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WEEKLY COMMENT: FRIDAY 3 JULY 2015

1. The Government's 2015 Budget contained a number of so-called "property compliance proposals". This week and next week I will review these proposals. This week I look at the new information requirements and next week I will look at the bright-line test.

Overview of the property compliance proposals

2. The property compliance measures consisted of:
 - (a) Getting better tax information from all people (New Zealanders and offshore people) dealing in land;
 - (b) Promoting the enforcement of tax obligations of offshore persons (who may include certain New Zealand residents and certain New Zealand citizens) more generally, and not just tax compliance in land dealings;
 - (c) The introduction of a new "bright-line" test, under which gains from residential property sold within two years will be taxed, unless the property is the seller's main home, inherited from a deceased estate or transferred as part of a relationship property settlement;
 - (d) Providing Inland Revenue with a further \$29 million for property tax compliance, taking its total budget for work in this area over the next five years to \$62 million, expected to generate additional tax assessed of around \$420 million in the coming five years; and
 - (e) Investigating introducing a withholding tax for non-residents selling residential property.
3. The proposed commencement dates for the announced measures are as follows:
 - (a) The measures to improve information gathering and promote enforcement of offshore persons' tax obligations are contained in the *Taxation (Land Information and Offshore Persons Information) Bill* ("the Tax Information Bill"), introduced on 22 June with a commencement date of 1 October 2015 once it is enacted.
 - (b) The details regarding the bright-line test are contained in *Bright-line test for sales of residential property – An officials' issues paper* ("the Bright-line Test Issues Paper"), released on 29 June 2015. The test will apply to residential properties for which an agreement to purchase was entered into on or after 1 October 2015.
 - (c) Officials will consult on the details of the proposed withholding tax for non-residents selling residential property, with a view to the withholding tax being introduced around the middle of 2016.

The Tax Information Bill

4. The Tax Information Bill had its first reading on 25 June. It has been referred to Select Committee and is due to be reported back by 17 August 2015. The Bill contains proposed amendments to:
 - (a) The *Land Transfer Act 1952* (“LTA 1952”); and
 - (b) The *Tax Administration Act 1994* (“TAA 1994”).

Tax information required under the LTA 1952

5. Purchasers and vendors of property will, subject to certain exceptions, need to provide a New Zealand IRD Number and, those who are tax resident in another jurisdiction will also have to provide an overseas Tax Identification Number, as part of the proscribed conveyancing process.
6. More specifically, proposed s. 156B in the LTA 1952 provides that an instrument to transfer a “specified estate in land” is not in order for registration unless each of the transferor and transferee has completed a tax statement, and the information in that statement required under proposed s. 156C, referred to as “tax information”, is give to the chief executive of Land Information New Zealand (“LINZ”).
7. A “specified estate in land” is defined in proposed s. 156A(1) as meaning:
 - (a) Freehold estates, including fee simple and life estates; and
 - (b) Leasehold estates; and
 - (c) Stratum estates in freehold within the meaning of the Unit Titles Act 2010; and
 - (d) Stratum estates in leasehold within the meaning of the Unit Titles Act 2010; and
 - (e) Licences to occupy (as defined in s. 121A(1) of the LTA 1952); and
 - (f) Any other estate in land declared to be a specified estate in land by regulations made under the LTA 1952.
8. Proposed s. 156C in the LTA 1952 contains the requirements for the content of the tax statement. The tax statement must be signed, dated on the date it is signed, and provide the transferor’s or transferee’s full name and either:
 - (a) State that the transfer instrument is for an exempt transfer (or, is an exempt transfer in respect of the transferor or transferee making the statement) and specify the category of that exempt transfer (refer to paragraph 9 onwards below); or
 - (b) Provide the information described in proposed s. 156C(2) of the LTA 1952 (refer to paragraph 14 onwards below).

What is an exempt transfer

9. An “exempt transfer” is defined in proposed s. 156A(2), and means:
 - (a) In relation to a transferee, the transfer of residential land that is intended to be the transferee’s main home, but not if the transferee will own the residential land as a trustee (i.e. a trustee transferee cannot claim an exempt transfer on account of acquiring a main home).

