officials consider that factors should be added into the legislation to guide the exercise of the Commissioner's discretion in line with this policy intent.

Without limiting the Commissioner's discretion, the factors that the Commissioner could consider when approving another method to determine the residence of a customer would include:

- whether the supply is made in a low-value, high-volume digital context;
- whether the supply is a one-off transaction, as opposed to circumstances where the supplier and customer have an on-going relationship;
- the information that is commercially available to the supplier.

Similarly, when approving an alternative method for an offshore supplier to determine whether a supply is made to a New Zealand GST-registered business, the Commissioner could consider additional factors such as:

- the nature of the supply (for example, certain advertising services that are generally only purchased by registered businesses);
- the value of the supply (for example, the provision of a high value software package that would only be associated with business use);
- the terms and conditions of the provision of services (for example, software that is licensed for enterprise use across a large number of networked computers would be likely to be supplied to GST-registered businesses).

Recommendation

That the submission be accepted, subject to officials' comments.

Issue: Meaning of "other commercially relevant information"

Submission
(Chartered Accountants Australia and New Zealand, KPMG)

Guidance should be given on what the Commissioner would consider to be "other commercially relevant information". Any information used to make business decisions in the course of carrying on the supplier's business should be sufficient.

Comment

The use of "other commercially relevant information" in proposed section 8B(2) is intended to be consistent with rules that apply in the European Union.[1] It allows flexibility for offshore suppliers to use information that is routinely collected through their existing business processes to determine whether a customer should be treated as a New Zealand resident, rather than specifically prescribing the items of evidence that should be used. This recognises that the information that is available to each offshore supplier will depend on their business model and the technologies used in their interaction with customers.

Examples of "other commercially relevant information" would include:

- the customer's previous trading history, such as the historic IP address or billing address of the customer;
- the customer's selection of their country of residence, for example from a "drop-down" menu on a website;
- the customer's purchase of a product that is localised or locked to a particular region.

The use of "other commercially relevant information" does not mean that only one item of evidence can be used to satisfy the test. A supplier must use two separate pieces of commercially relevant information or other evidence listed in section 8B(2) to meet the requirement of having two non-conflicting pieces of evidence.

Recommendation

That the submission be noted.

[1] Article 24f, Council Implementing Regulation (EU) No 1042/2013

NON-DOUBLE TAXATION RULE

Clause 55(3)

Submission
(Corporate Taxpayer Group, KPMG, Deloitte, New Zealand Racing Board, PwC, New Zealand Law Society)

Further work needs to be done by officials to ensure double taxation does not arise under the proposed new rules. The rule that prevents double taxation in relation to services supplied to non-residents should be broadened to include services that are physically performed outside New Zealand, and the incidence of double tax be closely monitored to determine whether GST should be considered and included as part of New Zealand's double tax agreements.

When a remote service is supplied to a non-resident that is physically present in New Zealand, the supplier should be entitled to zero-rate the supply and no double tax mechanism should be required in these circumstances *(Corporate Taxpayer Group, KPMG, New Zealand Racing Board, Deloitte).*

Global guidelines should be developed to determine which jurisdiction is responsible for giving a refund on a particular supply where GST is due in more than one jurisdiction. We recognise any such measure remains a long way off. *(Chartered Accountants Australia and New Zealand, KPMG)*

The proposed rule allows a deduction to the extent of output tax paid. There does not appear to be any limit to that deduction. If the foreign GST rate exceeds New Zealand's rate, the supplier will be entitled to a refund. *(KPMG)*

The non-double taxation rule should refer to "a tax similar to GST" as opposed to "consumption tax". (*New Zealand Law Society*)

Comment

The non-double taxation rule (under section 20(3)(dc)) is intended to prevent double taxation when the normal GST rules seek to tax a remote service supplied to a non-resident, and at the same time another jurisdiction's GST or Value Added Tax (VAT) rules also seek to tax that same service because the service is being supplied to one of their residents. In this situation, the non-double taxation rule provides an input tax credit for the amount of tax paid to the other jurisdiction in recognition of this double tax effect.

It is intended that the input tax credit be limited to the output tax (GST) paid on the supply in New Zealand (15%) and to the extent tax is paid and returned in the other country.

Example

A resident of Country A visiting New Zealand receives a remote service from a New Zealand supplier. The service is physically performed in New Zealand and therefore subject to New Zealand GST. Country A also requires the New Zealand supplier to register for GST and tax the service at a rate of 20% as it is a remote service supplied to a resident of their country.

The non-double taxation rule allows the New Zealand supplier the ability to claim an input tax credit of up to the amount of New Zealand GST returned on the supply (15%) if the supplier has returned and paid GST to Country A (if Country A's tax rate was 10%, the supplier would only be entitled to an input tax credit of 10%).

Double taxation is only likely to occur in this context when services are performed in New Zealand, as services performed in New Zealand are generally subject to GST. If the service is performed outside New Zealand to a non-resident, the service will be zero-rated (see section 11A(1)(j)), and therefore, double taxation should not occur.

A new zero-rating rule was considered when developing these rules to address double taxation. However, a special deduction rule was considered preferable because:

- at the time of supply the New Zealand supplier may not be aware of his/her obligation to return tax in another country and therefore would not know to zero-rate the supply;
- remote services may be mistakenly zero-rated if it was later found that output tax did not need to be returned in another country; and
- there is less revenue risk associated with a special deduction rule as Inland Revenue would be better able to substantiate that output tax had in fact been returned in another country before providing relief from double taxation.

The non-double taxation rule will therefore prevent double tax in the rare situations when double taxation arises. Officials will monitor the application of the rules and the developments in other jurisdictions to ensure that if these situations become more common the double-taxation rule continues to operate effectively.

Finally, the drafting of the non-double taxation rule in referring to "consumption tax" is consistent with other parts of the Act, specifically section 54(B), which allows non-residents to register and claim back New Zealand GST if they are, amongst other requirements, registered for a "consumption tax" in the country or territory in which they are resident. Consumption taxes are considered to be "a similar tax to GST" and would include VAT and sales taxes. Therefore, officials consider that an amendment is not necessary.

Recommendation

That the submission be declined, subject to officials' comments.

SUPPLIES TO NEW ZEALAND GST-REGISTERED BUSINESSES

Clause 49

Issue: Support for not requiring GST to be returned on business-to-business supplies

Submission
(Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group, KPMG)

Submitters support the proposal that GST will not be required to be returned on remote supplies from offshore suppliers to New Zealand GST-registered businesses. However, an offshore supplier and GST-registered recipient would be able to agree to treat the supply as being made in New Zealand, and therefore zero-rated.

Recommendation

That the submission be noted.

