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By email

BEPS - Transfer pricing and PE avoidance
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SUBMISSION: BEPS - TRANSFER PRICING AND PERMANENT ESTABLISHMENT AVOIDANCE - A GOVERNMENT DISCUSSION DOCUMENT

1. INTRODUCTION

1.1 This letter contains Russell McVeagh's submissions on the Government discussion document "BEPS – Transfer pricing and permanent establishment avoidance" (March 2017) ("**Discussion Document**"). We would be happy to discuss any aspect of the submissions.

1.2 We use the following references:

(a) "**DTA**" means a double tax agreement that New Zealand has entered into;

(b) "**Income Tax Act**" means the Income Tax Act 2007;

(c) "**Multilateral Instrument**" means the OECD's *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*;

(d) "**PE**" means a permanent establishment; and

(e) "**TAA**" means the Tax Administration Act 1994.

2. PERMANENT ESTABLISHMENT AVOIDANCE (CHAPTER THREE)

Summary of proposal and its rationale

2.1 Chapter 3 of the Discussion Document proposes a new anti-avoidance rule that would apply to certain arrangements entered into by multinational groups having annual turnover exceeding EUR750 million which defeat "the purpose of [a] DTA's PE provisions" (Discussion Document at paragraph 3.21). A similar rule is proposed in respect of third party channel providers. Again, the rule would apply only if (among other criteria) the arrangement "defeats the purpose of the PE provisions" (Discussion Document at paragraph 3.27).

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2.2 The Discussion Document refers to the Multilateral Instrument which contains a widened PE definition to counter the avoidance of PE status. Paragraph 3.15 of the Discussion Document explains why the Government is concerned that the OECD's response will not be sufficient to prevent arrangements being entered into to avoid a multinational having a PE in New Zealand:

> This widened definition should be effective in addressing some of the PE avoidance we see in New Zealand. **However an issue with the widened definition is that it will only be included in a DTA if both parties so elect. Several of New Zealand's trading partners are not expected to elect to include the widened PE definition**, including some countries from which significant investment into New Zealand is made. **Therefore, the Government expects that the OECD's PE amendments will not be sufficient to address the issue of PE avoidance in New Zealand**.
>
> [Emphasis added]

2.3 The Discussion Document therefore proposes (see paragraphs 3.40 to 3.45) that the new PE avoidance rule should override New Zealand's DTAs. This aspect of the proposed PE avoidance rule is said to be justified on the basis that "the proposed rule is an anti-avoidance provision [and] will only apply to an arrangement which defeats the purpose of the DTA's PE provisions".

Submission: PE avoidance rule should not override DTAs

2.4 The definition of PE is an important provision in delineating the source country's taxing rights. It appears (given the variations to the definition seen in New Zealand's DTAs) that the PE definition in any given DTA reflects a negotiated position. In those circumstances, New Zealand should not enact a rule that could in effect unilaterally vary the agreed definition. For New Zealand to do so could do significant harm to the confidence that foreign investors have in the stability of New Zealand's tax policy settings and ability to rely on what New Zealand has agreed in its DTAs.

2.5 For these reasons, we submit that:

(a) the PE avoidance rule should be drafted so it is clear that it applies only to arrangements that defeat the purpose of the PE definition in the particular DTA; and

(b) the PE avoidance rule should not override DTAs. Given the comments at paragraphs 3.40 to 3.44 of the Discussion Document, and the fact that the PE avoidance rule would apply only to arrangements defeating the purpose of the PE definition, there is no justification for the avoidance rule to override a DTA. Rather, the rule should be read alongside the relevant DTA, and in light of the recognition in the OECD Commentary (referred to at paragraph 3.42 of the Discussion Document) that there will generally be no conflict between such anti-avoidance provisions and the DTA.

3. AMENDMENTS TO THE SOURCE RULES (CHAPTER FOUR)

Summary of proposals and rationale

3.1 A new source rule is proposed to confirm that income will have a source in New Zealand if it is attributable to a PE in New Zealand ("**proposed PE source rule**"). A domestic law definition of PE is proposed, so that this rule applies even if the non-resident with the PE is resident in a country with which New Zealand does not have a DTA. It is also proposed that a non-resident's income be deemed to have a source in New Zealand if it would have a New Zealand source under a particular source rule, treating the non-resident's wholly owned group as a single entity ("**anti-avoidance source rule**").

