NEW ZEALAND
LAW SOCIETY
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Taxation (Neutralising Base Erosion and Profit Shifting) Bill

13/02/2018

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Introduction

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Taxation (Neutralising Base Erosion and Profit Shifting) Bill (Bill).

2. While the Law Society supports the general intent behind the Bill to engage with the OECD's Base Erosion and Profit Shifting (BEPS) initiative, some aspects of the Bill require further consideration. These are set out below.

3. The Law Society does not wish to be heard on the Bill.

Proposed changes to the Income Tax Act 2007 (ITA)

Clause 36: Proposed replacement section GC 13(6)

4. The Bill proposes a replacement subsection GC 13(6), which would allow the Commissioner to increase or decrease an assessment for tax at any time in the period of seven tax years after the tax year in which a return of income is made for the assessed year ('transfer pricing time bar').

5. However, no corresponding amendment has been proposed in relation to section RM 2 of the ITA which allows for a refund of overpaid tax where "the Commissioner is satisfied, or receives notice, that the person is entitled to the refund before the end of the 4-year period under section 108 of the Tax Administration Act 1994" (refund provision). This results in a mismatch between the two provisions, which were aligned when the transfer pricing time bar remained at four years.

Recommendations

6. The Law Society recommends that section RM 2 be amended to specifically refer to section GC 13(6) to ensure that the timeframes in the transfer pricing time bar and the refund provision align. That is, to the extent that the Commissioner decreases a taxpayer's assessments for seven years (if, for example, the taxpayer is entitled to a higher interest deduction), the taxpayer can equally receive refunds of overpaid tax for all of those years.

7. The Law Society recommends that section RM 2 should also ensure that refunds for any consequential transfer pricing adjustments align with the transfer pricing time bar. If, for example, the Commissioner decreases an assessment because the interest deductions claimed by the taxpayer are too high and the taxpayer has losses, the Commissioner may need to refund any non-resident withholding tax (NRWT) paid by the taxpayer on the interest payments. As currently worded, although the Commissioner can increase the income tax assessments for the seven year period, the taxpayer would be entitled only to a refund of NRWT for the four years which have passed from the end of the period in which the taxpayer furnished the NRWT return (see section 108(1C) of the Tax Administration Act 2007 (TAA).

8. To avoid any confusion between the time bar in section 108 of the TAA and the transfer pricing time bar, consistent terminology should be used. For example, section 108(1) (which now relates to time bar for income tax) refers to "tax return" whereas section GC 13(6) refers to "return of income".

Clauses 4, 34, 43 (definitions) and 44 to 48: Proposed permanent establishment rules

9. The proposed permanent establishment rules will deem a non-resident entity to have a permanent establishment (PE) in New Zealand if a related entity carries out sales-related activities for it here under an arrangement with a more than merely incidental purpose of tax avoidance (and the other requirements of the rules are met). This PE will be deemed to exist for the purpose of any applicable double tax agreement (DTA), unless the DTA incorporates the OECD's latest PE article contained in Article 12(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

10. The tax consequences of the deemed PE will be determined by the other provisions of the ITA and the DTA. For example, New Zealand will have a right to tax the profits attributable to the PE under the business profits article of an applicable DTA.

PE anti-avoidance rule: Unilateral override of New Zealand's DTA

11. The Bill introduces a PE anti-avoidance rule that will only apply where New Zealand has a DTA in place, and has not adopted the OECD's widened definition. The proposed anti-avoidance rule would unilaterally impose New Zealand's preferred PE definition onto its treaty partners and does not incorporate the PE definition that has been bilaterally negotiated.

12. This is arguably not in accordance with the legal effect of our existing treaty network; particularly given that the MLI provides a mechanism for countries to amend their treaties to give effect to the substance of these changes. Where countries choose not to amend their treaty, the Law Society questions whether New Zealand should be able to impose this change on them through our domestic rules.

13. The Law Society questions the reasons given for the proposition that the unilateral treaty override is permissible.[1] In particular, the fact that UK and Australia have already implemented similar overriding PE avoidance rules in their domestic laws without challenge from their treaty partners does not mean that New Zealand's proposed unilateral treaty override is permissible. In addition, the Commentary to the Bill notes that most of New Zealand's trading partners (including some countries from which significant investment into New Zealand is made) are not expected to adopt the widened PE definition.[2]

Recommendation

14. The Law Society recommends that consideration be given to amending the PE anti-avoidance provision in the Bill so that it reflects bilaterally negotiated treaty provisions.