- (b) In relation to a transferor, the transfer of residential land that was the transferor's main home, but not if:
- (i) The transferor owned the residential land as a trustee (i.e. a trustee transferor cannot claim an exempt transfer on account of selling a main home); or
 - (ii) The transferor has relied on the main home exemption at least twice within the 2 years immediately preceding the date of the transfer (i.e. they are selling their third main home in a 2-year period – apparently to facilitate identifying “habitual renovators” who are taxable under the general land tax rules); or
 - (iii) The transferor is an offshore person (as will be defined in s. 3 of the TAA 1994 – see paragraph 18 onwards below).
- (c) Any other transfer specified as being exempt in regulations made under the LTA 1952, and under proposed s. 236(4), regulations may only be made specifying transfers as exempt if:
- (i) Requiring persons to comply with the tax information requirements in s. 156B in the case of transfers proposed to be specified as exempt would be impractical or involve high compliance costs; or
 - (ii) There is a low risk of tax avoidance in relation to the transfers proposed to be specified as exempt.
10. Proposed s. 156A(1) of the LTA 1952 contains a number of relevant definitions. The same definitions are used in the Bright-line Test Issues Paper, which I discuss next week. There is a definition of “residential land”, which means:
- (a) Land that has a “dwelling” on it; or
 - (b) Land for which there is an arrangement that relates to erecting a dwelling.
11. “Dwelling” for this purpose is defined as a place used predominantly as a place of residence or abode, including any appurtenances belonging to or enjoyed with the place, excluding commercial lodgings like hotels, motels and hostels, and places like hospitals, rest homes and camping grounds. This is the same as the definition in s. YA 1 of the *Income Tax Act 2007*, but without serviced apartments being excluded. As will be discussed next week, this is apparently to ensure that investors in serviced apartments are subject to the proposed bright-line test.
12. Residential land does not include land used predominantly as business premises or as farmland. “Farmland” is defined as land that, because of its area and nature, is capable of being worked as an economic unit as a farming or agricultural business.
13. “Main home” is defined, for a person, as the 1 home:
- (a) That is mainly used as a residence by the person and any member of the person's family living with the person; and
 - (b) With which the person has the greatest connection.

What tax information has to be provided

14. If the transfer is not an exempt transfer in respect of a transferor or transferee, proposed s. 156C(2) requires all of the following information to be provided:
- (a) The transferor's or transferee's IRD number (and proposed s. 156C(4) states that if the transferor or transferee does not have an IRD number, they must acquire one for the purpose of providing this information); and

- (b) Whether the transferor or transferee is, or is not, treated as tax resident in a jurisdiction other than New Zealand as at the date of the statement; and
 - (c) If the transferor or transferee is treated as tax resident in a jurisdiction other than New Zealand as at the date of the statement:
 - (i) The name of that jurisdiction; and
 - (ii) The country code for that jurisdiction as prescribed by the Commissioner of Inland Revenue; and
 - (iii) The equivalent of the transferor's or transferee's IRD number in that jurisdiction.
15. The information must relate to the transferor's or transferee's circumstances. Proposed s. 156C(3) states that:
- (a) If the transferor or transferee is acting in the capacity of a trustee of a trust, the information must relate to a trustee in that capacity – i.e. the trust's IRD number must be provided;
 - (b) If the transferor or transferee is acting as a nominee or under a power of attorney, the information must relate to the person who made the nomination or granted the power of attorney;
 - (c) If the transferor or transferee is acting in the capacity of a partner in a partnership, the information must relate to the partnership – i.e. the partnership IRD number must be provided;
 - (d) If the transferor or transferee is a person acting on behalf of an unincorporated body, the information must relate to the unincorporated body.
16. It is an offence to provide false or misleading tax information for which a person is liable upon conviction for the first time, to a fine not exceeding \$25,000, and upon subsequent convictions to a fine not exceeding \$50,000.
17. The person who provides the certification for a transferor or transferee under s. 164A of the LTA 1952 for a transfer of a specified estate in land, referred to as the "certifier" must retain the tax statement for 10 years, as must the chief executive to whom it is given, and either person must provide the tax statement to the Commissioner of Inland Revenue upon receiving a request to provide it.

