

## **WORK OF A MINOR NATURE**

This item was originally issued as an exposure draft for public consultation in 2000. A revised exposure draft was issued for public consultation in November 2002, and a further revised draft was issued for public consultation in May 2004. Since the publication of the most recent exposure draft, the Income Tax Act 2004 has been enacted. Two amendments have been made:

- One sentence in the discussion of boundary adjustments has been replaced in order to clarify the Commissioner's position; and
- A statement has been added to the effect that no change is required as a result of the enactment of the Income Tax Act 2004.

## **SUMMARY**

This Interpretation Guideline sets out the Commissioner's interpretation of specific work undertaken as part of development or division work, in the context of section CD 1(2)(f), that constitutes "work of a minor nature" and therefore excludes the proceeds of sale from being treated as gross income of the taxpayer.

The guiding principle in deciding whether work done in undertaking a subdivision is of a minor nature is that it depends on an overall assessment of the facts of each case, having regard to the time, effort and expense involved. This is to be measured both in absolute terms and relative to the nature and value of the land on which the work is done.

The question of whether or not work is of a minor nature requires an overall assessment of what was done in particular circumstances, rather than the application of a checklist. There are four different overlapping factors to be taken into account:

- The importance of the work in relation to the physical nature and character of the land.
- The total cost of the work done in both absolute and relative terms.
- The nature of the professional services required.
- The nature of the physical work required for the subdivision (if any).

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Interpretation Guideline was prepared with reference to the Income Tax Act 1994. It has been reviewed following the enactment of the Income Tax Act 2004. In the new Act, section CD 1(2)(f) is recast as sections CB 10, CB 15(1), CB 18, and CB 21. There are no intended policy changes in the relevant legislation. While there are some changes to the words used, these changes are not considered material. It was therefore

concluded that the enactment of the Income Tax Act 2004 does not lead to any change in the law dealt with in this Interpretation Guideline.

## **BACKGROUND**

Section CD 1(2)(f) includes in the gross income of a person any amount derived from the sale or other disposition of land where the following elements exist:

- An undertaking or scheme (whether or not an adventure in the nature of trade or business) involving the development or division into lots of that land.
- The development or division work has been carried on or carried out by or on behalf of the taxpayer, on or in relation to that land.
- The work is not work of a minor nature.
- The undertaking or scheme was commenced within 10 years of the date on which that land was acquired by the taxpayer.

## **ISSUES**

Section CD 1(2)(f) taxes the gross income from the sale of land where development or division work has been done that is more than of a minor nature. The question considered in this statement is: what factors do the Courts take into account in determining whether a development or division of land is “work of a minor nature” in terms of section CD 1(2)(f) so that the proceeds of sale are not deemed to be gross income of the taxpayer. This is determined by considering:

- The background to section CD 1(2)(f) including the policy reasons for its introduction.
- The context and words of section CD 1(2)(f), including interpretative provisions specific to section CD 1.
- The basic principles for approaching section CD 1(2)(f), including consideration of the meaning of certain expressions used in section CD 1(2)(f): “undertaking or scheme”, “development or division into lots”, “development or division work”, and “work of a minor nature”.
- The factors that the courts have weighed in deciding whether work is of a minor nature, namely:
  1. The importance of the work in relation to the physical nature and character of the land.
  2. The total cost of the work done, in both absolute and relative terms.
  3. The nature of the professional services required.
  4. The nature of the physical work required for the subdivision (if any).

## LEGISLATION

Section CD 1 states:

(1) Any amount derived from the sale or other disposition of any land, being an amount to which this section applies, is gross income.

(2) For the purposes of subsection (1), the gross income of any person includes the following amounts –

....

(f) Any amount derived from the sale or other disposition of land where –

- (i) An undertaking or scheme, whether or not an adventure in the nature of trade or business, involving the development or division into lots of that land has been carried on or carried out, and that development or division work, not being work of a minor nature, has been carried on or carried out by or on behalf of the taxpayer, on or in relation to that land; and
- (ii) That undertaking or scheme was commenced within 10 years of the date on which that land was acquired by the taxpayer:

Provided that this paragraph shall not apply in any case where the development or division work involved in any undertaking or scheme (being development or division work in relation to which, apart from this proviso, this paragraph would apply if it were development or division work of other than a minor nature) is for the purposes of the creating or effecting of a development or division or any other improvement that is for use in and for the purposes of –

- (iii) The carrying on by the taxpayer of any business on or from the land, not being a business that consists of that undertaking or scheme; or
- (iv) The residing, on the land, of the taxpayer and any member of the taxpayer's family living with the taxpayer; or
- (v) The deriving by the taxpayer, from or in relation to the land, of gross income of any of the kinds referred to in section CE 1(1)(e):

The element requiring that the work not be of a minor nature is an exclusion in relation to the section. If the work that has been and will be undertaken by the taxpayer is “work of a minor nature”, any gains on sale will not be gross income under section CD 1(2)(f).

## ANALYSIS

### Background to section CD 1(2)(f)

The provisions of section CD 1 were originally enacted as section 88AA of the Land and Income Tax Act 1954. The provisions of section 88AA were inserted by section 9(1) of the Land and Income Tax Amendment Act 1973.

In the Court of Appeal decision of *Lowe v C of IR* (1981) 5 NZTC 61,006, Cooke J said (at p.61,010) that the purpose behind the addition of section 88AA was to remove the need for a profit making intention before an amount could be seen as income arising from a scheme or undertaking. He went on to note that in the same year as the Land and Income Tax Act 1954 had been amended by the inclusion of section 88AA, the

Property Speculation Tax Act 1973 (imposing tax on profits derived from the buying and selling of land for speculative purposes) had also been passed. He noted that under that Act an assessable profit derived from speculative land transactions could not escape tax on the ground that it was a capital gain. He went on to say:

The exception of certain dispositions of farm land for farming purposes [in section CD 1] throws some light on the policy of the legislature. It suggests that, by contrast, Parliament had in mind, for example, vendors who were able to make profits by schemes of development or subdivision which took advantage of the growing community's need for urban expansion into rural land. In defined circumstances they were to contribute some share of their profits to the community. And both exceptions are consistent with an intention that a profit should not automatically escape [section CD 1(2)(f)] or [section CD 1(2)(g)] merely because it was a capital profit; for cases within the exceptions would normally be instances also of capital profits.

But I do not base any conclusion on the exceptions. The crucial point is that the phrase "whether or not an adventure in the nature of trade or business" reflects the very language used in *McClelland's* case to describe undertakings or schemes giving rise to income according to ordinary usages and concepts. The only reasonable inference is that for the future Parliament was ruling out that criterion in cases falling within [section CD 1(2)(f)] or [section CD 1(2)(g)].

The purpose of section CD 1(2)(f) was referred to in Parliament by the then Member for Kapiti, Mr O'Flynn, at the third reading of the Land and Income Tax Amendment Act 1973. He said:

It is quite wrong to claim that a man who owns a section of half or three-quarters of an acre for, say, not quite 10 years, and who cuts it up into three lots and sells two of them, would be lumbered with what the Opposition emotionally called a capital gains tax. The paragraph uses the words "not being work of a minor nature", and it is well known that if one merely cuts up a big section the only work involved for the subdivider is having a surveyor draw up a simple plan, and often not even a plan which requires the formal depositing arrangements under the Land Transfer Act. (NZPD, Vol 387, 1973: 4,805)

Richardson J in *Costello v CIR* (1994) 16 NZTC 11,253 said (at p.11,256):

The focus [of the inquiry under section CD 1(2)(f)] is on the nature of the work involved, as is apparent from the parallel provisions of [section CD 1(2)(g)] and the description of work within the parentheses in [g]. The focus is on what was actually done not on the economic benefits from doing the work.

It appears that such an interpretation (focusing on the activity undertaken rather than the taxpayer's intention to profit) gives the best effect to the intention of Parliament. The general aim of section CD 1 is that profits from trading in property or arising from schemes of development or subdivision or from improvements to land should be taxable. However, section CD 1(2)(f) is worded so as to exclude very basic subdivisions (such as the most basic and simple domestic ones) from its operation.

### ***Context and wording of section CD 1(2)(f)***

A brief summary of the scope of section CD 1 is provided to place section CD 1(2)(f) in its legislative context. The wording of section CD 1(2)(f) will then be looked at more closely to give an understanding as to how the "work of a minor nature" exemption fits into the section as a whole.

## *Scope of section CD 1*

Section CD 1 commences by providing in subsection (1) that certain amounts derived from the sale or other disposition of land are gross income. Subsection (2) then identifies the amounts that are deemed to be gross income. It sets out seven different tests, and satisfying any one of those tests suffices. Subsections (3) to (7) provide exceptions for certain amounts that would otherwise be gross income under one or more of the paragraphs in subsection (2). A proviso to s CD 1(2)(f) extends the exceptions in subsection (3) in terms specific to section CD 1(2)(f) and adds a further exception for section CD 1(2)(f) relating to the derivation of income from real property assessable under section CE 1(1)(e). Subsections (10) to (14) are interpretative and deeming provisions, further explaining the “land” to which section CD 1 applies, and providing for associated persons transactions, mortgagee sales, and compulsory acquisition by the Crown or any local or public authority. Subsections (5), (8) and (9) are repealed.

