BILL COMMENTARY

Digital Services Tax Bill

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Digital Services Tax Bill – commentary on the Bill

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Overview of the Bill

Overview

The Digital Services Tax Bill (the Bill) proposes to introduce a digital services tax (DST) for the purposes of taxing the "digital economy". The digital economy refers to economic activity that is significantly reliant on information and communication technology.[1]

There has been significant international concern over the under-taxation of the digital economy, and digital multinational enterprises in particular. This under-taxation is mostly caused by deficiencies in the current international tax rules, which have not kept up with digitalisation and other modern business developments.

The digital economy provides many benefits to New Zealanders, and it is an important source of future economic growth. However, its under-taxation impacts the sustainability of Government revenues and the fairness of the tax system. It also distorts investment in favour of digital multinationals, which pay lower worldwide income tax compared with other industries.

The Government is committed to ensuring everyone pays their fair share of tax, including digital multinationals. Achieving this will require changes to the current tax rules. In June 2019, the Government issued a discussion document: *Options for taxing the digital economy*[2] (the discussion document). In the discussion document, the Government outlined two options for taxing the digital economy:

- New Zealand's preferred option is to change the current international income tax rules, (usually referred to as the "international tax framework") via an internationally agreed solution. Jurisdictions, including New Zealand, have been discussing different ways of achieving this via the Inclusive Framework, led by the Organisation for Economic Co-operation and Development (OECD).
- The other option is to apply a unilateral DST to certain digital activities. A DST taxes, at a low rate, the gross revenue attributable to a jurisdiction received by certain highly digitalised businesses.

While the Government remains committed to an internationally agreed solution, it wishes to introduce a DST Bill so it can be ready to quickly impose a DST if jurisdictions cannot make sufficient progress towards implementing the OECD solution. The DST Bill proposes that the DST commences on 1 January 2025. However, the Government can defer the commencement date for up to five years through Orders in Council. The Government's intention is that this commencement date would be deferred if sufficient progress is made

[1] Refer to OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, for more information on the digital economy, its business models, and key features.

[2] Options for taxing the digital economy (ird.govt.nz)

on implementing an acceptable global solution. Once such a solution was in place, the intention is to ask Parliament to repeal the Act. Accordingly, this Bill does not represent a definitive commitment to impose a DST.

The measures proposed in this Bill will provide the legislative framework for a DST in order to address the issue of adequately taxing the digital economy.

The DST proposed in this Bill (the New Zealand DST) is a flat tax charged at 3% on a group's gross revenue attributable to New Zealand from in-scope activities. It is levied at the group level and regardless of the legal separation of the various group members.

The application of the New Zealand DST to a group involves these steps:

- Determine if the DST applies to the group. The DST would apply if:
  - **Step 1** – one of the group's business services includes any of the activities defined to be taxable digital services; and
  - **Step 2** – the group's global revenue from in-scope activities exceeds €750 million per year.
- If the DST applies, the group would calculate and pay its DST liability. This would involve these further steps:
  - **Step 3** – the group determines the amount of its revenues that are attributable to New Zealand users or New Zealand land from its in-scope activities;
  - **Step 4** – the group calculates the DST on those attributable revenues at the rate of 3%. However, the DST would be nil if the group's digital services revenue attributable to New Zealand is less than $3.5 million per year; and
  - **Step 5** – the group returns and pays the DST to Inland Revenue by the due date.

Summary of key features

Taxable digital services

The New Zealand DST is intended to apply to services resulting from digital business activities that can be scaled up without a physical presence in New Zealand, and whose value is dependent on the size and active contribution of their user base (although these are not specific requirements of the Bill). The Bill deems these in-scope activities as taxable digital services and are defined by reference to specific business models.

These core taxable digital services are:

- intermediation platforms
- social media and content sharing platforms, and

- internet search engines.

An activity that is incidental to an in-scope activity will also be a taxable digital service.

To provide certainty, the Bill also details activities or services that are out of scope of the New Zealand DST.

Digital services revenue

All revenue that is connected to a taxable digital service is digital service revenue for the purposes of the New Zealand DST. For example, it would apply to revenue from advertising provided through social media platforms and search engines, and commissions charged on transactions carried out through intermediation platforms.

The revenue is the gross amount received, without any deduction for expenses. This reflects the fact that a DST is charged on the supply of the relevant services. It is not charged on the profit made by the supplier for those services.

Digital services group

A digital services group is a group of all the companies included in the consolidated financial statements of an ultimate parent entity. Where an ultimate parent entity does not prepare consolidated financial statements, a digital services group is defined on the basis of deemed consolidation as if that ultimate parent entity did prepare consolidated financial statements.

A digital services group would be liable for DST where the revenue of the consolidated accounting group satisfies the global threshold. This is where global revenue from taxable digital services is €750 million or more for the revenue year.

Calculating the DST liability

The DST would be paid on the revenues attributable to New Zealand users or New Zealand land at a rate of 3% if those revenues total $3.5 million or more per year.

Background

The New Zealand DST proposed in this Bill is designed to ensure digital businesses pay tax reflecting the value they derive from New Zealand users. It is a response to problems with the current international income tax framework.

Under the current framework (formed by our double tax agreements (DTAs) and related OECD guidance) a non-resident's business income is only taxable in New Zealand if:

- the non-resident has a sufficient taxable presence in New Zealand; and

- some of the multinational's profit is attributable to that taxable presence.

For a non-resident entity to have a taxable presence, it must operate in New Zealand either through a New Zealand resident subsidiary (in which case the subsidiary is taxable on its income) or through a permanent establishment (PE) of a non-resident group member. For a PE to exist, the non-resident must have some kind of physical presence in New Zealand, for example, through a fixed place of business, or a dependent agent that enters into contracts on its behalf. This is generally referred to as the nexus requirement.

If a non-resident does have a PE in New Zealand, then under our DTAs New Zealand can only tax the income that is attributable to that PE. Most jurisdictions follow detailed guidelines published by the OECD on how to attribute income to a PE. The guidelines aim to attribute income to a PE by reference to the value generated by the non-resident through that PE, compared to the value it generates overseas. To do this, the guidelines generally look at the assets of the PE and the activities carried on through the PE by its personnel. The effect of this is that a non-resident's business income is only taxable in New Zealand under our DTAs to the extent the non-resident has assets or personnel here. If the non-resident has no assets or personnel here, they are not taxable on their New Zealand income. These are referred to as the profit allocation rules. While the rules limit New Zealand's ability to tax non-residents that do business here, they also benefit New Zealand by limiting the rights of other jurisdictions to tax New Zealanders that do business in those jurisdictions.