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1 Cabinet Paper *BEPS — transfer pricing and permanent establishment avoidance* (13 July 2017) at paragraph 24

2 *Taxation (Neutralising Base Erosion and Profit Shifting Bill: Commentary on the Bill*, December 2017 http://taxpolicy.ird.govt.nz/sites/default/files/2017-commentary-nbeps-bill.pdf

Criteria listed in proposed section GB 54(1)

15. The Commentary to the Bill states that the intention of the PE anti-avoidance rule is to target BEPS activities, rather than more ordinary commercial arrangements. However, several of the criteria set out in proposed section GB 54(1) can *prima facie* capture a number of ordinary commercial arrangements, subject only to subsections (h) and (i), which precludes arrangements that do not have a more than incidental purpose of avoiding tax. The uncertainty associated with determining whether an arrangement has a "merely incidental purpose of tax avoidance" for the purposes of the general anti-avoidance rule (GAAR) in section BG 1 will also be present in the context of the proposed PE anti-avoidance rule. The Law Society therefore recommends that consideration be given to amending subsections (h) and (i) to limit the uncertainty that is likely to arise in interpreting these sections. For example, subsection (h) can be broadly interpreted given almost any arrangement can directly or indirectly alter the incidence of income tax.

16. According to the Commentary to the Bill, the typical PE anti-avoidance problem that the Government is trying to address usually involves the non-resident entity establishing a New Zealand subsidiary to carry out local sales-related activities. The Law Society understands this to be a common structure adopted by many multinationals which would generally not be considered "tax avoidance". A number of Advance Pricing Arrangements (APAs) would have been issued by Inland Revenue to taxpayers with such structures to whom the PE anti-avoidance could potentially still apply, given APAs only rule on the transfer pricing element of the arrangement. It is not clear how the proposed PE anti-avoidance rules would apply to taxpayers who have existing APAs in place.

17. We outline below further comments regarding specific criteria under proposed section GB 54(1).

The facilitator is associated or commercially dependent on the non-resident – section GB 54(1)(c)(ii)

18. The proposed PE anti-avoidance rule can apply in circumstances where the non-resident's sales activities are carried out by a New Zealand resident that is not associated with the non-resident but is commercially dependent on it. This criterion tests whether the unrelated facilitator derives more than 80 per cent of its assessable income from the non-resident or its associates.

19. The Law Society acknowledges that there could be situations where the non-resident could work with an unrelated third party in New Zealand who could undertake the same activities as a related facilitator in New Zealand. However, for the reasons set out below, it is submitted that the "commercially dependent" test, as it currently stands, is insufficient to ensure that it will achieve its policy objective of only capturing unrelated facilitators that carry out significant economic activity for the non-resident to such an extent that it is capable of creating a deemed PE for a non-resident.

20. As currently drafted, section GB 54(1)(c)(ii) does not take into account situations where a facilitator should be prevented from being classified as commercially dependent, such as:

- Situations where the facilitator's income varies due to decisions made outside the control of the non-resident – for example, where the facilitator decides to stop selling a product or service which could suddenly result in the facilitator being commercially dependent on the non-resident or where another entity (from whom the facilitator derives sales) decides it no longer wishes to sell its products and services through that particular facilitator.

- The size of the facilitator – in the New Zealand context, there would be many small to medium sized businesses whose assessable income would be largely derived from only one or two sources. However, this could well be a choice that the facilitator makes rather than as a result of the non-resident exercising "de facto control" over the facilitator. In this regard, the Law Society considers that it would be unfair for a non-resident's tax position to be affected by decisions made by unrelated parties.

Recommendations

21. The Law Society recommends that consideration be given to amending subsections (h) and (i) of section GB 54(1) to limit the uncertainty highlighted at paragraph 15 above.

22. The Law Society recommends that additional criteria be added in determining whether a facilitator is commercially dependent for the purposes of GB 54(1)(c)(ii). For example, this could be achieved by including a time frame over which the facilitator's income could be measured to ensure that facilitators that are genuinely independent are not inadvertently included.

Clauses 44 to 48: PE source rule

23. A new source rule is proposed in new section YD 4(17C) under which income will have a New Zealand source if it is attributable to a PE in New Zealand. The proposed change has a potential overreach which undermines the fabric of New Zealand's DTA network.

