TRANS TASMAN TAXATION

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As in many things, the New Zealand and Australian tax systems have much in common. Our beer, our climates and our tax systems have a distinctly Antipodean quality and yet are not identical. Similarities in the underlying concepts and approaches only highlight the important differences. Those differences have arisen because of different practical and policy considerations; different attitudes on the part of taxpayers; different judicial attitudes in the interpretation of statutes and, to a large extent, simply because there has been no attempt to bring the two systems closer together.

All international tax planning is a question of minimising the total tax burden of an enterprise worldwide in a way which is consistent with commercial objectives and within Governmental restraints such as exchange controls. The common thread of international tax planning is the double tax agreement network existing on a one-to-one basis between many western countries. Such an agreement exists between Australia and New Zealand an an assessment of a trans Tasman tax liability will involve investigations under New Zealand and Australian domestic tax laws and an examination of the effects of the double tax treaty.

EFFECTS OF THE N.Z. EXPORT INCENTIVES

Under the final C.E.R. agreement, Australia and New Zealand have agreed to a phased elimination of New Zealand's performance-based export tax incentives between 1985 and 1987. In addition, there is agreement not to introduce any export subsidy, export incentive or other assistance measure having similar trade distorting effects to existing performance based export incentives. It is not the object of this paper to discuss in detail the existing incentives nor to contemplate how the Government's commitment to maintain the profitability of exporting might be implemented. It can be said generally, however, and within the context of New Zealand/Australia trade in particular, that the inclusion of the incentive scheme within the Income Tax Act has done nothing for the tax system itself and creates distortions and anomalies both in the results brought about and in the actions required of taxpayers.

We are probably all aware of examples of the incentive system operating unfairly or forcing taxpayers into structures or methods of trading they would not otherwise adopt. My own experience includes a New Zealand manufacturer exporting to an unincorporated joint venture, of which it was also a member, and being denied the export incentive on the grounds that there was not an overseas purchaser and the Australian enterprise which incorporated in New Zealand solely in order to take advantage of tourist promotion incentives as a New Zealand taxpayer.

It is also far from ideal having the incentive system administered by the Inland Revenue Department which, quite properly, has as its main objective the collection of tax and the protection of the revenue. Until comparatively recently the Department adopted a broader "substance" approach to the interpretation of the incentive provisions. Recently this has changed and the Department now appears to adopt the same view of the incentive provisions as any other charging provision of the Income Tax Act. It is heartening to see the High Court recently adopt a "commonsense and commercially realistic view" of an export situation "having regard to the purpose of the Act and adopting a liberal form of construction in relation to the incentive provisions": George & Ashton Limited v. C.I.R. Even assuming that this view will prevail (and not necessarily just at the High Court level) there is much to be said for taking any incentive or relief provisions out of the Income Tax Act and, if possible, for giving their administration and interpretation to a Department whose main function is not to collect revenue.

There is little doubt that the incorporation of the various export incentives within the tax system has had effects both within New Zealand enterprises and in their relationships with trading partners and markets out of New Zealand.

One important consequence of our incentive system has been to lower the New Zealand effective tax rate, sometimes to the point where no New Zealand tax is payable. This has had the consequence of discouraging overseas ventures where the effective overseas tax rate would be more than the New Zealand rate and the credit available would consequently be of no value. New Zealand has, in effect, been turned into a tax haven with any non-New Zealand tax liability becoming a net cost. To this has to be added the natural inclination of most enterprises to avoid involvement in other tax jurisdictions wherever possible. No enterprise likes filing tax returns and most enjoy dealing with the revenue authorities of other countries even less than with their own.

Undoubtedly, these factors, together with our stringent exchange controls, have prevented the widespread use of offshore and especially tax haven operations by New Zealand enterprises. More than one New Zealand taxpayer has measured the advantages of deriving part of his profitability in an associated offshore entity against the loss of export incentives in New Zealand and found the result unacceptable. However, as existing incentives are phased out and possibly replaced by alternatives without direct fiscal consequences and as the involvement of New Zealand enterprises extends beyond merely selling in overseas markets, the international trend in the use of tax havens in tax planning is bound to grow. For many New Zealand taxpayers, the first step may well be consideration of the method of entry into Australia.

