Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT: IS 20/08

INCOME TAX – WHEN IS DEVELOPMENT OR DIVISION WORK "MINOR"?

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in Appendix 1 to this Interpretation Statement.

Contents

Inland Revenue
Te Tari Taake

Scope of this statement

1. An amount a person receives from the disposal of land is taxable if the requirements of s CB 12 are satisfied. One of the requirements is that the person (or another person for them) must have carried on development or division work that is not minor, on or in relation to that land (s CB 12(1)(d)). The focus of this Interpretation Statement is on the meaning of the word "minor" in s CB 12(1)(d). The other requirements of s CB 12(1) are also discussed.

2. This Interpretation Statement updates and replaces Interpretation Guideline IG0010 "Work of a minor nature", *Tax Information Bulletin* Vol 17, No 1 (February 2005): 5 (IG0010). The main conclusions in this Interpretation Statement are unchanged from IG0010. However, some parts have been updated for clarity and to account for changes to the legislation. The item has also been updated to reflect the conclusions reached in two public items:

   - "QB 15/04: Income tax — whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37.
   - "QB 15/02: Income tax – major development or division - what is 'significant expenditure' for section CB 13 purposes?", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 20.

3. 'Safe harbour' figures for absolute cost and relative cost have also been identified to assist taxpayers with compliance.

Summary

4. Under s CB 12(1), an amount a person receives from the disposal of land will be income of a person where the following requirements are satisfied, and provided no exclusions apply[1]. The requirements are that:

   - the person carries on an undertaking or scheme (not necessarily in the nature of a business);
   - the undertaking or scheme involves the development of the land or the division of the land into lots;
   - the development or division work is carried on by the person (or another person for them) and that work is on or relates to that land;
   - the work is not minor; and
   - the undertaking or scheme was begun within 10 years of the date on which the person acquired the land.

5. For income to be taxable under s CB 12(1) a person must carry on an "undertaking or scheme". An "undertaking or scheme" is a plan, design or programme of action devised to attain some end and includes a project or enterprise. There must be a

[1] The relevant exclusions are listed at [19].

Inland Revenue
Te Tari Taake

coherent plan or purpose which involves a series of steps directed to an end result. Not a great deal is needed for an activity to constitute an undertaking or scheme.

6. The undertaking or scheme must involve the "development of the land" or the "division of the land into lots".

   - "Development of the land" includes work done on or in relation to the land in preparation for its intended use. This might include fencing, demolishing buildings, clearing the site, earthmoving, installing power or water, creating a driveway or entranceway, legal work, zoning applications, the drawing of engineering plans and specifications, and entering into contracts for the physical work necessary for the development. It does not include the development of buildings.

   - "Division of the land into lots" requires, at a minimum, a level of activity designed to facilitate the division of land. This could include planning and preparation of formal plans; survey work, obtaining resource and building consents, and legal work, including the deposit of subdivision plans and the issue of separate titles if required.

7. The development or division work must be carried on by the person (or another person for them) and that work must be on or relating to the land. Work performed by a local authority in fulfilment of its own statutory function is not work carried on by the person (or another person for them).

8. The development or division work must be more than minor. Whether development or division work is more than minor depends on an overall assessment of the facts of each case, having regard to what has been done relative to both the nature and value of the land involved. The case law identifies four factors that must be considered when making that assessment:

   - *The total cost of the work done, in both absolute and relative terms*

     Whether development or division work is minor depends on an overall assessment of the work involved, including the cost, as measured both in absolute terms (total cost) and relative terms (relative to the value of the land that is subject to the undertaking or scheme at the start of the development or division work). The Commissioner accepts that amounts of $50,000 or below are low in absolute cost terms. Similarly, the Commissioner accepts that relative costs of less than 5% of the value of the land at the start of the development or division work are low in relative cost terms. These figures are 'safe harbours' and are intended to give taxpayers greater certainty when making this cost assessment. Both measures of cost must be considered as it is possible for costs to be low in absolute terms but high in relative terms, and vice versa.

     The cost factor is weighed along with the other three factors discussed below. However, the Commissioner considers that there will be a point where the absolute value of the sum spent on the development or division work is so high that this factor alone will indicate that the work is more than minor.

   - *The nature of the professional services used*

     Development or division work typically requires the services of professionals such as a solicitor, a surveyor, an engineer and/or a valuer. The more time a professional spends on the development or division work, the more likely that the development or division work is not minor. In addition, the more complex

Inland Revenue
Te Tari Taake

and significant the work undertaken by the professional the more likely that the development or division work is not minor.

