TAX PLANNING IN A CHANGING NZ TAX CONTEXT

Estate and Taxation Planning Council New Zealand Inc Seminar

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What does NZ's tax future look like?

- "The inconsistent taxation of capital gains therefore has the effect of reducing the proportion of tax paid by the wealthiest members of our society " (*2019 Tax Working Group Report*, at 32).

- "Estate taxes are worthy of consideration. They are not a tax on giving but a tax on unearned income. Well designed, they could help fund a reduction in the ever growing income tax burden and help mitigate increasing wealth inequality" (D. Wood of Grattan Institute, *Taxing Inheritances might be unpopular, but it's fair*, 19 December 2018).

- “…an acceleration in the number of billionaires worldwide and the wealth they control is now estimated at close to $9trn” (*How the super-rich invest: The rise of the family office*, The Economist, December 15, 2018, at 22).

- “…in order to prevent avoidance of the law by clever tax lawyers and accountants, Parliament has passed on general anti-avoidance rule, see *Cullen Group Limited v CIR* [2019] NZHC at 404 at [61], ignoring the directive of the Supreme Court in *Ben Nevis* that tax avoidance analysis must not “be distracted by intuitive subjective impressions of the morality of what taxation advisers have set up” (2009) 24 NZTC 23,188 at [102].

- Will be increasing and continued tax focus by revenue authorities around the world on the "wealthy"
  - Clearly this will be the position in New Zealand also under guise of "fairness, balance, and integrity" (TWG Report).
  - "…it is important that it is the "use" of specific provisions which is compared with their purpose. This is an "intensely factual" exercise, focusing on how the taxpayer's arrangement has used, or deployed, the specific provisions including in terms of the variety of considerations stated in *Ben Nevis*, as outlined earlier" (see, *Cullen Group Limited v CIR* [2019] NZHC 404 at [62], the substantive legal / commercial reality of what taxpayers do in fact must make "good sense")".
- Logical tax policy approach because:
  - NZ Inc not wealthy, needs heaps more tax revenue to fund inadequate infrastructure, health, education, etc.

- Very small pool of taxpayers that can pay more tax of whatever type, tax narrative says (“wealthy” can and should: matter of fairness and equity, large percentage of income tax already paid by households earning over $150,000).

- “Tax planning” badge of shame (Palmer J, *Cullen*) – implicit that wealth derived by dodgy means (no recognition at all or discussion about source of wealth: years of effort, tens of thousands of work hours, substantial risk on borrowing, slave to banks, love, and relationship property settlements (with thanks to Brian Ferry!).

  - Even if all wealth legitimate and hard-earned morally correct to transfer some of that to state for the benefit of others (generally not disputed but “How Much”?, Sir Jim Ratcliffe (off to Monaco)/Sir James Dyson (going to Singapore)

- Practically what all this means is that increased tax focus on wealthy by IRD and their wealth retention / creation vehicles (trusts/estates)

- *Trusts being used to avoid paying billions in tax*, ATO Report, 18/1/19, Professor John Glover ($3 trillion in Australian trusts, generated $340 billion) in income 2013-14, over 1 million trusts by 2022).

- Trusts Register (likely)

- New trust tax rules (identified TWG, e.g. trading in trust losses (more tax avoidance challenges))

What wealthy should do?

- Get best tax and trust advice;
- Get binding ruling on all material tax positions;
- No dumb tax structures / tax planning;
- Get all material "included capital assets valued" (asset list yet to be resolved by Government) by best valuers;

- Family home key tax exclusion and non-trading personal use assets;
- Personal use asset exclusion (cars / boats / jewellery / fine art (may come back into tax base later), anticipate timing step-up in asset cost basis if can, remember no deduction if loss on asset (private assets like now).

- Excluded home ("main residence"), "irrevocably entitled" to the property or proceeds of sale (sounds like "fixed trust" (not discretionary, language of this exclusion critical)
- Trusts (ordinary rules apply to them if own "included assets") but:
  - Normal rules trustee / beneficiary election apply to income from disposal of capital assets
  - If complying trust distributions (i.e. tax paid income) – distributions tax free
  - Non-complying only corpus tax-free
  - Foreign trust distributions (corpus / <u>pre-CGT capital gains (non-associated</u>)

- Settlements capital assets onto trusts (gifts, transfer at market value?)
- Distributions of capital assets to beneficiaries (gifts, transfer at market value?)
- What dispositions of capital assets rolled-over (at the moment just first inheritance) (like relationship property)

- Significantly greater level of contestable tax areas:
  - Excluded home?
  - Principal residence?
  - Right type of trust (main residence, but also a beneficiary of the trust who becomes *irrevocably entitled* to the property or to the proceeds from the sale of the property (TW6 Report, Volume 11, at 8))?

- Settlement assets onto / distributions assets from trust
- Capital account or revenue account assets?
- How will capital losses work (quarantining?).

- Just new tax and trust rules to grapple with (make sure fully compliant in NZ or like Sir Jim Ratcliffe/Sir James Dyson in the UK change your tax domicile to a country that is more tax-friendly (check if exit tax on migration of assets).