Section CD 1(1) states:

Any amount derived from the sale or other disposition of any land, being an amount to which this section applies, is gross income.

Section CD 1(2) provides that amounts derived from the sale or disposition of land will be gross income if -

- The land was acquired with the purpose or intention of selling or otherwise disposing of it: section CD 1(2)(a).
- When the land was acquired, the taxpayer was in the business of dealing in land and either the land was acquired for the purpose of the business of dealing in land, or the land was sold or disposed of within 10 years of acquisition: section CD 1(2)(b).
- When the land was acquired, the taxpayer was in the business of developing or subdividing land (not being development or division work of a minor nature), and either the land was acquired for the purposes of the business, or the land was sold or disposed of within 10 years of acquisition: section CD 1(2)(c).
- When the land was acquired, the taxpayer was in business as a builder, and the taxpayer carried out improvements of more than a minor nature to the land, and either the land was acquired for the purposes of the business, or the improved land was sold or disposed of within 10 years of completing the improvements: section CD 1(2)(d).
- Within 10 years of acquisition the taxpayer disposes of the land for more than its cost, and 20 % of that excess is due to any one or more of: the rules of an operative district plan or any change in those rules after the taxpayer acquired the land; or any resource consent or Planning Tribunal decision after the taxpayer acquired the land; or the removal of any limitation on the use of the land under the Resource Management Act 1991 after the taxpayer acquired the land; or the likelihood of any of these; or any similar change or occurrence. (This provision (section CD 1(2)(e)) does not apply if any other paragraph of section CD 1(2) applies.)

- An undertaking or scheme commencing within 10 years of acquisition and involving the development or subdivision of the land has been carried on or carried out and the work undertaken is not work of a minor nature: section CD 1(2)(f), discussed in more detail below.
- Where none of the above applies, the amount was derived from a development or subdivision undertaking or scheme involving significant expenditure on certain specified types of work: section CD 1(2)(g).

Section CD 1(2)(b)-(d) include an associated persons test. This means that if, when the taxpayer acquired the land, an associated person was in the business dealt with in the relevant paragraph, the amount will be included in the gross income of the taxpayer if the land was acquired for the business, even if the taxpayer was not in the business. An associated persons test is included in these provisions because they relate to sales and dispositions that are taxable on the basis of the characteristics of the taxpayer selling or disposing of the land, rather than on the nature of the transaction itself. Because the characteristics of the taxpayer are central to the taxability of the transaction, the association of the taxpayer with a person with characteristics that section CD 1(2)(b)-(d) relates to will also make the transaction taxable. The test of whether a taxpayer and another person are associated persons is applied only at the time of the acquisition of the land. The test of association is not applied at the time of the sale or other disposition of the land (see BR Pub 03/05, TIB Vol 15, No 9, September 2003).

Section CD 1(2)(b), (c), and (e) are limited in scope because they apply only if the land is sold or disposed of within 10 years of acquisition, if the land was not acquired for the purpose of the taxpayer's business. Section CD 1(2)(d) will only apply if the land is sold or disposed of within 10 years of the date on which any improvements to the land were completed, if the land was not acquired for the purpose of the taxpayer's business of erecting buildings. In section CD 1(2)(f), the requirement is that the undertaking or scheme of subdivision must be commenced within 10 years of the date on which the land was acquired. Section CD 1(2)(a) and section CD 1(2)(g) apply without a time limit.

### ***Exemptions***

A transaction that may otherwise be included in gross income under section CD 1(2)(a) to (g) will be exempt if it also comes within one of the exemptions provided for in section CD 1(3), (4), (6) and (7). These exemptions relate to land used for business premises or for residential or farming purposes. The proviso to section CD 1(2)(f) excludes from section CD 1(2)(f) development, division or other improvements for the taxpayer's use in and for certain purposes. These purposes are: carrying on any business on or from the land; residing on the land; or deriving income of a kind referred to in section CE 1(1)(e) (that is, rents, fines, premiums, or other revenues from any lease, licence, or easement affecting the land, or from the grant of any right of taking the profits of the land).

### ***Interpretative provisions***

Section CD 1(10) makes it clear that section CD 1 will apply where the whole or part of any land is sold.

Section CD 1(11)-(13) contain deeming provisions relating to associated persons' transactions and the definitions of "sale" and "disposition".

### **The elements of section CD 1(2)(f)**

In discussing the elements of section CD 1(2)(f) in general terms, McMullin J said in *Lowe v CIR* (1981) 5 NZTC 61,006 at p.61,034:

In enacting sec. [CD 1(2)(f)] in the form in which it did, the legislature has placed some limitations upon the taxability of profits or gains derived from the sale or other disposition of land. Profits or gains are only caught by the provision where the undertaking or scheme:

- (a) Involves a development or division into lots that has been carried on or out, and
- (b) The work of development or division is not of a minor nature, and
- (c) The undertaking or scheme was commenced within 10 years of the date, and
- (d) It is outside of the matters mentioned in [section CD 1(6) and (7)].

The time element is particularly important. It distinguishes the class of case caught by sec. [CD 1(2)(f)] from cases of subdivision or development by persons who have held and used their land as farm land for a longer period of time and have found subdivision necessary or worthwhile only because of the impact of the urban sprawl. These factors, namely the time at which the subdivision is carried out and the need for development to be of more than a minor nature, suggest to me that the legislature was creating a new and separate category of taxable gains or profits, whether they be regarded as capital or not, when it introduced sec. [CD 1(2)(f)].

I think that there is no warrant for placing upon the subsection a construction which would limit its application to profits or gains of a traditionally income kind and the activity engaged in by appellants falls squarely within the provision.

However, proceeds from a scheme or undertaking that have the characteristics outlined by McMullin J will only be included in gross income if the exemptions in section CD 1(2)(f)(iii)-(v) do not apply. The exemptions state that section CD 1(2)(f) does not apply to any development, division, or improvement that is used in, and for, the purposes of:

- any business carried on by the taxpayer on or from the land with the exception, of course, of a land subdivision or development business to which section CD 1(2)(c) would apply;
- a private residence for the taxpayer and any member of his or her family living with him;
- the derivation of rents or other similar revenues from the land.

### **Basic principles for approaching section CD 1(2)(f)**

When discussing the question of what constitutes work of a minor nature, the Courts consistently refer to the need to assess each case on its own facts.

*Costello v CIR* (1994) 16 NZTC 11,253 is the leading case on the meaning of the phrase "work of a minor nature" as it is the only Court of Appeal decision on the issue.

Richardson J (as he then was), delivering the Court of Appeal’s judgment, noted that the phrase focuses on the nature of the work undertaken, not the economic benefits that result from the work. He emphasised the need to carry out a comparative analysis of the work undertaken in determining whether the work was minor in nature. He commented, at p.11,256, that this analysis needed to be performed on a case by case basis rather than by simply applying a pre-determined or mechanical checklist:

“Minor” like “lesser” is a relative expression. It becomes a question of degree. Whether the work in question is of a minor nature is a matter of fact to be determined on all the circumstances of the particular case. Every subdivision of a larger area into lots will include some survey work, the preparation of appropriate plans, obtaining planning consents and local authority permits and associated legal work including the depositing of subdivisional plans and the issue of any separate titles. [Section CD 1(2)(f)] recognises that the work involved in some subdivisions may be of a minor nature. Whether or not it is so in the particular case calls for an assessment of what was done which in practical terms may require consideration of the time, effort and expense involved. The statutory yardstick is not precise. It does not specify any particular criteria. It calls for an overall judgment not a mechanical application of a checklist.

His Honour’s comments are an amplification of the *obiter* remarks he made in *Lowe v CIR* (1981) 5 NZTC 61,006 in which he said (at p.61,020):

Whether work is of a minor nature must, it seems, depend on an overall assessment of such matters as the time, effort and expense involved, measured both in absolute terms and relative to the nature and value of the land on which the work is done.

Accordingly, in general terms, whether work done in undertaking a subdivision is of a minor nature depends on an overall assessment of the facts of each case, having regard to what has been done relative to the nature and value of the land involved. A matrix of cases that have considered the work of a minor nature exemption is at the end of this guideline.

### ***Meaning of “undertaking or scheme”***

The words “undertaking or scheme” were considered in *Vuleta v CIR* [1962] NZLR 325. Henry J at p.329 defined scheme as:

a plan, design, or programme of action, hence a plan of action devised in order to attain some end; a project, an enterprise.

This definition has been approved in a number of land subdivision cases, including *Wellington v CIR* (1981) 5 NZTC 61,101 at p.61,103 and *O’Toole v CIR* (1985) 7 NZTC 5,045 at p.5,049.

In *Lowe v CIR* (1981) 5 NZTC 61,006 and *Costello v CIR* (1994) 16 NZTC 11,253, it was accepted by the taxpayers that the subdivision work they had done amounted to an undertaking or scheme. In both cases the Court commented that this was a proper concession to make. Richardson J noted in *Lowe v CIR* (at p.61,020):

More importantly for present purposes, division as an alternative to development and the limitation of the exception to work of a minor nature suggest that not a great deal is required by way of activity to constitute a plan or programme of action an undertaking or scheme under the paragraph.