AUSTRALIAN TAX

Australian residents are subject to tax on their worldwide income, subject to one important exception. Income derived by residents from sources outside Australia is exempt from Australian tax where that income is subject to tax in the country from which it was derived (s.239). This exemption does not apply to dividend income and interest and royalty income derived from most tax treaty countries. The demise of s.239 is expected at any time.

Non-Australian residents are subject to tax on income derived from Australian sources, other than exempt income.

The Australian legislation also contains anti-avoidance provisions designed to prevent non-residents from reducing the profits of enterprises in Australia by adjusting prices paid to or by them in trading with a related company. Section 136 applies where a business carried on in Australia is controlled principally by non-residents or is carried on by a company, the majority of the shares in which is held by or on behalf of non-residents. The equivalent New Zealand provision is s.22.

Both resident and non-resident companies are divided into public and private companies. Generally, public companies are those whose shares are listed on a stock exchange anywhere in the world or are subsidiaries of listed companies. All other companies are private. The current tax rate of 46% applies to both private and public companies although previously a lower rate has applied to private companies. In addition to income tax, private companies are subject to an undistributed profit tax at the rate of 50% if 20% of their after-tax trading income is not distributed within a certain period after the end of their financial year.

Non-resident companies are subject to a further 5% branch profits tax on Australian source income. This applies to all types of income with some exceptions notably dividend income and interest income subject to withholding tax.

A company is resident in Australia if it is incorporated there, or if not incorporated in Australia,

(a) Its central management and control are to be found in Australia; or

(b) It carries on trading operations in Australia and its voting power is controlled by Australian resident shareholders.

In the case of individuals, an Australian is a resident if he resides in Australia either within the ordinary meaning of that expression or under three statutory tests: A person domiciled in Australia is deemed to be resident there unless the Commissioner is satisfied that his permanent place of abode is outside Australia; residence in Australia is attributed to a person present in Australia for a total period of more than half a tax year unless he can establish that his usual place of abode is outside Australia and that he does not intend to take up residence there; finally, contributors to certain superannuation funds are deemed to be Australian residents.

Although the basic concepts underlying the two tax systems are similar, the differences are vital in overall tax planning. I take two examples by way of illustration. The Australian loss carry forward provisions require a 50% continuity in shareholding or a continuity of business test. Consequently, it is less easy to absorb losses of a failed venture even where, because of joint venture participation, the New Zealand shareholding test can be complied with. For that reason alone it may be preferable to absorb losses immediately against tax liability in New Zealand.

In New Zealand dividends received by companies are exempt. Deductions which the corporate shareholder is otherwise entitled to are set off against assessable income or carried forward to be set off against future income. In Australia, inter-company dividends are usually not taxable because of a rebate system which operates only after the deduction of losses and outgoings against all income, including dividend income. This means that charges such as interest costs should accrue in the place where they are most effective, that is against other source income, rather than against dividends which, if there are no offsetting deductions, will in any event be subject to rebate.

For the New Zealand enterprise venturing into Australia there is no substitute for local Australian advice as to the Australian tax consequences of a proposed venture or trade even if this is only to confirm advice given here. With the increasing complexity of legislation in New Zealand, Australia and elsewhere, few would claim mastery of one tax system and no-one can be confident in giving final advice about a system in which they are not working on a day-to-day basis.

SALES IN AUSTRALIA BY OVERSEAS MANUFACTURERS AND MERCHANTS

Where goods are imported into Australia after manufacture and are sold either before or after importation, the profit derived in Australia from the sale is ascertained by deducting from the sale price:-

(1) The amount for which goods of the same nature and quality could be purchased by a wholesale buyer in the country of manufacture; and

(2) The expense incurred in transporting the goods to Australia and selling them.

