New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

25 November 2021

Cross-border workers: issues and options for reform
C/- Deputy Commissioner, Policy and Regulatory Stewardship
Inland Revenue
Wellington

By email: policy.webmaster@ird.govt.nz

Re: Cross-border workers: issues and options for reform – officials' issues paper

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the official's issues paper: *Cross-border workers: issues and options for reform* (**issues paper**).

1.2 The Law Society's Tax Law Committee has considered the issues paper and provides submissions in relation to the following parts of the issues paper:

(a) PAYE flexibility options

(b) Territorial limitation and the tests of presence

(c) Ability to transfer employment-related tax obligations to a New Zealand entity

(d) Non-resident contractors' tax (**NRCT**) on their territorial limitation

(e) NRCT: "all circumstances" vs "single payer" view

(f) NRCT flexibility

(g) NRCT register

(h) Permanent establishment

2. PAYE flexibility options

2.1 We welcome the consideration of options to achieve greater PAYE flexibility (including not imposing penalties and interest) where a breach of the day-count exemption occurs due to unforeseen delays or the employee spends extra days in New Zealand for non-employment-related reasons that are not known to the employer until a later time.

2.2 We note the issues paper at paragraph [2.19] suggests that the removal of penalties and interest will only apply where the employer seeks to correct the position within 28 days of "first becoming aware" the threshold has been breached. This may be difficult to apply in practice. Consideration should be given to having a fixed period of time (grace period) during which no PAYE is required to be deducted, provided PAYE is paid within a reasonable period of time after the end of the grace period. This would be significantly easier to operate.

2.3 On the basis of the outline of the two options presented in the Issues Paper, option 2 (In-year square ups) is likely to be simpler and involve less compliance costs, requiring additional interaction by the employer with the PAYE system only when required to correct a previously taken position.

3. Territorial limitation and the tests of presence

3.1 At paragraph [19] of our submission[1] on the draft Operational Statement ED0223 (**OS**), we suggested it would be more helpful if each of the circumstances where an employer may have a tax presence in New Zealand was discussed in more detail in the OS.

3.2 A different approach is taken in the issues paper from paragraph [2.31], by proposing a threshold test whereby the employer would always have an obligation to apply the PAYE, FBT and ESCT rules, regardless of whether the employer had a sufficient tax presence. Paragraph [2.34] states that it is not intended that the threshold test should replace analysis of a sufficient presence. However, this would be the effect of a threshold test – except in those cases where the threshold test was not met.

3.3 Therefore, the proposed threshold test does not provide 'additional clarity' about whether there is sufficient tax presence under the current rules, but instead would be a new criterion, which could result in additional employers (without such a presence) having an obligation to apply the PAYE, FBT and ESCT rules. Since it is possible that an employer may have a sufficient tax presence without meeting the proposed threshold test, the need for a threshold test should be determined only after further work is undertaken on clarification of the current position.

3.4 A higher threshold should apply before there is an obligation to apply the PAYE, FBT and ESCT rules. For example, we consider that the rules should not capture a 'remote worker' who is working temporarily in New Zealand even if they do so from a fixed place, such as a home office. A threshold based on a fixed period of time in New Zealand would be easier to operate.

4. Ability to transfer employment-related tax obligations to a New Zealand entity

4.1 The Law Society agrees with the suggested optional transfer approach outlined at paragraphs [2.53] and [2.55]. It is noted that cross-border employees are commonly participants in a multinational group's employee equity arrangements, and part of their income thereunder may be apportioned to New Zealand under section CE 2(5) – (6) of the Income Tax Act 2007 (**IT Act**). Consideration should accordingly be given to the interplay between this transfer approach and the employee share scheme rules in the IT Act generally (including whether reporting employee share scheme benefits need to be included on the PAYE return and the operation of the provision for employer deductions) as well as the related employee income information reporting obligation and optional PAYE provision.

4.2 Further, we suggest that the transfer of employment-related tax obligations should be possible between a non-resident employer and an unrelated New Zealand resident. In practice, there are cases where resident employers include employees of unrelated companies on their payroll/PAYE returns. We suggest that it should be possible for a New

[1] New Zealand Law Society submission on ED0223: Non-resident employer's obligations to deduct PAYE, FBT and ESCT in cross-border employment situations, available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/l-IR-ED0223-Non-resident-employers-obligations-cross-border-employment-2-9-20-v2.pdf

Zealand resident employer to agree to operate PAYE on behalf of a non-resident employer. For example, where a non-resident employer is providing employees to New Zealand to perform a contract for a New Zealand company, there can be circumstances where it would be commercially easier for the New Zealand company to include the employees on their PAYE returns, rather than requiring the non-resident to register for PAYE.

