

DEPARTMENTAL REPORT

Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill

DEPARTMENTAL REPORT TO THE FINANCE AND EXPENDITURE SELECT COMMITTEE ON SUBMISSIONS ON THE BILL

- OECD Pillar Two: Global anti-base erosion (GloBE) tax rules
- Trustee tax rate
- Taxation of backdated lump sum payments
- Other policy items
- Other items
- Miscellaneous issues
- Miscellaneous submissions
- Out-of-scope submissions
- Matters raised by officials

Note that the final wording of any provision that is the subject of a recommendation in this report is subject to advice from legislative counsel. Legislative counsel may make other minor or technical changes to improve the workability of the Bill and the clarity of the drafting.

Prepared by Policy and Regulatory Stewardship, Inland Revenue

February 2024

FIRST PUBLISHED

February 2024 by Policy and Regulatory Stewardship, Inland Revenue, PO Box 2198, Wellington 6140.

Taxation (Annual Rates for 2023-24, Multinational Tax, and Remedial Matters) Bill – Departmental Report on the Bill



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Table of Contents

Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill.....	1
OECD Pillar Two: Global anti-base erosion (GloBE) tax rules	13
Overview	15
Submissions supporting the proposal	16
Referencing the globe rules in New Zealand legislation	17
Issue: Incorporation of GloBE rules by reference.....	17
Issue: Automatic update for future amendments.....	19
Issue: Consistency with OECD Commentary and guidance.....	20
Issue: Application of terms used in GloBE rules in domestic legislation	21
International relations.....	23
Issue: Effectiveness of GloBE rules.....	23
Issue: Tax treaty override	24
Application date and implementation.....	26
Issue: Income Inclusion Rule application date.....	26
Issue: Critical mass	27
Issue: Ambiguity regarding “declared” versus “deemed” implementation	27
Issue: Lack of backstop commencement date.....	28
Issue: General problems with application and implementation	29
Issue: Criterion for exercising Order in Council power.....	31
Issue: Recommendation to exercise Order in Council power.....	32
Issue: Coordination between regulation-making powers	32
Tax liability	34
Issue: Release from joint and several liability	34
Issue: Allocation of multinational top-up tax liability	34
Issue: Imputation.....	35
Issue: Foreign tax credits for QDMTT	36
Compliance costs.....	37
Issue: Compliance costs	37
Issue: Website accessibility of OECD referred documents	38
Issue: Accounting standards.....	39
Issue: New Zealand safe harbours and exemptions.....	39
Issue: Qualified domestic minimum top-up tax.....	40
Exchange of information	42
Issue: Exchange of information safeguards.....	42
Privacy	44
Issue: Consultation with Privacy Commissioner	44

Penalties.....	45
Issue: Penalties for filing late or incomplete return or for late registration	45
Issue: Disparity in penalty rates.....	47
Other considerations	48
Issue: Addressing transfer pricing impacts.....	48
Issue: Public disclosure of country-by-country reports	48
Issue: Beneficial ownership tax register	49
Issue: Exemption from GloBE rules for iwi organisations	49
Issue: Impact on foreign direct investment and export/import trade	50
Issue: Inland Revenue should be able to provide binding rulings on the applied GloBE rules.....	50
Issue: Empowering assessment provisions for discretionary penalties.....	51
Trustee tax rate.....	53
Overview	55
General submissions	57
Issue: Support for proposals	57
Issue: Timing of proposals	58
Problem definition	60
Issue: Concerns with problem definition	60
Issue: Evidence supporting the problem.....	61
Issue: Use of trusts for non-tax reasons	66
Impact of proposals.....	69
Issue: Risk of over-taxation	69
Issue: Use of beneficiary income allocations to mitigate over-taxation.....	71
Issue: More beneficiary income allocations expected	74
Issue: Behavioural shift from trusts to PIEs and companies.....	75
Issue: Misalignment and horizontal equity concerns	77
Issue: Negative impacts on direct investment likely.....	79
Issue: Misalignment with corporate rate unavoidable	80
Issue: Proposals will result in continued indebtedness	81
Issue: Rationale for proposed modifications	81
Alternative approaches.....	83
Issue: Alternative solutions to problem definition	83
Issue: Trustee income de minimis	86
Issue: Rules to buttress a de minimis.....	89
Issue: Indexation of trustee income tax threshold(s).....	90
Issue: Imputation credits concessions	91
Disabled beneficiary trusts.....	92

Issue: Beneficiary income allocations may be inappropriate for disabled beneficiary trusts	92
Issue: Disabled beneficiary definition too narrow	92
Issue: Disabled beneficiary definition would increase compliance costs	97
Issue: Problematic to determine eligibility	97
Issue: Limit on number of beneficiaries	98
Issue: Power to add and remove beneficiaries	100
Issue: Trusts created by a will.....	100
Issue: Eligibility based on purposes of the trust	101
Issue: Receiving payments in relation to an income year.....	101
Issue: Grace period.....	102
Issue: Applicable rate for disabled beneficiary trusts	102
Issue: Exemption from associated persons rules	103
Deceased estates	105
Issue: Over-taxation of deceased estates.....	105
Issue: Deceased estates modification does not apply for long enough	106
Issue: Extended period for deceased estates subject to court challenge	109
Issue: Tax rate applicable to trustee income of deceased estate	110
Issue: Deceased estates modification should apply automatically	111
Issue: Complexity of deceased estates modification	112
Issue: Deemed disposition/reacquisition of assets at death.....	114
Specific types of trusts	115
Issue: Trusts within corporate groups.....	115
Issue: Trusts with benevolent purposes	116
Issue: Trading trusts.....	117
Issue: Securitisation trusts.....	118
Issue: Securitisation trust remedial amendments.....	120
Issue: Superannuation schemes	121
Issue: Testamentary trusts	124
Issue: Widely-held trusts	127
Issue: Tax treatment of Entrust.....	129
Issue: Māori trusts	130
Corporate beneficiary rule	132
Issue: Opposition to corporate beneficiary rule.....	132
Issue: Genuine reasons to allocate beneficiary income to a company.....	134
Issue: Concerns with example in RIS and Bill commentary	136
Issue: Application of corporate beneficiary rule should be narrowed	137
Issue: Treatment of beneficiary income subject to corporate beneficiary rule..	139

Issue: Natural love and affection.....	140
Issue: Corporate beneficiary rule and tax credits.....	141
Issue: Corporate beneficiary rule and securitisation trusts	141
Corpus and other settlements.....	144
Issue: Corpus and other settlements.....	144
Process, implementation and administration	145
Issue: Guidance on areas of uncertainty needed	145
Issue: Generic tax policy process.....	146
Issue: Timing of release of officials' advice	147
Issue: Further consultation required	148
Foreign trusts.....	150
Issue: Foreign-sourced amounts derived by resident trustees	150
Issue: Taxation of distributions from foreign and non-complying trusts	151
Trust disclosures	153
Issue: Trust disclosure rules	153
Issue: Trust disclosures and non-active trusts	154
Issue: Comments on trust disclosure insights.....	155
Other comments regarding trusts	157
Issue: Minor beneficiary tax rate should remain at 33%.....	157
Issue: Concerns with revenue estimate for the proposals	158
Issue: Revenue raised should be spent effectively	159
Issue: Collaboration with investor groups needed.....	159
Issue: Deemed settlor rule	160
Issue: Aligning New Zealand's tax rules with other common law jurisdictions..	161
Taxation of backdated lump sum payments.....	163
Taxation of backdated lump sum payments.....	165
Issue: General support for the proposals.....	165
Issue: Retrospectivity of proposed changes.....	165
Issue: Backdated lump sum payments for attendant care	166
Issue: Impact of ACC and MSD lump sum payments on Working for Families Tax Credits	167
Issue: Backdated lump sum payments of foreign social security pensions	168
Issue: Extend proposals to apply to redundancy payments.....	169
Issue: Including the amount of the lump sum in the tax rate calculation.....	169
Issue: Support for information sharing provision.....	170
Issue: Education campaign in MyIR.....	170
Issue: Tax on the lump sum payment should be a final tax.....	171
Issue: Backdated MSD entitlements.....	172

Issue: Definition of main benefit.....	172
Issue: Guidance on the implication for tax return data points.....	172
Issue: Extend proposals to cover certain other payments.....	173
Issue: Consideration of other lump sum payments.....	174
Issue: There should be no time limit on ACC backdated lump sum payments .	174
Issue: Suggested changes to non-Inland Revenue Acts.....	175
Other policy items.....	177
Payment of Kiwisaver contributions to PPL recipients.....	179
Issue: Support for the proposal.....	179
Issue: KiwiSaver member must contribute to receive proposed government contribution.....	179
Issue: New Zealand’s PPL provisions should be reconsidered	180
Taxation rollover relief.....	182
Issue: Support for proposal	182
Issue: Proposal should be made generic.....	182
Issue: Widen proposal to accommodate buy-outs by central and local government	183
Issue: Turn off bright-line and other timing tests	184
Issue: Extend rollover relief to land improvements.....	184
Issue: Add June 2023 East Coast floods to events covered by rollover relief	185
Issue: Add Nelson flood event buy-outs.....	186
Issue: CA ANZ support for other proposals	187
Issue: Recognising expenditure deductions for suspended activities.....	188
Issue: Rollover relief election process must be electronic and as simple as possible.....	188
Issue: Recognising late rollover elections.....	189
Issue: Remove requirement to assess asset as uneconomic to repair.....	190
Issue: Assets available for use but inaccessible.....	191
Issue: Amend general insurance provisions to exclude uneconomic to repair assets	192
Issue: Apportionment of global insurance pay-out	192
Issue: Thin capitalisation rule.....	193
Issue: Amend latest date for providing election for 2022–23 income year	194
Issue: Consultation with the Privacy Commissioner on the provision of personal information.....	195
Schedule 32 – overseas donee status.....	197
Issue: Emergency Alliance donee status.....	197
Exemption for non-resident oil rig and seismic vessel operators	198

Issue: Support for extending the exemption	198
Issue: Benefits for New Zealand economy and revenue take.....	198
Issue: Opposition to extending the temporary exemption	198
Other items	201
Correcting extra pay inaccuracy on termination.....	203
Issue: Request for additional amendments	203
Issue: Application date should be extended	204
Issue: Proposal may not reduce inaccurate taxation	205
Allowing death information to be shared with Kiwisaver scheme providers	207
Issue: Support for the proposal.....	207
Issue: Consultation with Privacy Commissioner on provision of personal information	207
Gift-exempt bodies	209
Issue: Feedback on proposal	209
Deregistration tax.....	211
Issue: Opposition to proposal.....	211
Issue: Support for proposal	214
Issue: Grandparenting provision	214
Issue: Tax charities	215
Charitable trust definition	216
Issue: Support for proposal	216
Issue: Support for proposal	217
Charitable entities and RWT-exempt status.....	218
Issue: Support for proposal	218
Double tax agreement source rule	219
Issue: Support proposed changes to section YD 4(17D)	219
Issue: Section YD 4(17D) should be repealed.....	219
Issue: Section YD 4(17D) should be further narrowed	220
Issue: Definition of “technical services fees” should be clarified.....	221
Issue: Reference to a “PE outside New Zealand” is not sufficiently clear.....	222
Issue: Proposed amendment should be used as a case study for the Select Committee’s processes	222
Transitional residents holding domestic financial arrangements.....	224
Issue: Support for proposal	224
10% Income interest test for access to the attributable FIF income method	225
Issue: Support for proposed amendments.....	225
Issue: Consistency with income interest calculation	225
Issue: Amend other income interest test provisions.....	226

Provisional tax – technical change to section RC 6	227
Issue: Technical change to section RC 6.....	227
Portfolio investment entity (PIE) remedial amendments.....	228
Issue: Remedial PIE amendments.....	228
Resident withholding tax and custodians.....	229
Issue: Non-cash dividend received by an intermediary	229
Clarify meaning of “building” for depreciation purposes.....	230
Issue: Proportional approach to depreciation	230
Issue: Wider review	230
Issue: Simplify the depreciation regime	231
Rollover relief remedial amendments.....	232
Issue: Application date of rollover relief provisions.....	232
Issue: Transfers from a trust following death of settlor	232
Main home exclusion: Construction period	234
Issue: Main home exclusion should treat construction days as main home days	234
Issue: Design of construction period rule in relation to off-the-plan sales	234
Issue: Supportive of proposal to ignore construction period.....	235
Issue: Time bar and the main home exclusion	235
Child support.....	237
Issue: Clarifying that the child support time-bar does not apply to temporary exceptions	237
Issue: Capturing of income	237
Issue: Child support formula	238
Flooding tax relief.....	239
Issues: Timeframe for employees to relocate and definition of affected area...239	
Issue: Three-month meal allowance tax exemption time limit should be reconsidered.....	239
Issue: Proactive compensatory processes be identified and given legal form ..240	
Remedial amendments are required to address taxation of securitisation trusts . 241	
Issue: Overreach of the associated persons rules	241
Issue: Transfer from a securitisation SPV that does not elect into the regime .. 241	
Issue: Notes issued by a securitisation trust should be excluded from the restricted transfer pricing rules	242
Issue: Securitisation trusts should be excluded from the thin capitalisation rules	243
Goods and services	244
Issue: Remove GST from rates	244
Issue: Remove GST on fresh fruit and vegetables	244

Issue: Incorrect terminology.....	245
Miscellaneous issues.....	247
Issue: Operation of the financial arrangements entry rules where the borrower is insolvent	247
Issue: Section EW 46D should be repealed or amended	248
Issue: Cross-references in section FC 2(3).....	250
Issue: Platform economy – allow any GST-registered underlying supplier to remain responsible for their own GST obligations.....	250
Miscellaneous submissions.....	253
Out-of-scope submissions	254
Matters raised by officials.....	255
Remedial amendments to Tax Administration Act 1994.....	257
Issue: Annual MACA return not required.....	257
Issue: Information sharing with Te Whatu Ora for COVID-19 response purposes	257
Issue: Clarifying that individuals earning “non-reportable income” can change balance dates.....	258
Issue: Platform economy Information reporting and exchange – penalties	259
Issue: Record-keeping requirements for platform operators.....	260
Issue: 12-month limit on emergency event payments for Working for Families purposes.....	260
Issue: Cross-border workers: Nominated taxpayer	261
Remedial amendments to Income Tax Act 2007.....	263
Issue: Disability support payments, reference to Ministry for Disabled People	263
Issue: Deducting expenditure related to mitigating environmental hazards.....	263
Issue: Time to make a look-through company election.....	264
Issue: Setting the early payment discount rate	265
Housing remedial amendments	266
Issue: Unintended land tainting on a partition of land	266
Issue: Partitioning of land among co-owners.....	267
Issue: Error in trust provisions	268
Issue: Rollover relief and the main home exclusion.....	268
Issue: Land used for transitional housing	269
Platform economy GST remedial matters.....	271
Issue: Adjustment rules for the flat-rate credit	271
Issue: Listing intermediaries	272
Issue: Flat-rate credit – technical matters	273
Issue: Minor remedial matters	273

Other remedial amendments	276
Issue: Revoking redundant regulation.....	276
Maintenance items raised by officials.....	277
Summary of proposed amendments	277
Effective date.....	277
Summary of recommendations.....	279
Summary of recommendations	281
OECD Pillar Two: global minimum tax.....	281
Trustee tax rate.....	282
Taxation of backdated lump sum payments.....	284
Other policy items.....	285
Other items	286
Matters raised by officials.....	289

**TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX,
AND REMEDIAL MATTERS) BILL**

**OECD Pillar Two: Global anti-base
erosion (GloBE) tax rules**

OVERVIEW

The Bill proposes to implement the Organisation for Economic Co-operation and Development (OECD) Pillar Two Global Anti-Base Erosion (GloBE) tax rules in New Zealand.

There were 17 submissions received in relation to this proposal.

Eight of the 17 submissions expressed support generally for the proposal. Five of these submissions also expressed concern about aspects of the proposal.

Key concerns raised by submitters related to:

- referencing the GloBE rules in New Zealand legislation
- automatic updating of New Zealand rules when additional OECD guidance is published
- application date
- tax liability
- compliance cost
- exchange of information
- privacy, and
- penalties.

Officials recommend making the following changes to the Bill as a result of the submissions:

- Clarify that the Model Rules must be interpreted in accordance with the Commentary and Agreed Administrative Guidance, meaning that in some cases the Commentary and Agreed Administrative Guidance will override the Model Rules.
- Provide for companies leaving a group to be released from joint and several liability for that group's GloBE rules' taxes.
- Clarify that foreign tax credits are allowed for tax paid overseas under a qualified domestic minimum top-up tax (QDMTT).

Officials also submit that the legislation should explicitly provide that binding rulings can be made on the application of the GloBE rules just as they can on other tax laws.

SUBMISSIONS SUPPORTING THE PROPOSAL

Clauses 6, 7, 21, 44, 45, 48, 51 to 54, 59(4), (5), (11) and (12), 63, 68, 69, 72, 74, 75 and 77

Submission

(Baucher Consulting Ltd, Bryce Jensen, Cantin Consulting, EY, New Zealand Council of Trade Unions, PwC, Russell McVeagh, Tax Justice Aotearoa)

Eight of the 17 submissions expressed support for the proposal to introduce the GloBE rules. Five of these submissions also expressed concerns with aspects of the proposal. *(Cantin Consulting, EY, PwC, Russell McVeagh, Tax Justice Aotearoa)*

Generally, the reason for the support was because the GloBE rules were considered the best available option to address concerns regarding the level of tax paid by multinational enterprises (MNEs). *(Baucher Consulting Ltd, Bryce Jensen, Cantin Consulting, EY, New Zealand Council of Trade Unions, Tax Justice Aotearoa)*

Others supported the proposal because a significant number of other jurisdictions will be enacting the GloBE rules. Introducing the rules in New Zealand will help reduce the costs that would be incurred by New Zealand headquartered MNEs that would otherwise be required to comply with the Undertaxed Profits Rule (UTPR), often in two or more countries. *(PwC, Russell McVeagh)*

Recommendation

That the submissions be noted.

REFERENCING THE GLOBE RULES IN NEW ZEALAND LEGISLATION

Clauses 44, 63 and 77

Issue: Incorporation of GloBE rules by reference

Submission

(Chartered Accountants Australia and New Zealand, Cantin Consulting, EY, Patterson Legal, KPMG, Mayne Wetherell, New Zealand Law Society, OliverShaw Ltd, PwC, Regulations Review Committee, Tax Justice Aotearoa)

Some submitters supported the incorporation by reference approach because it should reduce translation errors and ensure New Zealand's domestic rules comply with the Inclusive Framework's rules. *(Cantin Consulting)*

Others accepted the proposed approach but submitted that the statute should specify who the rules apply to (see [Issue: Compliance costs](#) below). *(OliverShaw Ltd, PwC)*

The rest of the submissions were generally concerned that incorporating the GloBE rules by reference would undermine New Zealand's sovereignty and autonomy. They made the following points:

- a. The Committee should understand how other countries (such as Australia, the United Kingdom and the United States of America) intend to enact this tax, as well as seek advice on whether this is appropriate under section 22 of the Constitution Act 1986. *(Patterson Legal)*
- b. It is not clear that the incorporation by reference approach will include certain components of the GloBE rules, in particular the transitional safe harbour provided for in Chapter 1 of the December 2022 document titled Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris. *(KPMG)*
- c. The GloBE rules should be repeated in New Zealand legislative material to avoid ceding sovereignty to the OECD and to give more scope to ensure the legislation does not have unintended consequences, although this would involve more work for Inland Revenue. *(Chartered Accountants Australia and New Zealand)*
- d. Incorporation by repeating the rules in New Zealand legislative material would also improve accessibility of the rules and scrutiny of future amendments. *(Mayne Wetherell)*
- e. When incorporating external materials like the GloBE rules into domestic legislation, there needs to be a mechanism to clarify whether changes to the external materials are to be applied or disapplied in New Zealand as they arise. The default position is that,

under section 66(2)(a) of the Legislation Act 2019, changes to external materials have no effect unless they are specifically incorporated by secondary legislation. There is a mechanism of sorts addressing changes to Commentary and interpretation materials through a regulation-making power in proposed section 226G in the Tax Administration Act 1994 (TAA) (which also has issues), but there is no similar provision for changes to the GloBE rules themselves. The legislation would be improved by specifically providing for this mechanism in section HP 4 of the Income Tax Act 2007 (ITA), and further, clarifying that a change to the external GloBE rules will not be effective until it is implemented. (Regulations Review Committee)

Comment

In response to the submission that the scope of the GloBE rules (who they apply to) should be specified in the legislation, setting out the scope of the rules in New Zealand legislation would require significant drafting to be comprehensive. While the core of the rule can be shortly stated (for instance, "MNE groups with €750 million or more turnover in at least two of the four previous fiscal years") it relies on definitions that are lengthy and at the margins complex (such as "of Consolidated Financial Statements", "Constituent Entity" and "MNE Group") and modifications (dealing with changes in group membership in Article 6.1), such that incorporating them into New Zealand law directly would itself create undesirable drafting complexity.

In response to the other submissions referred to above:

- a. Officials understand that Switzerland has incorporated the rules by reference, but we are not aware of any other countries that have done so. As to the constitutionality of the incorporation by reference approach, officials point out that insofar as the Bill incorporates into New Zealand the GloBE rules as they exist on the date of enactment, Parliament can be presumed to know those rules.
- b. It is clear that the guidance that includes the transitional safe harbour is Agreed Administrative Guidance. It satisfies the definition in the Model Rules of being "guidance on the interpretation or administration of the GloBE rules issued by the Inclusive Framework".
- c. Incorporation by repetition would need to include both the Model Rules (68 pages) and the Commentary (225 pages when initially released, and now materially longer following the release of two tranches of Agreed Administrative Guidance). This would require significant resources and risks the New Zealand legislation diverging from the Model Rules.
- d. It is important that New Zealand's rules do not depart in any material way from the Model Rules, so the benefits of scrutiny at a New Zealand level are perhaps overstated. New Zealand does have input through the Inclusive Framework. The process of generating Agreed Administrative Guidance also generally involves an opportunity for input from affected businesses.

- e. The proposed defined term “global anti-base erosion model rules” in section YA 1 of the ITA provides for changes to the Model Rules (other than to the 15% minimum rate) to flow through automatically into New Zealand’s domestic law. Section 66(2)(a) of the Legislation Act does not apply because the ITA is primary legislation, not secondary legislation.

Recommendation

Officials recommend that the submissions against incorporation by reference, and the submission concerning the flow-through of Model Rules changes to domestic legislation, be declined.

Clause 44 and 77

Issue: Automatic update for future amendments

(Cantin Consulting, EY, KPMG, Mayne Wetherell, New Zealand Law Society, Patterson Legal, PwC)

Submission

One submission considered the proposed automatic update approach to incorporating future changes to the GloBE rules to be a sensible and a practical way of complying with the Inclusive Framework’s requirements. However, it was not opposed to requiring an Order in Council to explicitly adopt changes so there is parliamentary scrutiny of any changes. *(Cantin Consulting)*

All other submissions on the proposed approach of automatic incorporation opposed it, taking the view that some level of parliamentary scrutiny should be required, whether this was by Order in Council or by primary legislation. *(EY, KPMG, Mayne Wetherell, OliverShaw Ltd, PwC)*

Some submissions said that the Select Committee should seek advice on whether it is appropriate, under section 22 of the Constitution Act 1986 and other constitutional conventions, for amendments to the Model Rules to amend New Zealand tax law. If it is, there should be a process in the statute for Parliament or Inland Revenue to notify that there has been a change to the Model Rules. *(Patterson Legal)*

The New Zealand Law Society submitted that the Bill could be improved by including a provision that more clearly and expressly addresses the question of future amendments to the GloBE rules and Commentary.

PwC submitted that in any event, Inland Revenue should issue guidance specifically as to how the rules will apply in practice, particularly if New Zealand will incorporate any changes on a retrospective basis.

Comment

An automatic update approach has been proposed for adopting future amendments to the GloBE rules because it is a sensible and practical way to comply with the requirements of the rules. Requiring parliamentary scrutiny for future amendments when the domestic rules need to be substantially the same as the Model Rules to be qualifying would be resource intensive.

The proposed automatic update approach is not unique in a New Zealand tax context. For example, there are tax laws within the ITA that rely on amounts calculated under International Financial Reporting Standards. These accounting standards may be updated from time-to-time resulting in changes to tax rules and regimes.

Section 22 of the Constitution Act 1996 provides that it is not lawful for the Crown to levy a tax except by or under an Act of Parliament. In keeping with this requirement, the GloBE rules have been included in a Bill that, if passed, will become an Act of Parliament once it receives Royal assent.

The intention is that future changes to the GloBE rules are adopted unless they are specifically made non-applicable by an Order in Council. The regulation-making power is in section 226G of the TAA.

The reference in the opening words of section HP 3(3) of the ITA, that the GloBE rules apply "at a time", is not entirely consistent with the language of section HP 3(3)(b)(ii) that the rules apply for a fiscal year. Officials agree this could be made clearer.

Recommendation

Officials recommend that the submission, that the opening words of section HP 3(3) should be amended for clarity, be accepted. Officials recommend that the other submissions on automatic update be declined.

Clause 44

Issue: Consistency with OECD Commentary and guidance

(Cantin Consulting)

Submission

Proposed new section HP 3 of the ITA provides that the GloBE rules are treated as applying "consistently with" the most recent Commentary and Agreed Administrative Guidance developed by the OECD/G20 Inclusive Framework. The submission queried whether the current wording would achieve the desired policy intention. In particular, "consistently with" does not necessarily mean "as modified by".

Comment

Officials agree that the current drafting of proposed section HP 3 may not achieve the desired outcome, which is that the Commentary and Agreed Administrative Guidance developed by the Inclusive Framework would prevail over the Model Rules if inconsistent (which is not generally expected to be the case).

Recommendation

That the submission be accepted.

Clauses 44, 45 and 74

Issue: Application of terms used in GloBE rules in domestic legislation

Submission

(Office of the Clerk of the House of Representatives)

Incorporating external material into domestic legislation through reference could result in ambiguity regarding how definitions for terms used in the external materials apply to New Zealand. The Bill includes terms, such as "MNE group", that are defined within the GloBE rules. However, definitions for such terms are not explicitly provided in the amendments to primary legislation. While the intention may be for the definitions included in the external materials to apply, this is not made clear. Additionally, the term "ultimate owner" is used in new section 139AAB, when the GloBE rules use the term "Ultimate Parent Entity" for the same concept. This inconsistency may also create ambiguity. The Committee may wish to consider whether definitions for terms connected to the GloBE rules, Commentary or Agreed Administrative Guidance, should be explicitly included in domestic legislation.

Comment

Proposed new section HP 5 of the ITA (see clauses 44 and 45 of the Bill) provides that, in the application of the relevant provisions of the ITA and TAA, a term defined in the GloBE rules and used in those provisions has the meaning that it has at the time under the GloBE rules, as modified by proposed new section HP 3(2) of the ITA. This drafting approach was based on precedents in sections 185O and 185S of the TAA, which relate to the *Common Standard on Reporting and Due Diligence for Financial Account Information* and the *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy*, respectively.

Recommendation

That the submission be noted.

INTERNATIONAL RELATIONS

Clauses 44 and 63

Issue: Effectiveness of GloBE rules

Submission

(Cantin Consulting, Tax Justice Aotearoa)

The GloBE rules generally require accounting profits to be attributed to a country for them to be taxed (although a UTPR may allow a country to tax profits not attributed to that country). In a simplified model, (global) accounting profits are based on use of resources, use of intellectual property and delivery to customers – profits are allocated based on an arms-length standard. This limits the profits recognised in a “source” or “market” country. The GloBE rules do not change this; therefore, source countries may not consider the solution advantageous. There are calls for the United Nations to promote an alternative. *(Cantin Consulting)*

It is not clear whether a particular country will benefit from the GloBE rules, especially developing or poorer countries. Some countries may use a domestic minimum tax (provided for in the GloBE rules) to the detriment of other countries. The Select Committee should note the position of such agencies as Oxfam, Independent Commission for the Reform of International Corporate Taxation (ICRICT) and others. *(Tax Justice Aotearoa)*

Comment

The GloBE rules do not prevent countries offering low rates or incentives to attract real investment. The submission raised in relation to the allocation of accounting profits is an issue that is outside the scope of the proposed rules. Officials note that the issue around the allocation of profits may be addressed by Pillar One of the OECD/G20 Inclusive Framework.

Officials note that a domestic minimum tax cannot be implemented to the detriment of another country because it is the right of a country to tax the income arising in that country, whether by way of a domestic minimum tax or otherwise.

Recommendation

That the submissions be noted.

Clause 7**Issue: Tax treaty override****Submission**

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Deloitte, New Zealand Law Society, OliverShaw Ltd, PwC)

The submitters do not support the proposed treaty override provision because there is a risk that other countries could respond negatively. For example, other countries could impose tariffs or revoke a tax treaty. New Zealand's approach to addressing the interaction between double tax agreements and the GloBE rules should be consistent with the approach taken by treaty partners.

The GloBE rules are consistent with tax treaties making an override of treaties unnecessary. This view is supported by comments made by the OECD. *(OliverShaw Ltd, PwC)*

Comment

Tax treaties generally prohibit a country from taxing the income of a non-resident unless it arises in the country. However, the treaties generally permit a country to tax its own residents as it likes. There is an argument that the UTPR violates the first (prohibition) rule. Although it taxes a resident member of a multinational group, it often does so on the basis that the income of a non-resident member not arising in the tax-imposing country has been under-taxed.

As noted by submitters, the OECD's position is that it considers the GloBE rules to be treaty compliant, because of the second (permissive) rule described above. Officials agree with this view. Also, it is clearly the intention of the Inclusive Framework of around 140 countries, including the United States, that countries should apply the UTPR. Further, the proposals in the Bill will only come into effect if a critical mass of countries adopts the GloBE rules, including the UTPR. As a result, Officials consider there is a low risk that another country will respond negatively if New Zealand applies the UTPR, with one possible exception.

One country that might respond negatively to the GloBE rules is the United States. While the current administration supports the rules, a section of the Republican party does not. So there is a small risk that the United States may respond negatively to the introduction of the UTPR itself, for example, by imposing trade tariffs. Given the number of countries introducing a UTPR, officials believe this risk is very small.

The purpose of the proposed treaty override provision is to avoid unproductive disputes being raised by MNEs that may seek to challenge the imposition of tax by New Zealand under the UTPR.

Officials note that section BH 1(4) of the ITA already provides for treaties to be overridden in certain circumstances. For example, sections BG 1 and GB 54 (which relate to tax avoidance)

and section RF 11C (which relates to interest paid by non-resident companies to non-residents) override tax treaties.

Recommendation

That the submissions be declined.

APPLICATION DATE AND IMPLEMENTATION

Clauses 2 and 44

Issue: Income Inclusion Rule application date

Submission

(Corporate Taxpayers Group, Deloitte, PwC)

New Zealand's rules should only apply once the UTPR starts to apply in a critical mass of other countries. This is when New Zealand headquartered MNEs will otherwise have compliance costs in other countries. This will be from 1 January 2025 at the earliest.

Comment

It is now clear that a critical mass of countries will be adopting an income inclusion rule (IIR) from 1 January 2024 and a UTPR from 1 January 2025. The effective date for New Zealand's GloBE rules can therefore be set in the Bill, rather than left to be determined by Order in Council.

New Zealand's IIR should be effective no later than 1 January 2025. There is an issue as to whether the IIR should be made effective from 1 January 2024. Retrospective application of taxes is generally not desirable, which is a strong argument in favour of a 1 January 2025 start date for the IIR.

The effective date for the UTPR cannot be earlier than 1 January 2025, and now that it seems clear that the rules will be adopted internationally, this date can be specified.

A later start date is feasible for the domestic IIR (DIIR). The Transitional UTPR Safe Harbour, published in July 2023, means that no country will impose its UTPR on any under-taxed New Zealand-sourced income of a New Zealand headquartered MNE until 1 January 2026 at the earliest. Therefore, implementing the DIIR a year later will have no adverse impact on New Zealand MNEs, but it will have the positive impact of giving them more time to prepare their compliance capabilities.

Recommendation

That the submission be accepted, and that the Bill accordingly specify a 1 January 2025 start date for the IIR and UTPR and a 1 January 2026 start date for the DIIR.

Clauses 2 and 44

Issue: Critical mass

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, KPMG, OliverShaw Ltd, PwC)

The submitters generally support the proposal to only implement the GloBE rules in New Zealand if a critical mass of other countries also does so.

Clear guidance is needed on what constitutes a critical mass. *(KPMG, PwC)*

New Zealand's major trading partners should be included in the critical mass – Australia in particular. *(Corporate Taxpayers Group, OliverShaw Ltd)*

Comment

The Order in Council process for setting an effective date allowed the Government the flexibility to determine a critical mass. However, as set out above, subsequent events mean that this process is not necessary, and the submissions referred to on this point will not be relevant if the Bill specifies the effective dates for the components of the GloBE rules.

Recommendation

That the submissions be declined, noting officials' comment above.

Clause 44

Issue: Ambiguity regarding “declared” versus “deemed” implementation

Submission

(Regulations Review Committee)

Section HP 1(1) of the ITA sets out a general obligation to pay tax under the GloBE rules. Section HP 1(2) provides an exclusion to this obligation, stating that tax is not payable in accordance with a component of the GloBE rules set out in section HP 4(2):

- (a) if a date has not been declared [in regulations] for the implementation in New Zealand of the component; or
- (b) for fiscal years starting before the date declared [in regulations] for the implementation of the component otherwise.

Section HP 4(3) states that an Order in Council may "deem" a component of the GloBE rules to have been implemented in New Zealand on a date in the past if the date is not earlier than 1 January 2024 and the first day of the calendar year in which the date is declared.

This use of "deemed" implementation in section HP 4(3) creates confusion with section HP 1. It is not immediately clear whether a date of "deemed" implementation is effective for the purposes of the section HP 1(2) carve-out removing liability to pay tax, which is based on "declared" implementation. This creates ambiguity in terms of when liability arises during a "deemed" implementation period.

The Finance and Expenditure Committee should consider whether section HP 4(3) should be amended to include the term "declare", to avoid ambiguity regarding liability under section HP 1(2) and (2).

Comment

Officials agree that using the word "declare" in section HP 4(3) would resolve the ambiguity. However, officials are now proposing to set effective dates for the rules, which, if agreed to, would result in the deletion of the Order in Council mechanism and the ambiguous wording in question.

Recommendation

That the submission be accepted, noting officials' comment.

Clause 2

Issue: Lack of backstop commencement date

Submission

(Regulations Review Committee)

Clause 2 is the commencement provision of the Bill. Various parts of the Bill commence at different times. Clauses 44, 66(3) and (5), 68, 69, 70(2), 71(2), 72, and 75 come into force on a single date to be set by Order in Council.

All these clauses provide for the dates when the GloBE rules commence to apply. However, there are no time limits in clause 2 for commencement by Order in Council. Often, a time range is given for such matters, including both or either of a date by which the order must be made ("long stop" or cutoff date).

The explanatory note for the Bill states that the reason for the commencement of these provisions by Order in Council is so they can be brought into force once a critical mass of other countries has adopted the GloBE rules. Therefore, flexibility is needed. However, lawmakers should still consider using a "long stop" date, because doing so maintains parliamentary sovereignty and avoids the possibility of the executive intentionally or unintentionally frustrating the law-making process.

Comment

For the GloBE rules to be effective, a critical mass of countries must adopt them. It is therefore preferable that the rules do not come into effect in New Zealand until this occurs. However, as noted in the officials' comment on the submission [Issue: Income Inclusion Rule application date](#), it is now clear that a critical mass of countries will be adopting their GloBE rules from 1 January 2025. Accordingly, officials propose that a hard effective date of 1 January 2025 be set for New Zealand's IIR and UTPR, and 1 January 2026 for the DIIR, replacing the Order in Council mechanism.

Recommendation

That the submission be declined, noting, however, that its substantive intent is achieved by officials' proposal to replace the Order in Council mechanism altogether with set effective dates for the GloBE rules.

Clauses 44 and 77

Issue: General problems with application and implementation

Submission

(Regulations Review Committee)

New section 226G in the TAA provides for the making of regulations that disapply changes to the OECD-published Commentary and Agreed Administrative Guidance to the GloBE rules. New section HP 3(3)(b) in the ITA states the default position that the GloBE rules are to be interpreted in accordance with the most recent Commentary and Agreed Administrative Guidance.

- a. Section HP 3(3) states that, "subject to section HP 1(2) and any regulations made under section 226G", the GloBE rules are "treated as applying at a time [...] consistently with [the most recent Commentary and Guidance]". It is uncertain what is meant by the inclusion of "treated as" and "at a time" and why the provision is phrased in this way rather than just saying "apply".

Section HP 3(3) should be reworded to state more clearly that the GloBE rules apply consistently with the most recent Commentary and Guidance. The phrases "treated as" and "at a time" should be removed because they create ambiguity.

- b. There is no regulation-making power (RMP) that implements the Commentary and Guidance themselves (as external materials) and provides for the implementation of changes to them. New section 226G provides for regulations to disapply changes to the Commentary and Guidance. Section HP 3(3) seeks to apply the Commentary and

Guidance; however, this provision does not sit easily alongside the RMP in section HP 4 to implement the GloBE rules themselves. Without coordinated RMPs implementing the Commentary and GloBE rules, there is a risk that the Commentary and GloBE rules themselves could become out of sync.

Further, it is not made explicit in section HP 3(3) that the "most recent" versions of the Commentary and Guidance, as a default position, would include any changes to that Commentary and Guidance that have been made subsequent to the implementation date of the GloBE rules themselves, which is set by RMP in section HP 4. The fact that section HP 3(3) is subject to section HP 1(2) (which deals with implementation dates set by Order in Council under section HP (4)) may create this impression, but this could be made more transparent.

Sections HP 3 and HP 4 should be amended to provide for the implementation of Commentary and Guidance materials themselves, and to provide for the implementation of changes to Commentary and Guidance, to avoid ambiguity as to how and when changes to these materials are to apply in New Zealand.

Comment

- a. Officials are proposing to change the wording "at a time" to "for a fiscal year", for clarity. Officials also agree that removing the words "treated as" may reduce ambiguity.
- b. Given that, under the Bill as drafted, there is automatic flow-through of changes to the Model Rules as well as to Commentary and Guidance, officials do not agree that there is a risk of the Commentary and GloBE rules becoming out of sync.

The Bill does not require secondary legislation to be made to implement Commentary or Guidance, or changes to them. This reflects the policy intent that amendments to the Commentary and Agreed Administrative Guidance be incorporated automatically into New Zealand's law. Section HP 3 refers to the most recent Commentary and Guidance published by the OECD before the start of the relevant fiscal year. Given that the OECD may either amend or replace its Commentary or Guidance, keeping the reference ambulatory avoids the need to refer to a particular document, which may end up being replaced during the passage of the Bill through Parliament. Officials consider it is clear enough that the "most recent" version published before the start of the relevant fiscal year may have been published after the commencement of the section, and that an attempt to make this more explicit would introduce unnecessary wordiness to the legislation.

Recommendation

- a. That the submission be accepted.
- b. That the submission be declined.

Clause 44

Issue: Criterion for exercising Order in Council power

Submission

(New Zealand Law Society)

If New Zealand proposes to only implement the rules in the event a critical mass of other countries also does so, then that criterion should be reflected in the power allowing the Government to select the implementation date. This would provide a standard against which a New Zealand court may test the Government's exercise of its power under section HP 4 of the ITA.

Comment

As noted in comments on other application date-related submissions, officials are now proposing to set fixed effective dates for the GloBE rules, and these effective dates, if agreed to, would replace the Order in Council power. However, a rationale for the formulation of the Order in Council power is set out below.

The originally proposed Order in Council power sets an earliest potential implementation date of 1 January 2024. The purpose of the power is to give the Government the flexibility to make a judgement-based decision on the appropriate implementation date subject to this limitation.

The intention is that the Government will implement the rules if a critical mass of other countries also implements them. The Government may consider a range of supporting factors when determining whether a critical mass of countries will implement. It is not intended that the implementation of the rules, if and when decided on, should be subject to review.

Section 185T of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 contains an Order in Council power for setting the implementation date for the extended model reporting standard for digital platforms with no statutorily-prescribed criteria. This provides a precedent for the approach proposed in the Bill.

Recommendation

That the submission be declined, noting officials' first comment.

Clause 44

Issue: Recommendation to exercise Order in Council power

Submission

(Cantin Consulting, KPMG)

The implementing Order in Council should be made on the recommendation of the Ministers of Revenue, Finance, Foreign Affairs, and Trade and Export Growth, and should take into account not only whether there is a critical mass but also whether implementation is supported by New Zealand's economic and trade interests, including the risk of a trade response from the United States.

Comment

An Order in Council is an order made by the Governor-General in Council, which means the Governor-General acting on the advice and with the consent of the Executive Council, which comprises all Ministers of the Crown including the Ministers of Revenue, Finance, Foreign Affairs, and Trade and Export Growth. Therefore, it is not necessary to name a specific Minister to recommend the making of the Order in Council. Although proposed section HP 4(1)(c) of the ITA only mentions the Minister of Revenue, the purpose of this provision is to give the Minister of Revenue the power to initiate the process through their recommendation.

As noted in other comments, however, officials are now proposing to set fixed effective dates for the GloBE rules, and these effective dates, if agreed to, would replace the Order in Council power.

Recommendation

That the submission be declined, noting officials' final comment.

Clauses 44 and 69

Issue: Coordination between regulation-making powers

Submission

(Office of the Clerk of the House of Representatives)

- a. Clause 44 would provide for the implementation of the GloBE rules by inserting new subpart HP into the ITA. The Bill would also insert a number of provisions relating to the GloBE rules, such as the information disclosure and reporting requirements in new sections 78H, 78I and 78J (clause 69), into the TAA. The current design of regulation-

making powers in the Bill would provide that these provisions come into force by different Orders in Council.

For some of these provisions, text is included in the Bill to account for coordination between potential different implementation dates (see clause 69(2)). However, while this text is included in the Bill itself in these cases, it is not included in the text of amendments that would be inserted into the TAA. While tax legislation has different drafting conventions, it is unclear why this design choice has been made.

- b. Additionally, there is no coordination mechanism between the making of the Order in Council, which would provide for the commencement of section 78H (clause 69), and the Order in Council that would implement the GloBE rules. New section 78H relates to subject matter contained in the GloBE rules, which, as external materials, would not take effect in New Zealand before implemented through secondary legislation (through regulation-making powers contained in new section HP 4 of the ITA). Therefore, it is unclear how new section 78H could take effect without being coordinated with the implementation of the GloBE rules.

Comment

- a. Clause 69(2) of the Bill is an application provision for proposed new sections 78I and 78J of the TAA. Including application provisions for amendments to principal tax Acts in the 'skeleton' of the amending Act accords with Inland Revenue's drafting conventions for tax legislation. This differs from the Parliamentary Counsel Office's drafting convention for non-tax Acts of including application provisions for amendments to a principal Act in the first schedule of the principal Act.
- b. The intention was that an order would be made under clause 2 implementing all the clauses referred to in clause 2(22) of the Bill at the same time the Order implementing the first component(s) of the applied GloBE rules was made under proposed new section HP 4 of the ITA. Thus, a coordination between the making of these orders was envisaged. But coordinating them legislatively would add unnecessary complexity to the legislation.

However, officials are now recommending that the Bill set fixed effective dates for the various components of the applied global anti-base erosion rules. If this recommendation is accepted by the Committee, both of these regulation-making powers would be deleted from the Bill.

Recommendation

That the submission be noted.

TAX LIABILITY

Clause 44

Issue: Release from joint and several liability

Submission

(PwC)

Additional provisions are needed to allow for the release of a New Zealand entity from joint and several liability when it leaves a particular MNE group. These provisions should be similar to the rules that apply in the context of a company leaving a tax consolidated group and a person leaving a GST group.

Comment

Officials agree.

Recommendation

That the submission be accepted.

Clause 44

Issue: Allocation of multinational top-up tax liability

Submission

(KPMG)

Clarification is required on how a UTPR top-up tax liability for New Zealand is allocated between companies in New Zealand. The proposed rules do not provide any clarity on which company has the prima facie UTPR tax liability (which is determined on a jurisdictional basis) or how this UTPR liability is to be allocated between companies (with associated filing obligations).

Comment

The Bill proposes that all constituent entities located in New Zealand will be jointly and severally liable for the UTPR top-up tax. It would be up to the New Zealand constituent entities to decide how that tax liability is met. If it is not met, the Government can pursue any of them.

Recommendation

That the submission be declined.

Clauses 51 to 54

Issue: Imputation

Submission

(OliverShaw Ltd)

Companies should have imputation credits for all payments of multinational top-up tax. The reason for not allowing imputation credits is that the credits might be seen as a refund of company tax. However, in New Zealand, almost all individual shareholders entitled to claim imputation credits will be on a tax rate of 30% or more (above 15%) so there is no realistic material likelihood that imputation credits will lead to tax refunds reducing the effective tax rate of income earned through companies below 15%.

Comment

The Model Rules state that if the payment of tax under a country's IIR or UTPR gives rise to a benefit, the IIR or UTPR will not be qualifying. In that event, other participating countries will continue to apply GloBE top-up tax to the country's in-scope MNEs under their UTPR.

Generally, New Zealand income tax paid by a New Zealand company gives rise to an imputation credit, which can be passed on to the company's shareholders when the company pays a dividend. However, if New Zealand's IIR or UTPR gave rise to an imputation credit, although sufficient tax will be paid at a corporate level under the IIR or UTPR, the entire GloBE top-up tax amount will be available as a dollar-for-dollar tax reduction to the shareholder's tax liability and the imposition of the IIR or UTPR would be unwound on distribution. The OECD has advised that this benefit would result in an IIR and UTPR being non-qualifying. For this reason, under the proposed rules, GloBE top-up tax payable under the IIR and UTPR does not give rise to imputation credits. This is the same result that would apply if there had been no under-taxation giving rise to imposition of the IIR or UTPR in the first place. In that case there would be foreign tax paid instead of IIR or UTPR. Foreign tax does not give rise to an imputation credit.

A payment of tax under a country's top-up tax rules for domestic income that gives rise to an imputation credit, will not result in the rules being non-qualifying. This is specifically provided for in the GloBE rules and reflects that, while these rules must be based on the GloBE rules, they are a local tax on local profits.

Recommendation

That the submission be declined.

Clause 48

Issue: Foreign tax credits for QDMTT

Submission

(KPMG)

It is arguable that GloBE top-up tax paid under a QDMTT is of substantially the same nature as multinational top-up tax given a QDMTT must (by definition per the Model Rules) determine excess profits in a manner that is equivalent to the GloBE rules. Legislative clarification is required to confirm that GloBE top-up tax paid under a QDMTT is in fact included within the meaning of foreign income tax and therefore a foreign tax credit is available.

Comment

The Bill currently excludes from the definition of “foreign income tax” an amount of tax of substantially the same nature as multinational top-up tax, which is defined in the Bill as tax payable under the proposed subpart HP of the ITA. This subpart includes the proposed domestic income inclusion rule, which is substantially the same in nature as a QDMTT, so it is arguable that there would not be a foreign tax credit for GloBE top-up tax paid under a QDMTT. However, a foreign tax credit should be available for top-up tax paid under a QDMTT, so officials agree the legislation should be clarified to this effect.

Recommendation

That the submission be accepted.

COMPLIANCE COSTS

Clauses 44 and 63

Issue: Compliance costs

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Deloitte, EY, New Zealand Law Society, OliverShaw Ltd, Patterson Legal, PwC, Russell McVeagh)

The proposed GloBE tax rules will affect very few New Zealand taxpayers. Yet the rules are complex and will impose high compliance costs on taxpayers that are in scope or have the potential to be in scope.

- a. To alleviate the burden, compliance with the rules and the information return for New Zealand businesses should be made as simple as possible. (Chartered Accountants Australia and New Zealand)
- b. The legislation should include enough details such that taxpayers can determine whether they are in scope of the proposed GloBE rules without needing to access and understand the OECD documentation. (Corporate Taxpayers Group, Deloitte, New Zealand Law Society, OliverShaw Ltd, PwC)
- c. Inland Revenue should also maintain and publish a list of countries where there is an obligation to exchange information. (Corporate Taxpayers Group, Deloitte)
- d. New Zealand officials should support in-scope taxpayers by publishing guidance or working with them to work out how the GloBE rules should be applied in a New Zealand context. (Chartered Accountants Australia and New Zealand, PwC)
- e. There is a critical need to ensure sufficient resourcing within Inland Revenue to support in-scope MNEs to comply with the new rules. (EY)

Comment

- a. Officials agree that the GloBE rules and information return should be made as easy to comply with as possible to reduce the compliance burden. This is an ongoing workstream at the OECD/G20 Inclusive Framework.
- b. The purpose of including the GloBE rules by reference is to incorporate those rules efficiently and effectively within New Zealand legislation. These seemingly simple rules contain wording with complex definitions. It would not be possible to include the scoping criteria or to add a purpose provision without inadvertently over-simplifying those rules, and repeating the Model Rules and Commentary would defeat the purpose of the inclusion by reference approach.