The deduction of the wholesale value in the country of export instead of the actual cost of the goods means the manufacturing profit, if any, is excluded from Australian income tax where the sale is made by the manufacturer.

In the case of merchants importing and selling in Australia the profit deemed to be derived in Australia from the sale is ascertained by deducting purchase price, transport and selling costs from the actual sale price.

A non-Australian manufacturer or merchant who is instrumental in Australia in bringing about a sale of his goods is assessable on the profit derived from the sale as calculated above. This is the case whether or not the principal operates by means of an agent or representative in Australia and whether or not the agent has power to bind the principal. If an agent in Australia is instrumental in bringing about a sale the profit is assessable to the principal even if the orders, contract and payment take place outside Australia. An overseas vendor of goods not carrying on business in Australia whose sales to customers are not brought about by the activities of himself or his representative in Australia is not subject to Australian tax. He is not made subject to Australian tax by advertising or carrying on direct correspondence with Australian purchasers.

AN AUSTRALASIAN CASE LAW?

The differences between Australia and New Zealand are not limited to legislation. In C.I.R. v. Banks the Court of Appeal considered the deductibility of a proportion of expenses on mortgage interest, rates, insurance, heating and so on, all relating to a home study used by a part-time tutor doing work at home. The New Zealand Supreme Court had already considered the question and Beattie J. had held in Castle v. C.I.R. that such expenditure was deductible. Subsequently, a number of Australian decisions came to the contrary conclusion and Banks case was taken to the Court of Appeal, although the Commissioner had earlier accepted the Supeme Court decision in Castle. In Banks he argued that Castle was wrongly decided and invited the Court of Appeal to follow the later Australian decisions where a deduction for home office expenses had been refused. The Court of Appeal declined the invitation and rejected the reasoning in the Australian decisions.

Possibly the most obvious divergence between the New Zealand and Australian judicial approach is in the interpretation adopted in the respective countries of the general anti-avoidance provisions. The contrast here is particularly dramatic as, until recently, the Australian section (s.260 Income Tax Assessment Act) adopted in large part the wording of the equivalent New Zealand provision (s.99, formerly s.108 of the Income Tax Act 1976). These provisions enable the respective Revenue authorities to ignore for tax purposes certain arrangements having the purpose or effect of avoiding tax or altering the incidence of tax as between taxpayers. They are both remarkable in that they fail to identify with any degree of particularity the types of transactions which are to be avoided and at one stage failed to provide a basis for taxation once a transaction had been voided for tax purposes. Both provisions demanded more than interpretation in any narrow sense but the application of a number of judicial glosses giving an acceptable practical effect to the actual words used in the legislation.

The formulation of these glosses has occupied much of the time of the Courts of both Australia and New Zealand at all levels including the Judicial Committee of the Privy Council. New Zealand commentators have watched with amazement and, until recently, with some envy at the development of the law in this area across the Tasman. Few of us harboured any hope that cases such as Cridland v. F.C.T. would have been decided the same way in New Zealand. That case involved a scheme for students designed to take advantage of the averaging provisions applicable to primary producers. The scheme involved the payment of a dollar into a trust (of which the students were beneficiaries) to carry on primary production! (In fact, not even the dollar was actually paid).

There has been a subsequent legislative and judicial backlash to the growth of tax avoidance arrangements in Australia. We in New Zealand are now relieved to have no equivalent of the penalty and criminal provisions applicable in certain cases in Australia.

Although the area of tax avoidance shows the most marked differences between Australian and New Zealand attitudes, they exist through the income tax system. New Zealand courts will adopt the reasoning and approach of an Australian Court if they find it attractive but, equally, they need no judicial justification for rejecting decisions they do not wish to follow. Differences in the legislation, however slight, provide more than sufficient basis for adopting a different view which, in fact, might be based as much on New Zealand pragmatism, policy or even morals as upon differences in the wording in the legislation involved.