Adoption of the PE source rule

24. The measures proposed in the Bill are intended to reflect New Zealand's response to BEPS. However, the introduction of a PE source rule is not proposed or endorsed by the OECD BEPS project.

25. Under the current rules, in order to tax a non-resident on its New Zealand sales income, it is necessary to show that the income both has a New Zealand source and is attributable to a PE under a DTA. Commentary to the Bill states that this increases the compliance and administrative burden of determining a non-resident's tax liability for its sales to New Zealand customers. However, this in itself is not a strong enough reason to effectively depart from international norms by introducing standalone rules.

26. A number of the proposed amendments in the Bill acknowledge the alignment of New Zealand's rules with Australia's tax rules (e.g. changes to transfer pricing rules and the introduction of a PE anti-avoidance rule). However, the changes introduced as part of Australia's multinational anti avoidance law (MAAL), did not also introduce a new PE source rule.

27. The Law Society notes that section YD 4 already contains 18 different categories, including the all-encompassing "any other source in New Zealand". It appears that proposed new section YD 14(17C) would have the effect of unnecessarily broadening New Zealand's domestic source rules.

28. In addition, given the focus of the rule is to ensure that an appropriate proportion of non-residents' income from sales to New Zealand customers is attributed to the sales activities carried

out in New Zealand for the purpose of facilitating those sales, the proposed changes to the transfer pricing rules should be sufficient to address these concerns. In particular, the OECD's revised transfer pricing guidelines will be based on a broader, economic substance approach, which should ensure that the transfer pricing regime alone is sufficient to impose tax on the total value generated by a multinational subsidiary in New Zealand.

Recommendation

29. The Law Society recommends that careful consideration be given to whether it is appropriate to proceed with the introduction of the source rule in proposed new section YD 4(17C).

Scope of the proposed rule

30. The Commentary to the Bill states that the PE source rule is broadly targeted at non-residents' sales income from sales to New Zealand customers where sales activities are carried out in New Zealand for the purpose of bringing those sales about.

31. However, as currently drafted, the proposed PE source rule can potentially apply in much broader circumstances than intended. For example, it is currently broad enough to capture non-residents' sales income from sales to non-resident customers. This result would not be consistent with the existing international tax framework.

Recommendation

32. The Law Society recommends that if the source rule in proposed new section YD 4(17C) proceeds, changes be made to the Bill to ensure that the rule does not go beyond its stated intention – i.e. it should be limited to applying to non-residents' sales income from sales to NZ customers.

Clause 45: Proposed section YD 4B(4)

33. The Commentary to the Bill states that the OECD Commentary, as amended from time to time by the OECD, is to be used as a guide under proposed section YD 4B(4). It is proposed by the Government that the latest version of the OECD Commentary should be used for this purpose, rather than the version applying when the Bill is enacted or the version applying when the relevant amount of tax became payable. Commentary to the Bill considers that this is consistent with the application of the OECD Commentary to the DTAs generally.

34. However, this is not how OECD Commentaries are currently applied. A number of academics have concluded that if a revision to the OECD Commentary involves a fundamental change, then the revised commentary would have little application to a treaty that was concluded earlier, but this would not be true if the revision were more in the nature of a clarification.[3] In addition, courts

[3] Hugh J Ault "The Role of the OECD Commentaries in the Interpretation of Tax Treaties" (1994) 22 Intertax 144 at 148; Peter Wattel and Otto Marres "The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties" (2003) 43 European Taxation 222 at 229.

have also accepted that later OECD Commentaries can be of some assistance in the interpretation of a treaty provided they clarify or amplify the previous OECD Commentary.[4]

35. It is therefore apparent that in determining which OECD Commentary to use, it is essential to consider whether the changes made to the commentary constitute a mere clarification or a fundamental change. This is inconsistent with the position taken in the Bill where reference to the OECD Commentary "as amended from time to time" in the draft legislation will result in continuing retrospective law change and create uncertainty for taxpayers.

36. In addition, the process which the OECD undertakes in determining whether a change is classified as a clarification (which can be applied retrospectively) or a change in interpretation (which can only be applied prospectively) will likely be different from the process that New Zealand would undertake in determining whether a particular legislative change should have retrospective effect, as the OECD would take into account feedback from a number of countries that make up the OECD, whose tax settings may be different from that of New Zealand.