Since these nexus and profit allocation rules are contained in New Zealand's DTAs, the Government cannot change them unilaterally – it would require the consent of the other jurisdictions that are party to these DTAs. In addition, the nexus and profit allocation rules in most DTAs are based on a common standard published by the OECD or the United Nations, which in turn reflect a consensus on international taxation established nearly a century ago. It would be difficult to fundamentally diverge from these nexus or profit allocation standards in our DTAs (although most DTAs diverge in some less significant respects).

Policy issue

The main problem with this international tax framework is that it was established nearly a century ago and has not kept up with modern business practices. The digitalisation of the economy now means that a non-resident company can be significantly involved in the economic life of New Zealand without being subject to income tax here.

The OECD has identified that this issue is caused by three main factors:

Scale without mass – Digital companies can transact with customers over the internet without having the physical presence (ie, a PE) required by the international tax framework for income tax to be charged in the users' or customers' jurisdiction. This is a problem for both the nexus and the profit allocation rules – even if the digital company was deemed to

have a PE in the jurisdiction, the lack of activities carried out in the jurisdiction by the multinational means there would be no profit to attribute to that PE.

User value creation – Even where a digital company does have a PE, the profit allocation rules do not recognise the new kinds of value that digital companies can generate in their market jurisdictions. Digital companies can derive significant value from the active participation of their users, from data generated by the users and from network effects. None of this value is recognised by the current profit allocation rules.

Intangible assets – Much of the value of digital companies can be attributed to intangible assets, such as trademarks and other intellectual property. These intangibles are hard to value. They are also mobile, meaning the income attributable to them can be easily moved to low tax jurisdictions.

While not all these issues with the international tax framework are limited to digital companies, they are all exacerbated by digitalisation. The problems with the international tax framework in relation to user value creation and scale without mass are particularly acute for digital companies. For this reason, the DST proposed in this Bill is aimed at certain highly digitalised business activities or services that generate significant value from active user participation and network effects. This follows the approach of other jurisdictions that have adopted a DST.

Commencement date

Commencement date

Clauses 2 and 4

Summary of proposed provision

The DST Bill would come into force on either 1 January 2025, or a later date fixed by Order in Council, up to 1 January 2030.

Background

While the Government remains committed to a multilateral solution to the problem of taxing highly digitalised businesses, it also wants to be prepared if the multilateral solution takes an unacceptable amount of time to implement or otherwise fails to take effect in practice.

Providing for a flexible commencement date balances the need to provide certainty for taxpayers while allowing the Government to quickly react to changing circumstances, including progress at the OECD, the actions of similarly situated jurisdictions and the overall international context.

Detailed analysis

If enacted, the DST Bill will commence on 1 January 2025. This date may be deferred by Order(s) in Council on the recommendation of the Minister of Revenue.

Constitutional best practice requires limitations on the ability of the Executive to alter the will of Parliament. This means the DST Bill cannot propose an unlimited ability to defer the application date by Order(s) in Council. Consequently, a backstop commencement date is necessary. To conform with best practice, the DST Bill must commence by 1 January 2030. This five-year backstop would allow the Government a reasonable length of time to defer the imposition of the DST and repeal the DST in favour of a satisfactory multilateral solution.

The DST would be imposed for DST revenue years starting on or after the 1 January that follows the commencement date – this would be 1 January 2030 at the latest.

Taxable digital services

Taxable digital services

Clauses 5 and 11(1)

Summary of proposed provision

The Bill proposes that only a digital services group's revenues from taxable digital services are relevant for determining whether a group is subject to the DST.

Background

Digital businesses generate significant value from the active participation of their users, from data generated by the users, and from network effects. None of this value is recognised by the current income tax profit allocation rules. The New Zealand DST would address this issue by taxing the services or activities provided by businesses whose value is dependent on the size and active contribution of their user base (although this is not part of the legislative test).

Detailed analysis

The Bill provides a list of the types of business activities or services that would be within scope of the New Zealand DST. Clause 11(1) defines these in-scope activities or services as "taxable digital services".

The core categories of taxable digital services are detailed in clause 11(1)(a)–(c) and are the provision of:

(a) an intermediation platform

(b) a social media and content sharing platform, and

(c) an internet search engine.

In addition to these categories, clause 11(1)(d)–(f) also details activities that are deemed to be taxable digital services where there is a nexus or connection with a taxable digital service. These are as follows:

- advertising on, linked to, connected with, or facilitated by, a platform or engine detailed above in (a)–(c)
- activities in relation to user-generated data, gathered in connection with a platform, engine, or advertising described above in (a)–(c), and

- any activity carried on, that is incidental to a platform, engine, or advertising described above in (a)–(c).

Online platform

Under clause 5 of the Bill, an online platform means a website, application or any other electronic medium through which data or digital content is collected, viewed, consumed, delivered or interacted with. This definition is intended to reflect the ordinary meaning of online platform.

Intermediation platform

An intermediation platform is defined in clause 5 of the Bill. When interpreting this definition businesses should consider whether:

- the platform is an online platform (as detailed above)
- the platform facilitates the sale by users of goods or services to other third-party users, and
- a main purpose of the platform is to facilitate the sale of goods or services offered by third party users.

If all three conditions are met, then a business is providing an intermediation platform.

Facilitation of the sale of goods or services between users

This condition will be satisfied when the online platform enables users to sell or advertise goods or services to third party users. This does not include e-commerce retailers or online sales directly to users. It is limited to situations where the online platform's business acts as an intermediary between users. In other words, it only captures platforms that provide an intermediation service for users to sell their own goods or services to other third-party users including platforms that facilitate peer to peer transactions (such as peer to peer gambling).

Goods and services have the same meaning as that in the Goods and Services Act 1985. Therefore, it will capture most of the items or services listed by users on online platforms. This includes transportation and accommodation services.

The types of business models covered are intended to be wide and it is irrelevant whether:

- the platform facilitates transactions between business to business, business to consumer or consumer to consumer (including peer to peer)
- the platform facilitates the final transaction (ie, payment and delivery) on its online platform or where the platform service is limited to allowing users to advertise goods or services for sale between themselves, or

- the platform is merely an intermediary for users or if it also regulates the platform's content and/or offers significant value adding services like delivery.

Example 1

Barter Us allows users to list secondhand goods for sale on an online platform and charges a fixed listing fee for each item. Interested parties then contact the seller through the platform's communication channel. If a sale and purchase is concluded, the users arrange payment and collection. The payment and collection of the goods is independent of Barter Us because the platform does not provide this service.

Barter Us meets the second condition for being an intermediation platform because it enables users to list goods for sale to other third-party users.

A main purpose of the platform

This condition will be satisfied when a main purpose of the online platform is to enable or facilitate the sale of goods or services between users.

