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Tax Alert

December 2021

COVID-19 Some business support gets a red light

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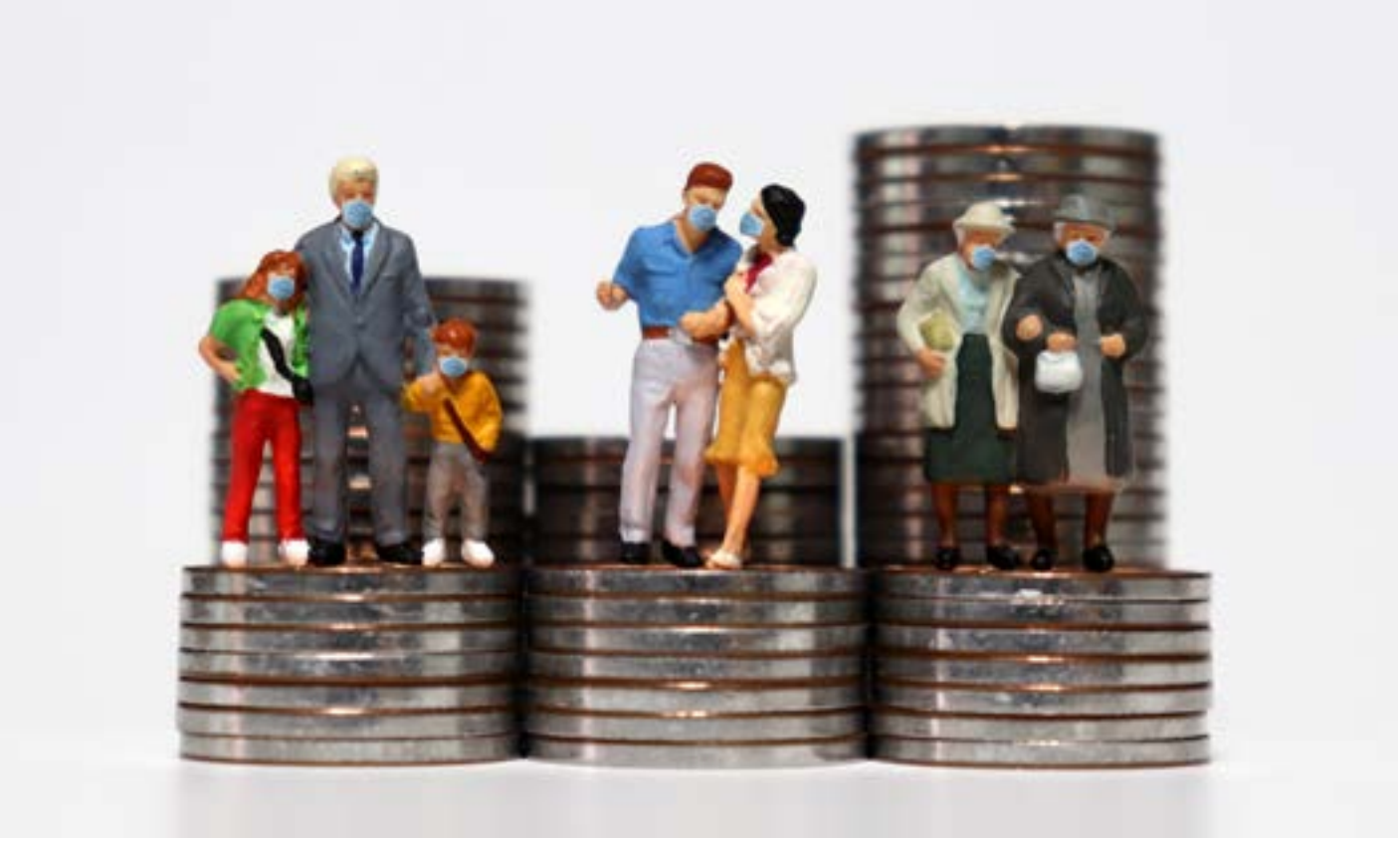
COVID-19 Some business support gets a red light

By Robyn Walker



As we farewell the "Alert Level" system on Friday 3 December 2021, we inevitably farewell some of the business support options which have a link to Alert Levels. The Wage Subsidy requires part of New Zealand to be at Alert Level 3 and the Resurgence Support Payment requires part of New Zealand to be at Alert Level 2; the 4 tier Alert Level system doesn't easily collapse into a traffic light system, and we therefore see the end of these two schemes with them closing after the 8th and 6th payments respectively.

The Government has advised that there will be a "Transitional Payment" available to mark the end of the Wage Subsidy and the Resurgence Support Payment. The Transition Payment will have the same criteria as the Resurgence Support Payment and will be administered by Inland Revenue. It will be a payment of $4,000 + $400 per FTE (to a maximum of 50 FTEs or $24,000) and applications will open on Friday 10 December. No further business support is intended to be made available (noting that the Leave Support Scheme and Short Term Absence Payment do remain available), but this will be re-evaluated in the new year. If a decision is made that further support is needed, it is anticipated it will only be provided to businesses complying with vaccine certificate requirements and operating in parts of New Zealand which are in "red".

With the Wage Subsidy and Resurgence Support Payment coming to an end, it's important that businesses consider whether they have a need for further support, and whether (if they've not claimed to date) applications should be made for the existing support.

It's important to note that applications for the first 3 rounds of the Resurgence Support Payment closed on **1 December** 2021, and rounds 4 – 6 close on **13 January 2022.** The closing date for the Transitional Payment is 13 January 2022.

The Wage Subsidy

An eighth round of the Wage Subsidy opened on Friday 26 November and applies where there is a 40% reduction in revenue between 23 November – 6 December 2021 due to Alert Level 3 settings or the application of the COVID-19 Protection Framework in Auckland. Applications close at 11:59pm no Thursday 9 December 2021.

The wage subsidy settings have remained steady throughout the eight rounds of the scheme. Our previous articles summarise how the Wage Subsidy works. The number of businesses claiming the wage subsidy has been steadily declining, the following table outlines the claims made for the first six rounds of the Wage Subsidy:

Wage Subsidy Round	Total applications	Approved applications	Amount Paid ($000)
WS#1	342,288	289,224	$1,326,681
WS#2	265,374	222,960	$933,435
WS#3	191,580	160,392	$614,477
WS#4	155,547	136,881	$474,122
WS#5	141,459	124,944	$427,436
WS#6	130,962	113,409	$366,604
Total	**1,2267,210**	**1,047,810**	**$4,142,755**

*claim data is available from the Ministry of Social Development each week, the data above is updated as of 19 November 2021.

Resurgence Support Payment

The Resurgence Support Payment (RSP) has gone through a number of changes during this outbreak. Originally it was intended to be a single payment but has instead has had six rounds of payments available. The value of the RSP doubled from the fifth round.

Details of the RSP eligibility criteria are available here.