- *The extent of the physical work required*

  The more physical work undertaken as part of the development or division work, the more likely it is that the work is not minor. However, a lack of physical work does not necessarily mean that the development or division work will be minor.

- *The significance of the changes to the physical nature and character of the land*

  The more significant the changes to the physical nature and character of the land since the development or division work began, the less likely it is that the development or division work will be minor.

9. Finally, the undertaking or scheme must have begun within 10 years of the date on which the person acquired the land. An undertaking or scheme begins when the first step in carrying out the scheme takes place; when there is some act done that sets it in train.

Introduction

10. An amount a person receives from the disposal of land is taxable if the requirements of s CB 12 are satisfied. One of the requirements is that the person (or another person for them) must have carried on development or division work that is not minor, on or in relation to that land (s CB 12(1)(d)). The focus of this Interpretation Statement is on the meaning of the word "minor" in s CB 12(1)(d). The other requirements of s CB 12(1) are also discussed.

11. The interpretation taken in the statement is based on:

- the context and wording of s CB 12;
- the background to s CB 12, including the policy reasons for its introduction;
- principles for interpreting s CB 12, based on the relevant case law; and
- the factors the courts have considered in determining whether development or division work is "minor" under s CB 12(1)(d).

Context for s CB 12

12. Section CB 12 is one of several provisions in subpart CB that treat amounts derived from a disposal of land as income. Other sections include:

- land disposals falling within the bright-line test (s CB 6A);
- land disposals where the land was acquired with the purpose or intention of sale (s CB 6);
- land disposals where the land was acquired by a land dealer or developer (s CB 7);
- land disposals where the land was used as a landfill (s CB 8);

Inland Revenue
Te Tari Taake

- land disposals within 10 years:
  - land dealing business (s CB 9);
  - land development or subdivision business (s CB 10);
- land disposals within 10 years where the person or their associate carries on a business of erecting buildings and makes improvements to the land (s CB 11);
- amounts from the major development or division of land that are not already income under another land disposal provision (s CB 13);
- amounts from land affected by change that are not already income under another land disposal provision (s CB 14);
- land disposals where the parties are associated persons (s CB 15(1)).

13. Amounts derived from the disposal of land may also be taxable income if they are amounts derived from a business (s CB 1), amounts derived from a profit-making undertaking or scheme (s CB 3), or as income under ordinary concepts (s CA 1(2)).

Background to s CB 12

14. Earlier versions of what is now s CB 12 stated that a disposal of land was taxable income if it involved "development or division work, not being work of a minor nature".[2] The interpretation of this phrase was considered in IG0010.

15. When the income tax legislation was rewritten, "work of a minor nature" became "the development or division work is not minor". This wording change was not intended to change the substantive effect of the provision[3]. Therefore, s CB 12 should be interpreted consistently with earlier versions of the legislation.

Purpose of s CB 12

16. In *Lowe v CIR* (1981) 5 NZTC 61,006 (CA), Cooke J said that the purpose of s 88AA of the Land and Income Tax Act 1954 (an earlier version of s CB 12) was to remove the need for a profit-making intention before an amount would be income arising from an undertaking or scheme.

17. In *Costello v CIR* (1994) 16 NZTC 11,253 (CA), Richardson J noted that the focus of what is now s CB 12 is on the activity undertaken by the person with respect to the land, rather than any economic benefits the person may have obtained. In passing what is now s CB 12, Parliament sought to limit the scope of the provision to exclude developments or divisions of land that were only minor. This limitation was referred to in Parliament by the then Member for Kāpiti, Frank O'Flynn, at the third reading of the Land and Income Tax Amendment Act 1973:[4]

[2] Section 67(4) of the Income Tax Act 1976, s CD 1(2)(f) of the Income Tax Act 1994 and s CB 10 of the Income Tax Act 2004.

[3] See s ZA 3 of the Income Tax Act 2007, s YA 3(3) and (4) of the Income Tax Act 2004 and s YB 4(3) of the Income Tax Act 1994.

[4] (2 November 1973) 387 *New Zealand Parliamentary Debates* 4,792 at 4,805 (Land and Income Tax Amendment Act 1973 – Third Reading, Frank O'Flynn).

Inland Revenue
Te Tari Taake

> 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.

18. Limiting s CB 12 to developments or divisions of land that are more than minor was an attempt to exclude very basic development or division work from the scope of the provision.