- c. The exact details required in the GloBE information returns, as well as the exchange of information in relation to these returns, are still being worked out. Depending on the outcome of this work, there could be merit in publishing a list of countries where there is an obligation on New Zealand to exchange information.
- d. Officials agree that assistance should be provided as necessary in the appropriate form to promote compliance.
- e. Officials agree that Inland Revenue should be resourced adequately to assist in-scope MNEs in New Zealand with complying with the proposed rules.

Recommendation

That the submissions be noted, except for the submission in paragraph (b), which should be declined.

Clauses 44 and 63

Issue: Website accessibility of OECD referred documents

Submission

(Corporate Taxpayers Group, Deloitte, New Zealand Law Society, OliverShaw Ltd)

OECD documents that are incorporated into legislation by reference should be made accessible to the New Zealand public on a New Zealand Government website(s).

These documents should be made accessible on the New Zealand legislation website, both electronically and available for purchase. *(New Zealand Law Society)*

Comment

Officials agree that the OECD documents incorporated into legislation by reference should be accessible to the New Zealand public.

Consistent with other OECD documents incorporated by reference (such as transfer pricing, where the OECD transfer pricing guidelines are incorporated by reference), officials consider that this is best achieved by including a hyperlink on the Inland Revenue website to the OECD documents, which are located on the OECD website; and note that no legislative provisions are required to implement this. The documents are available to view and download, free of charge by any person, on the OECD website.

Recommendation

That the submissions be noted.

Clauses 44 and 63

Issue: Accounting standards

Submission

(Corporate Taxpayers Group, Deloitte)

Inland Revenue commentary should make it clear that the IIR and DIIR can be calculated using either the ultimate parent's or the New Zealand parent's accounting standards to reduce compliance costs.

Comment

Article 3.1.3 of the Model Rules and related Commentary contain rules for when an accounting standard other than the ultimate parent's accounting standard may be used to determine the financial accounting net income or loss for a constituent entity. Under Article 3.1.3, another accounting standard may be used if it is not reasonably practical to use the parent's accounting standard and certain other requirements are met.

The Commentary states that this rule is not expected to apply in many cases because an MNE will typically have mechanisms in place to convert a subsidiary's entity-level accounts to the ultimate parent's accounting standard for the purposes of preparing the consolidated financial statements. However, the rule could apply, for example, when an MNE has undertaken a recent acquisition of a group of entities that have historically used a different accounting standard to that of the acquiring MNE, and it is not reasonably practicable for the MNE to convert the acquired entities' financial accounting systems from their historical financial accounting standard to the ultimate parent's standard.

Therefore, where the financial accounting net income or loss for an entity is calculated under the ultimate parent's accounting standard, the Model Rules, and Commentary require that calculation to be used. New Zealand's rules on the use of accounting standards must align with the Model Rules and Commentary to be qualifying.

Recommendation

That the submission be declined.

Clauses 44 and 63

Issue: New Zealand safe harbours and exemptions

Submission

(OliverShaw Ltd, Russell McVeagh)

New Zealand has few MNEs in scope and because of our robust domestic tax laws the GloBE rules are unlikely to have a material impact on New Zealand. Notwithstanding this, the rules will result in a material compliance cost for some MNEs. New Zealand should consider and provide a range of exemptions and safe harbours to reduce compliance costs.

Comment

The GloBE rules operate on a “common approach” basis such that our rules need to be “qualifying” to stop another country’s GloBE rules applying to our MNEs. This means there is no scope for New Zealand to introduce safe harbours specific to New Zealand.

Consequently, to ensure safe harbours are as effective as possible, multilateral solutions should be developed. In this respect it should be noted that the OECD released the second iteration of Agreed Administrative Guidance on the GloBE rules, which includes a permanent QDMTT safe harbour and a transitional UTPR safe harbour.¹ Officials are confident these will go a long way to ensuring that the compliance burden on MNEs, including New Zealand MNEs, is minimised.

Recommendation

That the submission be declined.

Clauses 44 and 63

Issue: Qualified domestic minimum top-up tax

Submission

(Cantin Consulting, Chartered Accountants Australia New Zealand, Corporate Taxpayers Group, Deloitte, EY, Philip Coghini, PwC)

The Bill proposes that New Zealand MNEs be subject to a domestic IIR, such that they would have to pay top up tax if their mobile New Zealand profits are low taxed. Submissions supported New Zealand implementing a qualified domestic minimum top-up tax (QDMTT) applying to all in-scope MNEs with operations in New Zealand, rather than the more limited DIIR. Given the differences between the DIIR and the QDMTT, it should be stress-tested with the OECD that the DIIR is considered to be “qualifying”. Separately, it needs to be ensured that the DIIR does not breach any of New Zealand’s international trade and investment agreements. *(PwC)*

It would be more appropriate for the New Zealand government to collect tax on New Zealand low-taxed income, rather than another jurisdiction, even if the additional tax

¹ OECD (2022), *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/safe-harbours-and-penalty-relief-global-anti-base-erosion-rules-pillar-two.pdf

collected may not be significant. Because the tax will otherwise be imposed in another jurisdiction, a QDMTT can be imposed with no impact on foreign direct investment. (*Cantin Consulting, Corporate Taxpayers Group, Deloitte*)

A QDMTT is not substantially different to the DIIR, so it should not materially increase compliance costs for MNEs. (*Cantin Consulting, EY*)

Inland Revenue's administration costs in confirming whether a QDMTT applies, and audit costs, can be minimised through leveraging existing features of the tax system and taking a targeted approach to assessing risk. (*Cantin Consulting*)

Other countries, such as Australia, have indicated they will be implementing a full QDMTT. The DIIR will therefore create disparity between countries, resulting in uncertainty for in-scope MNEs and complexity in the administration of the rules. Further, the disparity may create opportunities for tax arbitrage, international tax planning, and other unintended consequences. (*Chartered Accountants Australia and New Zealand, EY*)

Should the adoption of the DIIR proceed, it will be essential for Inland Revenue to provide clear guidance on the key differences between the DIIR and a QDMTT; and undertake an education campaign on these differences targeting in-scope MNEs and other tax authorities. (*EY*)

Comment

The New Zealand DIIR proposed in the Bill is based on the Model Rules. Preliminary engagement with the OECD Secretariat indicates that the proposed rules will be qualifying. Officials expect this to be formally confirmed as part of the OECD qualification process.

Officials note that the resources Inland Revenue would have to apply to police the multinationals within scope of the proposed DIIR is significantly lower than the resources that would have to be applied to police the multinationals within scope of a QDMTT. This is because the proposed DIIR only applies to multinationals headquartered in New Zealand whereas a QDMTT applies to all multinationals in scope of the GloBE rules.

Officials are looking to adopt the GloBE rules in a way that makes compliance easier for MNEs in New Zealand, including those headquartered overseas. Compliance will be easier for New Zealand multinationals if they only have to report to Inland Revenue. Compliance will be easier for foreign multinationals if they report and pay top-up tax to their own headquarter's country, and not also to New Zealand.

Officials agree that guidance should be provided on New Zealand-specific aspects of the proposed GloBE rules to assist with compliance.

Recommendation

That the submissions supporting adoption of a QDMTT in New Zealand be declined, and the other submissions be noted.

EXCHANGE OF INFORMATION

Clauses 44, 63, 68 and 69

Issue: Exchange of information safeguards

Submission

(Russell McVeagh)

The GloBE rules provide that the GloBE Information Return will be shared with other jurisdictions under agreements for the automatic exchange of tax information.

New Zealand should ensure that the models developed for exchange of information incorporate rigorous safeguards against the disclosure of confidential and extremely sensitive commercial information so that New Zealand MNEs subject to the rules are not in any way commercially compromised or undermined.

Comment

The automatic exchange of tax information is not unique to the GloBE rules. Mechanisms for sharing tax information between tax authorities have been in place for some time and are used extensively. This includes bilaterally through double tax agreements and multilaterally through the OECD's Convention on Mutual Administrative Assistance in Tax Matters.² Robust safeguards to protect commercially sensitive information are a fundamental pillar of tax information exchange agreements and the terms of such agreements are drafted with this firmly in mind. The safeguards are also rigorously monitored by tax authorities. Upon signing up to the convention, over 60 jurisdictions agreed to adhere to its requirements, which are also monitored by the OECD through a periodic peer review process.

The mechanism for the automatic exchange of tax information in relation to the GloBE rules has not yet been fully developed. In the GloBE Information Return report, published by the OECD in July 2023³, the OECD Inclusive Framework noted that the mechanism would follow that used in current models, saying:

... bilateral and multilateral models for the Qualifying Competent Authority Agreement will be developed and would be based on the Convention on Mutual Administrative Assistance in Tax Matters, a Tax Information Exchange Agreement, a Tax Treaty with a provision equivalent to Article 26 of the OECD Model Tax Convention or any other international agreement that allows automatic exchange of information.

² The Convention used for the exchange of tax information under the OECD's Common Reporting Standard and Country-by-Country Reporting.

³ OECD (2023), *Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two)*, July 2023, available at www.oecd.org

Recommendation

That the submission be noted.

PRIVACY

Clauses 68 and 69

Issue: Consultation with Privacy Commissioner

Submission

(Office of the Clerk of the House of Representatives)

It is not clear whether the Privacy Commissioner or the Inland Revenue Privacy Officer were consulted on the information-requiring provisions in clauses 68 and 69. The Privacy Commissioner has a statutory function to examine proposed legislation that provides for the collection of personal information by public sector agencies. If a Bill raises privacy issues, it is standard practice for the Privacy Commissioner to be consulted. Consequently, the Committee may like to ask officials whether the Privacy Commissioner or the Inland Revenue Privacy Officer were consulted on clauses 68 and 69, and if not, why not.

Comment

In relation to clause 68, the clause does not require any additional information – only that the information be provided in a prescribed electronic form. In relation to clause 69, the information required to be provided is information the Commissioner of Inland Revenue would already be entitled to ask for. The reporting obligations being placed on such MNEs in this case are similar to those they already face in relation to other taxes, except that more information is required regarding their non-New Zealand operations. The Privacy Commissioner was not consulted because there did not seem to be any reason for such consultation.

Recommendation

That the submission be noted.

PENALTIES

Clauses 74 and 75

Issue: Penalties for filing late or incomplete return or for late registration

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Deloitte, EY, KPMG, OliverShaw Ltd, PwC)

A proposed penalty of up to \$100,000 for filing a GloBE Information Return (GIR) late or incomplete is punitive and inconsistent with other penalties in the TAA, and should be reduced.

In particular, imposing a penalty of this size for late registration (later than six months after the end of the first fiscal year that a New Zealand constituent entity is a member of a group that comes within the proposed rules) seems unnecessarily punitive. *(Corporate Taxpayers Group, Deloitte)*

If a reduction in the amount of the penalty renders it non-compliant with the GloBE rules, the penalty should be limited to foreign-headquartered MNEs. *(Chartered Accountants Australia and New Zealand)*

The penalty should not apply to an incomplete return. The return will be filed electronically so there is little scope for omission. If the error is deliberate, there are other ways to address this within the tax system. *(Chartered Accountants Australia and New Zealand)*

New Zealand taxpayers should not be penalised in relation to tax filings made outside New Zealand or by other group members, such as a late and/or incomplete return by the ultimate parent entity or in a country with which New Zealand does not have an exchange of information agreement. *(PwC)*

Other suggestions submitted are:

- Inland Revenue contacting taxpayers directly if a submission is completed late because very few taxpayers are impacted by the regime. *(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group)*
- Taxpayers being notified and given an ability to respond before a penalty is imposed. (The submission noted this would not require a change to the proposed legislation and could be reflected in guidance instead.) *(PwC)*
- A grace period in the initial years as impacted MNEs get up to speed with the rules. (The submission noted this would not need a change to the proposed legislation and could be reflected in guidance instead.) *(PwC)*
- The penalty only applying in exceptional circumstances. *(KPMG)*

Concern was expressed about the discretionary nature of the penalty because the penalty, up to \$100,000, could be disproportionate to the offence. Guidance on how the Commissioner of Inland Revenue's discretion is to be applied should be legislated or otherwise provided to provide certainty for taxpayers. *(EY, KPMG)*

Comment

The Model Rules do not stipulate what penalties should be imposed, or the amount, in the event of non-compliance. However, the penalty needs to be sufficiently large to be effective in deterring non-compliance. The target of the penalty is MNEs with annual global revenue over €750 million.

Officials note that section 139AB of the TAA already provides for the Commissioner to impose a penalty of up to \$100,000 on members of large multinationals that fail to provide certain required information within the allowed time window. Moreover, as the GloBE rules are intended to be a multilateral solution, regard must also be given to the size of the penalty relative to what is being proposed in other jurisdictions. Officials note that Australia has proposed penalties between \$111,000 and \$555,000 for similar non-compliance.

It is important that the registration, filing and other requirements of the New Zealand GloBE rules are complied with.

The Bill proposes that a New Zealand taxpayer will have filing obligations if a foreign member of the group has not filed the required information on time in their own home country. This means it is appropriate that the New Zealand constituent entity is subject to the proposed penalty regime if they fail to comply. This is in line with the Model Rules.

Officials note that the Bill allows exculpatory factors to be taken into account by allowing the amount of the penalty to be discretionary. As recognised by some submitters, existing rules allow the Commissioner discretion to contact and work with the taxpayer before a penalty is imposed, and to state in advance what factors will be relevant in determining the level of penalty.

Officials acknowledge those submissions that have brought up concerns over the discretionary nature of the amount of the penalty. However, the Commissioner already has discretion in relation to other penalties. Officials note that the GloBE rules will be administered by a specialised team within Inland Revenue to ensure the rules are administered in a principled and consistent manner.

Recommendation

That the submissions be declined.

Clause 75**Issue: Disparity in penalty rates****Submission**

(Office of the Clerk of the House of Representatives)

Clause 75 would insert new section 139ABB into the TAA and impose the following penalties for MNEs:

- a civil penalty of up to \$100,000 for failure to register for GloBE or fulfil reporting requirements as required under new section 78H, 78I or 78J
- a civil penalty of \$500 for failure to provide a return for a fiscal year as required under new section 78J.

These provisions are standard within a tax context and the penalty amount of up to \$100,000 is in line with similar penalties for non-compliance with information disclosure obligations, such as section 139AB of the TAA. However, the structure of proposed new section 139ABB appears unusual. The carve-out for a lower penalty rate is unusual for penalty provisions and the difference between these two penalty rates (\$500 and up to \$100,000) seems unusual.

Comment

Section 139ABB imposes penalties for:

- an in-scope MNE group with operations in New Zealand failing to register for GloBE tax
- such a group failing to file its pre-assessment GloBE information return in New Zealand if required by the GloBE rules to do so
- such a group failing to file a tax return in New Zealand.

The first two breaches are subject to a penalty of up to \$100,000. This is in line with penalties imposed by Australia, and meets the OECD requirement for such penalties to be sufficient to dissuade non-compliance by these extremely large entities. The third penalty is for a purely domestic tax obligation and is in line with the penalty for failing to file an income tax return.

Recommendation

That the submission be noted.

OTHER CONSIDERATIONS

Clauses 44 and 63

Issue: Addressing transfer pricing impacts

Submission

(Philip Coghini)

Consideration should be given to addressing the potential for transfer pricing.

Comment

The Model Rules contain specific rules to address the valuation of cross-border transactions in accordance with the arm's length principle; the allocation of profit between a permanent establishment (PE) and its head office; and the allocation of the income of a tax transparent constituent entity (when not attributable to a PE). These rules all rely on the existing arm's length concepts. Determination of an arm's length price is a vast topic in its own right, which it would not make sense to duplicate in the GloBE rules. Officials consider that this approach is sufficient to address the transfer pricing considerations.

Recommendation

That the submission be declined.

Clauses 68 and 69

Issue: Public disclosure of country-by-country reports

Submission

(Tax Justice Aotearoa)

Country-by-country reports should be made publicly available on a similar basis to that recently proposed by the Australian Government.

Comment

Officials acknowledge the matter raised in this submission but note that it would require prioritising and resourcing as part of the Government's tax policy work programme. Whether country-by-country reports should be made publicly available is a matter better dealt with at the OECD.

Recommendation

That the submission be declined.

Clauses 44 and 63

Issue: Beneficial ownership tax register

Submission

(Philip Coghini)

One submitter suggested that the GloBE rules should recommend the implementation of a beneficial ownership tax register since they impact on double tax agreements and reducing offshore income and profits.

Comment

Officials acknowledge the matter raised in this submission but do not believe that the GloBE rules are the appropriate place to deal with it.

Recommendation

That the submission be declined.

Clauses 44 and 63

Issue: Exemption from GloBE rules for iwi organisations

Submission

(Philip Coghini)

One submitter asked whether Iwi organisations can qualify as organisations exempt from the GloBE rules.

Comment

Officials acknowledge that because Māori authorities are taxed at a lower statutory tax rate than ordinary companies this could potentially expose them to a GloBE tax liability. However:

- The rate is still above the GloBE rate of 15%.
 - The scoping criteria of €750 million revenue in at least two of the four fiscal years immediately preceding the test year and an international presence would not bring any Māori organisations in scope. In addition, because it is not a one-year test, should a
-

Māori organisation reach this threshold there is ample time for officials to approach the OECD Inclusive Framework to consider the inclusion of Māori authorities on the excluded entity list.

Recommendation

That the submission be declined, noting officials' comment above.

Clauses 44 and 63

Issue: Impact on foreign direct investment and export/import trade

Submission

(Philip Coghini)

Consideration should be given to whether the GloBE rules benefit foreign direct investment in New Zealand and improve export/import trade, or whether the rules benefit outward direct investment and import (and/or re-exports) trade.

Comment

It is intended that the GloBE rules would only be adopted when a critical mass of other jurisdictions have adopted the rules as well. This means that the adoption of the GloBE rules in New Zealand should not impact international trade or foreign direct investment because GloBE tax liability would be incurred regardless of whether New Zealand adopts the rules or not.

Recommendation

That the submission be noted.

Clauses 44 and 63

Issue: Inland Revenue should be able to provide binding rulings on the applied GloBE rules

Submission

(Matter raised by officials)

Inland Revenue should be able to provide binding rulings (under Part 5A of the TAA) in relation to the application of the applied GloBE rules, including the Model Rules and Agreed

Administrative Guidance, in the same way as it provides binding rulings on other tax laws. It is not clear from existing section 91C of the TAA that it is entitled to do so. We note that section 91C explicitly gives the Commissioner the power to make binding rulings in relation to Orders in Council and regulations made under the TAA. Adding an explicit reference to the applied GloBE rules would remove uncertainty.

Recommendation

That the submission be accepted.

Clauses 74 and 75

Issue: Empowering assessment provisions for discretionary penalties

Submission

(Matter raised by officials)

A drafting error has been identified where two proposed discretionary penalties in the TAA do not have corresponding assessment provisions that would empower the Commissioner to make an assessment of the penalties. These penalties are for:

- persons who do not meet the country-by-country reporting requirements (as included in the Bill in proposed section 139AAB), and
- those associated with the applied global anti-base erosion rules (as included in the Bill proposed section 139ABB).

In addition to the penalties proposed in the Bill, two other existing penalties have been identified as not having a corresponding assessment provision. These penalties are for:

- members of large multinational groups that do not provide information required of them by the Commissioner (section 139AB), and
- trustees of foreign exemption trusts who do not register with, or provide information to, the Commissioner, when required (section 139AC).

All these penalties have been modelled on existing penalties in the TAA that have empowering assessment provisions. These are penalties the Commissioner can assess in relation to the Common Reporting Standard and the Digital Platform Information reporting requirements.

Officials recommend adding empowering assessment provisions for the above penalties to ensure there is no doubt that the Commissioner can assess them if the relevant statutory requirements are met.

Officials also recommend that the Commissioner is not required to issue a notice of proposed adjustment before making an assessment of the above penalties. This is also consistent with the rules that exist for penalties related to the Common Reporting Standard and Digital Platform Information reporting requirements.

The proposal is mechanical in nature and merely clarifies the clearly understood policy intent, so the amendments should take effect from the date after the Bill receives the Royal assent, except for the penalty related to the applied global anti-base erosion rules, which should take effect on and from 1 January 2025.

Recommendation

That the submission be accepted.

TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX, AND REMEDIAL MATTERS) BILL

Trustee tax rate

OVERVIEW

The Bill proposes to increase the trustee tax rate to 39% from 1 April 2024.

The current 33% trustee tax rate means that individuals that earn tax-paid trustee income from a trust are not subject to the 39% personal tax rate on such distributions, even if they earn over \$180,000 in personal income and distributed tax-paid trustee income. This undermines the fairness of the tax system.

To buttress the proposed 39% trustee tax rate, the Bill includes a proposal to tax certain beneficiary income allocations at this rate. This would ensure that companies cannot be used to shelter income from the trustee tax rate. This proposal is targeted towards family trusts and would not affect the commercial use of trusts in large corporate groups.

While addressing the current under-taxation of trust income, it is also important as far as possible to mitigate any over-taxation. This arises when trustee income is taxed at a rate higher than the personal tax rates of the beneficiaries and settlors of the trust.

The risk of over-taxation can currently be mitigated in many situations by the ability of trustees to allocate income to beneficiaries (taxed at the personal tax rate of the beneficiary). However, there are situations where income cannot be allocated to beneficiaries. The Bill contains proposals to further help mitigate the risk of over-taxation of deceased estates and trusts settled for the care of disabled people (disabled beneficiary trusts).

Due to Budget sensitivity, we were unable to undertake public consultation during the development of the proposals. However, since Budget, we have undertaken consultation with a large number of stakeholders. Feedback from most stakeholders focused on the risk of over-taxation of trust income.

Submissions on the trustee tax rate proposals in the Bill can be summarised into the following categories:

- support for the proposals
- opposition to the proposals and, in particular, the process followed and approach taken to addressing the under-taxation of trustee income
- feedback on the timing of the proposals and, in particular, that they should be deferred
- concerns about the problem definition and supporting evidence
- concerns about the impact of the proposals, including behavioural responses by trustees, the over-taxation of trustee income and the over-taxation of specific types of trusts
- suggestions for alternative approaches to the problem
- feedback on the proposed design of the disabled beneficiary trusts and deceased estates modifications

- opposition to, and feedback on, the proposed corporate beneficiary rule, and
- the relevance of the trust disclosure rules in the context of a 39% trustee tax rate.

Officials are recommending changes to the proposals based on feedback from targeted consultation and written submissions. These recommendations can be summarised as the following:

- Introducing a \$10,000 trustee income de minimis to further reduce the risk of over-taxation under a 39% trustee rate.
- Amendments simplifying and expanding the application of modifications for deceased estates and disabled beneficiary trusts proposed in the Bill, including:
 - Taxing eligible deceased estates and disabled beneficiary trusts at 33%.
 - Extending the deceased estates modification to cover the year of death and the following full three income years.
 - Allowing a disabled beneficiary trust to have multiple disabled beneficiaries.
- Excluding energy consumer trusts and legacy superannuation funds from the 39% trustee tax rate because these trusts have limited ability to mitigate over-taxation.
- Minor technical amendments.

Submissions on the trustee tax rate proposals, and officials' responses, are discussed below.

GENERAL SUBMISSIONS

Clauses 62(1)(b) and (4)

Issue: Support for proposals

Submission

(Baucher Consulting Ltd, EY, KPMG, New Zealand Council of Trade Unions, NZ Shareholders' Association, Patterson Legal, PwC, Securities Industry Association and NZX Ltd)

The proposed 39% trustee tax rate addresses the current discrepancy between the top personal tax rate and the trustee tax rate. *(New Zealand Council of Trade Unions, Patterson Legal)*

- Inland Revenue data shows that when the trustee tax rate has been lower than the top income tax rate, significant amounts of income have been diverted into trusts to take advantage of the lower tax rate. This is not conducive to a fair and progressive tax system and undermines the Government's ability to raise revenue. *(New Zealand Council of Trade Unions)*
- This is an orthodox approach and was recommended by the Tax Review 2001 and has been recommended in other reviews since that time. *(Patterson Legal)*

Acknowledgement of the rationale for increasing the trustee rate from 33% to 39%. *(KPMG, NZ Shareholders' Association, PwC, Securities Industry Association and NZX Ltd)*

- The proposal to increase the trustee rate is a logical adjunct to the increase in the top personal tax rate. However, it is crucial to ensure that the increased trustee tax rate does not result in over-taxation of trusts with lower-rate beneficiaries. *(EY)*
- This is consistent with the goal of maintaining the integrity of the tax system. However, it may significantly increase the compliance costs for trustees of trusts with minimal income. *(Baucher Consulting Ltd)*
- The previous Government's concerns about potential under-taxation due to tax rate misalignment and the merit in addressing this from a tax policy perspective is understandable. *(PwC)*
- The previous Government's intention to align the trustee and top personal tax rates is respectable. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*

Recommendation

That the submissions be noted.

Issue: Timing of proposals

Submission

(A Harmos, C Macalister, Cantin Consulting, Chartered Accountants Australia and New Zealand, NZ Shareholders' Association, OliverShaw Ltd, PwC, Securities Industry Association and NZX Ltd, Taxpayers' Union)

The application date of the proposed 39% trustee rate should be deferred.

- The proposals require more time and consideration. The current approach will give rise to adverse and unintended consequences. *(A Harmos, PwC)*
- This would allow time to analyse trust disclosure information collected for the 2021–22 income year and to develop appropriate rules. In the absence of additional data and analysis, the proposal to increase the trustee rate is premature. *(Chartered Accountants Australia and New Zealand)*
 - If deferral is not possible, an application date of 1 April 2025 is recommended.
- The change should at least be deferred until a proper consultation process has been carried out. This should minimise the chances of hasty policy development being translated into legislation that inappropriately impacts some (or many) taxpayers. *(Taxpayers' Union)*
 - This may be a major change for the 400,000 trusts registered in New Zealand.
 - Inland Revenue has proposed special arrangements in certain cases, but there may be arrangements it has not considered or is not aware of.
- The proposals should not proceed in this Bill if a better approach to bolstering the 39% tax rate cannot be found in the given time frame. *(C Macalister)*
- The principle that “tax should be paid at the personal tax rate of the economic owner” should be considered and subject to GTPP. The decision on whether this should be a principle of New Zealand’s tax system should be made explicit. The proposals should be deferred until this is settled. *(Cantin Consulting)*
- The proposals should be withdrawn until:
 - The “tax at personal rate” principle and the reasons why it is not always applied have been considered, the result of that consideration has been subject to GTPP, and a decided policy is made explicit.
 - Other solutions have been considered according to the GTPP. For more information, see [Issue: Generic Tax Policy Process](#) and [Issue: Further consultation required](#). *(Cantin Consulting)*
- The change to the trustee tax rate should be delayed until a comprehensive solution to portfolio investment entity (PIE) tax alignment is proposed. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*

- The proposals should be deferred to allow for a full consultation process. (*OliverShaw Ltd*)

Comment

The Government has decided that the trustee tax rate should be increased for the 2024–25 and later income years (beginning 1 April 2024 for most taxpayers). Deferring the proposals to a later application date would have a significant fiscal cost.

For more information, see [Issue: Alternative approaches to problem definition](#) and [Issue: Generic tax policy process](#).

Recommendation

That the submissions be declined.

PROBLEM DEFINITION

Issue: Concerns with problem definition

Submission

(A Harmos, C Macalister, Cantin Consulting, Deloitte, Jim Gordon Tax Ltd)

Submitters consider that the problem definition has been poorly defined.

- The terminology used in the proposals misdescribes the problem:
 - The stated problem is that trusts are used to “avoid” the 39% tax rate. “Avoid” should not be used to describe a design feature of the trust rules.
 - Trusts are described as “circumventing” the 39% tax rate, which presumes that the 39% rate should apply when there is no discernible policy that it should.
 - The term “misalignment” presumes an issue with income not being taxed at personal tax rates. This is not a discernible principle in the tax system. *(Cantin Consulting)*
- We should not assume that the income arising from capital invested through the trust would unlikely arise to the settlors in the absence of the trust rules. *(C Macalister)*
- The proposals seem to be a fundraising measure rather than a tax base buttressing measure. *(A Harmos, Jim Gordon Tax Ltd)*
- Current legislation already contains rules that ensure the tax treatment should mirror the economic outcome and the recent personal tax rate change, along with the trust disclosure rules (despite being an overreach), have gone a long way to ensure that the tax treatment reflects economic reality. *(Deloitte)*
- The trustee rate proposals and their real intent have been deliberately misrepresented by the Government, Inland Revenue and the Treasury to the New Zealand public. *(A Harmos)*
 - The foundation of the proposals is the false characterisation of unrealised revaluation gains as income in the Inland Revenue report as Minister Parker has ordained.
 - The actual intent and effect of the legislation is to broaden the tax net by treating trustees of a trust as 39% taxpayers, not closing a loophole where 39% taxpayers can receive tax-paid trustee income that has been taxed at a lower rate.

Comment

The current 33% trustee tax rate is a final tax. This means that subsequent distributions of tax-paid trustee income are not subject to the 39% personal tax rate on those distributions, even if they earn over \$180,000 in personal income and distributed trustee income. This

undermines the fairness of the tax system because an individual that earns more than \$180,000 in personal income and distributed trustee income is subject to less tax than an individual that earns more than \$180,000 from personal income alone. This is the “under-taxation” of trust income.

Officials agree that the terms “avoid” and “circumvent” are unhelpful when describing the problem of under-taxation. This outcome is a result of tax policy settings and is not, in and of itself, a result of taxpayers “avoiding” or “circumventing” the 39% personal tax rate. We acknowledge that “misalignment” presupposes that there is a problem with having different tax rates across the tax system. A more neutral description could be that the tax system has “non-aligned” or “unaligned” tax rates.

Conversely, “over-taxation” occurs when trustee income is taxed at a rate higher than the personal tax rates of the beneficiaries and settlors of the trust. Over-taxation is an existing issue with the 33% trustee tax rate that will be exacerbated by increasing the rate to 39%.

Since the introduction of the current trust tax regime in 1988, the trustee tax rate has been 33%. This rate was chosen intentionally to achieve alignment with the top personal tax rate, and it has only fallen out of alignment during the two periods since 2000 when the top personal tax rate was 39%.

In addition to addressing the under-taxation of trust income while minimising over-taxation where possible, one of the objectives of the proposals was to raise revenue for Budget 2023.

HWI research project

Data from Inland Revenue’s HWI research project, or any conclusions from that project, did not inform policy development of the trustee tax rate proposals. The trustee tax rate proposals were considered by Cabinet before the HWI research project was published.

The proposals were developed to address the under-taxation of trust income, while mitigating as far as possible any over-taxation. The proposals also had the objective of raising revenue for Budget 2023 – there was no link with the HWI research project.

Recommendation

That the submissions be noted.

Issue: Evidence supporting the problem

Submission

(ATAINZ, Cantin Consulting, Chartered Accountants Australia and New Zealand, Deloitte, OliverShaw Ltd, Perpetual Guardian)

Submitters consider that there is a lack of evidence to support the problem definition and/or proposals:

- Despite Cabinet in 2020 deferring a decision on an increase in the trustee rate “to a later date pending information on whether there is a behavioural response to avoid paying the new [39%] personal income tax rate”, the increased rate is now being proposed before such information is available. (Chartered Accountants Australia and New Zealand, OliverShaw Ltd)
- There is no information about the amount of non-taxable distributions made to persons with a marginal tax rate of 39%. This information is essential to establish the extent to which, if at all, taxpayers are using trusts to circumvent the top personal tax rate of 39%. In the absence of additional data and analysis, the proposal to increase the trustee tax rate is premature. (*Chartered Accountants Australia and New Zealand*)
- There has been no evidence of the quantum of trusts that are believed to be circumventing the 39% marginal tax rate. Any such examples are in the considerable minority. (Perpetual Guardian)
- There are an unknown number of trusts, and many have minimal or no income. According to Inland Revenue statistics, 250,000 trusts filed trust tax returns for the 2021 tax year and 72,500 of those (just over 29%) reported nil income or a loss. No breakdown is presently publicly available of the income bands of those trusts that reported positive income. (*ATAINZ*)
- The Government seems to believe trusts are being used to shelter income that could otherwise be taxed at 39%, companies having income allocated but never paid, and individual beneficiaries receiving the benefit of income that is taxed at the trustee level. These beliefs are misguided, and the trust regime is being used as intended and does not result in wholesale tax avoidance. (Deloitte)
- The public evidence does not support the conclusion that the 33% trustee rate means the 39% rate does not apply or that trustee income results in under-taxation. A smaller population of trusts have the 39% problem, but the evidence does not disclose where exactly the problem is. (*Cantin Consulting*)
 - To obtain an indication of the possible size of the issue, Inland Revenue could estimate the amount of trustee income not subject to the 39% rate of a beneficiary by attributing trustee income to beneficiaries in proportion to their beneficiary income. Given the trust disclosures made for the 2022 year, this process could be modified by attributing trustee income based on the total taxable and non-taxable distributions.
 - A 39% rate for all trustee income is not a fair solution. Inland Revenue’s publication of trust disclosure insights⁴ from the 2022 tax year shows that the

⁴ Page 20, <https://www.ird.govt.nz/about-us/tax-statistics/revenue-refunds/trusts-and-estates-statistics/trust-disclosure-information-from-the-2022-tax-year>

majority of non-taxable distributions disclosed are distributions of trust capital (tax-paid prior year trustee income and realised capital gains).

- It appears that roughly \$2.3 billion in trust capital was distributed to beneficiaries on \$70,000 or less. Assuming all the distributions are from tax-paid income, the overpayment of tax at a 39% rate for these taxpayers will be more than the tax on the \$800 million trust capital distributed to taxpayers earning \$500,000 personal income.
- The report discloses \$5 billion of non-taxable distributions to taxpayers earning over \$180,000 personal income. This would likely outweigh the over-taxation of taxpayers earning less than \$70,000, but it may not outweigh the over-taxation of those earning less than \$180,000.
- The report does not disclose how much income was finally taxed at 28% due to the PIE tax rules. The PIE rules create an 11% differential from the 39% rate and officials have speculated that investments via PIEs may be a reaction to a 39% rate. The trend of PIE income and PIE investments should be considered.

Submitters also commented on increases in trustee income in the 2021 income year or the early 2000s:

- We acknowledge that the level of trustee income increased in the 2021 income year. This is a result of companies paying out their accumulated retained earnings as dividends prior to the increase in the personal income tax rate to 39%. As in the 2000 income year (prior to the introduction of a 39% personal rate in 2001) we expect this increase in trustee income to be a one-off occurrence. (Chartered Accountants Australia and New Zealand)
- Increases in trustee income do not of themselves provide evidence that a rate higher than the trustee rate would have applied in the absence of a trust. (*Cantin Consulting*)
 - Conclusions regarding the extent of the problem cannot be extrapolated from the early 2000s because, at the time, the 39% personal tax rate applied to a greater proportion of the population (due to applying at a lower threshold than currently).
 - The early 2000s' reorganisation of many SMEs as companies owned by family trusts may indicate a problem with the 39% rate threshold rather than the rate. It also suggests that the company tax rate is the issue.
 - Companies retained income at the company tax rate rather than trustees retaining income at the trustee rate. There is no evidence of the number of companies or of their income, and therefore whether trust ownership of the companies would mean the 39% does not apply.
 - The increase in trustee income in 2021 is most likely in anticipation of the 39% personal tax rate. Although the change did not affect the trustee rate, many companies declared and paid dividends to ensure that individual shareholders

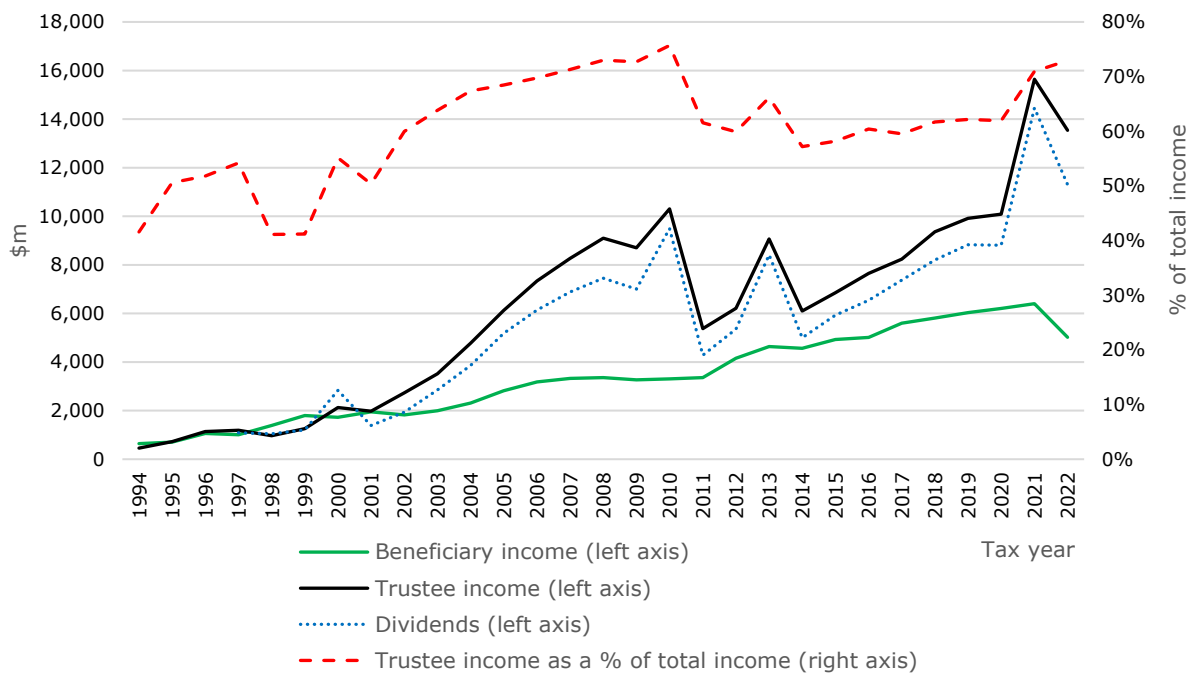
did not have the 39% rate applied. Where shareholders included trusts, they would also have derived dividends because dividends cannot be streamed to different shareholders.

Comment

Income tax return data

In the year before the application of the 39% personal tax rate (ie the 2021 tax year), trustee income was significantly higher than previous years. The announcement of the 39% rate during the 2021 tax year, ahead of it applying for the 2022 year, led to companies paying out dividends to individual shareholders and trustees before the new rate came into effect. This ensured that income could be taxed at the (then) 33% top personal tax rate or the 33% trustee tax rate. The increased dividend income derived by trustees in the 2021 tax year is reflected in the dotted blue line on the graph in Figure 1.

Figure 1: Income reported by trusts (1994–2022)



In the 2022 tax year, dividend income derived by trusts fell by \$2.7 billion (down 18.7%). There was a decrease in beneficiary income (down 18.8%) and in trustee income (down 9.8%). As a result of the smaller decline in trustee income, the amount of income taxed at the trustee rate slightly increased.

The dashed red line in Figure 1 shows trustee income as a percentage of total income. The amount of income treated as trustee income increased by 10 percentage points in 2021 (before the 39% personal tax rate took effect), and this allocation ratio has been maintained in the 2022 year, despite the decrease in total income. This may illustrate that trustees have made income allocation decisions in response to the 39% personal rate to treat a greater

proportion of taxable income as trustee income. Despite the change in total income between 2021 and 2022, trustees have maintained this allocation ratio.

Behavioural responses to the 39% personal tax rate

Increased disclosure requirements for trusts were introduced for the 2021–22 and later income years. Disclosure and tax return data shows that trustees are retaining significantly more income as trustee income following the introduction of the 39% personal tax rate from 1 April 2021.

Table 1 below summarises insights based on disclosure and tax return data that shows the behavioural responses of trustees to the introduction of the 39% personal tax rate. Further information can be found on Inland Revenue’s website.⁵

Based on the increased percentage of total income being retained as trustee income, and the below insights, we consider that there is strong evidence that trusts provide a tax advantage allowing income to be earned through a trust and not be subject to the 39% personal tax rate.

Table 1: 39% insights from trust disclosures

Summary	Detail
Trustees are retaining significantly more income as trustee income	For trusts that allocated beneficiary income to an individual earning over \$180,000 personal income in the 2020 tax year (prior to the 39% personal tax rate), the amount of income being retained as trustee income has increased from 35% (\$590 million) in 2020 to 60% (\$840 million) in 2022.
Trustees are allocating less beneficiary income to individuals with more than \$180,000 personal income	The amount of beneficiary income allocated to individuals earning over \$180,000 has halved from \$900 million in 2020 to \$450 million in 2022.
Significant settlements have been made on trusts since the 39% personal tax rate was introduced	Settlements, reported for the first time in 2022, were significant (over \$15 billion) with \$4.7 billion settled on trusts settled after the introduction of the 39% personal tax rate.

Recommendation

That the submissions be declined.

⁵ <https://www.ird.govt.nz/about-us/tax-statistics/revenue-refunds/trusts-and-estates-statistics/trust-disclosure-information-from-the-2022-tax-year>

Issue: Use of trusts for non-tax reasons

Submission

(A Harmos, ATAINZ, Baucher Consulting Ltd, Cantin Consulting, C Macalister, C Wilson, Chartered Accountants Australia and New Zealand, CPA Australia, Corporate Taxpayers Group, Deloitte, G McKinlay, NZ Shareholders' Association, Perpetual Guardian, PwC, Securities Industry Association and NZX Ltd, Te Kāhui Ture o Aotearoa New Zealand Law Society, Trustees Executors Ltd, W Blake)

Submitters raised concerns that the proposals presume that tax mitigation is a major reason behind the settlement of a trust:

- The use of trusts is not solely tax-related or tax driven, and most trusts are established for non-tax reasons. (ATAINZ, Baucher Consulting Ltd, C Macalister, C Wilson, PwC, Te Kāhui Ture o Aotearoa New Zealand Law Society, W Blake)
- It is important that the tax system recognises that there are other reasons for using trusts that are not connected to a tax advantage. (Deloitte)
- Reasons for the establishment of a trust relationship include:
 - intergenerational wealth preservation and transfer
 - wealth generation and accumulation
 - relationship property protection
 - asset protection
 - succession and estate planning
 - continuity of business
 - privacy and confidentiality
 - charitable giving
 - providing for those who cannot provide for themselves
 - withholding funds from a relation with addiction issues
 - protective mechanism for those that have lost mental capacity. (ATAINZ, Baucher Consulting Ltd, C Macalister, C Wilson, Chartered Accountants Australia and New Zealand, CPA Australia, Deloitte, G McKinlay, NZ Shareholders' Association, Perpetual Guardian, PwC, Securities Industry Association and NZX Ltd, Trustees Executors Ltd, W Blake)
- Trusts established for commercial purpose are not vehicles used as substitutes for income that would have otherwise been subject to the 39% personal tax rate, which is the focus of the proposed change. (Corporate Taxpayers Group)
- It is not the experience of the submitter that high-income individuals choose to use trusts to circumvent the top 39% personal tax rate. (Perpetual Guardian)

- As a professional trustee, in exercising our professional and fiduciary responsibilities, a trust cannot be established for the sole purpose of tax minimisation. (Perpetual Guardian)
- If people were solely motivated by tax considerations, all family investment would be in companies and subject to tax at 28%. At present, much wealth sits in trusts as opposed to lower tax rate companies because it allows a better mechanism to distribute wealth. (C Macalister)
- The trust regime is being used as intended and does not result in wholesale tax avoidance. The proposed changes will fundamentally damage the trust regime and negatively impact the genuine use of trusts. As such, the trustee tax rate should remain at 33%. (*Deloitte*)
- Trustees must comply with the trust deed, trust law and tax law. This means that tax rules will inform their decisions, however care needs to be taken in concluding that having regard to tax is a policy problem. (Cantin Consulting)
- When the Law Commission reviewed trust law, it was estimated that there were more than 400,000 trusts in New Zealand. Even assuming that most of the trusts were established in a 39% personal tax rate environment, one can draw from the RIS tables that taxation is not a significant driver of trust establishment for most trusts (by number, rather than income). (*Cantin Consulting*)
- A useful function of trusts will be undermined. Many retain and pay tax on income and apply it to growing the capital of the trust, which itself is applied for the benefit of the economy and community through enabling compounding of reinvested income, which itself is ultimately taxed. (*A Harmos*)

Comment

We acknowledge that trusts are settled and used for a wide range of non-tax reasons. Broadly, tax forms one part of the environment that any taxpaying entity operates in.

The proposal to increase the trustee tax rate to 39% is intended to address concerns regarding the under-taxation of trust income. Under the current 33% trustee tax rate, under-taxation occurs when an individual derives over \$180,000 in personal income and tax-paid trustee income. This occurs regardless of whether the trust was set up for non-tax reasons.

The proposals are not solely focused on the use of structures for tax minimisation, but rather are intended to improve the fairness of the tax system by ensuring that individuals do not receive a tax advantage solely by earning income through a trust.

The trustee tax rate only applies to income earned by the trust that is not beneficiary income – the underlying assets of the trust are not affected. Therefore, the trustee tax rate will only affect the non-tax purposes of the trust to the extent that the trustees choose not to retain income in the trust. The underlying assets of the trust will not be exposed to relationship property claims or lose asset protection.

We are recommending introducing a \$10,000 trustee income de minimis. While this would help mitigate the impact of the 39% trustee tax rate for many trusts, we acknowledge that trustees will be required to make trade-offs between mitigating over-taxation by making beneficiary income allocations and retaining income for other reasons. See [Issue: Risk of over-taxation](#) and [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be noted.

IMPACT OF PROPOSALS

Issue: Risk of over-taxation

Submission

(C Macalister, C Wilson, Cantin Consulting, Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, CPA Australia, Deloitte, EY, G McKinlay, Jim Gordon Tax Ltd, KPMG, Perpetual Guardian, PwC, Trustees Executors Ltd)

Submitters raised concerns that the proposals will result in over-taxation where beneficiaries have personal tax rates of 33% or lower. *(Chartered Accountants Australia and New Zealand, EY, Jim Gordon Tax Ltd, G McKinlay, KPMG, Perpetual Guardian, PwC)*

- This is likely to be the case for most New Zealand trusts. *(KPMG)*
- This is contrary to the rationale of improving the fairness and progressivity of the tax system. The trustee tax rate should therefore be retained at 33%. *(Perpetual Guardian)*
- Trustees of small trusts will pay more tax and have increased accounting fees to cover the increased time spent on their trusts and any distributions to beneficiaries. *(C Wilson)*
- In many cases, trustee income is over-taxed at the current 33% trustee tax rate. However, trustees are comfortable that the tax paid is reasonable given the purposes of the trust and the aim to reduce compliance costs and complexity (as contemplated by section 4 of the Trusts Act 2019). *(Deloitte)*
- Taxing trusts within corporate structures at 39% will give rise to over-taxation. These trusts are not being used to shelter income from the top personal tax rate and it would be inappropriate to tax them as if they were. Accordingly, we do not support the increase in the trustee tax rate in its current form. *(Corporate Taxpayers Group)*
- Increasing the trustee tax rate is a crude approach that will tax income from capital and services at the same rate, thus overtaxing income from capital.
- In testamentary trusts, funds are held and paid by the trustee when required for the needs of the beneficiary. The trust is used to ensure funds are available for the care of the named beneficiary, not minimise tax. The 39% rate will increase unfairness and inequality when trusts hold funds for the future expenses of vulnerable people. *(Trustees Executors Ltd)*

Submitters considered that the proposals are poorly targeted:

- The proposals are targeted at only 5% of trusts (9,000 out of 177,000) but all trusts with trustee income will be affected. *(C Wilson)*
- The tables in the Regulatory Impact Statement (RIS) on the distribution of trustee income show that for most trusts, the non-application of the 39% rate is at best a minor explanation for trustee income. Any problem is with a minority of trusts, albeit

with most of the income. The solution should be proportionate accordingly. (*Cantin Consulting*)

- The proposed increase to the trustee tax rate is a blunt approach and will disproportionately affect those who are not the target of the proposals. Most high-net-worth individuals operate highly sophisticated structures whereby most of the income derived is generated and taxed within corporate subsidiaries. (PwC)
- There is little validated data on the number and size of trusts. Limited data that has been released by Inland Revenue suggests the median assets of trusts is only \$830,000 (equivalent to owning a house), median trustee income is \$8,000 and 68% of trusts (120,000 trusts) reported less than \$180,000 of trustee income in 2021. Clearly, this demonstrates that while there may be some trusts with a lot of wealth, there are significantly more with less and these are the ones that will suffer over-taxation because of this change. (*Deloitte*)
- Any tax measure must target the tax avoidance behaviour as opposed to adversely affecting taxpayers who are using trusts for legitimate non-tax reasons. (*CPA Australia*)

Comment

We acknowledge that over-taxation is a risk under current trust tax settings that will be exacerbated by the proposal to increase the trustee tax rate to 39%.

Under the current trust regime, it is highly challenging to address the under-taxation of trust income by targeting the proposals to only impact individuals that earn over \$180,000 in personal income and distributed trustee income. This is because trustee income must be taxed to someone in the year it is earned, and it is not always clear which trusts will eventually distribute tax-paid trustee income to an individual earning over \$180,000 in personal income and tax-paid trustee income.