The Court in *O’Toole* stated at p.5,050 that an undertaking or scheme existed because the taxpayers:



entered into a project or enterprise directed towards the subdivision of their land into lots with a view to sale of those lots at a profit. The scheme existed in the plan or purpose to sell off the lots not reserved by the objectors for their own use in order to realise the maximum available profit.

### ***Meaning of “development or division into lots”***

In *Dobson v CIR* (1987) 9 NZTC 6,025 at p.6,029 Hardie Boys J stated that the scheme of the statute made it clear that “development” is to be interpreted in a restricted sense. It means development in the sense of the preparation of the land for an intended use. It does not include the development of buildings as this is dealt with in section CD 1(2)(d). In *Dobson v CIR*, “development” was found to be the demolition of existing buildings and the clearing of the sites. This implies that development work entails some form of physical work undertaken in relation to the land, although no actual subdivision has been carried out (*Anzamco Ltd (in liq) v CIR* (1983) 6 NZTC 61,522), whereas division into lots involves some definite action in terms of the division of land into lots. Unlike the term “development”, no physical activity involving the land needs to occur. However, there is a degree of overlapping between “development” and “division” work (*Wellington v CIR* (1981) 5 NZTC 61,101 at p.61,104, confirmed by the Court of Appeal in *Smith v CIR (No 2)* (1989) 11 NZTC 6,018 at p.6,024).

The cases also show that the term “division into lots” does not require the land to be physically divided into lots (*O’Toole v CIR* (1985) 7 NZTC 5,045). However, there are certain criteria that need to be fulfilled before it can be said that a division into lots has taken place. These criteria are listed in *Wellington v CIR* as planning and preparation of formal plans, survey work, obtaining town planning consents and local authority permits, and legal work including the deposit of subdivision plans and the issue of separate titles if required. Therefore, the term “division into lots” requires, at a minimum, a level of activity designed to facilitate the division of land.

### ***Boundary Adjustments***

In respect of a boundary adjustment (relocation, rearrangement, or realignment) it is the Commissioner’s view that a voluntary boundary adjustment to surveyed boundaries between contiguous lots of Land Transfer land will amount to “division into lots” for the purposes of section CD 1(2)(f), even where there is no increase in the number of lots. A boundary adjustment requires the existing boundaries to be erased and new boundaries to be created although there is no increase in the number of lots. The work is exactly the same type of work that is carried out in a subdivision where the number of lots is increased. A boundary adjustment therefore divides the land. Whether it was previously differently divided into lots is not a relevant consideration on the straightforward language of section CD 1(2)(f)(i), and in *Lowe v CIR* (1981) 5 NZTC 61,006 (CA, Cooke, Richardson and McMullin JJ), both Cooke J and Richardson J indicated that the natural meaning of the words was to be adopted in construing section CD 1(2)(f). It is therefore the Commissioner’s view that, if a lot of land owned by a person is altered by transferring a part of the lot to, and including it in the title for other adjoining land owned by, another person there is a division into lots of the first-mentioned lot.

Furthermore, section CD 1(13) provides that section CD 1 applies where the land sold is the whole or part of any land to which section CD 1 applies or the whole or part any such land together with any other land. Therefore, if the boundaries between adjoining

lots of land owned by the same person are altered, there is a division into lots of the land comprised of those adjoining lots; and if any of the resulting lots is sold or otherwise disposed of any amount derived on the sale or other disposition will be gross income under section CD 1(2)(f) if the other requirements of section CD 1(2)(f) are satisfied.

However in many cases a boundary adjustment will involve nothing more than minimal survey and legal work, and no physical work on the land. That is clearly work of a minor nature, so that many straightforward boundary adjustments are not within section CD 1(2)(f).

In *Case SI* (1995) 17 NZTC 7,001, 7,004 Barber DJ said that a boundary adjustment was deemed not to be a subdivision. In the Commissioner's view, the context of this statement, including its place in the decision under the heading "The evidence and the facts" and the surrounding discussion of the taxpayer's property division activities, shows that this statement is not intended as Judge Barber's analysis of the law or as a general proposition of law. The statement merely reflects the evidence given on the reasons for the taxpayer's decision to pursue, and later not to pursue, a boundary adjustment.

It is also considered that an interpretation that such a boundary adjustment or relocation was not a "division into lots" or "division work" could potentially give rise to anomalies in the operation of the section. For example, a land owner who owns a 10 acre block and carries out a subdivision of 5 acres would be subject to the provisions of section CD 1(2)(f) as this activity would be a "division into lots" or "division work", whereas a land owner who owns a 10 acre block with two existing titles (a 1 acre block and a 9 acre block) and amends the existing titles to comprise of two 5 acre blocks would not be subject to the provisions of section CD 1(2)(f). On the proper construction of section CD 1(2)(f), a boundary adjustment or relocation is a division into lots. The primary test in section CD 1(2)(f) turns on the work involved in the development or division scheme. A boundary adjustment involves similar work to other subdivision of land, and produces a similar outcome. It would therefore seem logical in terms of the underlying policy of the provision that section CD 1(2)(f) applies in the same way to a boundary adjustment as it does to other subdivision of land.

A boundary adjustment where any physical work is carried out could also fall within the broad definition of "development work" for the purposes of section CD 1(2)(f) (see *Anzamco (in liq) v CIR* (1983) 6 NZTC 61,522, *Dobson v CIR* (1987) 9 NZTC 6,025 and *Wellington v CIR* (1981) 5 NZTC 61,101).

A subdivision of land will satisfy the requirements of section CD 1(2)(f) as it will be an undertaking or scheme (being a plan of action directed toward some end) and it will also constitute division into lots as required by that section. As Richardson J noted in *Lowe v CIR* (1981) 5 NZTC 61,006, (at p.61,020):

More importantly for present purposes, division as an alternative to development and the limitation of the exception to work of a minor nature suggest that not a great deal is required by way of activity to constitute a plan or programme of action an undertaking or scheme under the paragraph.

*Costs to be specifically included or excluded in the phrase “development or division work”*

The meaning of “development or division work” includes any type of work done on or in relation to the land, such as (but not limited to) professional fees (surveyor, solicitor, valuations), fencing, demolishing buildings, clearing the site, the cost of installing power or water onto a site, and creating a driveway or entranceway.

Some costs incurred by subdividers and specifically included or excluded by the Courts are outlined below.

#### Cost of constructing any building

In *Dobson v CIR*, Hardie Boys J held that development work in section CD 1(2)(f) does not include the construction of buildings, as income derived from this activity is assessed under section CD 1(2)(d). Therefore, the cost of constructing any building on the land being subdivided should be excluded in deciding whether or not the work done is of a minor nature.

Sometimes it can be difficult to determine whether the work is preliminary development or division work (and therefore not excluded in deciding whether or not the work done is of a minor nature) or part of the construction process. In *Dobson* Hardie Boys J concluded (at p.6,030):

... demolition, clearing of the sites, surveys, the deposit of plans, the preparation of cross leases, the obtaining of composite titles, were all part of, and together comprised, the development and division work involved. All else was part of the construction of the new flats.

Accordingly, the demolition and clearing of the sites was regarded as preliminary work that was within the phrase “development and division into lots”.

Whether an item of development work is preliminary to construction work or is part of the construction process is a question of fact to be determined in each case. For example, drainage work preparatory to the construction process, and drainage which is part of the building itself.

*Dobson* was followed in *Case R7* (1994) 16 NZTC 6,035. In that case an old house was purchased, placed on the site of the subdivision, and partly renovated. The Authority held on the basis of the facts before him that the development and subdivision work carried out on the property was work of a minor nature. Barber DJ did not regard the purchase and placement of the house on the site as being development work. He excluded the necessary minor excavation work for the foundations of the house from consideration when he weighed up whether or not there had been work of a minor nature.

Where a building existed on the land before the subdivision was begun, it is suggested that it should be included in the value of the land against which the cost of the subdivision work is measured. This conclusion is inferred from the facts in *Wellington v CIR*, which Hardie Boys J cited with approval in *Dobson* (although not on this point), and with the general principle that once a building is attached to the land it becomes a part of the land. In *Wellington v CIR* Ongley J held that work costing \$9,080, in

relation to the land and buildings that cost \$12,000, could hardly be said to be of a minor nature.

### Financial contributions as a condition of a resource consent

A financial contribution of either money or land may be imposed as a condition on a resource consent under the Resource Management Act 1991 (the “RMA”), as a charge against land-owners who are subdividing. The financial contribution will be specified in the relevant district plan, and can be a significant proportion of the total subdivision costs. It can often end up being more than half the cost of the subdivision.

The planning consent provisions of the RMA repealed those of the Local Government Act 1974. Under the RMA financial contributions in the form of money relate broadly to environmental management issues such as the management of natural and physical resources.

A financial contribution may also be made in the form of an actual transfer of land to the Council. The cost of dividing off additional lots of land as a financial contribution may increase the cost of a subdivision. However, this will not be an issue in cases dealing with work of a minor nature. Land is only given in large developments, as in a small development the amount of land cut off as a financial contribution would be very small. Therefore, in small subdivisions, where the exemption for work of a minor nature will apply, a financial contribution would be required generally in the form of money only.