37. The Bill also specifically introduces reference to OECD Guidelines in areas proposed to be amended. For example, the Bill proposes that New Zealand's transfer pricing rules explicitly refer to the OECD Transfer Pricing Guidelines. However, where updates occur, New Zealand proposes to review the revisions of the guidelines with a view to updating the definition of the OECD Transfer Pricing Guidelines in section YA 1 so that it refers to the latest version of the guidelines where it is considered appropriate.

Recommendation

38. The Law Society recommends that the same approach of reviewing any revisions to the OECD Commentary to ensure they are appropriate for New Zealand should also adopted for the purposes of the OECD Commentary that should apply to section YD 4B(4).

Clause 47: Proposed new section YD 5B

39. Proposed new section YD 5B sets out how the profits attributable to a PE are to be determined. This section has been drafted to replicate the wording of the business profits articles of most of New Zealand's DTAs (adjusted to reflect the differences in terminology between the ITA and DTAs). Accordingly, where the income is attributable to a PE for the purposes of the new source rules, the Commentary to the Bill states that this should be determined under the normal PE profit attribution principles (as applied by New Zealand).

40. However, there is insufficient local guidance as to what the "normal PE profit attribution principles" applied by New Zealand are.

41. The Commentary to the Bill notes that an earlier version of OECD's latest PE attribution rules (known as the "authorised OECD approach" or AOA) will be followed for two reasons:

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4 Elliffe, C. M. "Cross Border Tax Avoidance: Applying the 2003 OECD Commentary to Pre-2003 Treaties" (2012) 3 British Tax Review 307; *Lin v CIR* [2017] NZHC 969.

- The AOA only applies to DTAs which incorporate the latest version of Article 7 and none of New Zealand's DTAs incorporate this version of Article 7, so the AOA is not relevant to New Zealand's DTAs; and
- New Zealand does not agree with some aspects of AOA and has made an explicit reservation against it.

42. However, Action 7 of the BEPS Action Plan mandated that the work should address related profit attribution issues arising from the development of changes to the definition of PE. The BEPS Report on Action 7 (at page 45) states that although the changes to Article 5 do not require substantive modifications to the existing rules and guidance concerning the attribution of profits to a PE under Article 7 of the OECD Model Tax Convention, there is a need for additional guidance on how the rules of Article 7 would apply to PEs resulting from the changes in that report. It also stated that there is a need to take into account the result of the work on other parts of the BEPS Action Plan dealing with transfer pricing, in particular the work related to intangibles, risk and capital.

43. Although New Zealand may have reservations to the AOA, there are aspects of the AOA that would have been updated as a result of other BEPS Action Plans that have been adopted in New Zealand. They should also be taken into account in applying the PE profit attribution rules in New Zealand, rather than applying the 2010 version.

Recommendation

44. The Law Society submits that in light of the current lack of an appropriate OECD guidance, Inland Revenue should issue specific guidance on New Zealand's approach to the attribution of profits to PEs.

Application dates

45. The Law Society understands that the ultimate objective of the proposed PE avoidance rule is to discourage non-residents from entering into PE avoidance structures in the first place.

46. The Commentary to the Bill states that:

> *The Government anticipates that some multinationals may wish to restructure their New Zealand operations in response to the proposed PE anti-avoidance rule. One of the policy goals of the proposed rule is to encourage taxpayers to move away from PE avoidance structures. Therefore, the Government is happy for taxpayers to restructure their New Zealand operations in response to the rules by either adopting a formal PE, or by moving to a standard local distributor model (where the goods or services are sold by the non-resident to an associated party, who then on-sells the goods to unrelated customers).*

47. However, despite acknowledging the above, the proposed application dates contained in the Bill do not recognise that restructures, particularly in the context of large multinationals, generally take a reasonable amount of time and resources to implement.

Recommendation

48. The Law Society recommends that in order to achieve the stated policy goal of disincentivising PE avoidance structures, the Bill should contain provisions for transitional periods to be implemented alongside the proposed new rules. This would enable large multinationals to consider their structures and implement any changes as a result of the proposed new rules. Alternatively, the proposed application dates should be delayed to give multinationals an opportunity to restructure rather than expecting them to effectively start restructuring into an environment where there is yet no certainty on the applicable rules.

Clause 34: Inconsistent application dates for proposed new section GB 54

49. The Commentary to the Bill states that the amendments relating to the PE rules are proposed to apply to income years starting on or after the date of enactment of the Bill.