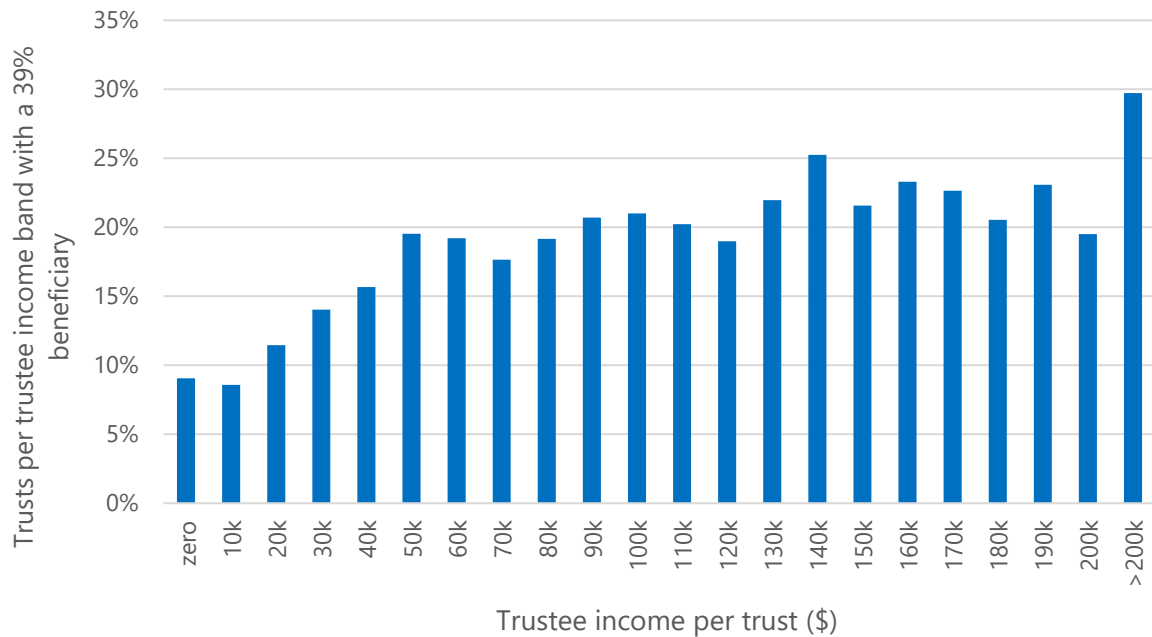
Alternative approaches could more accurately target the proposals, however many of these approaches would involve significant departures from the current trust regime. This has been ruled out by the Government. [See Issue: Alternative solutions to problem definition](#) for more information.

There are challenges with targeting the proposals based on the personal income of the beneficiaries of the trust. Trustee income is income that has not been paid to, or vested absolutely in, a beneficiary. Furthermore, most trusts in New Zealand are discretionary trusts – trustees generally have the discretion to add or remove beneficiaries. This means that in the year the trustee income is earned, it is not always certain which specific beneficiary will (eventually) receive the tax-paid trustee income when it is later distributed.

Based on trust disclosure information, there is not a strong correlation between the amount of trustee income of a trust and whether a trust has a 39% beneficiary. The graph in Figure 2 shows, for \$10,000 bands of trustee income, the percentage of trusts that made a distribution (taxable or non-taxable) to an individual earning over \$180,000 personal income.

Every trustee income band contains trusts with 39% beneficiaries. This means that targeting the proposals based on the amount of trustee income would be imperfect.

Figure 2: Percentage of trusts with a 39% beneficiary in 2022, by trustee income bands



On balance, we are recommending introducing a \$10,000 trustee income de minimis. This will help with the targeting of the proposals by ensuring that 27,000 trusts would not be affected by the proposed 39% trustee tax rate. Given the concentration of trustee income in a relatively small number of trusts, this would reduce the over-taxation of many trusts while still addressing most of the under-taxation of trust income. See [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be noted.

Issue: Use of beneficiary income allocations to mitigate over-taxation

Submission

(ATAINZ, Baucher Consulting Ltd, Cantin Consulting, Chartered Accountants Australia and New Zealand, CPA Australia, C Wilson, Deloitte, EY, J Guthrie, KPMG, Patterson Legal, Perpetual Guardian, Public Trust, PwC)

Submitters considered that the ability of trustees to allocate income to beneficiaries (to be taxed at the beneficiaries' personal tax rates) would not sufficiently mitigate over-taxation:

- Trusts are established for a variety of non-tax reasons, and it is not always appropriate or possible to distribute income to beneficiaries to mitigate over-taxation. ([See Issue: Use of trusts for non-tax reasons.](#)) (ATAINZ, Chartered Accountants Australia and New Zealand, CPA Australia, C Wilson, PwC)
- Making beneficiary income allocations solely to reduce over-taxation may breach the trustees' obligations under the Trusts Act 2019, and the terms of the particular trust deed. Trustee decisions must be made in the best interests of the beneficiaries and cannot be driven by tax considerations. (Chartered Accountants Australia and New Zealand, KPMG, Perpetual Guardian)
- Making distributions to lower-rate beneficiaries will result in increased compliance costs for trustees. (ATAINZ, Baucher Consulting Ltd)
- The Commissioner of Inland Revenue has a legislated duty to collect over time the highest net revenue that is practicable within the law having regard to the compliance costs. In the absence of a de minimis, trustees seem likely to incur greater compliance costs, which is at cross-purposes with this duty. (ATAINZ)
- Deemed taxable income can only be distributed if the trust is able to make distributions of such income and has the funds to do so. For trusts with taxable income but no accounting income, simply distributing income to beneficiaries may not work as a solution to mitigating over-taxation, and over-taxation already occurs under the 33% rate but will be exacerbated by the increase to 39%. Examples include:
 - foreign investment fund (FIF) income in excess of dividends
 - situations where not all expenses are deductible, such as the denial of interest deductions for residential investment property. (Cantin Consulting, EY, KPMG)
- The Bill commentary overstates the ability under current tax rules to mitigate over-taxation by using beneficiary income allocations. Under current rules, for an amount to be treated as beneficiary income and taxed at the beneficiary's personal tax rate, the amount must vest absolutely with the beneficiary and effectively be placed under the beneficiary's control. Where trustees do not wish to put an amount at the disposal of the beneficiary, the amount is subject to the trustee rate. (EY)
- In the case of estates, child beneficiaries usually have to attain a certain age before income can be distributed. By the time they can receive their share it will have diminished in value. (J Guthrie)
- The terms of the will (which are binding on trustees of a testamentary trust) may prevent trustees from making beneficiary income allocations. (Public Trust)
- Changes to the current trust tax rules are required to allow mitigation of over-taxation contemplated by the Bill commentary. Specifically, trust income should be subject to the beneficiary's personal tax rates where:
 - amounts are allocated for future possession
 - amounts are credited to an account of a beneficiary, but the trustee cannot or does not wish to distribute a cash payment

- a trustee settles income on a sub-trust on behalf of a beneficiary. *(EY)*
- Beneficiary income allocations will not help mitigate over-taxation in the following situations where trustees are required to treat income as trustee income:
 - trusts with minor beneficiaries
 - employee trusts (employee share scheme trusts and superannuation trusts) where exact allocations are determined at a future time
 - trusts used as superannuation vehicles. *(EY)*

Where beneficiaries under a trust have a personal tax rate lower than the 39% rate, in many cases they will appropriately be able to earn “beneficiary income” taxed to them at their personal tax rate rather than the 39% trustee tax rate. The 39% trustee tax rate in many cases does not create problems for lower tax rate beneficiaries as long as the trustees are prepared to vest income in or distribute income to those beneficiaries. *(Patterson Legal)*

Comment

Officials acknowledge that beneficiary income allocations will not be an appropriate or desirable method of mitigating the risk of over-taxation in all situations. Trustees will be required to make trade-offs between mitigating over-taxation by making beneficiary income allocations and retaining income for other reasons. This may result in increased compliance costs.

The trustee tax rate only applies to income earned by the trust that is not beneficiary income – the underlying assets of the trust are not affected.

The recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Some submitters have raised concerns that trustees will not be able to allocate all trust income as beneficiary income due to income that arises under tax law, but not trust law (eg, FIF income and situations where not all expenses are deductible). Interpretation Statement [IS 12/02: Income tax – whether income deemed to arise under tax law, but not trust law, can give rise to beneficiary income](#) outlines when deemed income can give rise to beneficiary income.

Recommendation

That the submissions be noted.

Issue: More beneficiary income allocations expected

Submission

(A Harmos, Baucher Consulting Ltd, C Wilson, Cantin Consulting, NZ Shareholders' Association, Patterson Legal, Securities Industry Association and NZX Ltd)

The proposals will encourage distributions of trust income to beneficiaries so that income is taxed at beneficiaries' personal tax rates instead of the proposed 39% trustee tax rate.

- This will defeat the purpose of many income-generating family trusts, which is not to provide income to beneficiaries until they reach a level of maturity. This could reduce beneficiaries' motivation to work, succeed, and increase a sense of entitlement. (A Harmos)
- The proposals will encourage distributions to corporate entities to avoid additional tax. (A Harmos)
- However, distributions to beneficiaries will be constrained by the trust's objectives and deed. *(Cantin Consulting)*
- More compliance costs will be incurred because of the proposals. (Baucher Consulting Ltd, C Wilson)
- If trustees are forced to make beneficiary income allocations to reduce the amount of tax paid on trust income, the income will become relationship property, which the partners of beneficiaries will be able to make claims to. This undermines the purpose of trusts settled to preserve assets for children and grandchildren. Trust assets and income could end up diluted because it is lost to beneficiaries' partners when relationships end. *(C Wilson)*
- The proposals encourage a bias towards distribution and expenditure, as compared to ongoing productive investment and long-term savings growth. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*

Comment

Officials agree that the proposals are likely to result in more beneficiary income allocations being made where the beneficiaries of the trust are on rates below 39%. In some circumstances, trustees will be required to make trade-offs between making increased beneficiary income allocations to mitigate over-taxation and retaining income for other purposes.

The trustee tax rate only applies to income earned by the trust that is not beneficiary income – the underlying assets of the trust are not affected. The recommended \$10,000 trustee income de minimis would help mitigate the impact on many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be noted.

Issue: Behavioural shift from trusts to PIEs and companies

Submission

(A Bramley, A Harnos, C Macalister, Cantin Consulting, Chartered Accountants Australia and New Zealand, EY, NZ Shareholders' Association, OliverShaw Ltd, Patterson Legal, PwC, Securities Industry Association and NZX Ltd)

There will be restructuring from trusts to PIEs or companies due to the difference between the 39% trustee tax rate, the 28% company tax rate and the capped 28% PIE tax rate.

- This behaviour will be tax driven and increase compliance costs and tax inefficiencies. (C Macalister, NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd)
- Existing investments may already be organised this way, so it is possible that nothing may need to change. (Cantin Consulting)
- The proposed 39% trustee tax rate gives a look-through rate, but not look-through profit accountability on the distribution of profits to owners. Trusts enabled widespread tax minimisation. This amendment to tax rates needs to "stick" and not enable other more elaborate schemes pursuing the same end. There is little point in having capital gains taxes when income is manipulated into low-rate regimes. (A Bramley)
- The introduction of the Trusts Act 2019 and other related disclosure rules has already resulted in a greater administrative and economic burden for taxpayers with trust structures. The proposed increase in the trustee tax rate may result in certain individuals and families deciding to move away from trusts and towards other ownership structures and options. (PwC)

PIEs

- A PIE cannot make the full range of investments that a trust can. This includes investments in rental properties and companies, which are more than portfolio interests. (Cantin Consulting)
- Individuals who, absent tax incentives, may have chosen to manage long-term and superannuation investments through trusts will be further incentivised to use PIEs to access the top PIR tax rate of 28%. (EY)
- More portfolio share investments and bank term deposits will move into PIE structures to reduce the income tax paid from 39% to 28%. (NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd)

- Restructuring into PIEs to minimise tax is tax avoidance. (NZ Shareholders' Association, Securities Industry Association *and NZX Ltd*)

Companies

- Taxpayers will be able to use companies to preserve the 28% company tax rate by retaining funds in investment companies, holding companies, or other more complicated schemes, to only distribute amounts to trustees when funds are needed by beneficiaries. (A Bramley, A Harmos, Cantin Consulting)
- A company can generally be used to make all the investments a trust can make, although there are costs to establishing and maintaining a company. (Cantin Consulting)
- Income-producing assets, like real estate or shares, are likely to be shifted to company holding structures. (EY)
- Many trusts own real estate that is leased to an associated operating company. A significant portion of the profits in these structures is generally applied to reduce bank debt. The proposals will mean that these structures are subject to a 39% tax rate when profits are simply retained to repay bank debt. This will likely result in many trusts transferring assets, at market value, into companies owned by trusts, so that the tax on retained earnings is reduced from 39% to 28%. (*OliverShaw Ltd*)
- Many taxpayers accept the difference between the 28% PIE and company rates and the current 33% trustee rate. However, they are less likely to be comfortable if the trustee rate is increased to 39%. (*Chartered Accountants Australia and New Zealand, OliverShaw Ltd*)
 - This may drive negative behaviours, such as the use of companies to earn passive income. Restructuring investments is unproductive and costly. (*Chartered Accountants Australia and New Zealand*)
- Misalignment between the 28% corporate tax rate and the 39% trustee and top personal tax rates incentivises the retention and reinvestment of corporate earnings. (A Bramley, Cantin Consulting, Patterson Legal)
- The proposals will disadvantage those who are unable to use companies. For example, in the farming sector, most farms include the family home. A corporate structure results in a major tax inefficiency where the owners have to pay a market rental for the use of the family home. As a result, trust structures are used, where the costs of the family home are non-deductible but there is no taxable deemed income based on market rental. (*OliverShaw Ltd*)

Comment

We acknowledge that even if the trustee tax rate is aligned with the top personal tax rate, taxpayers will be able to substitute or invest in companies and PIEs to access lower tax rates. However, trusts are a completely different legal structure, and they are not a complete substitute for companies and PIEs.

- **Substitutability with PIEs:** Some trusts have investments that earn large amounts of income that could not be put into a PIE. These are primarily businesses that settlors or beneficiaries' control, such as farms and SMEs. While the general population may not have many of these investments, they represent a large amount of the assets of high-income investors.
- **Substitutability with companies:** Trusts have certain tax advantages that companies do not. Capital gains derived in trusts can be distributed immediately to beneficiaries tax free, whereas capital gains can usually only be extracted from a company upon liquidation or as a taxable dividend. Trusts can stream distributions to different beneficiaries and can be used for asset protection in a way that companies cannot. Also, the company and dividend tax rules are relatively more comprehensive than the trust tax rules. Therefore, there are some important advantages that would counteract, to a degree, the incentive for taxpayers to shift income from trusts to companies.

This reduced level of substitutability means that increasing the trustee tax rate to 39% is likely to be a worthwhile step in addressing the under-taxation of trust income, even if no changes are made to the tax treatment of PIEs or companies.

Inland Revenue has published high-level guidance regarding how it may view some taxpayer transactions and structural changes regarding the increase in the trustee tax rate: [GA 24/01: Proposed increase in the trustee tax rate to 39%](#).

Recommendation

That the submissions be noted.

Issue: Misalignment and horizontal equity concerns

Submission

(A Bramley, Cantin Consulting, CPA Australia, NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd)

A strategic approach should be taken to addressing the non-alignment of tax rates across the whole tax system, rather than a proposal to address the issue only partially. *(Cantin Consulting, NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd)*

- A more holistic review of tax rates is required to address imbalances between different investment structures. This should include consideration of the simplification of tax structures to encourage fairness and minimise scope for tax minimisation. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*
- The 39% trustee tax rate will create a significant misalignment in the tax treatment for direct listed share investments held in a trust and those held in managed funds.

Accordingly, we disagree with the Bill's proposal to apply a 39% trustee tax rate. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*

- At a minimum there should be a plan to address the rest of the issue of having non-aligned rates in the tax system, or a rationale for only partially addressing it. *(Cantin Consulting)*
- The reason we have non-aligned rates seems to be that while Parliament has legislated for more progressivity through the 39% top personal rate, it does not want the high economic costs of taxing savings and investment at such a rate. Thus, it has kept the company and PIE rates at 28%. Increasing the trustee tax rate contradicts the rationale behind these settings because trusts derive savings and investment income. *(OliverShaw Ltd)*
- The 39% personal tax rate is targeted at high salary and personal services income earners not investment and savings income. Trusts should not be taxed at 39% since they do not derive employee or personal services income. The better approach would be to focus only on areas where companies, trusts, or PIEs are used to convert labour income (that should be taxed at 39%) into investment/savings income (that need not be taxed at 39%). However, this is not a major issue at present given the personal services income tax rules. *(OliverShaw Ltd)*
- Increasing the trustee tax rate to 39% is an ad-hoc approach to the issue of income tax rate misalignment. This is recognised in the RIS, but it then argues that the proposal has merit because the 28% company rate is not a final rate and the capped PIE tax rate of 28% is available only to portfolio or passive investors. These arguments do not withstand close analysis. *(OliverShaw Ltd)*
 - The top-up of company tax on distribution of dividends may be many years later, or never.
 - No justification is given for allowing passive portfolio investors to have their tax rate limited to 28% while active SME owners may pay tax at 39%.
- By increasing the personal and now trustee tax rates from 33% to 39% the Government is undermining New Zealand's broad base low-rate approach. *(CPA Australia)*.

Comment

We acknowledge that addressing integrity pressures arising from non-aligned tax rates across the tax system at the same time would be preferable to addressing the under-taxation of trust income alone. A cohesive approach to non-alignment would provide further, long-term benefits for the robustness and sustainability of the tax system. This would require making compatible tax changes to both trusts, PIEs and companies/shareholders.

However, due to the reduced substitutability of trusts for PIEs and companies, we consider that addressing the under-taxation of trust income on its own is a worthwhile step forward in improving the robustness of the tax system. See [Issue: Behavioural shift from trusts to PIEs and companies](#).

Recommendation

That the submissions be noted.

Issue: Negative impacts on direct investment likely

Submission

(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)

The difference between the proposed 39% trustee tax rate and the capped 28% PIE rate will result in a bias against direct investment and towards managed funds, which will affect New Zealand's capital markets.

- The capital market flow from customers switching into PIEs could cause disruption and waste. The long-term consequence could be markets becoming less liquid and increasingly dominated by large overseas fund managers.
- PIEs typically invest in the top 30 to 50 NZX stocks, so our new or growth companies will find it harder to attract capital from the direct investor. They may have to seek foreign investment to raise capital, which would be detrimental to the domestic economy.

The proposals would have unintended consequences for the financial futures of New Zealanders.

- Tens of billions of dollars of direct investment into NZX-listed firms is invested through family trusts. Shareholders are everyday New Zealanders who play a significant role in our capital markets, with nearly a quarter of New Zealand investors holding direct shares.
- There are hundreds of thousands of "mum and dad" and young investors with relatively small direct share investments. These savings and investments are used for retirement, house deposits, or supporting family members. A shift towards PIEs, which are typically lower risk, could affect returns.
- The proposals will result in New Zealanders who wish to make investment decisions themselves being penalised. We should encourage New Zealanders working toward financial independence.
- We should encourage New Zealanders to take a long-term view of investing, rather than focus on tax impacts and minimisation.
- There could be implications for KiwiSaver. Given most KiwiSaver funds are PIEs, and those PIEs invest in direct shares, more certainty on the long-term taxation of PIEs and KiwiSaver is needed.
- Without certainty or a known timeframe regarding the potential for changes to the taxation of PIEs, there could be a scenario where trustees restructure direct shares into

PIEs and then restructure them back if there are further tax changes. Uncertainty also poses challenges for individuals planning long-term investments.

Comment

We acknowledge that the proposals will encourage a behavioural response from trustees to restructure or invest in PIEs. See [Issue: Behavioural shift from trusts to PIEs and companies](#).

However, the trustee tax rate only applies to income of a trust that is not beneficiary income. Direct investments by trustees will not be affected by the 39% trustee tax rate if the investment returns are distributed to beneficiaries of the trust as beneficiary income.

Furthermore, the recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. For more information, see [Issue: Trustee income de minimis](#).

The Government is not currently proposing to change the tax treatment of PIEs. Additionally, officials would recommend that any proposals relating to the taxation of PIEs be subject to public consultation through the generic tax policy process (GTPP).

Recommendation

That the submissions be noted.

Issue: Misalignment with corporate rate unavoidable

Submission

(Patterson Legal)

Although alignment of the corporate tax rate and the 39% trustee and top personal tax rates is desirable in the world of economics, there can be no question of increasing the corporate rate to 39%. International competitiveness keeps pressure to maintain corporate tax rates in line with other countries. If New Zealand is adopting higher than 28% personal tax rates, it seems inevitable that we will be living with misalignment of the company tax rates and top personal tax rates, as is the case for most countries in the world now.

Comment

We agree that there are sound policy reasons for the company rate to be lower than the top personal tax rate. As a small, open economy, New Zealand relies on foreign investment, which makes a high company tax rate difficult to sustain. Further changes could be considered to help ensure New Zealand's tax system is robust and sustainable, despite having a lower corporate tax rate by comparison with the trustee and top personal tax rates. However, this would require further consideration and public consultation before being

proceeded with, and this would be subject to resourcing and prioritisation as part of the Government's tax and social policy work programme.

Recommendation

That the submission be noted.

Issue: Proposals will result in continued indebtedness

Submission

(C Wilson)

A consequence of the proposed 39% trustee tax rate is that there is less left in a trust at the end of the year to pay down debt, so the indebtedness of the trust continues. Amounts left over after tax and expenses are deducted from rental income, or inputs from trustees, are used to pay down debt. Given the inability to deduct interest costs in buying property, trusts are now into negative cash flow and are paying for tenants to be in rental properties.

Comment

We acknowledge that a consequence of increasing the trustee tax rate is that the after-tax amount of trustee income retained in a trust will be lower. The recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. For more information, see [Issue: Trustee income de minimis](#).

Regarding the interest limitation rules, it is an intended policy outcome of the rules that the taxpayer is not able to deduct certain interest expenses. However, the Government is proposing to reverse the interest limitation rules, with details of timing yet to be announced.

Recommendation

That the submission be noted.

Issue: Rationale for proposed modifications

Submission

(Patterson Legal)

The proposed modifications for deceased estates and disabled beneficiary trusts are interesting. However, the identification of these two circumstances alone does seem somewhat random. The idea seems to be that the proposed modifications apply in situations

where the burden of the 39% rate may not be able to be softened through beneficiary income allocations.

Comment

The proposed modifications in the Bill for deceased estates and disabled beneficiary trusts are aimed at mitigating situations where there is an additional risk of over-taxation. Similar precedents exist in the current exclusions from the minor beneficiary rule for (a) estates where the minor was alive within 12 months of the settlors date of death, and (b) for a minor for whom the child disability allowance is paid.

Officials consider that deceased estates are at an increased risk of over-taxation because the beneficiaries of an estate may not be known to the trustees. This means that the trustees will not be able to use beneficiary income allocations to mitigate over-taxation. Other jurisdictions also have special, time-limited rules for the taxation of deceased estates. For example, Australia has rules that tax deceased estates at a concessional rate in the first three income years.

The disabled beneficiary trust modification is intended to help mitigate the risk of over-taxation for trusts settled for the care of disabled people. These trusts may choose to retain income as trustee income to be able to provide for the future care of the disabled beneficiary (or disabled beneficiaries). In most situations, we expect such trusts would continue to be able to allocate income as beneficiary income to the disabled beneficiaries.

Recommendation

That the submission be noted.

ALTERNATIVE APPROACHES

Issue: Alternative solutions to problem definition

Submission

(A Harnos, ATAINZ, Baucher Consulting Ltd, Cantin Consulting, C Macalister, C Wilson, Chartered Accountants Australia and New Zealand, CPA Australia, Deloitte, G McKinlay, NZ Shareholders' Association, KPMG, OliverShaw Ltd, PwC, Securities Industry Association and NZX Ltd, Taxpayers' Union, W Blake)

Submitters recommended that the following alternative approaches should be **considered**:

- a. Taxing trustee income on a tiered tax scale. *(Cantin Consulting, OliverShaw Ltd, PwC)*
- b. Extending the imputation regime to trusts. *(A Harnos, Cantin Consulting, Chartered Accountants Australia and New Zealand, PwC)*
 - o This would achieve the desired outcome of the proposals in a simpler fashion, without undermining the legitimacy and proper purpose of trust-generated and retained income. *(A Harnos)*
- c. Introducing an elective settlor-attribution regime where income derived by trustees can be attributed to and taxed in the hands of the settlor for tax purposes only, with the funds remaining held in trust for legal purposes. *(Cantin Consulting, PwC)*
- d. Introducing a "notional" distribution regime where income is deemed to be distributed to a beneficiary for tax purposes only, so that tax is paid at the beneficiary's personal tax rate but the funds remain in the trust for asset protection purposes. This approach would be similar to how we currently tax limited partnerships. *(PwC)*
- e. Amending the definition of beneficiary income to include amounts paid or applied after balance date (which would otherwise be trustee income). *(Cantin Consulting)*

Submitters recommended that, if the proposals proceed, the following approaches should be **adopted**:

- f. Introducing a de minimis rule for trustee income, where trusts with income below a certain threshold remain taxed at 33%. *(ATAINZ, Baucher Consulting Ltd, Cantin Consulting, C Wilson, Chartered Accountants Australia and New Zealand, G McKinlay, NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd, W Blake)*
- g. A settlor-interested regime that applies to trusts where the settlor has retained some or all the benefits arising from the trust. Trust income would not be taxed in the hands of the trustees but streamed to the beneficiaries (including the settlor). *(C Macalister)*
- h. Targeted rules to address integrity concerns, rather than subjecting all trusts to the 39% rate and addressing over-taxation in an ad hoc manner. *(CPA Australia, KPMG)*

- i. Taxing distributions of tax-paid trustee income to beneficiaries on the 39% personal tax rate at 39%. (*A Harmos*)
- j. Inland Revenue should be auditing taxpayers under the existing rules rather than amending the trustee tax rate. (*Deloitte*)
- k. The 39% top personal tax rate should be reduced to remove concerns about the differential between the trustee tax rate and the top personal tax rate. (*CPA Australia, Taxpayers' Union*)

Comment

- a. We do not recommend introducing marginal tax rates for trustee income. This approach would not only help trusts mitigate over-taxation, but it would also undermine the objective of the proposals to address under-taxation – all trusts would benefit from the lower marginal trust tax rates. The likelihood that trustee income is over- or under-taxed is not necessarily correlated to the amount of trustee income earned; a trust could have a small amount of income yet have only 39% rate settlors and beneficiaries. Furthermore, marginal tax rates for trustee income would also likely have a significant fiscal cost.
- b. Extending the imputation system to trusts was considered in early policy development of the proposals. This approach was ruled out as being significantly complex to design and implement. Despite the existing imputation system for companies and Māori authorities, Inland Revenue's experience suggests that both taxpayers and tax agents find imputation one of the most challenging aspects of the tax system. The Government has decided that proposals should be implemented for the 2024–25 and later income years. Extending the imputation system to trusts would not be able to be developed and implemented within this timeframe.
- c. The Government has decided that proposals should be implemented for the 2024–25 and later income years. Introducing a settlor-based regime would result in fundamental changes to the trust tax rules that would not be able to be introduced within this timeframe. Making significant changes to the trust tax regime at this stage of the Bill risks introducing unintended consequences.
- d. Introducing a "notional" distribution regime would be a significant departure from the current trust tax regime and would not be able to be implemented for the 2024–25 and later income years. Making significant changes to the trust tax regime at this stage of the Bill risks introducing unintended consequences.
- e. We do not recommend amending the definition of beneficiary income as part of this Bill. Any changes to core trust provisions, if necessary, would significantly benefit from public consultation and further policy development. Any changes to the definition of beneficiary income would require further consideration and be subject to prioritisation on the Government's tax and social policy work programme.

- f. Given the concentration of trustee income in a relatively small number of trusts, officials agree that introducing a de minimis for trustee income would help reduce over-taxation while still addressing most of the under-taxation of trust income. For further detail, see Issue: Trustee income de minimis.
- g. Flowing income sourced from services to the settlors of a trust would be a significant departure from the current trust tax regime and could not be implemented for the 2024–25 and later income years. Making significant changes to the trust tax regime at this stage of the Bill risks introducing unintended consequences.
- h. Officials acknowledge that targeted rules to address the problem would be preferred. However, given timing constraints, we consider that any proposals in this Bill to address the problem need to fit within the existing trust tax regime to avoid the risk of unintended consequences and allow sufficient time for policy development and implementation. Given the flexibility of trusts, designing targeted proposals is challenging. See Issue: Risk of over-taxation.
- i. Taxing distributions of tax-paid trustee income to beneficiaries on the 39% personal tax rate was considered during early policy development of the proposals, but ruled out due to administrative complexity and concerns about whether this approach would address the problem. Unless robust anti-streaming rules were also introduced, officials expect that trustees would stream taxable distributions to lower-rate beneficiaries and tax-free capital distributions to 39% beneficiaries.
- j. The issue of the 33% trustee tax rate being a final tax with distributions of trustee income not being subject to tax, even if the individual is earning over \$180,000 personal income and tax-paid trustee income, is an outcome of current tax policy settings. Auditing taxpayers in these situations would not address the problem.
- k. The previous Government decided to introduce a 39% personal tax rate in 2020 for the 2022 and later income years. Consideration of changes to personal tax rates is outside the scope of the Bill.

Recommendation

- a. That the submissions be declined.
- b. That the submissions be declined.
- c. That the submissions be declined.
- d. That the submission be declined.
- e. That the submission be declined.
- f. That the submissions be accepted.
- g. That the submission be declined.
- h. That the submissions be declined.

- i. That the submission be declined.
- j. That the submission be declined.
- k. That the submissions be declined.

Issue: Trustee income de minimis

Submission

(ATAINZ, Baucher Consulting Ltd, C Wilson, Cantin Consulting, Chartered Accountants Australia and New Zealand, G McKinlay, NZ Shareholders' Association, OliverShaw Ltd, Securities Industry Association and NZX Ltd, W Blake)

A de minimis for trustee income should be introduced, where trusts with trustee income up to the de minimis are taxed at 33% and trusts with more trustee income are taxed at 39% on all trustee income.

- A de minimis threshold balances the objective of maintaining the integrity of the tax system with minimising compliance costs for trustees. *(Baucher Consulting Ltd)*
- A de minimis would reduce the need for specific exemptions, and address some of the concerns with the proposed special rules for deceased estates and disabled beneficiary trusts. *(ATAINZ, Chartered Accountants Australia and New Zealand, Cantin Consulting)*
- A de minimis rule would mitigate overreach (some overreach already exists but is tolerated at the 33% rate), ensure certainty, simplicity and minimise compliance costs. *(Chartered Accountants Australia and New Zealand)*
- If it is not possible to delay the proposal, a de minimis threshold should be introduced to not penalise most small-value direct shareholders. *(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)*

Submitters had mixed views on a potential threshold:

- Some submitters considered that the 39% rate should only apply to trusts with:
 - A "suitable minimum exemption". *(G McKinlay)*
 - Net income (before distributions) greater than \$10,000. *(Baucher Consulting Ltd)*
 - Net income (before distributions) greater than \$50,000. *(ATAINZ)*
 - Trust taxable income greater than \$50,000. *(W Blake)*
 - Up to \$75,000 for any trust with at least two named beneficiaries. This avoids those set up for sole personal benefit and would leave \$37,500 per beneficiary. This amount of income would not be significant in avoiding the 39% personal tax rate. *(C Wilson)*
 - Trustee income (before any allocations) greater than (say) \$100,000. *(Chartered Accountants Australia and New Zealand)*

- A tiered tax rate should be introduced with the first \$100,000 of trustee income taxed at 33%. (*OliverShaw Ltd*)
- Given that the findings of the 2022 trust disclosures are yet to be made publicly available, Inland Revenue will be best placed to confirm an appropriate de minimis income threshold. (*Chartered Accountants Australia and New Zealand*)

Comment

Given the concentration of trustee income in a relatively small number of trusts, we agree that introducing a de minimis for trustee income would help reduce over-taxation while still addressing most of the under-taxation of trust income.

- **Trustee income is concentrated in a small number of trusts:** Only 5% of trusts with assessable income in the 2021 tax year (9,000 out of 177,000) accounted for 78% of trustee income (\$13.3 billion out of \$17.1 billion).
- **Most trusts have relatively small amounts of trustee income:** 75% of trusts with assessable income in the 2021 tax year (133,000 out of 177,000) accounted for only 2.5% of trustee income (\$0.4 billion out of \$17.1 billion). This includes 43,000 trusts that reported only beneficiary income (ie, they had no trustee income), those trusts would not be impacted by a change in the trustee rate.

Based on trust disclosure information, the likelihood that trustee income is over- or under-taxed is not necessarily correlated to the amount of trustee income earned. As noted in Figure 2, any trustee income de minimis would result in some level of under-taxation. See [Issue: Risk of over-taxation](#).

We recommend basing the de minimis on trustee income after deductible expenses. This ensures that the trustees can reduce their income by any deductible expenditure incurred in deriving the income. The de minimis should not be based on how much income the trust has before beneficiary income allocations because there is not an under- or over-taxation concern with amounts that are allocated as beneficiary income; such amounts are taxed at the personal tax rates of the beneficiary.

On balance, we recommend introducing a de minimis of \$10,000 of trustee income for the following reasons:

- **Targeting the under-taxation of trust income:** Given the concentration of trustee income in a relatively small number of trusts, a low de minimis threshold would help reduce over-taxation while still addressing most of the under-taxation of trust income. A higher threshold would increase the risk of under-taxation, reducing the fairness of the tax system.
- **Mitigating the incentive to settle multiple trusts:** Submitters have noted that ongoing compliance costs for a trust can range from \$750 to \$1,000 (see [Issue: Rules to buttress a de minimis](#)). A \$10,000 de minimis would provide a benefit of up to \$600 per trust. A higher threshold could incentivise taxpayers to settle multiple trusts to take advantage of the lower tax rate.

- **Simplicity:** Keeping the threshold low means that additional rules to address the risk of settling multiple trusts are not necessary. Aggregation rules could be complex and/or have high compliance costs.
- **Fiscal cost and diminishing returns:** As the trustee income de minimis threshold increases above \$10,000, there are diminishing returns in terms of reducing the number of trusts affected by the 39% trustee rate and increasing the fiscal cost.

A \$10,000 trustee income de minimis would ensure that 27,000 out of 76,000 trusts would not be affected by the 39% trustee tax rate. This represents 36% of trusts that would be subject to the 39% rate (trusts with positive trustee income after deductible expenses and prior year tax losses). Although some of these trusts would have 39% beneficiaries, the risk of under-taxation in dollar terms would be very minor.

Table 2: Trustee income de minimis thresholds

De minimis threshold (\$)	Maximum benefit per trust (\$)	Number of trusts eligible for de minimis	Estimate fiscal cost per tax year (\$m)	Estimated fiscal cost over the forecast period (to 2027/28) (\$m)
1,000	60	12,500 (16%)	<1	<1
10,000	600	27,000 (36%)	3	14
20,000	1,200	37,500 (49%)	10	40
50,000	3,000	48,000 (63%)	25	107
100,000	6,000	56,000 (73%)	51	217
180,000	10,800	62,500 (82%)	91	386

Note: apart from the \$10,000 threshold, the above estimates are not formal costings and are only intended to provide an indication of the order of magnitude of the fiscal impact of different thresholds. If a threshold higher than \$10,000 is introduced, special rules may need to be introduced to address the risk of taxpayers' settling multiple trusts to take advantage of a lower tax rate. The above estimates are conservative and do not take into account any behavioural responses or additional integrity rules.

Point of difference

For the 2024–25 and later income years, trusts and estates with trustee income (after expenses) up to \$10,000 should remain at the current trustee tax rate of 33%. Trusts with trustee income (after expenses) in excess of \$10,000 should be subject to the 39% trustee tax rate on all trustee income.

Recommendation

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

Issue: Rules to buttress a de minimis

Submission

(ATAINZ, Baucher Consulting Ltd, C Wilson, Chartered Accountants Australia and New Zealand, OliverShaw Ltd)

Submitters did not consider the risk of taxpayers settling multiple trusts to take advantage of a de minimis to be significant:

- Existing anti-avoidance provisions and the impact of compliance costs would mitigate this concern. *(ATAINZ, Baucher Consulting Ltd, C Wilson, Chartered Accountants Australia and New Zealand, OliverShaw Ltd)*
- The cost of settling a new trust (typically between \$3,000 and \$5,000) together with the ongoing annual compliance costs (variable but at least \$750 to \$1,000) would wipe out the potential benefit of a de minimis. *(ATAINZ, Baucher Consulting Ltd, C Wilson)*

Submitters considered that rules could be introduced to alleviate concerns regarding tax planning to take advantage of the de minimis:

- a. A specific anti-avoidance provision could be introduced, if necessary. *(OliverShaw Ltd)*
- b. An aggregation rule could be introduced, if necessary. *(Chartered Accountants Australia and New Zealand)*
- c. Alternatively, the de minimis could be restricted so that it only applies to certain trusts:
 - First, for inter-vivos trusts settled before 17 October 2020 (the date of the 2020 General Election) following which an increase in the personal income tax rate to 39% became likely.
 - Second, for the first inter-vivos trust settled by an individual on or after 17 October 2020. This would enable new trusts to be settled for non-tax reasons. *(ATAINZ, Baucher Consulting Ltd)*
- d. The de minimis threshold could be divided by the total number of trusts settled by a person, however this would unfairly penalise persons who legitimately settled trusts prior to the 2020 General Election. *(ATAINZ)*

Comment

Officials agree that the risk is low that the proposed \$10,000 trustee income de minimis will incentivise taxpayers to settle multiple trusts given expected ongoing compliance costs to operate a trust would likely exceed the tax benefit of the de minimis. Given this low

incentive, we consider that a specific anti-avoidance provision targeted at arrangements or structures entered into to take advantage of the de minimis is not necessary. The Commissioner of Inland Revenue already has a robust general anti-avoidance provision.

Given the recommended de minimis threshold, we do not recommend introducing aggregation rules or rules to split the de minimis amongst multiple trusts. Such rules would likely over-complicate the trust rules and create heavy compliance costs for a relatively low risk problem.

Recommendation

- a. That the submission be declined.
- b. That the submission be declined.
- c. That the submissions be declined.
- d. That the submission be declined.

Issue: Indexation of trustee income tax threshold(s)

Submission

(CPA Australia)

If multi-tiered tax rate thresholds are allowed, we recommend that the thresholds are indexed to inflation.

Comment

Officials do not recommend legislating automatic indexation of a trustee income de minimis threshold. This would be inconsistent with other thresholds in the Inland Revenue Acts.

Threshold indexation is outside the scope of the proposals in the Bill.

Recommendation

That the submission be declined.

Issue: Imputation credits concessions

Submission

(PwC)

If the proposed increase in the trustee tax rate proceeds, consideration should be given to introducing concessions to enable imputation credits to be preserved in certain circumstances, such as where shares in a company are distributed to the beneficiaries of a trust.

Comment

Officials do not recommend introducing imputation credit concessions. We acknowledge that taxpayers may breach imputation continuity requirements if they restructure in response to the proposed 39% trustee tax rate, however, providing imputation credit concessions without public consultation, and at this stage of the Bill, would risk introducing unintended consequences. Imputation credit concessions could also set a precedent for the imputation regime and future tax rate changes.

Recommendation

That the submission be declined.

DISABLED BENEFICIARY TRUSTS

Clauses 39, 59(9), (10) and (17) and 62(2)

Issue: Beneficiary income allocations may be inappropriate for disabled beneficiary trusts

Submission

(Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand)

It has been suggested that where a trust has a disabled beneficiary but does not meet the proposed criteria, the income can be distributed as beneficiary income. This will not be possible, nor appropriate, in all cases.

Comment

We acknowledge that there may be cases where beneficiary income allocations either may not be possible or may be inappropriate for disabled beneficiary trusts – the proposed modification aims to help mitigate this. For more information on the recommended changes to simplify and expand the eligibility for this modification, see:

- [Issue: Disabled beneficiary definition too narrow](#)
- [Issue: Limit on number of beneficiaries](#)
- [Issue: Power to add and remove beneficiaries](#)
- [Issue: Receiving payments in relation to an income year, and](#)
- [Issue: Applicable rate for disabled beneficiary trusts.](#)

Additionally, the recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be noted.

Issue: Disabled beneficiary definition too narrow

Submission

(A Rose, Chartered Accountants Australia and New Zealand, KPMG, Perpetual Guardian, Public Trust, Trustees Executors Ltd)

The proposed definition of “disabled beneficiary” in the Bill is too narrow. The definition would exclude people who:

- are based overseas, so do not receive support payments from the New Zealand Government (Chartered Accountants Australia and New Zealand)
- are not eligible for government support payments for reasons unrelated to their disability, eg, because they exceed income limits (A Rose)
- choose not to receive government support payments (Chartered Accountants Australia and New Zealand, KPMG)
- receive ACC payments (Chartered Accountants Australia and New Zealand)
- have reached retirement age and receive New Zealand Superannuation rather than government support payments for a disability (*Perpetual Guardian*)
- are vulnerable and cannot make decisions for themselves, and (Trustees Executors Ltd)
- have a loss of mental capacity or have substance abuse or addiction issues, most of these people are on lower personal tax rates. (*Perpetual Guardian*)

The proposed definition of “disabled beneficiary” will have fairness issues:

- Trusts with disabled beneficiaries that do not qualify under current proposals will be unduly penalised. They will be over-taxed, with the additional tax paid reducing the resources available to care for them. (A Rose, KPMG)
- We support the intent of the modification. However, including some disabled/vulnerable people but not others within the definition is unfair and inequitable. (*Trustees Executors Ltd*)

The definition of “disabled beneficiary” should:

- provide a clear definition that is simple to apply and that extends beyond people who have lost capacity (Public Trust)
- ensure all disabled and vulnerable beneficiaries qualify, regardless of whether they receive the Supported Living Payment or the Child Disability Allowance (Trustees Executors Ltd)
- include beneficiaries who would be entitled to the relevant benefits, regardless of whether they actually receive the benefits in the income year. Parents, guardians or trustees could make reasonable inquiries to affirm whether the benefits would be available for the disabled beneficiary via a disclosure point in the trust’s tax return. Inland Revenue should also consult with other Government agencies on what information could be shared regarding eligibility and receipt of support payments as well as their duration (*KPMG*)
- include disabled beneficiaries who have been assessed as eligible for government support payments for the rest of their lives, even if they don’t receive a support payment in a given year (*KPMG*)
- not refer to the receipt of government support payments. (*A Rose, Perpetual Guardian*)

It may be suitable to apply the same disability criteria for the modification that applies to state disability benefits. (*A Rose*)

The proposed rules do not adequately reflect how disabled family members are provided for. (*Chartered Accountants Australia and New Zealand*)

Comment

We agree that the currently proposed definition of “disabled beneficiary” is too narrow and needs to be broadened. The proposals were developed as part of the Budget process, so we could only undertake very limited consultation with other government agencies before the introduction of the Bill. As a result, the proposed modification for disabled beneficiary trusts was designed narrowly, with the intention of undertaking consultation to determine whether the definition should be expanded.

The definition of “disabled beneficiary” needs to have objectively verifiable criteria to ensure it can be administered by Inland Revenue. Inland Revenue does not have the expertise to develop and apply a general definition of disability. A subjective definition of disability would significantly expand the eligibility, however it would also be unenforceable and risk allowing non-disabled people to receive a tax advantage from the rules.

The definition should also target lower-income beneficiaries, as they may be at risk of over-taxation under the proposed 39% trustee tax rate.

Point of difference

Extending the definition to additional support payments

The proposed definition of “disabled beneficiary” refers to the receipt of government support payments. This helps ensure the eligibility criteria is objectively verifiable.

The current definition includes people who receive the **Child Disability Allowance** or the **Supported Living Payment** on the grounds of restricted work capacity. We recommend extending this definition to also include people for whom at least one of the following support payments are paid:

- **The Disability Allowance**, which is a weekly payment for people with regular, ongoing costs because of a disability. A person does not have to be on a benefit to qualify for the Disability Allowance. However, they must have a disability that is likely to last at least six months, as well as regular and ongoing costs because of their disability that are not covered by another agency. The Disability Allowance is means-tested, which suggests recipients are on lower incomes.
- **The JobSeeker Health Conditions and Disability**, which is a weekly payment for people who cannot work, or are working fewer hours, because of a health condition, injury or disability. The JobSeeker Health Conditions and Disability is means-tested, which suggests recipients are on lower incomes. Since people who are not disabled can receive this payment, we recommend also requiring a person to have received this

payment for six months for them to be considered a “disabled beneficiary”. This would be broadly consistent with the criteria for the Disability Allowance, which requires a person to have a disability that is likely to last at least six months. In targeted consultation, the Ministry of Social Development advised that some disabled people start receiving this support payment before later transitioning to the Supported Living Payment (which is already included in the “disabled beneficiary” definition).

Disabled people who receive New Zealand Superannuation

We agree that the proposed definition of “disabled beneficiary” does not sufficiently cover people of retirement age. We recommend extending the definition to include a person if:

- they are aged 65 or older, and
- they satisfied the definition of “disabled beneficiary” in the income year in which they turned 65, or the previous income year.

This would help ensure that disabled people who transition off disability-specific support and onto New Zealand Superannuation when they reach retirement age can continue to meet the definition of “disabled beneficiary”.

Other criteria referred to by submitters

Submitters referred to examples of disabled people who would not qualify under the currently proposed definition, and would not qualify even if the definition is extended to include people for whom the Disability Allowance and/or JobSeeker Health Conditions and Disability are paid. However, we do not recommend extending the definition of “disabled beneficiary” any further for the reasons set out in the table below.

Table 3: Further criteria and examples referred to by submitters

Criteria/examples	Rationale for not extending definition of “disabled beneficiary”
<p>People who do not receive New Zealand Government support payments, for reasons including:</p> <ul style="list-style-type: none"> ▪ being based overseas ▪ not being eligible for support for reasons other than their disability, such as exceeding income limits for means-tested support payments, or ▪ being entitled to support payments but choosing not to receive them. 	<p>The definition of “disabled beneficiary” needs to be administrable by Inland Revenue and simple for trustees to apply. Inland Revenue does not have the expertise to develop and apply a general definition of disability. A general definition would also be more difficult for trustees to apply. Therefore, we recommend the definition refer to criteria that is objectively verifiable and can be used as a proxy for disability.</p> <p>It would be challenging for Inland Revenue and trustees to determine whether a person is entitled to a support payment if they do not receive it, or whether a person receives a disability support payment from an overseas government.</p>

Criteria/examples	Rationale for not extending definition of “disabled beneficiary”
<p>People who receive other support payments that are not included in the proposed definition (such as payments from ACC).</p>	<p>We considered extending the definition of “disabled beneficiary” to include other government support payments, including those made by ACC following an injury. However, we do not have any data on what the personal tax rates of recipients of other government support payments are, particularly if the payments are not means-tested. Given our recommendation that a flat 33% tax rate applies to trustee income of disabled beneficiary trusts (see Issue: Applicable rate for disabled beneficiary trusts), we consider it necessary to limit the application of the modification to trusts with beneficiaries who have personal tax rates that are 33% or less. As a result, we do not recommend extending the definition beyond the Supported Living Payment on the grounds of restricted work capacity, the Child Disability Allowance, the Disability Allowance, and the JobSeeker Health Conditions and Disability.</p>
<p>People who are vulnerable and cannot make decisions for themselves, have lost mental capacity or have substance abuse or addiction issues.</p>	<p>We considered extending the definition of “disabled beneficiary” to include trusts with beneficiaries for whom:</p> <ul style="list-style-type: none"> ▪ An enduring power of attorney has been invoked because the beneficiary has lost mental capacity (invoked EPA). ▪ A court order has been made under the Protection of Personal and Property Rights Act 1988. ▪ A court order has been made under the Mental Health Act 1992 for compulsory mental health treatment. ▪ A court order has been made under the Substance Addiction Act 2017 for compulsory treatment for addiction. <p>Extending the definition to include trusts with the above beneficiaries could result in a very wide definition. Given our recommendation that a flat 33% tax rate apply to trustee income derived by disabled beneficiary trusts (see Issue: Applicable rate for disabled beneficiary trusts), we consider it necessary to limit the application of the modification to trusts with beneficiaries who have personal tax rates that are 33% or less. We do not recommend extending the definition to include trusts with these beneficiaries since it is unclear if it would be sufficiently targeted towards low-income beneficiaries. We do not have data on the marginal tax rates of beneficiaries who have invoked EPAs or for whom court orders have been made.</p>

Recommendation

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

Issue: Disabled beneficiary definition would increase compliance costs

Submission

(Public Trust, Trustees Executors Ltd)

The proposed "disabled beneficiary" definition would increase compliance costs.

- This would be detrimental to the beneficiaries the modification is intended to protect. *(Public Trust)*
- Each year, a trustee would need to confirm if the beneficiaries have met the narrow criteria proposed. *(Trustees Executors Ltd)*

Comment

Officials acknowledge that the disabled beneficiary trusts modification would involve compliance costs for eligible trusts due to the need for the definition to be objectively verifiable for Inland Revenue to be able to administer the proposals.

