

## BOOK REVIEW

NEW ZEALAND'S INTERNATIONAL TAXATION, by Garth A. Harris. Auckland, OUP, 1990. xvi and 456pp including index. Price \$89.95.

Garth Harris states in the Preface that the purpose of this book is to examine the New Zealand tax system as it applies to situations and transactions containing an international element: "It is desired to provide a reasonably detailed exposition of the applicable rules for parties investing in or settling in or having business transactions with New Zealand, and for New Zealanders engaging likewise outside New Zealand."

It is an ambitious project involving a consideration of some of our most difficult domestic legislation and twenty four double tax treaties. Harris starts by examining the relevant provisions of the New Zealand Income Tax Act 1976 and, in particular, the concept of residence and the source rules under domestic law. He then proceeds to look at the treaties, not treaty by treaty (which would have been a tedious and repetitious approach) but topic by topic. Thus, for example, Part 5 of the book entitled "Special Business Regimes" deals successively with Non-Resident Contractors, Non-Resident Entertainers, Transport Operators, Mining Operators, Renting of Films and Insurance. Under each heading there is a discussion of relevant domestic law and the effect of the treaties, setting out the most common provisions and also noting the various alternatives. Of course, by trying to cover so many different treaties in this way, problems are created for the reader who simply wants to research the articles in only one treaty. To do this, the treaty itself must be examined. However, the comprehensive text in the book should provide a most useful aid to an understanding of the articles in question.

The law is stated as at 1 December 1989, just before the publication of the report of the Court of Appeal's decision in *JPF Energy Inc v Commissioner of Inland Revenue* (1990) 12 NZTC 7,176. This case, the High Court decision of which is discussed by Harris at pp 232-233, concerns the meaning of the expression "borne by a permanent establishment" in Article 15 of the tax treaty between New Zealand and the United States (cf Article 15 of the OECD Model Treaty). In the High Court Eichelbaum CJ said that "the term refers to a matter of fact, as distinct from hypothesis: something actually carried, sustained or endured." Richardson and Hardie Boys JJ in the Court of Appeal, after referring to this passage with approval, stated the test under paragraph 2(c) to be as follows ((1990) 12 NZTC 7,176, 7,179):

Subparagraph (c) could not be clearer. It requires an answer to the question "Is the remuneration borne by a permanent establishment . . . ?" It is not whether it could have been borne or even should on some hypothesis have been borne. It is what actually happened, not what might have been. It is not sufficient that the expenditure was incurred for the benefit of the permanent establishment. Had that kind of nexus been

regarded by the framers of Article 15 as sufficient they could readily have used appropriate language such as "attributable" or "referable".

In other respects, there have been no major developments to the law in this area, although it is anticipated that New Zealand may soon enter into a new tax treaty with Australia. There has, however, been some academic discussion of the concept of residence under section 242 of the Income Tax Act 1976. It has been suggested that, in some circumstances, a test of personal absence for a specified period under subsection (3) may take precedence over the test of permanent place of abode in subsection (1): (1990) 14 NZULR 179. And, it has been suggested that, because of the different settings in which the words "permanent place of abode" are placed in the new section, they may have a meaning that differs from their meaning in the old section: [1990] NZLJ 102, 105 (cf *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 591, per Lord Macnaghten).

The only criticism that may be made of this book is that it does not set out any of the treaties in its appendices. At the very least, the OECD Model Treaty could have been included just to show what a double tax treaty looks like. In other respects, the book is a comprehensive and well written text which will be of great value to students, teachers and tax practitioners.

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