NEWSLETTER

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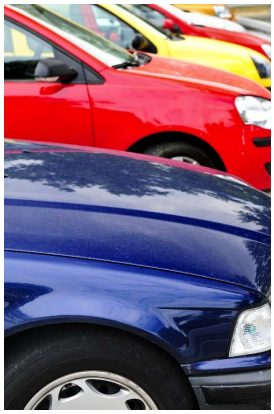
# Employer provided carparks

Employers are required to pay FBT on non-cash benefits provided to staff. However, like most taxes, there are exemptions. It is important to be aware of the exemptions to ensure FBT is not overpaid. One such exemption provides that benefits (other than travel, accommodation or clothing) provided and used on the employer's premises will not be subject to FBT. The provision of carparks fits within this exemption category.



Historically, what qualifies as "premises of the employer" has been uncertain. For example, if an employer is located next door to a carpark building and arranges and pays for six employees to have access to carparks in the building, do these carparks qualify as being provided on the employer's premises?

The IRD has recently finalised two Public Rulings that include a change to its position on what qualifies as "premises of the employer" in this situation. Previously, the legal form of the car parking arrangement was the determining factor. For instance, carparks were required to be owned or leased by the employer to qualify for the exemption. Licence agreements did not satisfy the exemption requirements, even if the substance of the agreement was more akin to a lease.

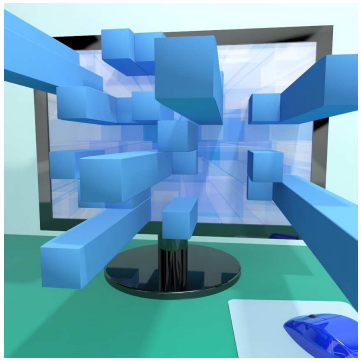
In its Ruling, the IRD has softened its view and allowed a 'substance over form' approach. This will increase the number of situations that fall within the exemption by allowing license agreements to be regarded as being "on premises", provided that the employer has a "substantially exclusive" right to use the carpark.

IRD has defined the phrase "substantially exclusive right" to mean that no one, including the carpark operator or any other third party, can use or control the carpark in a manner inconsistent with the employer's substantially exclusive right.

The IRD provide a list of practical considerations which help to determine whether the employer has a 'substantially exclusive right'. Although not definitive, the FBT exclusion is likely to apply if the employer has unrestricted access to the carpark, the carpark remains vacant when the employer is not using it, the employer may permit others to use the car parking space, if an unauthorised person parks in the space the employer has the right to tow the unauthorised vehicle and, the employer can decide how the car parking space is used.

What this effectively means is that the nature of the agreement, rather than the label on the document will determine whether the exclusion applies. In recognition of the change in position, IRD are allowing employers to request refunds of previously paid FBT where employers have relied on the old approach.

# Changes to the IRD's administration system



The manner in which we interact with Inland Revenue (IRD) is likely to change dramatically over the next two years as the upgrade of IRD's IT system and associated legislation comes on-line. IRD's broad objective is to reduce the amount of time and cost it and private business spends on tax administration by modernising its software platform.

At present, both GST and PAYE processing costs are higher than necessary and there are problems with the quality and timeliness of information submitted. These issues not only impose costs on employers and the IRD, but also limit the Government's ability to provide effective social services.

IRD is currently working with third party software providers to design digital solutions that will integrate tax obligations into everyday business practices. To ensure the changes are well designed and beneficial to all parties, feedback is being sought on potential changes via discussion documents.

One of the most recent discussion documents outlines potential changes to GST and PAYE. The IRD is currently requesting feedback on proposed changes and poses several questions that are designed to challenge our thinking on the current approach. For example, whether changes should be made to the calculation of PAYE on extra pays, holiday pay and years that include an extra pay period?