We have recommended changes to simplify the proposal to expand eligibility and reduce compliance costs. For more information, see:

- [Issue: Disabled beneficiary definition too narrow](#)
- [Issue: Limit on number of beneficiaries](#)
- [Issue: Power to add and remove beneficiaries](#)
- [Issue: Receiving payments in relation to an income year, and](#)
- [Issue: Applicable rate for disabled beneficiary trusts.](#)

Recommendation

That the submissions be noted.

Issue: Problematic to determine eligibility

Submission

(Deloitte, Perpetual Guardian, Public Trust, Trustees Executors Ltd)

Establishing eligibility for the modification could be problematic.

- The proposed definition could create privacy issues. (*Deloitte, Perpetual Guardian, Public Trust*)
 - The trust does not have information about whether a beneficiary receives a qualifying benefit. If trustees are expected to gather this information, is this consistent with the Privacy Act 2020? (*Perpetual Guardian*)
- Because of their disability, some beneficiaries would not be able to answer the questions of whether they meet the criteria. (*Trustees Executors Ltd*)

Comment

Establishing eligibility for the modification may be challenging where a disabled person is in receipt of a support payment but does not wish to share that information with the trustees of a trust of which they are a beneficiary. However, we expect that in many cases, the family members or guardians of a disabled person will be involved in the administration of a trust settled for the person and will have the information required to determine whether the disabled person satisfies the definition of “disabled beneficiary”.

If the trustees of a trust are unable to establish whether a disabled person satisfies the definition of “disabled beneficiary”, the trustees would still be able to make beneficiary income allocations so that trust income is taxed at the beneficiary’s personal tax rate.

Furthermore, if the trust has up to \$10,000 trustee income, it would be eligible for the recommended \$10,000 trustee income de minimis. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be noted.

Issue: Limit on number of beneficiaries

Submission

(*ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, Deloitte, EY, Perpetual Guardian, Public Trust, Trustees Executors Ltd*)

Trusts with multiple beneficiaries would be excluded under the proposed eligibility criteria, resulting in increased compliance costs.

- This will result in many new trusts being created. (*Perpetual Guardian*)
- The criteria do not address the treatment of existing trusts where the primary beneficiary is a disabled person. To qualify, they will need to be resettled or amended.

This would be unfair for trusts that are not a target of the proposals. (ATAINZ, Baucher Consulting Ltd)

- The proposed rules do not adequately reflect how disabled family members are provided for, as there may be more than one disabled beneficiary in a family or the disabled beneficiary may be supported out of a general family trust. (Chartered Accountants Australia and New Zealand)
- It is unclear how the exemption will apply if a trust has multiple beneficiaries, not all of whom are disabled. (Public Trust)
- Trusts with multiple beneficiaries should qualify. The disabled or vulnerable beneficiary could be of primary importance, with their needs being the first consideration in the management of the trust. (*Trustees Executors Ltd*)
 - Trusts with multiple disabled beneficiaries should qualify. (ATAINZ, Baucher Consulting Ltd, Deloitte)
 - Multiple beneficiaries should qualify if they are within two degrees of blood relationship. (ATAINZ, Baucher Consulting Ltd)
- The proposed amendments are complex and could be achieved in a simpler manner. The modification could apply to trusts established principally for the case of a disabled person (or persons). (EY)

Comment

We agree that only allowing disabled beneficiary trusts to have a single disabled beneficiary is too restrictive and could result in unnecessary additional compliance costs where there are multiple disabled people within the same family.

Point of difference

We recommend allowing disabled beneficiary trusts to have multiple beneficiaries, provided all the beneficiaries of the trust (ignoring any residual beneficiaries, who can only receive trust property if there is no longer any living beneficiaries) satisfy the definition of "disabled beneficiary".

We do not recommend extending the modification to trusts that have a combination of disabled and non-disabled beneficiaries. Although this would limit the availability of the modification, it ensures that only disabled beneficiaries benefit from the modification. This reduces the risk that disabled beneficiary trusts could be used to provide a tax advantage for non-disabled persons.

Recommendation

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

Issue: Power to add and remove beneficiaries

Submission

(Chartered Accountants Australia and New Zealand)

Most trust deeds include a power to add/remove beneficiaries. A trust specifically set up to provide for a disabled person that includes such a clause will not satisfy the eligibility criteria for the disabled beneficiary trusts modification.

Comment

We acknowledge that trust deeds often include a power to add or remove beneficiaries, and that the proposed modification does not currently allow this. This rule is intended to ensure a trust cannot be settled for a disabled beneficiary, have income taxed at rates below 39%, and then have a non-disabled beneficiary receive the benefit of trustee income taxed at a disabled beneficiary's lower tax rate.

Given our recommendation that multiple disabled beneficiaries should be allowed, we recommend that there is no restriction whether a trust deed has the power to add/remove beneficiaries. For more information, [see Issue: Limit on number of beneficiaries](#).

Recommendation

That the submission be accepted.

Issue: Trusts created by a will

Submission

(Perpetual Guardian)

When a trust is created via a will, and the will has other beneficiaries, will the disabled beneficiary trust modification apply?

Comment

If a trust is created via a will, the trust may qualify for the modification provided it satisfies the eligibility criteria. No distinction is made in the eligibility criteria between *inter vivos* and testamentary trusts. It should not matter if the will has other beneficiaries, provided the trust itself only has disabled beneficiaries (ignoring any residual beneficiaries).

Recommendation

That the submission be noted.

Issue: Eligibility based on purposes of the trust

Submission

(EY)

Trusts established principally for the care of a disabled person should qualify. This would achieve the Bill's objectives in a simpler manner.

Comment

The definition of "disabled beneficiary" needs to have objectively verifiable criteria to ensure it can be administered by Inland Revenue. We do not recommend allowing trusts to qualify for the disabled beneficiary trusts modification solely based on the purposes of the trust. This ensures that non-disabled beneficiaries cannot receive a tax advantage from the modification.

Recommendation

That the submission be declined.

Issue: Receiving payments in relation to an income year

Submission

(Matter raised by advisor)

The "disabled beneficiary" definition should not be limited to people who receive the relevant government support payment during the income year – it should also include people who receive a relevant payment **in relation to** the relevant income year. Payments can be paid in later income years in relation to an earlier year due to administrative delays.

Comment

Officials agree that eligibility should not be based on whether the payment was received during the income year, but that it should be based on whether the payment related to an income year.

Recommendation

That the submission be accepted.

Issue: Grace period

Submission

(Chartered Accountants Australia and New Zealand)

There should be an allowance for a remediation period whereby if a trust fails to meet the criteria, the trustees have a period of time to address the breach, enabling the trust to continue in the regime.

Comment

We do not consider it necessary to introduce a grace period for trusts that briefly fall out of eligibility for the disabled beneficiary trusts modification. We are recommending that the definition of “disabled beneficiary” allows a beneficiary to be eligible if the relevant government support payment is received at any point in time (including after the income year) in relation to the relevant income year. For more information, see [Issue: Receiving payments in relation to an income year](#).

Recommendation

That the submission be declined.

Issue: Applicable rate for disabled beneficiary trusts

Submission

(Chartered Accountants Australia and New Zealand, Deloitte, EY)

Changes should be made to the tax treatment of trustee income of disabled beneficiary trusts:

- a. A 33% flat rate should apply. *(Deloitte, EY)*
 - o Some disabled beneficiaries may be very protective of retaining their privacy and may not want to share the information required for trustees to calculate the beneficiary’s personal tax rate. *(Deloitte)*
 - o While agreeing with what the Bill is trying to achieve, the proposed amendments are too complex. *(EY)*
- b. Trustees should be able to choose to either apply a 33% flat rate (the existing trustee tax rate), or the personal tax rate of the disabled beneficiary. The existing formula is overly complex and will create compliance costs, so some trustees may prefer to apply a flat 33% rate. *(Chartered Accountants Australia and New Zealand)*.

Comment

- a. The Bill proposes that where the modification applies to a trust, the personal tax rate of a disabled beneficiary would apply to trustee income derived by the trust. To simplify the modification and overcome the potential privacy issues raised by submitters, we recommend that a 33% flat rate apply instead.

We also recommend a 33% rate because:

- o If a disabled beneficiary trust were allowed multiple disabled beneficiaries, it would be much simpler to tax trustee income at a flat tax rate rather than personal tax rates (see [Issue: Limit on number of beneficiaries](#)).
- o A 33% rate is the status quo – the current 33% trustee tax rate applies to all trusts, including disabled beneficiary trusts.

A 33% rate would provide consistency with other recommendations:

- [Issue: Trustee income de minimis](#), and
- [Issue: Tax rate applicable to trustee income of estates](#).

Having consistent rates apply where there are variations from the proposed 39% trustee tax rate makes the rules simpler for taxpayers to understand and comply with, as well as for Inland Revenue to implement and administer.

- b. We do not recommend allowing trustees to choose between applying personal tax rates or a 33% flat rate. This would increase complexity, and there are strong reasons why simply applying a 33% flat rate is preferable.

Recommendation

- a. That the submissions be accepted.
- b. That the submission be declined.

Issue: Exemption from associated persons rules

Submission

(M Marshall)

An exemption should be added to Test 8 of the associated persons rules (section YB 9 of the Income Tax Act 2007 (ITA)). The exemption should apply for all trusts where a disabled person is both the settlor and the beneficiary who has benefited (or is eligible to benefit) under the trust.

Comment

It is unclear whether the submission is specifically referring to the disabled beneficiary trust proposals or disabled persons generally. It is unclear why either would require an exemption from the associated persons rules.

Due to the lack of clarity regarding the problem, and the risk of introducing unintended consequences, officials do not recommend introducing an exemption from the associated persons rule in section YB 9 for disabled people.

Recommendation

That the submission be declined.

DECEASED ESTATES

Clauses 33, 62(2) and (4)

Issue: Over-taxation of deceased estates

Submission

(EY, Jim Gordon Tax Ltd, OliverShaw Ltd, Perpetual Guardian, Public Trust, PwC)

A 39% trustee tax rate would result in over-taxation for estates.

- Even under the current 33% rate, estates are over-taxed. (Perpetual Guardian, Public Trust)
- It is estimated that only 50% of New Zealanders have a will. It is likely that a large portion of those who do not have a will would have lower-rate beneficiaries who would be over-taxed at 39%. If estates are included in the proposed changes, many wills may need to be changed to ensure lower-rate beneficiaries are not over-taxed. This will lead to increased compliance costs. (Perpetual Guardian)
- The difficulties and costs in defining, implementing, and enforcing mitigating policies for lower-rate beneficiaries, who are not the target of the 39% trustee tax rate, clearly outweighs any gains of including them. (Perpetual Guardian)
- The increase in the trustee tax rate will result in over-taxation and have a disproportionate impact on deceased estates. (PwC)
- The Bill commentary indicates that officials are concerned about over-taxation of deceased estates when they are under the control of executors – this concern is well based. (Jim Gordon Tax Ltd)
- A full review of the tax rules for estates is needed. Tax rules in this area seem overly complex and would benefit from a review with full input from the lawyers and accountants who need to operate the rules. This requires a full consultation process. (OliverShaw Ltd)
- Although we support the efforts to mitigate over-taxation derived by deceased estates, the changes should go further in this area. *EY*

Comment

Officials acknowledge that estates face particular difficulties in mitigating over-taxation. Unlike *inter vivos* trusts (trusts created between living persons), the beneficiaries of an estate may not be known in the income year the estate earns the income, so the trustees of the estate may not be able to use beneficiary income allocations to mitigate over-taxation.

To help mitigate this, the Bill includes a proposed modification for deceased estates. We are also recommending changes to this modification to extend its application and make it easier

to comply with. For more information, see [Issue: Deceased estates modification does not apply for long enough](#) and [Issue: Tax rate applicable to trustee income of deceased estates](#).

A comprehensive review of the taxation of deceased estates, or the introduction of a new tax regime for estates, is outside the scope of the proposals in the Bill. Any consideration or progress of these issues would be subject to prioritisation on the Government's tax and social policy work programme.

Recommendation

That the submissions be noted.

Issue: Deceased estates modification does not apply for long enough

Submission

(ATAINZ, Baucher Consulting Ltd, Cantin Consulting, C Wilson, Chartered Accountants Australia and New Zealand, CPA Australia, Deloitte, Digital Service Providers Australia New Zealand, EY, G McKinlay, Jim Gordon Tax Ltd, KPMG, OliverShaw Ltd, Perpetual Guardian, Public Trust, PwC, S Lindsay, Te Kāhui Ture o Aotearoa New Zealand Law Society, Trustees Executors Ltd)

The modification does not apply for long enough. Most estates would require longer than 12 months following a person's death to be wound up because of:

- the time required to obtain probate or letters of administration (ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, CPA Australia, Public Trust, Trustees Executors Ltd)
- assets held overseas (ATAINZ, Baucher Consulting Ltd, S Lindsay)
- overseas beneficiaries (C Wilson)
- issues relating to the deceased's assets (Chartered Accountants Australia and New Zealand, CPA Australia, Trustees Executors Ltd)
- issues relating to the deceased's debts (Chartered Accountants Australia and New Zealand)
- disputes regarding the estate (ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand)
- the deceased person dying intestate (CPA Australia)
- unheard of descendants appearing after a person's death (S Lindsay)
- delays issuing IRD numbers. *(Public Trust)*

Submitters suggested various time periods the modification could apply for, which are set out in the table below.

Table 4: Time periods suggested by submitters

Time period	Detail
One year	<ul style="list-style-type: none"> ▪ At least a full income year after the date of death. (<i>KPMG, Te Kāhui Ture o Aotearoa New Zealand Law Society</i>)
Two years	<ul style="list-style-type: none"> ▪ At least 24 months from the date of death. (<i>C Wilson, EY, Jim Gordon Tax Ltd</i>) ▪ Two full income years after the year of death. (<i>Digital Service Providers Australia New Zealand, Te Kāhui Ture o Aotearoa New Zealand Law Society</i>)
Three years	<ul style="list-style-type: none"> ▪ 36 months from the date of death. (<i>C Wilson, PwC</i>) ▪ Three full income years after the date of death. (<i>CPA Australia, Deloitte, Te Kāhui Ture o Aotearoa New Zealand Law Society</i>) ▪ Three to five years, to reflect the actual period that an estate is in the executorship stage. (<i>Public Trust, Trustees Executors Ltd</i>)
Four years	<ul style="list-style-type: none"> ▪ 48 months from the date of death. (<i>ATAINZ, Baucher Consulting Ltd, G McKinlay</i>) ▪ Four full income years after the date of death. (<i>Cantin Consulting, S Lindsay</i>) ▪ Three to five years, to reflect the actual period that an estate is in the executorship stage. (<i>Public Trust, Trustees Executors Ltd</i>)
Five years	<ul style="list-style-type: none"> ▪ At least five years. (<i>Chartered Accountants Australia and New Zealand</i>) ▪ Three to five years, to reflect the actual period that an estate is in the executorship stage. (<i>Public Trust, Trustees Executors Ltd</i>)
Based on income years rather than months	<ul style="list-style-type: none"> ▪ Applying the modification on an income year basis, rather than using a fixed 12-month approach, avoids the complexity of the currently proposed formula for determining the applicable tax rate. (<i>CPA Australia</i>)

Time period	Detail
	<ul style="list-style-type: none"> ▪ This would avoid the complexities associated with having to make calculations for part-year periods. (<i>Te Kāhui Ture o Aotearoa New Zealand Law Society</i>)
Until date of assent	<ul style="list-style-type: none"> ▪ The period starting from the date of death and ending on the date of assent. (<i>PwC</i>)
Time limiting the application period of the modification	<ul style="list-style-type: none"> ▪ The submitter accepts the concern that estate administration can be drawn out and a time limit should be set. (<i>Jim Gordon Tax Ltd</i>) ▪ A time limit should not apply for having to wind up deceased estates for tax reasons. The modification should apply for the duration of the deceased estate's administration. This would not incentivise trustees to retain income, as the trustees have a fiduciary obligation to the beneficiaries to efficiently administer the estate, and wind it up in a timely fashion. They would likely be in breach of their obligations if what the Bill commentary is suggesting occurred (artificially delayed distributions). It seems unlikely that beneficiaries will seek to delay or defer the wind up of a deceased estate because this would delay or defer their access to any assets. (<i>KPMG</i>) ▪ Estates in the administration phase typically have a limited life because they exist so that beneficiaries can be identified, assets gathered, liabilities paid, and distributions made to those beneficiaries. There is protection in the Trusts Act 2019 to ensure trusts are completed promptly in the form of trustees' duties, one of which requires trustees to act honestly and in good faith. (<i>Perpetual Guardian</i>)

Comment

We agree that the currently proposed application period for the modification is insufficient because many estates would require more than 12 months to be wound up following a person's death. We understand from consultation on this issue that:

- 85–90% of estates are not wound up within 12 months of a person's death
- the average estate requires at least 18 months to be wound up
- 85% of estates are likely to be wound up within three income years after the income year of a person's death
- particularly complex estates could take five years to be wound up.

Point of difference

We recommend the modification apply for the income year in which a person has died plus the following three full income years to ensure it applies for a long enough period for most estates. While we acknowledge the fiduciary duties of trustees referred to by one of the submitters regarding administering an estate, we consider an appropriate balance nevertheless needs to be struck between ensuring the modification applies for long enough for most estates, while still ensuring it does not apply for so long that there are incentives to prolong the existence of an estate.

Any estates that continue to derive trustee income beyond the modification application period would still have access to the de minimis recommended by officials, if eligible (see [Issue: Trustee income de minimis](#)). Where the de minimis applies, trustee income would be taxed at a 33% flat rate. The de minimis would help to mitigate over-taxation for estates that continue to derive income beyond the modification application period and have up to \$10,000 trustee income in a year. Inland Revenue data indicates that 84% of estates have trustee income of \$10,000 or less.

Recommendation

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

Issue: Extended period for deceased estates subject to court challenge

Submission

(Cantin Consulting)

The modification should apply for a further extended period for estates subject to court challenge. A challenge should not generally extend the period the modification applies for when it is not justified. Court challenges are subject to court control to progress, and court/other costs would also need to be incurred.

Comment

We expect most estates would be wound up within the recommended length of time for the modification (year of death plus three full income years), for more information see [Issue: Deceased estates modification does not apply for long enough](#).

Introducing a special rule for deceased estates subject to court challenge would add additional complexity to the trust tax rules. To the extent an estate continues beyond this period, it would be eligible for the recommended trustee income de minimis if it has \$10,000 trustee income or less (see [Issue: Trustee income de minimis](#)).

Recommendation

That the submission be declined.

Issue: Tax rate applicable to trustee income of deceased estate

Submission

(Deloitte, Digital Service Providers Australia New Zealand, EY, J Guthrie, Perpetual Guardian, Public Trust, S Lindsay, Trustees Executors Ltd)

The modification should provide the following tax treatment for trustee income of a deceased estate:

- A 28% flat rate. *(Public Trust, Trustees Executors Ltd)*
 - This would align with the PIE tax rate, which is a final tax. In most cases this would be higher than the deceased's marginal tax rate. *(Public Trust)*
- A 33% flat rate. *(Deloitte, EY, S Lindsay, Trustees Executors Ltd)*
 - Instead of introducing the proposed amendments, a schedule could be added into the ITA that would list different types of trusts (including deceased estates) and the tax rates that apply to trustee income for these trusts. The schedule would list that the rate for deceased estates is 33%. This would be simpler and consistent with existing treatment. *(Deloitte)*
- A flat rate that is below 39%. The applicable rate could be determined by analysing the average income of estates and individuals in the year of death, and then basing the rate on where the average or median income sits in relation to the personal tax scale. *(Digital Service Providers Australia New Zealand)*
- The deceased's personal tax rate. *(Perpetual Guardian)*
- A concessional tax rate should apply for the first part-year if a person dies part-way through a tax year. *(Deloitte)*
- Estates should be exempt from the 39% trustee tax rate. Trusts and estates are very different, they should not be subject to the same tax rules. *(J Guthrie)*

Submissions on the issues associated with applying personal tax rates, which is what is proposed in the Bill as introduced, are set out in [Issue: Complexity of deceased estates modification](#).

Comment

We agree that compared with applying the deceased's personal tax rate, as is currently proposed, a flat tax rate is considerably simpler. A flat rate is easier for taxpayers to comply

with, as well as easier for Inland Revenue to administer and implement. Reduced compliance costs and complexity is particularly relevant given many estates have relatively small amounts of income. Inland Revenue data indicates that 84% of deceased estates have \$10,000 of trustee income or less.

A 33% flat rate would provide consistency with the recommended trustee income de minimis (see [Issue: Trustee income de minimis](#)) and the recommended changes to the disabled beneficiary trusts modification (see [Issue: Applicable rate for disabled beneficiary trusts](#)). It is also the status quo for deceased estates. We therefore recommend that the deceased estates modification should apply a 33% rate instead of a 28% rate to trustee income.

While arguably a lower rate might be more appropriate, particularly where the deceased person had a lower personal tax rate before death, the deceased's personal tax rate becomes less relevant the longer an estate continues. Given the recommendation to extend the modification to apply for the income year of death plus the following three full income years it is less appropriate to base the applicable rate on the deceased's personal tax rate. (see [Issue: Deceased estates modification does not apply for long enough](#))

The personal tax rates of the beneficiaries of an estate may be more relevant to determining what an appropriate trustee tax rate would be for this modification, particularly if it were to apply for a longer period. However, for some estates, it may not yet be known who the beneficiaries are when trustee income is derived. Even when the beneficiaries are known, trustee income has not been distributed to a particular beneficiary in the year it is derived. As it is not yet known which beneficiary will ultimately receive the trustee income, it is very difficult to determine what tax rate would be the most appropriate to apply in the year trustee income is derived.

Point of difference

The deceased estates modification should be amended to provide that trustee income of an eligible deceased estate is taxed at a flat rate of 33%. This ensures consistency with other modifications and provides simplicity for taxpayers.

Recommendation

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

Issue: Deceased estates modification should apply automatically

Submission

(CPA Australia)

The modification should apply automatically, without the need for trustees of a deceased estate to opt-in.

Comment

If our recommendation that a flat tax rate apply is accepted (see [Issue: Tax rate applicable to trustee income of deceased estates](#)), then we agree that the modification should apply automatically to all estates. It would be sensible to apply the modification by default because it would be preserving the status quo for deceased estates (a 33% trustee tax rate). Making the modification automatic removes the risk that an estate unintentionally fails to elect into the rules.

Applying the modification automatically is also administratively simpler for Inland Revenue.

Point of difference

If our recommendation to apply a flat tax rate instead of personal tax rates is not accepted, then we do not recommend that the estates modification applies automatically. Applying the deceased's personal tax rate, particularly in the income year of death, is significantly more complicated than applying a flat rate. For estates with small amounts of income, the compliance costs of having to calculate the deceased's personal tax rate could outweigh the benefits of being able to access the lower tax rate. For more information, see [Issue: Complexity of deceased estates modification](#).

Recommendation

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

Issue: Complexity of deceased estates modification

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, CPA Australia, Deloitte, Digital Service Providers Australia New Zealand, KPMG, Perpetual Guardian, Public Trust, Trustees Executors Ltd, Te Kāhui Ture o Aotearoa New Zealand Law Society)

The deceased estates modification in the Bill involves applying the deceased's personal tax rate to trustee income derived by estates. This approach is complex:

- What is currently proposed will increase compliance costs and complexity. (Deloitte, Digital Service Providers Australia New Zealand, KPMG, Perpetual Guardian, Public Trust, Trustees Executors Ltd)
- The proposal will require multiple part-year returns and calculations because different tax rates could apply for different periods. (Digital Service Providers Australia New

Zealand, KPMG, *Te Kāhui Ture o Aotearoa* New Zealand Law Society, Perpetual Guardian, Public Trust, Trustees Executors Ltd)

- It is likely a personal date of death return would be necessary to establish the deceased's personal tax rate. (Public Trust)
- Clarity is needed regarding how to calculate the tax rates for an estate should a change in tax rate occur during a tax year. (Trustees Executors Ltd)
- It is unclear how Inland Revenue will know whether tax has been calculated correctly if every estate has its own tax rate. (Digital Service Providers Australia New Zealand)
- This is a significant level of complexity for the small amounts of income that most estates have. If professionals are needed to prepare tax returns for estates, the increased costs will likely outweigh the tax benefits. If professionals are not used, there is a high chance of errors due to the high complexity. (Digital Service Providers Australia New Zealand)
- For estates, the difficulties and costs in defining, implementing and enforcing mitigation policies for lower-rate beneficiaries, who are clearly not the target of the proposed increase in the trustee tax rate, clearly outweigh the gains of including them. (Perpetual Guardian)
- The submitter supports the proposed formula for calculating the applicable rate under the modification. However, they suggest there might be a simpler method administratively, such as a new tax return form that combines pre-death and post-death income and calculates tax liability by applying the personal tax scale. (*Chartered Accountants Australia and New Zealand*)
- In Australia, a concessional rate will apply for the first three income years of the deceased estate. Using the income year instead of a fixed 12-month approach, the application of the complex formula method proposed in the Bill is avoided. (CPA Australia)

Comment

We agree that the current proposals are complex and should be simplified. We have recommended that a flat tax rate applies instead of personal tax rates, and that the modification applies for the year of death plus three full income years. This would remove the need to perform part-year calculations and apply multiple tax rates in the same income year. This would preserve the status quo for most deceased estates (see [Issue: Tax rate applicable to trustee income of deceased estate](#) and [Issue: Deceased estates modification does not apply for long enough](#)).

Recommendation

That the submissions be noted.

Issue: Deemed disposition/reacquisition of assets at death

Submission

(Jim Gordon Tax Ltd)

Death often causes a deemed disposition and reacquisition of the deceased's assets. The deemed disposition and reacquisition should instead occur at the end of the executor's administration of the estate (when either trustees are appointed to manage the ongoing estate, or the estate is distributed). This would allow the estate, when it is under the control of the executors, to be taxed as if the deceased was living.

Comment

Amending rules relating to deemed disposition and reacquisition of the deceased's assets, so that the deemed disposition and reacquisition occurs at the end of the executor's administration of the estate would be a significant change for the taxation of estates that would warrant public consultation before progressing. Further work on this matter would require further consideration and be subject to the prioritisation on the Government's tax and social policy work programme.

Recommendation

That the submission be declined.

SPECIFIC TYPES OF TRUSTS

Issue: Trusts within corporate groups

Submission

(Corporate Taxpayers Group, EY)

A number of corporate groups have trusts within their group structures, including “hardship” trusts, employee share schemes, or other trusts used for commercial purposes. They are not being used to shelter income and it is important that a tax system recognises that there are other reasons for using trusts that are not connected to a tax advantage. The 39% trustee tax rate will result in over-taxation for these types of trusts. *(Corporate Taxpayers Group, EY)*

If the 39% trustee tax rate proceeds, trusts that sit within corporate groups should be excluded. This exclusion could be based on the nature of the trust and why it was established. Eligibility for this exclusion could require approval from the Commissioner of Inland Revenue and the corporate group meeting certain criteria, such as having a listed parent.

- Alternatively, the ITA could define which trusts the 39% tax rate should apply to, which are by definition trusts in respect of which one or more settlors has natural love and affection for the natural person beneficiaries. For example, refer to section EX 46(6)(b)(iii) of the ITA.
- Exemptions from the trust disclosure rules in section 59BA(3) of the Tax Administration Act 1994 are a precedent. *(Corporate Taxpayers Group)*

Comment

Hardship and education trusts

Trusts are used in some corporate groups to provide benefits to employees and/or family members of employees. Income is accumulated in the trust to support the beneficiaries of the trust, including supporting employees in hardship and providing grants for employees’ education. Although these trusts can have benevolent or charitable purposes, they cannot register as a charity under the Charities Act 2005 due to only providing benefits to a limited group of beneficiaries (eg, employees and their families).

Although these trusts may have benevolent or charitable purposes, there are a wide range of other trusts that are not part of corporate groups but have similar charitable purposes. Introducing special rules for certain benevolent or charitable trusts within corporate groups without also considering other trusts with similar purposes would undermine the fairness of the tax system. We do not recommend introducing special rules for trusts with benevolent or charitable purposes. (See [Issue: Trusts with benevolent purposes](#).)

Designing special rules for such trusts while ensuring that the modification cannot be abused could be challenging. Hardship/education funds would be difficult to define for the purposes

of a modification and could provide an opportunity for 39% taxpayers to received distributions of tax-paid trustee income that has been taxed at a lower rate.

The existing charitable tax exemption is provided for charities on the proviso that certain requirements are met, including public accountability requirements to ensure that funds are used appropriately and a requirement that no individual receives a private pecuniary benefit. Similar requirements may be necessary for any special rules for hardship/education funds in corporate groups to help ensure that funds are used appropriately. It is unclear if these trusts would meet such requirements, given that the benefits of hardship funds and education trusts are provided to employees and their family members.

Additionally, the recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Employee share schemes

Officials also note that the trustees of employee share schemes are treated as nominees in all aspects, so there is not a trust for tax purposes. Such trusts should therefore not be affected by the proposed 39% trustee rate.

Recommendation

That the submissions be declined.

Issue: Trusts with benevolent purposes

Submission

(Chartered Accountants Australia and New Zealand)

Taxing trusts with benevolent purposes, including education trusts, at 39% is an overreach because the beneficiaries are generally not subject to the 39% personal tax rate. This will result in a reduction in philanthropy.

Comment

We do not recommend introducing special rules for trusts with benevolent purposes. The tax system already provides an income tax exemption for charities registered under the Charities Act 2005. Introducing a partial concession (a lower trustee tax rate) for trusts that choose not to register as, or don't qualify as, registered charities would result in having a two-tier tax regime for entities with charitable purposes. Introducing special rules for trusts with purposes similar to charitable purposes without undertaking further policy development and consultation could result in unintended consequences.

Additionally, the recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submission be declined.

Issue: Trading trusts

Submission

(Chartered Accountants Australia and New Zealand)

Where a trust has an active trading activity, similar to a company, it is unlikely to be a tax avoidance vehicle for investments. These structures are the same as companies and the income should be subject to the company tax rate. However, given that company tax is a withholding tax only, and may be subject to a top-up on distribution to shareholders, it may be more appropriate to tax trusts with an active business activity at the current trust rate of 33% rather than 28%.

It is unrealistic that trading trusts could avoid the 39% trustee tax rate by making the beneficiaries employees of the trust and paying all the income to them as salaries or wages, which would be taxed at their personal rates. Trading trusts often hold significant assets and will retain some income in the trust to maintain the assets and expand the business. Furthermore, beneficiaries providing personal services to a trading trust generally receive remuneration commensurate with the services provided.

Comment

Generally, tax rates are based on the entity type or structure, rather than the use or purpose of the entity. Different entities and structures have different advantages and disadvantages. Officials consider that this is a situation where a taxpayer is not necessarily required to operate their business through a trust. We note that a trust-owned company is a common structure where the assets are owned by the trust but leased to the trading company for use.

Introducing rules based on whether a trust has an active trading activity would be a significant change to the tax system. We do not recommend making such a change at this stage of the Bill.

The recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional

specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submission be declined.

Issue: Securitisation trusts

Submission

(Australian Securitisation Forum, Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Financial Services Council, Financial Services Federation, Mayne Wetherell, New Zealand Banking Association)

A securitisation is a transaction in which receivables (such as loans to consumers or businesses) originated by a sponsor (typically a finance company) are transferred to a special purpose vehicle (SPV) trust. The SPV trust issues debt securities to funders/investors and the payments on those securities are supported by the cash-flows from the receivables that have been securitised. Any residual profit in the SPV trust after financing costs, service charges and other expenses is paid to the sponsor, typically in the form of a trust distribution.

(Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Federation, Mayne Wetherell)

New Zealand's banking sector often participates in securitisation transactions, which are designed to ring-fence a book of receivables inside an SPV trust. The use of the SPV structure reduces credit risk and allows the SPVs to reduce the cost of funding these books, ensuring efficient, competitive funding is available, to the ultimate benefit of New Zealand businesses and consumers. *(Financial Services Council, New Zealand Banking Association)*

SPV trusts are intended, by design, to be tax-neutral:

- For funders/investors to be prepared to provide debt financing to SPV trusts, it is critical that the trust has no anticipated liabilities, including tax liabilities. A confirmation of tax neutrality is always a condition precedent to draw down of funding by the SPV trust, illustrating the commercial importance of the tax treatment. *(Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Federation, Mayne Wetherell)*
- Section HR 9 of the ITA allows certain debt-funding SPVs to be treated as a look-through vehicle for tax purposes. However, not all SPV trusts qualify for these rules. Such trusts are taxed under ordinary trust rules and achieve tax neutrality by distributing all taxable profit of the trust as beneficiary income. Because the beneficiary of an SPV trust is almost always a company, the taxable profit is taxed at 28%. However, in instances where not all taxable income can be distributed it will be subject to the trustee tax rate. *(Australian Securitisation Forum, Corporate Taxpayers Group,*

Financial Services Council, Financial Services Federation, Mayne Wetherell, New Zealand Banking Association)

It is relatively common for securitisation structures not to use the debt funding SPV regime because:

- the regime is not available to trusts with multiple originators where they are not all in the same wholly-owned group
- if receivables that have been financed via a warehouse trust that has not been subject to the regime are transferred to a new trust, that new trust may not qualify for the regime
- if not all an originator's trusts qualify for the regime, it is easier administratively to have a consistent approach
- some arrangements involve origination within the trust itself, and the regime cannot be applied in these cases (receivables must be originated by a corporate to qualify). *(Australian Securitisation Forum)*

The proposed 39% trustee tax rate will result in over-taxation for securitisation trusts:

- The proposal to increase the trustee tax rate to 39% will exacerbate the current risk of over-taxation under the 33% trustee tax rate where tax neutrality of the SPV fails. *(Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Council, Financial Services Federation, Mayne Wetherell, New Zealand Banking Association)*
- Corporate securitisations may involve a unit trust, which will be taxed at the company tax rate. Where it is not a unit trust it is not sensible to tax the vehicle at 39% as it would result in overreach. *(Chartered Accountants Australia and New Zealand)*
- The risk of having any SPV profits taxed at 39% rather than 28% reduces the attractiveness of SPVs and would act as a disincentive to the use of securitisation structures, to the detriment of efficient capital markets. *(Financial Services Council, New Zealand Banking Association)*
- A 39% tax rate for a securitisation trust would have a flow-on effect to significantly increase the cost of funds to non-bank lenders and increase the cost of borrowing to New Zealand business and consumers who rely on the funding they obtain from non-bank lenders. *(Financial Services Federation)*
- Securitisation trusts that have a single corporate beneficiary (provided the beneficiary is not a look-through company) should be taxed at 28% instead of the 39% trustee tax rate to ensure that trustee income of these trusts is taxed at a rate no higher than the tax rate of the corporate beneficiary, in the event of a tax neutrality failure for the trust. *(Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Council, Financial Services Federation, Mayne Wetherell, New Zealand Banking Association)*

It is usual for trusts that do not use the DF SPV regime to make beneficiary income allocations to a company within the sponsor/originator group. These trusts may be affected

by the proposed corporate beneficiary rule (see [Issue: Corporate beneficiary rule and securitisation trusts](#)). (*Australian Securitisation Forum*)

Comment

Submitters have noted that confirmation of tax neutrality is always a condition precedent to draw down of funding by an SPV trust. Given that tax neutrality is an essential feature of these structures, we expect that securitisation trusts that are not in the existing look-through tax regime in section HR 9 are already explicitly structured to avoid deriving any trustee income at all. Therefore, how often such trusts derive trustee income is unclear.

Furthermore, whether a securitisation trust derives trustee income taxed at 33% or 39%, tax neutrality will have failed. We expect that in most situations any trustee income will be able to be distributed to a corporate beneficiary.

Given there is an existing tax regime for securitisation trusts, we do not recommend introducing special rules for securitisation trusts outside of this existing regime. There is a risk that making changes to the existing regime in this Bill would be complex and/or have unintended consequences. Further work may be undertaken for a later Bill on whether the eligibility for the securitisation trust look-through regime should be expanded, however this would be subject to the prioritisation on the Government's tax and social policy work programme.

We are recommending that securitisation trusts be excluded from the proposed corporate beneficiary rule. For more information, see [Issue: Corporate beneficiary rule and securitisation trusts](#). This will ensure that if tax neutrality fails for a securitisation trust, they will be able to distribute any net income to a corporate beneficiary to be taxed at 28%.

Recommendation

That the submissions be declined.

Issue: Securitisation trust remedial amendments

Submission

(*Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Federation, Mayne Wetherell*)

Further work is required on the following points to improve the taxation of securitisation trusts. These issues were previously raised by the Australian Securitisation Forum in its submission dated 29 October 2021 on the Taxation (Annual Rates for 2021–22, GST, and Remedial Matters) Bill.

- A person should not be associated with a securitisation trust (or treated as holding related-party debt) simply because the person (or an associate of the person):

- is a settlor of the securitisation trust or has the power to appoint or remove the trustee, or
- is a beneficiary, settlor or person with a power of appointment or removal of a security trust.
- It should be possible to elect to use the debt funding SPV regime where receivables are transferred to a debt funding SPV by an entity (other than the originator) that would be eligible to elect, but has not elected, into the regime.
- Notes issued by a securitisation trust should be excluded from section GC 18 of the ITA (Loan features disregarded by rule for transfer pricing arrangements).
- Securitisation trusts should be excluded from the thin capitalisation rules.

Comment

These issues are outside the scope of the Bill. Progressing these changes at this stage of the Bill would risk introducing unintended consequences. We recommend considering these issues for a later Bill, subject to prioritisation on the Government's tax and social policy work programme.

Recommendation

That the submissions be declined.

Issue: Superannuation schemes

Submission

(ATAINZ, Baucher Consulting Ltd, EY, Financial Services Council, i-Select Ltd)

Submitters raised general concerns about the ability of trusts that are superannuation schemes to mitigate over-taxation.

- a. Trustees of a superannuation trust have limited ability to mitigate over-taxation.
 - Superannuation trusts are required to treat all income as trustee income, despite beneficiaries of the trust being subject to lower personal rates. *(EY)*
 - The trust deed for some superannuation schemes may preclude distributions of beneficiary income being made to some beneficiaries before a defined age. Any superannuation scheme on a register administered by the Companies Office should be excluded from the proposed 39% trustee tax rate. *(ATAINZ, Baucher Consulting Ltd)*

- b. Distributing income as beneficiary income may not mitigate over-taxation for trusts used as a superannuation savings type vehicle by persons who wish to manage their investments themselves rather than using third-party savings vehicles. *(EY)*

Submitters also raised concerns about superannuation schemes registered under the Financial Markets Conduct Act 2013 (FMC Act). “Widely-held superannuation funds” are defined in the ITA as a retirement scheme within the meaning of the FMC Act that has 20 or more members. These schemes are taxed at a flat rate of 28%. Schemes that are not multi-rate PIEs and do not qualify as widely-held would be subject to the 39% trustee tax rate.

- c. Restricted retirement schemes within the meaning of the FMC Act should be excluded from the 39% trustee tax rate and taxed at 28%. The restricted workplace savings scheme sector includes numerous schemes which are not multi-rate PIEs and are therefore taxed as widely-held superannuation funds. These schemes will fall out of the “widely-held superannuation fund” definition if they have less than 20 members, which is expected to be the case for an increasing number over time. In this case, they would be subject to the proposed 39% rate, even though no current pensioners within the sector will have had a 39% employer superannuation contribution tax (ESCT) rate applied to them. Winding up the impacted schemes is not generally practicable. *(Financial Services Council)*
- d. Single-member retirement schemes registered under schedule 3 of the FMC Act should be taxed at 28%. Schedule 3 schemes have always been at a disadvantage to PIEs and widely-held superannuation schemes because they are taxed at the trustee rate rather than at 28%. This will be compounded by the proposed 39% rate because all income of a registered superannuation scheme is treated as trustee income – it cannot be allocated as beneficiary income. Schedule 3 schemes are long-term retirement savings vehicles and are usually not fully accessible until a member has reached the retirement age. These schemes are not used as tax avoidance devices and should not be caught by the proposals. *(i-Select Ltd)*

Comment

- a. We acknowledge that superannuation schemes have limited ability to mitigate over-taxation of trust income. However, generally, tax concessions for retirement savings have only been extended to entities that are widely-held to ensure that such funds operate on arm's-length terms and do not invest in assets owned by the investors or associated persons. We do not recommend introducing special rules for superannuation funds that are not widely-held.
- b. Officials do not recommend introducing special rules for private family trusts that are operated as retirement savings vehicles. Trusts are required to satisfy certain criteria to be considered a superannuation scheme under the FMC Act, including that the trust’s purpose must be to provide retirement benefits directly or indirectly to individuals. Private family trusts are not subject to the same requirements. Providing tax

concessions for private trusts operated as retirement savings vehicles could create tax planning opportunities and could have unintended consequences.

- c. We agree that restricted workplace savings schemes that fall out of the “widely-held superannuation fund” definition due to declining membership should not be subject to the proposed 39% trustee tax rate. The 28% tax rate for widely-held superannuation funds is intended to ensure that such funds have a similar tax treatment to PIEs. It is not intended that restricted workplace savings schemes (funds that cannot have new members) should be subject to an increased tax rate simply due to declining membership. Officials recommend introducing a provision to tax “legacy superannuation funds” (superannuation funds that were once “widely-held”) at 28%, to ensure such funds are not worse off due to the 39% trustee tax rate.
- d. We do not recommend introducing special rules for single-person superannuation schemes. Although these trusts cannot mitigate over-taxation as beneficiary income, many of these funds invest in PIEs; PIE income is capped at a 28% tax rate. Furthermore, settlors generally retain a large degree of control over these trusts and do not need to invest on arm’s-length terms. Providing tax concessions for these types of entities would be inconsistent with the widely-held requirements for retirement savings vehicles like PIEs. We expect that approximately 33% of the single-person Schedule 3 superannuation funds would be eligible for the recommended \$10,000 trustee income de minimis, and therefore would not be affected by the proposals.

The recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for superannuation funds with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. For more information, see [Issue: Trustee income de minimis](#).

Point of difference

We recommend that, from 1 April 2024, a flat tax rate of 28% should apply to a trust that at one point qualified as a “widely-held superannuation fund” and is either:

- a trust listed on the Financial Markets Conduct (Designation of Restricted Schemes) Order 2016 as a Restricted Workplace Savings Scheme, or
- a trust that is a scheme referred to in section 59A(1)(b) of the National Provident Fund Restructuring Act 1990.

This ensures that the proposed “legacy superannuation fund” 28% tax rate only applies to superannuation funds with restricted membership. The reference to the National Provident Fund Restructuring Act is necessary because those schemes were separately deemed to be restricted superannuation schemes and are not listed in the above Order.

Recommendation

- a. That the submissions be declined.
- b. That the submission be noted.

- c. That the submission be accepted, subject to officials' comments.
- d. That the submission be declined.

Issue: Testamentary trusts

(J Guthrie, OliverShaw Ltd, Perpetual Guardian, Public Trust, S Lindsay, Trustees Executors Ltd)

Submission

Testamentary trusts should be exempt from the proposed 39% trustee rate.

Table 5: Submissions on exempting testamentary trusts from the proposals

Submission	Detail
Testamentary trusts not used to avoid tax	<ul style="list-style-type: none"> ▪ Testamentary trusts are not established to avoid or minimise tax obligations. People do not die to minimise tax. <i>(S Lindsay, Trustees Executors Ltd)</i>
Testamentary trusts are used to protect children and vulnerable people	<ul style="list-style-type: none"> ▪ The purpose of many testamentary trusts is to protect vulnerable people. <i>(Public Trust, Trustees Executors Ltd)</i> ▪ Testamentary trusts are used to support children (including orphans) who have not reached the age at which the will-maker deems they can manage their own affairs. <i>(J Guthrie, Trustees Executors Ltd)</i>

Submission	Detail
39% rate would result in over-taxation	<ul style="list-style-type: none"> <li data-bbox="580 241 1366 488">▪ Trustees of trusts settled for children (including orphans) and vulnerable beneficiaries, distribute income as it is needed to ensure funds are available for their care. The beneficiaries are typically not on high incomes, so applying a 39% rate would have fairness implications. <i>(Trustees Executors Ltd)</i> <li data-bbox="580 521 1366 723">▪ Beneficiary income allocations will not be possible where child beneficiaries need to reach a certain age before income can be distributed, which leads to over-taxation. Child beneficiaries will be unfairly disadvantaged. <i>(J Guthrie)</i> <li data-bbox="580 757 1366 913">▪ In many cases, the deceased is on a personal rate lower than the current 33% trustee rate. This over-taxation will be exacerbated by a 39% trustee rate and will dilute the assets being held on trust. <i>(Public Trust)</i>
Issues for testamentary trusts because of the deceased estates modification	<ul style="list-style-type: none"> <li data-bbox="580 976 1366 1088">▪ The proposed special rules for estates will increase complexity for testamentary trust administration. <i>(Public Trust)</i> <li data-bbox="580 1122 1366 1368">▪ For testamentary trusts, the difficulties and costs in defining, implementing and enforcing mitigation policies for lower-rate beneficiaries, who are clearly not the target of the proposed increase in the trust tax rate, clearly outweighs any gains of including them. <i>(Perpetual Guardian)</i>
A tax rate of 28% should be applied to testamentary trusts	<ul style="list-style-type: none"> <li data-bbox="580 1435 1366 1637">▪ The terms of a will may not allow for beneficiary income allocations. In this case, the increased trustee rate would likely result in over-taxation. This will be especially unfortunate for vulnerable beneficiaries, such as orphans. <i>(Public Trust)</i> <li data-bbox="580 1671 1366 1783">▪ Testamentary trusts are established via a will, so are not being used by high-income earners to avoid the 39% tax rate. <i>(Perpetual Guardian)</i> <li data-bbox="580 1816 1366 1928">▪ A new, lower-rate tax category of 28% should be created for estates and testamentary trusts. <i>(Public Trust, Trustees Executors Ltd)</i>

Submission	Detail
A tax rate of 33% should be applied to testamentary trusts	<ul style="list-style-type: none"> <li data-bbox="580 241 1334 358">▪ The tax rate for testamentary trusts should be 33% for the year of death and the following four income years. <i>(S Lindsay)</i>

Comment

Risk of over-taxation

We do not recommend introducing special rules for testamentary trusts. The trust taxation rules do not generally distinguish between *inter vivos* trusts (trusts settled while the settlor is still alive) and testamentary trusts (trusts settled on the death of the settlor, often via a will). Officials consider that deceased estates warrant special rules because it is reasonably likely that the administrators of an estate may not know who the beneficiaries are. This poses a risk to the ability to use beneficiary income allocations to mitigate over-taxation.

A testamentary trust, similar to an *inter vivos* trust, is not expected to face the same limitation. For the most part, we expect that trustees will be able to use beneficiary income allocations to mitigate over-taxation, regardless of whether a trust is an *inter vivos* trust or a testamentary trust.

Testamentary trusts and minors or vulnerable people

Submitters raised concerns about testamentary trusts settled for minors and vulnerable people, and how a 39% rate would be unfair given the lower personal tax rates many minors and vulnerable people would have. While ordinarily the minor beneficiary rule would apply to tax beneficiary income allocations to minors at the trustee tax rate, testamentary trusts are excluded from that rule provided that the minor was alive within 12 months of the deceased's date of death.

For vulnerable people who are not minors, beneficiary income allocations would also be an option for mitigating over-taxation, provided the will/trust deed does not legally prevent beneficiary income allocations being made. A testamentary trust would also be able to qualify for the disabled beneficiary trust modification, provided it satisfies the eligibility criteria.

Furthermore, the recommended \$10,000 trustee income de minimis would help mitigate the risk of over-taxation for many testamentary trusts with small amounts of income. Such trusts would not be affected by the proposed increase in the trustee tax rate. This helps reduce the need for additional specific modifications and minimises additional complexity for the tax system. For more information, see [Issue: Trustee income de minimis](#).

Recommendation

That the submissions be declined.

Issue: Widely-held trusts

Submission

(ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, KPMG, OliverShaw Ltd, PwC)

Trusts with many beneficiaries (widely-held trusts), including those with a community purpose (community trusts), should be excluded from the proposed 39% trustee rate due to the risk of over-taxation.

- It is not possible for a 39% taxpayer to use these trusts as an investment vehicle because the trust property is pre-determined, and the beneficiaries are identified by class. *(Chartered Accountants Australia and New Zealand)*
- These trusts do not pose integrity concerns that justify a 39% trustee tax rate. *(KPMG)*
- Existing or proposed measures will not help to mitigate over-taxation. Given the large beneficiary class of widely-held trusts it is not always appropriate or possible to make beneficiary income allocations. *(Chartered Accountants Australia and New Zealand, KPMG, PwC)*
- Income will often be too significant for a de minimis to be effective and there may also be legislative requirements for the use of widely-held trusts. *(Chartered Accountants Australia and New Zealand)*

Submitters have suggested that certain widely-held trusts should be excluded from the 39% trustee tax rate:

- a. Widely-held trusts generally. *(ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, KPMG)*
- b. Energy consumer trusts (ECTs). *(ATAINZ, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, KPMG, OliverShaw Ltd)*
- c. Community trusts. *(ATAINZ, Baucher Consulting Ltd, OliverShaw Ltd)*
- d. Māori post-settlement governance entities (PSGEs) established pursuant to Treaty settlement legislation to receive, administer, manage and protect settlement assets on behalf of their members. *(KPMG)*

Comment

- a. Widely-held trusts generally: We do not recommend introducing special rules for widely-held trusts generally. It would be relatively easy for trustees of a discretionary trust to add additional beneficiaries (even non-associated ones if the eligibility was based on the number of associated persons). This could create tax planning opportunities.