Exclusions to s CB 12(1)

19. Section CB 12(1) is subject to four exclusions. The exclusions apply where the land disposed of is for the person's:

- residential occupation (s CB 17);
- business premises (s CB 20);
- farming or agricultural business (s CB 21);
- business of deriving investment income from the land as described in s CC 1; for example, renting or leasing the land (s CB 23).

20. Section CB 12(2) states that s CB 12(1) is overridden by these exclusions. These exclusions are not discussed in this item.

Other relevant provisions

21. Section CB 12 is subject to several provisions that help to interpret its scope and meaning.

22. Section CB 15(1) applies to s CB 12 and provides that land that is transferred between associated persons and later sold by the transferee (the person who received the land) gives rise to income in the hands of the transferee where:

- the transferee derives a gain when they sell the land; and
- the amount the transferee derived would have been income of the transferor (the person who transferred the land to the transferee) under any of ss CB 6-CB 14, if the transferor had retained the land and sold it themselves.

23. Section CB 15B states that a person will acquire an estate, interest or option in land on the date that begins a period in which the person has an estate or interest in, or an option to acquire, the land (alone or jointly (in common with) another person).[5]

24. Under s CB 23B, s CB 12 and the exclusions in ss CB 17 to CB 23 can apply if the land disposed of is part or the whole of the land to which s CB 12 applies or is disposed of together with other land.

25. Section YA 1 defines terms used in s CB 12(1), including "dispose" and "land".

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[5] For more information, see "QB 17/02: Income tax – date of acquisition of land, and start date for 2-year bright-line test", *Tax Information Bulletin* Vol 29, No 4 (May 2017): 125.

Inland Revenue
Te Tari Taake

The requirements of s CB 12(1)

26. Under s CB 12(1), any amount a person receives from the disposal of land will be income of that person where the following requirements are satisfied, and provided no exclusions apply. The requirements are that:

- the person carries on an undertaking or scheme (not necessarily in the nature of a business);
- the undertaking or scheme involves the development of the land or the division of the land into lots;
- the development or division work is carried on by the person (or another person for them) and that work is on or relates to that land;
- the work is not minor; and
- the undertaking or scheme was begun within 10 years of the date on which the person acquired the land.

27. This Interpretation Statement considers when development or division work, carried on as part of an undertaking or scheme, is minor. The other requirements of s CB 12(1) are also discussed.

28. This statement addresses three questions:

- What is an "undertaking or scheme"? (From [29].)
- When does a person carry on "development or division work"? (From [39].)
- When is development or division work "minor"? (From [75].)

What is an "undertaking or scheme"?

29. The words "undertaking or scheme" were considered in *Vuleta v CIR* [1962] NZLR 325 (SC). Henry J, at 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. To "devise" likewise is to order the plan or design of; to plan, to contrive, to think out, to frame or to invent.

30. This definition was approved by the Court of Appeal in *Duff v CIR* (1982) 5 NZTC 61,131 (CA). This definition has also been approved in several land subdivision cases, including *Wellington v CIR* (1981) 5 NZTC 61,101 (HC) and *O'Toole v CIR* (1985) 7 NZTC 5,045 (HC).

31. Similarly, Judge Barber defined an "undertaking or scheme" in *Case S86* (1996) 17 NZTC 7,538 at 7,548:

> It is settled law that a scheme or undertaking means some plan or purpose which is **coherent and has some unity of conception; there should be a series of steps directed to an end result; a fairly generalised plan is all that is needed; the scheme need not be precise**: refer *Duff v CIR* (1982) 5 TRNZ 343, *Steinberg v FCT* (1975) 134 CLR 640. [Emphasis added]

32. In both *Lowe* and *Costello*, it was accepted by the taxpayers that the subdivision work they had done amounted to an undertaking or scheme. In both cases, the

courts commented that this was a proper concession to make. Richardson J noted in *Lowe* at 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.** [Emphasis added]

33. The court in *O'Toole* stated at 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 the 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.

34. In summary, an undertaking or scheme is a plan, design or programme of action devised to attain some end and includes a project or an enterprise. There must be a coherent plan or purpose which involves a series of steps directed to an end result. Not a great deal is needed for an activity to constitute an undertaking or scheme under s CB 12(1).

When does an undertaking or scheme commence?

35. The time at which an undertaking or scheme commences is relevant because s CB 12 will only apply if the undertaking or scheme was begun within 10 years of the date on which the person acquired the land.