Submission: anti-avoidance source rule should not proceed

3.2 The stated rationale for the anti-avoidance source rule is to prevent non-residents from avoiding having New Zealand sourced income by dividing their activities between group members (paragraph 4.23 of the Discussion Document). This issue will, however, be addressed by the broadening of the PE definition in DTAs as a result of the Multilateral Instrument, the PE avoidance rule, which will apply to all PE definitions, and the new PE source rule and domestic law PE definition.

3.3 The only examples the Discussion Document provides of situations in which the anti-avoidance source rule is necessary are of contract-splitting and fragmentation of activities arrangements. Again, these arrangements would be addressed by the changes to the PE definition in the Multilateral Instrument and/or by the proposed PE source rule and PE avoidance rule. Possibly for this reason, the Discussion Document does not refer to (and we are not aware of) any international precedent for a wide-ranging anti-avoidance source rule such as is proposed.

3.4 In summary, we therefore submit that the proposed anti-avoidance source rule should not proceed. It would introduce unnecessary complexity in light of the proposed PE source rule, other source rules and the broadening of the PE definition in a number of DTAs as a result of the Multilateral Instrument. In addition, it runs the risk of conflicting with DTAs and appears not to be consistent with international practice.

4. STRENGTHENING THE TRANSFER PRICING RULES (CHAPTER FIVE)

Reconstruction power in domestic law is unnecessary

4.1 It is proposed that New Zealand's transfer pricing legislation include an explicit reference to the latest OECD Transfer pricing guidelines. If our domestic law is amended to incorporate the guidelines, we submit that there is no need for an additional reconstruction power in domestic legislation, as such a power is already contained in the guidelines in appropriate cases (see paragraphs 1.64 to 1.69 of the guidelines).

Burden of proof should not be shifted to the taxpayer or, alternatively, procedural protections are necessary

4.2 It is proposed that the burden of proof be placed on the taxpayer rather than the Inland Revenue. The stated reason for the proposed change is that multinational structures and transactions have become more complex since the transfer pricing rules were introduced, and that the taxpayer has better information than Inland Revenue does.

4.3 Under current law, the taxpayer determines the arm's length amount in the first instance, but Inland Revenue may determine the amount where Inland Revenue can demonstrate that another amount is a more reliable measure, or where the taxpayer has not co-operated with Inland Revenue (section GC 13(4) of the Income Tax Act). Therefore, while the underlying transactions may be complex, and while the taxpayer should have access to information supporting its determination of the arm's length amount, the taxpayer must nonetheless justify to Inland Revenue the arm's length rate it has determined and persuade Inland Revenue that another amount (proposed by Inland Revenue) is not a more reliable measure of the arm's length amount.

4.4 The current law recognises that there will usually be a range of arm's length prices rather than one precise arm's length amount. In the context of a self-assessment system, it should be sufficient for the amount determined by the taxpayer to be within the range of arm's length amounts. Section GC 13(4) achieves this, whereas placing the onus on a taxpayer to disprove Inland Revenue's asserted arm's length rate would not.

4.5 In the alternative, if the proposed change to the onus of proof does proceed, Inland Revenue should only be able to rely on publicly available information as the basis for whatever arm's length rate it asserts. This needs to be an express requirement in the legislation. If the taxpayer has the onus of proof in respect of a transfer pricing dispute, they need to have full access to the same information that the Inland Revenue is using. Inland Revenue should not be permitted to rely on tax secrecy to decline to disclose details underlying data that Inland Revenue may be relying on.

The time bar should not be extended

4.6 It is proposed that the time bar for transfer pricing matters be increased to seven years. The policy underlying the time bar and the significant role that it plays in the tax system is well known. In the government 2003 discussion document entitled *Resolving tax disputes: a legislative review* it was stated (at paragraph 6.2) that:

> Time frames provide certainty and finality in respect of a person's tax position. The finality provided by the four-year statutory time bar is emphasised by the courts as central to tax administration so that after the stipulated period of time taxpayers and Inland Revenue may close their books and dispose of their papers.

4.7 The stated rationale for lengthening the time bar in respect of transfer pricing disputes is that such disputes are very dependent on the facts and circumstances of the specific case. This rationale is difficult to sustain. Tax disputes generally are often very dependent on the facts and circumstances. A number of examples are readily available, for example capital/revenue disputes (such as the *Trustpower* case) and tax residency disputes.

4.8 To extend the time bar in transfer pricing matters would provide the wrong incentives for all parties. A particular difficulty in transfer pricing matters is that there will usually be no single "right" answer but instead a range of prices or rates that should be consistent with the arm's length standard. A further difficulty is that the search for comparables could (potentially) be endless if there is not a time limit on the parties to bring the issues to a head.