- b. Energy consumer trusts: Most electricity distribution companies in New Zealand are owned by trusts or local councils. There are 20 energy consumer trusts (ECTs) that are subject to tax. The beneficiaries of these trusts are the persons whose premises are connected to the energy company's distribution network.

We acknowledge that it may not always be possible for ECTs to distribute all taxable income as beneficiary income. On balance, we recommend taxing energy consumer trusts at 33% instead of the 39% trustee tax rate. Although we expect these trusts would be able to distribute income as beneficiary income in most cases, some of these trusts may face administrative issues or have restrictions in their trust deed that prevent this. We have no integrity concerns with providing an exclusion for these trusts because they are a well-defined group.

- c. Community trusts: A community trust is a trust established under the Trustee Banks Restructuring Act 1988 to acquire the shares in the capital of a trustee bank's successor company. These trusts are exempt from income tax under section CW 52 of the ITA and would not be affected by the proposed 39% trustee tax rate.
- d. Māori post-settlement governance entities: We acknowledge that PSGEs may be at risk of over-taxation due to generally aiming to retain and grow funds for the benefit of their beneficiaries and future generations. However, we consider that changes to the existing Māori authority regime is a more appropriate avenue than introducing specific tax rules for PSGEs at this stage.

Changes to the Māori authority regime would require further consideration and public consultation before being proceeded with, and this would be subject to resourcing and prioritisation as part of the Government's tax and social policy work programme. Also see: [Issue: Māori trusts](#).

Recommendation

- a. That the submissions be declined.
- b. That the submissions be accepted.
- c. That the submissions be declined.
- d. That the submission be declined.

Issue: Tax treatment of Entrust

Submission

(Entrust)

Entrust is an energy consumer trust and should be exempt from the proposed 39% trustee rate (and other similar community trusts if identified) on the same basis the Bill proposes disabled beneficiary trusts be exempt.

- Under its Deed of Trust, Entrust is required to distribute all its income as beneficiary income, so it should not be affected by the proposed 39% trustee rate. However, it could be exposed to the 39% rate on unclaimed payments that under the Deed of Trust revert to Entrust and are then distributed to other beneficiaries.
- Entrust cannot be used to shelter income that would otherwise be taxed at 39%, which is what the proposals aim to prevent. Additionally, only a very small number of Entrust's beneficiaries would be 39% taxpayers.
- Entrust withholds tax on unclaimed payments at the 33% rate in the year of original distribution so, with the agreement of Inland Revenue, Entrust has been treating the distribution of unclaimed payments as a tax-paid payment and not as trustee income. If Inland Revenue is comfortable with this past practice, that would alleviate concerns that the proposals could unfairly impose additional tax on Entrust's over 350,000 beneficiaries. At the time of writing discussions with Inland Revenue remain ongoing.
- Unexpected administrative delays could also result in Entrust distributions being paid after the date required for treatment as beneficiary income.

Entrust should be taxed as a PIE, rather than a trust, for the following reasons:

- Entrust has over 350,000 beneficiaries and holds a substantial asset for the benefit of the community. Applying the trust tax rules to such a large community investment entity results in rules that are costly to operate, complex and confusing to beneficiaries.
- For administrative reasons, Entrust is unable to determine the individual tax rates of beneficiaries because the beneficiary's initial and day-to-day contacts are with the electricity retailer, not Entrust.
- The trust rules result in many lower-income families and individuals being over-taxed on their Entrust distributions. Based on Inland Revenue data, Entrust calculates that approximately 86% of its beneficiaries are on rates lower than 33%. A detailed investigation by Inland Revenue suggests that 70% are over-taxed. The amount of over-taxation can be refunded if beneficiaries file a tax return, but the majority of (especially low-income) beneficiaries do not do so.
- The level of over-taxation is significant. Based on Inland Revenue data, Aucklanders are over-taxed by approximately \$14 million on their distributions.

- Under the listed PIE rules, Entrust would be taxed at a capped single rate of 28%. However, given Entrust's many lower-rate beneficiaries, a 17.5% capped rate would be more appropriate.

Comment

Officials acknowledge that Entrust may not be able to distribute all its income as beneficiary income due to administrative delays. It is also clear that energy consumer trusts (ECTs), such as Entrust, cannot be used to shelter income that would otherwise be taxed at 39%.

We are recommending that ECTs are excluded from the 39% trustee tax rate and remain taxed at 33% (for more information, see: [Issue: Widely-held trusts](#)). This would preserve the status quo for Entrust.

We do not recommend taxing Entrust as a PIE.

Recommendation

That the submission be declined.

Issue: Māori trusts

Submission

(Chartered Accountants Australia and New Zealand, KPMG)

- Not all trusts used by Māori for communal ownership purposes are eligible to be Māori authorities. Eligible trusts may also choose not to be Māori authorities because of the compliance burden. The 39% trustee rate will not be appropriate in these cases. If the proposals go ahead and a de minimis is not introduced, this is an example of an exemption that will be required. (Chartered Accountants Australia and New Zealand)
- Many Māori post-settlement governance entities (PSGEs) operate as complying trusts and would likely be over-taxed under a 39% trustee tax rate. PSGEs are established pursuant to Treaty settlement legislation to receive, administer, manage and protect settlement assets on behalf of their members. These trusts do not pose integrity concerns that justify a 39% trustee tax rate. (KPMG)

Comment

There is a risk that Māori will be over-taxed by the proposals. However, Inland Revenue does not hold ethnicity data for taxpayers, therefore it is very difficult to determine how exactly the proposals will impact Māori.

During consultation, officials received feedback that it is likely Māori are over-taxed under the current 33% trustee rate, and that this will be exacerbated under the proposed 39%

trustee rate. Stakeholders suggested that using beneficiary income allocations to mitigate over-taxation is not always be feasible.

We also received anecdotal evidence that Māori trusts tend to have small amounts of income. If Māori trusts have less than \$10,000 of trustee income, they will be eligible for the proposed de minimis (see [Issue: Trustee income de minimis](#)).

The tax system provides targeted rules for Māori organisations that manage and own communal assets for the benefit of iwi, hapū and whānau. Organisations that are eligible to apply these rules are called “Māori authorities” and are taxed at 17.5%. Trusts that are Māori authorities would not be affected by the proposals.

We understand that some trusts that should be eligible for the Māori authority regime are not, and many that are eligible do not opt into the rules, often due to compliance cost reasons. Māori trusts can have large numbers of beneficiaries, and it can be very challenging for the trustees to obtain agreement from all the beneficiaries to opt into the Māori authority rules. Changes to the eligibility for the Māori authority regime would require a comprehensive review beyond the scope of the proposals. Further work on this issue could be considered for inclusion on the Government’s tax and social policy work programme.

Additionally, there is a risk that introducing special rules for Māori trusts at this stage of the Bill could undermine the Māori authority regime or have unintended impacts. Consideration of any proposals relating to the taxation of Māori trusts or Māori authorities would significantly benefit from public consultation.

Recommendation

That the submissions be declined.

CORPORATE BENEFICIARY RULE

Clauses 10, 13, 17, 32, 35, 36, 39, 47 and 59(16) and (17)

Issue: Opposition to corporate beneficiary rule

Submission

(Chartered Accountants Australia and New Zealand, Deloitte, EY, OliverShaw Ltd, Te Kāhui Ture o Aotearoa New Zealand Law Society)

The proposal to treat beneficiary income allocated to a close company beneficiary as trustee income should not proceed. The rationale behind this proposal is unclear and its need has not been demonstrated. *(Chartered Accountants Australia and New Zealand, Deloitte, Te Kāhui Ture o Aotearoa New Zealand Law Society, OliverShaw Ltd)*

The proposed approach is not necessary or is inconsistent with the broader tax system.

- The general anti-avoidance rule would be sufficient to address the concerns outlined in the RIS. *(Chartered Accountants Australia and New Zealand)*
- The proposal is inconsistent with the broader framework of company taxation. *(EY, Te Kāhui Ture o Aotearoa New Zealand Law Society)*
- The proposed changes go beyond addressing circumstances where trustees deliberately circumvent the tax rules and should not proceed. *(EY)*
- It is unclear why transfers of funds from a company to another company via a trust are being singled out for taxation at the proposed 39% trustee tax rate. This is inconsistent with the taxation of PIE investments at 28% as a final tax. The proposal should be removed pending further consultation and consideration of the tax policy underlying the accumulation of profits in corporate structures and the taxation of PIE investments. *(Te Kāhui Ture o Aotearoa New Zealand Law Society)*
- Income of a company should not be categorised as under-taxed, simply because it is taxed at the rate set by Parliament for the taxpayer that derives it. Interventions to tax income of one taxpayer at another taxpayer's tax rate should be reserved for cases of deliberate tax avoidance. *(EY)*
- The proposal will have a distortionary effect on investment behaviour. The change is unlikely to have any additional revenue impact because taxpayers will simply favour corporate ownership of income-earning assets and activities. *(EY)*
- Under general accounting principles, an allocation to a company that is not paid in cash will be recorded as a loan by the company to the trust. Under current law, a loan to a shareholder or a person associated with a shareholder will give rise to a deemed dividend if interest is not charged at the appropriate rate. *(Chartered Accountants Australia and New Zealand)*

Comment

The ability for trustees to shelter income in a corporate beneficiary (taxed at 28%) is a significant integrity risk that would undermine the proposed 39% trustee tax rate.

Currently, allocations of income to corporate beneficiaries are not common in New Zealand, outside certain specialised contexts. However, the proposed increase in the trustee tax rate to 39% would significantly increase the attractiveness of making such allocations. These allocations are a major issue in Australia, where the trustee tax rate is 47% and the corporate tax rate for SME companies is 25%. In Australia it is common, for instance, for income to be allocated by a trust to a corporate beneficiary owned by the allocating trust (referred to as a "bucket company"). The cash is retained in the trust or lent to a high-rate individual beneficiary, with the allocation to the corporate beneficiary left outstanding indefinitely. It is clear that the allocation to the corporate beneficiary has been undertaken for tax purposes, and does not reflect the intended economic outcome. We understand that these kinds of transactions give rise to significant compliance problems.

Even when the income is not only allocated but paid to the company, taxing the income at 28% would be problematic. First, if the company is owned by the trust, then this allocation and payment is a very simple way to subvert the intended rate for trustee income. While the income is still in the trust (since the company is owned by the trust) it has been taxed at only the corporate rate. Second, if the company is owned by a natural person beneficiary, then again, the allocation to the company rather than the beneficiary effectively avoids the intended outcome of trust taxation. Nor is there generally any commercial reason for the income to be allocated and paid to the company, rather than to the natural person owner, who can then use it to invest in the company if they wish to.

The difference between the 28% corporate tax rate and the current 33% trustee tax rate does not seem to motivate significant allocations of trust income to companies this behaviour in New Zealand. However, officials consider that the increased differential would lead to similar problems in New Zealand to those already experienced in Australia.

It would be challenging to consider many of these situations as avoidance given the existing tax policy settings. Furthermore, a specific anti-avoidance provision would be difficult to target at the problem and could result in significant uncertainty.

Officials note that contrary to Chartered Accountants Australia and New Zealand's submission, it is not clear that there is a loan from a company to a trust when income is allocated but not paid by the trust to the company. While the trust does have a liability to the company, the company has not advanced any cash to the trust and may well not record the unpaid allocation as an asset in its accounts.

Recommendation

That the submissions be declined.

Issue: Genuine reasons to allocate beneficiary income to a company

Submission

(Chartered Accountants Australia and New Zealand, CPA Australia, Deloitte, EY, OliverShaw Ltd)

There are genuine commercial reasons a trust may allocate income to a company beneficiary:

- While not common, sometimes a company will earn income through a trust. The proposal would tax such income when the company distributes it to a 39% shareholder at a 63% tax rate. (OliverShaw Ltd)
- The company may use the income for capital improvements, expansion, day-to-day operations, to pay down debt, or for other routine commercial purposes. (Chartered Accountants Australia and New Zealand, EY)
- There are many commercial reasons why a company may not regularly make distributions to its shareholders. The absence of a distribution should not be interpreted as a sign of tax avoidance. *(Chartered Accountants Australia and New Zealand)*
- Trust structures are used to hold separate companies in start-up mode. This keeps the companies separate for creditor protection and because there could be third-party investors in the future. Funds are distributed from the trust to the companies for their use. *(Deloitte)*

In Australia, a corporate beneficiary of a trust is used to hold onto distributions until some point in the future, when it can be distributed to individuals. There are legitimate advantages to distributing trust income to companies, including:

- Companies pay a flat rate of tax on income, which can be more or less than the applicable individual tax rate.
- Using loans to a corporate beneficiary to purchase and hold assets in a tax efficient manner.
- A company is an efficient structure for wealth accumulation and asset succession.
- While a trustee is compelled to distribute the income of the trust, a corporate beneficiary can hold those distributions and distribute the profit at a later point in time.
- It may be possible for the company to deduct expenses from the income it receives from the trust such as distributing to a company that has carried-over tax losses from previous years. *(CPA Australia)*

Comment

We consider that the ability to shelter income in a corporate beneficiary is a significant risk to the integrity of the proposed 39% trustee tax rate. It would be challenging to consider

these situations as avoidance given the existing tax policy settings. Furthermore, a specific anti-avoidance provision would be difficult to target at the problem and could result in significant uncertainty. Therefore, we consider that a specific rule is required to address this risk.

Narrowing the proposal to target structures where the trust does not have an active business or where the corporate beneficiary does not actually receive the funds would be challenging and could be easily side-stepped. See [Issue: Application of corporate beneficiary rule should be narrowed](#).

Investing funds in a company

The corporate beneficiary rule would not prevent trusts from investing funds in a company. If the corporate beneficiary has a real need for funds, either a shareholder beneficiary or the trust on their behalf can invest the money in the company by way of either a loan or some form of capital contribution. As a commercial non-tax matter, the amount does not need to be distributed as beneficiary income.

Company owned by beneficiaries of a trust

If a company is owned by beneficiaries of a trust, and if one or more of those shareholder beneficiaries of the trust is on a lower tax rate, the trust does not need to distribute beneficiary income to the company (for the company to then pay dividends to the shareholder(s)). The trust can allocate the income directly to that person as beneficiary income to prevent over-taxation.

Multiple companies wholly-owned by a trust

The inter-corporate dividend exemption in section CW 10 of the ITA provides that a dividend paid from one company to another is exempt from income tax if the two companies are within the same wholly-owned group.

The proposed corporate beneficiary rule does not override the inter-corporate dividend exemption. This means that if a trust owns multiple companies, a dividend paid from one company to the trust, and then paid to another wholly-owned company as beneficiary income would be exempt from income tax. This dividend would not be subject to the corporate beneficiary rule because amounts of beneficiary income "retain their character". The dividend is treated as if it was earned directly, rather than through the trust.

Recommendation

That the submissions be noted.

Issue: Concerns with example in RIS and Bill commentary

Submission

(Chartered Accountants Australia and New Zealand, Deloitte, EY, Te Kāhui Ture o Aotearoa New Zealand Law Society, OliverShaw Ltd)

The rationale given for the proposed corporate beneficiary rule in the RIS is inaccurate. Paragraph 113 of the RIS states “There is no reason for taxing the income earned by a trust and allocated to a company in the same way as income earned directly by the company.”

- Our long-standing trust laws aim to treat beneficiary income as if it were derived directly. *(OliverShaw Ltd)*
- If a loan to an individual beneficiary is repaid to the trust at full market interest, this is not an “avoidance possibility”. If that is not the case, the trustees seem to have breached their fiduciary duties, which Inland Revenue could counter as tax avoidance. If considered necessary, a targeted avoidance rule could be enacted. *(OliverShaw Ltd)*

Paragraph 114 of the RIS is factually incorrect. Paragraph 114 states:

If the shareholder of the corporate beneficiary is the trust that is making the allocation, the allocation achieves nothing. The income effectively remains within the trust. The principal, or in many cases only, effect of the allocation is to ensure that the income is taxed at 28% rather than the trustee tax rate. While a subsequent distribution of the income by the company to the trust will be taxable as a dividend (with imputation credits attached), such a distribution may never be made.

- There is no support given for this statement and it is factually incorrect. This assumes the corporate beneficiary has no purposes other than being a vehicle for tax avoidance. Beneficiary income distributions to corporate beneficiaries are made for legitimate purposes. The corporate tax rate is irrelevant to this decision. *(Chartered Accountants Australia and New Zealand)*
- Before making any resolutions to distribute beneficiary income to a corporate, the trustees need to factor in the application of the financial arrangements rules. Distributions to corporate beneficiaries can give rise to income where there has been a forgiveness of debt to the trust. *(Chartered Accountants Australia and New Zealand)*

Example 21 in the Bill commentary appears inconsistent with the current tax rules:

- Under the example, the trustee allocates an amount to a corporate beneficiary, but also lends that amount to an individual. For the amount to be treated as beneficiary income of the company, it must vest absolutely with the company. For that amount to then be lent to the individual, it would need to be lent by or under agreement with the company itself. Even if credited in account only, the company’s cooperation in not withdrawing the amount would be required. *(EY)*
 - The Bill commentary asserts that the “real beneficiary of such an allocation of income is the ultimate natural person shareholder in the company”. The ultimate

shareholders are in no way “real” beneficiaries of corporate income unless and until such time as the company distributes its profits by way of dividends.

- This example may constitute tax avoidance, for which there are already appropriate safeguards. If officials consider current trust taxation rules do permit the example provided, targeted changes would be appropriate.
- This example is a highly artificial scenario where income will be distributed to a company without actually being made available to the company because the trust is loaning the same amount to the individual beneficiary of the trust. The distribution is not valid because is not presently able to be drawn because the amount has been loaned to another beneficiary. *(Deloitte)*

Comment

We consider that the ability to shelter income in a corporate beneficiary is a significant risk to the integrity of the proposed 39% trustee tax rate.

We acknowledge submitters concerns that the situations in the RIS and Bill commentary are potentially tax avoidance. However, we consider that it is difficult to be definitive on the point given the existing tax policy settings. A specific anti-avoidance provision would be difficult to target at the problem and could result in significant uncertainty.

We disagree that the example in paragraph 114 is factually incorrect. We acknowledge that tax forms just one part of the environment in which taxpayers operate, however it is unlikely that the corporate tax rate is irrelevant to the decision of a trust to allocate income as beneficiary income to a corporate beneficiary. Particularly so if the allocation resulted in the income being taxed at 28% rather than 39%.

Officials do not agree with the submissions to the effect that example 21 in the Bill commentary is factually incorrect. For example, take the Deloitte submission that it is not possible to allocate income to a company and lend the same amount to a beneficiary. Particularly if the loan is repayable on demand, there is no conflict between the two steps. If there is equity in the trust to begin with, it will be possible to pay the distribution without calling in the loan.

Recommendation

That the submissions be declined.

Issue: Application of corporate beneficiary rule should be narrowed

Submission

(Chartered Accountants Australia and New Zealand, CPA Australia, Deloitte, KPMG, PwC)

Submitters recommended that the proposed corporate beneficiary rule is not sufficiently well-targeted. The current proposal is too wide in scope and will capture many commercial, non-tax motivated transactions. If the proposal proceeds, the rule should only apply when:

- The company does not have an active business. (Chartered Accountants Australia and New Zealand)
- There is sufficient connection between the principal settlors of the trust and persons with material shareholdings in the close company. (KPMG)
- The corporate beneficiary never receives cash corresponding to the allocation of beneficiary income. (CPA Australia, PwC)
- Distributions are not paid to, or for the benefit of, a company within 12 months. This should be sufficient to allay Inland Revenue's concerns that trust income has been otherwise used by a beneficiary or the settlor. (*Deloitte*)

Comment

We do not recommend narrowing the application of the proposed corporate beneficiary rule in the ways suggested. A narrower application risks creating tax planning opportunities that could be hard to counter.

We do not recommend limiting the corporate beneficiary rule to situations where the company does not have an active business. Trusts will still be able to use an active business to shelter income from the 39% trustee tax rate.

The corporate beneficiary rule applies if a settlor has natural love and affection for a (direct or indirect) shareholder of the corporate beneficiary (and that more than 50% of the voting or market value interests in the company are held by five or fewer natural persons). We consider that this ensures there is a sufficient connection between the trust and the company.

Introducing rules based on whether a corporate beneficiary receives the distribution, or if it is simply only an allocation, would require introducing a different definition of the term "paid" in legislation. This distinction would be impractical and very challenging to enforce. We expect that this approach would also be easy to structure around.

Recommendation

That the submissions be declined.

Issue: Treatment of beneficiary income subject to corporate beneficiary rule

Submission

(Chartered Accountants Australia and New Zealand, Patterson Legal, Te Kāhui Ture o Aotearoa New Zealand Law Society)

The Bill proposes that beneficiary income subject to the corporate beneficiary rule would be treated by the beneficiary as a capital gain amount. Beneficiary income subject to the corporate beneficiary rule should be treated as:

- “Available subscribed capital” rather than a “capital gain amount”. This outcome would be fairer because a capital gain amount is reduced by capital losses. (Chartered Accountants Australia and New Zealand)
- Exempt dividends rather than an “available capital distribution amount”. Available capital distribution amounts can only be distributed tax-free when the company is liquidated, and such amounts should be able to be distributed by the corporate beneficiary to its shareholders tax-free at any time, given the amount has already been taxed at 39%.
 - Affected companies should be able to maintain a tracking account in respect of distributions taxed at 39% under the corporate beneficiary rule, and distributions made by affected companies to their shareholders should be tax-free to the extent that the distribution does not exceed the credit balance of the tracking amount. (Te Kāhui Ture o Aotearoa New Zealand Law Society)
 - Affected companies should be allowed imputation credits for at least 28% of the tax paid (possible the whole 39%) by the trustees on beneficiary income subject to the corporate beneficiary rule. This would ensure there would not be double taxation when the amount is distributed by the company to its shareholders. (Patterson Legal)

Comment

Currently, allocations of beneficiary income to corporate beneficiaries are not common in New Zealand, outside certain specialised contexts. In the 2021 tax year, 462 unique corporate beneficiaries were allocated \$503 million in beneficiary income from 323 unique trusts. This represented 7% of all beneficiary income. However, the beneficiary income allocations are not evenly distributed in this group, with 80% (\$401 million out of \$505 million) allocated by just 8% of these trusts (26 out of 323). We expect many of these trusts are involved in corporate structures, such as securitisation trusts. We have recommended that securitisation trusts be excluded from the proposed rule. For more information, see [Issue: Corporate beneficiary rule and securitisation trusts](#).

Available subscribed capital

We do not recommend that beneficiary income amounts derived by companies subject to the corporate beneficiary rule be treated as available subscribed capital (ASC). ASC represents amounts contributed to a company by its shareholders.

Exempt dividends

Providing that such beneficiary income amounts are treated as exempt dividends derived by the corporate beneficiary would not allow the company to distribute the amounts to shareholders tax-free. Under existing company tax rules, generally, any distribution or transfer to shareholders would be a taxable dividend.

Tracking accounts and imputation credits

Given the limited number of beneficiary income allocations to corporate beneficiaries currently, we do not expect many companies to be affected by the proposed corporate beneficiary rule. This rule will mainly prevent new behaviours emerging (ie, sheltering trust income in companies). Due to this, we do not recommend changing imputation rules to allow corporate beneficiaries to receive imputation credits for such distributions or introducing special rules such as memorandum accounts to track distributions. This would add additional complexity and compliance costs to the trust regime for limited benefit, and risk introducing unintended consequences.

Recommendation

That the submissions be declined.

Issue: Natural love and affection

Submission

(Deloitte, KPMG, Te Kāhui Ture o Aotearoa New Zealand Law Society)

The proposed corporate beneficiary rule applies if a settlor of the trust has natural love and affection for a direct or indirect shareholder of the close company beneficiary.

- The proposed rule may not apply if the settlor is the sole shareholder of the company because a settlor cannot have natural love and affection for themselves. If the proposal proceeds, it should be amended to ensure that it applies when the sole shareholder of the close company is a settlor of the trust. *(KPMG, Te Kāhui Ture o Aotearoa New Zealand Law Society)*

Interestingly there seems to be more concern in the Official Commentary for companies held directly by trusts, but these companies will not fall into the rules as drafted. *(Deloitte)*

- The proposed rule may not apply if the corporate beneficiary is owned by the trustees because it is not possible to have natural love and affection for trustees. If the proposal proceeds, it should be amended to provide that where the shareholder of a corporate beneficiary is a trust, then the rule would apply if a settlor of the trust making the distribution of beneficiary income has “natural love and affection” for the main beneficiaries of the trust which is the shareholder of the corporate beneficiary. (*Te Kāhui Ture o Aotearoa New Zealand Law Society*)

Comment

Officials agree that the corporate beneficiary rule should be amended to ensure that it applies if a direct or indirect shareholder of the close company is:

- a settlor of the trust making the beneficiary income allocation, or
- a trustee of a trust (where a settlor of the trust making the beneficiary income allocation has natural love and affection for a settlor or beneficiary of the trust that is a direct or indirect shareholder of the company).

Recommendation

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

Issue: Corporate beneficiary rule and tax credits

Submission

(*Chartered Accountants Australia and New Zealand*)

If the proposed corporate beneficiary rule proceeds in its current form, it is logical to allow the trustees to use the tax credits (proposed section LE 4B in the ITA). (*Chartered Accountants Australia and New Zealand*)

Recommendation

That the submission be noted.

Issue: Corporate beneficiary rule and securitisation trusts

Submission

(*Australian Securitisation Forum, Corporate Taxpayers Group, Financial Services Federation, Mayne Wetherell*)

The proposed corporate beneficiary rule could apply to beneficiary income derived by a closely-held corporate beneficiary of a securitisation trust. This would treat such beneficiary income as trustee income taxed at 39%, creating permanent over-taxation. This would undermine the viability of securitisation transactions for sponsors that are closely-held companies.

For trusts that do not use the debt funding special purpose vehicle (DF SPV) regime (see [Issue: Securitisation trusts](#)), it is usual for the net income of the trust to be allocated as beneficiary income to a company within the sponsor/originator group. This practice:

- reflects the economic substance of securitisation structures as being akin to secured borrowings by the sponsor/originator, such that any surplus (after meeting operating and financing costs) should belong to the sponsor/originator group, and
- is intended to achieve tax neutrality for the trustee, which is a requirement of leaders and rating agencies and appropriate given that the trustee wishes to avoid the risk of being taxed on any unforeseen amount of income. (*Australian Securitisation Forum*)

Across the industry, the amount of net income of a non-DF SPV trust that is allocated to a corporate beneficiary appears to be in the millions of dollars, ie, the net income amounts allocated from the trust as beneficiary income to a corporate beneficiary would not be small enough to qualify for a de minimis. While the majority of trusts are unlikely to have close-company sponsors/originators, some do, and they could be significantly affected by the proposed changes. (*Australian Securitisation Forum*)

This issue would not apply to a corporate beneficiary from a sponsor group that was not a closely-held company – beneficiary income would continue to be taxed at 28% in this case. (*Australian Securitisation Forum*)

To ensure that this exclusion is targeted towards securitisation trusts, a specific definition could be introduced into the ITA to adopt the existing definition of “debt funding special purpose vehicle” but with amendments to reflect the fact the securitisation trust would not necessarily be consolidated with the originator for financial reporting purposes.⁶

⁶ The proposed definition is:

Securitisation trust means a trustee of a trust:

- (a) that meets the definition of debt funding special purpose vehicle, disregarding paragraphs (a), (b) and (f) of that definition, and read as if:
 - (i) in paragraphs (c)(i) and (ii) of that definition, the reference to paragraph (b) is replaced with a reference to paragraph (e); and
 - (ii) in paragraph (d)(i) of that definition, the word “originator” is replaced with “a person who transferred some or all of their assets to the trustee”; and
- (b) the sole beneficiary of which is a company.

Comment

We agree that the proposed corporate beneficiary rule should not apply to corporate beneficiaries of securitisation trusts. The intent of the corporate beneficiary rule is to prevent income being sheltered from the 39% trustee tax rate in a corporate beneficiary, it is not intended to impact the use of trusts in corporate structures.

Recommendation

That the submissions be accepted.

CORPUS AND OTHER SETTLEMENTS

Clause 31

Issue: Corpus and other settlements

Submission

(Chartered Accountants Australia and New Zealand, EY)

The proposed amendment would clarify that amounts paid as beneficiary income and then settled on a new trust on the beneficiary's behalf are included in the corpus of the new trust.

- Chartered Accountants Australia and New Zealand noted the proposed amendment.
- EY submitted that a range of the trustee tax rate proposals, including this proposed amendment, could "be improved in certain areas".

Recommendation

That the submissions be noted.

PROCESS, IMPLEMENTATION AND ADMINISTRATION

Issue: Guidance on areas of uncertainty needed

(Cantin Consulting, KPMG, PwC, Te Kāhui Ture o Aotearoa New Zealand Law Society)

Guidance will be necessary, well in advance of the increased trustee tax rate taking effect, regarding:

- **Distributions of retained earnings by companies owned by trusts in anticipation of the increase in the trustee tax rate.** Many companies will seek to mitigate the impact of the proposed increase in the trustee tax rate to 39% by distributing retained earnings prior to 1 April 2024. Inland Revenue should issue clear guidance on the circumstances in which the payment of a dividend in anticipation of the increase in the trustee tax rate might constitute a tax avoidance arrangement. *(Te Kāhui Ture o Aotearoa New Zealand Law Society)*
- **Mitigating over-taxation by making distributions of beneficiary income to beneficiaries on lower personal tax rates.** The Bill commentary and fact sheet accompanying the introduction of the Bill note that beneficiary income allocations can be used to mitigate over-taxation. There is uncertainty under existing law about the tax treatment of beneficiary income that is settled by a beneficiary back onto a trust. Inland Revenue should issue clear guidance on the circumstances in which the distribution of beneficiary income might constitute a tax avoidance arrangement. *(Te Kāhui Ture o Aotearoa New Zealand Law Society)*
- **Tax avoidance.** Specifically, what pre-implementation measures Inland Revenue considers acceptable, and what measures would constitute tax avoidance for the purposes of the Income Tax Act 2007. *(PwC)*

Inland Revenue should engage with relevant stakeholders throughout the preparation of this guidance.

The commentary and fact sheet that were published alongside the introduction of the Bill were subsequently amended to correct an error.

- This has created significant uncertainty due to tax avoidance concerns and uncertainty as to how these rules are intended to apply in practice. *(KPMG)*
- The Select Committee should consider how and why the original materials did not reflect the expected and intended effect. The Committee should recommend processes to ensure that materials accompanying a Bill fully and correctly reflect the policy intent. *(Cantin Consulting)*

Comment

The commentary and fact sheet published alongside the introduction of the Bill included an example of a settlor of a trust (who is also a beneficiary) receiving an amount of beneficiary income. The example noted that the settlor could choose to settle that beneficiary income back on the trust to mitigate over-taxation. The commentary and fact sheet were amended shortly after introduction of the Bill to remove this example due to concerns regarding whether this example could be tax avoidance.

Officials acknowledge that the change to this example has created uncertainty for some taxpayers. This issue arose due to the proposals and supporting material being developed under Budget sensitivity. The commentary and fact sheet were provided to facilitate discussion on the proposals in the Bill and not as an interpretation of the current law.

Since the introduction of the Bill, Inland Revenue policy officials have been working closely with officials from Inland Revenue's Tax Counsel Office to ensure that material published alongside the Bill that summarises existing legislative provisions is accurate.

In February 2024, Inland Revenue published a General Article providing high-level guidance regarding how some taxpayer transactions and structural changes will be perceived by the Commissioner of Inland Revenue from a tax avoidance perspective ahead of the proposed 39% trustee tax rate taking effect. This General Article is available on Inland Revenue's Tax Technical website: [GA 24/01: Proposed increase in the trustee tax rate to 39%](#).

This guidance notes that, based on Inland Revenue's interpretation of current law, it could potentially be considered tax avoidance if income was allocated to a beneficiary taxed at a lower rate and then resettled back on the trust (rather than being paid to or left owing to the beneficiary), such that the beneficiary is not in reality benefiting from the distribution.

Following enactment of the Bill, officials will also include a summary of how the changes in the Bill are intended to apply in a Special Report published shortly after the enactment of the Bill and in a *Tax Information Bulletin*.

Recommendation

That the submissions be noted.

Issue: Generic tax policy process

Submission

(ATAINZ, Cantin Consulting, C Macalister, KPMG, OliverShaw Ltd, Te Kāhui Ture o Aotearoa New Zealand Law Society)

The GTPP has operated since 1994 to ensure better, more effective tax policy development. A particular feature of GTPP is building in external consultation and feedback into the policy development process, providing opportunities for public comment at several stages.

The proposals have not been subject to the GTPP.

- This may result in unintended consequences, such as the 39% trustee rate having a wider application than intended. (ATAINZ)
- The main reason the proposal to increase the trustee rate to 39% should not proceed is that it has not been considered fully and not been subject to the GTPP. (OliverShaw Ltd)
- Amendments of this nature undermine the GTPP. The changes would benefit immensely from a government discussion document process. (C Macalister)
- The issues with the proposed changes are now being addressed at the Select Committee stage of the Bill. This is what the GTPP was designed to avoid. (KPMG, Te Kāhui Ture o Aotearoa New Zealand Law Society)
- Proposals affecting many New Zealanders were not subject to public consultation. (Te Kāhui Ture o Aotearoa New Zealand Law Society)

Comment

We acknowledge that there was no consultation on the proposals before their introduction. Prior consultation was not possible because the proposals were developed under Budget sensitivity.

Following introduction of the Bill, officials undertook targeted consultation with a wide range of stakeholders, including experts in trusts and disabled communities, with the aim of testing the proposals and identifying areas where improvements could be made.

Recommendation

That the submissions be noted.

Issue: Timing of release of officials' advice

Submission

(Cantin Consulting)

The Select Committee should recommend the earlier release of documents that affect its work. Budget 2023 documents were proactively released on 12 July 2023. This did not provide adequate time for submissions to take account of the further information. Budget documents directly relevant to matters in the Bill should have been released alongside it, rather than on the Budget documents timeline.

Comment

Officials note the compressed timeframes between the publication of background tax policy advice to Ministers as part of the Budget 2023 proactive release on 12 July 2023 and the 14 July 2023 deadline for written submissions on the Bill.

However, the RIS for the proposals was published when the Bill was introduced on 18 May 2023, alongside a Bill commentary.

Recommendation

That the submission be noted.

Issue: Further consultation required

Submission

(A Harmos, Cantin Consulting)

The proposal should be withdrawn or deferred. However, if it proceeds, the Select Committee should provide further opportunity to consider the amended proposal (if it is amended) and its drafting. *(Cantin Consulting)*

- Since the proposals did not go through the GTPP, the Select Committee should publish officials' advice to the Committee in response to written submissions (because the advice can be assumed to be at least an interim statement of the Government's position) and invite further submissions to address officials' advice and any subsequent publication of further information on trusts.
- Consultation after the introduction of the Bill raised questions about the proposals' problem definition and effectiveness, along with the tax system's broader principles. Officials' responses to those questions are unknown because GTPP has not been followed, so the Select Committee will need to consider submissions made in a partial vacuum. This issue is compounded by the lack of public information on trust tax statistics for the 2022 income year (when the 39% personal tax rate applied).

This legislation is bad, ill thought through, and rushed. It is a toe in the water for increasing the current zero rate of death duty and probably capital gains. It needs a serious rethink and an honest debate. It does not achieve the key stated objective published – changes to current tax settings to ensure they are fair, efficient, and do not impede economic growth. *(A Harmos)*

Comment

It is a constitutional requirement that the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill is enacted by 31 March 2024 to set the annual income tax

rates for the 2023–24 tax year. It is not feasible to publish the Departmental Report, and then seek further public submissions on the Departmental Report, before reporting the Bill back to the House in time for enactment by 31 March 2024.

The Government has decided that the trustee tax rate should be increased for the 2024–25 and later income years (beginning 1 April 2024 for most taxpayers). Deferring the proposals to a later application date would have a significant fiscal cost.

Recommendation

That the submissions be declined.

FOREIGN TRUSTS

Issue: Foreign-sourced amounts derived by resident trustees

Submission

(Te Kāhui Ture o Aotearoa New Zealand Law Society)

Section 78(1) of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 replaced “New Zealand resident trustee” with “resident trustee of a foreign trust” in the opening words of section HC 26 of the ITA. This amendment appears to narrow the scope of the exemption for foreign-sourced amounts in section HC 26 such that it applies to foreign trusts only. This could mean that section HC 26 would no longer apply where a settlor is a transitional resident (despite transitional residents being expressly referred to in section HC 26(1)(a)).

The changes in the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 were intended to expand the foreign trust disclosure rules to apply to trusts that were not foreign trusts but that also utilised the exemption in section HC 26; not limit the application of section HC 26.

Section 78(1) of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 should be reversed.

Comment

We agree that the foreign trust changes in the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 were intended to update the foreign trust disclosure requirements, and not to narrow the application of section HC 26 of the ITA.

Point of difference

This change should be made retrospectively from 1 April 2023, the date when the change to “resident trustee of a foreign trust” in section HC 26 was made.

Recommendation

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

Issue: Taxation of distributions from foreign and non-complying trusts

Submission

(Cantin Consulting)

The use of the trust's balance date, rather than the New Zealand tax year, for determining the taxation of distributions from non-New Zealand trusts would reduce compliance costs and simplify processes.

Distributions from foreign and non-complying trusts are taxed, firstly, in the same way as complying trusts; trust income which is distributed to a beneficiary in the year is taxed as beneficiary income. Secondly, for distributions that are not of current year trust income, they are taxed if the distribution is from a prior year's trust income (for foreign trusts) and from capital gains (for non-complying trusts). Distributions are deemed to be from particular sources by an ordering rule. This ensures that what would be taxed if derived by a New Zealand resident is taxed on distribution to a resident beneficiary. There are compliance costs associated with this feature of the rules.

Trust income of foreign and non-complying trusts is determined by applying New Zealand tax rules to the trust's activities. This is determined based on a New Zealand tax year. This imposes further compliance costs where a trust has an annual balance date that does not align with the New Zealand tax year. This is because the trust prepares accounts and makes distributions based on its balance date. The beneficiary must restate the trust's activities to align with the New Zealand tax year. This also creates uncertainty because the status of the distribution cannot be determined when it is received.

Allowing beneficiary income for non-New Zealand trusts (ie, foreign trusts and non-complying trusts) to be determined based on the trust's balance date, by election, rather than the New Zealand tax year would reduce compliance costs and uncertainty.

Consequential matters arising from this proposal:

- The election could be limited to trusts that must file income tax returns in their country of residence or principal taxation. A further possible limitation is that the election can only be made for trusts that are resident in countries with which New Zealand has double taxation agreements and/or information sharing agreements. This would provide comfort that information on such trusts can be obtained by Inland Revenue if required.
- A difference in income may arise under the foreign investment fund (FIF) rules' fair dividend rate (FDR) methodology. FDR income calculated on a 1 April or, for example, 1 July basis, is equally correct and should not be a concern.
- There may be expenditure timing differences from the use of the trust's balance date to determine trust income, however this should be outweighed by the compliance benefits.

- An election to use the trust's balance date would align the foreign tax paid by the trust with the beneficiary income calculated in New Zealand for that year. Any difference in foreign tax credits should not, in principle, be of concern because the foreign tax would be for the same trust income as taxed in New Zealand.

Comment

Allowing trust income of foreign trusts and non-complying trusts to be determined based on the trust's balance date is outside the scope of the proposed changes in the Bill. Officials will consider this matter. However, further work on this matter would require prioritising and resourcing as part of the Government's tax and social policy work programme.

Recommendation

That the submission be declined.

TRUST DISCLOSURES

Issue: Trust disclosure rules

Submission

(C Macalister, CPA Australia, KPMG)

When the 39% personal tax rate was enacted, increased trust disclosure requirements were also introduced for the 2021–22 and later income years.

- a. The justification for the trust disclosure rules no longer exists if the top personal and trustee tax rates are the same and the compliance costs are significant. The disclosure rules should be repealed or amended to reduce compliance costs. (C Macalister, CPA Australia, KPMG)
- b. Delegating the design of the disclosure rules to Inland Revenue is contrary to good tax policy and tax law. While it may be permissible from a legislative point of view, these changes have resulted in increased uncertainty and compliance costs. Furthermore, delegating the detailed design to an Inland Revenue form is outside the spirit of the development of tax law. New Zealand has benefited from good and meaningful consultation, and leaving the design to Inland Revenue operations is a departure from this approach. (C Macalister)
- c. The Finance and Expenditure Committee should invite officials to release details of the disclosure information collected. (C Macalister)

Comment

The increased disclosure requirements were introduced not just to gain insight into whether the 39% personal tax rate is working effectively, but also to provide better information to understand and monitor the use of structures and entities by trustees. Information disclosed to date is helping to identify previous areas of non-compliance and other policy issues. We expect that disclosure information will help identify non-compliance relating to the proposed increase in the trustee tax rate for the 2024–25 year, including anticipated behavioural responses before and after the rate change.

The disclosures are delivering insights outside of issues relating to the difference between the 33% trustee tax rate and the 39% personal tax rate, including wider benefits such as improving New Zealand's international reputation in relation to transparency of beneficial ownership. Due to these wider benefits, consideration of changes to the requirements is outside the scope of the Bill.

Officials acknowledge that the increased disclosure requirements were introduced with limited consultation. However, since the requirements were enacted in legislation, Inland Revenue undertook multiple rounds of consultation in 2021 to refine and implement the

rules. The detailed design of most information collected by the Commissioner of Inland Revenue is set out in forms prescribed by the Commissioner.

A post-implementation review to determine ways to improve and simplify future disclosures is planned for 2024. Officials recommend that any changes to the disclosures be considered as part of that review.

Since the closing date for written submissions on the Bill, a high-level summary of data and insights from the first year of the disclosure rules (the 2022 tax year) was published on Inland Revenue's website: <https://www.ird.govt.nz/about-us/tax-statistics/revenue-refunds/trusts-and-estates-statistics/trust-disclosure-information-from-the-2022-tax-year>.

Recommendation

- a. That the submissions be declined.
- b. That the submission be declined.
- c. That the submission be declined.

Issue: Trust disclosures and non-active trusts

Submission

(Public Trust, Trustees Executors Ltd)

Section 43B of the Tax Administration Act 1994 provides an exclusion for trustees of non-active trusts and executors or administrators of non-active estates from their tax filing obligations. Trustees that are excluded from their tax filing obligations under section 43B are also excluded from the trust disclosure requirements.

One of the requirements to be a non-active trust is that it must be a complying trust. This means that the tax obligations relating to the trustee's income tax liability must have been satisfied for every tax year (refer section HC 10 of the ITA).

The proposed 39% trustee tax rate will have an impact on the ability of trusts to qualify as a non-active trust:

- If the trustee tax rate is increased to 39%, then an estate tax return will need to be filed because withholding tax rates are less than 39%. This will increase compliance costs for taxpayers (Public Trust).
- The interaction between the above requirement for trustees of non-active trusts to have satisfied all their tax obligations and the ability to derive income with tax withheld at rates lower than 39% should be clarified (*Trustees Executors Ltd*).

Comment

To qualify as a non-active trust under section 43B:

- a trust or estate must not earn more than \$1,000 reportable income (eg, interest or dividend income), and
- a testamentary trust must not earn more than \$5,000 reportable income.

The requirement to earn less than \$1,000 or \$5,000 reportable income, respectively, means that any trust that would be eligible for non-active status would also qualify for the recommended \$10,000 trustee income de minimis. (see [Issue: Trustee income de minimis](#)).

Since all trustee income of trusts eligible for the de minimis would be taxed at 33%, the proposals would have no impact on trusts eligible to be non-active. Such trusts can continue to derive interest and dividend income that has had resident withholding tax (RWT) withheld at 33% and still be excused from filing obligations and the trust disclosure requirements.

Recommendation

That the submissions be declined.

Issue: Comments on trust disclosure insights

Submission

(Cantin Consulting)

In November 2022, Inland Revenue published a report summarising insights from the first year of the trust disclosure rules.⁷

- Inland Revenue has highlighted the difference in beneficiary income paid to minors (under 16-year-olds) and 16–20-year-olds. For minor beneficiaries, the tax rate is 33% whether the income is allocated to them as beneficiary income – whether it is minor beneficiary income or trustee income, makes no difference to the tax payable. This is not unacceptable planning but a natural consequence of the rules.
- Some of the data is “point in time” because it is the first time that disclosures have been required. The reasons for the noted outcomes should be explored further.
- The report discloses possible errors made by trustees and beneficiaries. The errors raise some policy questions:
 - Should Inland Revenue have already identified these types of errors? Some may not have been because they were identified from information disclosed for the

⁷ <https://www.ird.govt.nz/about-us/tax-statistics/revenue-refunds/trusts-and-estates-statistics/trust-disclosure-information-from-the-2022-tax-year>

first time (such as non-taxable distributions), others will have been disclosed historically.

- Is the relevant rule fit for purpose? The report discloses possible errors but does not report on those in similar circumstances who have complied. For example, how many taxpayers (and how much income) correctly reported family scheme income? This information may be useful in assessing whether the rules are sufficiently clear or communicated to affected taxpayers.
- Some caution is required in concluding that a tax rate is the underlying reason for a certain behaviour.
- Any good report raises further questions, which this report does. However, some of these questions are due to gaps that can be remedied with existing data (PIE income for example).
- It would be helpful for Inland Revenue to disclose the data used for the graphs to allow contestability and quality assurance.

Comment

These matters are outside the scope of the Bill. Officials note the points raised by the submitter and will consider these issues further. We expect that the second year of trust disclosure insights will shed further insights and allow year-by-year analysis to help understand these matters.

Recommendation

That the submission be noted.

OTHER COMMENTS REGARDING TRUSTS

Clause 62(1)(b)

Issue: Minor beneficiary tax rate should remain at 33%

Submission

(OliverShaw Ltd)

The minor beneficiary tax rate should remain at 33%. The minor beneficiary rule was introduced in reaction to family trusts allocating relatively small sums of money to minor beneficiaries to fund what would be considered normal household expenses. The rule ensures the income is taxed at 33% (as it would be if derived directly by the parents) rather than the 10.5% or 17.5% rate that would apply if the beneficiary income were the only income of the child. The trustee rate of 33% was seen as reasonable in these circumstances, and applied even when the top personal rate was 39%.

There is no justification for taxing a child at 39% on small allowances provided by a trust established by the child's grandparents when a 17-year-old sibling is taxed at say 10.5%. The proposed increase to the minor beneficiary rule should not proceed.

Comment

The minor beneficiary rule applies to tax amounts of beneficiary income allocated to minors (people aged under 16 years of age) at the trustee tax rate. This means that for trusts eligible for one of the recommended modifications (disabled beneficiary trusts, deceased estates or a trust with up to \$10,000 trustee income), minor beneficiary income will continue to be taxed at 33%.

People, including families with minor children, typically meet their expenses out of income that has been taxed at their personal tax rates. The minor beneficiary rule is aimed at ensuring families with a trust do not gain a tax advantage over families without a trust.

If the minor beneficiary rule remained at 33%, parents and close relatives with a 39% personal tax rate would be able to satisfy their expenses out of trust income that is allocated to a minor beneficiary and taxed at 33%. This would undermine the proposed 39% trustee tax rate.

Furthermore, the minor beneficiary rule does not apply if the total amount of beneficiary income that the minor earns from the trust in an income year is \$1,000 or less. This ensures that distributions of small allowances to minors are not affected by the minor beneficiary rule.

Recommendation

That the submission be declined.

Issue: Concerns with revenue estimate for the proposals

Submission

(Cantin Consulting, EY, OliverShaw Ltd, Patterson Legal)

Submitters made various comments on the revenue forecast for the proposals:

- A significant number of taxpayers act affirmatively to reduce taxes now that the top personal tax rate has become 39% rather than 33%. The increased tax revenue from the proposed 39% trustee tax rate may not match the amounts forecast by Inland Revenue. In the RIS, Inland Revenue recognised that the amount of tax collected can depend significantly on taxpayers' behavioural response, particularly if there are different options available to taxpayers. (Patterson Legal)
- The \$13 million forecast for the 2024–25 year is too low. Profitability since 2021 should be taken into account when assessing the actual tax collected and its effect on future forecasts. (Cantin Consulting)
- The forecast tax revenue of \$350 million per annum assumes \$5.8 billion of trustee income. This compares to \$11.4 billion returned in 2020, and \$17.1 billion in 2021. It is sensible to ignore the 2021 year. Assuming the 2020 year base, the forecast assumes that approximately \$6 billion of what would otherwise be trustee income will be subject to one of three options for reducing tax (companies, PIEs or distributions to beneficiaries). The reasonableness of this assumption should be tested. (Cantin Consulting)
- The complex and costly restructures involved will result in little net revenue flowing to the Government. This would involve a net welfare cost to New Zealand and would materially reduce the forecast revenue gain to the Government (\$350 million per annum), given these estimates are stated to be based on a moderate behavioural response. (OliverShaw Ltd)
- The likelihood of over-taxation may result in a behavioural response that results in a reduction in overall tax revenue. *EY*)

Comment

The RIS acknowledges that the revenue raised from the proposals is uncertain and heavily dependent on the behavioural responses of trustees. The revenue estimates were forecasted based on the 2020 tax year; at the time, not all tax returns for the 2021 tax year had been filed.

