



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Taxation (Land Information and Offshore Persons Information) Bill

09 July 2015

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Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Taxation (Land Information and Offshore Persons Information) Bill (Bill). The time for public input on the Bill at select committee has been limited. In the short time available, the Law Society's Tax Law Committee and Property Law Section have considered the Bill, and the Law Society makes the following comments on technical issues in the Bill.

Timing

2. Clause 2 proposes that the Act "comes into force on 1 October 2015". On the face of it, this means that the tax statement requirements in proposed section 156B will apply to transfers of land under contracts entered into prior to 1 October 2015 (including contracts entered into prior to the date the draft Bill was released for public comment), where settlement and registration/e-dealing occur on or after 1 October. This has the potential to cause significant disruption to pre-existing contractual arrangements (including default, forfeiture of deposits and so on), entered into by the parties at a time when they could not and did not know they would need to comply with the tax statement requirements. The tax statement requirements should only apply to transfers of land under contracts entered into on or after 1 October 2015 and clause 2 should be amended accordingly.
3. It would also be sensible for the form of the tax statement to be either Gazetted or incorporated into standard form documents, to ensure that compliance costs and debates as to form are minimised.

New section 156A, Interpretation

"Dwelling"

4. In relation to the proposed definition of "dwelling", presumably the exclusions in paragraph (b) are intended to capture units/sections within the various premises listed, rather than the entire premises. If that is the case, it should be clarified.
5. In addition, in this context excluding (units within) rest homes and retirement villages from the "dwelling" concept, which means that transfers of such premises can never be "exempt transfers" because they will not be transfers of "residential land", seems unnecessary and inappropriate. Units within rest homes and retirement villages tend to be owner/licensee occupied, and it seems very unlikely the persons concerned would be involved in land dealing activity that might be of interest to Inland Revenue.

"Main home"

6. This concept is defined in the Bill as follows:

"main home means, for a person, the 1 home –

- (a) that is mainly used as a residence by the person and any member of the person's family living with the person; and
- (b) with which the person has the greatest connection."

7. The phrase “main home” appears to be a new term developed for this Bill and it is not clear what it means. For example, does a home cease to be a main home if family members move out and only one person remains living there?
8. Paragraph (b) of the definition also imposes a mixed subjective/objective test that may introduce significant uncertainty.
9. The Law Society considers it should be sufficient that the home concerned is the one home used by the person mainly as their place of residence, regardless of whether they subjectively consider they have the "greatest connection" to it. Further, if it is mainly used as a residence by the person, it should be irrelevant whether it is mainly used as a residence by any member of the person's family living with the person.
10. It is suggested that the definition “main home” be replaced with a term that already exists and therefore has a body of developed case law surrounding it.
11. If the expression “main home” is to be retained, it is suggested that a definition similar to section 3(1)(e) of the Joint Family Homes Act 1964 be used, such as:

‘main home’ means for a person the home which is used as the exclusive or principal residence of the person.

‘Residential land’

12. The Bill defines residential land to include land for which there is ‘an arrangement’ that relates to erecting a dwelling. It is not clear what ‘an arrangement’ is. Most often, a purchaser of land will not have entered into a building contract when the land is purchased.
13. It is suggested that the definition in limb (ii) be deleted and replaced with:

(ii) *land that will have a dwelling on it within [] months’*

This concept of having a dwelling within a certain number of months currently exists in section 3(1)(d) and (e) of the Joint Family Homes Act 1964. The relevant period of time in this Bill could be 12 months.

‘Exempt transfers’

14. New section 156A(2)(b) contemplates that properties owned by a trust will not be exempt transfers. Therefore, every change of trustee relating to a property will not be an exempt transfer. Many trusts which own non-earning property will not currently have an IRD number and will need to apply for one if the trust intends to transfer property or change trustees. The Law Society does not know the number of trusts in this position, but expects that the extra workload of IRD to accommodate this will be significant.
15. The same will apply for estates and application for an IRD number could delay estate distribution, especially if IRD will need to see a copy of probate before issuing an IRD number.
16. It is suggested that IRD allow application for IRD numbers in these situations to be fast tracked, similar to the application process for an IRD number for a newly incorporated company.

17. Trustees' details (rather than the trust's details) are included on the land register because section 128 of the Land Transfer Act 1952 does not allow trusts to be registered. However, the owner is effectively the trust and the Bill requires the IRD number of the trust, not the individual trustees, to be provided.
18. It is suggested that transactions that simply effect a change of trustees should be exempt transfers under the Bill. Alternatively, this could be a good opportunity to repeal section 128 of the Land Transfer Act.
19. Further, in the case of a transfer pursuant to a mortgagee sale or power of sale conferred by statute or court order, the transferor's obligation to provide a tax statement should be negated.
20. In the case of a transfer pursuant to a mortgagee sale, the transferor is the mortgagee, whose tax information is not relevant, whilst the tax information of the mortgagor/owner may not be available to the mortgagee.
21. The above exemption could be effected by regulation under proposed section 156A(2)(a)(iii). However, it would be desirable for that provision to be expanded to make it clear that an exemption limited to one of the parties to the transfer may be granted.

New section 156B, Transferors and transferees must provide tax statement stating that transfer exempt or providing tax information

22. The Explanatory Note to the Bill states that conveyancers will not be required to certify the accuracy of the information provided by a client in a tax statement. This is entirely appropriate, particularly as conveyancers will have no ability to check that the information is accurate.
23. The Law Society considers, however, that the absence of legal responsibility on the part of conveyancers should be made explicit. A new subclause (4) should be added to proposed section 156B along the following lines:

"For the avoidance of doubt, a certifier who gives tax information to the chief executive under subsection (2) or (3) does not certify the accuracy of that tax information."
24. The term 'chief executive' in proposed section 156B(2)(b) is not defined and it is recommended that a definition is included.

New section 156C(3)(b), Content of tax statement

Use of the term "nominee"

25. The Law Society understands that the sense in which the term "nominee" is used in this section reflects the nominee/bare trustee concept in clause YB 21 of the Income Tax Act 2007. Although this meaning of the term "nominee" is well understood by tax practitioners, conveyancers are more likely to think of a nominee as being a person who is "nominated" by the original purchaser under a contract to complete the transaction and take title in their own right (not on behalf of the nominator). Therefore, "nominee" should be defined by reference to the Income Tax Act definition.

New section 156E, Offence to provide false or misleading tax information

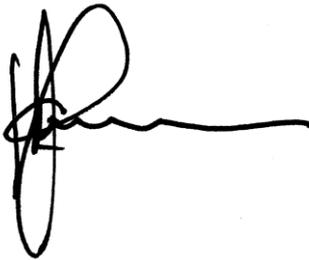
26. The Explanatory Note states that a “conveyancer will be required to provide declared information before certifying the property transfer. Conveyancers will not be required to certify the accuracy of the information provided”. It is understood that the certifier is just a messenger of the information. However, proposed section 156E does not make this clear and could be read as requiring the certifier to make enquiries of the person making the tax statement. The absence of legal responsibility on the part of the certifier should be made explicit.

New section 156G, Certifier and chief executive must hold tax statement and provide copies

27. It is suggested that retention by electronic means should be allowed and the Bill should provide for this.

Conclusion

28. The Law Society does not wish to appear in support of this submission. However, the Law Society is willing to meet with the Committee or officials advising if the Committee considers that would be of assistance.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long, horizontal, slightly wavy line extending to the right.

Chris Moore
President
09 July 2015