

est. 2011

### Welcome!

It is December 2011 at the time of writing this, and the Christmas holidays are nearly here. The big news in New Zealand recently is, of course, the hugely successful Rugby World Cup tournament, which we hosted and won. I think it's fair to say that the tournament gave all New Zealanders a sense of belonging and camaraderie that had to be experienced to be believed. We have also had a general election recently, and views on the result vary depending on peoples' affiliations. The outcome is that we have no change in government. That should relieve some of the uncertainty that prevailed pre-election. The financial situation in Europe remains problematic but perhaps not quite as critical as it has been in past months. Hopefully the Canterbury reconstruction will prove to be a buffer for NZ against any deteriorating world financial conditions.

### CHANGES IN THE NEW TAX BILL: WINNERS AND LOSERS

There are winners and losers in the income tax changes that are proposed in the Annual Rates Tax Bill introduced on 14 September 2011. The winners: taxpayers with failed software development costs, and taxpayers who have incurred expenditure on account of an employee in respect of future employment-related expenditure to be incurred by employees. Both types of expenditure are to be deductible from 2008-09 onwards. The losers: taxpayers who receive shares under a profit distribution plan (PDP) (to be taxable from 1 July 2010) and tax consolidated groups that remit intra-group loans that were advanced before the parties were in the consolidated group, even though they may have been in an ordinary tax company group at the time the loan was made (to be taxable from 2008-09 unless a return taking a contrary position was filed before 23 August 2011). See the Larger Companies section for more details.

<http://www.davidco.co.nz/index.php?page=largebiz#111>

### LIMITED PARTNERSHIPS: INVESTMENT TO INCLUDE LOANS

An amendment proposed in the Annual Rates Tax Bill clarifies that a limited partner's investment in a limited partnership will include loans by the limited partner to the limited partnership. Such loans will be taken into account when determining the limited partner's basis for the purposes of the loss limitation rules. For more on this refer to the Close Companies and Partnerships section.

<http://www.davidco.co.nz/index.php?page=smallbiz#52>

### MAJORITY INTEREST SUFFICIENT FOR CORPORATE SPINOUT CONCESSION

From 1 May 2011 a majority interest (>50% interest) will be sufficient to trigger the application of the corporate spinout shareholding continuity concessions. Before that date, a 100% shareholding was required by a parent company in a spun-out company in order for the shareholding concessions available to apply.

<http://www.davidco.co.nz/index.php?page=largebiz#62>

### MIXED-USE ASSETS: DEDUCTIONS TO BE DENIED WHEN NOT IN USE

Tax deductions for the periods of non-use of mixed-use assets (those used for both income-earning and private purposes) are the subject of an Officials' Issues Paper released in August 2011. The proposals link tax deductions for periods of non-use to whether the use of the asset is income-focused (used for earning income for at least 2 months in a year) and to a threshold level of private use (<10% if non-use deductions are to be apportioned and <15% if non-use deductions are to be allowed in full). There would be corresponding limits on interest deductions for funding such assets and on GST input tax. See the Larger Companies section for more details.

<http://www.davidco.co.nz/index.php?page=largebiz#133>

### NON-RESIDENT FILM RENTERS' TAX HOLIDAY OVER

The concessional tax treatment that non-resident film renters have enjoyed is about to end. The Taxation (Annual Rates, Returns Filing and Remedial Matters) Bill contains proposed amendments that will repeal the current tax on deemed income of 10% of gross payments and replace it with non-resident withholding tax on royalties.

This means that a foreign film-renting company for example, that is currently taxed at 2.8% of gross receipts from NZ, will be taxed at a minimum of 5% (if resident in a double tax agreement country with the lowest withholding tax on royalties) or 10% or 15% if resident in other double tax agreement countries, or otherwise, possibly more than 15%. See the Non-residents section for more details.

<http://www.davidco.co.nz/index.php?page=nonres#71>

### DOUBLE TAX AGREEMENT WITH HONG KONG NOW IN FORCE

A new double tax agreement with Hong Kong came into force on 3 November 2011. This should make it considerably easier to do business with Hong Kong residents and companies. The agreement refers to Hong Kong and NZ as "Contracting Parties" rather than States and contains all the provisions of the latest double tax agreement model that NZ is using. The Non-residents section in this website has been fully updated for references to the Hong Kong agreement.

On the tax front, the Taxation (Tax Administration and Remedial Matters) Act 2011 was enacted in August, which contained among other things all of the earthquake-related tax depreciation concessions. The Taxation (Annual Rates, Returns Filing and Remedial Matters) Bill was introduced in September, with a number of further adjustments to the new GST and LTC regimes.

Meanwhile, the Taxation (International Investment and Remedial Matters) Bill that was reported from the Finance and Expenditure Committee on 9 May and contains major changes to the FIF and thin capitalisation rules affecting outbound companies has still not been enacted, despite most of the changes supposed to have been effective from 1 July onwards.

### TIDYING UP THE LTC RULES

The Annual Rates Tax Bill contains several changes designed to tidy up the LTC rules.

