

International and cross-border taxation in New Zealand

James Coleman, Barrister, Wellington, reviews a new book

Earlier this year Thompson Reuters published Professor Craig Elliffe's work called *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015). It is a book of formidable intellectual rigour. It is a "must have" text book for anyone providing tax advice or involved in tax litigation.

Ironically, in the forward by Justice Susan Glazebrook (NZM), she observes that Professor Elliffe notes that there is "no such thing" as international tax law and yet he has produced 600 pages on the subject. She points out that a book such as this could not have been written before the reforms New Zealand made in the early 1990s to provide a comprehensive extraterritorial tax regime. That goes a long way to explain the gap in the market, which this textbook fills.

CONCEPTUAL FRAMEWORK

I will start by describing what you will find in the book. It is divided into seven chapters but conceptually into three broad areas. The first area involves a review of how New Zealand taxes New Zealand residents and their investments overseas. The second broad area concerns non-residents and the consequences of their investments in New Zealand. The third area focuses on New Zealand's international tax treaties and other ways in which profit allocation is handled.

New Zealand Residents

There are two chapters within the first broad theme of the taxation of New Zealand residents and their overseas investments. The first looks at the question of who is a tax resident in this country, both the law surrounding personal tax residents and the law surrounding corporate tax residents. Then the text tackles the issue of how New Zealand residents are taxed on the various types of overseas income which they may derive. Within this part of the book discussion is focused on the New Zealand legislation pertaining to extraterritorial investment and enterprise such as the controlled foreign companies' regime, foreign investment funds and New Zealand settled foreign trusts.

Non-residents

Within the second broad category the focus is reversed and the subject matter becomes the non-resident and the consequences for them of investment in New Zealand. Within this part is a chapter which looks at how New Zealand categorises receipts as being New Zealand sourced income subject to New Zealand tax under our domestic law and the interaction of the double tax treaty, which New Zealand has signed, with those domestic laws. Within the section there is also a discussion on the mechanisms available to the State for the collection of tax on New Zealand sourced income derived by non-residents.

Double tax treaty

Within the third broad category is the material on New Zealand's international double tax treaty, in a discussion about how they are to be interpreted in the context of New Zealand's tax system. Finally, there is a chapter dealing with how profit and interest allocation rules work in New Zealand, with respect to the thin capitalisation and transfer pricing regimes.

It is always a sure sign that an author is fully on top of their subject matter when they make the complex simple and understandable. In this book Professor Elliffe does just that. The simplicity of expression is partly achieved by the liberal use of diagrams within the text to illustrate the points he is making. He deploys diagrams to illustrate reasonably complex decision trees that need to be worked through when some of the statutory tests come to be considered. He also uses diagrams when timing is an issue and they do convey very eloquently the key points about start and end dates and so forth in a way that can be lost when one is attempting to describe the same thing using prose alone.

There is rich use of Venn diagrams to get across the idea that some concepts have conceptual overlap even if the individual tests are separated in the text of the legislation. A good example of that is with respect to the four corporate residency tests. The final area where diagrams are employed to good effect is with respect to the New Zealand overseas country distinction. The simple expedient of a diagram with the boundary line demarcating New Zealand from the rest of the world enables the author to make very clear the direction of cash flows and the like across the border which is being addressed in the text.

COMPLETE COVERAGE

It is particularly useful to have one textbook covering the entirety of international and cross-border taxation. It is useful partly because other major sources of commentary in the tax field tend to have the commentaries particularised to the section in question, rather than being thematic. Professor Elliffe has used a themed approach so that the reader, after having completed each chapter, has a thorough grasp of the issues pertaining to that issue. This is particularly useful with respect to the effect of double tax treaties because there is very little good academic commentary on the interpretation and application of those treaties, particularly from a New Zealand perspective.

When it comes to the interpretation of double tax treaties, the practitioner is typically left to read the OECD model commentary and make their own judgement call as to how the treaty provision applies to the client's case. There is very little analysis in those model commentaries or in the logic behind them, if at all, on the market at present. This textbook not only identifies the relevant OECD model commentary in

each instance but helpfully explains how it was arrived at and what is currently topical in terms of review and evolution of thought. The depth of insight in this area is probably in part attributable to the fact that Professor Elliffe is the first New Zealander to be appointed to the Permanent Scientific Committee of the International Fiscal Association, since it was formed in 1938.