4.9 In our experience, these factors can result in transfer pricing investigations and disputes (already) taking longer than they should. Time limits are especially important in such cases, to encourage the parties to compromise if they can, and if they cannot compromise, setting a time limit within which an assessment must be made so the case can be considered by the court.

4.10 Finally, we submit that the table at paragraph 5.70 of the Discussion Document comparing the standard time bar and time bar for transfer pricing issues in a number of jurisdictions is not compelling evidence that New Zealand should change its approach. While Australia and Canada have adopted the approach that the Discussion Document proposes, many other jurisdictions, such as the US and the UK, have not done so.

4.11 Accordingly, we submit that the time bar should not be extended.

5. ADMINISTRATIVE MEASURES (CHAPTER SIX)

Any determination that a large multinational is non-cooperative (see paragraphs 6.13 to 6.20 of the Discussion Document) should be subject to additional procedural safeguards

Criteria and process for determining that a taxpayer is non-cooperative need to be clear, transparent and principled

5.1 A determination that a taxpayer is non-cooperative will not only have adverse consequences for the taxpayer under the proposed rules, but could also have significant reputational consequences for the taxpayer. As such, we submit that the definition of non-cooperative should be set out in legislation and further procedural safeguards should be provided for the taxpayer.

Statutory definition

5.2 Any statutory definition should make it clear that a taxpayer is not non-cooperative merely because the taxpayer exercises its right to dispute Inland Revenue's position or to contest any steps that Inland Revenue may take in an investigation. We are concerned that any definition that provides otherwise would be inconsistent with section 27(3) of the New Zealand Bill of Rights Act 1990. Relevantly, section 27(3) provides that:

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to the law, in the same way as civil proceedings between individuals.

5.3 The White Paper on the Bill of Rights was in the same terms as the current Act. The White Paper commentary noted that the purpose of what is now section 27(3) was:

> to give constitutional status to the core principle recognised in Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.

5.4 The Courts have interpreted the right consistently with the White Paper.[1] If Inland Revenue could deem a taxpayer to be non-cooperative merely because the taxpayer is questioning or resisting (using proper process) some action Inland Revenue is taking in connection with a dispute, this would provide a procedural advantage to Inland Revenue that is not enjoyed by a lay litigant. This would be contrary to the right enshrined in section 27(3).

Further procedural safeguards

5.5 In addition to the statutory definition, Inland Revenue should issue guidance regarding the process to be followed in determining whether a taxpayer is non-cooperative. Such guidance should be in the form of a Standard Practice Statement.

5.6 We agree with the Discussion Document (at paragraph 6.16) that the power to make any such determination should be confined to a relatively small number of officials within Inland Revenue. This should help achieve a consistency of approach. Furthermore, we submit that the senior official making such a determination should be independent from the personnel auditing/investigating or otherwise engaged with the taxpayer.

5.7 We also agree that Inland Revenue should warn the taxpayer before any determination is made. We submit that this should take the form of a written notice specifying the acts or omissions that Inland Revenue considers make the taxpayer non-cooperative. The taxpayer should then have the opportunity to respond to the warning and/or to remedy the acts or omissions that Inland Revenue has specified.

5.8 It is important for a taxpayer to have a right to challenge (before a court) any decision of Inland Revenue to deem it to be non-cooperative. As noted above, any decision to deem a taxpayer to be non-cooperative may have consequences going beyond the proposals in the Discussion Document.

1 See for example *Vinelight Nominees Limited v Commissioner of Inland Revenue* (2005) 22 NZTC 19,298 at [52]–[55].

The proposal to bring forward the date for payment for tax in dispute (paragraphs 6.21 to 6.26 of the Discussion Document) is arbitrary and should not proceed

Primary submission: proposed amendment is unnecessary and should not proceed

5.9 The Discussion Document proposes that the payment of tax in dispute for large multinationals in a dispute with Inland Revenue in relation to certain disputes be brought forward. We submit that this proposal is unjustified for the following reasons:

(a) The proposed rule is arbitrary. The Discussion Document proposes that the rule apply where the dispute relates to transfer pricing, the amount of income with a New Zealand source or the amount of tax payable under a DTA. We submit that there is nothing special about these matters to warrant the payment of tax in advance.

(b) The general rule that disputed tax be payable only following final determination of any dispute should remain. In cases where Inland Revenue considers there to be a significant risk that the tax in dispute will not be paid should the disputant's challenge be unsuccessful, the Inland Revenue can require the taxpayer to pay the tax early (see section 138I(2B) of the TAA).