THE NEW ZEALAND/AUSTRALIA DOUBLE TAX AGREEMENT

The heart of the trans-Tasman tax link lies in the New Zealand/Australian Double Tax Agreement. This is a treaty agreement between the two countries, given effect to by each under domestic legislation. In the case of Australia the Income Tax (International Agreements) Act must also be considered as it goes further than just giving effect in

Australia to its double tax agreements. The Agreement is part of the treaty network between western countries, most of which now follow to a large extent on the O.E.C.D. model treaty. New Zealand current has 17 such agreements and a number more are currently under negotiation or are awaiting ratification.

The description "double tax agreement" is misleading. It does not do justice to the range of matters dealt with in the Agreement. New Zealand's dometic tax law itself goes some way to avoiding double taxation by allowing, as a credit against New Zealand tax, any similar tax paid on the same income in another country (s.293). For a taxpayer primarily liable as a resident of a high tax rate country such as New Zealand, such a provision may be sufficient if he is only concerned to see that his total tax bill does not exceed that of the country in which he is primarily liable for tax.

Governments, of course, tend to be concerned not only with the total tax payable by an enterprise but also as to which country it is payable. Consequently, most double tax agreements, including the New Zealand/Australian Agreement, are concerned not just with giving a credit in one country for tax paid in the other but in determining in which country tax on certain types of income is payable and in some cases prescribing rates at which tax or withholding tax may be imposed by either country.

The New Zealand/Australian Agreement, like most modern double tax agreements, imposes a prime tax charge either in respect of the origin or source of income or in respect of the residence of the taxpayer deriving that income.

Certain classes of income are taxed only in the country of residence of the recipient. In the present context these are:

1. Industrial or commercial profits where the recipient has no permanent establishment in the source country.

2. Remuneration derived by an individual for personal services if the individual is in the other country for less than 183 days in the relevant fiscal year.

Income on which tax is imposed in the country of origin on a withholding basis includes dividends, interest and royalties.

RESIDENCE UNDER THE AGREEMENT

Relief from double taxation within the Agreement is dependent upon determination of the residence of the taxpayer concerned. Under the general principles of income tax law applicable in both in New Zealand and Australia, it is possible to have dual residence in both countries. For example, a company incorporated in Australia but controlled from New Zealand will have residence in Australia for tax purposes and in New Zealand for New Zealand tax purposes. This situation is dealt with in the Agreement by setting out various tests by which companies or individuals who are resident of both countries under domestic law are treated, for the purposes of the Agreement, as being resident in one country or the other. The taxpayer is then exempted in the country in which he is deemed not to be a resident in respect of income other than income which is derived or deemed to be derived from sources in that country. Of course he is allowed a credit in his country of residence for tax imposed by the other country pursuant to the Agreement. (Article 3) .

SOURCE OF INCOME

The question of source of income is, of course, important in determining tax liability in both Australia and New Zealand. New Zealand has very comprehensive source rules set out in S.243 of the Act. Under the scheme of the Australian legislation the question of the source of income is principally one of fact. It has been held that the Australian legislature, in using the word "source", meant not a legal concept "but something which a practical man would regard as a real source of income". "The ascertainment of the actual source of income is a practical, hard matter of fact". Nathan v. F.C.T. (1918) 25 CLR 183. The general considerations are:-

(a) The place in which any contract giving rise to income was entered into;

(b) The place of payment;

(c) The place where a contract is performed.

One of the most difficult problems in the effective operation of any double tax agreement is the question of source of income including the resolution of conflicts of domestic applicable source rules and interpretation of any source rules in the Agreement itself. The New Zealand/Australia Agreement goes some way to resolving these problems in the case of industrial or commercial profits associated with a permanent establishment and by the application of withholding taxes to interest, dividends and royalties. In addition, there are specific rules relating to particular types of enterprise, for example the operation of shipping and air transport. However, there is no overall reconciliation or code dealing with the source of income as between the two countries and in many cases this will require a close examination of the domestic law of the two countries with particular care to ensure that income does not have a dual source and to ensure income does have the appropriate source as between the two countries.

