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IRD Strips Uncertainty Around "Asset Stripping"

Under section HD 15 of the Income Tax Act 2007 (formerly HK 11 of the 1994 and 2004 Income Tax Acts), directors and shareholders can become personally liable for the tax debts of a company in certain situations. The effect of this provision is that IRD can "pierce the corporate veil" if a director or shareholder has been party to an asset stripping arrangement so that the company cannot pay its tax debts. This is not a new provision however, IRD have rarely used this provision partly because of uncertainty about how the section operated in the context of the disputes resolution procedures. In particular, IRD were unclear whether a Notice of Proposed Adjustment (NOPA) was required to be issued to a director or shareholder. In the recent case of *CIR v Skudder* the IRD made an application to the Court for a ruling on this particular issue. The Court held that the decision to invoke section HD 15 was a "disputable decision" which meant that IRD was required to issue a NOPA to directors or shareholders before they could become liable for the tax debts of a company. This decision is not being appealed. Armed with certainty about the operation of section HD 15 it is likely IRD will be far more vigilant in its efforts to recover corporate tax debt from directors and shareholders, particularly in these current economic conditions.

If you have clients looking to enter transactions which might leave their company in a position where it cannot meet its tax liabilities then consideration should be given to whether personal liabilities could arise under section HD 15. If you have any doubts please give one of our tax consultants a call for advice about these issues.

David Weaver**GST Refund Delays**

Recent experiences and media publicity suggest that the IRD is holding onto GST refunds longer than is necessary, ignoring the reality that GST is meant to be neutral between registered persons and is a real cost and a cashflow to a business. We have no problem with reasonable and legitimate requests, and the GST Act has specific rules that allow for a refund to be withheld while a claim is verified.

When a GST return is filed claiming a refund, the IRD may decide to audit the claim or request information in support of the claim. In either case under section 46 of the GST Act, the IRD must notify the taxpayer and request information within 15 working days of receiving the GST return. Once information has been supplied a request for further information must be made within 15 working days. Where that period is exceeded the refund should be released, although that doesn't stop the IRD from continuing with their enquiries.

The High Court confirmed in the case *Contract Pacific Limited v CIR* (2009) 24 NZTC 23,092 that when a refund is withheld while the Commissioner investigates the circumstances of the return, a request for information must still comply with the 15 working day time limit.

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Where a request is made outside that 15 working day period, the Commissioner no longer has the authority to withhold the refund.

The *Contract Pacific* decision is under appeal but the position in NZ law is that once a court hands down a judgment, it is valid and enforceable until overturned on appeal by a higher court, or until another court of higher jurisdiction rules otherwise (the doctrine of stare decisis).

We are aware of instances where the IRD has declined to release a refund despite breaching the 15 working day period. A judgment cannot be ignored because the Commissioner does not agree with the decision. An appeal does not suspend the operation of the judgment. The Commissioner's remedy if he wishes to ignore the High Court judgment is to apply to the High Court judge for a stay of the judgment until the appeal is decided.

If you are aware of a refund hold up check the timelines to see if the 15 working day period has been breached. If it has, you need to consider what remedies there are to resolve the matter.

Contact an nsaTax consultant for advice if you have a problem with a GST refund.

Gavin Stewart**New Tax Bill Enacted**

The Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill was passed into law on 6 October 2009. The amending legislation contains an omnibus of changes to the Income Tax Act 2007 ("the Act"). There are a number of effective dates for the changes, some are immediate while others do not take effect until the 2010-11 income year, other changes apply retrospectively. Some of the more notable changes include the first stage of an overhaul of the international tax regime, changes to the associated persons definitions and amendments to the portfolio investment entity and foreign investment fund rules.

One of the main changes to the international tax rules is the removal of the "grey list" exemption from the controlled foreign company ("CFC") rules, save for Australia. Under the old rules shareholders of CFC's resident in a grey list country were not required to pay tax on income derived by the CFC and were only taxed on dividends received. However, the grey list exemption has been replaced with a completely new approach to taxing CFC income depending on whether the CFC meets an "active business" test. Under the new rules a CFC has an "active business" if less than 5% of its total gross income is passive income, this type of income includes interest, dividends, rents and royalties.

At first glance this may appear to be a positive change however, the replacement of the grey list exemption with the "active business" test potentially widens the scope of the CFC rules. Shareholders of CFC's

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who were previously not required to return income from foreign companies may now be required to do so. For example, a CFC that derives a significant amount of interest income may fail to meet the active business test which would require the New Zealand shareholders to return their proportion of the interest income in New Zealand. For advice on how the CFC changes will effect your clients please contact one of our tax consultants.

Other changes to the international tax rules which I am sure will be a welcome relief include repeal of the conduit tax and dividend withholding payment rules.

The changes to the international tax rules apply to persons with income years beginning on or after 1 July 2009 but for the majority of people the changes will not be effective until the start of the 2010-11 income year.

As noted in earlier editions of *InBrief*, the Act contains wholesale changes to the associated persons definition which significantly expands the circumstances in which two or more persons will be "associated". These changes have wide-ranging ramifications given that the concept of "associated persons" is used throughout the income tax legislation. The most immediate change will be for the purposes of determining whether gains derived on the sale of land are taxable. The new definition applies in respect of land acquired, and where relevant, land on which improvements are begun on or after 6 October 2009. Other changes to the associated persons rules are not effective until the start of the 2010-11 tax year.

This is just a snippet of some of the changes under the Act. Please don't hesitate to give us a call to discuss how these changes and others may impact your clients.

David Weaver**Seminars**

Our spring seminar series is scheduled to run over October through to December. These are being held in Auckland, North Shore, Hamilton and Tauranga. The topics for this round of seminars are as follows:

- Outbound Migrants
- Terminating Entities
- Property Update
- Tax Update
- Know Your Rights

Also attached is our seminar registration form, if you have any queries please email seminars@nsatax.co.nz or contact Lara Hartmann on 09 309 6505.