RSP payment	Revenue loss period	Payment amount	Application closing date
1	17 August 2021 – 1 November 2021	$1,500 + $400 per FTE (maximum 50 FTEs)	Closed 1 December 2021
2	8 September 2021 – 1 November 2021	$1,500 + $400 per FTE (maximum 50 FTEs)	Closed 1 December 2021
3	1 October 2021 – 1 November 2021	$1,500 + $400 per FTE (maximum 50 FTEs)	Closed 1 December 2021
4	22 October 2021 – 1 December 2021	$1,500 + $400 per FTE (maximum 50 FTEs)	**13 January 2022**
5	5 November 2021 – 1 December 2021	$3,000 + $800 per FTE (maximum 50 FTEs)	**13 January 2022**
6	19 November 2021 – 1 December 2021	$3,000 + $800 per FTE (maximum 50 FTEs)	**13 January 2022**
Transitional Payment	**3 October 2021 – 9 November 2021**	**$4,000 + $400 per FTE (maximum 50 FTEs)**	**13 January 2022**

As of 18 November, the following amounts have been paid out under the first five rounds of the RSP:

RSP payment	Number of customers	Amounts paid ($000)
1	212,030	$632,778
2	130,458	$374,076
3	95,164	$260,754
4	70,582	$189,281
5	37,532	$190,694

Other support

The existing Small Business Cash Flow Loan Scheme, Leave Support Scheme and Short-Term Absence Payment should remain available for businesses to access, these schemes are not directly connected to the Alert Level framework. The Leave Support Scheme will be moving from a fortnightly to a weekly payment to reflected reduced isolation timeframes.

Housekeeping

As New Zealand gradually returns to a more "normal" state, it's important that businesses which have accessed either the Wage Subsidy or the RSP ensure that they have met all the relevant eligibility criteria. The Wage Subsidy, in particular, has been run on a high-trust model and businesses were able to claim the subsidy on the basis of anticipated revenue losses. A number of subjective criteria also need to be satisfied for both the Wage Subsidy and the RSP. We've found in many instances that minimal effort has been put toward documenting eligibility beyond the objective revenue loss test. It is a requirement of both schemes that evidence is prepared and held available for review.

Given all receipts of the Wage Subsidy and the RSP can be seen on public registers, those who have claimed these payments should be verifying entitlements and making repayments to the extent eligibility criteria have not been met. Obviously, all claims could be reviewed by either the Minister of Social Development or Inland Revenue, but we've also seen an increasing number of businesses having claims queried as part of external audits and also when a business sale is being contemplated. We strongly urge everyone to ensure documentation is in place. You can read more about getting audit-ready here.

For more information about how your business can be supported through this COVID-19 outbreak, please contact your usual Deloitte advisor.

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Rental Agreements: Ensure your GST housing-keeping is in order

Since the advent of COVID-19 lockdowns, many businesses have suffered significant downturns in their revenue and several landlords have granted reductions to commercial rental charges to assist their commercial tenants. In addition, many commercial tenants have disputed the amount of rent that they are required to pay to their landlords. In light of this, it is important not to forget about GST on rental payments as it can often add significant unforeseen costs as well as penalties and interest if ignored.

Many commercial landlords will be on the invoice basis, where a GST output obligation is imposed at the earlier of when an invoice is issued, or payment is received. Importantly in the COVID-19 environment for GST invoice basis landlords, it is irrelevant if your client has not paid and is disputing the amount, if a valid invoice has been issued, GST output is still payable by the landlord to Inland Revenue.

Frequently for commercial rental charges, a "perpetual invoice" would have been issued at the start of the lease, setting out the rental payments and when they fall due.

If adjustments are agreed between the parties to reflect changes in rental payments, a GST credit or debit note must be issued. The requirements for a credit or debit note are similar to a GST tax invoice with the required 'tax invoice' wording replaced with 'credit note' or 'debit note'.

Changes proposed in the Taxation (Annual Rates for 2021–22, GST, and Remedial Matters) Bill signal a move away from paper-based invoicing systems, and changes to the requirements for credit and debit notes. But there will still be a need to communicate the adjustments if earlier information showing a higher amount of GST payable had been issued by the landlord.

It is also important to consider the accounting implications for the lessor, due to the reduced rental income over the term of the lease.

For more information contact your usual Deloitte advisor.

Removal of Depreciation Rate Finder

By Veronica Harley & Melissa Parmar

Inland Revenue has recently removed its handy depreciation rate finder tool from its website for an upgrade, as part of their Business Transformation project. In the meantime, while a new tool is being developed (likely to be available sometime after March 2022), the rates of depreciation will need to be manually looked up using the IR 265, which is the published schedule of general depreciation rates. As a result, there may be more scope for errors when undertaking a manual process of choosing a rate. There is a correct process for determining the correct depreciation rate that applies to an asset – it is not a matter of choosing the highest rate that may "fit" an item if several might be relevant.

To find the depreciation rate, the taxpayer must firstly look at the asset class descriptions in the industry and asset categories in the Commissioner's Table of Depreciation Rates. If there is an appropriate industry category for the taxpayer's relevant industry and the asset is specifically listed, then the taxpayer must use that depreciation rate. If the item is listed in the industry category, there is no need to look at the asset categories.

However, if the asset is specifically listed in an industry category which is not the taxpayer's main industry, then that depreciation rate is used only if the asset in question is used in a similar way to how it is used in the industry. Therefore, the nature of the item and how the item is used by the taxpayer will be a relevant consideration in determining the appropriate depreciation rate.

If the asset is not listed under an industry category, then the general asset categories should be looked at to find the applicable rate. If an applicable rate is not located from the asset categories, the default rate under the industry or asset category may be used. The rate adopted should be the one which is most appropriate in terms of how the asset is used.

If more than one asset class description fits an item of depreciable property i.e. where the description in a default rate asset class and the description in a more specific asset class describes the item, then the depreciation rate for the item in the more specific asset class is the applicable rate. The asset class description must be the description that most accurately describes the taxpayer's item of depreciable property, so caution is advised in making these considerations.

Example:
An example of an asset that appears in both the industry and the asset categories are "sterilisers".

Under the "Meat and fish processing (MEAT)" industry category, sterilisers are specified as an asset. Sterilisers are also specified in the "Medical and Medical Laboratory" industry category. However, sterilisers (where not used in a medical laboratory) are also specified in the asset category under "Scientific and Laboratory Equipment".

It is important that the more specific industry class rate is used. Therefore, if the taxpayer is in the MEAT industry, then that rate should be used for sterilisers (13% DV) or if they are in the Medical and Medical Laboratory industry, that rate should be used for sterilisers (10% DV).

If they are not in the MEAT or Medical and Medical Laboratory industry but use the asset in a similar way to that of either industry, then the corresponding rate can also be used. If they are not part of either industry and do not use the asset in a similar way, then the rate under the Scientific and Laboratory Equipment asset category can then be used (10% DV). The specific industry and the use of the asset will determine the rate.

Conclusion

For the next few months at least, there will be no access to the depreciation rate tool finder. Going forward, it might be timely to conduct a review on depreciation rates or the process for selecting rates as part of a fixed asset review. It is also important to monitor newly issued depreciation determinations and whether there are any assets which require new rates to be applied. If you would like any further information, please contact your usual Deloitte advisor.

