



27 March 2018

AEOI Team
Inland Revenue
Wellington

By email: global.aeoi@ird.govt.nz

Inland Revenue Notification: The application of the Common Reporting Standard to corporate trustees within a professional group

Introduction

1. Thank you for your letter of 8 March 2018, inviting the New Zealand Law Society to make further submissions¹ on the application of the Common Reporting Standard (CRS) to corporate trustees (and trusts) set up by professional firms.

Comments

2. The Law Society notes that the CRS should be interpreted in accordance with section 1850(3) of the Tax Administration Act 1994 (TAA), which requires that the CRS be applied consistently with the OECD's Commentary on the CRS Standard.
3. The phrase "if the Entity's gross income attributable to the relevant activities ..." (as it appears in the investment entity definition in the CRS) can be read in two ways. It could mean that, when assessing whether an entity is primarily conducting a business, one must look at:
 - income earned by the entity to the extent that it is connected to the relevant activities it performs (**first interpretation**); or
 - income paid in respect of relevant activities performed by an entity (regardless of who the recipient is) (**second interpretation**).
4. The Law Society considers that the first interpretation makes the most sense, and understands that this is the interpretation adopted in practice.
5. Inland Revenue, however, prefers the second interpretation, indicating that the attribution rule is found in the text of the investment definition itself, and that this interpretation is consistent with the CRS Commentary. Inland Revenue's justification for attributing the income of the trustee to the firm as a related entity is not made clear.

¹ See earlier NZLS submission dated 7.2.18, available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/118609/I-IRD-Corporate-Trustees-CRS-7-2-18.pdf.

6. Inland Revenue refers (on page 3 of the Notification) to paragraphs 10 and 11 on page 160 of the CRS Commentary. These paragraphs simply explain the types of income the OECD considers will be attributable to holding financial assets and common types of Custodial Institution. There is no discussion about attributing income received by one entity to another.
7. On page 5 of the Notification, Inland Revenue refers to the CRS definition of 'Related Entity'. There is no explanation of how this is relevant when interpreting the definition of 'investment entity'. Page 5 of the Notification also refers to paragraph 17 on page 162 of the CRS Commentary. This is not relevant, as it merely discusses the meaning of 'managed by' (i.e. when will an entity be managed by another entity).
8. The Law Society also notes that New Zealand is not compelled to follow guidance issued by other Participating Jurisdictions, so the discussion about overseas guidance does not provide justification for Inland Revenue's position.
9. Finally, the examples provided in the letter of 8 March 2018 do not provide adequate reasoning in support of Inland Revenue's position. For example, in relation to Examples 1 and 2, Inland Revenue concludes that the remuneration for the trustee's services is primarily attributable to the relevant activities. However, it does not explain how this remuneration is linked to the trustee itself. The "primarily attributable" test requires that *an Entity's* gross income be primarily attributable to the relevant activities – Inland Revenue has not explained why it considers the fees paid to the firm to be gross income of the trustee.

Further information

10. This submission has been prepared with the assistance of the Law Society's Tax Law Committee. If you wish to discuss this further, please contact the committee convenor, Neil Russ, via the committee secretary Jo Holland (jo.holland@lawsociety.org.nz / 04 463 2967).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal line extending to the right.

Andrew Logan
Vice President