DOING BUSINESS IN AUSTRALIA

– a tax perspective

For many New Zealand businesses, Australia is the first port of call for dipping the toes in the water for global expansion plans.

Most of us want to ensure that we get the maximum return for every dollar of investment that we make, and one of the prime considerations in any foreign jurisdiction, not just Australia, is how much the local taxing authorities will want to take from us, and what impact this will have on the ultimate investment return.

LEVEL OF PRESENCE IN AUSTRALIA

My first question to clients looking to expand offshore, is what level of presence do they require in the foreign jurisdiction as this will dictate the type of structure required and the resulting compliance implications for the business.

The level of presence in Australia for example, usually determines Australia's right to tax the income and this will be on the basis of whether or not your business is considered to have a permanent establishment ("PE") in Australia.

If you either incorporate an Australian company or establish an Australian based office for your existing NZ business entity, there is little doubt that you will have an Australian PE – which will give the Australian tax authorities the right to tax any profits attributable to that PE.

DOUBLE TAX TREATY

What is not so clear however and is often overlooked, is that the Double Tax Treaty ("DTA") agreement between NZ and Australia also contains a provision where your business will be deemed to have an Australian PE where you have a person based in Australia who has the authority to "substantially negotiate or conclude" contracts on behalf of your business.

Once Australia gains a taxing right, your ultimate cost of doing business offshore from a taxation perspective can increase to 53%. In other words, for ever dollar of income you earn, you have 47 cents left over once the Australian and NZ tax authorities have taken their share.

BUSINESS STRUCTURES

Typically, a NZ business looking to expand offshore will utilize one of two common structures mentioned earlier – an Australian company usually 100% owned by the NZ parent company or the NZ company will trade directly in Australia, commonly referred to as a branch operation.

Under either of these structures, Australian income tax of 30% is payable, and essentially this is your total income tax cost if the tax paid profits are simply to be retained in your business to fund ongoing operations. However, should you wish to repatriate the Australian income to your NZ shareholders, usually via a dividend payment, a further 33% withholding tax must be paid to the NZ Inland Revenue at the time the dividend is paid. As a consequence, your total income tax cost has now increased to 53%.

However all is not lost, there are alternative structures available. For example, the relatively new look through company ("LTC") regime provides an opportunity to still limit your total tax from doing business across the ditch to 33%. The LTC trades similar to a NZ company branch operation. It still pays income tax of 30% in Australia, however due to the look-through nature of the LTC from a NZ taxation perspective, the LTC shareholder (often a family trust) has the direct obligation to pay any NZ income taxes on the Australian sourced income, gets to claim a credit for the Australian tax paid to the extent of the NZ taxes payable on that income, and in a trustee income situation (a trust shareholder retaining the income as trustee income) only requires a top up tax of 3% to be paid to the NZ IRD. Net cash in the hand to you is therefore 67 cents.

The LTC structure does have a number of limitations including a restriction on the maximum number of counted owners to five, however it offers an attractive alternative to the more common structures, if you can tick all the boxes. Should the LTC scenario not work for you, there are a number of other investment vehicles to choose from. At the end of the day, seek the advice of a suitably qualified person to assist you with structuring your business expansion appropriately.

As a tax specialist my views are naturally biased towards minimizing the total tax impact to your business bottom line however taxation mitigation should certainly not be the sole focus of your structural decisions and the numerous commercial issues that your business will face entering a foreign trading jurisdiction also need to be taken into account. ■

Richard Ashby
TAX SPECIALIST
GILLIGAN SHEPHERD