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Clough v Commissioner of Taxation: A Lesson in Poor Execution?

By Matthew Scoltock & Edwin Zhang

On 12 November 2021, the Full Federal Court of Australia handed down its judgment in Clough v Commissioner of Taxation [2021] FCAFC 197, finding in favour of the Commissioner of Taxation and largely affirming the courts' view as to the deductibility in Australia of a payment made by a company to cancel employee options and other employee equity rights in order to facilitate a liquidity event (in the taxpayer's case, a takeover and delisting).

The Facts

The taxpayer, Clough Limited ("Clough") had in place an employee share option plan ("Option Plan") and a separate equity-based employee incentive scheme ("Incentive Scheme"). Under the Option Plan, Clough offered options to employees pursuant to which the employees were entitled, upon exercise, to subscribe for shares in Clough at a specified strike price. Under the Incentive Scheme, employees were offered "performance rights" which, after three years, entitled the employees to either (a) acquire shares in Clough, or (b) receive in cash an amount equal to the market price of the shares that they would otherwise have been entitled to acquire. The Option Plan and Incentive Scheme were designed to secure key personnel and incentivise their performance as employees of Clough. While the Option Plan and the Incentive Scheme had different vesting criteria, both allowed for accelerated vesting upon a "Change of Control Event."

On 28 August 2013, Clough and its c. 60% shareholder, the Murray & Roberts Group, entered into a scheme implementation agreement under which the Murray & Roberts Group was to acquire the remaining c. 40% shareholding in Clough pursuant to a scheme of arrangement; and Clough was to be delisted from the Australian Stock Exchange ("ASX"). Clough's entry into a scheme of arrangement constituted a "Change of Control Event" with respect to the Option Plan and the Incentive Scheme. Pursuant to the scheme implementation agreement, Clough made an offer to cancel both the options and the performance rights, outside the terms of the Option Plan and Incentive Scheme, and despite the terms of the Incentive Scheme allowing for performance rights to be cashed-settled without actually being cancelled.

The scheme of arrangement was implemented on 11 December 2013. On the same day, a subsidiary company of Clough paid c. A$15M to certain employees to cancel their options and performance rights in accordance with the cancellation offer. Clough was delisted from the ASX the next day. A deemed assessment was subsequently made in respect of the 2014 income year, on the basis that the c. A$15M payment was not allowed as a deduction. Clough's objection to the deemed assessment was disallowed.

The Judgment

On appeal from the lower court – which found in favour of the Commissioner of Taxation earlier in 2021 – the Full Federal Court held that the payment was not allowed as an immediate deduction under Australia's general permission. In doing so, the Court stated that:

"… in a practical business sense, the payments are better characterised as payments made pursuant to an agreement to secure a change in control rather than as meeting employee entitlements on a change of control. The payments were made to effect a reorganisation of the capital structure of Clough, through a takeover by [the] Murray & Roberts [Group] and the delisting of Clough from the ASX. The bringing to an end of the various rights of the employees under the employee schemes was necessary to secure the reorganisation of the company's capital structure for the enduring advantage of the business."

The Court, agreeing with the decision of the lower court, concluded that the payment failed to meet the "positive limbs" of the general permission on the basis that it was not "incurred in gaining or producing… assessable income." The need or occasion for the payment lay in the takeover, despite the fact that the payment would not have been made but for the existence of the options and participation rights in the first place.

The Court went further to note that even if the payment had satisfied the positive limbs of the general permission, it would not have been allowed as a deduction as it was also of a capital nature.

However, as Australia has a general rule allowing "black-hole" expenditure to be deducted on a straight-line basis over a five-year period, Clough's appeal was allowed in part, and the deemed assessment to entirely deny a deduction for the 2014 income year was found to be commensurately excessive.

The Court also made the important observation that its finding as to the deductibility of the payment was not to be denied by the fact that a payment to cash-settle the performance rights – pursuant to the terms of the Incentive Scheme – may have been allowed as a deduction. Citing academic text and well-established case law authority, the Court noted that a payment is not allowed as a deduction simply because it is made to relieve a taxpayer of a future payment that may itself be deductible.

Our Thoughts

There are a number of compelling reasons why the Full Federal Court's analysis may not be applicable in New Zealand, given that Clough related to Australia's general permission and capital limitation rather than a specific statutory regime governing the deductibility of expenditure incurred in relation to employee options and other employee equity rights.

In New Zealand, an employer's allowable deduction for actual or deemed expenditure in relation to an "employee share scheme" is codified by section DV 27 of the Income Tax Act 2007. Section DV 27 was deliberately drafted to supplement New Zealand's general permission by deeming the employer to incur expenditure in an amount equal to the employee's income. While subject to the capital limitation (to ensure that expenditure is not allowed as a deduction if it relates to an employee share scheme with clearly capital features), the fundamental intent of section DV 27 is to ensure that remuneration in the form of an employee share scheme is subject to income tax in the same way as a cash bonus and the deductions follow suit.

The deductibility of a payment to cancel "shares or related rights" under an employee share scheme is specifically within the ambit of section DV 27. It may therefore be appropriate that if the employee share scheme is "vanilla" – without any features of a capital nature – a cancellation payment ought to be allowed as a deduction under section DV 27, just as a deduction would be allowed if a cash bonus had instead been paid. Within the unique framework established by section DV 27, where the terms of the underlying options/equity rights do not have capital features, the right policy outcome is surely to allow a deduction for the employer.

As New Zealand's legislation does not allow a general deduction for black-hole expenditure, the application of Clough has the potential to be highly detrimental (by contrast, in Australia, the issue is likely to be one of timing only). It is therefore particularly important that companies think very carefully about the terms of employee share schemes at the outset; as well as the appropriate mechanisms (and income tax outcomes) before cancelling options/equity rights. Notwithstanding the very different statutory regime in New Zealand, it does seem clear that cancelling the options and performance rights – rather than allowing them to vest, be exercised, and for the employees to then participate in the takeover – was an important factor in Clough's sub-optimal result.

Accelerated vesting upon a liquidity event is very common in the New Zealand market. It is important that the design of any accelerated vesting is considered through a tax "lens" to ensure that it provides commercial flexibility without compromising tax deductibility. If you would like to discuss Clough in more detail, or if you would like to understand what it might mean for your employee share scheme, please reach out to your usual Deloitte tax advisor.

