NEW ZEALAND LAW SOCIETY

NZLS EST 1869

SOP 193 to the Taxation (Annual Rates for 2019-20, GST Offshore Supplier Registration, and Remedial Matters) Bill

27/03/2019

Submission on SOP 193 to the Taxation (Annual Rates for 2019-20, GST Offshore Supplier Registration, and Remedial Matters) Bill

1 Introduction

1.1 The New Zealand Law Society welcomes the opportunity to comment on Supplementary Order Paper 193 (SOP) to the Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Bill (Bill), which relates to the Commissioner's care and management powers in the Tax Administration Act 1994 (TAA).

1.2 These provisions were previously in the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill before being removed for further consideration and review. This SOP reintroduces the care and management provisions to the Bill following review by the Legislation Design and Advisory Committee.

1.3 The primary change to the Commissioner's care and management powers, as currently worded, provides the Governor-General on the recommendation of the Minister of Revenue the power to modify the application of the Inland Revenue Acts by Order in Council, and for the Commissioner to grant an exemption from a provision of the Inland Revenue Acts.

1.4 In the short time available the Law Society's Tax Law Committee has reviewed the redrafted provisions and, in general, the Law Society considers that the redrafted provisions will achieve their intended purpose and have sufficient taxpayer protections to ameliorate many of the rule of law concerns previously raised.[1] The Law Society does have specific comments on the wording of the provisions and the scope of the provisions, which are set out below.

1.5 The Law Society would appreciate the opportunity to appear before the Finance and Expenditure Committee on this matter.

2 Comments

Opting-in or opting-out

2.1 The SOP provides that modifications or exemptions may be either opt-in or opt-out. If a modification or exemption is to be opt-out, it is not clear how a taxpayer does so. If this required a taxpayer to write a separate letter at the time of filing their returns, this would be onerous and we have concerns that this starts imposing the modification or exemption on the taxpayer. Instead, we presume a taxpayer could make this choice by the filing of their tax return taking a position incorporating or giving effect to that modification or exemption.

2.2 We note that the modification and exemption powers in the SOP can be retrospective for up to 4 years. But the SOP does not specify how it will apply to taxpayers who have already filed their past year returns without knowledge of that matter. Presumably such taxpayers would have to file a section 113 TAA application to have their earlier return amended to give effect to that choice, however this is cumbersome and would involve additional compliance costs.

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[1] NZLS submission 7.11.18 to the Finance and Expenditure Committee, on the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill. http://www.lawsociety.org.nz/__data/assets/pdf_file/0007/128617/I-SC-Taxation-Bill-subpart-2B-7-11-18.pdf.

Case law also confirms that the acceptance of such applications is entirely discretionary for the Commissioner. The Law Society submits that in these circumstances the Commissioner should be required to exercise her discretion under section 113 TAA to reassess the taxpayer's prior year returns in accordance with the modification or exemption if applicable and the taxpayer opts to apply it.

2.3 The Law Society notes that one of the requirements for the Minister to make a recommendation for a modification, or for the Commissioner to grant an exemption, is that a person must have a reasonable opportunity to choose whether or not to apply that modification or exemption. That requirement is particularly important if the modification/exemption applies to the person unless they choose not to apply it. However, if a modification or exemption is opt-in there is presently no such requirement for the Minister or Commissioner to expressly advise taxpayers of that choice. Where taxpayers find after they have filed their return that there is a relevant modification or exemption that could have applied, the Commissioner should also be required to reassess the taxpayer's prior returns in accordance with the modification or exemption under section 113 TAA.

Urgency

2.4 The Law Society has concerns about proposed section 6F(3) which allows for the consultation period to be reduced or dispensed with by the Minister or Commissioner when urgency is required. The requirement for consultation to occur before the power is exercised is a crucial taxpayer protection that also reduces the rule of law concerns. As such, consultation should only be reduced or dispensed with in very narrow, prescribed situations. Unfortunately, section 6F(3) does not stipulate in what circumstances consultation may be dispensed with.

2.5 Urgency should be permitted only in "*exceptional circumstances*". That test is applied elsewhere in the Act and has been interpreted by the courts, so will provide some guidance for the Minister, the Commissioner and taxpayers over when consultation is not required to take place. Additionally, the Law Society submits that the urgency carve-out from the consultation process should only apply to the Minister, and not the Commissioner, so that there will at least be internal consultation between the Commissioner and Minister.

Subsequent amendments to legislation

2.6 The Commissioner's power is intended to address legislative anomalies for only a short period until the matter can be addressed or resolved by Parliament. However, the SOP does not stipulate that the Commissioner must attempt to address that anomaly in a tax amendment bill put before Parliament at any time during the period that her modification or exemption applies. The previous version of these provisions provided that the Commissioner must review the modification during the period it is in force to determine if it should be included in an amendment to the relevant provisions.

2.7 Similarly, while the duration of the Commissioner's revised interpretation is limited to 2 years, the absence of any requirement for a statutory amendment to correct that anomaly makes it possible that the same modification or exemption could be essentially renewed under these provisions for an additional 2 years in perpetuity without ever going through the proper law-making process. While this situation is unlikely to arise, it raises rule of law

concerns that the Commissioner's reinterpretation may never be satisfactorily considered by Parliament, and dual interpretations of the relevant provisions could apply for many years. Given the policy work regarding the anomaly that we assume is required before an exemption is granted by the Commissioner, the issue could presumably be included within the normal policy work programme within that 2-year period.

2.8 An extra subsection could be added to the "*Purpose of remedial powers*" part of section 6C to state that the purpose is to provide this relief pending legislative amendment. Additionally, the requirement for the Commissioner to review the modification or exemption during the period it is in force, should be re-introduced.

Intended purpose of object of the provision

2.9 The Law Society has concerns relating to the consideration of what is the "*intended purpose or object of the provision*". Only when an anomaly is identified can a modification or exemption be considered by the Minister or the Commissioner. We acknowledge that Inland Revenue has reservations about the use of a remedial panel, as raised during a stakeholder meeting with officials in December 2018. However, where the modification or exemption is based on the intended purpose or object of the provision, the Commissioner and/or Minister should at least consult with an advisory committee/panel over the intended purpose or object of a provision. This very limited form of consultation should be mandatory when the normal consultation process is to be abandoned or abridged. Accordingly, the Law Society continues to support the establishment of an advisory committee/panel, which is seen by the Law Society as helpful to the Commissioner, in terms of providing a measure of objectivity to the process, and in terms of taxpayer perceptions of the integrity of the tax system (section 6(2) of the TAA).

Audits and disputes

2.10 Often an (alleged) anomaly may be identified during a tax audit or dispute with an individual or group of taxpayers. While that anomaly is considered by the Commissioner with a view to exercising her power to re-interpret the relevant provision, during that period we consider it would be inappropriate for Inland Revenue to continue to audit or dispute that matter unless or until she has reached a decision on whether to invoke her new power to re-interpret the relevant provision – just as she presently suspends audits and disputes while a matter is undergoing internal escalation. Then further time should be permitted to allow the taxpayer to make its choice whether to apply the resulting modification or exemption. Any audit or dispute over that issue should only recommence once the modification or exemption has become law.

Kathryn Beck
President
27 March 2019