#### i. Financial contributions in the context of section CD 1(2)(f)

*Case D24* (1979) 4 NZTC 60,597 is the only case directly considering whether a financial contribution should be taken into account in deciding whether work is “development or division work” in section CD 1(2)(f).

A.J. Lloyd Martin said (at p.60,607):

The amount payable to a local authority as “Reserve Contribution” cannot in my opinion be considered as amounts payable for “work” done. Such sums become payable as the result of the subdivision of land into lots but the contributions are not part of the costs involved in creating such subdivisions.

He went on to hold that expenditure incurred in the preparation and deposit of the necessary land transfer plan could not be considered as “work” for the purposes of the section.

*Wellington v CIR* overruled *Case D24* on the question of whether surveying of the land and preparation of the land transfer plan constitute “development or division work” for the purposes of the “work of a minor nature” test. However, Ongley J did not comment on what A.J. Lloyd Martin had said on the question of reserve contributions, although his list of the minimum work required for a subdivision in *Wellington v CIR* included the category “obtaining town planning consents and local authority permits”.

ii. Financial contributions in the context of section CD 1(2)(g)

*Aubrey v CIR* (1984) 6 NZTC 61,765 (applied in *Mee v CIR* (1988) 10 NZTC 5,073), a High Court case dealing with the meaning of “work involving significant expenditure” under section CD 1(2)(g)), supports the argument that Ongley J’s category of work involving “obtaining town planning consents and local authority permits” means only the professional work involved in these activities.

In *Aubrey*, Tompkins J had said (at p.61,769):

The Crown contended that a reserve fund contribution paid in cash would also be in the second category [note: the second category to which Tompkins J was referring was the second category of work listed in the definition of ‘division or development work’ in section CD 1(2)(g). The work listed in the brackets following the words ‘division or development work’ could be divided into two categories. The first consisted of “earthworks, contouring, levelling, drainage, roading, curbing or channelling”. The second category was described as “any other work, service, or amenity customarily undertaken or provided in major projects”], because the provision of reserves was an amenity customarily provided in major projects. It must be remembered that all the words in brackets are describing the kind of development or division work that has been carried out or carried on or in relation to the land. The division work involves the preparation and obtaining of the requisite approval of the scheme plan of the subdivision, then the lodging in the Land Registry Office of the deposited plan. The legal and survey costs involve expenditure on that work. But although a reserve fund contribution may be required to obtain the approval of the subdivision, I do not consider that it can be regarded as an expenditure on that work. Nor do I consider that it can be regarded as an expenditure on an amenity customarily provided in major projects.

Given that Tompkins J considered that a reserve fund contribution could not be considered as expenditure on “division work”, it is the Commissioner’s view that A.J. Lloyd Martin’s analysis in *Case D24*, stating that the amount paid as a reserve contribution does not count as “work”, is still good law. Therefore, financial contributions of money and/or land as a condition of resource consent are excluded from the meaning of “development or division work”.

Environmental assessments as part of resource consent

Another requirement of resource consent is that the applicant must also provide “an assessment of any actual or potential effect that the activity may have on the environment, and the ways in which any adverse effects may be mitigated”: section 88(4)(b) of the RMA. The Commissioner considers that the meaning of “development or division work” includes any work involved in obtaining an environmental assessment as part of resource consent.

The Commissioner considers that any subdivision will constitute an undertaking or scheme involving development or division into lots for the purposes of section CD 1(2)(f).

***Meaning of “work ... carried on or carried out by or on behalf of the taxpayer”***

The Courts have not addressed the meaning of the words “work ... carried on or carried out by or on behalf of the taxpayer” in the context of section CD 1(2)(f)(i) or its predecessor legislation. However in *Mee v CIR* (1988) 10 NZTC 5,073 (HC), Hardie Boys J considered the words:

... development or division work ... has been carried on or carried out by or on behalf of the taxpayer on or in relation to that land.

in section 88AA(1)(e) of the Land and Income Tax Act 1954 (now section CD 1(2)(g)). One matter in dispute was whether a payment (as a condition of the subdivision consent) of an agreed sum to the territorial authority for roading, water and sewage was within this description. Hardie Boys J found that it was not, saying (among other things):

... Execution of this scheme did not involve the taxpayer in this particular work. All that was required of him was the payment of money to enable the Council to do it at a later date. When the Council did eventually do it, it did not do it on Mr Mee's behalf. It was not acting as his agent, or in any other representative capacity, but independently, in the fulfilment of its own duties. ...

It is inferred from this that work performed by a local authority in fulfilment of its own statutory functions is not "work ... carried on or carried out by or on behalf of the taxpayer" in terms of section CD 1(2)(g). Because section CD 1(2)(f) was originally enacted at the same time as, and as part of the same legislative scheme as section CD 1(2)(g), and because the two paragraphs deal with development or division work involved in the development or division into lots of land, it is presumed that a court would adopt the same view if the question arose in relation to section CD 1(2)(f).

#### *Resource consent application fees*

A taxpayer subdividing land may require consent under the Resource Management Act 1991 to do so (a "resource consent"). The Resource Management Act 1991 provides for territorial authorities to accept and consider applications for resource consents. The territorial authority receives, processes and grants or declines the resource consent application in fulfilment of its function of controlling the actual or potential effects of the use, development, or protection of land, of the subdivision of land, of the emission of noise, and of the actual or potential effects of activities in relation to the surface of rivers and lakes (Resource Management Act 1991, section 31). Territorial authorities charge the applicant for this work. The work may benefit the taxpayer (if the resource consent is granted), but it also benefits neighbours of the land in question by ensuring that the proposed use of the land accords with the local district plan and by providing them with an opportunity to influence the matters for which the resource consent is sought.

Because the territorial authority receives, processes and grants or declines the resource consent application in fulfilment of its own statutory function, that work is not "work ... carried on or carried out by or on behalf of the taxpayer" in terms of section CD 1(2)(f)(i). Consequentially, resource consent application fees should not be included in the costs taken into account when considering whether the development or division work is work of a minor nature.

#### ***"Work of a minor nature"***

In *Costello v CIR* (1994) 16 NZTC 11,253, Richardson J stated (at 11,256):

Every subdivision of a larger area into lots will include some survey work, the preparation of appropriate plans, obtaining planning consents and local authority permits and associated legal work including the depositing of subdivisional plans and the issue of any separate titles. [Section

**CD 1(2)(f)] recognises that the work involved in some subdivisions may be of a minor nature.**  
[Emphasis added]

On this basis, therefore, it can be inferred that the elementary level of survey, legal and planning work necessary to complete a basic subdivision would of itself be considered to be work of a minor nature. Any other conclusion would mean that the work of a minor nature exemption to paragraph (f) would not serve any purpose. This is also consistent with what Mr O’Flynn, the then Member for Kapiti, at the third reading of the Land and Income Tax Amendment Act 1973, stated when he said:

It is quite wrong to claim that a man who owns a section of half or three-quarters of an acre for, say, not quite 10 years, and who cuts it up into three lots and sells two of them, would be lumbered with what the Opposition emotionally called a capital gains tax.

This indicates that the purpose of the work of a minor nature exception to section CD 1(2)(f) is to make sure the basic subdivision requiring only minimal work would not be taxable. It is important to bear this in mind when approaching the work of a minor nature exemption.

Therefore, the Commissioner considers that some subdivision schemes or undertakings must be able to comprise work of a minor nature. Factors the courts have taken into account when deciding whether the development or division work is work of a minor nature are discussed below.

## **FACTORS THE COURTS HAVE WEIGHED IN DECIDING WHETHER WORK IS OF A MINOR NATURE**

While the courts have said that whether or not work is of a minor nature is a relative expression requiring assessment of what was done in particular circumstances, rather than the application of a checklist, they have also referred to a number of factors to be taken into account in determining the issue. The remainder of this guideline will focus on how each of these overlapping factors has been interpreted and applied. They are:

- The importance of the work in relation to the physical nature and character of the land.
- The total cost of the work done, in both absolute and relative terms.
- The nature of the professional services required.
- The nature of the physical work required for the subdivision (if any).

### **1. The importance of the work in relation to the physical nature and character of the land**

The importance of the work in relation to the physical nature and character of the land is a relevant factor in deciding whether work is of a minor nature. However, it should be noted that physical change to the land is not necessary for the work to be of more than a minor nature.

This factor was discussed in *Dobson v CIR* (1987) 9 NZTC 6,025. In this case the taxpayer had demolished the dwellings on three properties and replaced the dwellings

with a number of new flats. The subdivision work involved demolition, clearing of the sites, surveys, plan deposits, preparation of cross-leases and obtaining composite titles. Considered all together, this work could not be considered “minor”. Hardie Boys J found that the most significant feature of the development was the demolition of buildings on the properties, and commented (at p.6,030):

This was development work, and it was not minor, whatever its cost may have been, for it altered the whole character of each property, allowing for its complete redevelopment, which would not otherwise have been possible.

Hardie Boys J said that the land to be considered, when looking at the importance of the work to the nature and character of the land, was the original land and not the newly created lot.