(c) Contrary to the suggestion in the Discussion Document (at paragraph 6.21) large multinationals are not currently incentivised to delay the resolution of a dispute. The rate of use of money interest is materially higher than commercial rates for large multinationals. While the ability of a taxpayer to access funds in a tax pooling account can mitigate to some extent the use of money interest regime, it does not eliminate it since the use of tax pooling involves its own costs.

(d) The Discussion Document provides no evidence of large multinationals not paying disputed tax found to be owing at the conclusion of the dispute. If there is a risk of non-payment in a particular case, Inland Revenue has the power (in section 138I(2B) of the TAA) to require advance payment, as noted above.

5.10 Further, there is no justification for the Discussion Document proposal to restrict the use of tax pooling in disputes relating to transfer prising, the amount of income with a New Zealand source or the amount of tax payable under a DTA. The tax pooling rules were introduced in order to allow taxpayer to "[reduce] use-of-money interest exposure".[2] The Discussion Document offers no justification as to why that rationale does not apply (and tax pooling should not be available) in the three categories of dispute identified.

2 Inland Revenue Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill: *Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (November 2002) at 3.

Alternative submission: If the proposal does proceed, payment should be required within 90 days of Inland Revenue issuing an assessment and there should be further procedural safeguards

5.11 If the proposal does proceed, we submit that the first of the alternative options should be implemented (ie, that payment should be required within 90 days of Inland Revenue issuing an assessment for the tax in dispute). We consider that this would strike a more appropriate balance than the requirement to pay within 12 months of Inland Revenue issuing a notice of proposed adjustment.

The power to collect tax from a wholly owned subsidiary of a large multinational in New Zealand (paragraphs 6.27 and 6.28 of the Discussion Document) is unnecessary and inappropriate

Primary submission: proposed amendment is unnecessary and should not proceed

5.12 The Discussion Document proposes that any tax payable by a member of a large multinational would be collectible from "any wholly owned subsidiary of the multinational in New Zealand" and from "the related New Zealand entity in a case where the income is attributed to a deemed PE of the non-resident under the proposed PE avoidance rule" (discussed above).

5.13 The proposed rule will have the effect of making all wholly owned group members of a large multinational group jointly and severally liable for the tax obligations of the other members of the group. This overrides the fundamental principle of separate legal personality for companies and limited liability for obligations of a company.

5.14 We are unaware of any existing difficulty resulting from members of a large multinational group not paying tax which is due and payable which would justify this proposed new rule. The Discussion Document does not provide (or even suggest that there is) any evidence of such difficulties arising.

5.15 Under the *Convention on Mutual Administrative Assistance in Tax Matters*, Inland Revenue has the power (see Articles 11 to 16) to request assistance from other jurisdictions in the collection of tax owing. New Zealand should maintain its commitment to international cooperation in BEPS matters by using that convention, rather than seeking to impose unilateral measures which cut across fundamental principles of corporate law.

Alternative submission: If the proposal does proceed, further taxpayer protections should be implemented

5.16 If the proposal does proceed, we submit that Inland Revenue should be required to obtain a court order to collect tax from an entity other than the entity against which the tax was assessed. As noted above, the proposed rule is a significant departure from the norms of corporate law and any exercise of such a power should be subject to judicial supervision.

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Collection of information from offshore group members (paragraphs 6.29 to 6.37 of the Discussion Document)

Overview

5.17 The Discussion Document proposes to make a New Zealand entity responsible for providing information that Inland Revenue believes is held by another member of the large multinational group. The proposal would go further than the current powers in section 17 of the TAA which requires a person to provide information held by foreign entities which that person controls.

5.18 The Discussion Document at paragraph 6.35 proposes a "consequential change" to section 143(2) of the TAA to allow a person to be convicted of an offence if the person does not provide information alleged to be held by a non-resident associated person. The proposal means that a New Zealand group member could be convicted of an offence in respect of acts or omissions by one or more non-resident associates even though the New Zealand group member may have no control or influence over that associate.

The proposed rule has been rejected previously

5.19 An amendment to section 17 of the TAA that would have required a New Zealand person to furnish information held by non-resident associated persons was proposed in the *Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill* as introduced.[3] Following submissions to the Select Committee, it was accepted that the application of the rule should be restricted.[4] This narrowed rule (applying only to information held by foreign entities controlled by the New Zealand person, not to all non-resident associates of the New Zealand person) was subsequently enacted.