Issue: Zero-rating of business-to-business supplies

Submission
(PwC)

The offshore supplier should be allowed to deduct any New Zealand GST costs incurred in relation to supplies made to a GST-registered business without the need to obtain specific agreement to zero-rate the supply. It would be preferable if the offshore supplier could unilaterally elect to zero-rate supplies to GST-registered persons so long as they have evidence that the New Zealand customer is GST-registered. This would remove the additional compliance costs required to obtain agreement from the New Zealand-resident recipient.

Comment

Officials agree with the submitter. Agreement to zero-rate a supply of remote services by an offshore supplier to a GST-registered business should not be necessary and may impose unnecessary compliance costs on the offshore supplier. An amendment is therefore proposed to allow offshore suppliers to unilaterally elect to zero-rate supplies to GST-registered businesses.

Recommendation

That the submission be accepted.

Issue: GST refund requests from offshore suppliers

Submission
(Chartered Accountants Australia and New Zealand, KPMG)

It is critical that Inland Revenue has efficient procedures for dealing with GST refund requests from non-residents, as an offshore supplier is unlikely to return GST overpaid on a supply to a GST-registered business unless a refund is obtained. It should be considered whether non-residents should be given a greater ability to make adjustments for errors in subsequent GST returns.

Comment

It is expected that the majority of offshore suppliers will only be required to return GST (if they only make supplies of remote services) as they are unlikely to incur New Zealand GST. An optional simplified GST return is therefore being developed for these "pay-only" offshore suppliers, which will remove the ability to claim input tax deductions and receive refunds. A simplified return is expected to lower compliance costs and is consistent with international best practice. In addition, as these suppliers will only be returning GST, they represent a low risk to the tax base and therefore will only be required to provide minimal information about themselves, thus further reducing compliance costs.

There may, however, as the submitters have pointed out, be instances when a non-resident supplier accidently treats a GST-registered business as an individual consumer and therefore charges the GST-registered business GST. In these situations, proposed amendments to section 25(1) will allow a supplier to make adjustments to the payment of output tax in the return in which it is apparent that the mistake has been made. This is intended to reduce the need for a refund to be paid to these suppliers, although the need for a refund may still arise in some instances. Officials therefore note the submission.

Recommendation

That the submission be noted.

OPTION TO PROVIDE A TAX INVOICE FOR SUPPLIES OF NZ$1,000 OR LESS

Clause 57(2)

Issue: Support for option to issue a tax invoice for supplies of NZ$1,000 or less

Submission
(Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group)

The proposal to allow an offshore supplier to issue a tax invoice for a supply of less than NZ$1,000 is a sound, pragmatic solution to the issue of GST being charged inadvertently to a GST-registered business.

Recommendation

That the submission be noted.

Issue: Removal of the option to issue a tax invoice for supplies of NZ$1,000 or less

Submission
(New Zealand Law Society)

The NZ$1,000 limit on the ability for a non-resident to claim GST should be removed.

Comment

The option to provide a tax invoice is intended to be a compliance-saving measure for non-resident suppliers in relation to low-value supplies, when the compliance cost of issuing a refund may exceed the cost of issuing a tax invoice. The NZ$1,000 cap on the ability to provide a tax invoice is a revenue protection measure considered necessary to address the risks with offshore suppliers providing tax invoices and allowing GST-registered business recipients the ability to claim back the GST. For example, offshore suppliers may purport to charge GST but not return the GST and registered New Zealand businesses could then seek to claim the GST back in the normal manner.

Recommendation

That the submission be declined.

Issue: When a tax invoice has to be obtained

Clause 55(5)

Submission
(New Zealand Law Society)

The wording of clause 55(5) should be amended to require the recipient to obtain a tax invoice before claiming a credit.

Comment

It is intended that the existing deduction requirements under section 20(2) (no deduction without required documentation) continue to apply to those recipients that obtain a tax invoice when the consideration for the supply is less than NZ$1,000. In general, this provision requires the recipient to have a tax invoice before a deduction can be claimed.

Recommendation

That the submission be declined, subject to officials' comments.

Issue: Difficulty in determining whether GST is inadvertently charged

Submission
(New Zealand Racing Board)

It seems unclear how a New Zealand GST-registered business could determine whether or not New Zealand GST has been inadvertently charged in the absence of being provided a tax invoice. Once the transaction is completed online, the mechanism for contacting a supplier may be difficult, such that requesting an invoice after the fact may be practically impossible.

An employee may not know the relevant details to satisfy a foreign supplier that they are making the purchase on behalf of a GST-registered business. If the employee then seeks reimbursement from the employer, the employer will face compliance costs in recovering the GST suffered by the employee on behalf of the business.

The Committee should consider whether it is possible to oblige non-resident suppliers to provide easy to access contact details in order to request a tax invoice, or a refund of incorrectly charged GST, if this proves to be required after the transaction has been completed.

Comment

Officials consider that as the intention is to minimise compliance costs for offshore suppliers, the rules should not be prescriptive about when a refund must be provided, or require suppliers to provide publicly accessible details.

Recommendation

That the submission be declined.

ELECTRONIC MARKETPLACES

Clauses 47(3), 65 and 66

Issue: Support for electronic marketplace rule

Submission
(Chartered Accountants Australia and New Zealand, Trade Me)

The requirement for an electronic marketplace operated by a non-resident to register is a sound practical solution to the issue of requiring the registration of many small suppliers.

Recommendation

That the submission be noted.

Issue: Opposition to electronic marketplace rule

Submission
(KPMG)

The submitter does not support the compulsory GST registration of an electronic marketplace operated by a non-resident. The ultimate liability should be on non-resident suppliers to comply with the rules. There is a risk that a requirement for an electronic marketplace to register for GST could result in them ceasing to make supplies to New Zealand consumers.

Comment

The proposed rules will require the non-resident operator of an electronic marketplace (such as an app store), as opposed to the underlying suppliers, to register and return GST on supplies to New Zealand-resident consumers.

Typically, the electronic marketplace has a closer relationship with the customer than the underlying suppliers who make supplies through the marketplace. Consequently, the electronic marketplace rule generally places the responsibility to determine the GST treatment of a supply on the entity that has the best access to the information required to determine whether a customer is a New Zealand-resident consumer or GST-registered business. As the electronic marketplace is likely to be larger and better-resourced compared with the number of underlying suppliers that supply services through it, requiring the operator of the electronic marketplace to register and return GST is also likely to reduce compliance costs overall.

As the proposed rules are consistent with those in place in the European Union and Norway, and with those proposed in Australia, it is expected that many electronic marketplaces that operate globally will already be responsible for returning GST or VAT on supplies in other jurisdictions.

Recommendation

That the submission be declined.