INDUSTRIAL AND COMMERCIAL PROFITS

As in most double tax agreements, one of the most important practical effects of the Australia/New Zealand Agreement is the taxation of industrial or commercial profits only in the country of residence of the recipient in the absence of a permanent establishment in the country of derivation.

Article 5 establishes that for the industrial or commercial profits of enterprise resident in one country to be taxable in the other country it must be carrying on a trade or business in the other country through a permanent establishment there. The corollary effect is that if an enterprise of one country is carrying on trade or business in the other country through a permanent establishment then the other country may impose tax on all of the industrial or commercial profits of the enterprise from sources within that other country whether or not those profits are attributable to the permanent establishment. In this latter regard the Australia/New Zealand Agreement differs from many others which limit the source country's ability to tax to profits actually connected with the permanent establishment.

The term "industrial or commercial profits" is defined in Article 2 in terms of profits derived by an enterprise from the conduct of trade or business but excluding certain categories of income as follows:-

1. Dividends.

2. Interest.

3. Royalties.

4. Natural resource royalties.

5. Income from the sale or other disposition of land or shares in a land-owning company.

6. Income from timber, mining or natural resource rights.

7. Rent.

8. Profits from operating ships or aircraft.

9. Remuneration for personal, including professional, services.

The other key element is the definition of "permanent establishment" which is generally defined as a fixed place of trade or business in which the trade or business of an enterprise is wholly or partly carried on. The definition goes on to expand on the general definition by giving examples of what does and does not constitute a permanent establishment. (Article 2)

PERSONAL SERVICES INCOME

Protection against the double taxation of individuals is also offered by the Agreement. Under Article 11, remuneration derived by an individual in respect of personal, including professional, services is taxed only in the country in which he is a resident unless the services are performed in the other country. In that case, remuneration derived in respect of those services is deemed to have a source and to be taxed in the other country. Special provisions apply in the case of short visits paid by residents of one country to the other.

Remuneration derived in respect of personal services performed in the visited country are exempt from tax in that country if:-

(a) The person is present in that country for no more than 183 years in a fiscal year, and

(b) His remuneration is paid by a person who is not a resident of that country, and

(c) His remuneration is not deductible in determining the taxable income in a permanent establishment in the visited country, and

(d) His remuneration is subject to tax in the country of residence of the person concerned.

Where personal services are performed in Australia by a New Zealand resident and the 183 day rule does not apply, the tax payable in Australia would be available for credit against New Zealand tax under Article 18.

It is important to note that for a New Zealand resident to take advantage of the 183 day rule the employer must not be an Australian resident, for example an Australian subsidiary, although the employer need not, as in the case of some double tax agreements, be resident in the country of residence of the employee concerned. The income in question must also be taxable in New Zealand.

The particular advantage offered by the 183 day rule is to split the fiscal year in such a way that a lower marginal tax rate applies in Australia and/or New Zealand over a period of temporary absence from New Zealand.

DIVIDENDS

Dividends are not within the definition of industrial or commercial profits and are consequently not exempt from tax even in the absence of a permanent establishment in the country of their origin. However, Article 8 limits to 15% of the gross amount of dividends the tax imposed by the country of source in respect of dividends paid by countries to residents of the other country. Dividends paid to non-residents by Australian companies are subject to withholding tax irrespective of the source of the profits giving rise to the dividends. The general rate of New Zealand withholding tax on dividends is 30% as is the domestic withholding tax in Australia. Dividends connected with a permanent establishment in the source country are excluded from the limitation.

ROYALTIES

Under both Australian and New Zealand domestic law royalties paid by a resident of one country are deemed to have a source in that country. Article 10 limits to 15% of the gross amount of royalties, the tax which may be imposed by one country on royalties derived and beneficially owned by a person resident in the other country. Royalties are, of course, not within the definition of industrial or commercial profits. Article 10(2) defines royalties for the purposes of the Agreement and in particular it can be noted that Agreements for the supply of management services constitute royalties within the context of this Agreement. Article 10(3) removes the 15% limitation of tax where the recipient has, in the country of source of the royalty, a permanent establishment and the knowledge, information or property giving rise to the royalties is effectively connected with that permanent establishment.