This condition is intended to exclude businesses that do not actively facilitate the sale of goods or services between users but instead displays advertising on their websites as part of their ordinary course of business.

Example 2

Xtreme Fishin' provides a quarterly digital magazine to its audience of recreational game fishers. One of the revenue sources for the magazine is advertisements.

Xtreme Fishin' would not meet the definition of an intermediation platform because it does not actively promote or facilitate the exchange of goods or services between users as a main purpose. Xtreme Fishin's main purpose is to provide a digital magazine.

Social media and content sharing platform

A social media and content sharing platform is defined in clause 5 of the Bill. When interpreting this definition, businesses should consider whether:

- the platform is an online platform, and
- a main purpose of the platform is to promote interaction or facilitate the sharing of content between users.

User interaction or sharing of content

This condition will be satisfied when the online platform promotes interaction or facilitates the sharing of content between users.

The meaning of user interaction or sharing of content is intended to be wide and includes:

- users joining and creating networks
- communicating with other users
- organising events or meet-ups with other user.; and
- posting or displaying content for other users.

While "content" has not been defined in the Bill, it is intended to have a wide meaning and includes text and media content such as images, videos or audio. The content shared by users does not need to be user generated and can originate from a third party.

A main purpose of the platform

This condition would be satisfied when a main purpose of the online platform is to promote interaction or facilitate the sharing of content between users. This will be determined by reference to the facts and circumstances of the online platform.

However, the following indicators may be useful in showing that the promotion of interaction or sharing of content between users is a main purpose of the platform:

- the value of the business is highly dependent on the number of users engaged on the platform
- interaction with other users is a key factor in retaining existing users and attracting new users, or
- the business spends resources researching user behaviour and network effects.

Example 3

Network Us is an online platform that actively encourages users to join or create public networks and interact with other users. The large number of users on Network Us is a key reason in retaining existing users and attracting new users.

Network Us is a social media and content sharing platform because:

- it promotes user interaction by encouraging users to engage in user networks, and

- one of its main purposes is to promote user interaction as indicated by the value of Network Us being dependent on user interaction.

Example 4

Inflowenz is an online platform that allows users to share videos on its platform. The large number of users on Inflowenz is a key reason in retaining existing users and attracting new users.

Inflowenz is a social media and content sharing platform because:

- it facilitates the sharing of content between users, and
- one of its main purposes is to facilitate the sharing of content between users as indicated by the value of Inflowenz being dependent on the number of users on the platform.

Internet search engine

An internet search engine is defined in the Bill as an online platform that allows users to search the internet for digital content of multiple unrelated websites.

Internal search functions

Websites that provide a search function to allow users to navigate information solely on that website, rather than providing links to third party websites, are not included in the definition of an internet search engine. These search functions are not a distinct activity from the rest of the website or business but rather are an incidental activity that helps to support the main business activity.

An internal search function would not fall within the ordinary understanding of an internet search engine business in any case. A search engine business will in principle search the whole of the internet and will continuously collect data to improve the performance of the search engine. In contrast, an internal search function exists primarily to enable the user to find content on a particular website.

There may be situations where a website’s search function displays search results from third-party websites. Generally, the underlying search technology is provided by a third-party rather than the website owner. In those situations, it is the third-party search technology provider, rather than the website owner, that is providing an internet search engine and thus performing a taxable digital service.

Connected advertising activity

Advertising on, linked to, or connected with an intermediation platform, social media and content sharing platform or internet search engine is deemed to be a taxable digital service under clause 11(1)(d) of the Bill.

The advertising function is not in itself a separate taxable digital service but rather it forms part of the underlying in-scope activity to which it is connected. This reflects the fact that advertising generally forms one of the main revenue streams in digital business models and therefore needs to be included within the New Zealand DST. To capture these revenue streams, the scope of advertising is deliberately broad and is intended to capture the full range of services in the advertising supply process, apply irrespective of the form of advertising, and disregard whether the advertising is highly targeted to a specific type of user or to a broader audience.

Example 5

Network Us provides a social media and content sharing platform. It allows users to access the platform free of charge and generates its revenue from selling advertisement slots to third parties that are displayed to users on its platform.

Network Us facilitates the display of online advertising because it sells advertising space on its platform to third parties. The revenue it generates from these advertising space sales is the only revenue source for the business.

Therefore, the online advertising activity of Network Us would form part of its taxable digital services.

User-generated data

Digitalised businesses can gather a considerable amount of data based on a user's profile, their interaction with the digital interface and through passive monitoring (eg, user location tracked through mobile geolocation data). This data can result in useful information that can be used by the business or aggregated and sold or licensed to third parties for exploitation in their own businesses.

Because user-generated data can give rise to an important revenue stream for some digitalised businesses, the gathering of such data in connection with an intermediation platform, social media and content sharing platform, or internet search engine, or advertising with a link to these digital activities, is deemed to be a taxable digital service under clause 11(1)(e) of the Bill.

Incidental activity

Under clause 11(1)(f) of the Bill, where a business undertakes an activity that is incidental to the provision of an intermediation platform, social media and content sharing platform or internet search engine, it is deemed to be part of the taxable digital service.

An activity is incidental to a taxable digital service if the activity would not have occurred but for the business carrying on a main purpose of providing the taxable digital service. The GST principles of incidental supplies provide analogous analysis to this concept of incidental activity. This test is further described below in relation to clause 11(2)(a).

Example 6

Pōhutukawa is an intermediation platform that provides an optional delivery service users can access as part of facilitating the sale and purchase of goods between users. This is incidental to providing the intermediation platform because Pōhutukawa would not have carried on a delivery service if it was not also providing the intermediation platform and providing the intermediation service is the main purpose of the platform.

Therefore, the delivery function is considered to be part of the taxable digital service of providing an intermediation platform.

Exclusions from taxable digital services

Clause 11(2)

Summary of proposed provision

The Bill proposes that specific digital services or activities are excluded from the definition of taxable digital services.

Background

The New Zealand DST proposed in this Bill is targeted at highly digitalised activities or services that generate significant value from active user participation. To provide certainty for businesses, the Bill details activities that are specifically excluded from being within scope of the New Zealand DST.

Digital activities or services have generally been excluded because the business model does not generate significant value from active user participation or network effects.

Detailed analysis

The DST proposed in this Bill would be narrowly targeted at certain highly digitalised business models. In particular, it is focused on business models that derive significant value from active user participation.