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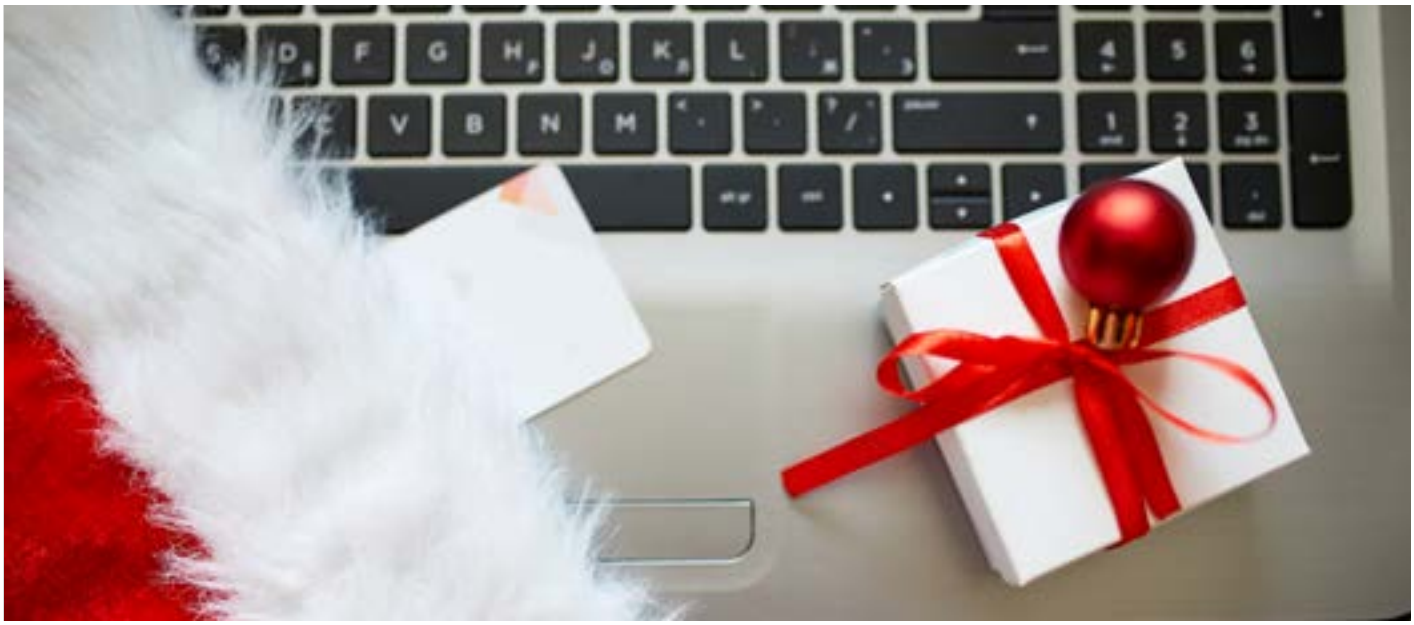
Physical or virtual Christmas celebrations: what employers need to remember

By Amy Sexton & Anna Zhang



Christmas is fast approaching, and the welcome move to the new COVID-19 Protection Framework with its relaxing on the gathering rules may encourage some employers to reconsider their plans and gather with their employees for a long-awaited (and needed) celebration. Others perhaps are thinking of holding a virtual Christmas Party or sending gifts to their working from home employees. It is great that we can start planning these festive celebrations again but is also important to consider the tax rules for these festivities, especially for employers planning a non-traditional celebration.

Entertainment vs FBT vs PAYE

Benefits provided to employees during Christmas time by employers will generally trigger one of three tax regimes: the entertainment regime, the fringe benefit tax (FBT) regime, or the PAYE regime. The common characteristics of each of these regimes are summarised in the table below to help you identify which rules you may need to apply, and the associated tax implications you need to be aware of.

Tax regime	Benefit characteristics	Tax implications
Entertainment	• Benefits that have both a private and a business benefit • Includes recreational events away from business premises • May include food and drink • Benefits are not received in the course of, or as a necessary consequence of employment duties	• Expenditures are restricted to 50% of cost for certain expenditure that provides both a private and a business benefit • A supply is deemed to take place for GST purposes on the non-deductible proportion
FBT	• Non-cash benefits provided to the employees, can be enjoyed at the employee's discretion and is unrelated to their employment duties	• Expenditures are 100% deductible • Pay FBT at the chosen rate • De minimis threshold for unclassified benefits
PAYE	• Costs incurred by employees and that are reimbursed by their employers or funded by an allowance	• Expenditures are 100% deductible • PAYE may or may not apply

Examples

Let's consider some examples appropriate for 2021, starting with a traditional Christmas party, followed by a few celebration ideas for the COVID-19 working from home era.

Christmas party event off-premises

Expenditure on venue hire, food and drink will be subject to the entertainment regime. Expenditure would include incidental costs such as hiring crockery, glassware or utensils, waiting staff, and music or other entertainment. Employers can only deduct 50% of these expenditures incurred.

Vouchers for uber eats / restaurant / café / hospitality

Many employers are encouraging their employees to support local retailers and hospitality businesses after the lockdown by providing vouchers. If the employee can choose when to use the vouchers, then the FBT regime kicks in and the cost of the voucher is subject to FBT.

Gift baskets for employees

What could be nicer than a gift basket for a virtual Christmas party or movie night? Gift baskets containing drink bottles, keep cups, clothing, food and drink will typically be subject to FBT as employees can enjoy these benefits at their discretion.

Remember though that any benefit subject to FBT can also be subject to various exemptions, such as the de minimis exemption.

Gift baskets for customers / clients / suppliers

To thank stakeholders for all their support in the past challenging year, businesses may send gift baskets containing food or drink items to customers, clients or suppliers. Spending on these items will only be 50% deductible under the entertainment regime. If the gift basket also contains other items that aren't food and drink (for example soap or tea towels), the expense must be apportioned between being fully deductible (non-food and drink items) and 50% deductible (food and drink).

Employee reimbursement

Perhaps as an employer you have told to your employees to have a "dinner out on us" and to expense claim it. This type of expense called a taxable benefit"expenditure on account of an employee" as it is not employment related. Once your employee has provided a receipt you will need add the full amount of the taxable benefit to your employee's salary or wage, with PAYE then being deducted from the total gross amount. Child support, student loan deductions and Kiwisaver are all assesessed on your employee's gross earnings, which includes taxable benefits. The expense will be 100% deductible for the business.

Cash bonuses to employees

Cash bonuses paid by an employer to an employee are taxable under the PAYE regime, this is a payment made in connection with the employee's employment and not a payment that is regularly included in the employee's salary and wages.

Using a company vehicle for personal travel

Given there is likely to be a desire to travel around the country this summer, some employees may be using their company vehicles as their means of transport during the holidays. Employers need to remember that FBT will arise whenever a company vehicle is available for an employee to use privately.

Please don't hesitate in contacting your usual Deloitte advisor to discuss any queries you may have further.

Whatever your festive season celebration and holiday plans are, Deloitte wishes you and your families a Merry Christmas and Happy New Year, along with a few days with your feet up enjoying the (fingers crossed) hot and sunny weather. See you in 2022.

