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PUB00276: Updated “permanent place of abode” extract from IS 14/01 – Tax Residence

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on *PUB00276: Updated “permanent place of abode” extract from IS 14/01, “Tax Residence”* (PUB00276).
2. The Law Society appreciates Inland Revenue’s diligence in updating IS 14/01, “Tax Residence” (March 2015) to reflect the Court of Appeal’s decision in *C of IR v Diamond* [2015] NZCA 613.
3. The Law Society’s submission concerns the scope of the proposed transitional operational position (yet to be released) and the analysis of some of the examples included in PUB00276.

Comments

Transitional operational statement

4. The preamble to PUB00276 states that Inland Revenue will issue a transitional operational position when the new interpretation statement on tax residence is issued. The preamble notes that the operational position will confirm taxpayers’ ability to request the reassessment of previous tax positions under section 113 of the Tax Administration Act 1994, where those tax positions are consistent with the analysis set out in the new interpretation statement.
5. The Law Society submits that the transitional operational position should also confirm that taxpayers who correctly applied the analysis set out in Public Information Bulletin No. 180 (June 1989) concerning what constitutes a permanent place of abode in taking tax positions prior to the 2015 tax year will not be required to revisit those tax positions, even though those tax positions may be at odds with the new interpretation statement. This would be consistent with the transitional operational statement issued at the time IS 14/01 was released.

Example 1

6. It is not clear why Inland Revenue has deleted the counterfactual at the end of Example 1. That counterfactual previously provided as follows:

"If Cate had not intended to return to New Zealand after the period of secondment, but rather to take up other work opportunities in Canada, and the terms of her secondment were such that her employer in New Zealand would make its best endeavours to have a position available for her to return to should she wish, but could not guarantee this, and if Cate and her family had taken most of their furniture and other belongings with them, then Cate would not have a permanent place of abode in New Zealand." [IS 14/01, para 127]

7. The Law Society considers that this counterfactual should be retained, as paragraph 63 of the new interpretation statement, but amended as follows:

"If, at the time she left New Zealand, Cate had not intended to return to New Zealand after the period of secondment, but rather to take up other work opportunities in Canada, and the terms of her secondment were such that her employer in New Zealand would make its best endeavours to have a position available for her to return to should she wish, but could not guarantee this, and if Cate and her family had taken most of their furniture and other belongings with them, then Cate would not have had a permanent place of abode in New Zealand from the time of her departure."

8. This counterfactual played an important role in setting out the circumstances in which Inland Revenue considered that a person absent from New Zealand for a period of three or more years would not be treated as having retained a permanent place of abode in New Zealand from the time of departure. Naturally, taxpayers are seeking more certainty on this point, given Inland Revenue's conclusion to Example 1 is different from Inland Revenue's conclusion on an almost identical set of facts in Example 3 in Public Information Bulletin No 180.

Example 2

9. The Law Society is concerned about Inland Revenue's analysis and conclusions to the counterfactual in paragraph 68. In essence, Inland Revenue considers that where a person has never lived independently from their parents prior to embarking on an OE, the parents' house would continue to be that person's permanent place of abode, given that person's other connections with New Zealand and their parents' house.
10. The Law Society questions whether this outcome is appropriate, given that it would be unusual for a person embarking on an OE to intend to continue to reside at their parents' house on an enduring basis after returning from their OE. Young people often embark on an OE to obtain life experience and become independent from their parents and, for that reason, their parents' house should cease to be their permanent place of abode once they leave New Zealand. Also, the analysis in paragraph 68 also appears to contradict the analysis to the counterfactual to Example 8 in paragraph 89.
11. The Law Society questions whether the slight factual differences between the counterfactual to Example 2 in paragraph 68 and the counterfactual to Example 8 in paragraph 89 are sufficient to justify a conclusion that the taxpayer in Example 2 retains a permanent place of abode on leaving New Zealand but the taxpayer in the counterfactual to Example 8 does not. While such an assessment will always turn on the specific facts, the Law Society considers

that, generally, neither taxpayer should be treated as retaining a permanent place of abode when leaving New Zealand.

Example 9

12. The Law Society appreciates the inclusion of a comprehensive example relating to when a taxpayer may be treated as having obtained a permanent place of abode in New Zealand. In practice, determining when a taxpayer obtains a permanent place of abode is just as important as determining when a taxpayer ceases to have a permanent place of abode. For example, the point at which a person obtains a permanent place of abode can impact on when their period of transitional residence ends and on their ability to receive interest income from New Zealand subject to the Approved Issuer Levy (AIL) regime. It will also have a flow-on effect in terms of the timing of complying trust elections made by trusts of which they are a settlor.

Conclusion

13. This submission was prepared with the assistance of the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the Tax Law committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / jo.holland@lawsociety.org.nz).

Yours faithfully



Kathryn Beck
President