Clause 11(2)(a)–(c) of the Bill specifically excludes the following activities or services from the meaning of taxable digital services:

- a taxable digital service detailed in clause 11(1) of the Bill where the activity is merely incidental to a supply of goods and services that is not a taxable digital service
- online financial marketplace activities that are supervised or regulated under specified New Zealand laws (Financial Markets Conduct Act 2013, Financial Markets Authority Act 2011, Financial Service Providers (Registration and Dispute Resolution) Act 2008 or Banking (Prudential Supervision) Act 1989) or are supervised or regulated under corresponding legislation in another jurisdiction, and
- loyalty programme online platforms.

The list in clause 11(2) is intended to provide certainty for businesses where it not clear whether the activities or services they provide may satisfy one of the definitions of taxable digital services in clause 11(1).

Merely incidental

Clause 11(2)(a) overrides clause 11(1) of the Bill and excludes a digital service from the meaning of taxable digital service where that activity is merely incidental to the supply of goods and services that are not a taxable digital service.

In determining whether an activity is merely incidental to an out-of-scope activity, a business may consider the following:

- Does the activity generate significant value for the business?
- Do users or customers engage with the business primarily for the purpose of accessing the activity?
- If the business no longer provided or facilitated the activity, would people continue to engage with the business?
- Would it be viable for the business to provide the activity as an independent offering?

Ultimately, whether an activity is merely incidental to an out-of-scope activity will depend on the particular facts and circumstances of each business.

Example 7

Content Printing publishes news articles in both a digital and printed form. The digital format allows people to leave comments under articles and interact with each other. People primarily access the website to view news stories and Content Printing generates value from this facility.

While allowing users to post comments on the website has elements of a social media platform, this activity would be considered merely incidental to Content Printing's main purpose of publishing news articles (which is an out-of-scope activity). People do not primarily access the digital platform to interact with users and Content Printing could continue to operate its business without this functionality.

Financial marketplace activities

Clause 11(2)(b) of the Bill excludes online financial marketplace activities that are supervised or regulated under specific New Zealand legislation, or the corresponding legislation in another jurisdiction. These activities are all related to markets and financial services. This exclusion reflects that such activities are regulated industries that undertake activities akin to the direct sale of services. The fact that these activities have shifted to digital platforms over time as a more efficient means for participants to trade is therefore not considered an activity that should be captured by the New Zealand DST.

This exclusion therefore covers recognised financial markets and exchanges (eg, NZX, ASX) and electronic fund transfers provided via online platforms (eg, credit cards, EFTPOS providers).

Loyalty programmes

Clause 11(2)(c) of the Bill excludes loyalty programmes accessed via online platforms from being within the definition of taxable digital services where it is part of a digital services group and incidental to the supply of goods and services.

Loyalty programmes of this nature are generally a marketing strategy designed to encourage customers to continue to shop at or use the services of a business associated with the programme. Value derived from loyalty programmes that are incidental to the supply of goods and services is not connected with users but rather the underlying business service to which the loyalty programme relates.

Other exclusions

Clause 11(2) of the Bill does not explicitly exclude the following activities or services, but they are intended to be out of scope of the New Zealand DST.

E-commerce

E-commerce or online sales generally (including the online sale of digital content such as software or music directly by the provider) are not within the meaning of taxable digital services.

The value that businesses generate by selling goods or services via e-commerce is not linked to user-generated value. Businesses are not relying on user participation to sell their goods or services online but use the platform to market to a customer base and generate sales revenue.

E-commerce would not come within the definition of an intermediation platform in clause 5 of the Bill because businesses are originating the sale of goods and services rather than facilitating transactions between users.

Example 8

Victory Co manufactures sporting products and sells these goods on its e-commerce platform. This service would not be a taxable digital service and thus out of scope of the New Zealand DST.

Provision of online content

The New Zealand DST would not apply to television, film and music streaming services, supply of digital news articles and video game subscription services (including online games with multiple participants). These business models are not relying on user participation to generate significant value. Whether a content provision service has a large number of users on the platform is irrelevant because it is the content available on the platform that is the key factor in attracting and retaining users.

The provision of online content would not come within the definition of social media and content sharing platform in clause 5 of the Bill because it is the business providing the content to consumers on its platform, not users sharing it with other users.

Television and radio broadcasting

Where television or radio content is made available online this would be considered to be the provision of online content (discussed above). This exclusion is consistent with the principle for excluding business models from the DST that do not derive significant value from user interaction.

Digital services revenue

Digital services revenue

Clauses 5 and 10

Summary of proposed provision

Under the Bill, all global revenues gross of expenses, losses and other deductions that arise in connection with in-scope activities are used for determining whether a digital services group is subject to the New Zealand DST.

Background

The New Zealand DST proposed in this Bill is targeted at highly digitalised activities or services defined as "taxable digital services". Therefore, the revenues the DST is levied on would be the revenues that result from the supply of in-scope taxable digital services.

Key features

A digital services group would need to determine its global revenue from activities or services provided to New Zealand users or connected to New Zealand land. The Bill proposes that group revenue is calculated on a consolidated basis to determine whether the group is subject to the New Zealand DST. These revenues are termed digital services revenue and consist of all the revenues that arise in connection with a taxable digital service.

Revenue for the purposes of the New Zealand DST is the gross revenue before any expenses, losses or other deductions. Digital services groups would use the gross revenue figures that are recognised in their consolidated financial statements for the period.

Where there is a connection between a revenue stream and a taxable digital service, then the revenue is taxable digital services revenue no matter how it is described. Whether a revenue stream is connected to the taxable digital service depends on the particular facts and circumstances of the business.

If the group carries on both taxable digital services and out-of-scope business activities, then only the revenue from taxable digital services would be included. Accordingly, the group would need to apportion its total revenues between in-scope taxable digital services and out-of-scope activities. Any apportionment made would need to be done on a fair and reasonable basis.

Detailed analysis

Clause 10 of the Bill defines taxable digital services revenue as the gross revenue arising in connection with a taxable digital service. A deduction for expenses, losses or other items is not permitted in the calculation of taxable revenue.

Revenue is intended to mean the gross amount received before deductions, as recognised in the digital services group's consolidated financial accounts prepared in accordance with acceptable accounting standards or principles (this is further explained in the *Digital Services Group* section of this commentary). This reflects that the DST proposed in this Bill is charged on the supply of the relevant services not on the profit made by the supplier of those services, and that using gross revenue figures recognised in the groups consolidated financial accounts will reduce compliance costs.

Connection with a taxable digital service

For revenue to be taxable digital service revenue it must arise in connection with a taxable digital service. Where this required connection occurs, it is taxable digital services revenue no matter how it is described by a business. This is intended to protect against arrangements that may attempt to artificially split out the revenue stream from the underlying taxable digital service.