GST related changes include the ability to allow GST return filing and payment processes to be integrated with digital accounting platforms. This would allow GST-registered persons to submit their GST returns through their chosen accounting software programme as they fall due, effectively eliminating the requirement to file a separate GST return as a separate process. Such changes would remove the need to double-enter information, and reduce the potential for error. IRD's proposals also include making GST refunds via direct credit to a customer's bank account compulsory, unless it would cause undue hardship or is not practicable.

PAYE could shift to a semi-automated process. Similar to the GST proposal above, businesses would be able to submit payroll information to the IRD direct from their accounting system and make necessary payments to the IRD at that time. For example, PAYE information could be submitted to IRD at the same time that a 'pay run' occurs. Under this design, employers' PAYE obligations would be integrated with their current business procedures, eliminating certain processes such as the need to file nil employer monthly returns. PAYE payments to IRD might be due at the same time the employee is paid.

By increasing the quality and timeliness of the information provided, IRD should have greater capability to improve individual's access to social entitlements and identify and prevent errors; such as overpayments of family assistance.

The changes represent a shift to a framework in which IRD's system would no longer work on a stand-alone basis. Instead, IRD would 'talk' to software providers, ensure their system worked in accordance with its view of applicable legislation and would then accept what it was sent. Such changes would provide the business and IRD with greater confidence regarding the accuracy and correctness of a tax return.

# Student loans – sharing with Australia

Compliance with student loan repayment obligations remains a continued focus for IRD and the Government. IRD currently estimates that $3.2billion is owed by student loan borrowers who are currently living overseas, the majority of whom reside in Australia.

In November 2015 a new Bill was introduced to Parliament which, once enacted, will enable IRD to

track down student loan defaulters living in Australia. The new legislation is part of a broader IRD focus on compliance and will allow IRD to obtain up-to-date information including taxpayer's addresses from the Australian Taxation Office (ATO). This information will then be matched against the IRD's records and where appropriate, IRD will act to recover outstanding loan amounts.

The Bill will also enable the IRD to demand the entire balance of an outstanding student loan debt from 'serious non-compliers' (rather than only being able to demand the outstanding loan repayments). The serious non-compliers who would be targeted by IRD are those with large amounts of outstanding debt, who have been in default for a long time, or who have missed multiple repayments.

In the IRD media statement Tertiary Education, Skills and Employment Minister Steven Joyce commented: "We are making steady progress in tracking down student loan defaulters and getting them to pay up. However, there is still too many who have spent a long time in Australia refusing to meet their obligations. This new initiative will give IRD up to date contact details to track down those deliberately avoiding their payments and being unfair to other taxpayers."

Information sharing with the Australia has also seen substantial success as the IRD has already used data from Australian customs officials to track defaulters and send letters out that explain how to repay loans. The IRD also offer facilities that make it easier for borrowers to comply with their obligations, with options such as fee-free payments for borrowers living anywhere in the world.

It is expected that the new rules will come into effect in mid-2016.

The above changes add to existing initiatives, such as the ability to arrest student loan defaulters, with the first arrest made on 18 January 2016. The arrest was made as a "last resort" after Inland Revenue had not managed to get hold of the borrower since he had left NZ, meanwhile his loan had increased from $40,000 to $120,000 (including interest and penalties). In other cases people have chosen to meet their obligations before an arrest was needed.

The overall message from the IRD is that just because someone leaves New Zealand that does not mean that they can forget their student loan debt. The New Zealand taxpayer funded their education and expects to be repaid so that the next generation of students can receive the same funding.

# Relief for 'non-residents'

Inland Revenue (IRD) is likely to soften its position on how it determines if a taxpayer is a New Zealand resident as a result of a recent Court of Appeal decision.

Broadly, a person is a NZ tax resident if they are either in NZ for more than 183 days in a 12 month period or if they have a 'permanent place of abode' (PPoA) in NZ. In 2013 the Taxation Review Authority (TRA) issued a decision that resulted in an individual, Mr Diamond, being deemed to be NZ tax resident.