36. The date of commencement is when the first step in carrying out the scheme takes place; when there is some act done that sets it in train (*Cross v CIR* (1985) 7 NZTC 5,054 (HC), *Cross* v *CIR* (1987) 9 NZTC 6,101(CA), *Smith v CIR (No 2)* (1989) 11 NZTC 6,018 (CA)). It is a question of fact in any given case as to whether the undertaking or scheme has moved beyond conception to having been put into operation. This is discussed in more detail in "QB 15/04: Income tax — whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37, from [39].

Undertaking or scheme not carried on with a view to disposal of that land

37. Section CB 12(1) will not apply to the disposal of land if it can be established that the undertaking or scheme involving development or division work was not carried on with a view to the disposal of that land.

38. This issue is also discussed in detail in "QB 15/04: Income tax – whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37, from [52]. QB 15/04's conclusion is based on case law, the words of s CB 12 and the purpose of the provision.

Inland Revenue
Te Tari Taake

When does a person carry on "development or division work"?

Development of the land

39. In *Dobson v CIR* (1987) 9 NZTC 6,025 (HC), 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 preparation of the land for an intended use. In *Dobson,* "development" was found to be the demolition of existing buildings and the clearing of the sites. This suggests that development work encompasses physical work undertaken in relation to the land. This conclusion is also consistent with *Anzamco Ltd (in liq) v CIR* (1983) 6 NZTC 61,522 (HC).

40. However, *Smith*, makes it clear that development work does not have to be physical work. As McMullin J stated, at 6,024–6,025:

> What then is meant by the words "development or division into lots". There is a degree of overlapping in that phrase. Some development work may not be division work and vice versa, but generally speaking the two will go hand in hand. "Division" is not defined in the Land and Income Tax Act or the Local Government Act 1974 which deals with the subdivision of land. "Development" is also not defined. This rather suggests that the framers of the tax legislation intended that the phrase "development or division" is not to be narrowly construed when considered in relation to an undertaking or scheme. By declining to define "development or division work" [s CB 12] leaves the exact nature of the work wide open. **Development work frequently involves physical work on the land itself but need not necessarily do so.** In their concession that the letting of the sewage contract in October 1971 was capable of construction as a development work, counsel for the appellant rightly recognised that a contractual step which anticipates physical work but itself falls short of it may be development work. In my view development work on a subdivision of land may cover a range of activities including, in appropriate cases, the preparation of a zoning application without which the subdivision and resulting sales at a profit could never be achieved, the drawing of engineering plans and specifications for roads, the provision of estimates, the preparation of subdivisional plans, the letting of the necessary contracts and the resulting physical work involving the construction of roads, rights of way and culverts. [Emphasis added]

41. Similarly, in *Smith,* Bisson J stated, at 6,026:

> If [counsel for the taxpayer] accepts as a matter of law that legal work can be division work in a scheme involving division into lots, there can be no justification as a matter of law and logic for not accepting legal work as development work in a scheme involving development. This would also be the case if the scheme involved both development and division into lots of the land in question.

42. In summary, development work includes any type of work done on or in relation to the land in preparation for its intended use, such as:

- fencing
- demolishing buildings
- clearing the site
- earthmoving
- installing power or water
- creating a driveway or entranceway
- legal work

- zoning applications
- drafting engineering plans and specifications
- entering into contracts for the physical work necessary for the development.

43. However, development work does not include the development of buildings. This is discussed in more detail from [60].

Division of the land into lots

44. Division of the land into lots requires, at a minimum, a level of activity designed to facilitate the division of land. The High Court in *Wellington* concluded that the work involved in the division of an area into lots would include at least the following for the purposes of s CB 12(1):

- 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.

45. These features will exist where the division work has been completed. However, s CB 12 only requires the work to be carried on, not to be carried out, so it is possible that an undertaking or scheme involving the division of land into lots would not involve some of the work listed.

46. The High Court in *O'Toole* found that the absence of physical work did not mean that there was no division work carried out. However, as confirmed by the Court of Appeal in *Smith*, in some situations there may be a degree of overlap between "development" and "division" work. For example, the physical work of erecting boundary fences or defining boundaries might be development work and the division of the land into lots.

47. The Commissioner considers that the "division of the land into lots" includes subdivisions, unit-titling and cross leasing.

48. The amalgamation of two or more lots of land into one lot will not, on its own, constitute the division of the land into lots for the purposes of s CB 12(1). However, if the amalgamation of land forms part of a subdivision scheme, the cost of that amalgamation work will be included in the cost of the division work (see *Case P61* (1992) 14 NZTC 4,416 and *Case R7* (1994) 16 NZTC 6,035).