Ultimately, whether a revenue stream is connected to a taxable digital service would depend on the particular facts and circumstances of the business. However, some key factors to consider are:

- whether the revenues would have been earned without the business supplying the taxable digital service, and
- the degree to which the revenues are connected to the user base, service or data the platform or engine provides or collects from users.

For most businesses, it should be clear whether a revenue stream is connected to a taxable digital service.

Digital services revenue from in-scope activities

The detail below provides guidance and specific examples about the types of revenues that are connected to taxable digital services. The situations where revenue is connected with taxable digital services is intended to be broad and capture the range of approaches that are used to monetise value from user activity. It therefore includes advertising revenue and amounts from the sale or licensing of user data collected in connection with a taxable digital service (clause 11(1)(d) and (e) of the Bill).

The examples below are not exhaustive and whether the revenue received is connected to a taxable digital service would require a business to analyse the nature of the revenue, the activity from which it is generated and the degree of relationship with the taxable digital service.

Intermediation platform

Revenues that arise in connection with intermediation platforms typically include:

- commission fees received for facilitating transactions between users
- delivery fees
- fees to access or otherwise buy and sell goods and services listed on the platform
- fees from advertising products to users of the platform, either by preferential search listings or display advertising
- general advertising on the platform, and
- subscription fees to access the platform's services.

Importantly, it is not the purchase price of the good or service transacted between users that is digital services revenue. Instead, it is the revenue that the intermediation platform itself earns for facilitating the transaction.

Social media and content sharing platforms

Revenues that arise in connection with social media and content sharing platforms typically include:

- fees for displaying advertising to users of the platform
- subscription or other access fees from users of the platform
- fees charged to users to access specific content on the platform
- other direct fees from users of the platform, and
- income from the sale/licensing of user data.

Internet search engines

Revenues that arise in connection with internet search engines typically include:

- fees charged for advertising on the group's search engine results
- fees charged for advertising that is shown by the search engine on third-party websites
- other search advertising revenues, and

- income from the sale/licensing of user data.

Carrying on multiple taxable digital services

Where a business carries on more than one taxable digital service, the revenues in connection with those activities should all be included in the group's total taxable digital services revenue.

Apportionment between taxable digital services and out-of-scope activities

If the group carries on both taxable digital services and out-of-scope business activities, then only the revenue that is connected to taxable digital services needs be included in the group's total taxable digital services revenue.

Accordingly, a group may need to apportion its total revenues between in-scope taxable digital services (including incidental activities) and out-of-scope activities. Any apportionment should be done on a fair and reasonable basis. Whether an apportionment is fair and reasonable will depend on the particular facts and circumstances of the business activities and the revenues concerned.

A fair and reasonable apportionment should be based on the information available to the business and reflect what an objective and informed person would consider to be fair and reasonable in light of that information. Any method chosen should reflect the relative contribution of the activity, or activities, to the wider business.

Example 9

Now Switch runs an intermediation platform (an in-scope activity for a DST) and a separate digital magazine service (an out-of-scope activity for a DST). Users are charged a single subscription fee to access the intermediation platform and digital magazine service.

Most of Now Switch's other revenue is generated from advertising on both the platform and digital magazine. In total 70% of the advertising revenue comes from the intermediation platform and 30% from the digital magazine. Accordingly, 70% of the advertising revenue relates to an in-scope activity and will be included in the group's taxable digital services revenue.

Because there is no separate subscription fee for the in-scope and out-of-scope activities, it is necessary to apply a fair and reasonable apportionment method to these fees. A fair and reasonable approach for Now Switch in this circumstance could be to

split the subscription fee revenue on a 70/30 basis (ie, following the advertising revenue split) between the in-scope intermediation platform and the out-of-scope digital magazine.

Digital services group

Digital services group

Clauses 5, 8 and 12

Summary of proposed provision

The Bill proposes that the DST applies to multinational groups that undertake relevant activities in connection with New Zealand users or New Zealand land and meet certain revenue threshold criteria. These criteria are applied to a "digital services group" and are calculated based on the revenue recognised in the multinational's consolidated financial statements.

Background

A DST needs to have meaningful thresholds below which it does not apply. This is intended to reduce compliance and administrative costs and reduce its impact on start-ups and small businesses (which, for example, may be loss-making).

The OECD guidelines on a DST recommended two separate thresholds:[3]

- A threshold based on the size of the group. For this purpose, the OECD suggested the current threshold for country-by-country reporting, which is €750 million of consolidated annual turnover.
- A threshold based on the amount of the digital group's global revenue that is attributable to the jurisdiction's users.

The design of the New Zealand DST proposed in this Bill has taken these guidelines into account when setting the global threshold and country-specific exception. The global threshold has been set in line with the OECD's guideline of €750 million of annual consolidated revenue. However, the New Zealand DST's global threshold requires the €750 million of annual revenue to be generated from in-scope taxable digital services (in common with the DSTs adopted by France and the United Kingdom). This is to ensure that the DST is targeted at mature digital services businesses that are more likely to benefit from the deficiencies in the international tax framework.

A multinational business would be liable for the proposed DST if it meets the global threshold. However, the group's DST liability in a revenue year would be nil if it qualifies for the country-specific exception. The country-specific exception of $3.5 million per annum is roughly proportionate to other jurisdictions that have adopted a DST given the different

[3] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

sizes of the economies (France has a €25 million local threshold and the United Kingdom has a local threshold of £25 million). This exception is discussed in more detail in the *Calculation and payment of the DST liability* section of this Bill commentary.

Detailed analysis

Clause 5 of the Bill introduces the term "digital services group". The term is defined as meaning a group of persons consisting of all persons that are included in the consolidated financial statements of an ultimate parent entity if those financial statements are prepared in accordance with generally accepted accounting practice (GAAP). If the ultimate parent entity does not file consolidated financial statements in accordance with GAAP, the digital services group would comprise all persons that would be included if the ultimate parent entity had to prepare GAAP-compliant consolidated financial statements.

This deeming provision is proposed as an integrity measure to ensure otherwise comparable groups are viewed similarly to ensure that the global revenue threshold has its intended effect.

Ultimate parent entity

The term "ultimate parent entity" is defined in clause 5 as a person that owns, directly or indirectly, a controlling interest in any other person and is not owned, directly or indirectly, by another person with a controlling interest.

Generally accepted accounting practice

"Generally accepted accounting practice" is defined in clause 5 as:

- International Financial Reporting Standards (IFRS), or
- other country-specific generally accepted accounting principles relevant to publicly traded entities outside New Zealand that require two or more entities to prepare consolidated financial statements in a similar manner to IFRS.

The tax will primarily affect digital services groups with limited to no presence in New Zealand, so a broad definition of generally accepted accounting practice has been adopted to minimise compliance costs.