Issue: Documentation for agreements between electronic marketplaces and underlying suppliers

Submission
(EY, PwC)

It would be preferable to remove references to documentation being provided and to agreements being made in documents signed by the relevant parties, as the references to signing documents may lead to confusion or uncertainty for offshore suppliers.

Comment

Officials agree with the submission and consider that proposed subsection 60C(2)(b) should be clarified to state that the supplier and the operator of the electronic marketplace do not need to agree in "a document" that the underlying supplier is responsible for paying GST on the supplies. However, it is expected that some form of evidence be kept to confirm that an agreement was entered into.

Recommendation

That the submission be accepted, subject to officials' comments.

Issue: Operation of electronic marketplace rule

Submission
(Trade Me)

The proposed definition of "electronic marketplace" is problematic. In the proposed definition, the obligation to return GST rests on the electronic marketplace in the first instance, and moves to the underlying supplier only if certain conditions are satisfied. Tax obligations, including registering and returning GST, should rest on the underlying supplier in the first instance. Then, if that supplier supplies to a marketplace, and when certain conditions are satisfied, such as the marketplace setting the terms of the transaction, and authorising payment and delivery, the GST obligation should move to the electronic marketplace, as it becomes best placed to deal with those obligations.

Comment

The rules are drafted to be consistent with those in other jurisdictions, which place responsibility on the electronic marketplace, unless certain requirements are satisfied. This is for the reasons relating to who has the best information, and how compliance costs are best reduced as outlined earlier in this section of the report. International consistency is desirable to reduce compliance costs and uncertainty, as an electronic marketplace will be able to apply the same rules in respect of their supplies to New Zealand as they do for customers in other countries.

Recommendation

That the submission be declined.

Issue: Ambiguous wording

Submission
(Trade Me)

The wording of proposed section 60C(2)(c) is ambiguous, and may cause interpretative issues. It is unclear whether an electronic marketplace must meet each requirement outlined in section 60C(2)(c)(i) – (iii), or whether meeting only two requirements will result in the marketplace failing to meet the test in section 60C(2) . It is submitted that the drafting be clarified to outline that a marketplace must not meet any of the requirements listed in section 60C(2)(c) to avoid returning GST.

Comment

To fall outside of the electronic marketplace rules, the supply must meet all of the requirements in section 60C(2)(a), (b) and (c). This is consistent with similar rules in other jurisdictions. In regard to subsection 60(2)(c), only one of the conditions set out in (i) – (iii) needs to be met before subsection 60(2)(c) precludes the marketplace and the underlying supplier from opting out of the marketplace rules.

Recommendation

That the submission be declined.

Issue: Meaning of "authorise the charge" to the recipient

Submission
(Trade Me)

One of the conditions of electronic marketplaces not being required to return GST on behalf of international suppliers, is that the electronic marketplace does not "authorise the charge to the recipient". It is unclear whether the intention is to outline that it is the marketplace which is the entity that is deducting the payment from the recipient's credit card following receipt of authorisation by the recipient.

Comment

The reference to "authorise the charge to the recipient" is intended to be consistent with similar rules in other jurisdictions. It refers to situations when the electronic marketplace can influence whether, at what time or under which conditions, the customer pays. The electronic marketplace authorises the charge when it decides that the customer's account can be charged for the service.

Recommendation

The submission be declined.

Issue: Excluding click-through entities

Submission
(PwC)

Click-through entities are those where the ultimate purchaser can click-through a link on their webpage to the supplier. The click-through entity does not facilitate the supply of services from the supplier to the purchaser and therefore should not be required to register and return GST on behalf of the supplier. While the proposed definition of electronic marketplace should not capture click-through entities as an "electronic marketplace", for the avoidance of doubt, we consider it is preferable to specifically exclude them from the definition. This will provide certainty to click-through entities that the proposed rules will not apply to them.

Comment

Officials agree that the definition of electronic marketplace is not intended to include "click-through entities". This is because the click-through entity does not make the supply in the situation outlined. Officials consider the wording of the definition of electronic marketplace achieves this policy outcome.

Recommendation

That the submission be declined, subject to officials' comments.

CROSS-BORDER SUPPLIES OF INSURANCE

Clauses 48 and 55

Issue: Rules for cross-border supplies of insurance

Submission
(KPMG)

Insurance is a complex area that will require further consideration and the rules should be carefully reviewed to ensure that they work appropriately in this context.

Recommendation

That the submission be noted.

Issue: Deductions for insurance payments to third parties

Submission
(KPMG)

Clause 55(2) should be amended to specify that a deduction is available unless the supply of the contract of insurance is zero-rated and the reverse charge exception applies, in order to ensure that an insurer would clearly be able to deduct a payment made by a third party supplier (for example for a replacement good).

Comment

A proposed addition to section 20(3)(d) prohibits an offshore insurer from claiming a deduction for an insurance payment made under a contract of insurance when the supply of the contract of insurance is zero-rated under proposed section 11A(1)(x) (the rule that zero-rates supplies to a GST-registered recipient).

The proposed addition to section 20(3)(d) does not prohibit deductions for payments made to third party suppliers (for example, for a replacement good). Instead, the normal deduction provisions under section 20 apply. Officials do not consider that an amendment is necessary to clarify this.

Allowing deductions for payments to third-party suppliers (for example, for replacement goods) ensures that there is no bias between making a cash payment and making a payment for a replacement good. If the GST-registered policyholder instead purchased the replacement good, he/she would normally be able to claim a deduction for any GST incurred.

Recommendation

That the submission be declined.

Issue: Marketplace rules for supplies of insurance

Submission
(Lloyd's of London, EY)

The rules do not take into account situations when insurance services are arranged through a marketplace, on behalf of a syndicate (a vehicle through which its members group together to underwrite insurance). This structure could also involve a New Zealand coverholder who is acting as an agent for syndicate members. The rules as currently drafted may require each syndicate member as an underlying supplier to register and return GST on their supplies, rather than the New Zealand coverholder or insurance marketplace.

Currently, the definition of an "electronic marketplace" is limited to electronically operated marketplaces through which supplies are made by electronic means. This definition could be amended to include a "marketplace" as approved by the Commissioner of Inland Revenue. This would allow the insurance marketplace to register and return GST. This is consistent with the policy intention to require marketplaces to account for GST on cross-border services where the marketplace covers a large number of underlying suppliers.

Similarly to an electronic marketplace, the New Zealand coverholder or the insurance marketplace would have a closer relationship with the New Zealand customer than the members of the syndicate that supply the contract of insurance. Therefore, they will be better placed to determine whether the New Zealand customer is registered for GST.