Tax elections, and valuation and timing methods adopted in relation to an LTC's income or property, are to be made or established by the LTC, not each owner. Fringe benefits provided to working owners will not be subject to FBT, and an LTC will be able to make use of the GST group-filing rules. These changes are to apply from 1 April 2011.

A "relative" for LTC purposes will not include a trustee of a trust under which a relative has benefited or is eligible to benefit. This change will apply from the first income year of the LTC following enactment of the amendment.

For more on these changes, refer to the Close Companies and Partnerships section.

<http://www.davidco.co.nz/index.php?page=smallbiz>

### INTEREST DEDUCTIONS FOR THE INVESTMENT IN AN LTC

The Commissioner has released a draft "Questions We've Been Asked" (QWB0092) which, while not specifically on point, appears to clarify that an LTC owner is entitled to interest deductions on money borrowed to make the investment in the LTC. Such deductions should be regarded as separate from the deductions attributed from the LTC, and therefore should not be subject to the loss limitation rules. For more on this refer to "Deduction of an owner's interest expenditure" in the Close Companies and Partnerships section.

<http://www.davidco.co.nz/index.php?page=smallbiz#84>

### TAX POOLING FEES DEDUCTIBLE IN YEAR TAX IS TRANSFERRED

Enacted changes confirm that use of money interest is tax-deductible from the 2010-11 income year onwards. The deduction is allocated to the income year in which the use of money interest is paid. Tax pooling fees are also deductible from the 2010-11 income year onwards. The deduction in this case is allocated to the income year in which the tax is transferred into the person's tax account by the Commissioner to satisfy the taxpayers tax liability. This may not be the year in which the fees are paid. See the Larger Companies section for more on this.

<http://www.davidco.co.nz/index.php?page=largebiz#47>

### GIFT DUTY ABOLISHED FROM 1 OCTOBER 2011

It's finally happened! Gift duty is not payable on a gift made on or after 1 October 2011. Consequently, gift statements will not need to be filed for dispositions of property made on or after 1 October 2011.

Gift duty continues to apply to any gift made before 1 October 2011.

The Ministry of Justice will monitor the impact of the abolition of gift duty so as to inform the government-wide post-implementation review.

Read the PDF on gift duty attached in the Trusts section of this website.

<http://www.davidco.co.nz/dl/AbolitionGiftDuty.pdf>

### GST: PROPOSED CHANGES TO THE APPORTIONMENT RULES

Proposed changes to the Apportionment rules contained in the Taxation (Annual Rates, Returns Filing and Remedial Matters) Bill include:

- Making the new rules apply to acquisitions before 1 April 2011 if no input tax was claimed or no adjustments were made before 1 April.
- The removal of the \$5000 threshold to claim input tax on pre-registration acquisitions.
- Allowing the use of a motor vehicle logbook to determine percentage intended use and percentage actual use.
- Clarifying that the concurrent use of land rules apply only to land simultaneously used for taxable and non-taxable purposes.
- Ensuring that the final adjustment period under the apportionment rules ends on the day before disposal if an asset is disposed of before the required number of adjustments have been made.
- Ensuring that input tax cannot be claimed on imported goods in relation to merely delivering or arranging delivery of the goods.

Refer to the PDF attachment on the "New GST Apportionment Rules" in the GST section for the details.

<http://www.davidco.co.nz/dl/GSTApportionmentRules.pdf>

A government discussion document on GST Business-to-business neutrality across borders and an Officials Issues Paper on Mixed-use assets were released in August. Also in August, the Supreme Court handed down its judgment in the Penny and Hooper tax avoidance case, which was in favour of the Commissioner and generated considerable discussion on commercial salary levels in family-owned companies. Inland Revenue followed up in September with a Revenue Alert on diverting personal services income. And the double tax agreement with Hong Kong came into force in November.

The High Court issued its judgment on the Alesco tax avoidance case on 12 December. The case concerned optional convertible notes (OCNs) issued by a wholly-owned NZ subsidiary to its Australian parent company, which was held to be abusive tax avoidance. Inland Revenue released a draft Interpretation Statement INS0121, dated 16 December 2011, on the application of sections BG 1 and GA 1. The deadline for comments is 31 March 2012.

This website has been fully updated to include all of these developments and more. All you need to do to get fully updated on all of the tax changes in the 2011 calendar year is take your laptop with you on holiday and have an internet connection.

Happy reading!

### QCs: ONLY RESIDENT'S RESTRICTED AMALGAMATIONS ALLOWED

An amendment proposed in the Annual Rates Tax Bill that was introduced on 14 September 2011 is designed to ensure that a new company cannot enter into the QC rules through an amalgamation that is not a resident's restricted amalgamation. After an amalgamation between a non-QC company and a QC, the resulting amalgamated company will not be able to use the QC rules. The amendment is to apply to amalgamations on or after the date of enactment. For more on this refer to page 23 of the PDF attached in the Close Companies and Partnerships section.