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Extreme tax powers could be used for almost anything

By Robyn Walker

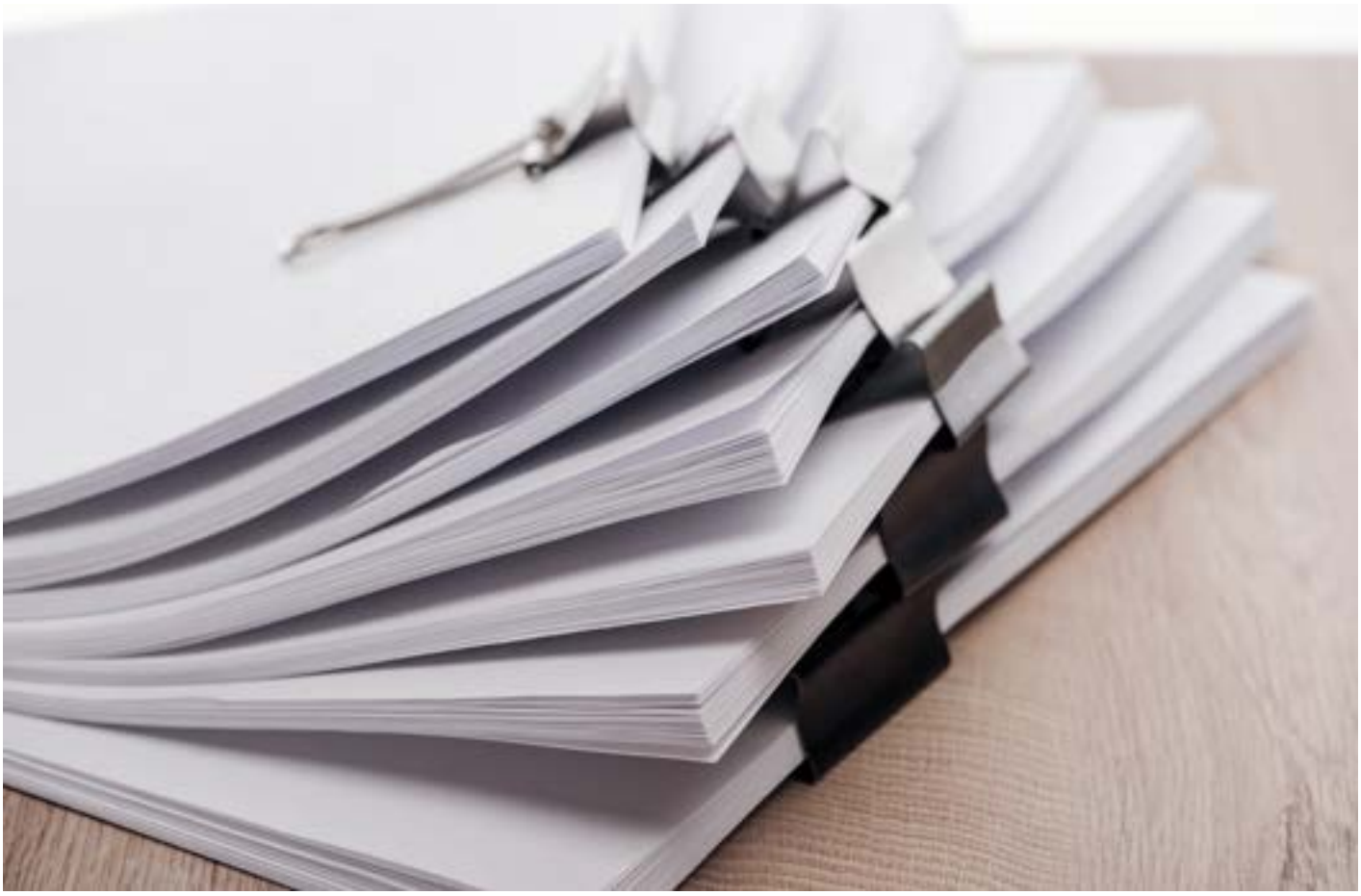
"A person must, when notified by the Commissioner that the person is required to provide information under this section, provide any information that the Commissioner considers relevant for a purpose relating to the development of policy for the improvement or reform of the tax system."

On 7 December 2020 these words were added into the New Zealand tax legislation, as section 17GB of the Tax Administration Act 1994. If you find the extent of the power concerning, you probably should. Ironically, even the Attorney-General found reason to be concerned with the rules. These rules could potentially be used to collect any information tangentially related to a current or future tax in some way.

In late November 2021, Inland Revenue released some draft guidance explaining the procedures Inland Revenue will follow when issuing section 17GB information requests; unfortunately it doesn't go so far as to put limitations on what type of information is considered relevant. Some colour can be obtained from the first high-profile use of the power; being the collection of extensive information about all forms of income and assets of over 400 high net worth individuals.

The draft guidance makes a few points which taxpayers should be cognisant of:

- The purposes for which information can be required can be very broad.
- Where a New Zealand resident directly or indirectly controls a non-resident, the New Zealand company will need to provide information about the non-resident if requested.
- It's not necessary for the information demand to include the policy purpose or an explanation of why the information is being sought.
- While information provided can't be used as evidence in proceedings against that person; there may be instances where the information obtained using the power is used for other purposes (e.g. if there is a legal obligation to provide the information or disclosure is permitted by law).



- Penalties may follow if an information request is not complied with. The penalties aren't specified but could include a fine of $25,000 for a first offence or three months imprisonment.

The new information gathering power, is by its nature extremely political. Tax policy direction is set by the Government, so naturally the information being collected will have a direct correlation to what is of interest to the part(ies) making up the Government of the day. To illustrate how broad this power is, below are some examples of information requests which could (hypothetically) be made, based on tax rules proposed by various political parties in New Zealand:

- Taxpayers could be asked to provide grocery shopping invoices in order to ascertain the proportion of groceries purchased which are "basic" items versus "luxury" items if consideration were to be given to removing GST from certain food and drink.
- Taxpayers could be asked to list out all gifts of money since gift duty was repealed in October 2011 to determine what impact this has had on behaviour.
- Taxpayer could be asked to provide details of inheritances; including how an estate has been divided.
- Cannabis consumption could be surveyed in order to establish potential additional tax revenues and laws associated with the legalisation of cannabis.
- All taxpayers could be asked to provide details of all assets owned and debts owning (e.g. the market value of family home net of any mortgages owing) in order to establish what proportion of New Zealand has total wealth in excess of $1million for the purposes of developing a wealth tax.

While this information gathering power may have come from a place of wanting to be able to collect information to help inform tax policy making, ultimately the compulsion factor and the threat of penalties is at odds with a tax system which is based on voluntary compliance. The Government should ask itself why it feels the need to compel information out of people rather than letting those who want to contribute to the tax policy debate continue to do so.

While the draft operational statement is not seeking submissions on the merits of section 17GB of the Tax Administration Act 1994, there is nothing to stop people using this as an opportunity to provide views on the section. Submissions close on 31 January 2022.

For more information please contact your usual Deloitte advisor.