Article 10(4) restricts the application of Article 10 where a special realtionship between payer and recipient results in the amount of the royalties paid exceeding the amount that would have been agreed had the parties been at arms length.

INTEREST

Article 9 limits to 10% of the gross amount of interest the tax that may be imposed by the source country on interest derived and beneficially owned by a person resident of the other country. The general rate of Australian withholding tax on interest is 10% and on New Zealand 15% reduced to 10% under the Agreement. The limitation in the Agreement does not apply where the payer and payee are associated with each other and the effect of this anti-avoidance provision is to limit the effect of the 10% limitation to the amount of interest that might have been agreed on by persons dealing at arms length.

Both countries have provisions for the waiving of all withholding tax on certain loans made by persons not associated with the borrower.

GENERAL

The agreement also contains provisions designed to assist the taxation authorities of the respective countries in the application of the Agreement and the prevention of tax avoidance. Article 19 provides for consultation between the competent authorities of both countries to ensure the proper applicaion of the Agreement. It allows the taxpayer to represent his case to the competent authority of the country in which he is resident if he believes that the competent authority of the other country has taken an action which results in double taxation contrary to the provisions of the Agreement. This provision is rarely used by taxpayers as it is confined to acts resulting in "double taxation" It is arguably limited in scope. Double taxation as such is unlikely to occur - a taxpayer is more likely to be concerned with the rate of tax or withholding tax imposed in a particular country in the first instance rather than whether he will receive a credit or other relief against double taxation.

Article 20 provides for the exchange of information between competent authorities where this is necessary for the carrying out of the Agreement or for the prevention of fraud or the avoidance of tax. This provision, and its equivalent in other double tax Agreements, is being used increasingly frequently. In effect, taxpayers become subject to an international tax regime which is capable of being enforced in New Zealand and overseas.

Article 6 allows for the re-allocation of profits between associated enterprises, for example companies under common control, where the commercial relationships between them differ from those that might be expected to operate between independent enterprises dealing at arms length.

BRANCH OR SUBSIDIARY

The question whether to operate through a branch or subsidiary in Australia is the first and most basic question faced by any New Zealand enterprise wishing to establish a presence there. There will be both tax and commercial consequences flowing from these alternatives.

NON-TAX FACTORS

A number of factors will usually have some influence on the decision whether a branch or subsidiary is used overseas. These include legal requirements of various foreign jurisdictions requiring or prohibiting the use of either a subsidiary or branch; the cost of operating and forming a branch or subsidiary; the question of limiting liability in the overseas country through the use of a subsidiary; the ability to borrow in the host country through a branch; the disclosure requirements in relation to a branch or foreign subsidiary. In addition to these factors, there are frequently considerations of national interest such as the acceptability of the enterprise in the foreign country in a particular form.

In the Australian/New Zealand context, there may be little significance in most of the above factors except the question of limited liability, which will depend on the circumstances of the particular case, and the ability of branches to borrow in Australia. It is the writer's experience that Australian Reserve Bank consent is more easily (and sometimes only) obtained if an Australian subsidiary is formed. This leads, at the moment, to a conundrum created by the attitude of the two central Banks. The New Zealand Reserve Bank prefers overseas enterprises to be funded offshore, even if loans are guaranteed by the New Zealand parent enterprise. This means that funds cannot be borrowed in New Zealand and remitted to fund an Australian operation. The Australian Reserve Bank requirement of borrowing by an Australian subsidiary precludes a branch operation and raises problems if interest costs are to be offset against New Zealand tax liability.

On balance, in many cases the non-tax factors will marginally favour an Australian subsidiary but this preference may be easily outweighed by the tax factors either in Australia or New Zealand.