If insurance is supplied through a New Zealand coverholder, that coverholder should be required to register. If there is no New Zealand coverholder, the insurance marketplace should return the GST. This is consistent with the approach being undertaken for electronic marketplaces.

Comment

Officials agree with the submission. Allowing non-electronic marketplaces (such as a marketplace for insurance) to register and return GST is consistent with the broader policy of allowing electronic marketplaces to register. This should lower compliance costs as underlying offshore insurers would not need to register separately and the marketplace could be expected to have a closer relationship with the New Zealand customer and therefore would be in a better position to apply the proposed rules.

Officials also agree that the non-electronic marketplace would need to agree with the Commissioner before being able to register on behalf of its members. This would allow the Commissioner to ensure that the marketplace was in the best position to return the GST as opposed to its members. This is particularly important for the insurance industry, as the marketplace would need to be in the position to return GST on both premiums received and claim deductions on payments made so that the margin-based approach for calculating the value of general insurance supplies can be properly applied.

Officials also agree that New Zealand coverholders should be able to register and return GST instead of the underlying non-resident insurer or marketplace as they are also likely to be in a better position to return the GST. The existing agency rules require the principal to return the GST (unless the principal is absent). Therefore, an amendment to the agency rules could allow New Zealand coverholders to make returns and be liable for the GST instead of the principal

(the offshore insurance provider), essentially treating the New Zealand coverholders as making the supply of insurance.

Recommendation

That the submission be accepted.

Issue: Standard-rate supplies of insurance to GST-registered businesses

Submission
(Lloyd's of London)

The bill provides an option for the insurer and the GST-registered recipient to agree to treat a supply as zero-rated under proposed section 11A(1)(x), rather than being excluded from GST under the proposed amendments. This optionality will create confusion and there will be greater compliance costs to administer the different GST treatments. Instead, supplies of cross-border insurance to GST-registered businesses should be subject to GST at the 15% rate, and a deduction should be allowed under section 20(3)(d) in respect of the related insurance payments.

Comment

Under the proposed rules, remote services supplied to GST-registered businesses are excluded, unless the parties agree to zero-rate the supply. The reasons for excluding these supplies are as follows:

- There would be significant compliance costs for no net GST revenue if offshore suppliers that made only (or predominantly) business-to-business supplies were be required to register.
- Tax invoice requirements can be relaxed because no New Zealand consumers charged with GST would be in a position to claim back the GST.
- There are some fiscal risks associated with applying GST to business-to-business supplies, which would arise if any offshore supplier purported to charge GST but did not return the GST. Registered New Zealand businesses could then seek to claim the GST back in the normal manner.
- Excluding business-to-business supplies is consistent with how similar rules have been applied in other countries.

The reasons for excluding remote services supplied to GST-registered businesses also apply to remote supplies of insurance services and officials consider that a special rule for insurance would be undesirable. The compliance costs associated with distinguishing between consumers and GST-registered businesses is expected to be manageable for many offshore insurers as they are likely to better understand the nature of the recipient for risk assessment purposes.

Like other offshore suppliers, offshore insurers will also be able to apply to the Commissioner for the use of another method to determine whether the supply is made to a registered person (see proposed section 8B(6)).

Despite the reasons outlined above, when a New Zealand coverholder is registered for GST on behalf of an underlying offshore insurance provider or marketplace, they would be treated as any other New Zealand-resident supplier and therefore would be required to return GST on both supplies to New Zealand consumers and GST-registered businesses. The amendment to the agency rules as suggested in the previous submission would need to ensure the New Zealand coverholder is treated like any other New Zealand-resident supplier.

Recommendation

That the submission be accepted in part, subject to officials' comments.

CROSS-BORDER SUPPLIES OF REMOTE GAMBLING SERVICES

Clause 48(1) and 52

Issue: Formula for determining consideration for gambling services

Submission
(KPMG, New Zealand Racing Board)

It may be difficult for suppliers to determine the boundary between one gambling or prize competition and another, which may lead to disputes and uncertainty. This is less relevant for a New Zealand supplier as all supplies are typically taxable supplies for GST purposes. *(KPMG)*

The formula proposed requires the offshore supplier to include "whole of business" data to apportion prizes (and refunds) to New Zealand. In order to promote voluntary compliance, such unnecessary complication should be avoided. It is more complex for the supplier to attribute the worldwide prizes according to the proportion of bets made by New Zealand residents, compared with simply knowing how much was actually bet (in aggregate) and how much was actually won (in aggregate) by the customers of a particular jurisdiction during the taxable period. Instead, the actual amounts received minus prizes paid to New Zealand-resident consumers should be taxed, and a credit/loss carry-forward mechanism should be developed to address fluctuations within a taxable period. *(New Zealand Racing Board)*

Offshore suppliers should be able to claim a refund for losses from a supply of remote gambling or prize competition, or should be able to offset these losses against the GST payable on other supplies. *(KPMG)*

Clearly, if the proposed pro rata approach is not adopted it will be necessary for negative consideration to be able to arise (and a carry-forward loss, credit or refund to arise to the supplier) to offset future positive consideration and GST payable when New Zealand-resident customers lose. *(New Zealand Racing Board)*

Comment

Officials agree with the submitters. After considering how offshore gambling suppliers would practically be required to apply the proposed formula, we note that there could be significant compliance costs for these suppliers. This may discourage some offshore suppliers of gambling services from complying with the rules or from supplying to New Zealand consumers.

While officials consider that the proposed formula does accurately reflect the value-add associated with supplies of gambling services, and therefore results in the appropriate amount of consideration on which GST would be payable, a similar result can be achieved with a simpler formula that calculates consideration on the basis of amounts received from New Zealand residents less amounts paid out to New Zealand residents:

Consideration = amounts received from residents – prizes paid to residents

As identified in the *Commentary* to the bill, this simplified formula may produce arbitrary results on a supply- by-supply basis or even over a taxable period, because offshore suppliers of gambling services will have limited control over the distribution of prizes across participating

countries. However, over time this distribution can be expected to even out, resulting in a more proportionate amount of consideration being allocated to gambling services provided to New Zealand residents.

Example

Gambling Co. operates an offshore gambling website. Gambling Co. offers a game of chance to two participants, one in Australia and the other in New Zealand. The Australian resident and the New Zealand resident each make a payment of $100 to participate in the game of chance for a 50 percent chance to win $150.

Depending upon who won the prize, the amount of consideration calculated by Gambling Co. could vary significantly if consideration was solely based on the amounts received by the New Zealand residents less the amount of prizes paid to the New Zealand resident. However, a result closer to one that would arise under the formula currently in the bill can be expected the more games the New Zealand and Australian resident plays.