50. However, clause 34 of the Bill, which contains the wording for the proposed new section GB 54 does not specifically indicate when the section would apply, whereas other clauses (such as clause 33) do.

51. Not having a specific reference in the Bill would suggest that clause 2 of the Bill (Commencement Date) would apply, which states that the ITA will come into force on 1 July 2018 unless otherwise stated (which it is not in respect of the proposed new section GB 54). This would have a different outcome from having an application date that applies to income years beginning on or after enactment of the Bill.

52. It appears that the intended application is as indicated in the Commentary to the Bill. This would be a more sensible application date to impose on taxpayers as it would prevent different rules from applying during an income year, which could result in taxpayers having a part-PE.

Recommendation

53. The Law Society submits that the application date for the proposed new section GB 54 be specifically referred to in the legislation to address any confusion.

Clause 30: proposed section FH 3 and FH 4

54. The proposed hybrid rules would provide a comprehensive override to existing policy outcomes in a number of regimes in the ITA. The interaction of these existing regimes and the hybrid rules is complex and will undoubtedly lead to unintended consequences.

55. In order to minimise the scope of those unintended consequences, the Law Society recommends that the hybrid rules should contain a positive list of the regimes that it is intended be overridden. For example, it is understood that the rules are not intended to apply to the trust rules in subpart HC. This should be explicit in the legislation.

56. Any such list should be a list of regimes that will be overridden rather than a list of regimes that will not. It is important that taxpayers can understand their tax obligations clearly through reading the legislation. It is not helpful if the plain words of one section written for a particular type of entity (e.g. limited partnership rules) are overridden by a general provision. If the hybrid rules are

intended to nullify aspects of the limited partnership rules, that should be made explicit in the drafting.

Proposed changes to the Tax Administration Act 2007 (TAA)

Clause 38: Proposed section HD 30

57. Proposed section HD 30 creates a new power for the Commissioner to recover unpaid tax from non-resident taxpayers. It permits the Commissioner to treat the New Zealand member of the group as if it was the "agent" of the non-resident member and therefore recover any tax owed by it from the New Zealand member directly.

58. Importantly, that power extends only to taxpayers within the same "wholly owned group" but otherwise has the effect that the New Zealand member becomes fully liable for all tax payable by the non-resident member. Presumably that power is primarily intended to allow the Commissioner to recover tax owing with respect to the income attributed to the non-resident's alleged new PE under the Bill – but the proposal is drafted so widely it could potentially apply to all tax obligations owed by the non-resident. This power therefore creates a significant new risk for non-resident groups operating in New Zealand.

59. Because section 138G is not proposed to be amended, the Commissioner's exercise of that new discretion would presumably be a disputable decision. Therefore, it appears that taxpayers may dispute any notice to a member of the group under section HD 30. Furthermore, it remains uncertain whether the New Zealand member in receipt of the HD 30 notice, itself has rights to dispute the underlying tax liability. Section HD 30 appears similar in nature to the current section HD 15 (previously HK 11) and the issues of dispute rights for alleged agents under that section remains unresolved.

Recommendation

60. The Law Society considers that it would be advisable for the Commissioner to explicitly provide dispute rights to any alleged agent in receipt of a notice of liability under the proposed section HD 30.

Clause 51: Proposed section 21BA

Proposed section 21BA(1)

61. Clause 51 inserts a new section, section 21BA, into the TAA. The Law Society is concerned that as currently drafted, the provision could have application beyond its intended scope. While proposed subsection (1)(c) explicitly refers to the transfer pricing and permanent establishment (PE) issues arising under BEPS, which are the subject matter of the Bill's proposed amendments to the ITA, the rest of the proposed subsection is drafted in such general terms that they appear to be intended to apply beyond that subject matter.

62. In particular, sub-paragraphs (a), (b) and (d) could each potentially apply in a wide range of non-BEPS related matters and affect any New Zealand member of the multinational group. Accordingly, this new information-gathering power could be utilised in a wide range of investigations that have nothing to do with the BEPS-related purpose for which that power is

being proposed. The Law Society therefore recommends the section be redrafted to state explicitly that it applies only to investigations relating to the matters stipulated in paragraph (c).

63. As currently drafted, the Bill provides (at proposed section 21BA(4)) that evidence may be excluded from proceedings under Part 4A or Part 8A of the TAA, including being deemed to be inadmissible in court proceedings. This may occur due to one or more of four circumstances set out in subsection 21BA(1).