NEW ZEALAND TAX

One of the principal advantages of a foreign subsidiary is the deferral of domestic tax on its retained profits not remitted by way of dividends. Because of the similarity in the rates prevailing as between Australia and New Zealand and the other basic similarities in tax treatment, there may often be no great advantage in avoiding New Zealand tax by means of an Australia subsidiary. However, it is not inconceivable that the effective Australian tax rate on particular sources of income will be less than the New Zealand rate, in which case there is an obvious advantage in retaining profits in Australia rather than merely obtaining a credit against the higher domestic tax rate.

If an overseas enterprise is expected to produce losses during its initial operations, those losses will be immediately available against domestic profits if a branch operation is adopted. The traditional international tax planning wisdom is, wherever possible, to commence overseas operations in the form of a branch if losses are expected with a view to incorporating the branch at a time when net profits may wish to be retained under a more favourable overseas tax regime.

S.191 of the Income Tax Act 1976 dealing with the grouping of companies for tax purposes in New Zealand arguably applies to all companies resident in New Zealand for tax purposes whether or not they are incorporated overseas. If this view is correct when a double tax treaty also applies, losses of an overseas subsidiary can be grouped against New Zealand profits under s.191 provided the overseas company is controlled from New Zealmand to the extent necessary to give it New Zealand residence under New Zealand tax law. This may lead to the situation where New Zealand control is established or maintained through any loss period but relinquished when a New Zealand tax liability is no longer desired.

AUSTRALIAN TAX

The prime consideration here is, of course, to determine the Australian tax liability of the enterprise particularly the effective tax rate compared with the effective New Zealand rate.

Both the subsidiary and branch will attract Australian taxation. The subsidiary will be taxed at the 46% rate which applies to both resident and non-resident corporations. Assuming all profits are paid as dividends to the New Zealand resident shareholder, tax and withholding tax will total 54.1%. If the New Zealand shareholder is an individual, a credit for withholding tax will be allowed against his New Zealand tax liability and consequently his total Australian and New Zealand tax liability will be little different from his New Zealand tax liability on a totally New Zealand enterprise. Where a company is the New Zealand shareholder, dividends received by it from its Australian subsidiary are exempt and no credit can be obtained for the withholding tax in Australia.

In the case of a branch, the non-resident corporation rate of 46% will apply. In addition, a branch profits tax of 5% (making the total tax payable 51% on taxable income derived by branch operations) will apply. Consequently, if profits are to be retained in Australia there is a slight tax advantage in the subsidiary route whereas if profits are to be repatriated to New Zealand the branch has a slight advantage after taking into account the fact that no credit will be allowed against dividends paid to a New Zealand corporate shareholder.

It is also important to consider any incentives, reliefs or other tax advantages obtainable in Australia. These have the effect of reducing the effective tax rate and will be lost if a branch is used since the income of the branch will be taxed in New Zealand and no advantage will be obtained for Australian taxes avoided. The use of a subsidiary, on the other hand, will take full advantage of any Australian tax relief at least while profits are retained in Australia.

Another important Australian factor is that locally incorporated companies are entitled to dividend rebates which effectively mean that they do not pay tax on dividends. Dividend income received by a New Zealand enterprise through a branch will, of course, be subject to the usual withholding tax rates.

From the Australian point of view, the decision between branch or subsidiary may turn on the operation of the branch profits tax and therefore upon the percentage of after tax profits remitted to New Zealand. If more than 60% of total profits are to be remitted to New Zealand the branch will provide the cheapest overall tax cost.

INTERNATIONAL TAX PLANNING

In the case of enterprises operating solely within New Zealand, the opportunities for international tax planning are limited. Exchange control constraints limit or prohibit the movement of capital necessary to establish offshore operations and provisions in the Income Tax Act itself prevent transfer pricing and other arrangements designed to shift part of the profits of an enterprise offshore. In the case of exporters, S.91 of the Act deems all trading stock to have been sold at its fair market price as determined by the Commissioner. Where the New Zealand enterprise is trading with an associated entity offshore, S.22 allows for arbitrary assessments by the Commissioner where the profitability of the New Zealand business appears to be insufficient or where an excessive loss is created.

