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WEEKLY COMMENT: THURSDAY 27 JUNE 2024

1. The *Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023* ("the Platform Economy Amendment Act"), with a date of assent of 31 March 2023, contains the new rules that apply to the treatment of amounts derived by cross-border employees.

Treatment of amounts derived by cross-border employees

2. Section CE 1 of the *Income Tax Act 2007* ("the Act") concerns amounts derived in connection with employment. Section CE 1(3B) is headed "Persons on shadow payrolls" and states:

   "For the treatment of PAYE income payments made to a cross-border employee who undertakes employment services in New Zealand, see section CE 1F."

3. The meaning of "cross-border employee" is set out in s CE 1F(4), and covers more than simply persons on shadow payrolls. A "cross-border employee" is defined as:

   (a) Meaning:

      (i) For a person providing a service in New Zealand, an employee of a non-resident employer;

      (ii) For a person providing a service outside New Zealand, a resident employee; and

   (b) Including a secondee or a person who provides a service for or on behalf of a person who is not resident in New Zealand.

4. Section CE 1F(1) states that the section applies in certain circumstances when an employer pays a PAYE income payment to a cross-border employee who provides services in New Zealand. The payment may include an amount paid after the person has left NZ, if the payment is for services provided by the person while in NZ.

5. Section CE 1F sets out:

   (a) The tax treatment for persons on shadow payrolls: and

   (b) Circumstances in which employees must themselves undertake tax obligations in relation to their employment.

Tax treatment for persons on shadow payrolls

6. The meaning of a person on a shadow payroll is covered in s 23J of the *Tax Administration Act 1994* ("the TAA"). Section 23J(1)(b) states that s 23J applies for the purposes of a payment made to a person on a shadow payroll. Section 23J(6) states that a a payment

made to a person on a shadow payroll is a PAYE income payment paid by a non-resident employer to a person who undertakes employment services in New Zealand but who remains on the employer's payroll system in a country or territory outside New Zealand.

7. Section CE 1F(2) is the new section that now covers the tax treatment of a PAYE income payment received by a person on a shadow payroll. It states that when an employee remains on the employer's payroll system in a foreign country, the PAYE income payment is treated as derived by them on the 20th day after payment when the employer chooses to deliver their employment income information under s 23J(3) of the TAA.

8. This aligns the employee's date of derivation of the PAYE income payment with the employer's payday for PAYE reporting purposes under s 23J(3) of the TAA, which allows a non-resident employer 20 days after a payment before the requirement to provide employment income arises, and:

   (a) Treat the 20th day as the payday; or

   (b) Provide their employment income information relating to the payment twice-monthly under s 23C(4), treating the 20th day as the relevant day.

9. Inland Revenue provided an example in *Tax Information Bulletin* Vol. 9, No. 13, June 2018, on page 13, in which an offshore employer paid an employee working in New Zealand on Thursday 12 April. The employer has 20 days (actual days, not working days) after the original payday to calculate New Zealand taxable income. The 20th day is 2 May, which is in the first half of the month. Therefore, the employer must report the information at the latest as if the payday was the 15th, meaning the information would be due two working days after the 15th. If the 20th day falls in the second half of the month, the information must be reported two working days after month-end.

Grace period of 60 days for meeting or correcting employment-related tax obligations

10. Section CE 1F(3C) provides for a 60-day grace period within which an employer or other person that the PAYE rules apply to must make a reasonable effort to meet or correct their obligations relating to the PAYE income payments, employer superannuation cash contributions, or fringe benefits made or provided to the employee for the time the employee was in New Zealand.

11. Section CE 1F(3B) provides that this covers the situations when the employer or other person that the PAYE rules apply to under s RD 2(2) has taken reasonable measures to manage their employment-related tax obligations, and:

   (a) The employee is a New Zealand resident working outside New Zealand for a period, and during that period the employee receives an unexpected PAYE income payment; or

   (b) The employee is present in New Zealand for a period during which they:

      (i) Have breached a threshold under s CW 19 (Amounts derived during short-term visits); or

      (ii) Have breached a threshold set out in a double tax agreement; or

      (iii) Have received an unexpected PAYE income payment in the period.

12. Section CE 1F(3D) states that the 60-day period begins from the earlier of:

    (a) The date of the breach or the payment; or

    (b) The date on which the employer could reasonably foresee that a breach or a payment will occur.

13. Section CE 1F(3E) states that the grace period rules apply equally to an employee who undertakes the responsibility for meeting their own employment-related tax obligations, as discussed in **paragraph 27** onwards below.

14. Inland Revenue notes in *Tax Information Bulletin* Vol. 35, No. 6, July 2023 (the "Platform Economy TIB Item") that the policy intent is to reduce the need for a voluntary disclosure in circumstances where despite the employer's efforts to manage their New Zealand employment-related tax obligations, a tax liability in respect of a cross-border employee's remuneration has arisen. Instead, the correction of the underpaid tax can be made via existing systems.