DST revenue year

The term "DST revenue year" is a relevant accounting period under GAAP for a group or entity and is defined in clause 5 of the Bill.

Global threshold

Clause 8 of the Bill requires a group to have at least €750 million of global revenue from taxable digital services during a revenue year to be a digital services group liable for DST. This amount includes all relevant revenue from all members of the digital services group.

Calculation and payment of the DST liability

Calculation and payment of the DST liability

Clauses 6, 7, 9, 10, 12, 13 and 15 to 18

Summary of proposed amendments

This Bill proposes that the DST will be charged at a rate of 3% on a group's digital services revenue that is connected to New Zealand users, or New Zealand land where the revenue relates to an intermediation platform.

Background

One of the guidelines the OECD recommended for jurisdictions adopting a DST to consider was balancing the underlying policy objective of trying to address the rapidly emerging challenges raised by the digitalisation of the economy while also mitigating over-taxation as much as possible.[4] It noted that implementing a low rate of tax that was proportionate to the profit margins was an important factor in achieving this balance.

The design of the New Zealand DST proposed in the Bill has taken this guideline into account with the tax being charged at a low rate of 3%. This rate is also in line with other jurisdictions that have adopted a DST. France, Italy and Spain have a 3% rate while the United Kingdom and India have a 2% rate, and Turkey has a higher 7.5% rate.

In line with the OECD's guideline to include a country-specific threshold to determine whether a group is liable for DST, a group's DST liability for a revenue year is nil if their total digital services revenue attributable to New Zealand is below $3.5 million in that year.

Detailed analysis

If a group is a digital services group after satisfying the global revenue threshold, it would then calculate its DST liability.

Clause 7 of the Bill provides that DST liability is calculated by charging the DST at a rate of 3% on the group's digital services revenue for a DST revenue year. This would require the group to ascertain the revenues attributable to:

- New Zealand users, if the revenues arise from the use of a taxable digital service by a user normally located in New Zealand.

[4] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

- New Zealand land, if the revenues arise from the use of an intermediation platform that relates to land in New Zealand.

Clause 9 of the Bill proposes an exception whereby a group's DST liability is nil if its taxable digital services revenue for New Zealand tax purposes totals less than $3.5 million for that DST revenue year.

Example 10

ExchangeMe Group has €1 billion of global taxable digital services revenue from an intermediation platform. Of the global taxable digital services revenue, $100 million of revenue is connected to New Zealand users.

ExchangeMe Group's total New Zealand DST would be $3 million, calculated by charging the 3% DST on the $100 million of taxable digital services revenue connected to New Zealand users.

Currency

Clause 6 of the Bill outlines that for the purposes of the Bill, other than clause 8, all non-New Zealand dollar amounts would have to be converted to New Zealand dollars.

An amount would have to be converted by applying the close of trading spot exchange rate on the date the amount is required to be measured or calculated. However, if the amount relates to a period, the amount would be able to be converted by applying the average of the close of trading spot exchange rate for the 15th day of each complete month that falls in the relevant period.

Connected to New Zealand users

Digital services revenue (defined in clause 10 of this Bill) means all the revenues that arise in connection with a taxable digital service (defined in clause 11(1) of this Bill). This concept is explained in detail above in the *Digital Services Revenue* section of this Bill commentary.

This revenue arises from New Zealand users if the taxable digital service that generates that revenue is used by a "user" that is normally located in New Zealand.

Meaning of user

While there is no definition of "New Zealand user" in the Bill, it is intended to mean anyone (including both individuals and legal persons) who used the platform or service. Whether someone has used the platform or service would depend upon the underlying taxable digital service.

For some taxable digital services, there will be just one user in a transaction that has led to taxable digital services revenue. This will be the case for taxable digital services revenues that are derived from advertising where the user will be the person that views the advertisement.

In other cases, there could be multiple users in a transaction. This will be the case for revenues attributable to specific transactions facilitated between parties on an intermediation platform (eg, commission fees, delivery fees) where the different parties to the transaction are all users.

For the purposes of determining a user in the context of an intermediation platform, there is no distinction between a "buyer" or "seller". This is because both sides of the transaction are users of the intermediation platform, which derives value from having high volumes of users willing to exchange goods or services. It also avoids potential difficulties identifying which user is formally charged a fee or other amount as part of a transaction.

New Zealand user

An important feature of the DST is the connection between revenues and the value provided by users in New Zealand. Concepts such as tax residency can be difficult for a digital services group to determine for users of its taxable digital services.

Accordingly, clause 12 of the Bill identifies a New Zealand user as a person that is normally located in New Zealand, as evidenced by various indicators that the digital services group may collate in the course of user registration or user interaction with the platform or search engine.

The indicators listed in clause 12 of the Bill are as follows:

- the person's billing address
- the person's delivery or shipping address
- the internet protocol address of the device used by the person
- the person's bank details, including the account the person uses for payment or the billing address held by the bank
- the person's phone number area code, or country calling code
- global satellite positioning data on the person or another geolocation method
- other information considered relevant by the Commissioner
- an indicator agreed to with a member of the digital services group in writing by the Commissioner of Inland Revenue.

These indicators are provided to help businesses identify whether a user of their taxable digital services is normally located in New Zealand, rather than whether a user is in New Zealand at the time the taxable digital service is used.

As a result, the use of these indicators may lead to situations where users are classified as New Zealand users when they use a platform, service or engine while out of New Zealand. Vice versa this approach may result in foreign users that use a platform, service or engine while they visit New Zealand not being considered New Zealand users because they are not normally located in New Zealand. The indicators are intended to clarify who could be a New Zealand user and therefore lower the cost of ascertaining where the user is based. Requiring greater accuracy would increase compliance costs.

Importantly the Bill allows businesses to use other relevant information held as an indicator of whether a user is normally located in New Zealand. Any indicator used must be reasonable and will depend upon a business's unique circumstances.

The Bill also allows businesses to use an indicator agreed to with the Commissioner of Inland Revenue to determine whether a user is normally located in New Zealand. This is intended to provide a business using an unspecified indicator with certainty. Whether a business decides to exercise this option will depend on its own circumstances, resources available and comfort with relying on an unspecified indicator.

These rules are intended to provide flexibility for groups because the information available to different businesses varies and may change due to changes in technology and new business models. Compliance costs are reduced when a business can use information that it routinely collects through its normal process rather having to request additional information from its users for tax purposes.

Example 11

Kātata provides an online dating platform that satisfies the social media and content sharing platform definition. Users are charged a subscription fee to use the service.

Edward Williams is a user of Kātata. When he signed up to the service, he provided his New Zealand credit card details and billing address, which Kātata uses to charge the subscription fees.