The estimated \$13 million fiscal gain for the 2024–25 fiscal year is due to information flows. The timing lag in the revenue estimate is due to information flows: the first year of affected tax returns (2024–25 tax year) need to be filed before the additional income tax is recognised, and the second year is simultaneously accrued on the basis of that new information. The revenue estimate of \$13 million for the 2024–25 fiscal year is due to

provisional taxpayers using estimates, for whom there will be an impact within the 2024–25 fiscal year.

Recommendation

That the submissions be noted.

Issue: Revenue raised should be spent effectively

Submission

(Patterson Legal)

When taxes are increased or reinforced, the Government needs to spend the money raised by the taxes effectively and be perceived to be doing so. People are less likely to object to a tax increase if the Government is perceived to be effective at producing good outcomes on a cost-effective basis.

It is far more difficult for taxpayers to buy into a government system that is not delivering good outcomes or is wasteful in its spending. Both the reality and taxpayer perception of reality are important, and it appears that at the present point in time both are issues for the previous Government.

Comment

The proposals were introduced with the objectives of improving the fairness of the tax system and raising revenue for Budget 2023. Decisions regarding the use of revenue raised and government expenditure generally are outside the scope of the Bill and are a matter for the Government of the day.

Recommendation

That the submission be noted.

Issue: Collaboration with investor groups needed

Submission

(NZ Shareholders' Association, Securities Industry Association and NZX Ltd)

Parliament seems intent on perpetuating a bias against individual investors. The proposals are a further "nail in the coffin" for representation of individual investors in tax structures and government policies. There is already a significant lack of representation within Parliament for the interests of individual investors. Over recent years, the manner of investment

opportunities for retail investors have increased dramatically, to include structures such as PLEs, discretionary investment managed services (DIMS), and exchange-traded funds (ETFs), in addition to new investment platforms such as Sharesies. We propose a more collaborative approach with investor groups, including the NZ Shareholders' Association, to support the Select Committee in pursuing effective representation for individual investors.

Comment

Officials acknowledge the importance of public consultation and the valuable role that external stakeholders have in policy development. New Zealand's GTPP has been in place since 1994 to ensure better, more effective tax policy development through early consideration of key policy elements and trade-offs of proposals, such as their revenue impact, compliance and administrative costs, and economic and social objectives. Another feature of the process is that it builds external consultation and feedback into the policy development process, providing opportunities for public comment at several stages.

In most cases, officials would recommend that tax policy proposals are developed under the GTPP. However, Budget proposals rarely go through public consultation due to Budget sensitivity.

Engagement between the Select Committee and investor groups is not a matter for officials to comment on. It is a matter for the Select Committee to consider.

Recommendation

That the submissions be noted.

Issue: Deemed settlor rule

Submission

(C Macalister)

The \$25,000 deemed settlor rule in section HC 27 of the ITA should either be repealed, treated as applying for the following income year, or increased to remove its inadvertent application. This rule is often either overlooked or misunderstood. In many cases, people are not aware of deemed settlor implications until after the end of the income year when the trust accounts are prepared. This can affect eligibility for state assistance.

Comment

The definition of a "settlor" in section YA 1 of the ITA is broad, and includes a person, who, at any time, transfers value to a trust, for the benefit of the trust, or on terms of the trust. This definition includes a beneficiary who is owed money by the trustee. The \$25,000 threshold in

section HC 27 is a taxpayer-friendly provision to ensure that beneficiaries that are owed \$25,000 or less by the trustee are not automatically deemed to be a settlor of the trust.

Increasing the \$25,000 threshold or amending the treatment of this rule is outside the scope of the proposals in the Bill. Any work on this matter would be subject to prioritisation on the Government's tax and social policy work programme.

Recommendation

That the submission be declined.

Issue: Aligning New Zealand's tax rules with other common law jurisdictions

Submission

(C Macalister)

New Zealand should align its tax rules with those of other common law jurisdictions. Changing the trustee tax rate is a broad policy decision that has implications across the trust rules.

New Zealand's settlor regime (which ensures the worldwide income of a trust is treated as taxable to the trustees in New Zealand if a settlor was a New Zealand tax resident or died a New Zealand tax resident) has not been followed by other common law jurisdictions. Other jurisdictions have instead taken the approach of treating trusts as tax resident based on the tax residence of the trustees. The different approaches taken have led to tax avoidance opportunities for non-residents establishing foreign trusts with New Zealand-based trustees. The introduction of disclosure rules for foreign trusts may have had some success in addressing this but has also resulted in higher compliance costs.

Aligning New Zealand's trust rules with other common-law jurisdictions also has advantages for cross-border income and the application of double taxation agreements.

Comment

Departing from New Zealand's settlor-based trust tax regime would be a significant policy change and outside the scope of the proposals in the Bill. We do not recommend making fundamental changes to the taxation of trusts without undertaking public consultation.

Further consideration of this matter would be subject to prioritisation by Minister's on the Government's tax and social policy work programme.

Recommendation

That the submission be declined.

**TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX,
AND REMEDIAL MATTERS) BILL**

Taxation of backdated lump sum payments

TAXATION OF BACKDATED LUMP SUM PAYMENTS

Clauses 57, 59(15) and (19), 62(3) and (5)

Issue: General support for the proposals

Submission

(Associate Professor Hanna Wilberg, Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand, Community Law Centres Aotearoa, Devika Dhir, EY, International Tax Specialists New Zealand Ltd, KPMG, New Zealand Council of Trade Unions, New Zealand Law Society, OliverShaw Ltd, Sefton Pryce, Tax Justice Aotearoa, Taxpayers' Union)

Submitters generally welcome the proposed changes that will provide alternative tax treatment for backdated Accident Compensation Corporation (ACC) payments and backdated Ministry of Social Development (MSD) entitlements.

Recommendation

That the submissions be noted.

Clauses 57(2), 59(19) and 62(5)

Issue: Retrospectivity of proposed changes

Submission

(Associate Professor Hanna Wilberg, Baucher Consulting Ltd, Community Law Centres Aotearoa, Devika Dhir, Chartered Accountants Australia and New Zealand, EY, International Tax Specialists New Zealand Ltd, Sefton Pryce, Tax Justice Aotearoa)

Some submitters note that due to some reviewed sanctions by MSD in the Social Security Act 1964 since 2019, many backdated payments were made to correct any injustice resulting from these sanctions. These recipients therefore had to pay tax on lump sum payments that were made because of government error. Submitters noted that they would like to see all proposed changes, but at least the MSD lump sum backdated payments, made retrospective. *(Associate Professor Hanna Wilberg, Community Law Centres Aotearoa, Devika Dhir, Tax Justice Aotearoa)*

Some submitters note that the proposed application date of 1 April 2024 will not apply to the lump sum payments made in the 2024 tax year, which is the year the Bill was introduced. The submitters suggest that the proposed changes should apply to the tax year in which

they were announced, from either the start of the income year or from the date of introduction of the Bill. It is recommended this could be done through a square up as part of a recipient's 2024 tax return. (*Baucher Consulting Ltd, Chartered Accountants Australia and New Zealand*)

Other submitters note that all proposed changes should be made retrospective with no suggested period. (*EY, International Tax Specialists New Zealand Ltd, Sefton Pryce*)

Comment

Officials consider there is no clear basis to make the proposed changes retrospective because the proposed changes do not meet all the usual requirements for a policy to be made retrospective. These requirements include confirming a long-standing policy intent or correcting a clear error in the legislation. The law around these payments is clear and reflects the historic policy intent of the taxation of those payments, so the criteria that there is some uncertainty in the application of the rules or the law is contrary to the policy intent is not met.

If the change was made retrospectively, there will always be an arbitrary line where some people are taxed under the new rules and some will lose out only because they were paid the day before the retrospective application date. This could only be avoided by going back to when ACC was formed in 1974, which is not feasible.

Recommendation

That the submissions be declined.

Clauses 57(1) and 59(15)

Issue: Backdated lump sum payments for attendant care

Submission

(Action to Improve Maternity, New Zealand Law Society, Office of the Ombudsman)

The current drafting does not explicitly capture all cases intended to be captured by the proposed amendments. Specifically, the proposed amendments should be extended to address the tax treatment of backdated lump sum payments for attendant care to reduce the inequities that affect those who provide care for ACC claimants.

As the proposed legislation currently reads, family members or caregivers who are entitled to receive retrospective attendant care payments will be taxed at their current year's tax rate. This creates an unfair outcome for people who were intended to be captured under the proposed changes.

Comment

Officials agree that the proposed changes were intended to cover these payments and a drafting issue has meant these payments were not included in the Bill. Amendments should be made to the proposed changes to include backdated lump sum payments for attendant care.

Recommendation

That the submission be accepted.

Clause 57(1)

Issue: Impact of ACC and MSD lump sum payments on Working for Families Tax Credits

Submission

(Associate Professor Hanna Wilberg, Community Law Centres Aotearoa, Devika Dhir, Tax Justice Aotearoa)

Submitters note that under the proposed amendments, when a person receives their backdated lump sum payment, the payment will be included in the person's family scheme income, which is used to calculate the Working for Families (WFF) entitlement.

In the year when the person receives their backdated lump sum payment, their entitlement for WFF tax credits may subsequently decrease, which submitters perceive as an unfair outcome. The recipient may also experience WFF-related clawbacks as a result of the receipt of their backdated lump sum payment.

Comment

Backdated payments are considered family scheme income for WFF and other social policy obligations (including student loans). The effect on a person's current year entitlement is the flow on consequence of receiving a lump sum.

These obligations usually depend on how much cash a person has available, not what their taxable income is, and if a person receives a lump sum there is an expectation that the cash can be used to meet or repay those obligations.

In terms of social policy obligations and WFF, the receipt of a lump sum generally means that someone who has previously received too much WFF should repay some of that overpayment. This is on the basis that if the person had received the lump sum over the period when it should have been paid, they would have received less WFF. An exception to

this general rule is those who are receiving a full WFF entitlement, and the amounts received would not have reduced this.

Income support, however, looks at all the resources a person has available, and when someone receives a lump sum payment, they then have resources available to meet those obligations.

Recommendation

That the submission be declined.

Clause 57(1)

Issue: Backdated lump sum payments of foreign social security pensions

Submission

(International Tax Specialists New Zealand Ltd)

The submitter proposed that the scope of the policy be amended to include backdated lump sum foreign social security pensions received by New Zealand tax residents who are also in receipt of New Zealand superannuation.

When the recipients receive their backdated lump sum social security payments, it is deducted from their future New Zealand superannuation payments.

Comment

Officials do not believe that backdated lump sum payments of foreign social security pensions meet the criteria of the policy. It is considered that these lump sum payments arise due to a "fault" by the foreign government and not the New Zealand Government. This policy aims at addressing unfair tax treatment that arose because of a backdated lump sum payment that was made due to an error of the New Zealand Government.

Even if these payments fell within the criteria of the policy, the definition of these payments could also be problematic because they are not facilitated by the New Zealand Government and are paid by multiple different overseas governments. It would be complex to set out a definition that captures the intended payments.

Recommendation

That the submission be declined.

Clause 57(1)

Issue: Extend proposals to apply to redundancy payments

Submission

(Baucher Consulting Ltd)

The submitter proposed that the amendments be extended to apply to redundancy payments.

Comment

While redundancy payments may be seen to be related to previous years, the person is only entitled to the payment once they are made redundant, which occurs in the year of receipt of the payment. Although a redundancy payment is calculated with reference to the person's earnings in prior periods, this is just a basis of calculation and the payment itself does not relate to those prior years.

Officials consider that redundancy payments should not be included in the proposed changes because they are paid pursuant to provisions set out in an employment contract and do not relate to an entitlement that should have been paid in previous years.

Recommendation

That the submission be declined.

Clause 57(1)

Issue: Including the amount of the lump sum in the tax rate calculation

Submission

(Chartered Accountants Australia and New Zealand)

It was proposed that the formula used to calculate the lump sum recipient's average tax rate be revised so that it takes the amount of the backdated lump sum payment into account when calculating the tax rate to apply to the backdated lump sum payment because the current proposed calculation may result in under-taxation.

Comment

The policy has been designed to tax a backdated lump sum payment at the person's usual tax rate (or an approximation of that). Including the backdated lump sum payment in that

calculation would result in a higher rate that could push the recipient into a higher than usual tax bracket, which could result in unfair outcomes.

While the proposal could result in the under-taxation of the backdated lump sum payment in some cases, we consider these to be limited given the way the average tax rate is proposed to be calculated.

Recommendation

That the submission be declined.

Clause 57(1)

Issue: Support for information sharing provision

Submission

(Chartered Accountants Australia and New Zealand)

The submitter notes support for the proposed policy that will allow existing information sharing provisions to be utilised when a request for a recipient's tax rate is made to calculate the applicable tax rate for the backdated lump sum payment.

Recommendation

That the submission be noted.

Issue: Education campaign in MyIR

Submission

(Chartered Accountants Australia and New Zealand)

The submitter recommends that Inland Revenue undertake an education campaign in MyIR that shows taxpayers how the proposed changes work, including the calculation of the tax rate for a recipient's backdated lump sum payment.

Comment

The technical details of how the proposal will be implemented within Inland Revenue's systems is still being worked through. However, any calculations or adjustments will be clear in a recipient's MyIR account.

The proposed change will also be supported by guidance on Inland Revenue's website and through our usual channels such as the Tax Information Bulletin.

Recommendation

That the submission be noted.

Clause 57(1)

Issue: Tax on the lump sum payment should be a final tax

Submission

(Chartered Accountants Australia and New Zealand)

The submitter notes that the proposed rules do not consider cases where the information provided to Inland Revenue by a backdated lump sum recipient is not correct. This could result in a situation where a recipient may be under-taxed on their lump sum payment and have a tax liability with Inland Revenue. The submitter proposes that the tax deducted by ACC, as determined by the tax rate calculated by Inland Revenue, should be a final tax except when ACC has deducted too much tax on a backdated lump sum payment.

Comment

Inland Revenue provides ACC with a withholding tax rate based on the recipient's average tax rate, so officials consider that in most cases there should be no, or minimal, square up for most recipients. However, where Inland Revenue does not have full information for prior years or the person has a significant change in circumstances in the year of receipt, there may still be under- or over-taxation that will result in a square up at year end.

There is no way to determine the correct tax rate that the payment will be ultimately subject to because Inland Revenue may not have full information, particularly for the year of receipt of the backdated lump sum payment.

However, by using an average rate, officials consider the number of cases resulting in under- or over-taxation will be small. These will generally be restricted to cases where a significant change in circumstances for the person has occurred or where Inland Revenue does not hold full information for the prior four years and there is a missing outlier year.

We consider that using the withholding rate as a final tax will, in most cases, work out correctly. In limited outlier cases it may result in under- or over-taxation and a wash-up calculation will address this without creating issues for the majority of recipients given the calculation will be automatically done by Inland Revenue as part of the annual tax assessment process.

Recommendation

That the submission be declined.

Issue: Backdated MSD entitlements

Submission

(Chartered Accountants Australia and New Zealand)

The submitter notes that they have previously commented about this issue with the Welfare Expert Advisory Group and support the proposed alternative tax rate for backdated MSD entitlements.

Recommendation

That the submission be noted.

Issue: Definition of main benefit

Submission

(Chartered Accountants Australia and New Zealand)

The submitter notes the proposal of using the definition of “main benefit” as it is defined in schedule 2 of the Social Security Act 2018.

Recommendation

That the submission be noted.

Issue: Guidance on the implication for tax return data points

Submission

(Digital Service Providers Australia New Zealand)

The submitter notes that when proposed changes are likely to directly impact the tax return data points of potentially impacted individuals, the Bill commentary should address how the proposed changes will be implemented in Inland Revenue systems.

Comment

Although the guidance on how the proposed changes will be implemented was not included in the Bill commentary, Inland Revenue operational teams will engage with digital services providers if changes are made that are likely to impact the providers.

Recommendation

That the submission be noted.

Clause 57(1)

Issue: Extend proposals to cover certain other payments

Submission

(KPMG)

The submitter notes that a similar situation can occur with other lump sum payments. Due to non-compliance with the Holidays Act 2003, a lump sum payment that can relate to multiple tax years may arise. This issue can affect both the public and private sector.

The submitter states that the payments that have arisen from employers' issues with the Holidays Act 2003 are mostly due to the complexity of applying the Act in current payroll environments. The recipient of the lump sum payment may experience over-taxation on receipt of the lump sum payment and should therefore be able to apply the same calculation that is proposed for ACC backdated lump sum payments.

The submitter also notes that the proposed changes should be extended to any other lump sum payments that relate to two or more years and relates to a specified event.

Comment

Although there may be many people who are likely to receive lump sum payments due to their employer's non-compliance with the Holidays Act 2003, discussions officials have had with a number of large public sector employees indicates that the average amount paid out is not likely to have a significant impact on the tax liability of the recipient.

Inland Revenue has also not experienced a large number of complaints relating to these types of payments pushing recipients on to a higher tax rate. While officials recognise this could occur at the margins and for outlier cases, we have not seen evidence that this is a widespread issue.

Recommendation

That the submission be declined.

Clause 57(1)

Issue: Consideration of other lump sum payments

Submission

(Office of the Ombudsman, OliverShaw Ltd)

Submitters noted that other backdated lump sum payments that might fall within scope of this policy should be considered by the Select Committee or as part of the tax policy work programme.

Recommendation

That the submission be noted.

Clause 57(1)

Issue: There should be no time limit on ACC backdated lump sum payments

Submission

(David Reddell)

The submitter notes that there should not be a maximum period of four years for the proposed tax treatment to apply to a backdated lump sum payment because these payments differ in the length of time they address due to each individual's unique circumstances.

The submitter also notes that applying a 10.5%, or higher, tax rate to ACC backdated lump sum payments is not fair because the recipient has already paid PAYE on the payments in prior years.

Comment

The policy does not limit the period of the backdated lump sum payment so that only a portion of the lump sum is treated with the new proposed tax treatment. The entire payment will be subject to the new rules no matter what period the payment relates to. The four-year period is only used to calculate a person's average tax rate to apply to the payment.

The average tax rate is calculated based on the recipient's previous four income years. The higher of the calculated average tax rate or 10.5% is then withheld against the entire lump sum amount.

Tax is withheld from the payment by ACC, and this will be squared up at the end of the year. The payment is not taxed twice.

Recommendation

That the submission be noted.

Issue: Suggested changes to non-Inland Revenue Acts

Submission

(David Reddell)

The submitter notes that communication between Crown entities regarding ACC backdated lump sum payments should be improved because the current state can cause unfair outcomes for lump sum recipients, which does not adhere to the meaning of the Acts.

The submitter suggested changes to the way that ACC backdated lump sum payments are treated when a product administered by MSD is also involved.

Comment

These issues raised are not within the scope of this Bill because they raise issues that are not within the purview of the Income Tax Act 2007.

Recommendation

That the submission be noted.

TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX, AND REMEDIAL MATTERS) BILL

Other policy items

PAYMENT OF KIWISAVER CONTRIBUTIONS TO PPL RECIPIENTS

Clause 85

Issue: Support for the proposal

Submission

(Chartered Accountants Australia and New Zealand, EY, KPMG, New Zealand Council of Trade Unions, Tax Justice Aotearoa)

- The proposed change will help to address the issue that women on average reach retirement age with significantly lower KiwiSaver balances than men. (New Zealand Council of Trade Unions)
- The payment of an employer KiwiSaver contribution to eligible paid parental leave (PPL) recipients by the government is a small but positive step towards helping improve the retirement savings of women, which on average are 20% lower than men. *(Chartered Accountants Australia and New Zealand)*
- There is a need to address the gender inequity in KiwiSaver balances. The proposed government contribution provides an additional incentive for employees to make KiwiSaver contributions while on PPL beyond the existing incentive of saving for retirement. (EY)
- Support for the proposal because breaks in superannuation payments during parental leave contribute to women having lower levels of retirement savings than men. *(Tax Justice Aotearoa)*

Recommendation

That the submissions be noted.

Issue: KiwiSaver member must contribute to receive proposed government contribution

Submission

(EY, New Zealand Council of Trade Unions, Tax Justice Aotearoa, University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)

- The lack of incentive may not be the primary factor in caregivers pausing KiwiSaver contributions while receiving PPL payments, but rather unaffordability. Caregivers with
-

lower amounts of income may be unable to sacrifice 3% of their PPL payments to access the proposed matching government contribution, meaning the policy has the potential to be regressive. The government contribution should apply regardless of whether the PPL recipient also contributes 3% of their PPL payments to their KiwiSaver accounts. (EY)

- The efficacy of this proposal is somewhat undermined by the fact that the government payment is conditional on the recipient also paying 3% into their KiwiSaver account over the PPL period. This is expected to limit the reach of the proposed change because some people on PPL have to suspend their KiwiSaver contributions due to material hardship. This conditionality should be removed so that all recipients of PPL are eligible to receive the 3% government contribution regardless of whether they are also contributing during their time on PPL. (New Zealand Council of Trade Unions)
- The benefit of this proposal will disproportionately accrue to higher income households who are able to afford KiwiSaver contributions while on PPL, while doing little about the fundamental problems of the majority of women who take time out to look after children. (University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)
- The proposal will have both limited application and increase the gap between people in different financial situations. (Tax Justice Aotearoa)

Comment

While the benefit of the proposal will accrue to those who are financially able to contribute to their KiwiSaver accounts, the “coupling” (or conditionality) of employer and employee KiwiSaver contributions is a long-standing feature of KiwiSaver that has been present since the scheme’s inception. Accordingly, given constraints of time, officials recommended design choices that would align with existing KiwiSaver settings.

Recommendation

That the submissions be declined.

Issue: New Zealand’s PPL provisions should be reconsidered

Submission

(New Zealand Council of Trade Unions, Tania A, Tax Justice Aotearoa, University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)

- The policy reinforces the advantages of paid work over the value of caregiving because only those with a paid work connection will qualify for the state funded top-up, or PPL itself. (University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)

- There needs to be a fuller debate about effective KiwiSaver policies to make a real difference for women. Acknowledgement of unpaid caregiving requires substantial policy debate. (University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)
- Women would be assisted in a more meaningful way if the employer contribution was mandatory for all KiwiSaver members, regardless of whether they are on a suspensions holiday. The tax Bill should revisit the current proposal. (University of Auckland Economic Policy Centre – Pensions and Intergenerational Equity)
- There needs to be a fundamental rethink of how PPL is done in this country. New Zealand’s PPL provisions are weak compared to many other wealthy countries. In particular:
 - The number of weeks of PPL should be significantly increased, as should the weekly payment maximum (which is currently set well below the minimum wage).
 - Setting PPL rates at the living wage would ensure a more appropriate level of support and help to alleviate the financial burden of parenthood and the wage scarring that disproportionately affects women. (*New Zealand Council of Trade Unions*)
- PPL should be increased to a higher and more realistically liveable rate, such as the living wage. (Tax Justice Aotearoa)
- Analysis should be requested into whether these payments should be available to a wider range of people than those who take parental leave (for example, those who may need to stop paid work to look after dependants, those who are on unpaid parental leave and other people who may be unable to continue their KiwiSaver contributions. (Tax Justice Aotearoa)
- The proposal should also be applied to those who receive ACC weekly workers’ compensation who can’t be employed due to lifelong disabilities. (*Tania A*)

Comment

Officials note submitters’ comments on the possibility of expanding the scope of the proposal and redesigning existing PPL settings. However, any additional policy changes would need to be commissioned and resourced across the responsible agencies by the government.

Recommendation

That the submissions be declined.

TAXATION ROLLOVER RELIEF

Clauses 18B, 21B, 23 and 27

Issue: Support for proposal

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Federated Farmers, Jim Gordon Tax Ltd, PwC, Taxpayers' Union)

The submitters support the proposal to provide the option of taxation rollover relief when an insurance pay-out on North Island flood damaged property results in either profits arising on revenue account property or depreciation clawback on depreciable property. *(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Federated Farmers, PwC)*

Support for the proposal, subject to suggested amendments. *(Jim Gordon Tax Ltd)*

Recommendation

That the support be noted.

Issue: Proposal should be made generic

Submission

(Federated Farmers, Jim Gordon Tax Ltd)

This proposal should be made generic, rather than event driven, when there are insurance claims based on replacement cost rather than indemnity value.

Comment

Taxation rollover relief involves special treatment because any gains on disposal are carried forward to the replacement asset. While we do not generally recommend using the tax system to incentivise behaviour, in this case to rebuild/replace the asset, we acknowledge that the scale of major natural events can warrant this special treatment. As with the Canterbury and Hurunui-Kaikoura earthquakes, the flood events were unexpected, and the rollover relief is intended to simply put the business back into a similar tax position as if the events had not occurred.

Officials acknowledge that there seems to be an increasing number of serious weather-related and other emergency events. This has led to calls for a more streamlined process for handling the tax response rather than through specific legislation for each event. Currently,

reliance is placed on there being either a tax Bill already in the House or due to be introduced and enacted over the coming year.

There may also be a wider policy question, as noted in the submission, about whether rollover treatment should be applied more widely when there are insurance pay-outs, not just in specific event situations. Officials have noted on previous occasions that if it was undesirable for the Government to receive tax from depreciation recovered on assets destroyed by wide-scale events such as earthquakes, it could be worth considering why the law currently provides for such gains to be taxed on isolated events, such as a factory fire.

The feasibility of considering these issues would need to be assessed against other priorities on the Tax and Social Policy Work Programme. If there is scope, focus would initially be on streamlining the legislative process for the tax measures needed in the immediate response period to an emergency weather event. For example, a certain level of employer provided ex-gratia payments and fringe benefits could be made exempt from income tax through an Order in Council rather than having to await the passage of a tax Bill.

Recommendation

That the submission be declined.

Issue: Widen proposal to accommodate buy-outs by central and local government

Submission

(Federated Farmers, Jim Gordon Tax Ltd)

The proposal needs to be widened to accommodate buy-outs by local or central government.

Comment

Since the draft legislation was introduced in May, the Government has announced funding to assist local governments in their purchase of certain flood and cyclone affected residential properties. Most of these properties will have a category 3 rating, which means that it is ultimately unsafe to re-occupy them even with repairs.

The legislation is currently focused on revenue gains or depreciation recovery income arising from an insurance pay-out. An insurance pay-out does not result in a disposal for tax purposes, but the outcome is comparable. A local government or Crown buy-out will result in a disposal and, therefore, the taxation rollover provisions need to also apply to gains or depreciation recovery income arising from a buy-out. This situation would be most relevant

for owners of rented residential property that has been seriously affected by the flood and cyclone events covered by the buy-outs.

Recommendation

That the submission be accepted.

Issue: Turn off bright-line and other timing tests

Submission

(Chartered Accountants Australia New Zealand, Federated Farmers, Jim Gordon Ltd)

The 5- and 10-year bright-line tests need to be turned off for buy-outs by local or central government.

Comment

Officials agree with the submission. Although most residential property owners will be excluded from the application of these tests by the main home exclusion, it is possible that they could apply to owners of residential rental property if it had not been owned for the relevant minimum period. The Government has, therefore, introduced amendments to turn off the bright-line tests and other similar land-based timing tests for buy-out situations relating to the Auckland floods and Cyclone Gabrielle, through Supplementary Order Paper No 423 introduced on 6 September 2023.

Recommendation

That the submission be accepted, and that it be noted that this issue has been addressed by Supplementary Order Paper No 423.

Issue: Extend rollover relief to land improvements

Submission

(PwC)

The taxation rollover relief proposal should be extended to cover land improvements covered by sections DO 4 and DO 5 of the Income Tax Act 2007 (land improvements, trees and vines) because taxpayers may receive insurance proceeds that cover these destroyed assets.

Comment

Officials agree with the submission.

Section DO 4 covers a range of land improvements, including support frames for crops, access roads and tracks, dams, stop-banks and vineyard vines. Section DO 5 covers horticultural plants such as apple trees. In both cases, expenditure on such assets is amortised over their respective expected lives, in a similar way that other assets are depreciated.

There may be cases where the taxpayer receives an insurance pay-out for a land improvement covered by either section. If the insurance pay-out exceeds the residual tax value of the assets, then the equivalent of depreciation recovery income arises to the extent that an expenditure deduction has been previously claimed for the asset. Although it is not intended that an amortised asset should be subject to the equivalent of depreciation clawback, and that is the case if the asset is disposed of, clawback can arise when an insurance pay-out is received.

Given the unexpected nature of the income, it should at least be subject to deferral through the rollover relief option, as suggested by the submitter, provided the asset is replaced.

Recommendation

That the submission be accepted.

Issue: Add June 2023 East Coast floods to events covered by rollover relief

Submission

(Federated Farmers, Jim Gordon Ltd)

The East Coast floods in late June should also be incorporated in the events covered by the proposed rollover relief because the combined effects of the events exacerbated the damage. Such events may be covered by the current definition in the Bill but the submitters would prefer it to be put beyond doubt through an amendment. Alternatively, they would accept an officials' statement in their advice to the Committee.

Comment

Officials do not consider that it is necessary to add the June 2023 East Coast flood events to the list of eligible events. However, officials are willing to provide a statement that the events are covered by the current definition. The proposed definition in the Bill is:

North Island flooding events—

(a) means flooding and other damage that occurred in an affected area caused by any of the following weather events:

(i) Cyclone Hale, which crossed the North Island of New Zealand during the period commencing on 8 January 2023 and ending on 12 January 2023:

(ii) heavy rainfall commencing on 26 January 2023 and ending on 3 February 2023 in the Northland, Auckland, Waikato, and Bay of Plenty regions:

(iii) Cyclone Gabrielle, which crossed the North Island of New Zealand during the period commencing on 12 February 2023 and ending on 16 February 2023; and

(b) includes circumstances where damage caused by any of the events listed in paragraph (a) is exacerbated by a subsequent weather event.

Paragraph (b) is intended to provide for situations such as the June 2023 events, which exacerbate the damage from the earlier events.

Recommendation

That the submission and officials' statement be noted.

Issue: Add Nelson flood event buy-outs

Submission

(Matter raised by officials)

The Nelson floods should be added to the list of events covered by the turning off of the bright-line and other timing tests.

Comment

Since Supplementary Order Paper No 423 was prepared, the Government has announced a support package to help towards funding the Nelson City Council's buy-out of properties impacted by the floods of August 2022. We understand this will involve 14 properties. Given the possibility that some of these residential properties may be rented rather than owner-occupied (and therefore covered by the main home exclusion), the bright-line or other timing tests could apply in such cases. The proposed provision turning off the tests for buy-outs of North Island flood affected properties should, therefore, be extended to include the Nelson event.

Recommendation

That the submission be accepted.

Issue: CA ANZ support for other proposals

Submission

(Chartered Accountants Australia and New Zealand)

- a. Supports proposal on assets uneconomic to repair.
- b. Supports proposal to cap depreciation recovery income on repairable assets.
- c. Supports proposal to allow depreciation on assets where access is temporarily restricted.
- d. Supports optional timing rules for when to recognise income and deductions relating to both flood or cyclone damaged assets. This helps to reduce compliance costs.
- e. Supports the thin capitalisation proposal, but likely to be rarely used.
- f. Supports the definitions of "affected area" and "North Island flooding events".

Comment

- a. Proposed section EZ 83 will ensure that owners of assets that are uneconomic to repair can also elect to use rollover relief for such assets, putting them on par with assets that have been destroyed.
- b. Proposed section EZ 84 caps the amount of depreciation recovery income on a flood or cyclone damaged asset at the lesser of the amount of depreciation recovery income or the total amount of depreciation loss.
- c. Proposed section EZ 85 allows deductions for expenditure on assets when access to the asset is temporarily restricted. An example would be when the property has been red stickered, and machinery in the business premises cannot, therefore, be used to generate income.
- d. Proposed sections EZ 86 and EZ 87 provide optional alternative timing rules on when repair/replacement expenditure is incurred, and insurance income is received. These rules are designed to provide additional flexibility, in line with accounting practice.
- e. Proposed section FZ 7B provides the option of early recognition of insurance receipts for thin capitalisation purposes. Including the receipts in thin capitalisation calculations in effect replicates the asset position in the absence of the emergency event, so that interest deductions are not impacted.
- f. Clause 59(3) and (13) proposes to amend section YA 1 to ensure that the events and areas affected are consistent with other recovery legislation, including the Severe Weather Emergency Recovery Legislation Act 2023.

Recommendation

That the submission be noted.

Issue: Recognising expenditure deductions for suspended activities

Submission

(Chartered Accountants Australia and New Zealand)

Proposed section EZ 85, relating to expenditure deductions when an income earning activity is temporarily suspended, should be modified to allow deductions in the year the expenditure is incurred rather than when the activity is resumed.

Comment

The purpose of proposed section EZ 85 is to ensure that expenditure incurred when an income earning activity is suspended because of a North Island flooding event, can nevertheless be deducted. The deduction is timed for the year of activity resumption to avoid situations when deductions are taken but no income earning activity resumes because the business is ultimately considered unviable. That possibility may be less relevant if the business has other premises, such as orchards in various locations, from which it can operate in the meantime. Overall, however, officials consider that allocating the deductions to the year of resumed activity remains appropriate.

Recommendation

That the submission be declined.

Issue: Rollover relief election process must be electronic and as simple as possible

Submission

(Chartered Accountants Australia and New Zealand)

The rollover relief election process must be electronic and as simple as possible. It needs to be a simpler process than for the Canterbury earthquakes. This includes providing information only on a request basis.

Comment

Proposed sections CZ 25C and EZ 23BE outline the notice requirements for a taxpayer who elects rollover relief. These have been modelled on the requirements that applied for previous emergency events.

For example, proposed section EZ 23BE requires the taxpayer to give notice to the Commissioner of Inland Revenue specifying the affected property and linking each item of replacement property with an affected class of depreciable property. This notice must be given when the income tax return is filed for the income year in which the insurance pay-out can be reasonably estimated. Notice must also be given in each subsequent year in which the depreciation recovery income is suspended, and an update provided on the rebuild/replacement. This level of detail is required because of the different types of depreciable assets and the need to link the replacement asset with the same class. It also ensures that the taxpayer turns their mind to the issue annually, including whether they are still intending to replace the asset.

While we consider that it is still necessary to require notification of an election and to provide annual information to ensure parties turn their minds to the issue annually, we want to ensure that this process is as streamlined as possible. We agree with the submission that the notification information should be able to be provided electronically. That option was not readily available for the Canterbury earthquakes but is available for the current events. MyIR enables documents to be sent electronically as secure webmail and with any required attachment.

Recommendation

That the submission be declined.

Issue: Recognising late rollover elections

Submission

(Chartered Accountants Australia and New Zealand)

The Commissioner of Inland Revenue should have a wider discretion to accept a late election than just "exceptional circumstances".

Comment

Acceptance of late elections was an issue for the Canterbury earthquakes given the lack of flexibility around the Commissioner being able to accept such elections when they were received after the required cut-off date. The cut-off date for an election is the date for filing the relevant income tax return.

To address this concern, the relevant proposed provisions in the Bill provide flexibility through the Commissioner having the power to accept late elections in exceptional circumstances. This discretion is intended to cover situations beyond the control of the taxpayer or their agent, such as an election being delayed because the taxpayer's agent posted it.

There is a need to balance limiting the breadth of the discretion against creating too much uncertainty because the discretion is open-ended. Relatively open-ended discretions were provided in previous tax Acts but many were removed as part of the rewrite process because of the uncertainty and inconsistency that they could create. Overall, officials consider that "exceptional circumstances" is sufficient to accommodate most unusual situations likely to arise.

Recommendation

That the submission be declined.

Issue: Remove requirement to assess asset as uneconomic to repair

Submission

(PwC)

Proposed section EZ 83 applies to assets that are uneconomic to repair, as assessed by the payer of the insurance or compensation, or another qualified assessor. We recommend that consideration be given to removing the requirement for the payer of insurance or qualified assessor to assess the item as uneconomic to repair. The parties are more inclined to reach a practical settlement where a claim is significant.

Comment

During discussions with key stakeholder groups on the proposed provisions, we received feedback that insurers were often reluctant to provide an assessment that an asset is uneconomic to repair, and that the legislation should, therefore, provide for alternative assessors. We took this advice on board and added the reference to "or another qualified assessor". Our view was that an independent assessment on this point was important because leaving taxpayers to simply make their own assessment of whether an asset is uneconomic to repair could lead to inconsistency and unintended tax deferral opportunities. The proposed provision would still enable the insurer and asset owner to reach a practical settlement.

Point of difference

The submitter's concern is that the asset owner may still not be able to find a person to provide such an assessment and would not, therefore, technically meet the requirements of the provision despite having an asset that was not economic to repair. On balance, while an assessment is important, we agree that requiring businesses to obtain an independent assessment could be a technical impediment and that the business itself can be relied on to make such an assessment. We, therefore, instead recommend that the provision refer to the item being reasonably assessed by the business as uneconomic to repair.

Recommendation

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

Issue: Assets available for use but inaccessible

Submission

(PwC)

Assets that are irreparably damaged and assets that are uneconomic to repair as a result of the North Island flooding event should be treated consistently. Further, we submit that taxpayers should be entitled to continue to depreciate both categories of assets following the event in line with the policy of preventing windfall gains to the Government.

Comment

The submission seems to be based on a misunderstanding that proposed section EZ 85 extends to irreparably damaged assets. Instead, the provision applies only to assets that would be available for use but for the access restriction, which would exclude assets that are irreparably damaged. More generally, however, the proposed amendments already endeavour to treat assets that are uneconomic to repair comparably to assets that are irreparably damaged for the purposes of the rollover rules.

Recommendation

That the submission be declined.

Issue: Amend general insurance provisions to exclude uneconomic to repair assets

Submission

(PwC)

We suggest that section EE 52 be amended to exclude assets that are uneconomic to repair.

Comment

Officials do not agree with the submission.

Section EE 52 applies to depreciation recovery income when compensation is received, but specifically excludes assets that have been irreparably damaged. If the amount of insurance or compensation exceeds the amount of expenditure that the person incurs on repairing the asset because of the event, then that excess is deducted from the adjusted tax value of the asset. If this results in a negative amount, then that amount is depreciation recovery income. This seems a reasonable approach because it recognises that the person has in effect received back part of the original purchase price of the asset.

Proposed section EZ 83 will override section EE 52, to ensure that owners of assets that are uneconomic to repair can also elect to use rollover relief for such assets, putting those assets on par with assets that are irreparably damaged. The submission suggests going further, by removing assets that are uneconomic to repair from the treatment in section EE 52 on an ongoing basis, not just for the North Island flooding events. The matter is out of scope of this Bill and would be more appropriately considered in any future general review of the insurance provisions.

Recommendation

That the submission be declined.

Issue: Apportionment of global insurance pay-out

Submission

(PwC)

We submit that the Bill should be updated to reflect the position that insurance proceeds received under a global insurance settlement should be apportioned across the relevant insured assets on a fair and reasonable basis.

Comment

Officials do not agree with the submission.

The tax legislation does not provide specific rules for all situations and reliance on accounting concepts is common in the absence of specific tax legislation. This means that although the tax legislation does provide apportionment rules for some situations, for others, reliance on apportionment on a fair and reasonable basis can be appropriate.

We do not consider that the legislation needs to be so prescriptive on this issue given the common practice outlined in the submission. There is no indication that taxpayers will be so uncertain as to what to do to justify additional legislation on this point.

Recommendation

That the submission be declined.

Issue: Thin capitalisation rule

Submission

(PwC)

Proposed section FZ 7B(4)(b) requires taxpayers to give notice to the Commissioner of Inland Revenue of the amount of income that would have arisen under the thin capitalisation rules in the absence of proposed section FZ 7B. We submit that paragraph (b) should be removed, for compliance cost reasons, and the Commissioner could instead request this information (under section FZ 7B(4)(d)) only where it is necessary.

Comment

Officials do not agree that paragraph (b) should be removed. The thin capitalisation rules restrict the amount of interest that a New Zealand company or branch controlled by a non-resident can deduct for New Zealand tax purposes, as part of ensuring a fair share of the company's income is taxed in New Zealand. A company could otherwise have excessive debt in order to transfer profits to an overseas parent.

Proposed section FZ 7B provides the option of early recognition of insurance receipts for thin capitalisation purposes. Including the receipts in thin capitalisation calculations in effect replicates the asset position in the absence of the emergency event, so that taxpayers are not restricted by the flooding events in the amount of interest that they can deduct. Paragraph (b) simply provides the Commissioner with some information on the income adjustment.

The section FZ 7B option is likely to be used by very few taxpayers, and they will be sizeable businesses. Requiring those taxpayers to provide information on the amount of additional

income that would otherwise have arisen in the absence of the election, does not seem onerous or compliance intensive because the companies would likely want to know that information for their own purposes. This information was required for the Canterbury earthquakes.

Point of difference

Rather than remove paragraph (b) as recommended by the submitter, officials suggest that the paragraph be modified to simply require a reasonable estimate of the income. This modification should address the submitter's concerns that a precise measurement of the income would be onerous in the circumstances.

Recommendation

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

Issue: Amend latest date for providing election for 2022–23 income year

Submission

(Matter raised by officials)

The latest date for providing Inland Revenue with a rollover election for the first income year (2022–23) should be amended to 30 April 2024.

Comment

If a taxpayer opts for taxation rollover relief in relation to income arising in the 2022–23 income year, they must provide notification of their election to the Commissioner of Inland Revenue by the later of 31 January 2024 and the date on which the return of income needs to be filed for that income year (31 March 2024 for taxpayers with tax agents).

The Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill may not be enacted before March 2024. Therefore, we recommend that the latest date for providing an election notification be amended to 30 April 2024 to provide taxpayers with more time to provide their notification after anticipated enactment.

Recommendation

That the submission be accepted.

Clause 26

Issue: Consultation with the Privacy Commissioner on the provision of personal information

Submission

(Office of the Clerk of the House of Representatives)

It is not clear whether the Privacy Commissioner or the Inland Revenue Privacy Officer were consulted on the information-requiring provisions in clause 26.

Comment

The Privacy Commissioner has a function to examine proposed legislation that “may affect the privacy of individuals” and which provides for the collection of personal information by a public sector agency. The Privacy Commissioner does not scrutinise every proposed piece of legislation just because it may include a component of information collection. When considering if a proposal may affect an individual’s privacy, they will consider the amount of personal information being collected, whether it’s proportionate and necessary, voluntary or mandatory, where or who that information is being collected from, and whether the collection is unreasonably intrusive.

The Bill contains a proposal that would enable businesses whose assets have been destroyed by the 2023 North Island floods/cyclones to elect to defer any income that arises from the destruction of those assets provided the assets are replaced. An example of such income is the recovery of excess depreciation when there is an insurance pay-out.

As part of monitoring such elections and ensuring taxpayers turn their minds to replacing the assets, annual information would need to be provided to the Commissioner of Inland Revenue, as set out in clause 26. The information-requiring power in clause 26 therefore relates to assets used in a business context and is voluntary. If the person wishes to receive rollover relief, then they need to provide a notice to the Commissioner describing the affected property and giving details about any replacement property. The effective administration of this proposal is dependent on this information being voluntarily provided by the taxpayer.

The personal information collected is minimal given that the purpose of the clause relates to property. Furthermore, Inland Revenue is already able to ask for this type of information from a taxpayer to verify their tax return under current law. It is also important to note that the information collected will be subject to the strict privacy provisions of the Inland Revenue Acts. Similar information requirements were included in provisions that provided for taxation rollover relief for businesses seriously impacted by the Canterbury and Hurunui-Kaikoura earthquakes.

For these reasons, we did not consider it necessary to consult the Privacy Commissioner. The Inland Revenue Privacy Officer agrees with the above comments.

Recommendation

That the submission be declined.

SCHEDULE 32 – OVERSEAS DONEE STATUS

Clause 64

Issue: Emergency Alliance donee status

Submission

(Emergency Alliance)

Emergency Alliance should be granted overseas donee status and added to clause 64 of the Bill, for insertion in schedule 32 of the Income Tax Act 2007.

Comment

Emergency Alliance has been created to provide a single fundraising platform for its eight members. Its members are all charities that themselves are listed in schedule 32.

Emergency Alliance is designed to improve efficiencies and remove cost duplication when raising funds to support donation drives to support international emergency responses. It can be viewed as a restructure in the way that Emergency Alliance's members would typically raise donations individually in response to international emergency events. Emergency Alliance's purposes are directed towards:

- providing for the relief of poverty, hunger, sickness or the ravages of war or natural disaster, and
- advancing humanitarian aid and development in developing countries.

The charity's purposes are consistent with Cabinet's approval criteria for granting overseas donee status. Being a restructure of existing arrangements, we recommend Emergency Alliance be included in clause 64 of the Bill. Since the charity made its submission, on 26 October 2023, it has started an urgent appeal in response to the escalating humanitarian crisis in Gaza. We recommend the change apply from the same date, 26 October 2023, and have application to donations received on and after that date.

We have applied the same due diligence work to Emergency Alliance as has been applied to the other additions to schedule 32 set out in clause 64 of the Bill.

Recommendation

That the submission be accepted.

EXEMPTION FOR NON-RESIDENT OIL RIG AND SEISMIC VESSEL OPERATORS

Clause 16

Issue: Support for extending the exemption

Submission

(Corporate Taxpayers Group)

The submitter is supportive of the amendment to extend the temporary exemption for non-resident offshore oil rig and seismic vessel operators to 31 December 2029.

Recommendation

That the submission be noted.

Issue: Benefits for New Zealand economy and revenue take

Submission

(Chartered Accountants Australia and New Zealand)

The submitter notes the proposal. Extending the exemption should lessen the possibility of offshore non-resident drilling rigs leaving New Zealand before completing exploration work. A significant discovery, and consequential oil and gas production, has the potential to increase economic development activity, and tax and royalty revenue.

Recommendation

That the submission be noted.

Issue: Opposition to extending the temporary exemption

Submission

(Tax Justice Aotearoa)

The submitter does not support providing this exemption for non-resident offshore oil rig operators. Oil exploration is in the process of being phased out. While there may be an expectation that the tax exemption will be in place for a while yet, the submitter sees no justification for this. The exemption should be removed from the Bill.

Comment

The tax exemption was introduced in 2004 to address an issue created by New Zealand's Double Tax Agreements. The agreements provide that operators are only taxable in New Zealand if they are present for at least 183 days. Before the exemption was introduced, rigs and seismic vessels would leave New Zealand waters before the 183-day threshold was reached to avoid being subject to New Zealand tax. This is referred to as churn. If required, another rig or seismic vessel would be mobilised to complete the production or exploration programme.

The normal tax rules reduce the tax revenue base because rigs and seismic vessels will churn in and out of New Zealand waters, and the increased costs from churning are deductible to New Zealand petroleum miners. The reduced exploration and production resulting from churn may also lead to lower company taxes, petroleum royalties and other taxes being paid over time. The exemption removes the incentive for rigs and seismic vessels to churn.

While New Zealand is attempting to transition from fossil fuels, and will not issue new offshore petroleum exploration permits, there continues to be an offshore petroleum industry and that industry, while it exists, will always be reliant on non-resident rigs and seismic vessels. New Zealand does not have a policy to actively disincentivise, or prevent, petroleum production and even if it was to do so in the future, there would be more efficient measures to achieve this than a policy that inadvertently encourages churn.

Recommendation

That the submission be declined.

TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX, AND REMEDIAL MATTERS) BILL

Other items

CORRECTING EXTRA PAY INACCURACY ON TERMINATION

Clause 56

Issue: Request for additional amendments

Submission

(Digital Service Providers Australia New Zealand)

While the amendment will benefit payroll software providers in more accurately taxing extra pay, some changes should be made to better clarify the intent of the legislation and account for situations where there are not two prior paid pay periods available, or changes to a pay frequency. In particular:

- a. Reference to "paid" pay periods:
 - o The term "paid" should be included within section RD 17(1)(b) of the Income Tax Act 2007 to better align the intent of the legislation with how extra pay should be taxed in practice. For example, this section could be changed to "the annualised value of the PAYE income payments for the last two paid pay periods before the one containing the extra pay".
 - o The following definition should be used for "pay period": "*A regularly recurring period of time for which an employee is paid*". Inland Revenue should consult with payroll software providers on the definition used in the legislation.
- b. Situations where there are not two prior paid pay periods available:
 - o The Bill does not include information on how employers should treat situations where there are not two paid pay periods prior to the pay that contains the extra pay, or where there has been a change in the pay frequency (eg, if an employee has received a sign-on bonus).
 - o The following should be included in the legislation or guidance material: "*Where there are no prior paid pay periods before the one which contains the extra pay, the annualised earnings can be calculated by annualising the current pay period earnings*".
 - o Inland Revenue should also provide examples in its guidance where there are not two paid pay periods available.