While it is arguable that the creation of an additional lot is more than a minor adjustment to the land, the courts have not ordinarily found the creation of a new lot *per se* to be a major change to the nature and character of the land. Generally, something more has been needed. In *Dobson* it was thought that the mere bisection of a lot was of itself work of a minor nature. Hardie Boys J said (at p.6,030):

I doubt that the subdivision at Lyttleton/Edinburgh Streets, which involved simply the bisection of a virtually rectangular lot, was of itself more than work of a minor nature, and possibly the same might be said of that at MacKenzie Avenue, although there the access strip to the street meant that two boundary lines, connected by an arc, were required.

In *Case E90* (1982) 5 NZTC 59,471 Bathgate DJ said (at p.59,476):

...I consider that the nature and effect of the work in the way of development or division into lots must be a significant factor in ascertaining whether or not that work is of a minor nature in relation to that land...In this case one single piece of land in one title has been subdivided, there has been a division of the building into three major units, and two smaller units, with the definition of a further piece of land as common property.... I consider all this is not “work of a minor nature” for that particular piece of land. Nor has O satisfied me on the balance of probabilities that the division work alone is of a minor nature.

It has been suggested by some commentators that this appears to confuse the effect of the subdivision work with the extent of that work. It is the Commissioner’s view that:

- Section CD 1(2)(f) requires consideration of whether the work is not work of a minor nature – that is, it addresses the work itself and not the effects of the work; and
- In considering whether physical work is not work of a minor nature, the effect of that physical work is a relevant consideration, though it is only a consideration and it is not determinative.

This may be contrasted with the consideration of legal and professional work. It is explained later in this interpretation guideline that in considering whether legal or professional work is not work of a minor nature, one must consider the amount and complexity of the work (regardless of the costs incurred for it).



## 2. The total cost of the work done, in both absolute and relative terms

Richardson J in *Lowe v CIR* (1981) 5 NZTC 61,006 stated that whether work is of a minor nature must depend on an overall assessment of the work involved, including the cost, as measured both in absolute (or total) and relative terms.

### (i) *Total cost of the work to be done in absolute terms*

The court can take into account the total cost of the work to be done in absolute terms. The following table lists cases in chronological order (as to when the work was carried out), the total cost of the work with which the court was concerned, and the result in each case.

<i>Wellington v CIR</i> (1972)	\$9,000	Not minor
<i>O'Toole v CIR</i> (1974)	\$7,000	Not minor
<i>Case E41</i> (1982)	\$4,500	Not minor
<i>Case P61</i> (1985)	\$6,334	Minor in nature
<i>Costello v CIR</i> (1991)	\$1,700	Not minor

Not all cases make reference to the absolute amount expended in subdividing. In *Dobson v CIR*, *Case N59* (1991) 13 NZTC 3,457, *K v CIR* (1991) 13 NZTC 8,216, *Case R7* and *Case E90* the Court did not refer to the total amount incurred by the taxpayer in the development or division.

It should be noted that the findings reached in these cases were not solely determined according to the value of the work incurred. Other factors were also considered. For example, in *O'Toole* although the costs were largely limited to the surveying fees, the amount of time involved was reflected in the account for almost \$8,000 and this amount could not be considered a minor amount for surveying fees. (The difference between this figure and the figure in the table is explained by the fact that the original account tendered by the surveyor was \$8,000, but the taxpayer negotiated a reduction.)

Tompkins J stated in *K v CIR* that cost is one, but not the only, factor to be taken into account in deciding whether or not work is of a minor nature. In that particular case no legal costs were incurred because Mr K, being a solicitor, was able to and did carry out the work without charging himself or his wife a fee.

In analysing cost on an absolute basis there is no figure that will determine the issue definitively. It is a matter of degree. For example, in *Costello* it did not assist the taxpayer that the professional fees for the whole subdivision were a modest \$1,700. The Court of Appeal, when reviewing the work required to complete the subdivision, as opposed to cost of the work, was of the view that it was of more than a minor nature. On the other hand, in *Case P61* the subdivisional survey costs were \$6,334 in 1984 dollars. Barber DJ did not find that this expenditure jeopardised a decision that the work was minor in nature.

Although the work is to be measured in both absolute and relative terms, the Commissioner considers that there will always be a point where the absolute value of the sum expended is so high this factor alone will indicate that the work is more than minor. Conversely, the amount may be so low that as an absolute figure the amount

could in no circumstances be seen to be more than minor. However, this would only occur in extreme circumstances. As discussed below, although the amount of money spent is not enough to make the work of more than a minor nature on an absolute basis, the amount spent may indicate that there is more than work of a minor nature in relative terms.

**(ii) Cost of the work done in relative terms**

In his judgment in the Court of Appeal in *Lowe v CIR* (1981) 5 NZTC 61,006 (CA, Cooke, Richardson and McMullin JJ), 61,028, Richardson J said:

Whether the work is of a minor nature must, it seems, depend on an overall assessment of such matters as the time, effort and expense involved, measured both in absolute terms and relative to the nature and value of the land on which the work is done.

Thirteen years later, giving judgment for the Court of Appeal in *Costello v CIR* (1994) 16 NZTC 11,253 (CA, Richardson, Casey and Ellis JJ), Richardson J made reference to the total professional charges being “very small relative to land values”, not in relation to the cost of the land.

In *K & Anor v CIR* (1991) 13 NZTC 8,216 (HC, Tompkins J), Tompkins J says “Whether the work is of a minor nature is a matter of fact to be determined depending on all the circumstances of the particular case. Cost is one, but not the only factor.” Tompkins J goes on to find that the work involved in that case was not work of a minor nature. He considers the cost of the work, but finds that it is not a relevant consideration because some of the work was performed by one of the taxpayers at no cost.

However in *Case E41* (1982) 5 NZTC 59,255 (TRA, Barber DCJ), Barber DCJ considers the relative amount of certain development and division costs, including fencing work carried out by the taxpayer, and finds that it was not work of a minor nature. It is unexceptionable that the cost of the work performed by the taxpayer himself is ignored in such a case, for recognition of further costs could only have increased the relative significance of the development and division work.

In the High Court and the Taxation Review Authority, the cost of the work has been compared with, or it has been suggested that the cost should be compared with, –

- The cost of the land (*Wellington v CIR* (1981) 5 NZTC 61,101 (HC, Ongley J)); or
- The “ultimate value achieved” (*Dobson v CIR* (1987) 9 NZTC 6,025 (HC, Hardie Boys J)); or
- The sale price of the land or some of it (*Case E41* (1982) 5 NZTC 59,255 (TRA, Barber DCJ); *Case P61* (1992) 14 NZTC 4,416 (TRA, Barber DJ)).

There are no other High Court judgments or TRA decisions dealing with the question (in *O’Toole v CIR* (1985) 7 NZTC 5,045 (HC, Davison CJ) the comparison was made by a witness, not by Davison CJ).

In the Commissioner's view, whether the development and division work is work of a minor nature is a matter of fact to be determined depending on all the circumstances of the particular case, and relative cost is one, but not the only, factor to be considered. When considering relative cost, the cost of the work should be compared with the land in its state and value at the commencement of the work. That is because the cost of the work is to be compared with "the value of the land on which the work is done" (see the reference to *Lowe*, above), and drawing the comparison with the value of the land at any other time risks distortion due to alterations to the land and movement in land values. If the value of the land at that time is not available, it may be appropriate to compare the cost of the development or division work with the cost or the sale price of the land if the purchase or sale was relatively close in time to the commencement of the work. However, even if the purchase or sale was relatively close in time to the commencement of the work, intervening events might give reason to expect significant price movements so that the comparison might be misleading, and in such circumstances the alternative comparisons would not be appropriate. And if the work is performed at no cost, the work itself remains the important consideration.

It is necessary to keep in mind the statutory test. The cases considered above were not decided on the cost of the development or division work alone. The statutory test is whether the work is work of a minor nature. The comparison of the cost of the work with the value of the land uses monetary value as a basis for comparison between subjects (the work and the thing on or in relation to which it is done) that might otherwise be incommensurable. In any particular case a cost comparison may not be determinative. And if a cost comparison is significant, other bases of comparison may be also be appropriate or more appropriate.

As noted earlier, the findings reached in these cases were not solely determined according to the cost of the work done. The other factors that go towards determining whether the subdivision work is work of a minor nature are now considered.

### **3. The nature of the professional services required**

The cases establish that the more the professional services utilised in undertaking a subdivision, the less the likelihood that it will be work of a minor nature. For example, there may be the need to employ an engineer or a valuer in order to undertake the subdivision. Alternatively, it may only be necessary to employ a solicitor and a surveyor in order to undertake the subdivision, but the work undertaken might be of a high degree of complexity and/or require a large number of hours to complete.

In *Wellington v CIR* (1981) 5 NZTC 61,101 at p.61,103, Ongley J referred to the minimum work needed to complete a subdivision where no physical work is carried out:

Where no physical work of division is undertaken the work involved in division of a larger area into lots nevertheless must include at least the following:

- (i) planning and preparation of formal plans,
- (ii) survey work,
- (iii) obtaining town planning consents and local authority permits, and

(iv) legal work including deposit of subdivisional plans and issue of separate titles if required.

The fulfilment of these requirements will require the services of a surveyor and a solicitor. The need for professional services may go beyond these minimum requirements. For example, in *Costello v CIR* (1993) 15 NZTC 10,285 (HC); (1994) 16 NZTC 11,253 (CA) the taxpayers needed the services of three different professional disciplines in order to complete their subdivision.