Kātata can determine that Edward Williams is a New Zealand user, because his credit card details and billing address indicate that he is normally located in New Zealand.

Attribution to New Zealand users

Ideally a digital services group will be able to determine the total amount of global digital services revenue connected to New Zealand users based on the actual contribution of New Zealand users (ie, the revenues received from in-scope revenues involving New Zealand users on a transaction-by-transaction basis).

Example 12

Resonance is an online intermediation platform that facilitates the sale of musical instruments between users around the world. Buyers and sellers of instruments are charged a commission fee for each successful transaction facilitated by Resonance.

Resonance tracks the location of buyers and sellers for each transaction and has data available for the total amount of commission fees received on a country-by-country basis.

For the 202X revenue year it received commission fees from transactions involving sellers and/or buyers in New Zealand of $4 million out of a global total of €800 million.

Therefore, $4 million of Resonance's global digital services revenue is connected to New Zealand users.

However, because this approach may not be feasible for all businesses, or it may impose undue compliance costs, businesses can also attribute global revenue from taxable digital services to New Zealand users based on a fair and reasonable method. This could involve apportioning the global revenue from taxable digital services based on the proportion of New Zealand users to global users. Alternatively, businesses can use a different proxy to attribute to global revenue from taxable digital services to New Zealand users if this method is fair and reasonable. A benefit from this approach is that it may enable digital services groups to apply a consistent method to that used for attributing revenue to local users under foreign DSTs, thereby resulting in reduced compliance costs.

Example 13

Bargain Grab is an online intermediation platform which charges users with commission fees on transactions. For the 202X revenue year it received $1 billion of global commission fees.

Bargain Grab commission fees vary depending on the type and value of goods sold and it does not normally track these on a transaction-by-transaction basis. Therefore, determining the amount of global commission fee revenue paid by New Zealand users would involve applying significant resources. However, Bargain Grab identifies that of its total global users, 10% are normally located in New Zealand.

Therefore, Bargain Grab can apportion $100 million of taxable digital services revenue to New Zealand users (being 10% x $1 billion of total global taxable digital services revenue).

In attributing the global revenue from taxable digital services on a fair and reasonable basis, it is only the location of users that is relevant, not the location of the customers paying the digital services group for its services.

Advertising revenue

The digital services revenues that are generated from online advertising will be connected to New Zealand users when the advertising is viewed or otherwise consumed by users normally located in New Zealand.

An advert will be considered to be viewed by a New Zealand user when it is presented to a New Zealand user or otherwise engaged with (eg, clicked) by a New Zealand user in a way that gives rise to revenue for the digital services group.

Where there is no direct evidence of a New Zealand user viewing or consuming an advert (potentially because this is not tracked), the business should assess whether, for example, contractual evidence indicates that the advertising was in whole or part intended to be viewed by New Zealand users.

Example 14

Revel provides an online search engine that generates revenue from displaying advertising banners on its engine. For the 202X revenue year, it has satisfied the threshold and is a digital services group under the Bill.

For the revenue year ended 202X, it receives $5 million of revenue from displaying advertisements for businesses that operate solely in New Zealand. Revel can determine that these advertisements are intended for users normally located in New Zealand because the products advertised are not available to global users.

Connected revenue from intermediation platforms

Where a transaction facilitated by an intermediation platform involves a New Zealand user, all the revenues the intermediation platform receives from that transaction are deemed to be connected to New Zealand users. This reflects the fact that without a purchaser (or seller) there will be no transactions facilitated by an intermediation platform.

This applies regardless of whether the New Zealand user:

- purchases the good or service
- sells the good or service, or
- lists or advertises the good or service.

However, where the other user involved in the transaction is normally located in a jurisdiction that has a tax similar in nature to the New Zealand DST proposed in this Bill, the taxable digital services revenue connected to New Zealand users is reduced by 50%. This is discussed in more detail below.

Connected to New Zealand land

Where taxable digital services are related to New Zealand land, the revenues from that taxable digital service will be connected to New Zealand even if the owner of the land or the user of the land is not a New Zealand user.

Taxable digital services that are related to land include the lease or rental of accommodation or other buildings, for any time period, as well as services relating to the sale of land. However, they do not include services whose relation to land is indirect or remote – for example, advertising the sale of photographs of New Zealand land on an intermediation platform would not be a service in relation to New Zealand land.

This means that revenues from allowing a user to rent out a property in New Zealand are attributable to New Zealand irrespective or where the owner of the property is located or who stays in the property.

Example 15

CountyInn provides an online intermediation platform that facilitates users renting accommodation from other users and charges service fees to each user.

Bill Smithers is normally located in Australia but owns a property in Martinborough, which he lists for rent on CountyInn's platform.

Kevin Raymond is normally located in the United States but while on holiday in New Zealand he rents Bill Smithers' Martinborough property via the online platform provided by CountyInn.

All revenue CountyInn receives from this service is connected to New Zealand land because the property rented is located in New Zealand.

DST reduction for certain cross-border transactions

In general, where one of the users involved in a transaction on an intermediation platform is a New Zealand user, all the taxable digital services revenue an intermediation platform receives from facilitating that transaction is deemed to be connected to New Zealand users. This applies regardless of whether the other user is normally located in New Zealand or a foreign jurisdiction.

Clause 13 of the Bill provides a special rule to reduce the amount of taxable digital services revenue for an intermediation platform by 50% for transactions where it is reasonable to assume the foreign user is located in a jurisdiction that applies a tax substantially similar to the New Zealand DST.

The rule is designed to reduce the tax charged on a transaction where the other user is based in a jurisdiction that operates a similar tax to the New Zealand DST and thereby reduces the risk of double digital services taxation from the imposition of the New Zealand DST.

Reasonable to assume

In determining the jurisdiction where it is reasonable to assume that a foreign user is normally located, a group needs to consider all the information about that user's location available to them and any other relevant facts or circumstances. Businesses may wish to use the same indicators for determining whether a user is normally located in New Zealand under clause 12 of the Bill

A substantially similar tax

It should be easily identifiable whether a foreign jurisdiction is applying a tax that is substantially similar to the New Zealand DST.

The factors below are intended to help businesses determine whether a tax is substantially similar to the New Zealand DST or not:

- Is the tax levied on gross revenue or net income/profit?
- Is the tax levied at a low rate?
- Is the tax levied on revenue generated by active user participation?
- Is the tax limited to highly digitalised business activities?
- Is the tax based on users located in a jurisdiction rather than payment flows?

Example 16

Switcheroo is an online intermediation platform that facilitates the sales of goods between users around the globe and meets the thresholds to be a digital services group liable to pay New Zealand DST.