Comment

Following further conversations with payroll providers in September 2023 (see further at [Issue: Proposal may not reduce inaccurate taxation](#) below):

- a. Reference to “paid” pay periods:

Officials note that section YA 1 of the Income Tax Act 2007 defines pay period as “for an employee receiving regular payments of salary or wages, means the period for which any such payment is payable”. In officials’ view this, coupled with a requirement to “look back” to prior pay periods, effectively excludes any pay periods for which payment is not owed to an employee. Accordingly, we do not think further legislative amendment is required, but agree that guidance on this issue would be helpful.

- b. Situations where there are not two prior paid pay periods available:

Officials agree this matter should be addressed through guidance (if the proposal should be enacted). Officials intend to continue to work with payroll providers to ensure that an appropriate solution is provided for these.

Point of difference

The absence of prior pay periods is an existing problem. However, creating a specific rule within the legislation is likely to create unwarranted complexity within payroll software.

Recommendation

- a. That the submission be declined.
- b. That the submission be accepted, subject to officials’ comments.

Issue: Application date should be extended

Submission

(Corporate Taxpayers Group, Deloitte)

- The application date of 1 April 2024 should be pushed back to 1 April 2025 because the current year is an election year, and the Bill is unlikely to be enacted until early 2024. This does not provide sufficient certainty and time for payroll service providers to make the required changes to their systems once the legislation is enacted. *(Corporate Taxpayers Group)*
- If this amendment is to proceed, the application date of 1 April 2024 would seem to leave an inadequate period of time for software providers to update systems for the new calculation methodology and limited time to educate the many employers who prepare their own PAYE calculations. *(Deloitte)*

Comment

Following a further discussion with payroll providers in September 2023 (see [Issue: Proposal may not reduce inaccurate taxation](#) below), officials agree that allowing additional time for the payroll providers to develop the proposed new rule would be appropriate given the current time constraints.

Accordingly, officials recommend that application of the new rule be extended until the 2026 tax year (ie, 1 April 2025–31 March 2026).

Recommendation

That the submission be accepted.

Issue: Proposal may not reduce inaccurate taxation

Submission

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

- It is not clear that the proposal will help reduce the inaccurate taxation of extra pays received when employment is terminated. Determining the correct PAYE rate is difficult and a person's tax liability for the year is determined by a number of factors (such as the amount of salary or wages paid by the new employer, whether the person starts a new job immediately or takes a break, whether the person is retiring, etc). *(Chartered Accountants Australia and New Zealand)*
- Although the change is intended to make the taxation of extra pay on termination more accurate, this change does not fully address any inaccuracy. It is not clear this change is necessary given the systems changes that will be required, along with their associated costs. *(Corporate Taxpayers Group)*
- The proposed change will only replace one inaccuracy with another, making it doubtful that this change will result in more accurate tax returns. There is likely to be widespread confusion and errors in calculating extra pay tax rates. This change is not limited to extra pays following the termination of employment, but all extra pays (eg, bonuses, gratuities, profit shares, etc). *(Deloitte)*
- Although this may be more accurate in some situations, there are others where this will be inaccurate. For example, when a person is on parental leave and receives a bonus but will continue to be on extended leave. In this situation, the person will be taxed based on the last two paid pay periods, which will be before they were on paid parental leave (PPL), which is unfair. *(Deloitte)*

Comment

Officials held a further discussion with payroll software providers (the Providers) in early September 2023. During this conversation, the Providers affirmed that the taxation of extra pay arising on the termination of employment creates challenges for both employers and providers. Additionally, the Providers:

- Agreed that the proposed solution would likely be more accurate in the taxation of extra pay on termination than the existing rule (which focuses on amounts received over the preceding, arbitrary four-week period).
- Noted that applying the proposed solution to all extra pay could create temporary over-taxation in some situations that presently undergo temporary under-taxation but also acknowledged that the tax treatment of such amounts will vary and be heavily fact dependent.

An example is the situation given by Deloitte (above), where a bonus is paid while a person is on PPL. The tax treatment would depend on when the bonus is received in relation to the point at which the person ceases working and embarks on PPL. For instance:

- Where the person is paid fortnightly and the bonus is received at exactly the point the person embarks on PPL, then the result under the proposed and current rules is likely to be essentially the same.
- However, at the other end of the spectrum, where the person has received only PPL payments in the last four weeks, the application of the current rules is likely to result in the bonus being taxed at 10.5%, which (unless the person's top marginal tax rate is 10.5%) is likely to result in temporary under-taxation, until Inland Revenue provides them with a bill for the amount owing at the end of the current tax year as part of the annual square up. Conversely, the result under the proposed rules could produce temporary over-taxation until the taxpayer receives a refund as part of the annual square up at the end of the tax year.

Point of difference

Because the proposed change is intended to address the inaccurate taxation of extra pay upon termination of employment, officials recommend that the proposal be applied as a "special rule" to the specific situation of termination of employment, with the current rules to remain in force for other instances of extra pay until solutions are developed that improve accuracy in those cases, too.

This means the application of the proposal would be confined to the specific situation where extra pay arises on termination of employment, with the current rules remaining in force for all other situations where extra pay arises.

Recommendation

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

ALLOWING DEATH INFORMATION TO BE SHARED WITH KIWISAVER SCHEME PROVIDERS

Clause 86

Issue: Support for the proposal

Submission

(Chartered Accountants Australia and New Zealand)

The proposal is sensible, because currently a KiwiSaver provider may be unaware of a member's death and the account can become dormant. Alternatively, executors or administrators may not know the KiwiSaver account exists. The sharing of information will allow KiwiSaver providers to contact executors or administrators of the deceased member's estate and arrange for the account balance to be paid to the estate.

Recommendation

That the submission be noted.

Clause 86

Issue: Consultation with Privacy Commissioner on provision of personal information

Submission

(Office of the Clerk of the House of Representatives)

The Committee should ask officials why the Privacy Commissioner was not consulted on clause 86 of the Bill, which allows the sharing of death information with KiwiSaver providers.

Comment

The Bill proposes allowing the Commissioner of Inland Revenue to communicate information about deceased KiwiSaver members' estates to KiwiSaver providers so the providers can contact the executors of the deceased member's estate. This is intended to help with the distribution of assets from the deceased member's estate to their intended recipients.

Generally speaking, the Privacy Act 2020 does not apply to deceased people because the Act protects the rights of "individuals", defined as a "natural person, other than a deceased natural person". However, the Act does allow a person's personal representative to access information about the deceased person. The proposed reform would align with the scheme

of the Privacy Act and is not inconsistent with the requirements of that Act, so consultation with the Privacy Commissioner was not required.

Recommendation

That the submission be noted.

GIFT-EXEMPT BODIES

Clause 66(4)

Issue: Feedback on proposal

Submission

(A Muir, Chartered Accountants Australia and New Zealand, Simpson Grierson, Sue Barker Charities Law)

- a. Two submitters recommend deleting the proposed amendment in clause 66(4) from the Bill. *(A Muir, Sue Barker Charities Law)*

Sue Barker Charities Law submitted that the proposed amendment to include registered charities within the "gift-exempt body" definition is a duplication of the reporting and monitoring requirements for charities registered under the Charities Act 2005. The "gift-exempt body" definition should be focused on not-for-profit entities that are not registered charities.

- b. Support for the proposal. *(Chartered Accountants Australia and New Zealand)*
- c. Generally supportive, accept that updating the definition would be appropriate but suggest that the "gift-exempt body" definition should instead be amended to refer to donee organisations. Given the link between the gift-exempt body provisions in sections 18K, 32 and 58 of the Tax Administration Act 1994 (TAA) and the donation tax incentive provisions for gifts of money to donee organisations, it is not clear why tax-exempt status or RWT-exempt status should trigger the application of the gift-exempt body provisions in the TAA. *(Simpson Grierson)*
- d. The gift-exempt body provisions in the TAA should be clearer in regard to timing issues, such as how long records must be kept under section 32 of the TAA and the timeframe within which the Commissioner may require any return under section 58 of the TAA. *(Simpson Grierson)*

Comment

Officials recommend withdrawing this proposal from the Bill to allow any unintended consequences to be worked through. We agree with Simpson Grierson that given the link between the gift-exempt body provisions and the donation tax incentive provisions, the gift-exempt body definition should be linked to donee organisations rather than RWT-exempt status. However, to avoid introducing unintended consequences in relation to record-keeping requirements for gift-exempt bodies, officials will consider this matter over a longer timeframe and for inclusion in a later Bill.

Simpson Grierson have suggested clarifying how long records should be kept for gift-exempt bodies. We consider that this is addressed by Inland Revenue's Operational Statement [OS 22/04: Charities and Donee Organisations – Part 2 Donee Organisations](#). The Operational Statement notes that donee organisations must keep records for a minimum of seven years, even if the donee organisation ceases operating (refer to paras 153 to 159).

Recommendation

- a. That the submission be accepted.
- b. That the submission be noted.
- c. That the submission be noted.
- d. That the submission be declined.

DEREGISTRATION TAX

Clause 46

Issue: Opposition to proposal

Submission

(A Muir, Simpson Grierson, Sue Barker Charities Law)

Three submitters recommend deleting clause 46 from the Bill.

- a. It is unreasonable to impose further piecemeal amendments on the charities sector. Any changes should be delayed to conduct a first principles post-implementation review of the Charities Act 2005, including reviewing the definition of charitable purpose. *(Sue Barker Charities Law)*
- b. Deregistered charities should not be restricted to transferring assets to a “tax charity” for assets to be excluded from its deregistration tax calculation under section HR 12(3)(a) of the Income Tax Act 2007. The proposal would give rise to inappropriate and inequitable outcomes, including:
 - o Precluding a deregistered entity from utilising section HR 12(3)(a) in relation to the transfer of assets to charitable entities that are not registered charities, such as the following types of entities: a charitable entity that is not a registered charity because Charities Act registration is voluntary and the entity may already have tax-exempt status (eg, an amateur sport promotion body), a charitable entity that is not a registered charity because it does not derive material income, or it is a trust that distributes its income to other entities for charitable purposes. *(Simpson Grierson)*
 - o Requiring charities to transfer assets to a tax charity rather than to individuals distorts the rules, because individuals may be deserving beneficiaries of a charity’s funds, but they cannot be “tax charities”. *(Sue Barker Charities Law)*
- c. The current drafting of section HR 12(3)(a) does not raise issues regarding matters falling outside the jurisdiction of any New Zealand authority, unless the transferee is outside New Zealand, as a New Zealand transferee will be within Inland Revenue’s jurisdiction (and potentially the Attorney-General’s jurisdiction, in the case of a transfer for charitable purposes). *(Simpson Grierson)*
- d. The existing requirement under section HR 12(3)(a) to transfer assets to another person for charitable purposes, or in accordance with the deregistered entity’s Charities Act registered rules, is sufficient and appropriate. If the clause is not deleted, it should be amended to address the alleged “integrity risk” under the current drafting of section HR 12(3)(a) in a more targeted way, such as by requiring a transfer of assets to a

person in New Zealand and requiring notification of the transfer to the Commissioner of Inland Revenue. (*Simpson Grierson*)

- e. All tax charities must, by definition, have purposes that are exclusively charitable. This means that the proposed amendment requiring deregistered charities to transfer assets to a tax charity, rather than to "another person", will render the requirement to transfer assets in accordance with the charity's rules redundant. (*Sue Barker Charities Law*)
- f. If a charity has been deregistered on the basis that its purposes are no longer considered charitable (because Charities Services has taken exception to a particular activity that the charity has undertaken), the charity will not be able to transfer its assets to a "tax charity" in accordance with its rules, because the charitable purposes set out in its rules will suddenly have been found not to be charitable. (*Sue Barker Charities Law*)

Comment

- a. If an entity has claimed income tax exemptions as a charity and has accumulated assets and income, those assets and income should always be destined for a charitable purpose, even if the entity is deregistered by the New Zealand charity regulator. The deregistration tax is designed to be a disincentive to transfer net assets out of the charitable base once they are settled there. This is achieved by clawing-back tax benefits in certain circumstances when a charity is deregistered. These rules protect the integrity of the revenue base by ensuring the tax concessions that apply to charities are well-targeted and policy intentions are met.

The imposition of tax also ensures deregistered charities are held to account for the assets and income they built up while they enjoyed the benefit of the charitable tax concessions.

The current rules provide a carve out from the deregistration tax for assets that, within one year of deregistration, are disposed of or transferred for charitable purposes or in accordance with the entity's rules contained on the Charities Register. This means that assets can be transferred out of the regulated charitable sector after deregistration.

If assets are transferred to an entity with no regulatory oversight, the assets and their accumulated tax benefits may be used for non-charitable purposes or charitable purposes that do not benefit New Zealanders. The ability for assets to be transferred out of the regulated charitable sector undermines the policy intent that assets and income accumulated with the benefit of the charitable income tax exemptions should always remain destined for a charitable purpose.

Officials have referred the submitters comments in relation to a review of the Charities Act to the Department of Internal Affairs for its consideration.

- b. We agree with submitters that the proposal would be an overreach for some deregistered charities that distribute to entities that are not registered charities, but

qualify for an income tax exemption. Officials recommend expanding the proposal to also provide relief from the deregistration tax rules when transfers are made within 12 months of the date of deregistration to registered charities and to New Zealand tax-exempt entities (eg community housing entities and amateur sporting bodies), where the assets will continue to be used for charitable purposes. While this change will mean not all tax benefits are clawed back when assets leave the registered charity sector, it will address the most significant integrity concerns where assets are transferred to overseas entities or to New Zealand entities that do not qualify for a tax exemption. This change will reduce compliance costs for many deregistered charities that transfer their assets to tax-exempt entities.

Officials do not agree that assets disposed of in accordance with the entity's rules (eg by paying employees or funding activities) within 12 months of deregistration should be excluded from the deregistration tax. If the deregistered entity is subject to income tax after deregistration, and it is not subject to regulatory oversight or public reporting, it is appropriate to claw-back tax benefits that had accumulated at the date of deregistration. Officials recommend that the exclusion for the disposal of assets in accordance with the charity's rules is removed.

- c. Deregistered charities being able to transfer assets accumulated with the benefit of charitable tax exemptions out of the charitable sector is an issue within the scope of the deregistration tax, not an issue of limited jurisdiction of New Zealand authorities. The proposed amendment is necessary to ensure that the policy intent of the rules is not undermined.
- d. Amending the proposal to allow the transfer of assets to be to a person in New Zealand (not just to a tax charity) and requiring notification of the transfer to the Commissioner of Inland Revenue would not address the integrity risk. Once assets have been transferred to a person, even within New Zealand, that is not subject to the deregistration tax or regulatory oversight, the same risk applies. That is, the transferred assets and their accumulated tax benefits once transferred may be used for non-charitable purposes or charitable purposes that do not benefit New Zealanders, undermining the policy intent of the rules.
- e. As noted in (b) above, we recommend removing the exclusion for assets to be disposed of in accordance with the deregistered charity's rules to ensure the assets are not applied for non-charitable purposes.
- f. Due to the recommended changes in (b) above, a deregistered charity will no longer be required to dispose or transfer its net assets in accordance with its rules in order to be excluded from the deregistration tax. This ensures that a deregistered charity will not be subject to the deregistration tax if it transfers its assets to another tax charity or New Zealand tax-exempt entity for charitable purposes.

Recommendation

- a. That the submission be declined.

- b. That the submission be accepted, subject to officials' comments.
 - c. That the submission be declined.
 - d. That the submission be declined.
 - e. That the submission be declined.
 - f. That the submission be declined.
-

Issue: Support for proposal

Submission

(Chartered Accountants Australia and New Zealand)

The submitter supports the proposal and notes that it will ensure deregistered charities do not benefit from the tax concessions afforded to them while they were a charity.

Recommendation

That the submission be noted.

Issue: Grandparenting provision

Submission

(Simpson Grierson)

A grandparenting provision should be introduced. It would not be fair or equitable for an unnecessary and inappropriate substantive change, introduced following no consultation, to apply to arrangements that an entity has already legally committed to or obtained a binding ruling from Inland Revenue regarding such arrangements. *(Simpson Grierson)*

Comment

Officials acknowledge that the application date of the proposed amendment could unfairly impact charities that are already in the process of deregistering from the Charities Register.

We disagree that a grandparenting provision should be introduced for entities that have obtained a binding ruling from Inland Revenue. Generally, binding rulings are subject to any future legislative changes. Instead, we recommend amending the application date to ensure that the proposal only applies to charities that deregister on or after 1 April 2024. This would remove the retrospective impact of the proposals and ensure that charities that have taken a tax position (ie, deregistered from the Charities Register) before the enactment of the Bill are not affected.

Point of difference

The application date of the proposal should be amended to apply to charities that deregister on or after 1 April 2024.

Recommendation

That the submission be accepted, subject to officials' comment above.

Issue: Tax charities

Submission

(Matter raised by officials)

The proposed amendment would require the transfer of assets from deregistered charities to be a transfer to a "tax charity" to qualify for the carve out from the deregistration tax.

"Tax charity" is defined in section CW 41(5) and includes:

- a. entities that are registered under the Charities Act 2005
- b. entities that have taken reasonable steps towards registering as a charitable entity under the Charities Act or have not been notified by the Commissioner that they are not a tax charity
- c. non-resident organisations that carry out their charitable purposes outside New Zealand and are an approved tax charity by the Commissioner in situations where registration under the Charities Act is unavailable
- d. entities that have been removed from the Charities Register until the day on which the entity exhausts all disputes and appeals in relation to its charitable status.

Entities that are tax charities under section CW 41(5)(c) should be excluded from the carve out from the deregistration tax to ensure that deregistered charities cannot transfer assets to overseas charities to escape the deregistration tax.

Recommendation

That the submission be accepted.

CHARITABLE TRUST DEFINITION

Clauses 34, 37, 38, 40, 59(7) and 60

Issue: Support for proposal

Submission

(Simpson Grierson)

Simpson Grierson supports the simplification intent of the proposed amendments to the charitable trust definition but submit that the proposal may result in substantive changes.

- The changes do not appear to address the position that the definition of a charitable trust in section HC 13 of the Income Tax Act 2007 (ITA) applies in respect of an income year, not a particular point in time.
- Further, the changes would remove the standalone requirement under section HC 13(a) for all derived and accumulated income of the trust to be held for charitable purposes, and would remove the requirement under section HC 13(b) that all other applicable prerequisites for exemption under sections CW 41 and CW 42 (not just “tax charity” status) must be met.

The submitter suggests that a simpler way of addressing the stated concern that the term “charitable trust” in the ITA is inconsistent with the ordinary meaning of the term would be to retain and amend section HC 13 to define the term as “tax exempt charitable trust” or “tax charity trust”.

Comment

The term “charitable trust”, as defined in section HC 13, is used in only a few situations in the ITA. These can be summarised as ensuring that:

- settlors of these trusts are not liable as agent of the trustee for income tax payable by the trust (section HC 29)
- the deregistration tax applies appropriately (section HC 31(1B)), and
- the settlor of the charitable trust and the trust are not associated persons (section YB 8).

Officials consider that there should not be any unintended consequences of moving from a definition based on an income year to one based on a point time in time. This is because:

- The charitable trust term is used to exclude such trusts from section HC 29. Other exclusions from this section are based on a point in time, not an income year.
- The use of the charitable trust term in section HC 31(1B) is based on whether the trust has had a change in circumstances due to failing to meet the requirements to derive

exempt income under section CW 41 or CW 42. This is something that occurs at a point in time rather than an income year.

- The associated persons test between a settlor and trustee is also not based on an income year.

The charitable trust definition in section HC 13 currently requires all income derived or accumulated to be held for charitable purposes, and it applies on an income year basis. Replacing the charitable trust definition with the tax charity definition will remove the requirement in section HC 13 for all income derived or accumulated to be held for charitable purposes. This change is not expected to have any unintended consequences since all tax charities are required to have charitable purposes.

Recommendation

That the submission be declined.

Issue: Support for proposal

Submission

(Chartered Accountants Australia and New Zealand)

Support for the proposal to amend the charitable trust definition.

Recommendation

That the submission be noted.

CHARITABLE ENTITIES AND RWT-EXEMPT STATUS

Clause 67

Issue: Support for proposal

Submission

(Chartered Accountants Australia and New Zealand, Simpson Grierson, Sue Barker Charities Law)

The submitters support the proposed amendment to ensure that all charities registered under the Charities Act 2005 are automatically exempt from resident withholding tax for the duration of their registration.

Recommendation

That the submission be noted.

DOUBLE TAX AGREEMENT SOURCE RULE

Clause 61

Issue: Support proposed changes to section YD 4(17D)

Submission

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

Support for the proposals.

Recommendation

That the submissions be noted.

Issue: Section YD 4(17D) should be repealed

Submission

(PwC)

Section YD 4(17D) of the Income Tax Act 2007 should be repealed because it:

- remains unclear what income is captured that is not covered as part of the source rules
- will continue to deem income to have a source in New Zealand in unintended circumstances, requiring further remedial changes
- is not consistent across New Zealand's treaty network due to differences in treaty coverage, and
- potentially puts residents from treaty jurisdictions within a wider scope of New Zealand tax than residents from non-treaty jurisdictions.

Comment

Section YD 4(17D) serves a useful general purpose by ensuring that all items of income that New Zealand is entitled to tax under a double tax agreement (DTA) will have a domestic source and therefore be taxable under domestic law (unless excluded or exempt under another domestic provision). This also reduces the risk of double non-taxation.

Without the provision, a two-stage inquiry is required to determine if an item of income is taxable in New Zealand. Stage one requires finding a New Zealand source under domestic law, which can be an intensely fact-specific inquiry involving high compliance costs. Stage two requires checking the DTA to determine if New Zealand has taxing rights over the income. The provision simplifies this inquiry by only requiring the second stage.

While it's true that section YD 4(17D) may apply inconsistently across New Zealand's treaty network due to differences in treaty coverage, most of New Zealand's DTAs largely conform to New Zealand's negotiating model. Some degree of difference is inherent in bilateral tax agreements and is therefore unavoidable. However, this inconsistency is not expected to pose a problem for taxpayers in general because they would only need to consult the DTA relevant to their circumstances (not New Zealand's entire treaty network) to apply section YD 4(17D).

Officials acknowledge that section YD 4(17D) has applied in unintended situations (which have necessitated the proposed amendment). Officials are not currently aware of any further unintended situations. However, if they emerge, officials can further consider whether the section should be repealed.

Recommendation

That the submission be declined.

Issue: Section YD 4(17D) should be further narrowed

Submission

(Corporate Taxpayers Group, Deloitte, KPMG)

Section YD 4(17D) of the Income Tax Act 2007 should be further narrowed:

- a. Non-resident directors' fees should also be carved out of section YD 4(17D). (Corporate Taxpayers Group, Deloitte)
- b. The scope of section YD 4(17D) should be narrowed to only include income connected with a permanent establishment (PE) in New Zealand. This will align the DTA source rule with its original problem definition of PE avoidance. (KPMG)

Comment

Officials do not agree that section YD 4(17D) should be further narrowed in the ways that submitters have suggested.

- a. It is true that a New Zealand source may exist under section YD 4(17D) when directors' fees are paid by a New Zealand company to a non-resident in respect of directorship services performed abroad. However, officials do not consider this to be an overreach. Fees paid for being a director of a New Zealand company do have a connection to New Zealand. Even without section YD 4(17D), directors' fees in such circumstances will often be taxed under section YD 4(4) or (18), because there are special factors for directorship services that diminish the importance normally given to the place of performance (see [IS 19/01: Income tax – application of schedular payment rules to non-resident directors' fees](#) at [29]–[31]). Whether a New Zealand source exists under

section YD 4(4) and (18) is a question of fact that will turn on the specific factors of each case. In such cases, section YD 4(17D) serves a useful function by clarifying the position and reducing compliance costs, because it removes the need for an intense factual inquiry.

- b. Officials disagree with the submitter's suggestion that section YD 4(17D) was intended to address PE avoidance only. The original Bill commentary stated that the intention of section YD 4(17D) was to:

... deem an item of income to have a source in New Zealand if we have a right to tax the item of income under a DTA. Subsection (17D) is intended to ensure that if a DTA applies in respect of an item of income, that item of income will automatically have a New Zealand source.

Problems related to PE avoidance are separately addressed by sections GB 54 and YD 4(17C), which were introduced in the same Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018. Officials further disagree with the submitters' suggestion that section YD 4(17C) is limited to "business income" only. As such, officials consider that narrowing section YD 4(17D) to apply only to income connected to a PE would render it redundant and would be akin to repealing the provision altogether.

Recommendation

That the submissions be declined.

Issue: Definition of "technical services fees" should be clarified

Submission

(KPMG)

The description of "technical services fees" in section YD 4(17D) of the Income Tax Act 2007 is insufficient to cover the breadth of transactions that could be deemed to have a source in New Zealand and therefore subject to overreach.

For example, New Zealand's DTA with Malaysia does not refer to "technical services fees", but to payments made as consideration for the management, control or supervision of a business or other activity.

Comment

Officials agree that it is not clear under the current drafting whether the payments referred to under the Malaysia DTA would be included as "technical services fees". The same issue arises in respect of the Fiji DTA, which includes as royalties "the supply by a resident of a

Contracting State of management services in the other Contracting State". The intention is for such payments to be included in the proposed exception to section YD 4(17D). Officials agree that this should be clarified.

Recommendation

That the submission be accepted.

Issue: Reference to a "PE outside New Zealand" is not sufficiently clear

Submission

(KPMG)

The definition of a "PE outside New Zealand" is not clear.

The domestic PE definition is likely to be different to the definition of a PE in terms of an applicable DTA that is being considered. The PE definition in most of New Zealand's DTAs is only agreed between Contracting States that are parties to the DTA and not for the purposes of defining when a PE is in a third State.

If the intention is that the relevant principles of a PE definition in a particular DTA are to be used to determine when a PE is outside New Zealand and the other contracting State for the purposes of section YD 4(17D) of the Income Tax Act 2007, then this should be made clear in the legislation.

Comment

In determining whether there is a "PE outside New Zealand", the principles of the relevant DTA should apply. Officials agree that this could be made clearer in the legislation.

Recommendation

That the submission be accepted.

Issue: Proposed amendment should be used as a case study for the Select Committee's processes

Submission

(Cantin Consulting)

Concerns were raised regarding the process leading to the enactment of section YD 4(17D) of the Income Tax Act 2007 in the original Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 and a submission made that was declined by officials.

The submitter suggests that the proposed amendment should be used as a case study for examining the Select Committee's processes, which would allow it to consider what changes if any should be made to its processes.

Comment

We have no view to express on this matter. It would be something for the legislative branch to consider, for example as part of the Review of Standing Orders process.

Recommendation

That the submission be declined.

TRANSITIONAL RESIDENTS HOLDING DOMESTIC FINANCIAL ARRANGEMENTS

Clauses 23 and 24

Issue: Support for proposal

Submission

(Chartered Accountants Australia and New Zealand)

The submitter supports the proposal.

Recommendation

That the submission be noted.

10% INCOME INTEREST TEST FOR ACCESS TO THE ATTRIBUTABLE FIF INCOME METHOD

Clause 25

Issue: Support for proposed amendments

Submission

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

Submitters support the proposed amendments.

Recommendation

That the submission be noted.

Issue: Consistency with income interest calculation

Submission

(Corporate Taxpayers Group, Deloitte)

Additional wording should be added to section EX 46(3)(a)(ii) of the Income Tax Act 2007 so that, for the purposes of the section EX 50(4) income interest calculation, it is clear the relevant period is the period during which the person has rights in the foreign investment fund (FIF), rather than the entire accounting period.

Comment

The proposed amendment to section EX 46(3)(a) mirrors an earlier remedial amendment to section EX 35(a) to address the same concern around access to the 10% income interest test. Section EX 35(a) also refers to the section EX 50(4) income interest calculation, without the additional language proposed by submitters. While we are not aware of any concerns arising from this in practice, and the policy intent is clear from the earlier remedial and this one, we agree that it would provide additional certainty if both sections EX 46(3)(a)(ii) and EX 35(a) were amended.

Recommendation

That the submission be accepted.

Issue: Amend other income interest test provisions

Submission

(Corporate Taxpayers Group, Deloitte)

Submitters propose making amendments to sections CQ 2(1)(e), EX 14(1)(a) and EX 34(b) to ensure that the 10% income interest calculation is performed based on the period of ownership within the accounting period (rather than the entire accounting period).

Comment

The sections raised by the submitters relate to the entrance test – whether income is attributed under the FIF rules or the controlled foreign company (CFC) rules. Officials acknowledge that there are good reasons for amending this test where an interest is only held for part of an accounting period.

However, this is an established test that has been consistently applied across decades and multiple tax Acts (eg, section 245F(1)(b) of the Income Tax Act 1976). There are also other tests that rely on a similar calculation (eg, the foreign investment PIE requirements in section HM 55D(3)(c) of the Income Tax Act 2007).

Officials think it would be preferable for this to be considered for introduction in a future Bill. This would provide more exposure to the potential change as well as the possibility for further consultation than is possible at this stage of the current Bill. This project is not currently on the Government's tax and social policy work programme and would need to be considered alongside the Government's other priorities.

Recommendation

That the submission be declined.

PROVISIONAL TAX – TECHNICAL CHANGE TO SECTION RC 6

Clause 55

Issue: Technical change to section RC 6

Submission

(Chartered Accountants Australia and New Zealand)

Support for the proposal.

Recommendation

That the submission be noted.

PORTFOLIO INVESTMENT ENTITY (PIE) REMEDIAL AMENDMENTS

Clauses 5 and 43

Issue: Remedial PIE amendments

Submission

(Chartered Accountants Australia and New Zealand)

Support for the proposal.

Recommendation

That the submission be noted.

RESIDENT WITHHOLDING TAX AND CUSTODIANS

Clause 58

Issue: Non-cash dividend received by an intermediary

Submission

(Chartered Accountants Australia and New Zealand, KPMG)

Support for the proposal.

Recommendation

That the submission be noted.

CLARIFY MEANING OF “BUILDING” FOR DEPRECIATION PURPOSES

Clause 59(6)

Issue: Proportional approach to depreciation

Submission

(KPMG)

Depreciation should be based on the proportional use of the building, rather than an all or nothing test depending on whether the building is predominantly used for residential or non-residential purposes.

Comment

Given the government’s proposal to removal building depreciation, officials recommend that this submission is declined.

Recommendation

That the submission be declined.

Issue: Wider review

Submission

(KPMG)

A wider review of the definition of “building” should be undertaken.

Comment

A wider review would require prioritisation and resourcing as part of the government’s Tax and Social Policy Work Programme.

Recommendation

That the submission be noted.

Issue: Simplify the depreciation regime

Submission

(A Bramley)

The depreciation regime should be simplified to reduce the number of available depreciation rates. It is an administrative nightmare having a multitude of depreciation rates for every asset.

Comment

Depreciation is a measure of the reduction in the value of an asset over time. Different assets lose their value at different rates; therefore, it is appropriate that different depreciation rates apply to those assets to reflect the rate at which they lose value.

Recommendation

That the submission be declined.

ROLLOVER RELIEF REMEDIAL AMENDMENTS

Issue: Application date of rollover relief provisions

Submission

(Mayne Wetherell)

The application date provisions for section CB 6AB of the Income Tax Act (and the other rollover relief provisions where appropriate) should be amended so rollover relief is not restricted to land acquired on or after 27 March 2021.

Comment

Sections CB 6AB, CB 6AC and CB 6AE, which provide rollover relief for the purposes of the bright-line test in relation to certain transfers of residential land, only apply if the land in question was acquired by the person disposing of it on or after 27 March 2021.

Officials agree that the restriction of rollover relief to situations where the land was acquired by the transferor on or after 27 March 2021 is an error that should be corrected. Remediating this mistake would provide the intended policy outcome that rollover relief applies to all qualifying transfers made on or after 1 April 2022, consistent with the Commissioner's statements in [Tax Information Bulletin Vol 34, No 5](#) (June 2022).

Recommendation

That the submission be accepted.

Issue: Transfers from a trust following death of settlor

Submission

(nsaTax Ltd)

Section CB 6AB(2)(b) does not allow rollover relief when a property that was transferred into a family trust by the settlors is subsequently transferred back to the surviving settlor(s) following the death of a settlor. Consideration should be given to allowing rollover relief in this situation.

Comment

Section CB 6AB(2) applies in the scenario where the trustee of a family trust transfers land to a settlor (or a group of settlors). One of the tests for rollover relief under the section (which applies if the receiving settlor or "transferee" had previously transferred the land to the trust)

will only apply in a “multiple transferees” situation if the land each transferee receives from the trustee is in proportion to what they had originally transferred to the trust.

The submitter has pointed out that this proportionality requirement does not allow rollover relief to apply in the scenario where one of the settlors dies and, following their death, **all** the land (including the deceased’s share) is transferred out of the trust to the surviving settlors. This outcome is contrary to what was intended, and officials therefore recommend relaxing the proportionality requirement in the situation where one of the settlors has died.

Recommendation

That the submission be accepted.

MAIN HOME EXCLUSION: CONSTRUCTION PERIOD

Clauses 9 and 20

Issue: Main home exclusion should treat construction days as main home days

Submission

(KPMG)

The construction period rule for the main home exclusion from the 5-year bright-line test should treat construction days as main home days to be consistent with the main home exclusion from the 10-year bright-line test, rather than ignoring them.

Comment

Officials disagree with the submitter.

While the main home exclusion from the 10-year bright-line test treats construction days as main home days, the 10-year test operates on an apportionment basis. In other words, under the 10-year test, a person pays tax for periods where the property is not used as a main home.

The main home exclusion from the 5-year bright-line test operates as an all-or-nothing test – if the property is used for most of the bright-line period as a main home then the bright-line test will not apply at all, including to periods where the property is not used as a main home. It would not be appropriate to treat the period that the property is under construction as “main home days” under this test (especially given the shorter bright-line period) because it could mean a property is exempt from tax under the bright-line test despite only being used as a main home for a much shorter period of time than the period the property was not used as a main home (ie, rented out).

Recommendation

That the submission be declined.

Issue: Design of construction period rule in relation to off-the-plan sales

Submission

(KPMG)

Consideration should be given to whether any construction days need to be adjacent to days the person occupied the property as their main home. It is unclear how the main home

exclusion applies where a person purchases land off the plan (intending to move in once completed) but then disposes of their interest in the land prior to settlement.

Comment

Officials disagree with the submitter that the application of the main home exclusion from the 5-year bright-line test is unclear where a person purchases land off the plans intending to move in but sells the property prior to settlement.

For the main home exclusion to apply, the land needs to be used as a main home for most of the bright-line period. In this case, the property has not been used as a main home at all, and therefore the main home exclusion does not apply.

Recommendation

That the submission be declined

Issue: Supportive of proposal to ignore construction period

Submission

(KPMG)

We are generally supportive of the changes.

Comment

Officials welcome the support.

Recommendation

That the submission be noted.

Issue: Time bar and the main home exclusion

Submission

(KPMG)

We submit that:

- An amendment is required to permit the Commissioner to re-assess time-barred periods where the retrospective law change reduces the amount of tax the person owes in the time-barred income year.
 - There should be a legal obligation to the Commissioner to re-assess prior periods that have not been time-barred, rather than it being up to the Commissioner's discretion.
-

- Public guidance should be issued on this matter to ensure taxpayers understand the process for applying for a refund.

Comment

The submitter is correct that ignoring the construction period for the purposes of the main home exclusion from the 5-year bright-line test may retrospectively reduce the amount of tax that taxpayers were liable for in periods that have already been assessed.

For periods that have not yet been time barred, section 113 of the Tax Administration Act 1994 (TAA) is sufficient to enable these refunds to occur. An amendment is not necessary because the Commissioner will not exercise their discretion to decline a refund in these circumstances.

In terms of whether an amendment is necessary to re-assess time-barred periods, officials consider it highly unlikely that any taxpayer would have had their refund time barred in these circumstances, as follows:

- Section RM 2(1) provides that the Commissioner must refund an amount of overpaid tax if the Commissioner is satisfied that the person is entitled to the refund before the end of the 4-year period under section 108(1) of the TAA.
- Section 108(1) prevents the Commissioner amending an assessment if 4 years have passed from the end of the tax year in which the taxpayer provides the tax return.
- The 5-year bright-line test applies to land acquired on or after 29 March 2018. For a refund to be time barred, the taxpayer would have had to acquire land on or after 29 March 2018, construct a dwelling and live in it for a period and then sell it before 31 March 2018. Given the time it takes to obtain resource and building consent and construct a dwelling, officials do not consider this timeline to be feasible. The 2019 and later tax years would not be time barred by March 2024, which is when the Bill is expected to be enacted. For example, the return for the 2019 tax year is not due until July 2019 or March 2020 (depending on if the taxpayer has a tax agent or not), and 4 years from the end of the 2020 tax year is 31 March 2024.

Recommendation

That the submission be declined.

CHILD SUPPORT

Clauses 88, 89 and schedule 2

Issue: Clarifying that the child support time-bar does not apply to temporary exceptions

Submission

(Chartered Accountants Australia and New Zealand)

Note the proposal.

Recommendation

That the submission be noted.

Issue: Capturing of income

Submission

(A Bramley)

Child support assessments need to capture all income diverted by a liable parent to another entity. The income used in child support assessments needs to be the same as the income used for Working for Families purposes.

Comment

The Child Support Amendment Act 2021 included amendments that more closely align the definition of "income" used for child support purposes with other wider definitions of income used for Working for Families and student loans.

Interest and dividend income are now included as income for child support assessments and losses from earlier years are no longer offset. These amendments mean that the definition of "income" used better reflects a parent's financial capacity to pay child support.

Interest and dividend information is now reported to Inland Revenue on a monthly basis. Inland Revenue can include these amounts as income for child support assessments. Widening the definition further to include, for example, non-locked-in PIE income (which is not provided to Inland Revenue on a monthly basis), would mean that parents would need to provide this information each year. To keep compliance costs to a minimum, these other factors are not included as income for child support formula assessment purposes.

Recommendation

That the submission be declined.

Issue: Child support formula

Submission

(A Bramley)

The child support formula is needlessly complicated. It does not provide significant funds for supporting children.

Comment

The child support formula considers a wide variety of variables and factors. These variables ensure that parents either pay, or receive, child support in amounts that reflect their income, care of the child and costs of care.

Recommendation

That the submission be declined.

FLOODING TAX RELIEF

Clauses 11, 14, 15, 19, 59(3) and (13)

Issues: Timeframe for employees to relocate and definition of affected area

Submission

(Chartered Accountants Australia and New Zealand, Corporate Taxpayers Group, Tax Justice Aotearoa)

Support for the proposals.

Recommendation

That the submissions be noted.

Issue: Three-month meal allowance tax exemption time limit should be reconsidered

Submission

(Corporate Taxpayers Group)

The three-month meal allowance tax exemption should be reconsidered in the context of the Cyclone response on the East Coast.

Comment

Officials do not consider that the three-month meal allowance should be extended. The provision of meals is inherently private expenditure that is incurred by every worker regardless of their location.

Accommodation allowances differ because the provision of accommodation is an extra cost for an employee, particularly when they continue to maintain a home in another location. Meal allowances do not follow this profile and consequently we see these as quite distinct.

Recommendation

That the submission be declined.

Issue: Proactive compensatory processes be identified and given legal form

Submission

(Tax Justice Aotearoa)

Proactive compensatory processes should be identified and given legal form in advance of any such events, as well as appropriate mitigation and adaption planning.

Comment

Any work on this would require resourcing and prioritisation under the Government's tax policy work programme.

Recommendation

That the submission be declined.

REMEDIAL AMENDMENTS ARE REQUIRED TO ADDRESS TAXATION OF SECURITISATION TRUSTS

Officials note that the submissions below echo those previously made by the Financial Services Federation and the Australian Securitisation Forum on the Taxation (Annual Rates 2021-22, GST, and Remedial Matters) Bill. The submissions do not directly relate to proposed changes in the Taxation (Annual Rates for 2023-24, Multinational Tax, and Remedial Matters) Bill and are outside the scope of the Government's current tax policy work programme.

Issue: Overreach of the associated persons rules

Submission

(Financial Services Federation, Australian Securitisation Forum)

A person should not be associated with a securitisation trust (or treated as holding related-party debt) simply because the person (or an associate of the person) is a settlor of the securitisation trust, has the power to appoint or remove the trustee, or is a beneficiary, settlor or person with a power of appointment or removal of a security trust.

Comment

Officials acknowledge the matter raised by the submitter but note that this would involve a change in policy and additional work is required to understand its implications. Further consideration of this matter would require prioritising and resourcing as part of the Government's tax policy work programme.

Recommendation

That the submission be declined.

Issue: Transfer from a securitisation SPV that does not elect into the regime

Submission

(Financial Services Federation, Australian Securitisation Forum)

It should be possible to elect to use the debt funding special purpose vehicle (DF SPV) regime where receivables are transferred to a DF SPV by an entity (other than the originator) that would be eligible to elect, but has not elected, into the regime.

Comment

Officials acknowledge the matter raised by the submitter but note that this would involve a change in policy and additional work is required to understand its implications. Further consideration of this matter would require prioritising and resourcing as part of the Government's tax policy work programme.

Recommendation

That the submission be declined.

Issue: Notes issued by a securitisation trust should be excluded from the restricted transfer pricing rules

Submission

(Financial Services Federation, Australian Securitisation Forum)

Notes issued by a securitisation trust should be excluded from section GC 18 (Loan features disregarded by rules for transfer pricing arrangements).

When an originator holds junior notes, the restricted transfer pricing rules require the junior notes to be priced for tax purposes as if they ranked equally with the senior notes under the transfer pricing rules (as the originator and securitisation SPV will be associated parties). This means part of the interest paid by the securitisation SPV will not be deductible. This is because section GC 18 requires subordination to be disregarded. However, subordination is fundamental to the structure and purpose of a securitisation, and it should not be disregarded in this case.

Comment

Officials recognise the matter raised by the submitter and confirm they are actively assessing the need for remedial amendments to address this. However, this work is still in progress and will not be included in the current Bill.

Recommendation

That the submission be noted.

Issue: Securitisation trusts should be excluded from the thin capitalisation rules

Submission

(Financial Services Federation, Australian Securitisation Forum)

Securitisation trusts should be excluded from the thin capitalisation rules.

Comment

Officials acknowledge the matter raised by the submitter but note that this would involve a change in policy and additional work is required to understand its implications. Further consideration of this matter would require prioritising and resourcing as part of the Government's tax policy work programme.

Recommendation

That the submission be declined.

GOODS AND SERVICES

Issue: Remove GST from rates

Submission

(Marc Galle)

Local authorities should remove GST from rates on the basis that it is essentially a tax on a tax.

Comment

GST is designed to be a tax on all consumption in New Zealand, which helps to ensure the tax is as efficient and fair as possible. Local authority rates fund services provided by local authorities to ratepayers and therefore represent consumption that should be subject to GST.

Not applying GST to rates would create market distortions by giving price advantages to local authorities at the expense of private sector competitors (such as private rubbish collection services). Giving rates a concessionary GST treatment could also lead to greater compliance and administration costs.

Finally, removing GST from rates would have a fiscal cost that may necessitate a reduction in spending on public services provided by central government, or an increase in other taxes to make up the funding shortfall.

Recommendation

That the submission be declined.

Issue: Remove GST on fresh fruit and vegetables

Submission

(Phillip Coghini)

The Government should remove GST on all fresh fruit and vegetables. The submitter considers this policy would have the following advantages. The policy:

- is administratively easy to implement
 - does not impose high compliance costs on businesses
 - promotes an affordable and healthier diet for low-income families
-

- will have a deflationary impact and will see a drop in the Consumer Price Index for the first quarter after implementation, and
- has been implemented in Australia.

Comment

New Zealand's GST system is often regarded internationally as the model consumption tax because it applies so comprehensively (with very few exceptions) to most goods and services at a single standard rate of 15%. This broad application allows the government to efficiently raise revenue and minimise compliance costs for businesses that charge and collect GST.

Providing concessionary treatment for fresh fruit and vegetables would reduce the efficiency of the GST system and would increase affected businesses' compliance costs because they would be required to determine which products are zero rated or standard rated. As a result, businesses may not pass on the full savings, reducing the benefits to individuals.

Additionally, removing GST on fresh fruit and vegetables is an inefficient way to support low-income families. This is because higher-income households would benefit more from the policy in absolute terms than the lower-income households the policy is intended to assist. Providing targeted assistance to lower-income households in the form of transfer payments would be a more efficient and effective way to support those households.

Finally, the removal of GST on fresh fruit and vegetables would have a fiscal cost that may necessitate a reduction in spending on public services or an increase in other taxes.

Recommendation

That the submission be declined.

Clause 83

Issue: Incorrect terminology

Submission

(Chartered Accountants Australia and New Zealand)

The proposed amendments to section 25(4) of the Goods and Services Tax Act 1985 do not make sense.

Comment

The Bill proposes to replace some incorrect terminology with the correct terminology.

Section 25(4) was replaced by No 10 of 2022, section 31(7), effective 30 March 2022.

However, in the amendment, the reference to "the credit note or debit note" referred to the

wrong concept, it should have referred to "the tax invoice". The Bill proposes inserting the correct term into the amendment with effect from 30 March 2022.

Section 25(4) was amended again by No 10 of 2022, section 31(8)(a)(iii), effective 1 April 2023. The phrase "the credit note or debit note" was replaced with "the supply correction information". The Bill proposes to replace the reference to "the supply correction information" in the amendment with the correct term, "the taxable supply information" with effect from 1 April 2023.

Recommendation

That the submission be declined.

MISCELLANEOUS ISSUES

Issue: Operation of the financial arrangements entry rules where the borrower is insolvent

Submission

(Bell Gully)

When two offshore-incorporated subsidiaries of a New Zealand wholly-owned group become New Zealand tax resident so that a loan between them becomes subject to the financial arrangements rules, the parties are required to apply the entry rules in sections EW 37 and EW 41 of the Income Tax Act 2007 respectively. Those rules require the parties to calculate the market value of their obligations and entitlements under the loan. However, if the borrower happens to be insolvent at the time, it is possible the two companies will have different acquisition prices under those entry rules. In particular:

- For the borrower, the market value that it would be required to pay to a third party to assume its obligations under the loan can be assumed to be the face value amount that it currently owes.
- For the lender, the market value may be less, due to the insolvent position of the borrower, so a third party may be prepared to pay significantly less than the face value of the loan.

If that loan is subsequently remitted, section EW 46C (which is intended to ensure that no adverse tax consequences occur when debt owned within a wholly-owned group is remitted), will treat the loan as being repaid in full. For the borrower, this will result in the amount it is treated as repaying being equal to its face value so there are no further tax consequences. For the lender, they are also treated as receiving the full face value of the loan; however this will be higher than the "consideration provided" at the time the loan entered the tax base, so that could give rise to financial arrangements income to the lender. That outcome is inconsistent with the intended operation of section EW 46C.

The submitter recommends either:

- section EW 46C is amended so the lender is treated as receiving only the amount deemed to have been paid upon entry to the financial arrangements rules, or
- an amendment to the deemed acquisition under section EW 41 to change the acquisition cost to match the deemed or actual repayment.

Comment

The purpose of section EW 46C is to recognise that a remission of debt between two members of a wholly-owned group (or to the extent it is proportional with ownership) places the overall group in the same economic position before and after the remission. When this

debt is always between two New Zealand tax residents any impairment prior to an eventual remission will not result in a tax impost because there is symmetry across the amount lent and the amount deemed to be repaid. Officials agree this is not the case where the two sides of the loan have entered the New Zealand tax base at different values for the reasons outlined by the submitter. In this instance, a remission of some or all of the debt outstanding would still leave the group in the same economic position, and it would be inappropriate to effectively tax the lender on a loss incurred prior to them becoming a New Zealand tax resident.

Point of difference

Officials have discussed this submission with the submitter and have agreed that the case for preventing taxable income to the lender is clearer if the debt is remitted than if the debt was repaid in full. If the debt is actually repaid, the lender has only received back their original principal (plus potentially any interest), they have not made an overall gain on a worldwide basis; however, they have made a gain since the arrangement entered the New Zealand tax base, which is the purpose of the deemed acquisition. Therefore, officials recommend that the amendment relates only to a deemed repayment under section EW 46C rather than actual repayments. Officials would not expect a taxpayer in this situation to remit a debt that could or would otherwise be repaid to prevent financial arrangements income arising.

Unlike the full value of the debt, the market value of a debt, even on an unimpaired loan, will be reduced to reflect that time will need to pass before the lender receives repayment. Reducing the deemed repayment under section EW 46C to the market value would result in the deemed repayment being smaller than it should be. Instead, the amount of repayment should be reduced by the amount of impairment included in the deemed acquisition calculation.

Recommendation

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

Issue: Section EW 46D should be repealed or amended

Submission

(Mayne Wetherell)

Section EW 46D of the Income Tax Act 2007, which was enacted in the Taxation (Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023, imposes a tax liability in certain circumstances when a company repays debt using the proceeds of issuing shares to the lender.

The Officials' Report on the Bill, at p 325, included "It would not apply to a solvent borrower that issues a convertible note, even if the note is later converted when the borrower is

insolvent". However, the section as enacted does apply to convertible notes and other arrangements entered into by solvent debtors. Section EW 46D alters the long-standing treatment of certain financial arrangements and is inconsistent with assurances officials gave to the Select Committee.