In order for an appropriate amount of consideration to be calculated under the revised formula, the losses to the New Zealand resident would need to be carried forward and offset against the consideration from games won by the New Zealand resident. Therefore, officials recommend that the formula be simplified as suggested, with any New Zealand losses being required to be carried forward and offset against future New Zealand winnings. This ensures that offshore suppliers of gambling services do not return an excessive amount of GST when prizes are won by non-resident participants, nor claim excessive refunds.

Recommendation

That the submission be accepted.

Issue: GST registration threshold determined on a net basis

Submission
(New Zealand Racing Board)

The registration threshold should not be determined on a "net basis", but instead should be based on the amount received from New Zealand residents, to capture a greater number of operators.

Comment

The threshold as applied to domestic suppliers of gambling services is determined on a net basis. To ensure that domestic and offshore suppliers of gambling services are treated equally, officials consider that the threshold that applies to offshore supplies should also be determined on a net basis.

Recommendation

That the submission be declined.

Issue: Clarify treatment of refunded bets

Submission
(New Zealand Racing Board)

The formula proposed may not be sufficient to provide clarity on the treatment of refunds. Refunds could arise due to an event not proceeding or if the supplier offers a rebate to the customer based on the quantum of bets. Offshore betting providers may require assistance to confirm that "free-bets" provided to a New Zealand customer, when there is no "amount received" for the bet are not required to be included in "resident amounts".

Comment

To ensure consideration in relation to gambling services is not over-estimated, refunds paid back to New Zealand-resident participants should be subtracted from "resident amounts" (amounts received from New Zealand residents).

Recommendation

That the submission be noted.

MISREPRESENTATIONS BY RECIPIENTS OF REMOTE SERVICES

Clause 48(5)

Submission
(KPMG, New Zealand Law Society)

The proposed section 5(27) and knowledge offences should be amended to make it clear that they apply where the information is provided with the purpose of avoiding New Zealand GST, rather than leaving their application to administrative practice. (*KPMG*)

The Law Society is concerned at the vagueness of the threshold in proposed section 5(26)(c) that must be met before the Commissioner is allowed to invoke the reverse charge. The concept of "repeated" occurrence, could be as low as two occurrences, and the concept of there being "substantial" tax is also unclear. The Law Society recommends that the absolute values, for example a set number of occurrences in a six or 12-month period, and a minimum level of tax, such as NZ$1,000 should be required. (*New Zealand Law Society*)

Comment

Officials consider that these provisions could be amended to better reflect the policy intent, which is that they apply when the customer is providing false information for the purposes of avoiding GST.

However, officials consider that it is undesirable to amend the provision to provide for absolute values as suggested. While officials agree that in certain circumstances it is desirable to provide absolute values in order to provide taxpayers with certainty, in this situation the provision was deliberately drafted to provide flexibility in order for the Commissioner of Inland Revenue to consider instances of non-compliance on a case-by-case basis. Furthermore, providing absolute values may result in the legislation sanctioning a certain level of non-compliance by taxpayers and this would be undesirable from an integrity perspective.

Recommendation

That the submission be accepted in part.

TAXABLE PERIODS

Clause 54

Issue: Support for quarterly taxable periods

Submission
(Chartered Accountants Australia and New Zealand, EY)

The submitter supports the proposal to include changes to a simplified registration process and a change to quarterly taxable periods as part of Inland Revenue's Business Transformation project. *(Chartered Accountants Australia and New Zealand)*

We welcome the proposed intention to provide an initial six-month taxable period, while retaining a two-month option on application to the CIR, then providing for a quarterly taxable period. *(EY)*

Recommendation

That the submission be noted.

Issue: Two-monthly filing after 1 April 2017

Submission
(EY)

Suppliers should retain the option of two-monthly filing from 1 April 2017, if they can and wish to use two-month return periods. *(EY)*

Comment

Quarterly filing is in keeping with offshore suppliers' filing obligations in other jurisdictions. As creating additional options would lead to complexity in the registration process, we consider that default quarterly filing should be retained. Officials will monitor whether there is greater demand for alternative taxable periods and may recommend changes in the future if required.

Recommendation

That the submission be declined, subject to officials' comments.

EXPRESSING AMOUNTS IN A FOREIGN CURRENCY

Clause 68

Issue: Support for the option to express amounts in foreign currency

Submission
(Deloitte, Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group)

Submitters support the proposal to allow offshore suppliers to choose to convert amounts to New Zealand currency at the time of supply or at the date of filing (or at the due date for filing if filing past the due date).

Recommendation

That the submission be noted.

Issue: Increased flexibility in the conversion method

Submission
(Deloitte, Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group, New Zealand Racing Board)

The flexibility in accounting for supplies in foreign currency should be increased. There should be a catch-all provision that gives the Commissioner a power to approve a time and method for currency conversion, if the same method and timing is used for each conversion. So long as any method is applied consistently it is unlikely that there would be any ability to "game" the system in respect of exchange rates.

Complications arise for gambling conducted in a foreign currency, as the time of supply for gambling services is triggered on the first date on which the result is determined. Suppliers should have extra flexibility to either convert amounts to New Zealand currency on the last day of the taxable period, or convert amounts of bets received to New Zealand currency when a bet is placed and prizes to New Zealand currency when prizes are paid. *(New Zealand Racing Board)*

Comment

Officials agree that the options to express amounts in a foreign currency should be expanded by allowing an offshore supplier to agree with the Commissioner on an alternative method of converting amounts into New Zealand currency, provided that the method is applied consistently and is not open to manipulation.

Offshore suppliers should have the option to convert amounts into New Zealand currency as at the last day of each taxable period (or, alternatively, on the last day of each quarter for the period before 1 April 2017). This may assist offshore suppliers who are required to convert

amounts on the last day of each quarter in order to comply with equivalent rules in other jurisdictions.

As there may be circumstances in which a supplier needs to change their method within the proposed 24-month "lock-in" period (for example, when a supplier begins charging customers in New Zealand currency), officials consider that offshore suppliers should be able to change their method within this period if agreed with the Commissioner.

Therefore, officials recommend that a non-resident supplier of remote services should have the options of:

- expressing amounts in New Zealand currency at the time of supply;
- expressing amounts in a foreign currency and converting to New Zealand currency at the end of each taxable period (or, alternatively, at the end of each quarter for the period before 1 April 2017);
- expressing amounts in a foreign currency and converting to New Zealand currency at the time of filing the return (or at the due date for filing, if the return is filed past the due date);
- an alternative method as agreed with the Commissioner.

Once the supplier elects to use an option other than expressing amounts in New Zealand currency at time of supply, they may not change their method for a period of 24 months, unless they agree otherwise with the Commissioner.

Recommendation

That the submission be accepted, subject to officials' comments.