64. Of the four circumstances, three fall to be decided solely by the Commissioner (paragraphs (b), (c) and (d) provide the test, being "that the Commissioner considers"). Accordingly, this section permits evidence to unilaterally be deemed inadmissible in a court proceeding by one of the parties in that proceeding. This is a significant impairment to fair trial rights guaranteed under section 27 of the Bill of Rights Act 1990. Subsection 27(3) states:

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

65. The effect of this proposal is that any taxpayer to whom section 21BA applied would not have the right to have civil proceedings against the Crown heard in the same way as civil proceedings between individuals. In no civil proceedings between individuals can one party determine the admissibility of the evidence used by the other party. Accordingly, the proposed section *prima facie* breaches the Bill of Rights Act 1990.

Recommendations

66. The Law Society recommends that proposed section 21BA(1) be redrafted to state explicitly that it applies only to investigations relating to the matters stipulated in paragraph (c).

67. The Law Society recommends that paragraphs 21BA(1)(b), (c) and (d) be amended to remove the Commissioner's role in deciding whether the exclusion is engaged. Rather, the power should fall to the court or Authority to determine, as it must with proposed paragraph 21BA(1)(a). Paragraphs 21BA(1)(b), (c) and (d) should therefore read:

> *(b) provides, within 3 months of the demand date, a response that is misleading because it contains misleading information or omits relevant information:*
>
> *(c) provides, within 3 months of the demand date, a response that omits information, whether or not in the knowledge, possession, or control of the member, required by the information demand for the calculation of-*
>
> > *(i) an arm's length amount for a cross-border transaction:*
> >
> > *(ii) an amount of profit attributable to a permanent establishment in New Zealand of the member or another member of the large multinational group:*
>
> *(d) provides, within 3 months of the information demand date, a response that does not fulfil the requirements of the information demand.*

68. The wording in (c) referring to "whether or not in the knowledge, possession, or control of the member" is problematic. The Law Society recommends that careful thought be given to what would qualify for the defences discussed further at paragraphs 78 – 83 because as presently drafted, even if good faith efforts to fulfil the request have been made, there could nevertheless be unfair results for the taxpayer, upon whom the onus rests in tax disputes.

Proposed section 21BA(3)

69. As it is currently worded, proposed subsection 21BA(3) can lead to the exclusion of evidence in proceedings involving the taxpayer which might be unrelated to the issue under which subsection 21BA(1) is engaged. Subsection 21BA(3) provides:

> *If a member of a large multinational group disputes a prosecution, imposition of a penalty, assessment, or reassessment, relating to a tax year, and information that is required by an information demand and relates to the tax year is not provided to the Commissioner before the information deadline, the information that is not the subject of a court order under **subsection (4)** is not—*
>
> *(a) allowed as evidence for use by the member in a disputes procedure under Part 4A:*
>
> *(b) admissible as evidence for the member in proceedings under Part 8 or Part 8A, or other proceedings.*

70. There is no alignment between the information not provided and the proceedings described by paragraphs (a) or (b) – those proceedings are described in a general manner, as "a dispute procedure" or "in proceedings". Therefore, it is possible that information that falls under subsection 21BA(1) with respect to one investigation could never be used by the taxpayer in any proceedings under the TAA (even in future proceedings unanticipated at the time). Although it is unlikely that this was the intention, the wording needs to be amended to prevent this interpretation.

71. Furthermore, it is possible that this would not be cured by the limited protection in subsection 21BA(4) given the test in section 21BA(4)(a) appears to be one determined by the circumstances pertaining to the taxpayer at the time section 21BA(1) is engaged. In other words, the circumstances of the future proceeding would have no bearing on the outcome and so, once a taxpayer fails the test in section 21BA(4), the taxpayer fails it for all time.

72. Accordingly, the Law Society recommends that the proceedings referred to in section 21BA(3) must relate to the issue under which section 21BA(1) is engaged. This would bring the proposed section in line with the similar provision when taxpayers fail to provide information requested by the Commissioner "relating to the dispute" in section 89N(1)(c)(vi) of the TAA.

73. Finally, it is not clear why all three of the criteria listed in subsection (4) must be satisfied in every instance before the exception can apply. Each criterion should provide a separate ground to have the information admitted. At present, it does not allow for admissions following good faith attempts by the taxpayer to obtain and provide that relevant information, which would presumably be "in the interests of justice" but would not necessarily satisfy the other requirements.

