

Book Review — International and Cross-Border Taxation in New Zealand

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International and Cross-Border Taxation in New Zealand by Craig Elliffe (Thomson Reuters, New Zealand, 2015)

It has been 25 long years since a tax law professor at the University of Auckland produced the last comprehensive book on New Zealand's international tax rules. I still remember in 1990 how grateful we tax policy officials were to the late Garth Harris for his book that analysed New Zealand's domestic income tax law and double tax agreements (DTAs) and discussed how they interacted.^[1] As we struggled with an international tax policy problem and the DTA constraints on reform, we often referred to Harris's book.

Twenty-five years on, we have a new book on cross-border taxation in New Zealand by another tax law professor at the University of Auckland, Craig Elliffe. I have to say that I am not just sitting here in Wellington politely patting one hand against my knee in appreciation. I am standing and clapping vigorously with both hands high above my head, and I am not alone. I join others around the country and overseas in praise of this book (see the forewords by Justice Susan Glazebrook DNZM and Philip Baker QC, for example).^[2] Its 765 pages will richly reward readers from its ambitious target audience of New Zealand tax advisers and administrators, foreign advisers, academic teachers and advanced students.^[3] Indeed, so well-written is it that parts of it reach beyond this large target audience. This last trimester, for example, my undergraduate international tax class found Elliffe's practical examples on how key parts of the controlled foreign company and foreign investment fund regimes work cleared the fog for them. My undergraduate double tax treaty class quickly grasped Elliffe's methodology for "how to use a treaty" and applied it to each DTA issue they explored in their tutorial presentations to their classmates and in their exam answers to me.^[4]

One way of assessing what Elliffe has achieved in this book is to put his task in context. First, we need to look back to the late 1980s and, in particular, to what Harris achieved in his 1990 book, along with the gaps left for a book in the future. Second, we should note the national revolution in New Zealand's international tax policy over nearly 30 years and other factors that have created the demand for a new book. Finally, [(2016) Vol 22:1 NZJTL 10, 11] we need to consider likely future international opportunities and challenges, including those posed by the current OECD and G20 Base Erosion and Profit Shifting (BEPS) Project.

Back in 1990, Harris faced a dilemma. As a net importer of capital, technology and ideas, New Zealand, in its international income tax policy, had traditionally focused more on source taxation of non-resident providers of these three factors of production, as well as land and labour, than on cross-border taxation of its residents. As a consequence, much of Harris's research material related to source taxation. Unfortunately, from the late 1980s, the fourth Labour Government's income tax reform agenda included a radical rebalancing of New Zealand's international tax policy posture away from source and towards residence taxation. As at 1 December 1989 (the cut-off date for law to be taken into account in Harris's book), legislation implementing several complicated resident tax regimes was before the New Zealand Parliament but had not yet been enacted. Harris resolved his dilemma by pressing ahead with publication in 1990 and by adding 19 pages on the new proposed controlled foreign company (CFC) and foreign investment fund (FIF) regimes at the end of his 456-page book. Despite this short "addendum" and the brief discussion of the trust, superannuation and some other tax changes from the late 1980s, the orientation of the book was still skewed towards

the past. While source and residence taxation were discussed throughout the book, the 50 or so pages in chapter 3 on residents and overseas income was less than one-third the size of chapter 4 on non-resident source taxation. The book was scholarly and lawyerly but had few numerical examples that illustrated how the rules worked in practice. It may have reached beyond New Zealand case law, but where it did so it mostly drew on cases from old Commonwealth countries, with rare references to a United States or South African case.

The late 1980s, then, marked the beginning of a revolution in New Zealand's international tax policy that was to last more than 25 years. All areas of New Zealand international tax policy, including DTA policy, were reviewed and changed, with the notable exception of the New Zealand source rules, whose deficiencies were identified, but not all remedied.^[5] For a small, open economy, the radical shift in policy stance away from a focus on source taxation towards a focus on residence taxation was underpinned by a considerable amount of New Zealand-sponsored research undertaken by local and overseas experts from various disciplines. Most of this work was published by the New Zealand Government, government departments, the Victoria University of Wellington Institute of Policy Studies, academic journals such as the *Journal of Public Economics* and this journal, and professional and business publications. As new policy was converted into new tax regimes, there was further extensive writing by Inland Revenue, tax professionals, academics and other experts, as well as by the state-subsidised Tax Education Office, which operated for a decade from 1988.

In short, there has been no lack of writing on New Zealand's international tax rules during this 25-year period of national policy ferment. The problem is that much of this literature is now dated and hard to apply to today's law. There have been the inevitable amendments to make corrections, adjustments or consequential changes flowing from other reforms. There have also been major changes to policy as policymakers drew back from such an extensive application of the residence principle (for example, providing the active business exemption in the CFC regime) or sought to protect New Zealand source taxation (for example, tightening up the thin capitalisation regime for inward investment). Just as importantly, over much of this period New Zealand's income tax legislation was in the process of being rewritten, restructured and renumbered. As a consequence, even where an area of New Zealand's international tax law has been changed just once, **[(2016) Vol 22:1 NZJTL 10, 12]** old writing on the subject is likely to refer to the law expressed in different words, different sections and different parts of the income tax act.

