

12 October 2020

Public Consultation
Inland Revenue
Wellington

By email: publicconsultation@ird.govt.nz

Re: PUB00381: Do certain supplies wholly or partly consist of land for the compulsory zero rating (CZR) rules?

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the draft QWBA *PUB00381: Do certain supplies wholly or partly consist of land for the compulsory zero rating (CZR) rules (draft QWBA)*.

The Law Society's Tax Law Committee and Property Law Section Law Reform Panel have reviewed the draft QWBA, and provided comments on: sale of transferable development rights (**TDR**); sale of standing timber; and sale of a purchaser's interest in a sale and purchase agreement for land.

1 Sale of transferable development rights

1.1 The Law Society agrees with [21], which states:

“A TDR is merely a right that entitles the owner of a receiving site to obtain subdivision consent. It is not an estate or interest in land (whether it is a right that gives rise to an interest in land is considered from [24]). While the subdivision itself will give rise to an interest in land (that is, the owner's interest in the newly subdivided section), the TDR relates only to the consent process.”

1.2 [25] states:

“Further, the exercise of the rights conferred by the TDR will ultimately give rise to an interest in land, being the receiving owner's estate in the newly subdivided section (notwithstanding that the owner already owns the undivided land).”

1.3 We do not agree with the conclusion reached in [25] that the TDR will ultimately give rise to an interest in land, as the receiving owner's interest in land already exists.

1.4 All that the TDR does is enable a person to carry out an activity on land they already own or have an interest in, that in the absence of the TDR they may not be able to do or carry out. As such a TDR is merely a right that enables an activity to be carried on or carried out on land. It does not create an interest in land beyond an interest that already exists.

1.5 We do not agree that a TDR constitutes an interest in land and as such should not be subject to the compulsory zero rating rules when transferred.

2 Sale of standing timber

- 2.1 We understand the purpose of [29] – [34] is to clarify whether the transfer of a right to cut and remove timber from land is an interest in land.
- 2.2 [29] to [34] refer to a profit à prendre which essentially encompasses all types of profit à prendre, rather than those specifically relating to the right to take timber. If the focus of [29] to [34] is specific only to the right to take timber, then it should be specified as such.
- 2.3 The Income Tax Act 2007 specifies at section CB 24 that income includes proceeds derived from the disposal of timber or disposing of the right to take timber. It also makes a distinction between a disposal of timber and a disposal of land with standing timber. It follows that the right to take timber is a right that could be transferable to another person and it is not necessary that that right belongs to the owner of the land on which the timber stands.
- 2.4 The disposal or transfer of a right to take timber (other than the disposal of land with standing timber) should be viewed as a disposal of goods not as a disposal of land or an interest in land, because it is the trees/timber which are being disposed of not the land on which the timber stands.
- 2.5 The right to cut and remove the timber allows the person holding the right to enter land for a limited period of time to cut and remove the timber. It does not however give that person any other rights or interests in that land. Therefore, we do not agree that the transfer of a right to cut and remove timber should constitute an interest in land and accordingly should not be subject to the CZR rules.

3 Sale of a purchaser's interest in a sale and purchase agreement for land (SPA)

- 3.1 We have reviewed [35] to [41], which conclude that a purchaser's interest in a SPA will be land for the CZR rules if it is an equitable interest in land or a right that gives rise to an interest in land.
- 3.2 While we agree that a non-binding SPA does not create an equitable interest in land, we do not agree with the statement that an interest in a conditional SPA gives rise to an interest in land, for the purposes of the CZR rules.
- 3.3 We consider that the use of 'non-binding' and 'binding' contract are unhelpful, as these are not generally terms used in legal practice. There is either a binding contract or no contract, and where there is a binding contract it is either conditional or unconditional. A non-binding contract is not a contract.
- 3.4 There are numerous situations where two parties will enter a binding contract which is conditional, and if those conditions are not fulfilled the contract will end. The statement to the effect that a conditional contract gives rise to an equitable interest in land for the purposes of the CZR rules is too simplistic, given the subjectivity of the point in time when that equitable interest in land is actually created.
- 3.5 If officials intend to take the position that the transfer of an interest in an SPA is capable of creating an interest in land for the purpose of the CZR rules, there needs to be certainty and clarity as to when that point in time is reached. (For example, where all conditions in the contract have been completed but for each party fulfilling their settlement obligations.)
- 3.6 In addition, the QWBA should distinguish between a transfer of an interest in an SPA and a nomination.

4 Further Assistance

- 4.1 We hope these comments are helpful and if further discussion would assist, please contact the Tax Law Committee convener Neil Russ through the Law Society's Law Reform Advisor Emily Sutton (emily.sutton@lawsociety.org.nz).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Herman Visagie', written in a cursive style.

Herman Visagie
Vice President