Who is an offshore person under the TAA 1994

18. An "offshore person" is to be defined, in s. 3 of the TAA 1994, separately for an individual and a non-individual.
19. An individual is an "offshore person", under paragraph (a) of the proposed definition, if the individual is
- (i) A New Zealand citizen who is outside New Zealand and has not been in New Zealand within the last 3 years; or
 - (ii) A person who holds a resident class visa granted under the *Immigration Act 2009*, and who is outside New Zealand and has not been in New Zealand within the last 12 months; or
 - (iii) A person who is not a New Zealand citizen and who does not hold a resident class visa granted under the *Immigration Act 2009*.

20. A body corporate or an unincorporated body of persons, including a trust or a unit trust, is an “offshore person”, under paragraph (b) of the proposed definition, if it is a person who would be an “overseas person” under s. 7(2)(b) to (e) of the *Overseas Investment Act 2005* (“OIA 2005”), treating references to an “overseas person or persons” in that section as including individuals who would be “offshore persons” as defined in paragraph 19 above.
21. It should be noted that a unit trust is covered under s. 7(2)(f) of the OIA 2005. The inclusion of “unit trust” in the “offshore person” definition would appear to suggest that a reference to s. 7(2)(f) of the OIA 2005 should also be included.
22. Under s. 7(2)(b) and (c) of the OIA 2005, a body corporate is an “overseas person” if:
- (b) The body corporate is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand; or
 - (c) An overseas person or persons have:
 - (i) 25% or more of any class of the body corporate’s securities; or
 - (ii) The power to control the composition of 25% or more of the body corporate’s governing body; or
 - (iii) The right to exercise or control the exercise of 25% or more of the voting power at a meeting of the body corporate.
23. Under s. 7(2)(d) of the OIA 2005, a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust) is an “overseas person” if:
- (i) 25% or more of its partners or members are overseas persons; or
 - (ii) An overseas person or persons have a beneficial interest in or entitlement to 25% or more of its profits or assets (including on its winding up); or
 - (iii) An overseas person or persons have the right to exercise or control the exercise of 25% or more of the voting power at a meeting of the partners or members.
24. Under s. 7(2)(e) of the OIA 2005, a trust is an “overseas person” if:
- (i) 25% or more of the trust's governing body are overseas persons; or
 - (ii) An overseas person or persons have a beneficial interest in or entitlement to 25% or more of the trust property; or
 - (iii) 25% or more of the persons having the right to amend or control the amendment of the trust deed are overseas persons; or
 - (iv) 25% or more of the persons having the right to control the composition of the trust’s governing body are overseas persons.
25. Under s. 7(2)(f) of the OIA 2005, a unit trust is an “overseas person” if:
- (i) The manager or trustee, or both, are overseas persons; or
 - (ii) An overseas person or persons have a beneficial interest in or entitlement to 25% or more of the unit trust property.

Requirement for an offshore person to have a New Zealand bank account

26. Under proposed s. 24BA(1) of the TAA 1994, an offshore person must provide a bank account number to Inland Revenue in order to be allocated an IRD number.

27. Under proposed s. 24BA(2) of the TAA 1994, if a body corporate or an unincorporated body of persons, including a trust or a unit trust, which already has an IRD number, becomes an “overseas person” under paragraph (b) of the proposed definition (see paragraph 20 onwards above), a bank account number must be immediately provided to Inland Revenue. This is apparently to prevent a situation whereby, for example, shares in a New Zealand company with an IRD number are sold to a non-resident to avoid the application of the rule.
28. For this purpose, a “bank account number” is to be defined in s. 3 of the TAA 1994 as meaning the number of an account with:
- (a) A registered bank; or
 - (b) A licensed NBDT, as defined in s. 4 of the *Non-bank Deposit Takers Act 2013*.



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