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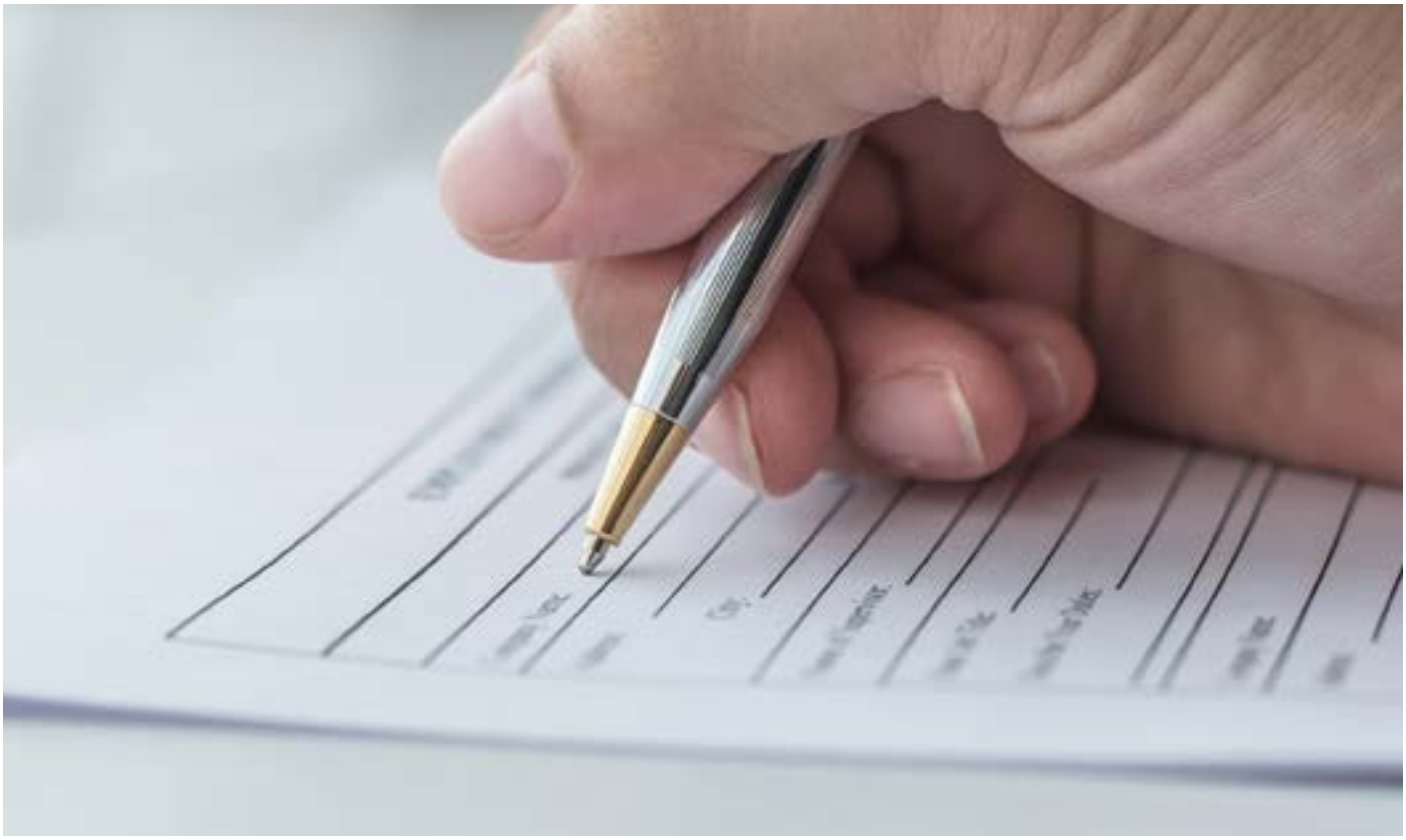
Will Technical Decision Summaries help with Inland Revenue decision making transparency?

By Amy Sexton & Veronica Harley



After many years of taxpayers and their advisers asking, the Inland Revenue is now publishing summaries of technical decisions, with the published decision to be known as a Technical Decision Summary (TDS). Since October 2021 there have been five TDS', all adjudication decisions, published.

Private ruling decisions will be published for applications received on or after January 2022.

What is a TDS?

A TDS is a summary of adjudication or private ruling decisions made by the Tax Counsel Office (TCO). It is expected that TDS' will be published within three months of a technical decision being finalised. TDS' will not be binding on the Commissioner; they are a summary of a technical decision and they are for information only. They are intended to provide a little more guidance as to Inland Revenue's legal interpretation process. This is the first time TCO's legal analysis on technical compliance issues has been made public.

What can we expect to see in a TDS?

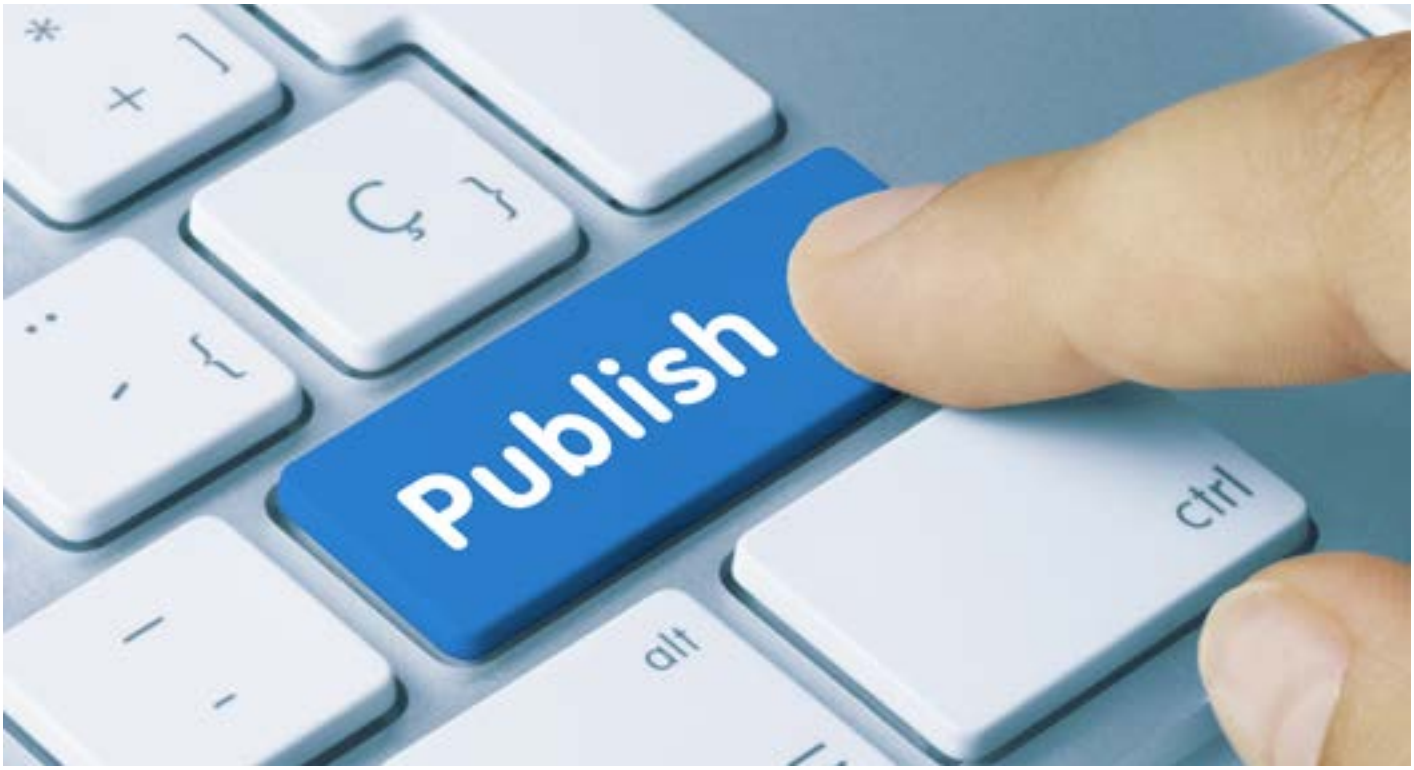
A TDS will be written by someone within TCO who was not directly involved with making the decision and will have four sections:

- Facts
- Issues
- Decisions
- Reasons for decisions

The Inland Revenue has advised that the TDS will include a summary of the factual situation and "sufficient" details of the legal analysis to be able to understand the reasons for TCO's technical decision. However, it must be remembered that a TDS is only a summary of the technical decision. Inland Revenue has issued a guideline for the publication of TDS'.

