Corporate Taxpayers Group

31 January 2020

Corporate tax residency reform options
Board of Taxation Secretariat
C/- The Treasury
Langton Crescent
PARKES ACT 2600

CORPORATE TAX RESIDENCY: REFORM OPTIONS

The Corporate Taxpayers Group ("**the Group**") is an organisation of major New Zealand companies. We are writing to submit on the Australian Board of Taxation's Corporate Tax Residency Reform Options ("**Reform Paper**") as members of the Group have been adversely impacted by the uncertainty regarding Australia's corporate tax residency rules.

This submission follows on from the Group's submission on the Australian Board of Taxation's Corporate Tax Residency Consultation Guide. The Group appreciates the opportunity to comment on this issue, which is of particular interest to our members.

SUMMARY

The Group submits that:

- Legislative changes to Australia's corporate tax residency rules are required and **must** provide companies with **certainty** as to whether they are Australian resident for tax purposes. Changes should be made as soon as possible, as a matter of priority.

- The Group supports modifying the CMAC test, in a way that reinstates the purpose and effect of the withdrawn Taxation Ruling TR 2004/15. There was a broad understanding of how residency should be determined under this Ruling and this would provide greater certainty to taxpayers.

- Consideration should also be given to making changes to the residency test to ensure that merely exercising CMAC in Australia does not on its own constitute the carrying on of a business in Australia to reinstate the generally accepted position prior to the decision in *Bywater Investments limited & Ors v Commissioner of Taxation* [2016] HCA 45.

- The Group would also support an incorporation-only test as long as reform is not delayed by the need, to develop and implement any additional base protection measures that are considered necessary.

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- To the extent that changes are made to the corporate tax residency rules, the Group considers it important that transitional measures are put into place to ensure that companies have sufficient time to adjust for changes in position. The ATO should also consider a further administrative transition with effect from the March 2017 withdrawal of TR 2004/15.

- The Group would like to refer the Board back to the Group's previous submission dated 9 October 2019 and the points made therein. In particular the Group would like to reiterate that when Australia and New Zealand renegotiate their double tax agreement with each other, both countries should unwind the MLI residency tiebreaker changes introduced under the MLI.

ABOUT THE GROUP – INFORMED, PRINCIPLED, PRACTICAL

About the Group

The Corporate Taxpayers Group is an organisation of major New Zealand companies whose objective is to pursue the principled interests of its members in the tax policy sphere. A list of our members is included at the end of this submission. This matter is important to the Group as a number of members of the Group are owned by Australian companies and the majority of the Group invest in or trade with Australia.

The Group's Principles for a Good Tax System

The Group believes that a good tax system for New Zealand should be built around a number of principles, including:

- *High certainty and low business risk:* For the corporate sector, tax is not just a cost of doing business but is also a very significant risk. Funds are raised, staff hired, and investments made on the basis of expected returns to corporate shareholders / owners. If tax rules increase business risk by creating uncertain or unexpected tax outcomes then the rate of return on investment has to be higher to compensate for this. Higher required rates of return mean less investment and fewer jobs, to the detriment of the economy. To lower business risks caused by the tax system, tax rules need to be as certain as possible and they need to be administered and interpreted consistently and speedily. Having a high level of certainty over the medium to long term is of high importance to the Group.

- *Low compliance costs*: Compliance costs imposed by the tax system are an economic cost. Those resources would be better employed creating jobs and raising the wealth of New Zealand.

- *Positive contribution*: The tax system plays a significant role in society and has the ability to contribute to the overall welfare and wellbeing of New Zealand and New Zealanders. Any changes to the tax system should focus on building and utilising the collective human, social, natural and financial capital of New Zealand, and should also make a positive contribution to New Zealand.

The above principles are central to the way the Group judges tax policy issues.

TWO PRIMARY REFORM OPTIONS: CENTRAL MANAGEMENT AND CONTROL OR INCORPORATION-ONLY

1. Certainty

1.1 The Group submits that legislative changes to Australia's corporate tax residency rules are required and must provide companies with certainty as to whether they are Australian resident for tax purposes. The current CMAC test, including its interpretation through Taxation Ruling TR 2018/5 *(Income tax: central management and control test of residency)* and the subsequent Practical Compliance Guideline PCG 2018/9 *(Central management and control test of residency: identifying where a company's central management and control is located)* means that companies can be left uncertain as to whether they are Australian tax resident.

1.2 Legislative changes should:

(a) provide certainty as to whether a company is resident in Australia;
(b) not result in companies being inadvertently dual resident in New Zealand and Australia; and
(c) not result in foreign companies being resident in Australia if they are not carrying on substantial business **in** Australia where the majority of the CMAC is exercised outside of Australia; and
(d) be implemented as a matter of priority.

2. Carrying on business and central management and control test

2.1 The Group supports modifying the CMAC test, in a way that reinstates the purpose and effect of the withdrawn Taxation Ruling TR 2004/15. There was a broad understanding of how residency should be determined under this Ruling, including through case law, precedent, and Authority / taxpayer practice. The rule should clearly state that it is a two-step test that requires both a majority of CMAC to be exercised in Australia and the separate carrying on of business in Australia.

