Worth a look

Henry Brandts-Giesen considers the new 'Look Through Company' regime in New Zealand

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The New Zealand government has recently introduced a new company regime to take effect from 1 April 2011.

Officially the new type of company is referred to in the legislation as a 'look through company'. This is perhaps unfortunate, as it may convey an impression that it is a company in which the corporate veil of limited liability is somehow compromised. However, readers can be assured that the moniker is simply a reference to the fiscal transparency of the entity.

It is expected that the new regime will further enhance New Zealand's credentials as a jurisdiction for international wealth structuring (holding assets that are not situated in New Zealand for the benefit of people who do not live in New Zealand). New Zealand is already well established as providing tax neutral legal architecture through the use of New Zealand 'foreign' trusts and limited partnerships. However, one of New Zealand's points of difference is that it is an OECD member jurisdiction and therefore distinct from the more well-known international financial centres that offer similar solutions. New Zealand is also well-positioned in time and space to the rapidly growing Asia-Pacific region.

Historical context

New Zealand company law is derived from English common law and statute.

Historically, companies registered in New Zealand have been taxed in New Zealand on their worldwide income at the prevailing tax rate of the time. The company tax rate for income in New Zealand is currently set at 28 per cent after being reduced from 30 per cent by the present government in April 2010.

Basic features of the new regime

A 'look through company' will be an orthodox New Zealand limited liability company established and constituted pursuant to the *Companies Act 1993*.

The new legislation, however, allows companies that meet certain criteria to be treated differently for tax purposes than previously. Such companies are available for use by both residents and non-residents of New Zealand.

Shareholders of existing and newly established New Zealand registered companies can elect to become a 'look through company'. The company must:

- have five or fewer shareholders
- be New Zealand resident for tax purposes
- issue only shares that have the same voting and participation rights, and
- have only natural persons or trustees as shareholders.

New Zealand resident shareholders of 'look through companies' will pay tax on the company's profits and use losses at their marginal tax rate. The highest marginal rate of income tax applicable to New Zealand resident individuals was recently reduced from 38 per cent to 33 per cent.

The income, expenses, tax credits, rebates, gains and losses of a 'look though company' will be passed on to its shareholders pro rata with their shareholdings in the company. This creates a fiscally transparent vehicle identical in its tax treatment to the New Zealand limited partnership. Like a limited partnership, a 'look through company' retains its identity as a registered entity and keeps the benefits of limited liability and separate legal personality. The existing corporate obligations and benefits under New Zealand company law are preserved.

The look through treatment applies for income tax purposes only. There is no general capital gains tax in New Zealand nor are there any inheritance or estate taxes or stamp duty land taxes.

In a fiscal sense, the shareholders of the 'look through company' are regarded as holding company assets directly and carrying on the activities of the company personally. Therefore, in the normal course of events, a sale of shares in a 'look through company' is treated as a sale of the underlying asset.

Uses for international wealth structuring

The new 'look through company' regime will provide significant benefits to non-residents of New Zealand who use New Zealand vehicles for international wealth structuring purposes.

Section BD 1(5)(c) of the *Income Tax Act 2007* provides an exemption from tax in New Zealand on income derived by a non-resident provided that income does not have its source in New Zealand. This means that a foreign shareholder of a 'look through company' that only receives foreign sourced income will not be subject to tax in New Zealand.

While the new regime offers most of the tax benefits of a limited partnership it also provides the widely recognised legal form of a company, and will complement the New Zealand limited partnership and 'foreign' trust for international wealth structuring.

In some cases it will be used in conjunction with either or both of those vehicles rather than as an alternative.

For example, where the entire issued share capital of a 'look through company' is owned by the trustees of a New Zealand 'foreign' trust (or a Jersey, Cayman or Singapore trust for that matter) then the company could hold assets or trade or otherwise earn income outside New Zealand without any withholding for tax in New Zealand.

Similarly, a New Zealand 'look through company' could be the limited partner of a New Zealand limited partnership. Provided the limited partnership does not derive New Zealand sourced income and the 'look through company' as limited partner does not have any New Zealand resident shareholders or other New Zealand sourced income then there will be no withholding for tax in New Zealand.

The 'look through company' regime also presents the international market with an OECD alternative to the more well known but (often unfairly) stigmatised 'offshore' companies or 'international business companies' (IBCs) provided by Jersey, British Virgin Islands, Cayman and so forth. In practice, a New Zealand 'look through company' is more of a Delaware LLC-style entity than an IBC, but the likely uses will be similar – trading, investment holding, captive insurance, introducing brokering and perhaps even closely held, closed ended collective investment funds.

'Look though companies' (and indeed any other types of New Zealand registered entities) that undertake financial services (which may include 'Introducing Brokers') will be required to register on the newly launched New Zealand Financial Service Providers Register.

Other new developments from New Zealand

It is also expected that in, due course, all New Zealand companies will be required to have a New Zealand resident director or 'agent'. It is not yet clear whether this will be a fully fledged directorship requirement or a more watered down agency or company secretary requirement – and if the latter what will be powers and duties of that office. This amendment to the law is long overdue and will assist to protect the reputation of the jurisdiction from damage by nefarious persons and organisations.

In other news, the current New Zealand government led by Prime Minister John Key (a former Merrill Lynch senior executive) has also announced its intentions to establish New Zealand as a centre of excellence for international fund administration and domicile.

Back and middle office fund administration is already carried out in New Zealand. There can be time zone advantages for hedge funds trading Wall Street and Chicago Mercantile Exchange list securities in having daily pricing carried out in New Zealand. The business day in New Zealand starts just as those exchanges are closing thereby allowing net asset value calculations to be processed and reported to investors before the markets reopen again.

Similarly the cost base in New Zealand is considerably lower than in other jurisdictions, but levels of quality assurance are generally high. Modern technology and flexible working patterns now means that the tyranny of distance and time is no longer an issue. This is even less of an issue where the funds have an Asia-Pacific regional theme.

It is widely hoped that this nascent fund administration industry will be enhanced by the implementation of UCITS or a similar gold-standard fund passport, which would allow funds to not only be administered but also established, domiciled and regulated in New Zealand.

The author will update readers as and when government announcements are made.