<http://www.davidco.co.nz/dl/QCPartnershipLTCComparison.pdf>

### 2012 TRANSITION TIME EXTENSION FOR QCs AFFECTED BY EARTHQUAKE

An extension of the time within which a QC must elect to transition in the 2012 income year has been granted to QCs that were unable to comply with the legislated time limits as a result of the Canterbury earthquake. The extension of time is for a period of 6 months (up to 31 March 2012) and there are specified requirements that will need to be satisfied. For more on this refer to the Close Companies and Partnerships section.

<http://www.davidco.co.nz/index.php?page=smallbiz#11>

### GOVT AND IR DELIVER ON EARTHQUAKE DEPRECIATION RELIEF

The depreciation changes discussed in the Fact Sheet – Earthquake Depreciation Issues released by Inland Revenue in April 2011 have all been enacted. These include timing of derivation of insurance receipts, deductibility of disposal costs, deductible depreciation loss on certain buildings and rollover relief for revenue account and depreciable property. IR's discretion to remit interest on late payments due to the earthquake has been extended to 30 September 2012. The changes apply generally and not just to earthquake damage, except for interest remission and rollover relief. Refer to the Larger Companies section for more details.

<http://www.davidco.co.nz/index.php?page=largebiz#21>

### COMPANIES AND LIMITED PARTNERSHIPS TO BE MORE ACCOUNTABLE

The Companies and Limited Partnerships Bill was introduced on 13 October under which companies and limited partnerships must have a "resident agent": a natural person who will be held responsible for the entity's legal and regulatory compliance. Other measures to bolster shareholder and creditor protection include prohibiting code companies (i.e. listed companies or those with at least 50 shareholders) from merging via long-form amalgamations, and enhancing the Registrar's powers to remove companies for persistent non-compliance by its directors, officers or shareholders. See the Larger Companies section for more details.

<http://www.davidco.co.nz/index.php?page=largebiz#182>

### GST: TIGHTENING UP LAND ZERO-RATING AND APPORTIONMENT RULES

Amendments to the compulsory land zero-rating rules (CZR rules), proposed in the Taxation (Annual Rates, Returns Filing and Remedial Matters) Bill introduced on 14 September, will ensure that the assignment of a lease will be a transfer of land for zero-rating purposes, and that output tax must be accounted for on any non-taxable use of services acquired as part of a wider supply of land. Refer to the GST section for more details.

<http://www.davidco.co.nz/index.php?page=gst#19>

The Bill includes amendments that will deem a supply of imported services to be made giving rise to output tax if the taxable use of imported services falls below 95% (currently 90%). Refer to the GST section for more details.

<http://www.davidco.co.nz/index.php?page=gst#14>

## SPECTRE OF ANTI-AVOIDANCE LOOMS LARGE

Inland Revenue has routed the taxpayer in a spate of recent anti-avoidance cases, the most recent ones being the High Court decision in Alesco and the Supreme Court decision in Penny and Hooper. Inland Revenue's views on non-market salaries, and on avoidance and reconstruction generally, have been set out in Revenue Alert RA 11/02 and draft Interpretation Statement INS0121 respectively.

In Alesco the use of optional convertible notes (OCNs) issued by Alesco NZ to its Australian parent company Alesco Corporation to fund NZ company and business acquisitions was held to be abusive tax avoidance. The decision will affect a number of other taxpayers.

In Penny and Hooper two doctors were held to have avoided tax through having been paid artificially low salaries. Inland Revenue's view on similar arrangements that are likely to be of concern has been set out in Revenue Alert RA 11/02 issued in August 2011.

What does this mean? Have the rules changed? The rules themselves have not changed, but the Courts' approach to interpreting them has changed.

The fundamental rule remains the same: in any arrangement involving a tax reduction the tax avoidance purpose or effect must be merely incidental to the commercial or family objectives. But, following the Supreme Court decision in the Ben Nevis case the focus of any inquiry into avoidance from now on will be on whether income tax legislation has been followed in a manner that was within the contemplation of Parliament when the relevant laws were enacted.

Inland Revenue has issued a draft Interpretation Statement INS0121 on the interpretation of sections BG 1 and GA 1. The Statement is dated 16 December and the deadline for comments is 31 March 2012. For a description of the approach espoused by the Supreme Court and the type of rigorous avoidance analysis that will be required when deciding whether an arrangement falls foul of the rules see the new Avoidance section in the website.

<http://www.davidco.co.nz/index.php?page=avoidance>

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## GST: OTHER PROPOSED AMENDMENTS

Other GST amendments proposed in the Taxation (Annual Rates, Returns Filing and Remedial Matters) Bill are:

- Late payment fees will be subject to GST with retrospective effect from 1 April 2003, subject to a concession for taxpayers who have adopted a regular practice of not charging GST on late payment fees.
- Liquidators and receivers of a registered person will be stopped from changing from a payments basis to an invoice basis if the registered person accounted for tax payable on a payments basis.
- No input tax can be claimed on secondhand goods situated in New Zealand sold by a non-resident if those goods have previously been leased to a NZ resident and have already been entered for home consumption.

Refer to the GST section for more details.

<http://www.davidco.co.nz/index.php?page=gst#68>

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