Annual PAYE arrangements

15. Section RA 15(4B) allows an employer of a class of cross-border employees to apply to the Commissioner for an agreement that the tax due for a PAYE income payment may be made by 31 May following the end of the tax year. Section 23IB of the TAA ensures that the employment income information is due at the same time.

16. Inland Revenue notes that an annual PAYE agreement would only be made where 'special circumstances' exist. Applicants would need to establish the basis for seeking an annual arrangement for payment. Inland Revenue will develop guidance to clarify the types of scenarios that would qualify for annual payments of tax.

Operational Statement OS 21/04: sufficient presence in New Zealand

17. Before these changes were enacted, Inland Revenue issued Operational Statement OS 21/04 in December 2021, titled "Non-resident employers' obligations to deduct PAYE, FBT and ESCT in cross-border employment situations" published in *Tax Information Bulletin* Vol. 34, No. 1, February 2022.

18. In OS 21/04, Inland Revenue noted that a non-resident employer has an obligation to withhold PAYE from a PAYE income payment made to an employee, and may also have a fringe benefit tax (FBT) or employer contribution superannuation tax (ESCT) liability for a benefit provided to, or a contribution made for an employee if:

    (a) The employer has made themselves subject to New Zealand tax law by having a sufficient presence in New Zealand; and

    (b) The services provided by the employee are properly attributed to the employer's presence in New Zealand.

19. Inland Revenue discussed the obligations of non-resident employers in the context of territorial limitation and their presence in New Zealand. It was noted that:

    (a) The PAYE rules[1] are intended to apply to New Zealand residents or matters over which New Zealand has jurisdiction;

(b) A non-resident may make themselves subject to New Zealand law (including the PAYE rules) by having a sufficient presence in New Zealand: *Alcan New Zealand Ltd v CIR* (1993) 15 NZTC 10,125 (HC) and *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133 (HL);

(c) The nature and extent of the required presence may vary: for example, a sufficient presence could range from a non-resident employer having a permanent office or site in New Zealand where trading operations are performed, or a non-resident employer having a single employee in New Zealand working from home and performing contracts in New Zealand on their behalf utilising labour and resources in New Zealand to perform that contract;

(d) If a non-resident employer has a trading presence in New Zealand, such as carrying on operations and employing a workforce for the purpose of trade, this would normally be sufficient for the employer to have a PAYE withholding obligation for employees:

  (i) Most of the time the PAYE withholding obligations will arise where the employee is based in New Zealand;

  (ii) However, it is possible that a New Zealand resident employee could perform services overseas that are properly attributable to the non-resident employers' New Zealand presence;

(e) A sufficient presence for a non-resident employer would also include having a permanent establishment, a branch, contracts that have been entered into in New Zealand and performing those contracts in New Zealand with employees based there for the purposes of carrying on trading operations;

(f) An address for service (in New Zealand) may also indicate that the non-resident employer has made themselves subject to New Zealand law, even though this may be for reasons other than tax purposes;

(g) A sufficient presence would not include a situation where an employee chooses (as a matter of personal preference) to undertake their employment activities in New Zealand where those activities have no necessary connection to New Zealand, and where this was the non-resident employers' only connection with New Zealand;

(h) Merely having employees in New Zealand would not, of itself, constitute a presence of the employer sufficient to subject the employer to New Zealand's jurisdiction: the degree to which an employee "represents" the employer in activities discussed above will be one of the things to take into account to decide whether the presence is sufficient to mean that the employer has submitted themselves to New Zealand's jurisdiction;

(i) Having a parent, subsidiary or associate would not be enough in itself to have a presence in New Zealand without something more, such as any of the factors discussed above.

20. Inland Revenue notes that a non-resident employer can also register voluntarily to be an employer and therefore make the deductions and payments for their employees in New Zealand.

Safe harbour for non-resident employers

21. Inland Revenue noted that if an employer wrongly assesses itself as not having a sufficient presence in New Zealand and on that basis does not perform its obligations under the rules, it will need to pay the underpaid tax, penalties and interest to Inland Revenue.

22. The new rules:

    (a) Make a safe harbour available to non-resident employers who wrongly assess their liability under the rules, where the conditions of the safe harbour are met; and

    (b) Provide that, where a non-resident employer does not have an obligation under the rules, liability for FBT and ESCT obligations may transfer to a cross-border employee working in New Zealand if the employer and employee agree that the employee is liable.

23. Section 120B(bb) of the TAA provides that the use-of-money interest rules in Part 7 of the TAA do not apply to an employer in relation to amounts of compulsory employer contributions unpaid and specified in a notice under s 141(5) of the *KiwiSaver Act 2006*.

24. Section 141ED(1B) provides that s 141ED(1B) and sections 139A and 139B (which relate to late filing and late payment penalties) do not apply when a non-resident employer incorrectly concludes that they do not have to withhold and pay, or pay, an amount of tax for an amount of tax for a PAYE income payment to a cross-border employee to the Commissioner in an income year, if the employer:

    (a) Has either 2 or fewer employees present in New Zealand during the income year or pays $500,000 or less of employment-related taxes for the income year; and

    (b) Has, within 60 days of a relevant failure to withhold and pay, or pay, taken reasonable measures to manage their employment-related tax obligations.