Section EW 46D should therefore be either:

- a. repealed and an appropriately targeted provision developed for inclusion in a future Bill, or
- b. amended to be consistent with the scope provided in the Officials' Report.

Comment

- a. The purpose of section EW 46D is to require shares issued by an insolvent debtor to be valued at their market value when the proceeds of that share issue are used to repay outstanding debt. Because the market value of shares in an insolvent company will often be low, this can result in debt remission income when the debt is repaid using the proceeds of these low value shares. Most shares issued that would be covered by section EW 46D will not be issued as part of a convertible note, and officials consider it is important the section continues to apply to this situation. In general, officials have no reason to consider the section is not working as intended and do not support it being repealed.
- b. Another way shares can be issued is as part of a convertible note, which is issued as debt but subsequently converts into shares at a later date. It is possible that a company can issue a convertible note when it is solvent but has become insolvent by the time the conversion occurs.

Officials consider there are arguments that a convertible note issued by a solvent borrower but converted to shares after that borrower becomes insolvent should be covered by section EW 46D. However, we acknowledge there are also arguments against this position and officials' advice in the previous Officials' Report was that the section would not apply in this circumstance.

We recommend that the section is amended to clarify that it does not apply when the conversion of debt into shares occurs pursuant to the conversion of a convertible note issued by a borrower who is solvent when the note is issued. Officials will consider whether a further amendment to cover this situation should be recommended for a future Bill and, if so, provide opportunity for affected parties to consult on such a proposal at that time.

Recommendation

- a. That the submission be declined.
- b. That the submission be accepted.

Clause 28

Issue: Cross-references in section FC 2(3)

Submission

(Chartered Accountants Australia and New Zealand)

The submitter has queried whether the proposed expansion of sections cross-referenced in section FC 2(3) of the Income Tax Act 2007 should include section FC 9D.

Comment

Section FC 2(3) lists several exceptions to the general valuation rule that applies to certain transfers of property. The list of exceptions in section FC 2(3) is proposed to be updated to reflect the recent addition of provisions that override the general rule, as well as several relatively longstanding exceptions that were previously omitted from being listed in section FC 2(3) (in each case as either a simple oversight or an inadvertent consequence of the 2007 rewrite of the Income Tax Act).

Section FC 9D applies when residential land that is subject to Te Ture Whenua Māori Act 1993 and is part of the settlement of a claim under te Tiriti o Waitangi (the Treaty of Waitangi) is transferred to a trust that is either a Māori authority or eligible to be a Māori authority. Given there is no overlap between section FC 9D and the general valuation rule,⁸ section FC 9D is not included in the exceptions proposed to be added to section FC 2(3).

Recommendation

That the submission be noted.

Issue: Platform economy – allow any GST-registered underlying supplier to remain responsible for their own GST obligations

Submission

(Oral submission raised by Deloitte)

The submitter considers:

⁸ The general valuation rule (in section FC 2(1)) applies mostly to the transfer of property in gift, trust resettlement or inheritance scenarios, or in certain cases where property is distributed by a trustee of a trust to a beneficiary or by a company to a shareholder. Transfers of residential land to trusts pursuant to te Tiriti settlements are not in scope of the general valuation rule in section FC 2(1).

- a. Changes that will require large information and technological investments by various people should have a longer implementation timeframe by default of 24 months. This would have been useful for the platform economy GST changes because now affected platform operators have compressed timeframes to implement the necessary changes ahead of the rules taking effect on 1 April 2024.
- b. Taxpayers that sell affected services through electronic marketplaces and that are already registered for GST should be able to choose to remain responsible for their own GST obligations. This process should be made easy. Allowing this would also reduce issues associated with implementation for affected sellers and platform operators. Inland Revenue should be empowered to allow this. Such changes would still ensure that GST was collected from sellers that are not registered for GST.
- c. Inland Revenue should be given the tools to share information on who is GST registered and who is not with platform operators.

Comment

- a. Lead-in time for tax changes is usually determined by the Government following advice from a range of different sources including tax policy officials and affected parties. This advice is developed during the policy development process. In this particular case, officials note the platform economy rules that come into force on 1 April 2024 were enacted as part of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023, which passed into law in March 2023. The rules are based on the GST rules for remote services. This means the rules use the same tests to determine whether a marketplace operator is treated as the supplier and therefore has a GST obligation on a supply that is actually made by another person (a seller). Officials note that affected platform operators have been given a longer implementation timeframe for the platform economy rules than they were given to comply with the remote services rules, which platforms have been successfully complying with since 1 October 2016. Inland Revenue is committed to assisting platform operators to comply with the new rules and encourages platforms to reach out with any questions they may have.
- b. The platform economy rules were intended to capture GST at a marketplace level from the broadest possible range of sellers, including GST-registered sellers. There are existing opt-out provisions that apply for specific sellers, but these provisions were deliberately limited to more significant enterprises, such as multinational hotel chains. The policy rationale for allowing these sorts of sellers to continue being responsible for their own GST obligations is these sellers are large enough to have sophisticated accounting systems and practices in place for managing their GST compliance, and it would be burdensome and result in no additional GST revenue for them to be subjected to marketplace rules where the marketplace operator is responsible for accounting for GST.

Officials consider that allowing GST-registered sellers more generally to opt-out of the platform economy rules could undermine the effectiveness of the rules and could result in less tax being collected. This is because any seller that is motivated to avoid GST could register for GST to opt out of the rules, and then be non-compliant with their own GST obligations.

- c. Officials agree that providing platform operators with the ability to verify the GST registration status of an underlying supplier would be a helpful addition that would support the implementation of the platform economy rules. This is currently being explored further by Inland Revenue. While such a service is explored, officials note the legislation already affords platform operators with protection if they rely on information provided to them by a seller on their GST registration status.

Recommendation

That the submission be declined.

MISCELLANEOUS SUBMISSIONS

The Committee has received the following submissions that officials have not considered further on the basis that the work would require resourcing and prioritisation as part of the Government's tax and social policy work programme:

Table 6: Miscellaneous submissions

Submission description	Submitter
Introduce new high income tax rate brackets to promote progressivity and increase revenue to support rising public healthcare and superannuation costs.	Philip Coghini
Introduce taxes targeted at reducing wealth inequality (including a wealth tax, capital gains tax or inheritance tax) to ensure our tax system is fair, efficient, and does not impede economic growth.	Philip Coghini Hugo Phibbs
Tax all revenue including from trusts and companies with no exemptions to make the tax system fairer for all.	Robyn Cain
Introduce a stamp duty at 17.5% for any asset transfers over \$100,000.	Marc Galle
Income tax brackets adjustments should occur every three years to align with central government budgeting, or annually adjusted on 1 April to the CPI.	Marc Galle
Income tax brackets should be indexed to CPI changes.	Cody Cooper

OUT-OF-SCOPE SUBMISSIONS

The Committee has received the following submissions that officials have not considered further at this time on the basis that the submissions raise matters outside the scope of the proposals in the Bill:

Table 7: Out-of-scope submissions

Submission description	Submitter
The education system should leverage more than just visual methods of teaching.	Bryce Jensen
Technological advancements have created new ways to learn at any age or to do work in almost any industry. As such, tax proposals must not stifle technological innovation.	Bryce Jensen
There should be no public compensation for properties built on a dangerous site or known risk zone.	Trudy Taurua
Recommends changes to the treatment of income for the purpose of the accommodation supplement.	Trudy Taurua
Recommends changes to the benefit abatement thresholds and abatement rates.	Trudy Taurua

TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX, AND REMEDIAL MATTERS) BILL

Matters raised by officials

REMEDIAL AMENDMENTS TO TAX ADMINISTRATION ACT 1994

Issue: Annual MACA return not required

Submission

(Matter raised by officials)

In 2022, a remedial amendment was made to section 69 of the Tax Administration Act 1994 (TAA) so that a member of a consolidated tax group or consolidated imputation group is not required to file a return (IR4J) for their imputation credit account (ICA) if it has a nil balance at all times during the relevant tax year.

This remedial was made to remove significant compliance costs that served no benefit. Similarly, section 69B of the TAA requires a Māori authority to file an annual IR8J return for their Māori authority credit account (MACA). IR8J's were omitted from the original amendment.

Section 69B should be amended so a Māori authority that is a member of a Māori authority consolidated group is not required to file an IR8J return if the account has no balance at all times during the relevant tax year.

This change should apply from the 2020–21 and later income years to align with the ICA remedial item.

Recommendation

That the submission be accepted.

Issue: Information sharing with Te Whatu Ora for COVID-19 response purposes

Submission

(Matter raised by officials)

"Government agency" as defined under clause 23B, schedule 7 of the Tax Administration Act 1994 should be amended to include Te Whatu Ora (legal name Health New Zealand).

Comment

In 2020, clause 23B was introduced to schedule 7 to allow information sharing between Inland Revenue and other government agencies for COVID-19 response purposes. This facilitated information sharing between Inland Revenue and the Ministry of Health for contact tracing.

However, this clause no longer reflects operational realities because contact tracing has been assumed by Te Whatu Ora, which is not a "government agency" as defined in this clause. This means that Inland Revenue is unable to directly disclose information to Te Whatu Ora for COVID-19 response purposes. This does not align with the policy intent of facilitating operational efficiency for an effective COVID-19 response.

Recommendation

That the submission be accepted.

Issue: Clarifying that individuals earning "non-reportable income" can change balance dates

Submission

(Matter raised by officials)

It is not clear under current legislation whether an individual earning income that is not reportable income (income that is not taxed at source, such as income from operating a business as a sole trader) can return income to a non-standard balance date. That is, a balance date that is earlier or later than the standard 31 March balance date.

Taxpayers can make a request to the Commissioner of Inland Revenue to change their balance date under section 38 of the Tax Administration Act 1994 (TAA). However, a restriction in section 38(1C) prevents individuals whose "final account" for a tax year is treated as an assessment from being able to request a balance date change. Both individuals only earning "reportable income" (income that is taxed at source by a payer, such as salary or wages or dividends) and individuals also earning non-reportable income (income that is not taxed at source, such as business income), will have a final account under the individuals' income information reporting rules in subpart 3B of Part 3 of the TAA.

In addition, section 22H(4) of the TAA requires that individuals provide income information as part of the process of finalising their account for a tax year to the Commissioner by 7 July in the following tax year (this is consistent with the standard due date for income tax returns). An individual wanting to return income to a late balance date may be unable to comply with this 7 July due date because it would be very close to or before the end of the income year they would be providing the information in relation to. This issue does not arise for non-individuals with a late balance date because under section 37(1)(b) of the TAA their income tax return will

be due by the seventh of the month that is the fourth month after the end of their income year.

The effect of the current legislation is an unintended consequence of 1 April 2019 amendments simplifying individuals' end-of-year income tax obligations. Prior to the 2019 amendments, the law did not allow individuals only earning income taxed at source by a payer to request a balance date change. However, individuals also earning income that was not taxed at source were able to request a change of balance date and return income to a late balance date.

Officials recommend amendments are made to reverse the unintended effects of the 2019 amendments. The amendments would clarify that individuals earning income that is not reportable income (ie, income not taxed at source) can request a change of balance date under section 38. The amendments would also adjust the due date for the provision of information under section 22H(4) for individuals with a late balance date so that it aligns with the due date in section 37(1)(b).

The proposed amendments should apply on and from 1 April 2019, this being the date that the legislative changes with the unintended effects discussed above apply from.

Recommendation

That the submission be accepted.

Issue: Platform economy Information reporting and exchange – penalties

Submission

(Matter raised by officials)

Section 142K(2)(c) of the Tax Administration Act 1994 applies from 1 January 2024 and provides that sellers operating through digital platforms are liable for a penalty if they do not provide information that they are required to provide to a platform operator under the OECD model reporting standard for digital platforms.

It is noted that the OECD reporting rules do not explicitly require sellers to provide information to platform operators, the rules merely require the operator to provide information in respect of sellers to the tax authority. Although it is implied that a seller would be required to provide this information to the operator, it is not explicit. There are no explicit obligations on sellers under the OECD reporting rules, so section 142K(2)(c) may not work as intended and should be clarified.

A remedial amendment should be introduced to ensure that a seller is liable for a penalty if they do not provide information to a platform operator that the operator requires to fulfil their reporting obligations under the OECD reporting rules.

Recommendation

That the submission be accepted.

Issue: Record-keeping requirements for platform operators

Submission

(Matter raised by officials)

Section 22(2) of the Tax Administration Act 1994 sets out record-keeping requirements for various taxes and provides that these records shall be retained for a period of at least seven years after the end of the relevant tax year to which they relate. New paragraphs (fe) and (lf) were added to section 22(2) as part of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 to extend these record-keeping requirements to platform operators in the platform economy.

The OECD information reporting rules that platform operators are required to adhere to under the platform economy changes operate on a calendar year basis, rather than a tax year.

A remedial amendment should be introduced to make it clear that platform operators with obligations to provide Inland Revenue with information under the OECD's information reporting rules are required to retain records for seven years following the end of the relevant **calendar** year instead of **tax** year (which ends 31 March).

Recommendation

That the submission be accepted.

Issue: 12-month limit on emergency event payments for Working for Families purposes

Submission

(Matter raised by officials)

The Tax Administration Act 1994 (TAA) should be amended to remove the 12-month limitation that applies to the treatment of emergency relief payments for Working for Families (WFF) purposes.

Comment

Under current law, payments aimed at relieving the adverse effects of an event are exempt from family scheme income, provided the event is declared an emergency event by the Commissioner of Inland Revenue. However, to be exempt income for the purposes of WFF, the period of the Commissioner's emergency event determination must be 12 months, or less, since the first day of the event. This creates inflexibility that impacts the Government's ability to distribute payments aimed at emergency event relief. Additionally, it impacts the WFF entitlements of emergency relief payment recipients. This issue has arisen most recently in relation to payments and support being developed as part of the Kaupapa Māori pathway, which has been established for Māori land and communities following the January floods and Cyclone Gabrielle. Although these events have been declared emergency events by the Commissioner, that declaration cannot be extended beyond late January 2024, and many of these payments may not have been paid out by then.

To ensure that legislation is suited to current and future contexts, and to give the Government flexibility in the way it responds to emergency events, officials propose that section 91AAS(2) and (3) of the TAA be amended to remove references to a 12-month maximum period. These changes will ensure that payments for emergency event relief do not constitute family scheme income for the period set by the Commissioner in an emergency event Determination. This will be the case even if the period set by the Commissioner is greater than 12 months since the occurrence of the emergency event.

It is proposed that these amendments apply on and from 1 September 2023, which is the date following the end of the last Determination ([DET EE 23/01](#)).

Recommendation

That the submission be accepted.

Issue: Cross-border workers: Nominated taxpayer

Submission

(Matter raised by officials)

Section 24HB of the Tax Administration Act 1994 enables a non-resident contractor to enter into an arrangement with a person resident in New Zealand in relation to their tax affairs or social policy entitlements, or both. The section has not yet come into force.

Concerns have been raised regarding the implementation of section 24HB. In particular, that the joint and several liability condition may overreach and cause unintended consequences. In addition, existing provisions already enable non-resident contractors to enter into an arrangement with a nominated person, agent or intermediary making this provision somewhat redundant.

However, the provision does confirm operational practice with regards to accepting the reporting and payment of employment-related taxes (pay-as-you-earn, fringe benefit tax and employer's superannuation contribution tax) in some circumstances. These circumstances arise where a New Zealand resident undertakes employment-related tax compliance activities on behalf of a non-resident contractor.

Given this, officials recommend that section 24HB be amended to narrow its application to employment-related taxes only, and the joint and several liability condition should be removed.

The proposed amendment would then reflect operational practice.

The proposed amendment would apply on and from 1 April 2024, the date section 24HB comes into effect.

Recommendation

That the submission be accepted.

REMEDIAL AMENDMENTS TO INCOME TAX ACT 2007

Issue: Disability support payments, reference to Ministry for Disabled People

Submission

(Matter raised by officials)

Section CW 52B of the Income Tax Act 2007 provides that where a person receives a direct funding disability support payment, the payment is not subject to income tax. This section previously referred to payments made by the Ministry of Health or District Health Boards. It was updated in July 2022 as a consequential change under health reform legislation to refer to payments made by Health New Zealand or the Māori Health Authority.

However, due to a legislative oversight, the July 2022 updates failed to reflect that the Ministry for Disabled People was established in July 2022 and began administering some of the direct funding disability support payments. Section CW 52B needs to be amended to refer to direct funding disability support payments made by the Ministry for Disabled People or the Ministry of Health, with application from July 2022, to ensure the income tax exemption continues to apply as intended.

Recommendation

That the submission be accepted.

Issue: Deducting expenditure related to mitigating environmental hazards

Submission

(Matter raised by officials)

The policy intent of section DB 46 of the Income Tax Act 2007 is to allow deductions for expenditure that involves avoiding, remedying, or mitigating environmental contaminants or the making of noise. Depending on the type of expenditure, it is either fully deductible (eg, expenditure related to monitoring the discharge of a contaminant) in the year it is incurred or gradually deductible on an amortised basis over the resulting asset's expected life (eg, expenditure on riparian planting). In the latter case, the expenditure can either be amortised on the equivalent of a straight-line or diminishing value basis.

Errors in the drafting of the current provision emerged during a ruling application, which then relied on the savings provisions in the preceding version of the Income Tax Act to achieve the ruling. The errors relate to the use of terms used in the depreciation provisions within section DB 46. Expenditure to mitigate environmental hazards is not depreciable property so the use of terms defined in relation to depreciable property is not correct in the context of section DB 46. Terms used include "adjusted tax value", "diminishing value method", "diminishing value rate", "straight-line method", and "straight-line rate. In the case of the definition of "diminished value", also used in the section, errors arose during the rewrite of the Income Tax Act in 2007.

As a result, section DB 46 should be amended to replace the references to terms used in the depreciation provisions with equivalent terms for the section and the errors in the "diminished value" definition should be rectified to ensure that expenditure to avoid, remedy, or mitigate environmental hazards is deductible as intended.

The amendments to section DB 46 should apply retrospectively from the date the provision was first introduced into the Income Tax Act 2004. The amendments to the definition of "diminished value" should apply from 1 April 2008. A savings provision should be included to ensure that positions on deductions already taken are not able to be re-opened.

It is important that section DB 46 works as intended because it is likely to be increasingly applied in the future. This is due to recent law changes requiring a large amount of expenditure to be incurred to remove asbestos from non-residential buildings. More generally, there will be a greater focus on mitigating environmental hazards as part of responding to climate change.

Recommendation

That the submission be accepted.

Issue: Time to make a look-through company election

Submission

(Matter raised by officials)

A new company can become a look-through company by making an election to the Commissioner **before** the last day for filing the return of income of the company per section HB 13(3) of the Income Tax Act 2007.

This creates confusion for taxpayers because this does not align with the general rules for other elections, which permit elections to be filed on the last day to file a tax return. Despite this, Inland Revenue has been permitting elections to be filled **on** the last day for the tax return to be filed.

Section HB 13(3) should be amended so the last election date for a new company to become a look-through company is the last day to file the company's tax return.

This change should apply for income years beginning on or after 1 April 2011 to provide certainty to taxpayers who have relied on Inland Revenue's practice since the inception of the look-through company election process.

Recommendation

That the submission be accepted.

Issue: Setting the early payment discount rate

Submission

(Matter raised by officials)

The early payment discount (EPD) should be amended so one rate is applicable throughout a tax year.

Currently, the EPD rate changes according to the Commissioner's paying rate. The recent economic environment has resulted in the paying rate changing more often than was envisaged. This creates uncertainty for taxpayers about which EPD rate will apply to their total tax payable for the year. This uncertainty, and the risks of overpaying or underpaying the tax payable, does not align with the policy intent of incentivising voluntary payment of taxes by businesses in their first year of paying tax.

To provide clarity, section RC 38(4)(a) of the Income Tax Act 2007 should be amended so the EPD is pegged to the Commissioner's paying rate as at 31 March of the previous tax year from the 2024–25 and later income years.

Furthermore, a separate amendment to section RC 38 should be made to use the highest Commissioner's paying rate during the income year to calculate the EPD rate for the 2022–23 and 2023–24 income years. This will ensure that taxpayers were not disadvantaged when interest rates increased during years that were completed prior to the proposed change.

Recommendation

That the submission be accepted.

HOUSING REMEDIAL AMENDMENTS

Issue: Unintended land tainting on a partition of land

Submission

(Matter raised by officials)

Section CB 10(2) of the Income Tax Act 2007 should be amended to ensure it does not apply to a disposal of land subject to section CW 3C.

Comment

Section CB 10(2) taxes land owned by a person associated with a land developer, if it is acquired at the time the developer is in business, and is disposed of within 10 years of acquisition.

Section CW 3C is intended to ensure that there is no income tax on a partition of land between co-owners, to the extent to which there is no substantive change in ownership.

A taxpayer who is exempt under section CW 3C on a partition of land may be subject to the land tainting rule in section CB 10(2), contrary to what was intended.

This will occur where part of the land is developed and sold. For example, consider a taxpayer who has held land on capital account for many years, but decides to subdivide the land into townhouses and keep one for themselves. The taxpayer incorporates a company to carry out the subdivision. The land is to be subdivided into five lots, with the taxpayer owning one and the company owning the remainder. The company therefore acquires 80% of the land, with the taxpayer holding the remaining 20%. Upon subdivision, the taxpayer ends up owning a 20% interest in five lots of land, and the company ends up owning an 80% interest in five lots of land. To achieve what the parties intended, the company needs to transfer an 80% interest in one lot to the taxpayer, and the taxpayer needs to transfer a 20% interest in four lots to the company. These transfers will be exempt under section CW 3C. However, the taxpayer would also be treated as acquiring the 80% interest in the land while associated with a developer (ie, the company that they established to develop the land). As a result, the land intended to be retained by the taxpayer is tainted and will be subject to income tax if disposed of within 10 years. This is contrary to the policy's intent.

Officials recommend that section CB 10(2) is amended with effect on and from 27 March 2021 (the date that section CW 3C originally applied from) to ensure that the policy intent of section CW 3C is not defeated by an unintended tainting.

Recommendation

That the submission be accepted.

Issue: Partitioning of land among co-owners

Submission

(Matter raised by officials)

Section CW 3C of the Income Tax Act 2007 should be amended to ensure that disposals between co-owners on a subdivision of land are not taxed to the extent that the post-subdivision allocation aligns with the original co-ownership shares.

Comment

Prior to the introduction of section CW 3C, co-owners who subdivided land and kept one parcel each were considered to have a 50% share in each parcel, and therefore to have disposed of their share in the parcel they didn't keep to the other co-owner.

Section CW 3C was intended to ensure that there is no income tax where there is no substantive change in ownership following a subdivision. If there is an effective change in ownership proportions, only the difference should be subject to tax. It was intended that the exemption in new section CW 3C would apply *to the extent* that post-subdivision allocation aligns with original co-ownership shares, with an exception for instances where there is a small difference in the allocations of up to 5% of the smallest co-owner's original holding. If the difference is greater than 5% of the smallest co-owner's original holding, the base rule should apply (ie to the extent the post-subdivision allocation aligns with the original co-ownership shares). The 5% rule is to ensure minor differences are ignored (these could arise due to topography for example).

The current provision is ineffective in achieving this as follows:

- The provision does not apply on a "to the extent" basis, which means if there is no proportionality, the exemption does not apply.
- The 5% rule as drafted only applies to the co-owner who owns the smallest proportion of the land, not all co-owners.
- The provision does not apply if any of the land is disposed of to a third party. For example, if two siblings purchase land, subdivide and build two houses and one sibling buys one of the houses with their partner, the entire provision wouldn't apply and both siblings would be taxed on a disposal. Instead, only the disposal to the partner should be taxed.

Officials recommend that section CW 3C is amended with effect on and from 27 March 2021 (the date the provision originally applied from) to ensure that only disposals that constitute an effective change in ownership are taxed.

Recommendation

That the submission be accepted.

Issue: Error in trust provisions

Submission

(Matter raised by officials)

Section CB 6AB(2) of the Income Tax Act 2007 contains two tests for rollover relief which are mutually exclusive (that is, it is not possible to get rollover relief under both tests). The first of these tests applies when the transferees had previously transferred the land in question to the trust, whereas the other test applies when the transferees had *not* previously transferred the land to the trust. The problem is that there is an “and” after the first test, which essentially requires both tests to be met for rollover relief to apply (even though this is clearly not possible and is not what was intended).

Officials recommend that the drafting be clarified so the two tests are clearly separate from one another, and a taxpayer only needs to meet one of these tests for rollover relief to apply (provided that all other applicable requirements for rollover relief are met).

Recommendation

That the submission be accepted.

Issue: Rollover relief and the main home exclusion

Submission

(Matter raised by officials)

The main home exclusions from the bright-line test should be amended to ensure that, where rollover relief under section CB 6AB of the Income Tax Act 2007 applies, the use of the property by the transferor (for example, as a main home) is attributed to the transferee.

Comment

The bright-line test taxes residential land acquired and sold within a specified timeframe. Rollover relief ensures that the bright-line test is not triggered in certain common situations where there is a legal transfer of residential land, but no change in economic ownership. Section CB 6AB provides rollover relief for transfers to or from family trusts and certain other capacities from the bright-line test.

The rollover provisions are ineffective in ensuring the bright-line test does not apply in certain circumstances where the main home exclusion also applies. For example, consider a family home that was acquired between 29 March 2018 and 27 March 2021 (therefore subject to a 5-year bright-line period), used as a family home for three years while under the ownership of Trust A, then transferred to Trust B and rented for a year before being sold.

Absent an amendment, Trust B will be taxed on the sale of the property under the bright-line test. This is because the main home exclusion will not apply as the property has not been used as a main home for most of the time it was owned by Trust B. However, if the actions of Trust A were attributed to Trust B, Trust B would be able to apply the main home exclusion because the beneficiaries of Trust B will be deemed to have occupied the property as their main home for three out of four years (ie, more than 50% of the time).

Officials recommend that the main home exclusions in sections CB 16A and CZ 40 are amended with effect from 27 March 2021 (the date the rollover relief rules apply from) to reflect the rollover relief provisions.

Recommendation

That the submission be accepted.

Issue: Land used for transitional housing

Submission

(Matter raised by officials)

Section DH 4(4) of the Income Tax Act 2007 should be amended to include land used for transitional housing.

Comment

Section DH 4(4) provides that the interest limitation rules do not apply to interest incurred by a person for land, to the extent the land is used by either a registered community housing provider, a government department or Kāinga Ora and its wholly owned subsidiaries for social housing, temporary accommodation or other accommodation for people in need.

It was always intended that this provision would also apply to land used by a transitional housing provider for one of the housing purposes listed in section DH 4(4). However, due to a drafting error, transitional housing providers were not included.

Officials recommend that section DH 4(4) is amended with effect on and from 27 March 2021 (the date section DH 4 applied from) to include land rented to a person contracted by a government department to provide land for social or transitional housing. This will enable owners of land used by a transitional housing provider to provide social or temporary housing to claim interest deductions. It will also ensure that other transitional housing arrangements are covered – for example, a person who rents their property to a charity and that charity has a contract with the Department of Corrections to provide housing to ex-convicts who are recently released from prison.

Recommendation

That the submission be accepted.

PLATFORM ECONOMY GST REMEDIAL MATTERS

Issue: Adjustment rules for the flat-rate credit

Submission

(Matter raised by officials)

The existing rules in the Goods and Services Tax Act 1985 (GST Act) for adjusting input tax deductions do not work for the flat-rate credit. Marketplace operators should be able to correct input tax deductions for the flat-rate credit when they realise the calculation will be wrong. This could apply, for example, when the value of the supply to which the flat-rate credit relates has changed.

Comment

GST-registered persons are generally able to adjust input tax deductions in accordance with adjustment rules in section 25 of the GST Act. These rules are not available for input tax deductions for the flat-rate credit for listed services.

Marketplace operators that are responsible for deducting input tax for the flat-rate credit should be able to make similar corrections when they discover the amount of the flat-rate credit to be wrong.

In these circumstances:

- where the marketplace operator discovers they have under-deducted input tax for the flat-rate credit, they should be able to deduct additional input tax for the under-deduction, and
- where the marketplace operator discovers they have over-deducted input tax for the flat-rate credit, they should be able to reduce future amounts of flat-rate credit payable to the underlying supplier (for example, host or driver).

Marketplace operators should be able to make these adjustments in the GST return for the taxable period in which under-deduction or over-deduction is discovered. This would reduce compliance costs for marketplace operators and administration costs for Inland Revenue because otherwise manual adjustments would be required via requests to amend original GST assessments. This also ensures that underlying suppliers who receive the flat-rate credit receive the correct amounts.

Recommendation

That the submission be accepted.

Issue: Listing intermediaries

Submission

(Matter raised by officials)

Following enactment of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023, it was identified that the rules do not adequately cater for many circumstances where a person, who provides property management services for short-term accommodation hosts in the platform economy (and may or may not operate an electronic marketplace of its own), lists accommodation on multiple third-party electronic marketplaces on behalf of their clients.

In these circumstances, the new law requires that the operator of the electronic marketplace (that the guest used to make the booking) account for output tax on the supply and deduct input tax for the flat-rate credit. The operator is then required to pass the flat-rate credit on to the (non-GST registered) underlying supplier and provide them with a statement showing the amount of flat-rate credit passed on. This is difficult in practice because the marketplace operator is not the person the underlying supplier of the accommodation has a relationship with, but an entirely unrelated third party who presently has no or very little need to collect information about the underlying supplier.

Following discussions with some affected businesses and private sector GST experts, officials recommend further amendments to ensure the rules are workable in these situations. Specifically, new rules should be introduced for a person who meets a legislative definition of “listing intermediary”, which would be a person who is tax resident in New Zealand and provides property management services to underlying suppliers of short-term accommodation where those services include listing accommodation for hire on multiple third-party electronic marketplaces.

A listing intermediary would be responsible for deducting input tax for the flat-rate credit for non-GST registered underlying suppliers and for providing regular statements to those underlying suppliers (at least monthly) showing the amounts passed on.

Unless the listing intermediary and the marketplace operator agree otherwise, the responsibility for output tax at the standard GST rate of 15% would remain with the marketplace operator, along with the requirement to provide taxable supply information to the guest. The listing intermediary would be treated as making a zero-rated supply of the accommodation to the marketplace operator. Any related services that the listing intermediary supplies directly to guests would also be treated as having been supplied to the marketplace operator (also as a zero-rated supply), with the marketplace operator being responsible for accounting for GST on those services at the 15% rate.

To provide additional flexibility, a listing intermediary would be able to agree with a marketplace operator in writing that the listing intermediary, rather than the marketplace operator, is responsible for output tax at the 15% rate on supplies of accommodation as well as any services supplied by the listing intermediary directly to guests. As with the

recommended default rules described above, the listing intermediary **would** be responsible for deducting input tax for the flat-rate credit (if applicable) and would **not** be responsible for providing taxable supply information to recipients of listed services. Instead, marketplace operators would provide taxable supply information to guests directly.

Officials recommend that these rules apply from 1 April 2024.

Recommendation

That the submission be accepted.

Issue: Flat-rate credit – technical matters

Submission

(Matter raised by officials)

Several amendments should be made to ensure the flat-rate credit operates as intended:

- It should be clarified that the flat-rate credit is not consideration for a supply of any goods or services by the underlying supplier.
- The definition of “input tax” in section 3A of the GST Act should be amended to include a reference to the “flat-rate credit” because it is deducted as input tax, but not currently included in the definition.
- Section CX 1 of the Income Tax Act 2007 should be amended to ensure the flat-rate credit is excluded income whether the recipient of the credit is a GST-registered person or not.
- The value of the flat-rate credit should not be reduced by the amount of any discount provided by a marketplace operator.

Recommendation

That the submission be accepted.

Issue: Minor remedial matters

Submission

(Matter raised by officials)

The following remedial matters should also be addressed:

- Only non-individual underlying suppliers (accommodation hosts, drivers and deliverers) should be able to unilaterally opt out of the GST marketplace rules on the basis of exceeding more than \$500,000 of taxable supplies in any 12-month period. Based on Inland Revenue data, no natural person underlying supplier would exceed this threshold and limiting the opt-out criteria accordingly would mitigate an integrity risk.
- A clarifying amendment should be made for when a marketplace operator collects an amount to cover its GST liability from a customer's payment due to an underlying supplier of listed services. The amendment should provide that this amount collected is not consideration for a supply.
- Several consequential amendments to include a reference to "listed services" were made to the GST Act but these have no practical effect and should be removed to prevent confusion. References to "listed services" in the following provisions should therefore be removed:
 - section 9(9), which contains a special time of supply rule that is only relevant to operators of loyalty programmes
 - section 11A(1)(y), which does not operate as intended but treats a supply of listed services between marketplace operators as a zero-rated supply
 - section 20(4C) and (4D), which are special input tax deduction denial rules that apply for business-to-business supplies of remote services and low value imported goods that were incorrectly zero-rated. These rules have no application for listed services (no business-to-business exclusion applies to listed services).
- A non-resident principal should be able to use a New Zealand tax resident agent, and in such circumstances the New Zealand resident agent should be treated as the supplier of the listed services.
- When a marketplace operator is treated as the supplier of listed services, the marketplace operator should always be required to provide taxable supply information and supply correction information (where applicable) to the recipient. This should apply without the need for the recipient to request the information, and regardless of the recipient's GST registration status.
- Recent changes to the definition of "electronic marketplace" have, arguably, subtly changed the way in which the electronic marketplace rules apply in the low-value imported goods context (and may have similar implications for the new listed services rules). Minor wording changes are required to clarify the rules.
- Section 60C(2BC) enables the Commissioner to issue determinations setting out criteria a person must meet if they wish to opt out of the marketplace rules but do not meet the other statutory criteria for an opt-out. An amendment is required to bring forward the application date for this provision from 1 April 2024 to 1 April 2023. This will enable the Commissioner to issue determinations before the marketplace rules take effect. This is consistent with the policy intent as reflected in the Bill commentary.

- Technical drafting changes to ensure the legislation aligns with the policy intent by ensuring the Commissioner must have regard to the factors in both paragraphs of section 60C(2BD) and ensuring only those underlying suppliers who make taxable supplies of more than \$500,000 can unilaterally opt out of the marketplace rules under section 60C(2BF).

Recommendation

That the submission be accepted.

OTHER REMEDIAL AMENDMENTS

Issue: Revoking redundant regulation

Submission

(Matter raised by officials)

The Tax Administration (Regular Collection of Bulk Data) Regulations 2022 enables Inland Revenue to collect datasets from payment service providers (PSPs) on a regular basis. The datasets consist of aggregate data of merchant sales and are used to detect non-compliance, including hidden economy activities. The datasets are used for risk analysis and to ensure compliance through education, marketing and targeted campaigns including investigation of high-risk cases. Macro analysis of this information is also used in research and to inform policy.

When the regulations were drafted, PSPs were concerned with Inland Revenue's ability to criminally prosecute a PSP for late information filing, even if it was due to extenuating circumstances. Regulation 13 was introduced to provide PSPs with a criminal defence if they took reasonable steps to provide the information by the due date.

On 11 May 2023, the Minister of Revenue received a letter from the Regulations Review Committee (the Committee) raising concern about regulation 13. The Committee, upon review of the Regulations, identified that regulation 13 potentially provides a defence against the offences and criminal penalties outlined in the Tax Administration Act 1994. Therefore, there is concern that this secondary legislation amends the application of primary legislation, when it has not been expressly empowered to do so by the legislation under which it is made.

Officials subsequently reviewed regulation 13 and concluded that it is ultra vires and should be revoked.

This change will apply from the day after the date of assent.

Recommendation

That the submission be accepted.

MAINTENANCE ITEMS RAISED BY OFFICIALS

Summary of proposed amendments

The proposed amendments in Table 8 reflect minor technical maintenance items raised by officials.

Effective date

Effective dates for the proposed amendments are outlined in Table 8.

Table 8: Maintenance items

Act	Section	Amendment	Effective Date
Income Tax Act 2007	CB 6AB(5)(a)	Correcting effective date	27 March 2021
	CB 6AC(4)(a)	Correcting effective date	27 March 2021
	CX 19D	Aligning with requirements of the Legislation Act 2019	1 April 2008
	YA 1 (reportable income)	Inserting defined term	1 April 2022
	Schedule 35	Removing deregistered company	20 October 2022
	Schedule 35	Updating company name	9 March 2023
Tax Administration Act 1994	3(1) (civil penalty)	Correcting effective date	1 January 2024
	3(1) (individual), (qualifying individual), 22D	Correcting cross-references	1 April 2019
	227F	Correcting cross-references	18 March 2019
	59BA(3)	Clarify exemption for foreign trust	1 April 2021, 1 April 2023

Act	Section	Amendment	Effective Date
Goods and Services Tax Act 1985	20(3LB), (3LC)	Clarifying relationship between provisions	30 March 2022
	20(3LB)	Correcting cross-reference	30 March 2022

**TAXATION (ANNUAL RATES FOR 2023–24, MULTINATIONAL TAX,
AND REMEDIAL MATTERS) BILL**

Summary of recommendations

SUMMARY OF RECOMMENDATIONS

OECD Pillar Two: global minimum tax

Rec #	Recommendation description	Submitter	Page #
1	Amend proposed section HP 3(3) of the Income Tax Act 2007 to clarify that the GloBE rules apply for a fiscal year	PwC	19
2	Clarify wording of proposed section HP 3 so the Commentary and Agreed Administrative Guidance would prevail over the Model Rules if inconsistent	Cantin Consulting	20
3	Set an effective date of 1 January 2025 for the IIR and UTPR, and an effective date of 1 January 2026 for the DIIR	3 submitters	26
4	Amend wording of OECD published Commentary and Guidance implementation provisions to remove ambiguities	Regulations Review Committee	27
5	Amend uncertain wording in application provision	Regulations Review Committee	29
6	Insert additional provisions to allow for the release of a New Zealand entity from joint and several liability when it leaves a particular MNE group	PwC	34
7	Clarify that GloBE top-up tax paid under a QDMTT is included within the meaning of "foreign income tax" and therefore a foreign tax credit is available	KPMG	36
8	Add an explicit reference to section 91C of the TAA giving the Commissioner the power to make binding rulings on the applied GloBE rules	Officials	50
9	Add empowering assessment provisions for discretionary penalties and allow Commissioner to make an assessment for these penalties without being required to issue a notice of proposed adjustment	Officials	51

Trustee tax rate

Trustee income de minimis

Rec #	Recommendation description	Submitter	Page #
10	Introduce a de minimis so that the first \$10,000 (after expenses and losses) of trustee income derived by trusts and estates is taxed at the current trustee tax rate of 33%	10 submitters (introduce a de minimis) Baucher Consulting Ltd (\$10,000 de minimis)	86

Disabled beneficiary trusts

Rec #	Recommendation description	Submitter	Page #
11	Extend definition of "disabled beneficiary" to two additional government support payments – the JobSeeker Support Health and Disability (if this is paid for at least six months) and the Disability Allowance	Officials	91
12	Extend the definition of "disabled beneficiary" to include people who are 65 or over and received one or more of the four eligible government support payments in the income year they turned 65 or one prior	Perpetual Guardian	92
13	Allow disabled beneficiary trusts to have multiple beneficiaries, provided they satisfy the definition of "disabled beneficiary"	Trustees Executors Ltd (allow multiple beneficiaries) 3 submitters (allow multiple disabled beneficiaries)	98
14	If recommendation 13 is accepted, allow disabled beneficiaries to be added/removed from the trust (as long as there is always at least one disabled beneficiary remaining)	Chartered Accountants Australia and New Zealand	100
15	Extend "disabled beneficiary" definition to include people who receive a relevant payment in relation to the relevant income year	Advisor	101

Rec #	Recommendation description	Submitter	Page #
16	Amend the modification so the current 33% trustee rate continues to apply to disabled beneficiary trusts	2 submitters	102

Deceased estates

Rec #	Recommendation description	Submitter	Page #
17	Extend the time limit of the deceased estates modification to apply for the income year of death plus the following three full income years	7 submitters (three income years) 17 submitters (extend application of modification)	106
18	Amend the deceased estates modification so that eligible estates are taxed at 33% on all trustee income	4 submitters (33% flat rate) 3 submitters (flat rate other than 33%)	110
19	If recommendation 18 is accepted, amend the modification so it applies automatically to all estates	CPA Australia	111

Specific types of trusts

Rec #	Recommendation description	Submitter	Page #
20	Apply a 28% "legacy superannuation fund" tax rate to trusts that at one point qualified as a "widely-held superannuation fund" and have restricted membership	Financial Services Council	121
21	Energy consumer trusts to remain at a 33% tax rate	5 submitters	127

Corporate beneficiary rule

Rec #	Recommendation description	Submitter	Page #
22	Amend the corporate beneficiary rule to ensure it applies if a direct or indirect shareholder of the close company is the settlor of the trust or a trustee of the trust	3 submitters	140
23	Amend the corporate beneficiary rule to ensure it does not apply to corporate beneficiaries of securitisation trusts	4 submitters	141

Foreign trusts

Rec #	Recommendation description	Submitter	Page #
24	Retrospectively reverse the replacement of "New Zealand resident trustee" with "resident trustee of a foreign trust" in section HC 26 of the ITA	Te Kāhui Ture o Aotearoa New Zealand Law Society	150

Taxation of backdated lump sum payments

Rec #	Recommendation description	Submitter	Page #
25	Amend the proposed changes to include backdated lump sum payments for attendant care	3 submitters	166

Other policy items

Taxation rollover relief

Rec #	Recommendation description	Submitter	Page #
26	Widen the taxation rollover relief provisions to accommodate buy-outs by local or central government of flood/cyclone damaged residential properties	2 submitters	183
27	Turn off bright-line and other timing tests for buy-outs by local or central government	3 submitters	184
28	Extend rollover relief to land improvements covered by sections DO 4 and DO 5	PwC	184
29	Note officials' statement that the June 2023 East Coast floods are intended to be covered by the definition of "North Island flooding events"	2 submitters	185
30	Add Nelson flood buy-outs to the list of events covered by the turning off of the bright-line and other timing tests	Officials	186
31	Replace the requirement that an independent assessment be made as to whether a damaged asset is uneconomic to repair with a requirement that the business has made a reasonable assessment that the asset is uneconomic to repair	PwC	190
32	Amend proposed section FZ 7B(4)(b) to simply require a reasonable estimate of the income involved	PwC	193
33	Amend the latest date for providing Inland Revenue with a rollover election notification to 30 April 2024	Officials	194

Schedule 32 – Overseas donee status

Rec #	Recommendation description	Submitter	Page #
34	Add Emergency Alliance to schedule 32 to the Income Tax Act 2007, with effect on and from 26 October 2023	Emergency Alliance	197

Other items

Correcting extra pay inaccuracy on termination

Rec #	Recommendation description	Submitter	Page #
35	Inland Revenue to provide guidance for situations where two pay periods are not available	Digital Service Providers Australia New Zealand	203
36	Application of the extra pay rule be extended until the 2026 tax year (ie 1 April 2025–31 March 2026)	2 submitters	204
37	Confine the application of the extra pay rule to extra pay arising on termination of employment, current rules will remain in force for all other situations	3 submitters	205

Gift-exempt bodies

Rec #	Recommendation description	Submitter	Page #
38	Remove clause 66(4) from the Bill	2 submitters	209

Charities: deregistration tax

Rec #	Recommendation description	Submitter	Page #
39	Amend the scope of the proposal to: <ul style="list-style-type: none"> ▪ exclude transfers of assets to registered charities or New Zealand tax-exempt entities for charitable purposes from the deregistration tax ▪ remove the exclusion from the deregistration tax for disposals of assets in accordance with a charity's rules (section HR 12(3)(a)(ii)) 	Simpson Grierson	211
40	Amend the application date for all the amendments to section HR 12 to ensure that they apply only to charities that deregister from the Charities Register on or after 1 April 2024	Simpson Grierson	214
41	Section HR 12(3)(a) should be amended to ensure that only transfers of assets to tax charities (within the meaning of "tax	Officials	215

Rec #	Recommendation description	Submitter	Page #
	charity" in section CW 41(5)(a), (b), (d) – ie, not (c)) are excluded from the deregistration tax		

Double tax agreement source rule

Rec #	Recommendation description	Submitter	Page #
42	Clarify definition of "technical services fees"	KPMG	221
43	Clarify definition of "PE outside New Zealand"	KPMG	222

10% income interest test for access to the attributable FIF income method

Rec #	Recommendation description	Submitter	Page #
44	Amend sections EX 35(a) and EX 46(3)(a)(ii) to add additional clarity that the relevant period for the income interest calculation is the period during which the person has rights in the FIF	2 submitters	225

Rollover relief remedial amendments

Rec #	Recommendation description	Submitter	Page #
45	Amend application date of rollover relief provisions	Mayne Wetherell	232
46	Relax the proportionality requirement in section CB 6AB(2)(b) so rollover relief may still apply when land is transferred from a trust to the surviving settlor(s) after the death of a settlor	nsaTax Ltd	232

Miscellaneous issues

Rec #	Recommendation description	Submitter	Page #
47	Limit the amount deemed to be paid under section EW 46C if an arrangement enters the financial arrangements rules at less than its face value	Bell Gully	247
48	Amend section EW 46D to clarify that it does not apply to shares issued under a convertible note issued by a borrower who is solvent when the note is issued	Mayne Wetherell	248

Matters raised by officials

Remedial amendments to Tax Administration Act 1994

Rec #	Recommendation description	Submitter	Page #
49	Amend section 69B so an IR8J return is not required if the MACA has no balance at all times during the relevant tax year	Officials	257
50	Amend definition of "Government agency" in clause 23B, schedule 7 to include Te Whatu Ora (legal name Health New Zealand)	Officials	257
51	Clarify that individuals earning "non-reportable income" can change balance dates	Officials	258
52	Clarify section 142K(2)(c) to ensure a seller is liable for a penalty if they do not provide information to a platform operator that is required to fulfil the operator's obligations under the OECD reporting rules	Officials	259
53	Amend section 22(2) to clarify platform operators' record-keeping requirements are seven years following the end of the relevant calendar year	Officials	260
54	Amend section 91AAS(2) and (3) to remove references to a 12-month maximum period	Officials	260
55	Amend the nominated taxpayer provision so that it applies to employment-related taxes only	Officials	261

Remedial amendments to Income Tax Act 2007

Rec #	Recommendation description	Submitter	Page #
56	Amend section CW 52B to include direct funding disability support payments made by the Ministry for Disabled People	Officials	263
57	Amend section DB 46 to remove terms linked to depreciable property and correct the definition of "diminished value"	Officials	263
58	Amend section HB 13(3) so the last election date for a new company to become a look-through company is the last day to file the company's tax return	Officials	264

Rec #	Recommendation description	Submitter	Page #
59	Amend section RC 38(4)(a) so the EPD is pegged to the Commissioner's paying rate as at 31 March of the previous tax year	Officials	265

Housing remedial amendments

Rec #	Recommendation description	Submitter	Page #
60	Amend section CB 10(2) of the Income Tax Act 2007 to ensure the policy intent of CW 3C is not defeated by an unintended tainting	Officials	266
61	Amend section CW 3C of the Income Tax Act 2007 to ensure that only disposals that constitute an effective change in ownership are taxed	Officials	267
62	Amend section CB 6AB(2) so a taxpayer only needs to meet one of the tests for rollover relief	Officials	268
63	Amend sections CB 16A and CZ 40 of the Income Tax Act 2007 to reflect the rollover relief provisions	Officials	268
64	Amend section DH 4(4) of the Income Tax Act 2007 to include land used for transitional housing	Officials	269

Platform economy GST remedial amendments

Rec #	Recommendation description	Submitter	Page #
65	Enable platform operators to self-correct errors related to the calculation of input tax for the flat-rate credit	Officials	271
66	Introduce new rules for listing intermediaries, being persons that, through automatic processes, act on behalf of underlying suppliers of listed services through electronic marketplaces	Officials	272
67	Technical amendments to the flat-rate credit to ensure it works as intended	Officials	273
68	Minor amendments to the GST rules for listed services to ensure they work consistently with the policy intent	Officials	273

Other remedial amendments

Rec #	Recommendation description	Submitter	Page #
69	Revoke regulation 13 of the Tax Administration (Regular Collection of Bulk Data) Regulations 2022	Officials	276

Maintenance items

Rec #	Recommendation description	Submitter	Page #
70	Correct the effective date for an amendment to definitions in sections CB 6AB(5)(a) and CB 6AC(4)(a) of the ITA 2007	Officials	277
71	Align section CX 19D with requirements of the Legislation Act 2019	Officials	277
72	Insert a definition of "reportable income" in section YA 1 of the ITA 2007	Officials	277
73	Amend schedule 35 of the ITA 2007 to change the name of a company and remove another company	Officials	277
74	Amend the effective date of a cross-reference inserted into the definition of "civil penalty" in section 3(1) of the TAA to 1 January 2024	Officials	277
75	Amend incorrect references in sections 3(1) (individual), (qualifying individual) and 22D of the TAA	Officials	277
76	Clarify exemption for foreign trust in section 59BA(3) of the TAA	Officials	277
77	Amend incorrect references in section 227F of the TAA	Officials	277
78	Clarify relationship between provisions in section 20(3LB), (3LC) of the GST Act	Officials	277
79	Amend incorrect references in section 20(3LB) of the GST Act	Officials	277