Issue: Currency conversion for tax invoices issued

Clause 57

Submission
(Corporate Taxpayer Group, EY)

An amendment should clarify that the date on which the foreign currency amount should be converted to New Zealand currency for the purposes of determining whether the NZ$1,000 threshold is breached should be the foreign currency amount converted to New Zealand dollars as at the time of supply.

It should be clarified whether suppliers should express the consideration details in the foreign currency or whether they must convert into New Zealand dollars.

Comment

Officials agree that it should be clarified that the NZ$1,000 threshold for the option to issue a tax invoice should be determined by reference to the foreign currency amount converted into New Zealand currency at the time of supply.

Consistent with the existing tax invoice rules, the amounts shown on the tax invoice should be expressed in New Zealand currency as at the time of supply. This will provide certainty to the recipient as to the amount that can be deducted by the recipient.

Depending on the conversion method chosen by the supplier, this means that currency movements could lead to a mismatch between the amount on the tax invoice and the amount returned by the supplier. Officials consider that the risk of a mismatch is acceptable from a revenue perspective given that this option is only available for relatively low-value supplies.

Recommendation

That the submission be accepted.

Issue: Guidance on currency conversion method

Submission
(Deloitte, Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group New Zealand Racing Board)

Inland Revenue should provide guidance on how the foreign exchange rules work and acceptable sources of exchange rate information to assist in compliance with the rules. Offshore suppliers should be provided with guidance on what to do if the date at which they must convert the foreign currency amounts is not a business day (such that a spot exchange rate is unavailable on that date).

Comment

The Commissioner will accept the exchange rates offered by a registered bank or a bureau de change at the relevant time, which is consistent with the practice for converting amounts to New Zealand currency under the current rules. See public ruling BR Pub 11/04 (Supplies paid for in foreign currency – GST treatment).

Recommendation

That the submission be noted.

HOLDING RECORDS OUTSIDE NEW ZEALAND AND IN A LANGUAGE OTHER THAN ENGLISH

Clause 67

Issue: Support for the exception to the requirement to maintain records inside New Zealand

Submission
(Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group, KPMG, PwC, New Zealand Racing Board)

Submitters support the proposal to allow offshore suppliers to keep records outside New Zealand and in a language other than English, without seeking authorisation from the Commissioner.

Recommendation

That the submission be noted.

Issue: Extend the exception to the requirement to maintain records inside New Zealand

Submission
(Corporate Taxpayer Group)

Customers of non-resident suppliers of remote services should be excluded from the requirement to request approval to store records outside New Zealand. This is pragmatic given that New Zealand customers may have no knowledge of where the records are kept and may not be in a position to determine whether an application is required.

Comment

The exception to the requirement to seek authorisation to keep and retain records outside New Zealand is intended to reduce compliance costs for offshore suppliers, who in many cases will have no connection to New Zealand other than supplying a remote service to New Zealand customers. Extending this exception to customers of non-resident suppliers of remote services is not consistent with this intention, and would reduce the scope of the existing provision significantly. This is a broader policy question that is outside the scope of this bill.

Recommendation

That the submission be declined.

EXCEPTION FROM THE BANK ACCOUNT REQUIREMENT

Clause 71

Issue: Support for the exception to the bank account requirement

Submission
(Chartered Accountants Australia and New Zealand, New Zealand Racing Board, PwC)

The submitters support the proposal to exempt offshore suppliers from the requirement to hold a fully functional New Zealand bank account in order to obtain an IRD number.

Recommendation

That the submission be noted.

Issue: Requirement for offshore persons to have a New Zealand bank account number in order to apply for an IRD number

Submission
(Chartered Accountants Australia and New Zealand, Corporate Taxpayer Group, KPMG, OliverShaw Ltd)

The bank account requirement imposes costs on banks and also applies where a non-resident's reason for applying for an IRD number is not related to a land transaction. For example, a non-resident business may wish to register as a taxpayer in New Zealand because it expects to pay GST in New Zealand (for example, if hosting a conference here). Similarly, non-resident employees from non-tax treaty countries may have New Zealand PAYE obligations if they are here for more than 92 days. In both cases, a New Zealand bank account will not be relevant for their purposes, which is to pay tax. The New Zealand bank account requirement is an unnecessary complication in these circumstances. *(KPMG)*

The relaxation of this requirement is narrow and will only take effect from 1 October 2016, which does not address the current issue. The ability to quickly and easily be supplied with an IRD number is fundamental to the operation of New Zealand's tax system. The previously enacted changes compromise that operation. We strongly recommend a change in the bill to remove the New Zealand bank account requirement (in section 24BA of the Tax Administration Act 1994). *(KPMG)*

We submit that the exemption from the requirement to hold a New Zealand bank account be widened to include other non-residents who have been subject to another form of identity verification either in New Zealand or overseas. *(Chartered Accountants Australia and New Zealand)*

The introduction of this exception in the bill highlights the breadth of the current bank account requirement in increasing compliance costs for non-residents and creating barriers for non-residents to comply with their New Zealand tax obligations. In the Group's view, these issues

are not limited to non-resident suppliers of offshore services and intangibles. *(Corporate Taxpayer Group)*

The scope of the bank account requirement should be revisited and further carve-outs considered or consider repealing the bank account requirement altogether. Six examples of issues created by the bank account requirement are: short term stays/fly in/fly-out arrangements, non-residents with a permanent establishment in New Zealand, non-resident providing assistance in an emergency situation (hypothetical situation), difficulties in getting a bank account, GST refunds for non-residents, Recognised Seasonal Employer (RSE) Scheme. *(Corporate Taxpayer Group)*

It is submitted that taxpayers should be exempt from the bank account requirement where:

- a New Zealand entity has already undertaken identity verification as part of AML checks; *(OliverShaw Ltd)*
- the offshore person has a bank account in another country and that other country has AML rules similar to New Zealand *(Chartered Accountants Australia and New Zealand);*
- a person is required to register for New Zealand GST *(OliverShaw Ltd);* or
- a New Zealand employer applies for an IRD number on behalf of an employee or contractor. *(Chartered Accountants Australia and New Zealand, OliverShaw Ltd)*

Comment

From 1 October 2015, a person who is an "offshore person" must have a functioning New Zealand bank account in order to apply for an IRD number. The requirement to have a New Zealand bank account ensures that the anti-money laundering (AML) identity verification requirements apply to offshore persons. It was introduced as part of a suite of Budget 2015 changes to improve the integrity of the property tax rules (particularly in the case of foreign owners).