Double tax treaty provisions have been interpreted by overseas courts, much more so than by New Zealand courts and it is very helpful to have ready access to what those cases are as well as the key reasoning adopted in them. The amount of time and effort spent finding such resources when they are not thematically assembled as they are in this textbook can be daunting.

The text is at what I call "litigation strength" in terms of its detail. By that I mean the author accesses the resources of case law, Inland

Revenue publications, legislative policy and straight statutory interpretation in explaining the various tax treatments. This is invaluable because it is vital to understand what a legislative regime is trying to achieve and why, as well as how the particular provisions have been construed and interpreted by courts. It is at the level of analysis and detail that one would expect, for example, in a High Court or appellate court decision. Therefore it is a resource that ought to be consulted not just by practitioners giving real-time advice but also by litigators seeking to defend positions already taken.

In some areas of tax law like, for example, the list of New Zealand sourced income categories provided in s YD 4 of the Income Tax Act 2007, the categories can look superficially self-evident and void of subtlety. The cases that impact on those categories are, however, assembled and their *rationes* helpfully discussed. This collection of case law extends beyond domestic jurisprudence and so, in that respect, is invaluable to the practitioner.

It is in the area of income source that interaction with DTAs begins in earnest. Inevitably, when one is discussing double tax agreements the OECD model commentary plays an important role. Professor Elliffe's impressive understanding of the processes and logic of the OECD is wonderfully on display. For example, with respect to the meaning of "beneficial owner" as it relates to dividends, he points out that there is uncertainty as to whether the concept of beneficial owner should be defined under domestic law of a contracting State or based upon some internationally agreed meaning. Here he summarises the history of beneficial ownership in what was meant by that phrase in DTAs. That discussion draws heavily on the work of prominent academics in the tax field around the world, and illustrates the richness of the resources used to craft this textbook. At points like this the text also discusses up-to-the-minute developments in thinking by the Committee of Fiscal Affairs.

There is insightful discussion about the manner in which revenue authorities are increasingly looking towards the substance of the transaction or structure rather than its legal form.

DETAILED ANALYSIS

The text is therefore not simply high-level or broad summary in nature, but rather detailed and exhaustive. For example, having read the chapter on New Zealand tax residency the reader can be confident that all the relevant cases and IRD publications that bear on the issue of residence have been identified and discussed. Professor Elliffe's eye for detail has not, however, rendered the text impenetrable. On the contrary, it is a pleasure to read. The sentences are short and the points made are clear.

The text book is also mercifully free of that insidious anti-officialdom bias that can creep into the work of practitioners particularly those that work on only one side of the fence. Professor Elliffe is above all that. He is concerned with what the tax law is, not with the motivations or distortions of tax politics.

PRACTICAL ADVICE

The book has also avoided the other peril that can befall tax academics, which is to become so detached from the everyday practice of giving advice on preparing returns that the text becomes theoretical and jurisprudential rather than practical. Professor Elliffe was a partner at KPMG for 14 years and then a partner at Chapman Tripp for another 8 years. He is not an ivory tower academic but a person deeply interested in tax law. As a consequence the text book is full of computational examples and workings so that a practitioner can apply the concepts to the facts they have before them. For example, when it comes to the discussion of the difference between measurement of income interests on a daily and on a quarterly basis his discussion contains workings.

The text does not just discuss what the law is but it also explains how it came to be and what the law is seeking to achieve. So, for example, when it comes to the review of the taxation of New Zealand settled foreign trusts, Professor Elliffe starts with the objectives articulated in the consultative document on international tax reform. This is also an area where he uses diagrams and flowcharts to articulate the difference between complying trusts, foreign trusts, and non-complying trust in a way which makes the consequence of those categories obvious at a glance.

One suspects that the text will be of interest not only to practitioners in private practice but also to in-house advisors. There are sections which deal specifically with the banking sector and insurers.

I am sure that this will become one of those standard texts like *Chitty on Contract* or *Cross on Evidence* that goes through many editions and becomes a standard feature in the libraries of those that practice in this area. □

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