NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Finance and Expenditure Committee

on the

Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill

P O Box 6645
Wellington
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Contents

Summary of recommendations

1. That the longer 3-year limit on tax exemption on accommodation expenditure should apply to any defined project (see 2.3 below).

2. That the term "workplace" should be defined to clearly fit all circumstances including mobile workplaces and we suggest the definition in the Employment Relations Act 2000 (s.5) which defines workplace as "a place where an employee works from time to time; and includes a place where an employee goes to do work" (see 2.7 below).

3. That the word "new" be deleted from the definition of "distant workplace" (see 2.10 below).

4. That when an employer re-estimates the length of a project to take its estimated duration beyond the relevant limit of 2, 3 or 5 years, the tax exemption on accommodation expenditure should continue to apply for the original 2, 3 or 5 years (see 2.12 below).

5. That when an employer re-estimates the length of a project that it originally estimated to be beyond the relevant limit of 2, 3 or 5 years, to take the estimated length under the relevant limit, the tax exemption on accommodation expenditure should become available, backdated to the start of the project (see 2.13 below).

6. That the circumstances of mobile workers such as in passenger and freight road and rail vehicles, ships and aeroplanes be more clearly addressed with regard to exemption of taxation on accommodation expenditure by expressing the entitlement in terms of changes in “accommodation base” (or similar) rather than changes in “workplace” (see 2.14 below).

7. That the entitlement to tax exemption for light refreshments in the form of tea, coffee, water, or similar refreshments apply to all workers, not only to those working at least 7 hours a day (see 2.17 below).

8. That work to cut off further areas of international tax avoidance should be accelerated, and consideration be given to further lowering the 60 percent debt loading threshold for Thin Capitalisation rules (see 3.2 and 3.4 below).

9. That non-resident shareholders with 50 percent or more ownership of a relevant company should be considered to be acting together for the purposes of the Thin Capitalisation rules and the onus of proof should be on the company to demonstrate the contrary (see 3.5 below).

1. Introduction

1.1. This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 330,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. This submission focuses on two aspects of this bill: taxation of allowances; and thin capitalisation.

1.4. We were consulted at an early stage by the Inland Revenue Department (IRD) on the taxation of allowances issues, and made a submission in February 2013 in response to an earlier consultation on the thin capitalisation issue, which covered only inbound investment[1].

1.5. Please note that page, clause and section numbers referred to below are references to the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill ('the Bill') unless otherwise stated.

2. Taxation of allowances

2.1. On the whole we accept the provisions proposed for tax exemption for Accommodation and Meal Payments. We have some points regarding their implementation in the Bill. We have no comment to make on the provisions for Distinctive Work Clothing.

Time limits on accommodation expenditure exemption

2.2. For accommodation, the Bill proposes (see p.3) that:

[1] See http://union.org.nz/policy/ird-review-thin-capitalisation-rules.

Accommodation and accommodation payments provided to employees who are required to work away from their normal work place on secondment or projects will be exempt from income tax:

- for up to 2 years generally, when there is an expectation that the employee will be working away for no more than 2 years;
- this is extended to 3 years when an employee is involved in a capital project; and
- up to 5 years for employees involved in Canterbury earthquake recovery projects.

Accommodation and accommodation payments will also be exempt when there is more than one regular workplace.

2.3. It is not clear why the extension to 3 years is only for a "capital project" (cl. 20, proposed s.CW 16B(4), definition of a "project of limited duration"). There could well be projects of substantial length that do not necessarily have as their principal purpose to "create, build, develop, restore, replace, or demolish a capital asset". Employees could be required to move to work on a large project lasting more than two years such as to design and then implement major organisational change. We **recommend** that the longer 3-year exemption should apply to any defined project.

2.4. It also appears that an overseas posting, which could well last more than two years with an employee fully expecting to return to New Zealand, will not be fully covered by these exemptions.

Definition of 'Workplace'

2.5. The definition of "workplace" in the proposed s. CW 16B(4) appears limited:

a particular place or base—

(a) at which an employee performs their employment duties; or

(b) from which an employee's duties are allocated

2.6. Some places of work such as passenger and freight road and rail vehicles, ships and aeroplanes are continually on the move and do not fit well with “a particular place or base”. Their drivers and crew may have no other “base” for extended periods, but require accommodation and meals at “distant” places.

2.7. We **recommend** that “workplace” should be defined to clearly fit all circumstances including mobile workplaces and suggest the definition in the Employment Relations Act 2000 (s.5) which defines workplace as “a place where an employee works from time to time; and includes a place where an employee goes to do work”.

2.8. A more expansive alternative which could also be considered is in the Health and Safety in Employment Act 1992 (s.2). It defines “place of work” as

> a place (whether or not within or forming part of a building, structure, or vehicle) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee),—
>
> (a) where the employee comes or may come to eat, rest, or get first-aid or pay; or
>
> (b) where the employee comes or may come as part of the employee's duties to report in or out, get instructions, or deliver goods or vehicles; or
>
> (c) through which the employee may or must pass to reach a place of work

Definition of ‘Distant Workplace’

2.9. The definition of a “distant workplace” to be required to be a “new workplace” (cl. 20, proposed s.CW16B(4)) is problematic. For example –

2.9.1. if an employee in a branch office of an employer is from time to time required to work in the head office which is “not within reasonable daily travelling distance of their residence”, the second and subsequent duties would arguably not be at a ”new” workplace and the exemption would not apply.