25. Inland Revenue notes,, in the Platform Economy TIB Item on page 43, that what will constitute "reasonable measures" will vary depending on the facts and circumstances of the case. "Reasonable measures" could include seeking New Zealand tax advice, using systems to monitor employee business travel and developing international employee mobility policies. Where the situation has arisen due to a permanent remote work arrangement in New Zealand, "reasonable measures" could include documenting that the employee is required to manage their New Zealand tax affairs.

26. Inland Revenue also notes that:

    (a) Access to the safe harbour is restricted to non-resident employers who have considered their New Zealand employment- related tax obligations, albeit that they reached an incorrect conclusion;

    (b) The safe harbour protects the employer from paying penalties and interest;

    (c) However, in line with general principles it cannot protect the employer from payment of the underlying tax, unless this has been paid by another person;

    (d) The existence of the safe harbour does not relieve the non-resident employer of their obligation to determine whether they have a New Zealand employment-related tax obligation;

(e) The intention of the safe harbour is to mitigate the effect of an incorrect decision about compliance in situations where the existence of an obligation is unclear and the risk to New Zealand's revenue base is low.

Employee undertaking responsibility for their own employment-related tax obligations

27. Section CE 1F(3) provides that when an amount of tax is not withheld or when payment is insufficient as described in s RD 21, s RD 62B, or RD 71B, as applicable, and the employee must undertake the relevant tax obligations in relation to the employment, they must do so as if an employer, and, for this purpose, may pay the initial amount of tax for the payment as a lump sum.

28. Section RD 21(1) provides that if, for any reason, some or all of the amount of tax for a PAYE income payment is not withheld at the time it is paid to an employee, the employee must:

(a) Provide the relevant employment income information under s 23J the TAA to the Commissioner; and

(b) Pay the amount of the deficiency.

29. Section RD 4(4) also states that if some or all of the amount of tax for a PAYE income payment is not withheld and paid the Commissioner as required by s RD 4(1), the employee in relation to whom the payment is required to have been made must pay to the Commissioner under s RD 21 an amount equal to the amount of tax by the 20th day of the month following the month in which the PAYE income payment was made.

30. Inland Revenue noted in OS 21/04 that in such circumstances, a New Zealand based employee of an overseas employer will be required to register as an IR56 taxpayer, file an Employment Information form and pay any taxes to Inland Revenue.

31. Inland Revenue has issued "IR56 taxpayer's handbook" IR365, July 2024, to be used by:

(a) A part-time private domestic worker;

(b) An embassy staff member;

(c) A New Zealand based employee of an overseas employer; and

(d) A United States Antarctic Program worker.

32. To register as an IR56 taxpayer, a worker whose employer is not required to deduct PAYE from their earnings should complete an IR359 "IR56 taxpayer registration". Once Inland Revenue receives the registration, Inland Revenue will send the taxpayer an Employment information – IR348 form and a New Employer and KiwiSaver details – IR346 form. These should be completed and returned to Inland Revenue as directed on the registration form.

33. The employee's obligations to make good any deficiency in the payments arise as follows:

(a) For a deficiency in a PAYE income payment, s RD 21 will apply to require the employee to provide the relevant employment income information under s 23I of the TAA and pay the deficiency, as discussed in **paragraph 28** above;

(b) For a deficiency in an FBT liability, s RD 62B, requires the employee to provide the relevant information under s 23I of the TAA and pay the deficiency, as discussed in **paragraph 34** below; and

(c) For a deficiency in tax on an employer superannuation cash contribution or an employer's contribution to a foreign superannuation scheme, s RD 71B, requires the employee to provide the relevant information under s 23I of the TAA and pay the deficiency, as discussed in **paragraph 35** below.

34. Section RD 62B applies where a cross-border employee receives a fringe benefit in relation to a period when they are providing employment services in New Zealand. Inland Revenue notes that:

(a) The policy intent is that the employer bears the primary liability for the payment and reporting of fringe benefits;

(b) However, where the employer and employee agree in a document that the employee is liable for employment-related tax obligations the employee must treat the value of the fringe benefit as a PAYE income payment and pay the PAYE due;

(c) The employer must aid the employee by providing the necessary information to calculate the value of the benefit. Payment and reporting will be undertaken by the employee via the IR 56 mechanism.

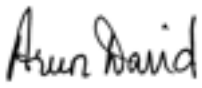
35. Section RD 71B applies where an employer's superannuation cash contribution or an employer's contribution to a foreign superannuation scheme is made for a cross-border employee who is providing employment services in New Zealand. Inland revenue notes that:

(a) Again, the policy intent is that the employer bears the primary liability for the payment and reporting of the employer's superannuation contributions;

(b) However, the employer and employee may record in a document an agreement that the employee is liable to pay and report ESCT;

(c) The employer must aid the employee by providing the necessary information to calculate the value of the benefit;

(d) Payment and reporting will be undertaken via the IR 56 mechanism.



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