Specific circumstances

49. This section provides further analysis on whether some specific types of work are development or division work for the purposes of s CB 12(1). The types of work are: previous work for a different purpose; abandoned and revived undertakings or schemes; boundary adjustments; building on the land; a financial contribution or an environmental assessment as part of resource consent; and work done by a local authority.

Inland Revenue
Te Tari Taake

Does previous work for a different purpose constitute "development or division work"?

50. If work is done on or in relation to the land and that work was for a different purpose to the undertaking or scheme of developing land or dividing land into lots, that work is not development or division work for the purposes of s CB 12(1).

51. In *Case P61*, the taxpayer carried out work involving water supply, sewerage, and land clearance to develop an orchard five or six years before the land was subdivided. Judge Barber concluded that this previous work was not division work carried on or carried out by the taxpayer and this work did not form part of the undertaking or scheme of the subdivision, as it was done for a different purpose. Consequently, this previous work was not considered development or division work.

What happens if an undertaking or scheme is abandoned? And what happens if the undertaking or scheme is later revived?

52. It is only necessary that an undertaking or scheme meeting the relevant criteria has been carried on, it does not need to have been carried out (ie, brought to fruition). If an undertaking or scheme was carried on but was subsequently abandoned, the ultimate disposal of the land will still be caught by the relevant provisions unless an exclusion applies or the taxpayer can establish that the undertaking or scheme was not carried on with a view to disposal of the land in question (See "QB 15/04: Income Tax – whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies" *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37, at [8] and *Cross* (HC)).

53. If an abandoned undertaking or scheme is subsequently revived as a continuation or modification of the original undertaking or scheme, s CB 12(1) will apply (provided the other criteria are met). For example, if the land was purchased in Year 1, the scheme was commenced in year 5 and abandoned in year 8 and later revived and sold in year 12, the sale will still be caught by s CB 12 as the scheme was begun within 10 years of the date on which the person acquired the land.

Are boundary adjustments the "division of the land into lots"?

54. Surveyed boundaries between adjoining lots of land may be adjusted. Adjustment might be by relocating the boundary and rearranging the lots or realigning the lots and may not involve any increase in the number of lots. The Commissioner's view is that all boundary adjustments are the division of the land into lots. There are two reasons for this view.

55. The first reason is that, technically, a boundary adjustment requires the existing boundaries to be erased and new boundaries to be created (even if there is no increase in the number of lots). The work is the same type of work that is carried out in a subdivision where the number of lots is increased.

56. The second reason is that s CB 23B provides that s CB 12 applies where the land disposed of is the whole or part of any land to which s CB 12 applies or the whole or part of 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.

57. While the term "division of the land into lots" has a broad meaning and encompasses all types of boundary adjustments, the amount received from the sale of that adjusted land may not be taxable under s CB 12 if:

- the other conditions of s CB 12(1) are not satisfied (that is, the division work is minor); or
- one of the exclusions to s CB 12 is satisfied; or
- it can be established that the undertaking or scheme involving the land was not carried on with a view to disposing of that land (discussed at [37] to [38] and in QB 15/04).

58. A boundary adjustment where physical work is carried out could also fall within the definition of "development work" in s CB 12(1) (see *Anzamco*, *Dobson* and *Wellington*).

59. Example 4 of this Interpretation Statement concerns a boundary adjustment.

Is building on the land "development work"?

60. In *Dobson,* Hardie Boys J held that development work referred to in what is now s CB 12(1) does not include the construction of buildings, as income derived from this activity is assessed under what is now s CB 11 or in the case of others who build for profit, what is now s CB 3.[6] Therefore, building work is not development work, so building work is not taken into account in assessing whether s CB 12(1) applies to the land. As observed by Hardie Boys J, at 6,030:

> The question to be determined in respect of each of the three properties involved in this case is therefore whether their division into lots, or their development, as distinct from the construction of buildings on them, was "work of a minor nature".

61. It may be difficult to determine whether the work is preliminary development or division work (which could be development or division work for the purposes of s CB 12(1)) or part of the construction process of a building (which, per *Dobson,* would not be development work). In *Dobson,* Hardie Boys J concluded, at 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.

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

63. The decision in *Dobson* was followed in *Case R7*. In that case, an old house was purchased, placed on the site of a subdivision and partly renovated. Judge Barber did not regard the purchase and placement of the house on the site as development work. He excluded the necessary minor excavation work for the foundations of the house when he weighed up whether the development work was minor.

64. 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.

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[6] Section CB 11 covers disposals of land within 10 years of improvement by a building business, and s CB 3 covers profit-making undertakings or schemes.