2.2 Consideration should also be given to making changes to the residency test to ensure that merely exercising CMAC in Australia does not on its own constitute the carrying on of a business in Australia. For example, where a non-Australian company is incorporated in New Zealand, there should be a requirement for it to separately carry on business in Australia, by virtue of activities other than the simple exercise of CMAC, before it is considered to be resident in Australia (consistent with the generally accepted position prior to the decision in *Bywater Investments limited & Ors v Commissioner of Taxation* [2016] HCA 45). If required, consideration could be given to limiting this requirement to operating entities that have business activities other than the holding of investments and including a de minimis to accommodate a minor level of business activity in Australia.

3. Incorporation-only test

3.1 The Group would also support an incorporation-only test if this could be implemented in a timely manner. An incorporation-only test would provide the greatest certainty out of the options considered (as it is an objective, black and white test), on the proviso that it is not accompanied by a wide range of new base maintenance initiatives. We do, however, acknowledge the need to ensure that appropriate safe guards, to the extent not already covered by existing regimes, are in place in an incorporation test were to be implemented. Historically countries, including Australia, did base residency on incorporation but subsequently moved away from this approach due to base maintenance concerns. Since that time there have been additional regimes and safeguards put in place which would likely mitigate a lot of the base maintenance concerns about returning to an incorporation-only test.

4. Transitional arrangements

4.1 To the extent that changes are made to the corporate tax residency rules, the Group considers it important that transitional measures are put into place to ensure that companies have sufficient time to adjust for changes in position. This is particularly true for an incorporation-only test, which is a significant shift from the current position, but it is just as true for any other change to the corporate residency rules (or the interpretation of them). Even slight changes to the rules may tip an organisation one way or another. The recent Taxation Ruling and Practical Compliance Guide changes in this area, and their subsequent effects, are proof of the impact a change in interpretation can have.

4.2 While the Group does not provide any comment on specific transitional rules that could be implemented, the Group submits that any changes to the corporate residency rules must be well signalled and publicised, with adequate lead time before the changes are put into effect, so that companies have sufficient time to address the impact the changes may have on its organisation and plan accordingly. As the Board is aware, tax residency has significant implications and it is important that companies are given the chance to put in proper tax governance policies and plans into place.

4.3 The ATO should also consider a further administrative transition with effect from the withdrawal of TR 2004/15 in March 2017 to minimise the effect of different rules applying to taxpayers over the interim period.

5. Previous submission points

5.1 The Group understands that this Reform Paper (which addresses only two options) does not mean that other options / submission points raised in the earlier rounds of consultation are being disregarded. In this respect, the Group would like to refer the Board back to the Group's previous submission dated 9 October 2019 and the points made therein.

5.2 In particular the Group would like to reiterate its submission point in relation to the Multilateral Instrument ("MLI"). When Australia and New Zealand renegotiate their double tax agreement with each other, both countries should unwind the MLI residency tiebreaker changes introduced under the MLI. The MLI tiebreaker test has introduced significant uncertainty and compliance costs into New Zealand and Australia's consideration of dual residency, and the requirement to seek competent authority approval is unduly burdensome.

For your information, the members of the Corporate Taxpayers Group are:

1. AIA Sovereign
2. Air New Zealand Limited
3. Airways Corporation of New Zealand
4. AMP Life Limited
5. ANZ Bank New Zealand Limited
6. ASB Bank Limited
7. Auckland International Airport Limited
8. Bank of New Zealand
9. Chorus Limited
10. Contact Energy Limited
11. Downer New Zealand Limited
12. First Gas Limited
13. Fisher & Paykel Appliances Limited
14. Fisher & Paykel Healthcare Limited
15. Fletcher Building Limited
16. Fonterra Cooperative Group Limited
17. Genesis Energy Limited
18. IAG New Zealand Limited
19. Infratil Limited
20. Kiwibank Limited
21. Lion Pty Limited
22. Meridian Energy Limited
23. Methanex New Zealand Limited
24. New Zealand Racing Board
25. New Zealand Steel Limited
26. New Zealand Superannuation Fund
27. NZME Limited
28. Oji Fibre Solutions (NZ) Limited
29. OMV New Zealand Limited
30. Pacific Aluminium (New Zealand) Limited
31. Powerco Limited
32. SkyCity Entertainment Group Limited
33. Sky Network Television Limited
34. Spark New Zealand Limited
35. Summerset Group Holdings Limited
36. Suncorp New Zealand
37. T & G Global Limited
38. The Todd Corporation Limited
39. Vodafone New Zealand Limited
40. Watercare Services Limited
41. Westpac New Zealand Limited
42. WSP New Zealand Limited
43. Xero Limited
44. Z Energy Limited
45. ZESPRI International Limited

We note the views in this document are a reflection of the views of the Corporate Taxpayers Group and do not necessarily reflect the views of individual members.

Yours sincerely

John Payne
For the Corporate Taxpayers Group

cc
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Carmel Peters, Strategic Policy Advisor, New Zealand Inland Revenue
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