Reference to Australian and Canadian provisions

5.20 Paragraph 6.34 of the Discussion Document states that the proposed change:

> … would align New Zealand's offshore information powers with other countries' such as Australia and Canada which have specific provisions that enable their tax authorities to directly request information or documents from offshore
>
> [Footnotes omitted]

For the reasons given below, the Australian and Canadian provisions are materially different from what is proposed in the Discussion Document.

3 Clause 75.

4 Inland Revenue *Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill: Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* ((November 2002) at 110.

Australia

5.21 The Discussion Document refers to section 264A of the Income Tax Assessment Act 1936 (Cth). Unlike the general power to request information in section 17 of the TAA, section 264A of the Income Tax Assessment Act 1936 (Cth) is directed at the particular risk to the Australian Commissioner of offshore information not being provided during an investigation and subsequently being used in proceedings to dispute an assessment.[5]

5.22 Failure to comply with an information request is not an offence.[6] The only sanction for failure to comply with a notice under section 264A is evidentiary (ie, the information that the taxpayer failed to provide under the notice cannot be used in subsequent proceedings to dispute an assessment).[7] In addition, there is greater scope to challenge the Australian Commissioner's decision to issue a notice given the more circumscribed nature of the power.[8]

Canada

5.23 The Canadian provision in section 231.6 of the Income Tax Act RSC 1985 c 1 also provides more scope for a taxpayer to challenge a decision to request information. Section 231.6(5) sets out the powers of a Judge when reviewing the decision to issue a request for foreign-based information or documentation. A Judge, on application of the taxpayer, may:

> (a) confirm the requirement;
>
> (b) vary the requirement as the judge considers appropriate in the circumstances; or
>
> (c) set aside the requirement if the judge is satisfied that the requirement is unreasonable.

5.24 Case law has clarified that a notice must be reasonable in all circumstances. That the information is held by a non-resident who is not controlled by a taxpayer will not make the request unreasonable,[9] however, the fact that the information is held by a non-resident who is controlled by the taxpayer will not make it reasonable.[10] A balancing exercise must be undertaken by the Judge in each case.

5.25 The consequence of failing to comply with a notice is similar to the Australian provision. Section 231.6(8) provides that:

> If a person fails to comply substantially with a notice served under this subsection 231.6(2) and if the notice is not set aside by a judge pursuant to section 231.6(5), any court having

5 *FH Faulding and Co Ltd v the Commissioner of Taxation of the Commonwealth of Australia* [1994] FCA 1492; (1994) 54 FCR 75 at [30].

6 Income Tax Assessment Act 1936 (Cth), section 264A(22)

7 Michael Chow (ed) *Australian Master Tax Guide* (56th ed, CCH Australia Limited, Sydney, 2015) at [21-220].

8 *FH Faulding and Co Ltd v the Commissioner of Taxation of the Commonwealth of Australia*, above n 5, at [34].

9 Income Tax Act RS C 1985 c 1, s 231.6(6).

10 See *Fidelity Investment Canada Ltd v Canada (Revenue Agency)* 2006 FC 551 at [32]; and *Soft-Moc Inc v Canada (National Revenue)* 2013 FC 291 at [32].

> jurisdiction in a civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.

5.26 In addition, a penalty can be imposed under section 238(1) but only by the court. On summary conviction, a taxpayer is liable to a fine of no more than CAN$25,000 and/or up to 12 months imprisonment.

Discussion Document's justification for the proposal

5.27 The Discussion Document notes that Inland Revenue can and does request information from foreign tax authorities using its exchange of information rights. The Discussion Document suggests however, that these powers are inadequate for two reasons:

> Recent improvements to the exchange of information between tax authorities are making it easier for Inland Revenue to request and exchange information that is held by offshore tax authorities. However, relying on an ability to request information indirectly from other tax authorities is not always adequate. In some cases, the relevant information is not held by the offshore tax authority and in other cases the foreign tax authority may be slow or unhelpful in responding to reasonable requests for information.

5.28 The first reason given is that the relevant information is in some cases "not held by the offshore tax authority". But this is not a compelling argument, since foreign tax authorities can and do exercise their own information gathering powers to obtain information that Inland Revenue requests under the DTA, just as Inland Revenue does when it receives requests for information from foreign revenue authorities.

5.29 It is difficult to evaluate the second aspect of the justification (that the foreign tax authority may be slow or unhelpful in responding) without knowing how common this is. It is to be hoped that this is not often the case given that the DTA or Tax Information Exchange Agreement ("**TIEA**") (as applicable) imposes an obligation on the foreign Government to comply with a valid request, and that New Zealand (presumably) complies with its obligations under the DTA or TIEA.