Recommendation

74. The Law Society recommends that proposed section 21BA(3) be amended to overcome the issues described at paragraphs 69 to 73 above.

Proposed section 21BA(4)

75. The proposed section does not mandate how a dispute over the alleged non-compliance by the taxpayer should be resolved. Under proposed section 21BA(4), a court or Authority can allow the use of non-disclosed evidence otherwise excluded under section 21BA(1). However, the protections provided by the proposed subsection (4) are insufficient.

76. Of the stated grounds under which a court or Authority can allow the use of evidence otherwise excluded under section 21BA(1), none permit the court or Authority to simply determine the consideration made by the Commissioner under section 21BA(1) was incorrect. Rather the stated grounds under section 21BA(4) require the court or Authority to determine the evidence was too resource-intensive to obtain and is necessary in the proceeding to avoid manifest injustice. This is problematic in that:

- It is not aligned with the grounds under which evidence can be excluded under section 21BA(1). In fact it is a different test. Therefore, it is quite possible a taxpayer might not meet the test for relief under section 21BA(4) (and so the court or Authority would be unable to admit the evidence), despite the fact the court or Authority might consider the Commissioner's decision under section 21BA(1) was wrong.
- It is inconsistent with relief that may be obtainable under judicial review. The Bill does not propose to amend section 138E of the TAA. Accordingly, it would appear a decision made by the Commissioner under section 21BA(1) would not be separately disputable but would be amenable to judicial review. Accordingly, the dispute over the correctness of the Commissioner's decision would have to be resolved under entirely separate proceedings and thus subject to far wider scrutiny than possible in a challenge proceeding which engaged section 21BA(4). The effect of this would be to force taxpayers to apply for judicial review, which would waste resources which could otherwise be streamlined in a challenge proceeding under Part 8A.

Recommendation

77. The Law Society recommends that section 21BA(4) be amended to permit the court or Authority to directly scrutinise the Commissioner's decision under section 21BA(1) to ensure its correctness. The test should be expressed in general language, such as whether it is in the interests of justice that the evidence should be admissible.

Clause 54: Proposed amendments to sections 143 and 143A

78. Sections 143 and 143A of the TAA provide for criminal offences for failure to provide information when formally requested by the Commissioner under her power pursuant to section 17 of the TAA. Section 143 provides for an absolute liability offence, while section 143A requires the offence to be committed knowingly.

79. The amendments in the Bill to section 17 of the TAA provide that the Commissioner can request information from one member of a multinational group which is held by another member of the group. The Commentary on the Bill gives the example that such a request can be served on the New Zealand subsidiary of a multinational group for information held by the subsidiary's offshore parent.

80. Therefore, the proposed amendments to section 17 expand the ambit of sections 143 and 143A such that a taxpayer can be charged with an offence which is the result of an act or omission of another person (i.e. the failing of that person to provide the taxpayer with the requested information). This effectively imputes secondary party liability for the failing of the other person onto the taxpayer (although here recast as a principal offender), without the separate party liability standard (such as that provided by sections 147 and/or 148 of the TAA) that would otherwise accompany the principal offence.

81. In this context, the only defence provided is that in the proposed sections 143(2)(c) and 143A(2)(c): where there is no member of the group that has the requested information in its knowledge, possession or control. However, this defence does not provide a sufficient safeguard for a taxpayer (such as a subsidiary) of a multinational group that may have very limited knowledge of or control over the information held by other members of the group.

Recommendations

82. The Law Society recommends that it should be a defence under sections 143 and 143A that the member charged with the offence did not have the knowledge that the requested information was in the knowledge, possession or control of another member of the group. Evidence of requests made by that New Zealand member in good faith to seek the relevant information from its overseas member should itself provide a ground of defence. Otherwise, there is a real risk of an injustice whereby a New Zealand member who is entirely unaware of the information and who has made genuine and reasonable attempts to seek that information from other members, may nevertheless be liable for criminal prosecution. Furthermore, the proposed section effectively requires the member to prove a negative (i.e. that the information does not exist and/or was not within the possession or control of any group member). Again, such a requirement breaches normal standards of criminal justice.

83. This recommended restriction would accord with the traditional principles of party liability and be more than compensated for, on the Commissioner's side, by the introduction of the new civil penalty in proposed section 139AB.

Andrew Logan
Vice President

13 February 2018