

27 January 2025

Tax Policy
Inland Revenue

By email: policy.webmaster@ird.govt.nz

Tēnā koutou

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa welcomes the opportunity to provide feedback on the Officials' Issues Paper "Effect of the FIF rules on immigration: proposals for amendments" (**consultation document**).
- 1.2 This submission has been prepared with input from members of the Law Society's Tax Law Committee. Given the relatively short consultation period, the feedback provided is largely high level.
- 2 **General comments on proposed solutions**
 - 2.1 The Law Society considers that the review of the foreign investment fund (**FIF**) rules is a positive step towards attracting capable migrants and talent to Aotearoa New Zealand.
 - 2.2 The Law Society appreciates the work Inland Revenue has done, to date, to consider the concerns raised in connection with migrants being subject to the FIF tax rules and to propose possible solutions.
 - 2.3 In summary, the Law Society's comments on the consultation document are as follows:
 - (a) The Law Society is generally supportive of the proposed changes set out in the consultation document.
 - (b) The Law Society considers there are good arguments that the proposed FIF rule changes should extend to certain non-migrants (i.e., New Zealand residents) who inadvertently hold significant offshore shareholdings as a consequence of corporate transactions.
 - (c) The Law Society considers that, in order to meet the objectives of the FIF review, any "exit charge" may have to be carefully considered as part of any proposed solution. The Law Society considers that an exit charge may be perceived as a disincentive to move to New Zealand and may counteract the aims of the proposed amendments to attract wealthy and talented foreign migrants to New Zealand.
 - (d) The proposed revenue account method may be perceived as a form of capital gains tax. Other jurisdictions generally adopt lower rates of tax for capital gains of this nature and include various exemptions, so as to not deter capital investment. The Law Society considers a lower rate of tax could be justified and

further consideration should be given to whether the current income tax rates are appropriate for assessable income of this nature. A lower rate would both ensure there is consistency with other jurisdictions and mitigate possible risks of double taxation.

- (e) The FIF rules is a complex area of tax law which affects many taxpayers. The Law Society considers that the FIF rules is an area which may benefit from wider consideration and reform in due course.

3 Application to non-migrants

- 3.1 In response to Inland Revenue's questions in paragraph 3.12 (bullet point 1) of the consultation document, the Law Society considers there are good arguments that the proposed FIF rules changes should extend to certain non-migrants (i.e., some New Zealand residents).
- 3.2 Members of the Law Society's Tax Law Committee are aware of a number of successful New Zealand businesses who have restructured to list in offshore jurisdictions or incorporate offshore 'holding' companies to hold their New Zealand operations. These corporate restructurings are done to attract capital from offshore markets and is often seen as necessary to attract investment (particularly from the United States). Importantly, most of the management, employees and business operations remain in New Zealand. Often those New Zealand resident founders, management and employees will retain interests in the offshore companies. Those New Zealand resident shareholders can become subject to the FIF rules, with no cash flow to fund the income tax.
- 3.3 It is also relatively common for offshore companies to acquire New Zealand companies or have New Zealand subsidiaries, with employees in New Zealand who are given shares, often during a transaction or as part of an employee share scheme. Again, these New Zealand employees can become subject to the FIF rules.
- 3.4 The Law Society considers there are compelling arguments in favour of extending these proposals to certain non-migrants. Extending the proposed changes to residents who are founders, management or employees of companies with 'holding' companies offshore would align with the Government's goals to foster innovation and retain successful businesspeople in New Zealand.

4 Revenue Account Method

- 4.1 The Law Society welcomes the proposed revenue account method, subject to further clarifications in relation to the questions proposed by Inland Revenue in the consultation document.

Optionality

- 4.2 In response to Inland Revenue's questions in paragraph 5.6 (bullet point 1) of the consultation document, the Law Society considers that the use of the revenue account method should be optional. The Law Society also agrees there could be potential issues to address, as identified by Inland Revenue at paragraph 5.5, regarding ease of compliance and "cherry-picking".