Inland Revenue
Te Tari Taake

Demolition work to prepare land before construction of a building is development work, but construction of the building itself is not.

Does a financial contribution imposed as a condition of resource consent represent "development or division work"?

65. In deciding whether development or division work is minor, the courts have evaluated the total cost of the work done in both absolute and relative terms (this is discussed further from [80]). It is therefore necessary to evaluate whether some expenses represent work done that is within the definition of development or division work and should therefore be included in the total cost of the work done.

66. A financial contribution of money or land may be imposed as a condition of a resource consent under the Resource Management Act 1991, as a charge against landowners 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.

67. The issue is whether the landowner's payments of financial contributions under the Resource Management Act 1991 would represent division work.

68. *Case D24* (1979) 4 NZTC 60,597 is the only case that considers whether a financial contribution under the Resource Management Act 1991 is a payment representing work done for the purposes of what is now s CB 12(1). Associate Judge Lloyd Martin said, at 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.

69. This view was later affirmed in *Aubrey v CIR* (1984) 6 NZTC 61,765 (HC) (in the context of s CB 13(1)) where Tompkins J concluded, at 61,769:

> 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.** [Emphasis added]

70. Accordingly, financial contributions of money or land or both imposed as a condition of resource consent do not represent "development or division work".

Is an environmental assessment as part of resource consent "development or division work"?

71. A resource consent application may require the applicant to provide an assessment of the activity's effects on the environment.[7] The Commissioner considers that "development or division work" includes any work involved in obtaining an environmental assessment as part of the process of applying for resource consent. This is because obtaining an environmental assessment is "development or division

[7] See s 88(2)(c) of the Resource Management Act 1991.

work carried on by the person (or another person for them) on or relating to the land". However, for work done by a local authority itself, see from [72].

Is work done by a local authority "development or division work carried on by the person, or another person for them"?

72. The courts have not addressed the meaning of the words "work … carried on by the person, or another person for them" in the context of s CB 12(1) or its earlier iterations. 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 what is now s CB 13. The issue was whether a payment of an agreed sum to the local authority for roading, water and sewerage as a condition of the subdivision consent represented development or division work carried on or carried out by the taxpayer. Hardie Boys J found that it did not, saying, at 5,076:

> 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.

73. It is inferred from this case that work performed by a local authority in fulfilment of its own statutory function is not "work … carried on by the person or another person for them" under s CB 12. The work carried out is the responsibility of the local authority. This is different to the situation where a local authority requires a taxpayer to undertake work themselves, as a condition of the consent. Because s CB 12 was originally enacted at the same time as s CB 13 and as part of the same legislative scheme, and because s CB 13 and s CB 12 deal with the development of land or the division of the land into lots, it is presumed that a court would adopt the same view if the question arose in relation to s CB 12.

74. Similarly, the processing of a resource consent application by a local authority is work done in fulfilment of the local authority's own statutory function, not "work … carried on by the person, or another person for them" under s CB 12(1). Consequentially, resource consent application fees are not included when evaluating whether the development or division work is minor.

When is development or division work "minor"?

75. As discussed at [15], when the Income Tax Act was rewritten, "work of a minor nature" became "the development or division work is not minor". The wording change was not intended to change the substantive effect of the provision, so s CB 12 is to be interpreted with reference to the earlier iterations of the Income Tax Act.[8]

76. In *Costello,* the Court of Appeal considered the meaning of the phrase "work of a minor nature". Richardson J, delivering the court'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 that this analysis needed to be performed on a case-by-

[8] See s ZA 3 of the Income Tax Act 2007, s YA 3(3) and (4) of the Income Tax Act 2004 and s YB 4(3) of the Income Tax Act 1994.

case basis rather than by simply applying a pre-determined or mechanical checklist, at 11,256:

> "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 CB 12] 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.

77. His Honour had made similar comments in *Lowe,* at 61,020:

> 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.

78. Therefore, whether work done in developing land or dividing the land into lots is minor depends on an overall assessment of the facts of each case, having regard to what has been done relative to both the nature and value of the land involved. It does not require a mechanical application of a checklist.

79. The courts have identified several factors to be considered in determining whether development or division work is minor. This Interpretation Statement focuses on how each of these factors has been interpreted and applied. These factors are:

- the total cost of the work done, in both absolute and relative terms;
- the nature of the professional services used;
- the extent of the physical work done; and
- the significance of the changes to the physical nature and character of the land.

Total cost of work done in both absolute and relative terms

80. Richardson J in *Lowe* stated that whether development or division work is minor depends on an overall assessment of the work involved, including the cost, as measured both in absolute (total cost) and relative terms.