5.30 But to the extent Inland Revenue might sometimes encounter difficulties or delays in obtaining information from a foreign revenue authority, we note that the New Zealand resident companies may be in no better position to compel a non-resident group member to supply information. This has been recognised by the courts in the discovery context. In that context, the courts are unlikely to order discovery when the information is held by an entity which the relevant party has no control over.[11] For the New Zealand company, it is not simply a matter of requesting the information from (or forwarding on Inland Revenue's information request to) the relevant foreign affiliates and expecting that the

11 See for example *Howard Trading Auckland Limited and Anor v Nissan New Zealand Limited* HC Auckland CIV-2009-404-003111 at [32].

information will be provided. There are more obvious practical difficulties which, we submit, makes this proposal unworkable:

(a) Multinational groups may be comprised of a large number of companies in many countries. It may be impossible for personnel working for the New Zealand entity to know which company holds what information.

(b) Inland Revenue information requests are often very broadly worded, and may call for the production of large numbers (not infrequently thousands) of emails and other documents, which in turn could necessitate the review of an even greater number of documents to determine which are within the scope of the request. For such requests to apply not only to the New Zealand group but also to foreign associated persons could make the requests so costly and burdensome to comply with that compliance is for all practical purposes impossible.

(c) The New Zealand company will usually have no legal right to require a foreign associate to provide information to it. And even if the foreign associate is willing (in the interests of the group) to devote the time and resources necessary to assist the New Zealand company in locating and providing relevant documents, the foreign associate will need to consider whether it is appropriate to do so. For example, some of the information may be legally privileged. And local privacy and confidentiality laws will need to be considered.[12]

Alternative submission: if the proposal does proceed a court order should be required

5.31 If the proposal does proceed, Inland Revenue should be required to obtain a court order to require the New Zealand entity to provide information not held by it or by an entity it controls. This would provide judicial oversight in respect of the breadth of the request and feasibility of complying with it, and as to whether the need for such an onerous power to be exercised is justified in the circumstances and its exercise would be reasonable.

5.32 We further submit that Inland Revenue should not have the power to impose a penalty for non-compliance with the offshore information request. New Zealand should follow the Australian and Canadian approach. Failure to comply with the information request should only result in evidentiary consequences unless a court imposes a penalty.

12 These considerations were behind the need for FATCA to be implemented through Intergovernmental Agreements, such as that concluded between New Zealand and the United States. Had New Zealand financial institutions agreed to provide information directly to the United States (pursuant to an agreement with the United States Government under section 1471 of the Internal Revenue Code) they may have been in breach of their implied contractual obligation of confidentiality and/or their obligations under the Privacy Act 1993. For them to disclose the information to another Government to avoid a financial detriment (FATCA withholding) may not have been recognised as falling within the disclosure under compulsion of law exceptions to their confidentiality and Privacy Act obligations.

Penalties for not providing information requested by Inland Revenue

Penalty for non-compliance should be required to be imposed by the court

5.33 The Discussion Document proposes that a civil penalty of $100,000 can be imposed by Inland Revenue if a large multinational fails to comply with an information request under section 17 or section 21. We submit that any power to impose such a penalty should rest with the Courts and not with Inland Revenue.

Alternative submission: if the proposed rule is introduced, taxpayers should have the right to apply to the court for relief

5.34 We submit that if the proposed rule is introduced, taxpayers should have the right to apply to the Court to have the penalty reduced or set aside. This is a necessary minimum requirement to comply with section 27 of the New Zealand Bill of Rights Act 1990 and should be explicit in the legislation.

General comments on section 21 of the TAA

5.35 Section 21 of the TAA should be rewritten or repealed. Inland Revenue has comprehensive information gathering powers under section 17 of the TAA. Section 21 is arbitrary in its application (being triggered by the non-response to an information request after 90 days, without regard to whether that time-frame is reasonable in the circumstances) and draconian in its consequences (denying a taxpayer access to the courts to challenge an assessment).

5.36 We do not consider there to be any reason why section 17 and section 21 should vary in their application. Denying a taxpayer access to the courts is, as discussed above, on the face of it a breach of section 27(3) of the New Zealand Bill of Rights Act. Section 21 therefore requires (at a minimum) to be reviewed, and unless on review it can be established that section 21 fulfils a purpose that is not met by section 17 then section 21 should be repealed.

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