2.9.2. Proposed section CW 16F (Accommodation expenditure: multiple workplaces) applies when (a) the employment duties of an employee require them to work on an ongoing basis at more than 1 workplace; and (b) 1 or more of those workplaces is a distant workplace. Again, the workplaces may constitute a regular run or small number of workplaces in which the employee repeatedly works and are therefore not “new”.

2.10. We do not see that the word “new” serves a useful function and **recommend** that it be deleted. If it does serve some purpose, the wording should be revised to address that purpose specifically rather than the current ambiguous usage.

Establishing time limits

2.11. With regard to the length of time that the tax exemption applies (2, 3 and up to 5 years respectively as described above), the exemption ends if “the employer’s expectation regarding the length of the period changes, and the total period is expected to be more than 2 [or 3 or 5] years” (proposed s.CW 16C(1(d), 2(d))).

2.12. This appears to have the effect that employees may suddenly find themselves having to pay tax on accommodation expenses simply because their employer has made a (perhaps quite minor) adjustment to its estimate of the life of a project to take it over the proposed threshold. We **recommend** that in these circumstances the exemption should continue to apply for the original 2, 3 or 5 years.

2.13. The entitlement also appears to be asymmetric. If an employer initially estimates the period of the project to be more than the limit of 2, 3 or 5 years but then revises it to be below the relevant limit after the project has started,

the tax exemption does not appear to become available for employees either from that point or backdated to the start of the project. That could lead to an inequitable situation where two subcontractors are working side by side on a project and take the same time to complete their part of it, but their employees would be treated differently in terms of tax exemption simply because one of the employers originally overestimated the time the work would take. We **recommend** that the exemption be made available in these circumstances, backdated to the start of the project.

2.14. We support the provision in proposed s. CW 16F exempting accommodation expenses without time limit when an employee is required to work on an ongoing basis at more than one workplace. However the wording not only has the problem outlined in 2.9.2 above but also suffers difficulties similar to those described in 2.6 above. For workers in passenger and freight road and rail vehicles, ships and aeroplanes it is not so much the place of work that changes as they drive, sail or fly from place to place, but it is their position relative to their normal residence. It is not clear for example that this provision covers a long distance truck driver whose runs cover multiple locations in New Zealand, nor air crew who fly regular routes in New Zealand or internationally because their "workplace" may not change, but it clearly should cover them. The approach taken in the proposed s. CW 17CB (5)(c) with regard to meals (cl.22) which refers to changes in "accommodation base" rather than "workplace" may resolve this problem and we **recommend** it be considered, although again the word "new" may be problematic: "different" is more neutral and captures the required meaning.

Provision of food

2.15. We agree in general with the provision regarding meals, which are covered in cl. 22:

> The Bill proposes that the full amount of meal payments will be exempt, if the meal payment is linked to work-related travel (for up to the 3 months). The full amount of meal payments and light refreshments

outside of work-related travel (such as conferences) will also be tax exempt.(p.3)

2.16. However we object to provisions in the proposed s. CW 17CB (2)(c) which covers “light refreshments in the form of tea, coffee, water, or similar refreshments, provided for the employee”. We cannot see why this should be limited to an employee who “normally works a minimum of 7 hours a day” (proposed s. CW 17CB (2)(c)(i)). Part time workers have the same needs for such refreshments, and are entitled to a break for that purpose if they work for more than 2 hours (see s. 69ZD of the Employment Relations Act 2000). Proposed changes under the Employment Relations Amendment Bill will disentitle some workers.

2.17. Provision of such refreshments is unlikely to be costly so any exemption will have little fiscal impact. It would also be impractical and almost impossible to enforce, particularly for casual workers. It is niggardly to exclude such workers and we cannot see any logic for it. We **recommend** that the entitlement apply to all workers.

3. Thin capitalisation

3.1. We have no detailed comment on these provisions. However we reiterate the views we expressed in our earlier submission on this subject, regarding inbound investment.

3.2. We welcome the work being done to reduce tax avoidance by overseas investors in New Zealand in order to move a little in the direction of restoring fairness to the New Zealand tax system and preventing the erosion of the tax base. However the effort needs to go well beyond addressing thin capitalisation, in which investors avoid tax by loading their companies with debt. Areas of international tax avoidance needing more work include transfer pricing and the techniques used by companies like Google and Facebook to avoid tax in New Zealand.

3.3. With regard to the proposals to tighten the rules around thin capitalisation, we consider the approach being taken is too cautious.

3.4. Consideration should have been given to further lowering of the 60 percent debt loading threshold.

3.5. The burden of proof as to whether overseas investors are “acting together” is placed on the IRD rather than on the investors, which immediately means limiting effectiveness due to public-sector resourcing constraints and the opportunities for legal manoeuvring and obstruction. For example it may be difficult to determine whether non-residents have entered into an arrangement setting out how to fund a company. We **recommend** that non-resident shareholders with 50 percent or more ownership of a relevant company should be considered to be acting together for the purposes of these rules and the onus of proof should be on the company to demonstrate the contrary.

4. Conclusion

4.1. We have focussed on two areas covered by this Bill: Taxation of allowances and Thin Capitalisation.

4.2. Our comments on Taxation of allowances are largely about difficulties with wording although on one matter, that of light refreshments such as tea, coffee or water, we have submitted that the proposals are niggardly in not applying the taxation exemption to all workers.

4.3. Regarding Thin Capitalisation, we agree with the direction in which Inland Revenue is moving, but consider it needs a more direct approach to determining companies of interest, that the debt threshold should be lowered further, and that more work needs to be done in preventing tax avoidance by overseas investors.

4.4. Thank you for the opportunity to comment on this Bill.