

3 February 2020

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Re: Tax policy consultation – Habitual buying and selling of land – proposed draft wording for amendments

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the proposed draft amendments to subsections CB 16A, CB 16 and CB 19, further to our October 2019 submission¹ on the tax policy consultation document: *Habitual buying and selling of land* (Paper).
2. As indicated by the Commissioner, the amendments are intended to strengthen the “habitual buying and selling” exception from the exclusions contained in those sections.

Use of the term “person A” in section CB 16A

3. The commentary to the proposed draft amendments states that the person who disposes of residential land in subsection (1)(a) is to be defined as “person A”. The commentary should also make clear that the term “person A” will also be used in subsection (2) as there is also reference in that subsection to a person who disposes of residential land.

Proposed section CB 16A(2C)(a) and section CB 16(5)(a) – circularity

4. There is circularity in these proposed provisions as drafted. These proposed provisions seek to include the transactions of a group of people in determining whether one person has engaged in habitual buying and selling.
5. However, the group of people whose transactions are to be included are all those people who occupy the land “that forms part of the regular pattern of acquiring and disposing” of land.
6. Therein lies the circularity. Whether there is a regular pattern of acquiring and disposing of land is the very question to be determined by looking at the transactions of a group of people but that group of people is defined by their occupation of land that forms part of the regular pattern of acquiring and disposing of land.
7. This section should be re-drafted to address the circularity.

¹ New Zealand Law Society submission, 23 October 2019, https://www.lawsociety.org.nz/_data/assets/pdf_file/0013/140611/l-IR-habitual-buying-and-selling-23-10-19.pdf

Cross-reference to section CB 6 in proposed sections CB 16(3)(a) and CB 19(2)(a)

8. The cross-reference should refer to s CB 6(1) to avoid circularity.

Lack of precision of the terms “significant involvement in” and “control of”

9. There is a lack of precision in the terms “significant involvement in” and “control of” used in proposed ss CB 16A(2C), CB 16(5)(b) and CB 19(2B). We expressed concerns about the ambiguity of a control-based test and the commercial uncertainty that will give rise to, in our October 2019 submission.²
10. The term “significant involvement in” is vague and open to interpretation. What does the word “significant” mean (*cf* the difficulty in interpreting what is “significant expenditure” in the context of s CB 13(1)) and what type of “involvement” is required? For example, does a shareholder have a “significant involvement” in a company? If so, then what level of shareholding is required?
11. Likewise, the word “control” is imprecise. Does this include de facto control or is it limited to de jure control? The interpretation of the phrase “control ... by any other means” has created uncertainty in the context of the ‘two companies’ test of association in section YB 2(3), as evidenced by the conflicting dicta of Clifford J and Edwards J in *Concepts 124 Limited v C of IR* (2014) 26 NZTC 21-100 and *Staites Drive Development Limited v C of IR* (2015) 27 NZTC 22-028, respectively.

Further assistance

12. We trust Inland Revenue will find these comments helpful. If you wish to discuss the comments, please do not hesitate to contact the Tax Law Committee convenor Neil Russ, through the Law Society’s Law Reform Adviser, Emily Sutton (Emily.Sutton@lawsociety.org.nz).

Your faithfully



Herman Visagie
Vice President

² Note 1, at paragraph 6.