What about privacy?

A TDS will not contain any information that could identify a taxpayer or include any confidential or commercially sensitive information. Before a TDS is published it will be sent to the taxpayer or their advisor so that they can review the draft to confirm the TDS does not breach confidentiality or include commercially sensitive information. Taxpayers have one month to contact the Inland Revenue if they have any concerns with the TDS before it is published.



Will all private ruling and adjudication decisions be published?

In short, no. The Inland Revenue has stated that while it is intended that most technical decisions will be published, there are some legal and practical reasons that may prevent some from being published. Examples provided by Inland Revenue in their guideline of "characteristics" that would prevent publication include:

- Where it is not possible to appropriately protect the confidentiality of the taxpayer or another party.
- Inland Revenue has decided the decision should not be followed in other contexts, or will not be applied to other taxpayers, pending an urgent consideration of the decision at the national level.
- The decision has been formally escalated within Inland Revenue and the Commissioner's position may change.
- The decision will be included in a public statement that will have public consultation.
- Implications of the decision mean the integrity of the tax system or certainty for taxpayers requires the Commissioner to engage with the government or give careful consideration regarding its implementation and communication.
- The issue has been referred to the Policy group for immediate legislative clarification or rectification due to the serious risk of undermining the tax system's integrity, government revenue or taxpayer certainty if it became public knowledge.
- The issue is purely procedural or administrative in nature and not likely to be of interest to taxpayers or advisors.

The decision to publish TDS' also only apply to private rulings that have been issued by TCO. What may not be known by taxpayers and advisors is that often the Customer and Compliance Services – Business (CCS) unit of Inland Revenue prepare and issue private rulings. These CCS issued rulings will not, at this stage, be published.

So, will these TDS' be useful?

There has been a huge body of law amassed by the Inland Revenue that taxpayers and their advisors are not privy to. Publishing these decisions is a step forward in improving the transparency of Inland Revenue's decision-making on matters of legal interpretation.

However, Inland Revenue should reconsider its position on not publishing all decision's that do not involve the protection of taxpayer confidentiality or the integrity of the tax system. Withholding a decision on the basis that there are differences of view within Inland Revenue because Inland Revenue intends to issue a public statement or the decision is subject to escalation undermines the key reason to publish and will present an incomplete picture of decisions made by the TCO.

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The false economy of working quickly

By Robyn Walker

We live in an ever fast-paced world, one where everyone wants everything now, or better still, yesterday; and we want to change a lot of things.

From a tax perspective, we've found ourselves regularly in a position where tax laws are enacted overnight with little consultation, or high-level policy decisions are made and announced by the Government and it's a case of urgently back-filling the detailed policy design and getting the laws enacted by the already determined due date. Alternatively, policy reform is mooted with an application date in mind, consultation takes place to help iron out the details but inevitably there comes a time when the policy needs to be converted into legislation, and this seems to frequently hit up against deadlines for having legislation included in a taxation bill. The result of all of the above has been an increasing amount of criticism about the quality of tax law drafting in New Zealand.

In response to concerns, Inland Revenue took the step of commissioning an independent review of taxation law drafting. The results of that review were publicly released last month. The review includes a comprehensive list of 40 recommendations to improve tax legislation.

While it may seem that criticism is being made of the Inland Revenue drafting unit, when the report is reviewed in whole, it illustrates that the drafting unit is the victim of everyone else wanting to do too much too quickly and/or leaving inadequate time for legislation to be drafted clearly and being subject to proper review before reaching parliament.

Increasingly tax legislation is becoming more complex and trying to deal with every conceivable scenario rather than taking a principled approach. The mixed-used asset and residential loss ring-fencing rules both get called out in the review as examples of complex regimes. The complexity of legislation is particularly concerning when the rules relating to common transactions apply to many taxpayers who may not have the resources to either understand the rules directly or to pay for professional advice. It is even more concerning when the legislation becomes so complex that even tax advisors have difficulty understanding it, a point noted in the review.

Poorly drafted and complex legislation leads to large amounts of downstream administration and compliance costs, including education, needing to effectively translate legislation into plain English, time-spent second-guessing and clarifying what legislation is intending to do, identifying errors in the legislation, and going through the time-consuming process of getting buy-in to make a legislative change and seeing that through the parliamentary process (which can take over a year). While it may feel great to say that a tax rule has been announced, developed and legislated in a short period, the job isn't done until the legislation is working in a way that matches the policy intent. This can result in many years of tidying up avoidable mistakes.

It's in everyone's best interests if we can try to strike an appropriate balance between moving too quickly and moving too slowly (and conversely causing issues by having outdated legislation which doesn't respond to new issues).

The drafting review, while shocking in some aspects, presents a useful opportunity for stakeholders in the tax system to take stock and to reassess how tax policy and legislation is developed. The constant need for speed on issues is clearly resulting in undesirable outcomes for everyone, not just those working in the Inland Revenue drafting unit.

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Snapshot of recent developments

Tax Legislation and Policy Announcements

Legislation Act 2019 now in force

On 28 October 2021, most provisions in the Legislation Act 2019 (the Act) were brought into force by the Legislation Act 2019 Commencement Order 2021. The Act improves accessibility of the law by incorporating the Interpretation Act 1999 to ensure the main provisions of NZ legislation concerned with Acts and secondary legislation are in one statue. Part 2 of the Act updates and re-enacts the 1999 Act to improve accessibility to the principles and rules of interpretation.

Legislation amending RSP and Working for Families Tax Credits

The Taxation (COVID-19 Support Payments and Working for Families Tax Credits) Act 2021, introduced on 23 November, passed through all stages in the House on 25 November 2021. The Act:

- Increases the Family Tax Credit from $5,878 to $6,642 per year for the eldest child in a family and $4,745 to $5,412 per year for subsequent children from 1 April 2022
- Provides for a scheduled CPI indexed increase to Best Start from $3,120 to $3,388 per year from 1 April 2022
- Increases the family credit abatement rate for the Family Tax Credit and the In-Work Tax Credit from 25 percent to 27 percent from 1 April 2022
- Increases the Minimum Family Tax Credit threshold from $31,096 to $32,864 from 1 April 2022, and
- Includes amendments that adapt the current Resurgence Support Payments into the COVID-19 Support Payments (CSP) framework. The CSP framework will continue to support eligible businesses affected by COVID-19 restrictions, but it will not be activated by a change in Alert Levels. The CSP framework will allow the Governor-General, by Order in Council, to authorise grants to be made to eligible persons financially affected by a public health measure, a business circumstance, or a matter related to COVID-19.