Availability to non-migrants

- 4.3 Inland Revenue has noted its starting position is that the revenue account method would only be available to migrants. For the reasons set out above, the Law Society believes that the revenue account method could be extended to certain non-migrants.
- 4.4 As noted by Inland Revenue at paragraph 5.4, the revenue account method is partly to address concern of a "dry tax charge". The Law Society considers this is equally an issue for non-migrants, especially for New Zealand resident founders and employees of companies that have sought capital in offshore jurisdictions.

Exit Tax

- 4.5 The consultation document considers circumstances where a migrant's residency changes, such as on a subsequent departure from New Zealand. In particular, the consultation document proposes that a migrant who has elected into the revenue account method should be deemed to dispose of their shares on emigration at market value. As noted by Inland Revenue at paragraphs 1.15 and 5.20-5.23, this would essentially be an "exit tax".
- 4.6 In response to Inland Revenue's question in paragraph 5.23 (bullet point 1) of the consultation document, the Law Society is concerned that an exit charge may be perceived as a disincentive to move to New Zealand and may counteract the aims of the proposed amendments to attract wealthy and talented foreign migrants to New Zealand. Furthermore, the Law Society considers that the introduction of an exit tax runs the risk of not being tax neutral, and could increase the Inland Revenue's tax take, which is not the stated intention of the changes.

Rate

- 4.7 The revenue account method could be considered to be a capital gains tax. The Law Society agrees with Inland Revenue's comments at paragraph 5.11, that "a marginal tax rate up to 39% on capital gains may be too high to make taxation on realisation an attractive option" and at paragraph 5.13, which highlights that a tax on capital gains at a marginal rate "could mean the FIF rules would continue to be a deterrent to settling in New Zealand".
- 4.8 In response to Inland Revenue's questions in paragraph 5.13 (bullet point 1) of the consultation document, the Law Society considers that a rate lower than the typical marginal tax rate would be appropriate. As noted by Inland Revenue at paragraphs 5.11–5.13, other jurisdictions generally adopt lower rates of tax for capital gains of this nature and include various exemptions, so as to not deter capital investment.
- 4.9 In response to Inland Revenue's questions in paragraph 5.13 (bullet point 2) of the consultation document, the Law Society considers that a low rate of, say, 15% could be an option. This would be around half of the marginal tax rate of the median New Zealand salary, which reflects the capital nature of the investment whilst also ensuring the "broad base low rate" principles of the tax system.
- 4.10 One further consideration, when determining the rate of tax, is that foreign capital gains tax rates for these types of investments are often lower than New Zealand's higher marginal tax rates. Any rate above these offshore rates may result in New Zealand tax

that cannot be claimed offshore. Adopting a lower rate would mitigate possible risks of double taxation.

Additional considerations

- 4.11 The Law Society considers it would be difficult for the proposed amendments to ensure that migrants to New Zealand will not be subject to some element of double taxation in relation to gains. However the rules are designed, there will always be a possibility that these migrants will be taxed both in New Zealand and taxed offshore without the benefit of a tax credit for New Zealand tax paid.
- 4.12 In response to Inland Revenue's questions in paragraph 3.31 (bullet point 2) of the consultation document, we are aware of situations where US citizens cannot obtain a US tax credit for New Zealand tax paid. For example, NZ/US employees can be taxed on employee shares under section 409A of the US tax Code in circumstances where the employee gets no credit for New Zealand tax paid.
- 4.13 Given the number and complexity of different offshore tax regimes, it is simply not possible to account for jurisdictional differences and ensure that individuals are taxed on the same amounts and on the same basis. Also, for this reason, it may be prudent to have a lower rate of tax applied to amounts assessable under the revenue account method.

5 Further comments

- 5.1 Should you wish to discuss this submission further, please contact Aimee Bryant, Manager Law Reform and Advocacy (aimee.bryant@lawsociety.org.nz).

Nāku noa, nā



Jesse Savage
Vice President