By 2015, the need for a new book was glaring. The existing comprehensive book on New Zealand's international tax system was 25 years old. Even when it was published in 1990, its predominant orientation towards source taxation was dated. In the following 25 years, there had been a revolution in international tax policy that had swung away from source taxation towards residence taxation and then back towards a greater balance between residence and source taxation. In addition, the whole income tax act had been rewritten and reorganised.

Who would be the perfect candidate to write this new book? Well, they would need to be a good writer to start with. It would help if they had worked in tax practice through this period to give them a sense of what was important and what was not, as well as what had worked and what had not worked. It would, of course, be a bonus if they had worked both in a major accounting firm as well as in a major legal firm. During this 25-year period, they should have refined their thinking by writing frequently on international tax. To strengthen their conceptual framework, deepen their thinking through working with post-graduates on international tax research and publications, and ensure they had the time to write, it would be ideal if the person had been an academic for a number of years and was one now. With the dearth of New Zealand international tax litigation and the fact that Inland Revenue does not publish edited versions of all Inland Revenue written binding advice, it

would be helpful if the candidate had worked in the Inland Revenue rulings and disputes review units. A period working on international tax policy in Inland Revenue or Treasury would also assist. Finally, to make sure that they have an outward focus and an awareness of developments in policy, practice and research in other countries and in international agencies, such as the OECD, it would assist if they were a member of the board of an international tax organisation that met regularly and organised research and conferences on key international tax topics. The perfect candidate cannot possibly exist, you might say, and you would of course be right. But there is someone who ticks all of those boxes, other than having worked as a tax official, and Thomson Reuters has engaged him to write this book.

The book is certainly comprehensive. It is 765 pages long. However, there is more to being comprehensive than just writing hundreds of pages. It is important for the book to cover thoroughly the topics that matter to its primary audience of New Zealand tax advisors and administrators in ways that will help them, as well as addressing the needs of its secondary audience of foreign advisers, academic teachers and advanced students. Elliffe has done an admirable job in the weighting he has given to the various topics and how he has written about them. The book consists of: a short introduction; around 300 pages on residence-based taxation; around 270 pages on source-based taxation; a little over 100 pages on double tax treaties; and around 30 pages on allocating profits (thin capitalisation and transfer pricing). This achieves a good balance between residence-based and source-based taxation. Some might argue that the coverage of thin capitalisation and transfer pricing is a little light. In relation to transfer pricing, at least, the New Zealand rules closely follow the OECD guidelines and there is already ample international and local writing available elsewhere. Others might argue that although the book does discuss the current OECD and G20 BEPS Project from time to time, a final chapter that looked forward to the future international opportunities and challenges posed by the current BEPS Project would have been a valuable addition. I would agree. New Zealand officials have been active participants in this major project that has the potential to redraw many of the international standards and guidelines that New Zealand will need to take into account in its future international tax policy making and rule making. **[(2016) Vol 22:1 NZJTL 10, 13]**

What I particularly enjoyed about this book is the clear and easy manner in which Elliffe writes. It is a pleasure to read. It achieves what I can only describe as a beautiful balance between law, accounting and scholarship. The text is clear. Wherever appropriate, it takes a legal, accounting or a law and accounting perspective to an issue, while referring to the relevant scholarship. The flow charts, diagrams and examples really enhance the text. The examples are fresh and illustrate well how the rules work in practice. It reaches beyond New Zealand and old Commonwealth case law.

So here I am at the end of my review. I am still standing. I am still clapping. I have just one more thing to say and it is directed to the publisher. Please, would you consider printing the next edition of this book in a bigger font size and providing a detailed table of contents, with second- and third-level headings, as well as a list of examples, tables and figures at the beginning of the book? A 765-page book that is divided into just seven chapters, with two of them called “residence-based taxation” and “the extension to residence-based taxation”, for example, demands more guidance for the reader about what is where than a single-page table of contents with just 14 entries printed in a minuscule font size. Secondly, the examples, tables and figures are one of the glories of this book. They are not listed anywhere in the book — at the beginning of the book, at the beginning of each of the seven chapters or at the end of the book. They need to be listed at the front to help entice readers into this magnificent book and to make it easier for them to locate what will be of great assistance to them.

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Footnotes

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Garth Harris *New Zealand's International Taxation* (Oxford University Press, Auckland, 1990).

2

Craig Elliffe *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015) at ix–xi.

3

Craig Elliffe, above n 2, at vii.

4

Craig Elliffe, above n 2, at 595–630.

5

WF Birch and W Creech *International tax: a discussion document* (Treasury and Inland Revenue Department, Wellington, 1995) at 31–35.