Once offshore operations are commenced, however, the opportunities for international tax planning beyond the countries directly involved must increase. Even where selling goods is the sole activity, the simplicity of a non-resident trader status for tax purposes is not always satisfactory from a commercial point of view and it becomes necessary to establish a branch or subsidiary in foreign markets manned by the employees of the enterprise with the appropriate training and experience.

One of the most common international tax pastimes is the "royalty game" which involves the steering of royalty payments through tax havens or low tax countries. It can be noticed, for example, that the New Zealand/Australia withholding rate on royalties of 15% is high compared with the 10% rate prevailing in many other double tax agreements including some entered into by Australia. That immediately raises the possibility of diverting royalty payments from Australia to a country with which it has such a favourable agreement and either retaining profits in that third country or routing them back to New Zealand.

As well as collecting income consisting of dividends, interest, royalties, licensing fees and the like, tax haven holding companies are typically used to control companies in order to avoid them acquiring a residence in a high tax country, to act as investment funds and to finance companies in such a way as to shift profits from the high tax base back to the low tax area. More specialised uses also a rise in particular industries such as captive insurance companies and the use of tax haven bases by shipping companies.

Ironically, the New Zealand Reserve Bank's attitude to the remittance of funds out of New Zealand may have the effect of encouraging the development of offshore operations. If an enterprise is forced to operate without funds remitted from New Zealand there is no corresponding obligation to remit profits back into New Zealand and there is every opportunity to retain those profits offshore in a way which does not involve a New Zealand tax liability.

AUSTRALASIAN TAX CHECKLIST

1. Can Australian tax be avoided and, in particular, if industrial or commercial profits are involved is there a permanent establishment in Australia.

2. What are the disadvantages of being an Australian taxpayer? Is it worthwhile from the tax cost and other points of view avoiding Australian tax?

3. Are there any advantages in being an Australian taxpayer if New Zealand tax can be avoided or deferred?

4. If there is to be an Australian presence, what form should it take - branch or subsidiary?

5. What are the tax consequences of the various alternatives in both Australia and New Zealand and under the double tax treaty?

6. What are the consequences if initial losses are expected and/or the enterprise never realises a profit and losses have to be carried forward?

7. Are charges and deductions including interest costs, accruing in the most advantageous place?

8. What are the effects of Australian withholding taxes on dividends, interest and royalties in terms of timing advantages and disadvantages and/or credit against New Zealand tax?

9. Where can profits most usefully be retained for future investment and/or lending to associated enterprises?

10. Can any country other than Australia or New Zealand be used to absorb dividends, interest or royalties at a lower tax rate and as a base from which to control and/or fund further offshore operations?

The double tax agreement network is a unique form of international legislation. Although agreements are negotiated as treaties on a one to one basis between countries wishing to protect their own fiscal base, they result, to a large extent, in a workable if not perfect compromise between the interests of competing states. They provide at least a measure of certainty without which international trade or commerce would certainly be more difficult, if not impossible. The adoption of the O.E.C.D. model treaty or parts of it, the re-negotiation of older treaties and the extension of the treaty network are all welcome developments for those whose job it is to advise enterprises of their trans-national tax obligations.

In the case of New Zealand and Australia, the Agreement, although it is not of the most modern and extensive type, does provide the key to trans Tasman tax planning. The community of interest as reflected in the wider sense by the C.E.R. agreement itself and the common heritage of the two countries in the legislative, judicial and professional aspects of the tax system suggest that even closer links are possible. An Australasian Tax Act may not be acceptable politically or technically. However, there is room to keep a common approach to basic tax matters and to have regard to the trans Tasman tax consequences of domestic tax legislation. This would have obvious practical advantages for taxpayers on both sides of the Tasman and would make it easier to share experience and judicial interpretation. Might the place to begin an Australasian Court be in the area of taxation?