An individual will be an offshore person for the purposes of the bank account requirement, if they are not a New Zealand citizen and they do not have a residence-class visa. A New Zealand citizen or a holder of a New Zealand residence-class visa will be an offshore person if they are not present in New Zealand, and they have not visited New Zealand within the past three years (in the case of a New Zealand citizen) or 12 months (in the case of a residence-class visa holder). A non-individual (a company, trust, partnership, or other body of persons) will be an offshore person if they are 25 percent or more controlled or owned by an offshore person.

Submitters have raised concerns that there seem to be practical difficulties with the bank account requirement and there may be unintended consequences where the taxpayer needs an IRD number in order to comply with their tax obligations, but has limited physical presence in New Zealand.

For some of these issues, further work needs to be undertaken to ensure that practical solutions (whether legislative or operational) can be found for situations where it may cause compliance issues, while still maintaining the integrity of the rules. This is particularly the case for non-resident contractors and short-term employees, as well as business investors into New Zealand.

However, to address some of the specific concerns that have been raised by submitters to the bill, officials consider that the following solutions would relieve some compliance costs while minimising risks to the underlying policy rationale of the bank account requirement:

Other non-resident suppliers registering for New Zealand GST

The bill as introduced proposes an exemption for a non-resident supplier of remote services from the requirement to have a bank account. This exemption is available only if the IRD number is applied for solely because the person is a non-resident supplier of remote services taxed under the proposed remote services rules. These are generally payers of GST, so officials consider the risks to be low.

We recommend that this exemption be extended to other non-resident suppliers (as well as non-resident suppliers who provide remote services), as long as the IRD number is applied for solely because the person is a non-resident supplier under the Goods and Services Tax Act 1985. There are a number of requirements that they must meet in order to become registered which reduce the identity verification risk. This proposal would make the policy more cohesive for non-resident suppliers.

The person has already had AML verification undertaken by a New Zealand reporting entity

In situations where the person has already had AML verification undertaken by a New Zealand reporting entity, we agree that the bank account requirement seems an unnecessary duplication.

The person is a worker under the recognised seasonal employer scheme and they obtain a fully functional bank account within one month of arriving in New Zealand

A further specific concern identified by submitters related to non-resident workers under the recognised seasonal employer (RSE) scheme.

An employee without an IRD number has tax withheld at the non-declaration rate which is a penal rate of 45%. Once they supply their employer with their IRD number, they will have tax withheld at the correct tax rate.

We understand that the standard practice for banks is for the person to visit the bank in person. Therefore, the bank account application cannot be finalised until after the person arrives in New Zealand. Proof of a fully functional bank account then needs to be sent to Inland Revenue for processing and issuing.

The delay means that at least one pay period will have a penal rate of 45%. This contrasts with the special tax code rate that is available to RSE workers, which is 10.5%.

Accordingly, there is a temporary over-withholding of 34.5% on the non-resident seasonal worker's pay, which results either in potential temporary cashflow issues for those workers, or increased costs for employers.

It is important that RSE workers have their wages paid into a New Zealand bank account. However, we recognise that in some cases there may be some delays in obtaining a New Zealand bank account.

Accordingly, we recommend that an employee who is a non-resident seasonal worker should have a one month "grace period" to get a New Zealand bank account and to send evidence of the bank account to Inland Revenue. If the person does not provide evidence of their bank account to Inland Revenue within one month, then their employer would be required to begin withholding PAYE tax at the non-declaration rate of 45%.

We recommend that these changes should apply from the date of Royal assent.

Recommendation

That the submission be accepted, in part.

OTHER ISSUES

Issue: Application of the Fair Trading Act

Submission
(KPMG)

Consideration should be given to whether the supply of remote services under the remote services rules would fall, or is intended to fall, within the ambit of the Fair Trading Act 1986.

Comment

The Fair Trading Act 1986 extends to conduct outside New Zealand that is undertaken by a person carrying on business in New Zealand, to the extent that such conduct relates to the supply of goods or services in New Zealand. This means that suppliers should avoid making false or misleading representations with respect to the price of any services they supply.

The prohibition against false or misleading representations does not require a trader to provide a single price for the services. However, any additional charges should be transparent so as not to mislead a potential or actual customer. Therefore, ideally the customer should be aware of any GST payable at the point where the price is promoted and on display.

There may be situations when an offshore supplier may not know the residency of the customer until the online checkout, and therefore, the GST may not be displayed on the promoted price. In these situations, potential customers should be made aware that GST may apply at the outset so that customers are not misled at the point when the initial price is on display.

Recommendation

That the submission be noted.

Issue: Forming a GST group

Submission
(PwC)

Officials should clarify that an offshore supplier who is required to register for GST under the proposed amendments is able to form a GST group with a company that is registered for GST under the standard rules.

Comment

Offshore suppliers will be subject to the ordinary rules for forming a GST group with no limitations to the existing provisions being proposed for offshore suppliers registering under the new rules.

Recommendation

That the submission be noted.

Issue: Drafting issues raised by submitters

Clauses 47, 48, 50, 52, 54, 57 and 67

Submissions
(EY, Trade Me, Corporate Taxpayer Group, New Zealand Racing Board)

The submitters raise a number of drafting issues:

- An amendment should clarify an apparent overlap where the three-month taxable period is "based on a first quarter ending on 31 March".
- The formula expressed in the bill to calculate the consideration should be clarified by inserting additional brackets, in order to avoid possible uncertainty and dispute.
- The reference to "lead" in proposed section 5(27)(b) should be changed to "led"
- The references in proposed new section 5(27)(c) would provide greater flexibility if the references to repeated occurrences and substantial amounts of tax not being charged were contained in two subparagraphs separated by a colon.
- Similarly, in proposed sections 8B(5) and 24(5B)(c), there should be a colon between (a) and (b) and (i) and (ii) respectively
- A definition of "New Zealand business number" should be provided in the GST Act.
- The term "marketplace" in section 2 is problematic, as it carries the implication of a neutral venue where sellers can meet to transact together. While we recognise the proposed definition for section 2 makes reference to a "distribution platform", Trade Me believes the term "electronic distribution service" is more appropriate.
- The legislation should be clarified to make it clear that non-resident suppliers of remote services are not required to seek approval for the Commissioner to keep records outside New Zealand or in a language other than English.

Comment

Officials acknowledge the minor drafting points raised by the submitters and have referred these points to the bill drafters for their consideration.

Recommendation

That the submissions be noted.

MATTERS RAISED BY OFFICIALS

Issue: Remote services not received by a registered person for the purpose of carrying on their taxable activity

Clause 55(4)

Submission
(Matter raised by officials)

The reverse charge provision in section 20(3JC) should be extended to apply when a registered person receives remote services that are zero-rated under section 11A(1)(j).

