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GES NewsFlash

New Zealand — Tax Residence – Clearing the muddy waters

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Overview

The long awaited Commissioner's interpretation statement on residence has finally seen the light of day. After almost a yearlong wait, coupled with the worrying decision from the Taxation Review Authority (TRA) TRA 43/11[2013] we now finally have the foundations for assessing an individual's New Zealand tax residence.

Feedback from tax professionals has clearly been acknowledged by the Commissioner, helping to set out a common sense approach that focusses on real life issues. This is a marked improvement on the draft statement released last year.

The Commissioner's initial view that a ownership of a commercially rented dwelling house would be a significant factor in assessing an individual's permanent place of abode (PPOA) left many New Zealand expatriates uneasy, particularly in light of the subsequent TRA decision concerning the long-term absentee ex-soldier. However, the final interpretation statement now issued acknowledges that the TRA decision was born from an exceptional set of circumstances that, when viewed holistically, indicated that the individual may never have lost his PPOA in New Zealand. Coupled with the fact that the individual was operating in countries with which New Zealand does not have a double tax agreement, and the fact that presumably little tax was paid elsewhere, the writing was perhaps on the wall.

However, the statement makes clear that long-term investment properties and holiday homes will generally not constitute a PPOA in isolation, unless other circumstances suggest otherwise. The Commissioner backs this up by breaking the PPOA test into two parts, firstly, a test for whether a place of abode exists and then whether this place is permanent.

The place of abode test focuses on the physical dwelling and its ownership. Investment properties will, in the most part, be caught by this test. The more interesting and detailed test is whether the place of abode is permanent, which centres on the durability of association. This takes into account family ties, employment, personal property, and so on. Under this test, foreign investors are unlikely to have an enduring association with New Zealand, and therefore, any investment property will not be seen as a PPOA in the first instance. However, durability of association may be the tipping point for deciding whether New Zealanders who move overseas are still resident.

The statement goes to great lengths to outline how association with New Zealand is established, and more importantly how it can be lost. When laying the interpretation

statement over the TRA decision, it becomes apparent that the case was decided mostly on the enduring relationship the taxpayer had with his children. The Commissioner goes further by adding her views on the case, stating that the regular contact with his children, coupled with the majority of his foreign income finding its way to New Zealand were key factors in considering the taxpayer was still a resident.

This is not to say that determining residence is clear-cut, and a number of detailed, real-world examples included in the Interpretation Statement help establish that the durability of association test is one where we must look at the picture as a whole and, most importantly, be applied on a case-by-case basis.

What is most pleasing to see is that the Commissioner has recognized the general unease that the TRA decision created, and has sought to put this into context when considering the various and variable factors that go toward assessing an individual's tax residence status.

The statement also provides guidance on how the PPOA rules interplay with the day-count rules, with helpful examples explaining the exact dates when a taxpayer acquires or loses tax residence.

We also have greater clarity that the absence of a dwelling will mean that individuals are able to become nonresident regardless of the duration in most cases, but forewarning that duration of absence itself is not in itself a determinative factor.

A further silver lining is a common sense approach to dealing with the concept of a "permanent home" for the purposes of determining residence under double tax agreements. The statement concedes that the rules for individuals make it "relatively easy to become a resident here, and more difficult to lose residence," but makes up for this by relaxing the view on what is considered a permanent home for double tax agreement purposes.

A year ago it was alarming to read the Commissioner believed that letting out your home under a short-term tenancy did not absolve a taxpayer of having a permanent home available to him or her in New Zealand. This was based on a tenuous view that tenants could be cast out at a moment's notice. The final statement presents a much more palatable notion that any arm's-length rental agreements will suffice to make the home unavailable to the landlord, and thus cannot be considered an available permanent home. This means that, for those unable to cease tax residence under domestic law, there is still the comfort that reference to a double tax agreement may remove some complexity in their tax affairs. Of course, it would be difficult to dispute that a permanent home would still exist if you had relatives or close friends keeping the house warm whilst you were overseas.

All in all, the final Interpretation Statement is a welcome announcement and common sense has prevailed.

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