81. However, cost is only one factor in the overall assessment. In *K v CIR* (1991) 13 NZTC 8,216 (HC), Tompkins J said, at 8,220:

> 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.

Cost of the work in absolute terms

82. The courts may take into account the total cost of the work done in absolute terms when assessing whether the development or division work is minor. The higher the cost, the more likely it is that the work is not minor. However, subject to the

qualification set out at [84], cost is only one of four factors that is considered and weighed up in an overall assessment.

83. In *Costello* it did not assist the taxpayer that the professional fees for the whole subdivision were a modest $1,700 (equivalent to approximately $2,980.00 in 2020). The Court of Appeal considered other factors and concluded that the division work was not minor even taking into account the modest absolute cost. In contrast, in *Case P61,* the survey costs were $6,334 (equivalent to approximately $18,800 in 2020), and Judge Barber did not find that this expenditure affected his decision that the division work was minor.

84. Although the development or division work is to be measured in both absolute and relative terms, the Commissioner considers that there will be a point where the absolute value of the sum spent on the development or division work is so high this factor alone will indicate that the work is more than minor.

85. To assist taxpayers with the absolute cost inquiry, the Commissioner accepts that amounts of $50,000 or below will be considered low in absolute cost terms. This figure is a 'safe harbour' figure. It is intended to give taxpayers greater certainty when making this cost assessment. It does not mean that amounts in excess of this figure will necessarily be considered more than minor, but it is a strong indicator that the scale of the work is likely to be more than minor. In some cases, the figure may be so high as to fail the test outright (as per [84]) and in other cases there may still be a need to weigh up all the factors.

86. Although the costs may be low in absolute terms, the amount spent may indicate that the development or division work is more than minor in relative terms.

Cost of the work in relative terms

87. As noted in *Lowe*, the courts may take into account the cost of development or division work relative to the nature and value of the land on which the work is done when assessing whether the development or division work is minor. The higher the cost of the work done relative to the value of the land that is subject to the undertaking or scheme, the more likely it is that the work is not minor.

88. One issue is what parcel of land must be valued for the purpose of the relative cost assessment: the value of the land disposed of, or all the land that is subject to the undertaking or scheme? The Commissioner considers that based on the language of s CB 12, the land to be valued is all the land that is subject to the undertaking or scheme. (See "QB 15/04: Income tax — whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37.)

89. Another issue is how to determine the value of the land, against which the cost of the development or division work could be compared. Over the years, various values have been used in the High Court and Taxation Review Authority, including the "cost of the land"[9], the "ultimate value achieved"[10] and the "sale price of the

[9] *Wellington v CIR* (1981) 5 NZTC 61,101 (HC).

[10] *Dobson v CIR* (1987) 9 NZTC 6,025 (HC).

land or some of it"[11]. However, the Commissioner considers that, based on the Court of Appeal decision in *Lowe*, the relative cost of the work should be compared with the total value of all the land subject to the undertaking or scheme at the commencement of the work. This is because the cost of the work is to be compared with "the value of the land on which the work is done" per Richardson J, at 61,028:

> 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**. [Emphasis added]

90. This approach minimises distortion due to movement in land values from the passage of time and from alterations to the land.

91. The value of the land at the commencement of the work should include the value of any buildings on the land. This was the approach taken in *Wellington* where 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 minor.

92. To assist taxpayers with this inquiry, the Commissioner accepts that relative costs of less than 5% will be considered low in relative cost terms. This figure is a 'safe harbour' figure and is intended to give taxpayers greater certainty when making this cost assessment. It does not mean that relative costs of 5% or greater will necessarily be considered more than minor, but it is an indicator that the scale of the work is likely more than minor, unless other factors can prove otherwise.

93. Although the costs may be low in relative terms, the amount spent may indicate that the development or division work is more than minor in absolute terms. For example, costs of $70,000 on a $2,000,000 subdivision would be low in relative terms at only 3.5% (according to the Commissioner's safe harbour) but would not be low in absolute terms (again, according to the Commissioner's safe harbour).

94. Where the value of land is unknown, an independent valuation may be used to determine the market value of the land prior to the start of the subdivision or development work. It may also be appropriate to use a recent council rating valuation, if that valuation reflects the market value of the land. Example 2 of this Interpretation Statement concerns a situation where the value of the land is unknown at the start of the work.