### ***How complex is the professional work?***

The courts have been willing to accept that the work is minor in nature only when the actual work involved is simple in nature: *Case P61*, *Case R7*. When additional work, beyond minimal surveying and conveyancing, is required for completion of the scheme, and that work is a fundamental and integral component of the subdivision, it seems that such work would be considered work of more than a minor nature. If any conclusion can be drawn, it is that a basic subdivision necessitating only the barest professional services will be work of a minor nature. The introduction of an additional activity that is an integral part of the undertaking may be enough to make the work more than of a minor nature: *K v CIR*, *Costello v CIR*, *O'Toole v CIR*, *Case N59*.

In *Costello* Speight J noted in the High Court that substantive work was required from the surveyor but those fees only amounted to a modest \$1,104. His services were required for:

- the receipt of instructions
- searching the title and ascertaining survey information
- measuring the flats and calculating the areas
- dividing the appropriate plans into individual holdings and delineating common areas
- obtaining consents from the chief surveyor in accordance with the Unit Titles Act 1972
- depositing the plan in the Land Transfer Office.

The surveyor's evidence was that it was a very straightforward job as the building was single-storeyed, thus no cross section of overlapping entitlements was required, and the angles in the building were all right-angles and parallel with land boundaries. However, inspection of the plan produced showed that there were more than 30 separate areas delineated, with their respective entitlements. Work was also done by a valuer in accordance with the requirements of the Unit Titles Act 1972, so that an appropriate valuation could be made for each unit. Speight J held that while the fees charged by the professionals were modest, a complicated series of steps was undertaken by the three separate disciplines of law, surveying, and valuation. The scheme could not have been finalised and unit titles made available for issue unless each of the steps was accurately completed. The number of the lots and the complicated nature of the plan as presented, and the fact that the unit title procedure was more complicated than the earlier

crossleasing procedure, led Speight J to the conclusion that it was not work of a minor nature.

The taxpayers appealed to the Court of Appeal: (1994) 16 NZTC 11,253. The taxpayers argued, among other things, that Speight J:

- appeared to be influenced by his conclusion that the unit title procedure involved was a complicated one requiring a considerable variety of professional services and in doing so placed undue weight on those factors. Counsel for the taxpayers submitted that there was no evidence before the High Court supporting the view that subdivision by way of a unit title was inherently more complicated than cross-leasing;
- had placed undue weight on the number of lots resulting from the unit title procedure and the plan of division;
- had placed unjustified weight on the distinction between historical cross-leasing procedures and the procedures contained in the Unit Titles Act.

Counsel for the taxpayers emphasised that non-physical subdivisional work will always involve some survey work, the preparation of formal plans, obtaining town planning consent and local authority permits, and some legal work. This would always include depositing subdivision plans and the issuing of separate titles.

The Court of Appeal held that although the surveyor's fee was modest and the total professional charges were very small relative to the land values, the job took the surveyor 36 hours in order to achieve the object of the subdivision into 9 lots. (The fees charged by the solicitor and surveyor were only \$560 plus \$13 disbursements and \$1,012 plus \$92 respectively. The valuer whose job it was to allocate percentages of the total value to each of the respective 9 units did not charge a fee and received a small gift.)

The Court held that Speight J neither erred in his overall approach to the question nor in his conclusion. Therefore, it was not work of a minor nature.

*K v CIR* (1991) 13 NZTC 8,216 involved complex legal work in the subdivision of two properties. Tompkins J said (at 8,221):

There would also have been considerable legal work in the deposit of each of the subdivisional plans and the issue of the separate titles that were going to be required in order to carry out the scheme involving, as it did, the sale of the home units. In this particular case no legal costs were incurred because Mr K, being a solicitor, was able and did carry out the work without charging himself or his wife a fee.

Similarly in *Case N59* the subdivision work was held not to be work of a minor nature due to the considerable legal work involved.

In *Case P61* two lots of land were amalgamated and then subdivided. The taxpayer's subdivision expenditure comprised only survey and legal work. It was submitted by the taxpayer that the only cost that was incurred in the subdivisional work was \$6,334 relating to the survey work.

The subdivision involved the creation of a number of easements to give access and to convey power and water. Barber DJ ascertained that these easements were effected by way of the standard Memorandum of Easements procedure in reliance on the Land Transfer Act and were quite straightforward from a legal point of view, needing little time, and was not more than work of a minor nature. The amount of the legal costs was not known because the costs had been incorporated into the taxpayer's legal fees for each sale. Barber DJ stated that he understood that the legal fees relating to the subdivisional work were modest.

The Judge noted that the subdivision work in this case comprised much of the type of work listed by Ongley J in *Wellington*. However, he said that the degree of such work that had been needed was relatively much less in relation to this particular subdivision, and therefore the work was of a minor nature.

*Case R7* also concerned an amalgamation. The Judge referred to the comments of Speight J in *Costello v CIR* (1993) 15 NZTC 10,285 that whether work is of a minor nature is a matter of fact to be determined on all the circumstances of the particular case. In *Case R7* the judge held that the development and subdivision work was of a minor nature because it involved uncomplicated and quite minor survey work and legal work.

In other cases more complex professional work, coupled with additional physical work, has led the courts to conclude that the work was not of a minor nature. This will be dealt with in the next section.

#### **4. The nature of the physical work required for the subdivision (if any)**

If physical work (in addition to professional work) is required to carry out the subdivision, the work required to complete the subdivision will be more than that of the most basic subdivision. However, the mere presence of physical work in a subdivisional scheme will not necessarily mean that it is more than work of a minor nature. The physical work undertaken should simply be weighed along with the other factors to be taken into account in deciding whether or not the work is of a minor nature, bearing in mind the fact that physical work will indicate that something more than the most basic subdivision is being undertaken.

In *Wellington v C of IR* (1981) 5 NZTC 61,101, Ongley J indicated that division work in relation to land includes:

- Physical work such as fencing, planting, and other work directly related to land; and
- Non-physical types of work, e.g. survey and legal work.

Other physical work involved in a subdivision could include the connection of water, sewerage, telephone, and electricity. Access in the form of roading or driveways may also need to be created.

In *Case E41* the taxpayer carried on a farming business on a 279-acre property, and in 1972 decided to create a subdivision of six lots out of a block of 177 acres. To carry out the subdivision he organised a survey and the issue of titles, and did some fencing

work, which was the only physical work required. The survey and legal costs to the taxpayer were \$1,160 and \$39 respectively. In relation to the fencing, the taxpayer cleared and burnt off gorse and put in 190 chains of fencing at a cost of \$3,303. Three of the lots were sold after the predecessor to section CD 1(2)(f) came into effect.

The taxpayer submitted that the subdivision involved development or division work of a minor nature. He contended the fencing work should not be taken into consideration, because it related to the renewal of existing boundaries and was not part of the subdivision work.

On the facts of this case, although the division work was not that extensive by comparison with other subdivisions, the combination of the survey, legal and fencing work was something more than of a minor nature. It was held that the fencing work was a necessary part of the subdivision and was not effected as part of the consideration for the sale price.

Of the 190 chains of fencing erected, about 62 chains were for the replacement of existing fences, as many of these were not stock-proof and over 50 years old. Only 120 chains were new fencing. Of these, 63 chains of the new fencing bounded the farm retained. The fencing work cost \$3,303, of which \$2,408 was for materials and \$895 for a fencing contractor. The taxpayer had done much of the work himself, including removing the gorse on the boundaries with a tractor and rear mounted blade. This took about two or three days of non-continuous work. The gorse was then burnt.

Barber DJ said that the fencing work done was more than of a minor nature even after allowing for the renewal in common boundary aspects. The physical work involved in the division was the fencing work, the cost of which has already been referred to, and the survey work the fees of which were approximately 1% of the sale of the three lots. It was not correct to say that the fencing work was part of the sale rather than the subdivision, because the sale would not have been completed unless the fencing condition had been fulfilled.

However, a lack of physical work does not necessarily mean that the work will be of a minor nature. For example, in *O'Toole v CIR* no physical work was done and yet the work was held to be of more than a minor nature.

Any physical work done on the property to be subdivided must be division or development work before it can be taken into account in deciding whether or not the work is of a minor nature. In *Case P61* some previous orchard development work had been done involving felling trees, drainage, and irrigation. These costs had been written off in the orchard accounts some years before the subdivision. Water pipes and power were laid for a house erected by the taxpayer after acquiring the property for use mainly as an orchard enterprise.

Barber DJ said that the previous work done did not form part of the undertaking or scheme of the subdivision. It was done for a different purpose and the subdivision was entitled to the benefit of it.

## CONCLUSIONS

The meaning of “development or division work” includes any type of work done on or in relation to the land, such as (but not limited to) professional fees (surveyor, solicitor, valuations), fencing, demolishing buildings, clearing the site, the cost of installing power or water onto a site, and creating a driveway or entranceway.

Work performed by a local authority in fulfilment of its own statutory functions and for the benefit of others as well as the taxpayer is not “work ... carried on or carried out by or on behalf of the taxpayer” in terms of section CD 1(2)(f)(i).