Comment

The reverse charge proposed in section 20(3JC) applies to GST-registered recipients of remote services, in cases when the supplier and recipient have agreed to treat the supply as being zero-rated and the taxable use of the service is less than 95 percent. This produces the same outcome as the existing reverse charge in section 8(4B), which applies when services are treated as being supplied outside New Zealand and therefore are not subject to GST, and the taxable use is less than 95 percent. However, if a supply to a registered person is treated as being made in New Zealand because section 8(4) does not apply, then there may be situations when neither reverse charge provision applies to require the recipient to account for their non-taxable use of a zero-rated supply.

If a GST-registered business receives a service for the purpose of making exempt supplies, or for other non-taxable purposes, it may not be received "for the purposes of carrying on the registered person's taxable activity". When the service is physically performed outside New Zealand, the supply will instead be zero-rated under proposed section 11A(1)(j), which applies to services that are physically performed outside New Zealand, other than supplies of remote services provided to New Zealand-resident consumers. As currently drafted, the reverse charge in section 20(3JC) only applies to services that are zero-rated under section 11A(1)(x). To provide a consistent treatment of non-taxable use by a GST-registered recipient of services, the proposed reverse charge should be extended to apply to a registered person who receives remote services that are zero-rated under section 11A(1)(j).

Recommendation

That the submission be accepted.

Issue: Drafting issues

Clauses 50 and 68

Submission
(Matter raised by officials)

Officials would like to raise a number of drafting issues:

- Proposed section 8B(2) refers to two items being "non-contradictory". However, in the remainder of proposed section 8B the reference is to "non-conflicting" items. Officials consider that an amendment should be made to ensure consistency of the use of the word "non-contradictory".
- Officials consider that proposed section 8B(3)(a) should refer to "at least" two non-conflicting items rather than simply "has", as the supplier may have more than two other non-conflicting items.
- Proposed section 77(2) allows a non-resident supplier of remote services to choose to express the amount of consideration in money for their supplies in a foreign currency. Officials consider it useful to clarify that the election to do so would be made in the non-residents suppliers GST return.

Recommendation

That the submission be accepted.

Student loan scheme

INFORMATION-SHARING ARRANGEMENT BETWEEN NEW ZEALAND AND AUSTRALIA

Clause 26

Issue: Support for the proposal

Submission
(Office of the Privacy Commissioner)

The Office of the Privacy Commissioner expressed its general support for the proposal, which facilitates the exchange of information between Inland Revenue and the Australian Taxation Office to assist Inland Revenue to obtain contact details of New Zealand borrowers living in Australia, and administer the student loan scheme in relation to those borrowers.

Comment

Officials note the general support for the proposed amendment.

Recommendation

That the submission be noted.

Clauses 21A, 26A and 26B

Issue: Facilitating electronic communications

Submission
(Matter raised by officials)

Clause 6 of the bill proposes an amendment to section 15 of the Student Loan Scheme Act 2011 to allow a person to cancel their loan contract in writing or by electronic means.

For consistency it is proposed that section 169 also be amended to allow a borrower to require in writing or by electronic means that the Chief Executive of the Ministry of Social Development determines an objection relating to the details of a loan advance made or charged to the borrower under section 167. This could be achieved by replacing "formally notifying" with "notifying in writing."

As a consequence, it is proposed that section 213, which defines "formally notify", should be repealed and the cross-reference to section 213 in section 214 should be removed.

The proposed amendment and repeal would come into force on the date of enactment.

Comment

The proposed amendment to section 15 would change the requirement for cancellation of a loan contract from "formally notify" to "notify in writing" to allow the cancellation of contracts by electronic means, in accordance with the Ministry of Social Development's current procedures. The terms are both defined for the purposes of the Student Loan Scheme Act 2011, but while "formally notify" excludes communication by email, "notify in writing" does not.

The only provision in the Act, other than section 15, that currently requires formal notification, to the exclusion of electronic communication, is section 169. Section 169 applies when a borrower has objected to the loan manager about details of a loan advance made or charged to the loan manager, but the objection has not been wholly allowed by the loan manager. The borrower may then require the matter, essentially an appeal right, to be determined by the Chief Executive of the Ministry of Social Development. Appeals under the Social Security Act to the Social Security Appeals Authority, which are required to be by written notice, are accepted electronically. This is also consistent with proposals to amend the Tax Administration Act 1994 to facilitate electronic communication, when appropriate.

An amendment to section 169, if agreed, would mean that the term "formally notify", as defined in section 213, is no longer used in the Student Loan Scheme Act 2011, and section 213 could be consequentially repealed.

Recommendation

That the submission be accepted.

Clause 4

Issue: Drafting clarification

Submission
(Matter raised by officials)

In support of the proposed delegation to the Commissioner for approval of charitable organisations for the purposes of the student loan scheme, the organisations that have been approved will be required to be listed on Inland Revenue's website to make the information easily accessible. Consequently, "list" is to be a newly defined term in the Student Loan Scheme Act 2011.

Clarity of meaning would be improved by replacing the proposed definition in section 4(1) with –

> "**list** means, in relation to an entity, to include the entity as a charity in the list kept under section 27A".

Recommendation

That the submission be accepted.

Remedial amendments

Issue: Clarification of rule for when land is acquired through the exercise of an option

Submission
(Matter raised by officials)

During the Committee stage of the Taxation (Bright-line Test for Residential Land) Bill, officials indicated that there would be an opportunity in the Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill to propose amendments that assist with the overall coherence of the land provisions. This submission is proposing such an amendment.

The Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014 introduced rules for determining the date on which land is acquired for the purposes of the land provisions (not including the recently enacted bright-line test). The rules recognise that land is acquired at the time a person acquires a first interest in the land. Officials have identified that the specific rule for land acquired through the exercise of an option (section CB 15B(3)) needs to be clarified to ensure it is clear how the specific rule operates.

Comment

The specific rule for land acquired through the exercise of an option is intended to recognise that when land (such as the freehold title to land) is acquired in this way, the first interest in the land is acquired at the time the option is exercised. This is irrespective of whether the person (the purchaser) previously held a different interest in the land such as a leasehold interest.

Recommendation

That the submission be accepted.

Issue: Technical amendment to relationship property rule for the bright-line test

Submission
(Matter raised by officials)

Section FB 3A applies for the purposes of the bright-line test when residential land is transferred on a settlement of relationship property. A remedial amendment is required to fix a drafting oversight in the recently enacted section FB 3A(3) which deals with the date of acquisition of land when land is acquired on a settlement of relationship property. The reference to section CB 6A(1)(a) or (b) should also refer to section CB 6A(2) – (4) because these provisions also deal with acquisition dates that are relevant for section FB 3A purposes.

Comment

Recommendation

That the submission be accepted.