5. NRCT on their territorial limitation

5.1 At paragraph 3.5, it is stated that:

> *While NRCT is included in the PAYE system, it can apply to contracts in which both payer and contractor are non-resident and only the activity takes place in New Zealand. There is no intention to extend the territorial approach to NRCT, as this would exclude the payer from the withholding obligation.*

5.2 We understand paragraph [3.5] to mean that:

(a) Inland Revenue considers that the obligation to withhold NRCT applies to a non-resident payer, even if the payer does not have "sufficient presence" in New Zealand as that concept is discussed from paragraph 2.31 of the Issues Paper and in the draft OS; and

(b) Inland Revenue does not intend to limit the application of the NRCT withholding obligation to only those non-resident payers who have a "sufficient presence" in New Zealand.

5.3 If our understanding is correct, then we disagree with paragraph [3.5] for the following reasons and note that the issues paper should be redrafted to provide clarity.

5.4 The issues paper states, in context of discussion of the PAYE rules, that a non-resident may make themselves subject to New Zealand law by having a "sufficient presence" in New Zealand. The issues paper cites as authority, without discussion, the High Court decision in *Alcan New Zealand Ltd v Commissioner of Inland Revenue*[2] and the House of Lords decision in *Clark (Inspector of Taxes) v Oceanic Contractors Inc*[3]. These cases affirm the principle of statutory construction that "in the absence of clear parliamentary intention to the contrary, a statute will not be construed to have effect outside the jurisdiction", with the consequence that, in the absence of such an intention, a non-NZ resident is not subject to NZ law unless they have some other "tax presence" in NZ.

5.5 It would be helpful if the issues paper could explain why Inland Revenue considers that the NRCT withholding obligation extends to non-resident payers who do not have a "sufficient presence" in New Zealand or, to put it another way, why the territorial limitation principle of statutory interpretation does not apply to the NRCT withholding obligation.

5.6 Further, a reasonable inference to draw from IS 10/04 "Non-resident Contractor Schedular Payments" is that Inland Revenue has, until this time, accepted that the territorial limitation does apply to the NRCT withholding obligation. Paragraph [26] of IS 10/04 states that where NRCT has not been withheld and the non-resident contractor has no continuing presence in New Zealand "the Commissioner may solely seek payment from the payer of the schedular payment". This comment appears to be predicated on the assumption that the payer is NZ

---

2 *Alcan New Zealand Ltd v CIR* (1993) 15 NZTC 10,125 (HC)

3 *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133 (HL)

resident or otherwise has a tax presence here, which presence must be based on something more than merely being the payer of a non-resident contractor.

6. NRCT: "all circumstances" vs "single payer" view

6.1 Paragraphs [3.7] – [3.10] include discussion of the "all circumstances" vs "single payer" view. We agree that the current "all circumstances" view can impose an excessive compliance obligation on the payer to determine whether a withholding exemption is available. Excessive compliance obligations risk undermining perceptions as to the integrity of the tax system. On that basis, development of the "single payer" view (where the payer only needs to take into account matters related to its contract) may be more appropriate.

7. NRCT flexibility

7.1 The proposal at paragraphs [3.16] – [3.20] to increase NRCT flexibility where the exemption thresholds are breached due to unforeseen factors appears appropriate and in line with the Minister's and officials' obligation to protect the integrity of the tax system.

8. NRCT register

8.1 Paragraphs [3.32] – [3.38] set out a proposal to capture details of non-resident contractors who hold exemption certificates in a searchable register. We agree that the establishment of a register may be beneficial. However, we consider that a register may be practically difficult to operate, particularly if non-resident contractors do not want their details to be public and because offshore jurisdictions do not provide uniform tax information numbers. Officials should consider providing for a register for non-resident contractors that are comfortable with having their details publicly available, while not penalising non-resident contractors who have a NRCT exemption certificate but do not want to be included on the register.

9. Permanent establishment

9.1 It is made clear in the introduction to the issues paper that it does not discuss situations in which an employee working in NZ constitutes a permanent establishment of a non-resident employer. Further to our comments on the draft OS, this is an issue that does need consideration by Inland Revenue and discussion with interested parties, given the increasing and accelerating use of cross-border working arrangements.

Next steps

If you have any questions or would like to discuss these comments, please do not hesitate to contact the Tax Law Committee convenor Neil Russ, through the Law Society's Law Reform and Advocacy Adviser, Emily Sutton (Emily.Sutton@lawsociety.org.nz).

Yours faithfully

Herman Visagie
Vice President