Inland Revenue statements and guidance

GST and finance leases

On 7 November 2021, Inland Revenue released draft Interpretation Statement PUB00357 – GST and finance leases. This consultation document explains how to classify finance leases for the purposes of the time of supply and value of supply rules. It also explains how to account for GST on finance leases when applying any special time and value of supply rules. Submissions close on 17 December 2021.

Variation to extend deadline for applying R&D tax credits

On 8 November 2021, Inland Revenue issued COVID-19 variation determination COV 21/05 - Variation to section 68CC(3) of the Tax Administration Act 1994. In summary the variation extends:

- To 7 December 2021 the time by which a person with a late balance date, to be entitled to R&D tax credits under s LY 1 of the Income Tax Act 2007 must apply for criteria and methodology approval for the 2020-2021 income year.
- By three months (to 30 November 2021 for February balance date and to 31 March 2022 for June balance date) the times by which a person with balance dates between 28 February 2022 and June 2022, to be entitled to R&D tax credits under s LY 1 of the Income Tax Act 2007, must apply for criteria and methodology approvals for the 2021-2022 income year.

This variation applies in circumstances where the planning or conduct of eligible R&D or the ability to appropriately obtain necessary information, seek advice and formulate an application under s 68CC of the Tax Administration Act 1994 on time has been materially delayed or disrupted by the COVID-19 outbreak and its effects. This variation applies from 9 November 2021 to 30 June 2022.

Establishing and maintaining a public fund

On 11 November 2021, Inland Revenue released a draft Questions We've Been Asked PUB00372 - What is required to establish and maintain a "public fund" under s LD3(2)(d) of the Income Tax Act 2007? A person who donates money to a donee organisation can receive a donations tax credit or deduction. A donee organisation includes a "public fund" established and maintained exclusively for the purpose of providing money for one or more specified purposes within NZ. Since 1 April 2020, a public fund must be registered with the Department of Internal Affairs' Charities Services (if it is entitled to be registered under the Charities Act 2005), and the name of the fund must be on the list of donee organisations the Commissioner publishes for a donor to receive a donations tax credit or deduction. This consultation document considers what is required to establish and maintain a public fund under s LD 3(2)(d) of the Income Tax Act 2007. It complements IS 18/05 - Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand and QB 19/10 - Donations – what is required to establish and maintain a fund under s LD 3(2)(c) of the Income Tax Act 2007? Submissions close on 24 December 2021.

GST - goods purchased on deferred payment terms

On 16 November 2021, Inland Revenue released draft Questions We've Been Asked PUB00330: GST - goods purchased on deferred payment terms. This consultation document explains when a person registered for GST on a payment basis can claim an input tax deduction for goods purchased on deferred payment terms as follows:

- Generally, a person registered for GST on a payment basis can claim input tax deductions only when and to the extent that payment has been made. This includes goods purchased under a standard sales agreement or goods purchased on a buy now, pay later basis.
- However, if the person has entered into a hire purchase agreement for the purchase of goods, they can claim the full input tax deduction in the taxable period in which they enter into the agreement instead of when the instalment payments are made.
- If the agreement is a layby sales agreement, the person can claim an input tax deduction only in the taxable period in which property in the goods is transferred, typically after the final payment has been made.

Submissions close on 24 December 2021.

Fact sheet for treatment of meal expenses

On 26 November 2021, Inland Revenue published the fact sheet to the Interpretation Statement IS 21/06 - Income tax and GST – Treatment of meal expenses, that was issued in July this year. The statement considers the income tax and GST treatment of meal expenses incurred by self-employed people. It also discusses the treatment of meal allowances paid to employees and entertainment expenditure. This fact sheet includes a table indicating deductibility of meal expenses in different scenarios, including self-employed, employees and shareholder-employees and look-through companies and entertainment expenses.

Early withdrawal discretion - flooding in Tairawhiti Gisborne region

In early November 2021, significant rainfall and flooding affected the Tairawhiti

Gisborne region. Currently the event has been classified as a 'localised adverse event'. At this time the Commissioner has not exercised her 'class of case' discretion for early withdrawals from (or late deposits to) the income equalisation scheme. Taxpayers are however able to apply on a case-by-case for basis for that discretion. More Inland Revenue support for affected businesses, individuals and families can be found here.

OECD updates

During the past month, the OECD has provided the following tax updates:

- On 31 October 2021, the OECD Secretary-General, Mathias Cormann, welcomed the G20 Leaders' declaration, recognising the historic tax agreement reached by the OECD/G20 Inclusive Framework on Base Erosion Profit Shifting (BEPS). This followed the G20 Finance Ministers and Central Bank Governors pledging support for the OECD BEPS proposal on 13 October and vowing to work together to achieve a possible 2023 start date, consistent with the OECD's implementation timeline. The Secretary-General said the OECD stands ready to facilitate the work needed to ensure the timely and effective implementation of the two-pillar solution as they're moving into the implementation phase of the agreement. Countries must move as quickly as possible to bring both pillars into effect.
- On 9 November 2021, the Tax Inspectors Without Borders (TIWB) Annual Report 2021 was released. The report describes TIWB and its relevance in the context of the COVID-19 pandemic; provides details on TIWB activities, trends and achievements and provides information on results obtained and lessons learned over the past year; highlights TIWB participation at international events and the initiative's communications; and sets out the work plan for the year and provides an overview of the previous year's objectives and performance. The event "Tackling tax avoidance and evasion in the post-pandemic era" was also held on the same date.
- On 22 November 2021, The 2020 Mutual Agreement Procedure (MAP) Statistics and the 2020 MAP Awards were presented during the third OECD Tax Certainty Day. MAP Statistics play an important role in monitoring BEPS Action 14 minimum standard, providing an objective and global frame of reference, as well as a country specific view. The statistics allow measurement of progress and show where further work is needed.

Global News Focus

ATO not to extend PE Residency Transitional Position

The ATO has recently released their decision that after careful consideration of the current status of the COVID-19 pandemic compared to the circumstances at the start of the COVID-19 compliance approach for permanent establishments (PEs) in March 2020, including the easing of travel restrictions both in Australia and abroad, it will **not** be further extending the Compliance Approach for PEs beyond the current end date of 31 December 2021.

The ATO has separately published a minor addendum to Taxation Ruling TR 2002/5 which provides an example on the issue of temporal permanence in the context of COVID-19. This will continue to provide assurance that the ATO will take into consideration the impact of COVID-19 when determining whether a PE exists in Australia.

Note: The items covered here include only those items not covered in other articles in this issue of Tax Alert.

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