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LET THE PEOPLE GO

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In February and October 2014 we reported on a "stoush" Inland Revenue was having with a taxpayer.

Inland Revenue was claiming that the taxpayer was a tax resident and so was liable for tax on his earnings from overseas.

The Taxation Review Authority agreed with Inland Revenue and imposed shortfall penalties. The High Court agreed with the taxpayer and in turn cancelled the assessments.

One all!

Inland Revenue appealed to the Court of Appeal and this was heard in October 2015 with a decision (in record time we wonder?) on 18 December.

Inland Revenue lost.

One - Two!

The issue before the Courts was whether or not the taxpayer had a "permanent place of abode" in New Zealand.

If so, he was liable for tax - if not he wasn't.

A key plank of Inland Revenue's case was that a rental property was "available" to him and so he had a permanent place of abode in New Zealand and so was a tax resident.

The Court of Appeal

The Court of Appeal expressly did not agree with Inland Revenue.

It held that the rental property had never been the taxpayer's home and that he never intended it to be his home. He had never lived in that property and had only ever used it as an investment.

As such, a place in which he had never lived could not constitute a dwelling with which he had enduring and permanent ties.

The judges considered that the term "permanent place of abode" meant not just an available place to stay but rather actual use of a property for residential purposes.

In essence, unless a person has a house or other accommodation in New Zealand which was their home before departure it will be difficult to have a "permanent place of abode" .

The Court of Appeal also set out a list of factors that may assist in determining the existence of a "permanent place of abode". These were:

- the continuity or otherwise of the taxpayer's presence in New Zealand;
- the continuity or otherwise of the taxpayer's presence in the dwelling;
- the duration of that presence;
- the durability of the taxpayer's association with the particular place;
- the closeness or otherwise of the taxpayer's connection with the dwelling (i.e. the situation before and after a period or periods of absence from New Zealand should be considered);
- the requirement for permanency is to distinguish merely transient or temporary places of abode;
- permanency refers to the continuing availability of a place on an indefinite (but not necessarily everlasting) basis;
- the existence of another permanent place of abode outside New Zealand does

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not preclude a taxpayer having a permanent place of abode in New Zealand;

- An assessment a particular case is an annual one; but
- evidence of the relevant circumstances both before and after those tax years may impact on the question of whether a taxpayer had a permanent place of abode in New Zealand in the tax years in question;
- the focus is on the taxpayer and not members of the taxpayer's family; which means that
- Even if a taxpayer provides a home for his family while the taxpayer lives offshore it does not necessarily establish that the taxpayer had a permanent place of abode in New Zealand.

Inland Revenue now has three options, namely:

1. Accept the decision and change its view
2. Appeal to the Supreme Court
3. Convince Government to change the wording of the law.

Let's hope commonsense prevails.

In the meantime, any person leaving the country "permanently" should sell their "family home" and cut their ties to New Zealand as much as possible.

If a person retains their house which was their home (or access to their "home") the risk of being considered to have a permanent place of abode in New Zealand is enhanced.

We look forward to some further clarity in the near future.

NO ROOM FOR THE PASSIVE

The days of the passive company director are now well gone! From 4 April new Health and Safety rules will take effect. These rules will expose all directors to a potential personal liability for a health and safety breach even if they are not aware of issues.

The new rules include increased penalties and make directors liable for failure to take responsibility for health and safety and any director not actively involved in the business of a company is simply increasing their exposure and risk.

We recommend some frank conversations with clients. Take the quarry company where the directors are "Mum and Dad" but "Mum" never goes near the quarry. Should she still be a director? What about "Dad" who is a director of Mum's catering business? Should either take the risk of exposure to penalty for rock falls and burns? We think not!

THE HEAT IS ON!

Prior to Christmas Inland Revenue advised Agents that it was continuing to target the construction industry. Agents were warned that some of their clients in that sector could soon receive contact from IRD regarding their obligations to declare all cash jobs in their GST and income tax returns.

Inland Revenue also noted that the message applied to all clients that do cash jobs.

There was however a veiled and concerning warning to Agents.

Inland Revenue stated that Agents "*have a responsibility and duty of care to ensure...clients declare all their income*". It also requested Agents "*do everything to make sure...clients meet their obligations*".

The terms "*responsibility and duty of care"* imply exposure if not! Is IR going to target Agents of evaders?

On the Spot Advice

Our telephone/fax/email consultation service is available to enable practitioners to deal with any questions as they arise.

Tax Opinions

Providing fully researched opinions on the taxation effect of transactions.

Tax Audits

Reviewing tax compliance requirements (FBT, GST,PAYE etc) to identify any deficiencies prior to any visit from tax inspectors.

Tax Disputes

Preparation of responses to disputes with Inland Revenue.