Costs to be specifically included or excluded in the development or division work:

- Where a building exists on the land before the subdivision commences, it should be included in the value of the original land against which the cost of the subdivision is measured: *Wellington*.
- The cost of constructing any building on the land being subdivided should be excluded from the total cost of the development or division work: *Dobson*.
- Financial contributions of money and/or land as a condition of resource consent are excluded from the total cost of the development or division work.
- The meaning of “development or division work” includes any work involved in obtaining an environmental assessment (section 88(4)(b) of the RMA) as part of resource consent.
- The work undertaken by a local authority in considering a resource consent application is not “work ... carried on or carried out by or on behalf of the taxpayer”. Resource consent application fees payable to a territorial authority for the development or division into lots of land are therefore excluded from the total cost of the work.

The general guiding principle in deciding whether work done in undertaking a subdivision is of a minor nature is that it depends on an overall assessment of the facts of each case, having regard to the time, effort and expense involved, measured in both absolute and relative terms: *Lowe v CIR*, *Costello v CIR*.

The courts have said that the question of whether or not work is of a minor nature is a relative expression requiring assessment of what was done in particular circumstances, rather than the application of a checklist. However, the courts have referred to four different overlapping factors to be taken into account in determining this question:

1. The importance of the work in relation to the physical nature and character of the land.

- Physical change to the land is not necessary for the work to be of more than a minor nature.
- Where the actual work carried out on the property is substantial this will indicate that the work is more than minor in nature.



- While substantial change to the physical character of the land will probably indicate that the work is more than minor in nature, the lack of any change to the physical character of the land may also be a factor that the courts take into account in deciding whether work is of a minor nature: *Case P61*.
  - The land to be considered is the original land and not the newly created lot: *Dobson*.
  - It is not necessary to look at the effect of the work on the legal status of the property, only the impact or effect of such work on the physical nature and character of the property.
2. The total cost of the work done, in both absolute and relative terms.
- Where a comparison of the cost of the work and the value of the land is relevant to the question whether work is work of a minor nature, the comparison should be between development or division costs incurred and arms' length prices and values for the land about the same time, or over a period of time when price movements (whether generally, locally, or specific to the site) are not material to the comparison. However there may be circumstances where a court would find a comparison between the cost of the work and the cost or the sale price of the land to be relevant (for example where the comparison is quite clear and the time between the purchase or sale and incurring the expenditure on the work is not so long as to suggest that the two are not comparable).
  - Cost is only one factor to be taken into account in deciding whether or not work is of a minor nature: *K v CIR*.
  - In analysing cost on an absolute basis, there is no figure that will determine the issue definitively. It is a matter of degree.
  - In exceptional circumstances, the absolute value of the sum expended may be so high that this factor alone will indicate that the work is more than minor. Conversely, the amount may be so low that as an absolute figure the amount could in no circumstances be seen to be more than minor.
  - The amount of money spent in undertaking a subdivision may be enough to indicate that there is work of more than a minor nature in relative terms, even if it is not enough to indicate that it is work of more than a minor nature on an absolute basis.
3. The nature of the professional services required.
- The cases establish that the more professional services are utilised in undertaking a subdivision, the less likely that it will be work of a minor nature.
  - The minimum work involved to complete a subdivision where no physical work is needed will require the services of a surveyor and a solicitor: *Wellington*. However, the need for professional services may go beyond these minimum requirements: *Costello*.

- Work that is simple in nature is more likely to be minor in nature: *Case P61, Case R7*.
  - When additional work, beyond minimal surveying and conveyancing, is required for completion of the scheme, and that work is a fundamental and integral component of the subdivision, it seems that such work would be considered work of more than a minor nature.
  - The introduction of an additional activity that is an integral part of the undertaking, may be enough to make the work more than of a minor nature: *K v CIR, Costello v CIR, O'Toole v CIR, Case N59*.
4. The nature of the physical work required for the subdivision (if any).
- If physical work (in addition to professional work) is required to carry out the subdivision, the work required to complete the subdivision will be more than that of the most basic subdivision. However, the mere presence of physical work in a subdivisional scheme will not necessarily mean that it is more than work of a minor nature. The physical work undertaken should simply be weighed along with the other factors to be taken into account in deciding whether or not the work is of a minor nature, bearing in mind the fact that physical work will indicate that something more than the most basic subdivision is being undertaken: *Case E41, O'Toole v CIR*.
  - Any physical work done on the property to be subdivided must be division or development work before it can be taken into account in deciding whether or not the work was of a minor nature: *Case P61*.
  - Previous physical work done for a different purpose will not form part of the undertaking or scheme of the subdivision, and therefore the subdivision will be entitled to the benefit of it without it counting as development or division work: *Case P61*.

## EXAMPLES

**Note:** While each fact situation must be considered individually, the following examples may be of assistance by way of illustration.

These examples consider only the work of a minor nature requirement and do not consider other requirements of section CD 1(2)(f) or any other matter that may determine the taxpayer's liability.

### Example 1

A taxpayer owns a 75-acre farm. In addition to the house she lives in, there is an old farmhouse situated at one end of the property. She wishes to subdivide off the old farmhouse and 3 acres of surrounding land. The expected sale price of the house and surrounding land is estimated to be \$130,000. The cost of the subdivision has been estimated at \$3,300. The survey costs are estimated to be \$2,700 and the legal costs \$600, including GST. The subdivision expenses are approximately 2.5% of the projected sale price. No fencing work is required as the house and surrounding land

have existing creek and hedge boundaries. The property already has water, and a septic tank for sewage. No easements are required.

All the work involved is minimal and straightforward. The professional services required are minimal and simple, and no physical work is required. The cost of the work is small compared to the estimated value of the land. Therefore, the proposed subdivision work that the taxpayer intends to carry out is work of a minor nature.

## **Example 2**

A taxpayer purchased 10 acres, containing a house, garage, and barn for \$220,000. The land value portion was \$120,000.

Council approval was obtained for a subdivision of 7 acres which was carried out, and the land subsequently sold for \$200,000. Costs involved in the subdivision amounted to \$33,000. The professional services of a surveyor, solicitor, and valuer were used. The taxpayer also organised fencing, felling and planting work, and the excavation of a driveway. Work involved in the subdivision included the removal of pine trees, a bush regeneration programme, stock-proof fencing, a site survey, the excavation of a driveway, and the planting of trees. The buildings and 1 acre of the remaining 3 acres are used for the taxpayer's car restoration business and residence.

It is considered that this subdivision involves work of more than a minor nature. While the survey and legal services could be classed as straightforward, additional services, i.e. fencing, planting and felling of trees, the excavation of a driveway and a valuation, were required to effect the scheme. This additional work means that the work is more than minor in nature. Furthermore, the costs involved could not be seen as minor either on an absolute basis or when compared with the value of the land and the sale price of the subdivision. Therefore, the work is of more than a minor nature, and the \$200,000 received from the sale of the land will be included as gross income if the other requirements of section CD 1(2)(f) are met and the exceptions elsewhere in section CD 1(2) do not apply.

## **Example 3**

Purchaser acquired a 50-hectare farm property at a cost of \$400,000. Two months later, she was offered \$50,000 for a 0.5 hectare parcel of the land, and accepted.

The condition imposed by the Council for subdivision consent is:

- Construction of an entranceway to the subdivided lot (\$550).

Satisfactory arrangements for telephone service to the subdivided lot already existed. Constructing an entrance way to the lot cost \$550 and was very straightforward. In addition, a power supply to the subdivided lot already existed. Within one month of Purchaser's acquisition of the property, the power was connected for farm development purposes at a cost of \$2,800 paid to the power company.

The creation of the entranceway is development work.

The farm had three existing titles, so it was a relatively simple exercise to adjust the boundaries to provide a small residential block for sale. The boundary adjustment is division work. The costs involved in the subdivision were:

Surveying (including:)	\$
Scheme plan preparation and submissions	1,500
Field Work and LT plan preparation	2,000
Entrance way	550
Legal fees	<u>1,000</u>
Total	5,050

The professional services of a surveyor and a lawyer were required to subdivide the land. The legal work involved was minimal in both cost and complexity. The survey work was standard as it entailed only a simple boundary adjustment.

The work undertaken by the Purchaser is the type of work typical of a basic subdivision, and the professional services were relatively simple. The legal and surveying work required appears to be quite straightforward. One additional item of physical work is to be carried out: the construction of the entranceway. However, it is considered that this is sufficiently minor still to be work of a minor nature.

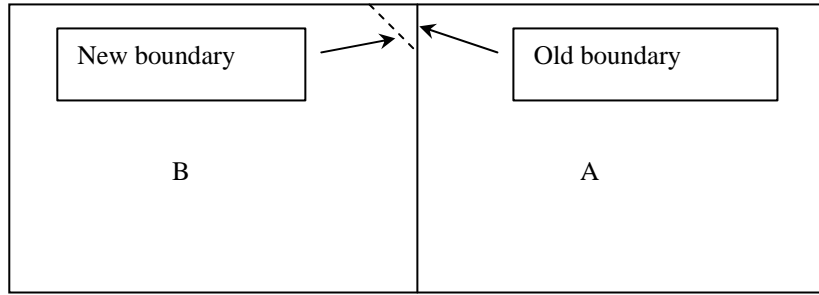
The power was connected within one month of Purchaser's acquisition of the property at a cost of \$2,800. The erection of the transformer structure was an expensive procedure, was work of a physical nature and, in conjunction with the construction of the entranceway, might be considered to be too complex to be "work of a minor nature". However, it did not form part of the undertaking or scheme of subdivision. It was done for a different purpose, of farm development. On this basis the additional costs associated with the supply of electricity to the section would not form part of the subdivision.