Mr Diamond had worked for the NZ Army for 25 years, retired in 2003 and left NZ with no intention of returning to live. He then worked in Papua New Guinea on a 12 month contract providing personal security; subsequently he spent approximately four months living in Queensland, before he began working in Iraq. In Iraq he also provided security services, completing a number of contracts up until April 2012, when he moved back to Australia.

Mr Diamond maintained close family and financial ties to his ex-wife and his four children who remained in NZ. He provided financial assistance to them, regularly visited and owned rental properties in NZ with his ex-wife (personally and then through a company).

Despite such a lengthy absence, the TRA found Mr Diamond to be a NZ resident (and liable for tax on his worldwide income) because, in brief, he had an investment property that was 'available' to him in New Zealand and an on-going 'enduring relationship' with his family and ex-wife. This was enough for the IRD to believe he had a PPoA in NZ.

The TRA decision appeared to lower the threshold for individuals to be classed as NZ tax residents and had a flow on effect generally for individuals who own property in NZ, as they could potentially be captured as tax residents of NZ.

Following the TRA decision an Interpretation Statement (IS 14/01) was issued that came into effect from 1 April 2014. The statement took into account the TRA case, stating that if a person is able to use a property as a place to live on an enduring basis, then it can still be their permanent place of abode irrespective of whether the property is rented to someone else. This approach is complex to apply and would have resulted in substantial uncertainty.

The case was appealed to the High Court and the TRA decision was overturned in favour of the taxpayer. IRD was quick to appeal that decision to the Court of Appeal (CoA) and again the decision was decided in favour of the taxpayer. The CoA ruled that the mere availability of a dwelling is not sufficient to deem a PPoA to exist. Whether an individual has a PPoA is a question of fact and requires an overall assessment having regard to a range of factors.

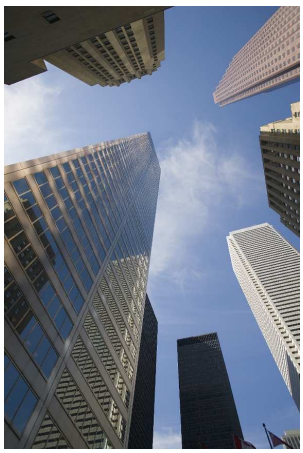
The CoA considered the Commissioners approach to determining whether Mr Diamond had a PPoA, to be in error. The key issue with the Commissioner's interpretation was that, once a dwelling that is merely available is identified, extraneous factors establishing a connection or remote ties to NZ could then be invoked to artificially assign to that dwelling the status of a permanent place of abode.

IRD is expected to update its Interpretation Statement to take into account the decision or comment on how the case will apply to residency determinations going forward.

# Snippets

### Australia shames non-tax paying firms

The Australian Taxation Office (ATO) has shamed large corporates by publishing revenue and tax information of more than 1,500 companies with reported total earnings over A$100 million (US$72.11 million) for the 2014 tax year. Of these companies more than a third paid no tax according to the ATO, with the highest level of non-payment coming from the energy and resources sector.



Companies listed include familiar names such as Boeing, Hilton Worldwide Holdings, and US oil services firm Halliburton (for list see https://data.gov.au/dataset/corporate-transparency). Based on the information provided by the ATO the Australian unit of Boeing, Hilton and Halliburton paid no tax on taxable earnings of A$53m, A$2m and A$1.3m, respectively.

Australia's Tax Commissioner blames aggressive tax structuring for the lack of tax paid and vows to continue to work to tackle base erosion and profit-sharing methods, which large corporations use to manoeuvre profits to lower-tax jurisdictions.

In contrast, despite Apple Inc and Microsoft Corp receiving negative media attention for their world-wide tax arrangements this year, their tax payments are more reasonable, having paid more tax than most of their tech peers.

It is unlikely IRD could do something similar given the secrecy provisions that it has to comply with, but a similar analysis of NZ companies would likely tell a similar story.

*If you have any questions about the newsletter items, please contact us, we are here to help.*