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## **PUB00260 Draft Question We've Been Asked – Income Tax – Land acquired for a purpose or with an intention of disposal**

### **Introduction**

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on draft Question We've Been Asked *Income Tax – Land Acquired for a Purpose or With an Intention of Disposal* (the draft). All legislative references are to the Income Tax Act 2007 unless otherwise stated.

### **Comments**

#### *Exclusions*

Paragraph 5 of the draft refers to the two exclusions which exclude the application of section CB 6, being section CB 16 (residential land) and section CB 19 (business premises). Both exclusions use the word "mainly".

Section CB 16 provides that if the land in question has a dwellinghouse on it and that dwellinghouse was occupied mainly as a residence by the person and any member of their family living with them (or if the person is a trustee of a trust, 1 or more beneficiaries of the trust), section CB 6 will not apply. Similarly, section CB 19 provides that if the land is the premises of a business and the person acquired and occupied, or erected and occupied, the premises mainly to carry on a substantial business from them, section CB 6 will not apply.

It would be helpful to clarify the meaning of the word "mainly". For example, does "mainly" mean the percentage of time the land was used as a residence throughout the entire period of ownership, or does it mean that where the land had more than one use or purpose the predominant use or purpose was that of the residence of the person and their family?

In addition, it would be helpful to clarify the term "substantial business" in section CB 19.

It is also noted that the language of section CB 16 is retrospective (the land **was** occupied) whereas the language in section CB 19 is in the present tense (the land **is** the premises of a business and the

person acquired and occupied ... mainly to **carry on** a substantial business ...”.

The Law Society notes that section CD 1(3)(a) of the Income Tax Act 2004 (the forerunner to section CB 19) used the word “was”. Given that the change in wording in section CB 19 was not a notified change, it is arguable the business premises exemption should apply in a situation where the land has at some stage of the period of ownership been used as business premises.

#### *Interaction between section CB 6 and section CB 6A*

It appears from the language used in paragraphs 7 and 23 of the draft that the Commissioner is taking the view that section CB 6A operates in precedence to section CB 6. In other words, one applies the tests in section CB 6A before applying section CB 6.

Section CB 6A(6) however very clearly states that section CB 6A applies if none of sections CB 6 to CB 12 apply. It is necessary therefore to consider the application of section CB 6 (as well as CB 7 to CB 12) before considering the application of section CB 6A.

The Law Society considers that it should be stated in paragraph 7 and the following paragraphs that it is necessary to consider the application of section CB 6 **before** section CB 6A. This is particularly important given that the date of acquisition under section CB 6 is an entirely different date from the date of acquisition under section CB 6A. It is important that taxpayers and their advisors are aware of the difference between the two dates and which date of acquisition is relevant for the purposes of having a purpose or intention of sale.

#### *Subdivided Land*

Paragraph 17 states that for the purpose of section CB 6:

*it does not matter if you divide the land and sell only some of it at any one time – you will still be taxed on the proceeds of all of the land whenever it is sold.*

It would be helpful if the Commissioner clarified that in the situation where a taxpayer acquires a piece of land for the purpose of subdivision but only intends to sell part of that land, section CB 6 only applies to the part they acquire with the intention of sale, rather than the entire piece of land. It is noted however that in this situation section CB 12 may well apply to tax any gain made on the sale of the balance of the land.

#### *Examples*

Examples 3 and 4 state that the test of whether a taxpayer had the purpose or intention of disposal of land when they acquired the land is subjective and the onus is on the taxpayer to establish that they did not have the requisite purpose or intention.

The examples given seem to suggest that where the taxpayer’s explanations are not supported by evidence (paragraph 43), the taxpayer is essentially deemed to have acquired the land with the purpose or intention of disposal unless they can prove otherwise. Section CB 6 is not a deeming provision. It does not deem a taxpayer to have the purpose or intention of disposal unless they prove otherwise. Rather, section CB 6 requires the taxpayer to discharge the burden of proof that he/she did not have the requisite purpose or intention of disposal.

It would be more helpful if the examples stated that the taxpayer has the burden of proof to establish that the taxpayer did not have the purpose or intention of disposal, and that in the stated examples the Commissioner does not consider that the taxpayer has discharged that burden of proof.

**Conclusion**

This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further, please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / [jo.holland@lawsociety.org.nz](mailto:jo.holland@lawsociety.org.nz)).

Yours sincerely

A handwritten signature in black ink, consisting of a stylized initial 'C' followed by a long horizontal line.

Chris Moore  
**President**