It should be noted that although the Commissioner considers that this example does not involve work of more than a minor nature, it is considered to be borderline.

If the Purchaser had, in addition to the above fact scenario incurred significant expenditure in dividing the 0.5 hectare parcel of the land into three portions, as well as fencing the relevant sections off (including the removal of gorse bushes, creating new fences and replacing old ones), the Commissioner considers that this example would most likely not be work of a minor nature. In that circumstance, the proceeds of the sale of the land would be included as gross income if the other requirements of section CD 1(2)(f) were met and the exceptions elsewhere in section CD 1(2) did not apply.

#### **Example 4**

In the course of preparing to sell his quarter-acre residential property, A discovers that he and his neighbour B have been mistaken for some time as to the location of the boundary between them. As a result, A's spa pool and surround extends a little over the boundary near the rear corners of their properties. He raises the question with B, and it is agreed that they will remedy the matter by a boundary adjustment to add a small corner from the rear of her property to his (see diagram). The only work involved is straightforward survey and legal work and is completed without any difficulty.



The work involved is work of a minor nature and is therefore not within section CD 1(2)(f)(i).

## Matrix of Cases Considering the Work of a Minor Nature Exemption

**Note:** The approximate date of expenditure or receipt is indicated for each case. For example, “(1974-75\$)” indicates that the expenditure or receipt occurred in the 1974 and 1975 years.

### Cases where it has been decided that the work is of a minor nature

Case	Land division/development & total value	Work: professional & physical	Reasons for decision
<i>Case D24</i> (1979) 4 NZTC 60,597	<ul style="list-style-type: none"> <li>• Division of 2.429 ha. into 6 lots</li> <li>• Total sale value of lots \$32,900 (1975-76\$)</li> <li>• Cost of land \$22,000 (1971\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of subdivision, professional services, surveyor’s fees, disbursements and legal fees: \$1,939 (1975-76\$)</li> <li>• Reserve contribution \$1,170 (1974\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Reserve contribution not work so costs of subdivision relative to value of land were minimal</li> <li>• Land Transfer Office deposit not considered to be “work” in circumstances of case (disapproved in <i>Wellington</i>)</li> </ul>
<i>Case P61</i> (1992) 14 NZTC 4,416	<ul style="list-style-type: none"> <li>• Amalgamation of 2 lots of land and then subdivision into 3 sections, land swap, and further subdivision to create 3 smaller lots</li> <li>• 20 acres</li> <li>• Two sections sold for \$46,137 (1984\$) and \$40,000 (1986\$) each</li> </ul>	<ul style="list-style-type: none"> <li>• Surveying and legal work simple and straightforward</li> <li>• Cost of survey work \$6,336 (1986\$)</li> <li>• Water, sewage and clearing work undertaking 5 or 6 years earlier for Orchard purposes</li> </ul>	<ul style="list-style-type: none"> <li>• While type of work similar to that in <i>Wellington</i>, the degree of work was relatively much less in this case</li> <li>• Costs of earlier work done for Orchard purposes excluded</li> </ul>
<i>Case R7</i> (1994) 16 NZTC 6,035	<ul style="list-style-type: none"> <li>• Amalgamation of 9-acre block of land with two ¼ acre sections</li> <li>• Total cost of land (9 acre block with two ¼ acre sections): \$34,250 (1973\$)</li> <li>• House built on corner of section, a small adjoining section was added to it and this part then subdivided and sold in a swap deal</li> <li>• House site sold for \$30,000 (1974\$)</li> </ul>	<ul style="list-style-type: none"> <li>• House site not part of development work</li> <li>• Uncomplicated and quite minor survey and legal work</li> </ul>	<ul style="list-style-type: none"> <li>• Uncomplicated and quite minor survey and legal work</li> </ul>

## Cases where it has been decided that the work is not of a minor nature

Case	Land division/development & total value	Work: professional & physical	<i>Reasons for decision</i>
<i>Wellington v CIR</i> (1981) 5 NZTC 61,101	<ul style="list-style-type: none"> <li>• Division of land into 8 blocks</li> <li>• Three blocks amalgamated into 1 block</li> <li>• Block of land later subdivided back into 3 original blocks and 2 blocks were subsequently sold</li> <li>• Land and buildings cost \$12,000 (1970\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Subdivision work cost over \$9,000 (1971-72\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of subdivision in relation to cost of land meant was more than work of a minor nature</li> </ul>
<i>Case E41</i> (1982) 5 NZTC 59,225	<ul style="list-style-type: none"> <li>• Subdivision of part of farm (177 acres) into 6 lots</li> <li>• Sale of 3 lots after s88(1)(d) came into force</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of work approximately 1% of amount of sale value of 3 lots</li> <li>• Total costs of work (fencing, legal and surveying work): \$4,502 (1972 -73\$)</li> <li>• Fencing included removal of gorse bushes, creating new fences and replacing some old fences. Work carried out mainly by farmer</li> </ul>	<ul style="list-style-type: none"> <li>• Combination of survey, legal and fencing work was more than of a minor nature</li> </ul>
<i>Case E90</i> (1982) 5 NZTC 59,471	<ul style="list-style-type: none"> <li>• Block of land divided into 5 lots</li> <li>• Unit sold</li> </ul>	<ul style="list-style-type: none"> <li>• Unit title plan prepared at cost of \$482 (1977-78\$)</li> <li>• Division into three major units and two smaller units, with further piece as common property</li> </ul>	<ul style="list-style-type: none"> <li>• Subdivision of land into 3 major units, 2 smaller units and the definition of a further piece as common property meant was not of a minor nature for the particular piece of land</li> </ul>
<i>O'Toole v CIR</i> (1985) 7 NZTC 5,045)	<ul style="list-style-type: none"> <li>• Subdivision of farm in 1974 into 18 lots</li> <li>• 12 lots sold, 3 kept and remainder were up for sale</li> <li>• Cost of land \$22,600 (1970\$)</li> </ul>	<ul style="list-style-type: none"> <li>• No physical work involved</li> <li>• Subdivision work considered quite difficult by surveyor. Approximate cost \$7,000 (1973\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Difficulty of survey, for reasons of topography, extent of cover on land and age and unavailability of previous survey marks meant was not work of minor nature</li> </ul>
<i>Dobson v CIR</i> (1987) 9 NZTC 6,026	<ul style="list-style-type: none"> <li>• Development of 3 rental properties</li> </ul>	<ul style="list-style-type: none"> <li>• Demolished buildings, cleared site, surveyed land, prepared and deposited cross leases and subdivision plans and obtained composite titles</li> </ul>	<ul style="list-style-type: none"> <li>• Totality of work involved was more than of a minor nature</li> </ul>

**Cases where it has been decided that the work is not of a minor nature  
(Continued)**

<b>Case</b>	<b>Land division/development &amp; total value</b>	<b>Work: professional &amp; physical</b>	<i>Reasons for decision</i>
<i>Case N59</i> (1991) 13 NZTC 3,457	<ul style="list-style-type: none"> <li>• Purchase of section to build 2 home units</li> <li>• Original intention to sell 1, later decided to sell both units</li> </ul>	<ul style="list-style-type: none"> <li>• Surveying, preparing, lodging and depositing plans with LTO, drafting and executing cross leases and obtaining separate composite titles</li> <li>• No evidence of cost</li> </ul>	<ul style="list-style-type: none"> <li>• Objectors failed to discharge onus of proof to show work was of a minor nature</li> <li>• Doubtful that work involved would be regarded as work of a minor nature</li> </ul>
<i>K v CIR</i> (1991) 13 NZTC 8,216	<ul style="list-style-type: none"> <li>• 2 cross lease developments</li> <li>• Cost of land and buildings for first development \$101,641 (1973\$)</li> <li>• Cost of land and buildings for second development \$95,247 (1973\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Demolished existing buildings, replaced with home units</li> <li>• Subdivision of land and cross-leasing home units</li> <li>• Taxpayer solicitor performed own legal work so no legal costs, but large amount of time involved</li> <li>• Total cost of cross lease plans: \$476.66 (1973-74\$)</li> </ul>	<ul style="list-style-type: none"> <li>• Cost only one factor</li> <li>• Division work significant as was essential for completion of scheme</li> </ul>
<i>Costello v CIR</i> (1993) 15 NZTC 10,285	<ul style="list-style-type: none"> <li>• Block of flats subdivided into nine lots and sold</li> </ul>	<ul style="list-style-type: none"> <li>• No physical work involved</li> <li>• Total costs of work (surveyor, solicitor and a valuation) approximately \$1,700 (1981\$)</li> <li>• Work was straightforward but 30 separate areas had been delineated</li> </ul>	<ul style="list-style-type: none"> <li>• Significant amount of time involved</li> <li>• Unit title procedure more complex than cross lease</li> <li>• Complicated nature of plan</li> </ul>