$100 of Switcheroo's taxable New Zealand digital services revenue results from a transaction between a New Zealand user and a foreign user. Switcheroo holds information about the foreign user's IP address and bank account details, both of

which are located in France. Therefore, it is reasonable for Switcheroo to assume that the foreign user is normally located in France.

It is reasonable for Switcheroo to assume the foreign user is normally located in France and the French DST (which is substantially similar to the New Zealand DST) will also apply to the transaction, this reduces the amount of New Zealand digital services revenue by $50 (being $100 x 50%).

Digital services tax is a debt due to the Crown

Clause 14 proposes to establish that the amount of digital services tax payable is a debt to the Crown owed by the digital services group and recoverable by the Commissioner in a court of competent jurisdiction.

Joint and several liability

Clause 15(2) of the Bill imposes joint and several liability on all members of a digital services group for payment of the New Zealand DST. This is to ensure that the New Zealand Government has recourse to payment of the tax if the group's representative member does not make payment for any reason.

Refunds and overpayments

Clause 16 proposes that the Commissioner refund overpaid DST within a four-year time bar. Similarly, clause 17 proposes that the Commissioner refund overpaid DST within a four-year period where a person makes an overpayment as the result of an amended assessment.

Tax avoidance

Clause 18 proposes that a tax avoidance arrangement with the purpose or effect of defeating the intent and application of the DST is void against the Commissioner.

Administrative provisions

Administrative provisions

Clauses 19 to 34

Summary of proposed amendments

The Bill proposes provisions that provide an administrative regime and support the calculation and payment of the DST. These include proposed amendments to the Tax Administration Act 1994 (TAA).

Specific administration rules are also required, which nevertheless generally follow existing administrative provisions. The specific features of the regime include:

- All in-scope digital services groups must register with the Commissioner within 90 days of the end of the first revenue year in which the digital services group meets the global revenue threshold.
- All in-scope digital services groups must file an annual DST return whether the digital services group owe a DST liability or if it has a nil return. That return will be due six months after the end of the revenue year of the group. However, a group that has not had to pay an amount of DST before would not be required to file a nil return even if they meet the global revenue threshold and thus have to register for DST.
- In-scope digital services groups must pay any DST liability for the current revenue year to the Commissioner within six months of the end of the group's DST revenue year.
- Increased penalties apply for a DST representative member failing to register and to provide information to the Commissioner.

Detailed analysis

Registration

Proposed new section 226G of the TAA provides that the ultimate parent entity of a digital services group must nominate a company that is a member of the group to be recognised as the DST representative member. The DST representative member will perform the obligations required on behalf of the digital services group. If no nomination is made, the ultimate parent entity of the group will be the DST representative member.

The nominated company ceases to be the DST representative member if the company leaves the digital services group or the ultimate parent entity nominates a different company to be the DST representative member.

Proposed new section 226H of the TAA provides that if a digital services group is liable to pay DST, the DST representative member must register with the Commissioner within 90 days of the end of the first DST revenue year in which the digital services group is liable to pay the DST.

As part of the digital services group registration process, the DST representative member would inform Inland Revenue of the name of the DST representative member, what digital services group it represents, the registered office of the DST representative member, the start and end dates of the group's DST revenue year, and the name and address of the ultimate parent entity of the digital services group, if the ultimate parent entity is not the DST representative member.

Digital services tax return

Proposed new section 33G of the TAA will require the DST representative member to file a DST return if the digital services group is liable to pay an amount of DST in the current DST revenue year. The DST representative member will also have to file a DST return for a zero or nil return of DST if the digital services group has been liable to pay an amount of DST in a previous revenue year.

The return for the current DST revenue year must be provided to the Commissioner in the form and with the particulars prescribed by the Commissioner within six months of the end of the DST revenue year.

Assessment of digital services tax

Proposed new section 92C of the TAA will require the DST representative member who provides the return for DST for a DST revenue year to assess the amount of DST that is payable for the digital services group. This assessment is to be made on the date on which the DST return is received by Inland Revenue. We expect the DST return will be filed through digital channels.

The Commissioner has an existing power in section 106 of the TAA to make default assessments in circumstances where the Commissioner is not satisfied with the contents of a return, or if a taxpayer fails to provide a return by the due date. This would also apply to the DST. If the Commissioner assesses DST payable in terms of section 106 of the TAA, the DST representative member can only dispute the assessment by providing a DST return for the DST revenue year.

Time bar for amending DST returns

Proposed section 108AD of the TAA prevents the Commissioner from amending the assessment for a DST revenue year if more than four years have passed following the end of

the DST revenue year in which the DST return is provided. This four-year time bar does not apply in circumstances where the Commissioner considers the digital services group has knowingly or fraudulently failed to disclose to the Commissioner all material facts that are necessary for determining the amount of DST payable for the DST revenue year.

Record keeping

Proposed new section 22BB of the TAA will require the DST representative member of a digital services group to keep sufficient records that are readily available to be collected by the Commissioner. These records must outline the digital services group's liability to pay DST and include records where the liability is a zero amount. The records must be in English or te reo Māori and may be kept outside New Zealand.

Consistent with the general record keeping requirements in the TAA, records will need to be kept for seven years following the end of the relevant DST revenue year.

Penalties

Failing to apply for registration

Proposed new sections 94E and 139ABB of the TAA will enable the Commissioner to impose a penalty of up to $100,000 on a DST representative member that fails to apply for the registration of a digital services group when it is liable for the DST.

The DST representative member is not liable to pay the penalty if they establish in proceedings challenging the assessment that the assessment is excessive or that the digital services group is not chargeable with the penalty.

The Bill proposes that the penalty is discretionary. This means the Commissioner is not required to impose the penalty in all circumstances where a person does not comply with their obligation to register.

This penalty is consistent with existing penalties in the TAA that the Commissioner can impose on a discretionary basis for other taxpayers of a similar size.

Failing to make a digital services tax return

Proposed new section 139ABB of the TAA additionally provides that a DST representative member that fails to comply with the requirements of providing a return for the digital services group to the Commissioner will face a penalty of $500.

Due date of penalties

The due date of the penalty imposed on the DST representative member for failing to apply for registration or failing to make a digital services tax return is the later of 30 days after the notice of the assessment for the penalty is issued by the Commissioner and the date specified by the Commissioner in the notice of assessment.

Shortfall penalties

The DST will also be subject to shortfall penalties, including the penalty for an unacceptable tax position, contained within the TAA.

Other provisions of the TAA

Proposed section 91C(1)(ed) of the TAA enables the Commissioner to issue binding rulings in relation to the DST.

Other provisions of the TAA will generally apply to the DST without modification, such as late payment penalties and use of money interest.