New Zealand Law Society
Te Kāhui Ture o Aotearoa

5 September 2025

Tax Technical
Inland Revenue Department

By email: public.consultation@ird.govt.nz

Tēnā koe,

PUB00478: Income tax - business activity

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on *PUB00478 Income tax – business activity*, a draft interpretation statement providing guidance on whether and when a taxpayer is carrying on a "business" for income tax purposes (**Exposure Draft**).

2. The Exposure Draft correctly identifies the decision in *Grieve v CIR* (1984) 6 NZTC 61,682 (CA) as the leading case on what constitutes a business. As summarised in paragraph 24 of the Exposure Draft, the test in *Greive* is a two-stage inquiry. As indicated at paragraph 28, the second stage requires the taxpayer to have subjective intention to make a profit (albeit objectively assessed).

3. While the Exposure Draft has correctly identified the test in *Grieve*, the Law Society is concerned that, in various places, it appears to misstate or misapply the second stage of the *Greive* test:

    a. The first row of the figure 1 (which provides indicators of whether a "business" is being carried on) on page 4 of the Exposure Draft refers to the activity having "a real prospect of profit". The second stage of the *Greive* test turns on subjective intention. As staged at paragraph 31, the test is "not whether there is any reasonable prospect of a profit being made". The first row of figure 1 appears inconsistent with the test in *Grieve* and should be amended.

    b. The stated reasons in Example 1 (on page 13) for why the farming operation is not a business includes that "the financial results are insufficient". This suggests that whether an activity is a business turns on whether the activity in fact makes a profit (rather than the taxpayer's intention). As stated at paragraph 26 of the Exposure Draft, Richardson J in *Grieve* made it clear that a business does not cease to be a business because it is unprofitable. The reasoning of Example 1 should be recast so as not to suggest that the actual financial results are a determinative factor.

    c. Example 2 (on page 14) states "Taking into account the *Grieve* factors, in particular the nature of the activity and the financial results…". Example 2, like Example 1, appears to suggest that the test in *Greive* is applied with hindsight by reference to the actual financial results. For the reasons explained above, this is not correct. The

reasoning of Example 1 should be recast so as not to suggest that the actual financial results are a determinative factor.

d. Example 3 (on page 16) states that "However, the level of intra-group management fees on-charged to its subsidiaries means the holding company will never make a profit under ordinary commercial principles. At best, the holding company can only break even." This example appears to take a narrow view as to what constitutes "profit" for the purposes of the test in *Grieve*, in that the Example does not consider the role capital gains or dividends could play in the holding company's return. However, as acknowledged in paragraph 36 of the Exposure Draft, Richardson J indicated that a lack of profit for tax purposes does not preclude the recognition of an activity as a business. The reasoning in Example 3 should be revisited.

4. The Law Society submits that the Interpretation Statement and its examples should emphasise that the focus of the second stage of the *Grieve* test is on the taxpayer's subjective intention, objectively assessed.

5. Should you wish to discuss any aspect of this feedback, please contact Aimee Bryant, Manager Law Reform and Advocacy (aimee.bryant@lawsociety.org.nz).

Nāku noa, nā

Jesse Savage
Vice-President