Work done by the taxpayer

95. In evaluating the total cost of the work done, the courts will consider work done by the taxpayer themselves. If the cost of the development was low, but this was because the taxpayer performed some of the development or division work, then the courts will give limited weight to the cost factor when evaluating whether the development or division work is minor.

96. For example, in *K v CIR*, Tompkins J concluded that although the expenses of the development or division work were low because the work was performed by one of the taxpayers, this did not undermine the conclusion that the development or division work was more than minor, at 8,219 and 8,220:

[11] *Case E41* (1982) 5 NZTC 59,255 and *Case P61* (1992) 14 NZTC 4,416.

Inland Revenue
Te Tari Taake

> The only cost relating to the division into lots was a cross-lease plan that cost $154.50. It was in reliance on these figures that [the taxpayer] submitted that obtaining the cross-lease plan, and therefore the division work, was minor having regard to the costs of each of the projects.
>
> …
>
> 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 to and did carry out the work without charging himself or his wife a fee.
>
> …
>
> It is my conclusion, having regard to these factors, that in both cases the division work of the kind I have described was not, in the context of each scheme, work of a minor nature.

97. Similarly, in *Case E41* (1982) 5 NZTC 59,255, Judge Barber considered the costs of certain development and division work, including fencing work carried out by the taxpayer, and found that it was not work of a minor nature despite the cost of the development being relatively low.

98. The Commissioner will take a similar approach when applying the absolute and relative cost safe harbours. Where a taxpayer has been able to keep development or division work costs low because they have performed the work themselves, the Commissioner will give limited weight to the cost factor when evaluating whether the development or division work is minor.

99. Example 3 of this Interpretation Statement concerns work done by the taxpayer and a low cost of work.

GST-treatment

100. In some cases, a taxpayer may be registered for GST and the land in question forms part of their taxable activity. If a taxpayer is registered for GST, and if they are able to claim back the input tax under the Goods and Services Tax Act 1985, then, the GST component of their costs may be excluded when determining the cost of the work done in absolute and relative terms. This reflects the fact that the taxpayer can claim an input tax deduction for this GST component, and therefore reduces their overall costs.

Nature of professional services used

101. Development or division work typically requires the services of professionals such as a solicitor, a surveyor, an engineer or a valuer. The courts have considered the use of professionals in determining whether the development or division work was minor.

102. From the case law, the use of professionals is considered in light of:

- the amount of time such professionals expended to undertake the development or division work; and
- the complexity and significance of the work that the professionals undertook.

Inland Revenue
Te Tari Taake

103. Even straightforward development or division work will require the services of professionals. For example, even the simplest subdivision would require the services of a solicitor and a surveyor. Consequently, the use of professional services is just one of the four factors that is taken into account when making an overall judgment as to whether the development or division work is minor.

Amount of time professional services were required

104. In *Case E41,* the taxpayer had undertaken much of the division work himself and the legal costs were not substantial. However, Judge Barber took into account the amount of time the surveyor took to undertake the subdivision and determined that the work of the surveyor, in combination with the work of a lawyer and the work done by the taxpayer, showed that the division work was more than minor. Judge Barber said, at 59,261:

> The evidence showed that the subdivisional work proceeded very smoothly, speedily and inexpensively as these matters go. **Nevertheless a surveyor was engaged in field work for two weeks and office drafting work for at least one day.** The legal and local authority aspects were minimal. I have already referred to Mr. ON's evidence of clearing gorse from the boundaries and then burning off same and the new fencing work involved. His evidence as quoted by me above shows that he intended the fencing work as part of the subdivision. In any case I think that where there is a scheme to subdivide lots for sale but they cannot be sold unless certain fencing work is effected, then that fencing work must be regarded as part of the overall scheme of subdivision work. The evidence outlined above shows that the purchasers required the fencing work to be effected. **I think that on the facts of this case, although the division work was not that extensive by comparison with subdivisional work in general, nevertheless the combination of survey, legal and fencing work was something more than "of a minor nature".** [Emphasis added]

105. The more time a professional, or professionals, spend on development or division work, the more likely the development or division work will not be minor. The amount of time a professional spends may also be an indicator of the complexity of the professional work.

Complexity and significance of the professional work

106. The complexity and significance of the professional work done to effect the development or division is an important factor the courts consider when evaluating whether the development or division work is minor. If the work required from professionals is straightforward, the courts will be more likely to conclude the development or division work is minor. For example, if a taxpayer divides land into lots and this division is very simple because it used established procedures and was routine, then a court would be more likely to conclude that the division work is minor.

107. Conversely, if additional work, beyond straightforward surveying and conveyancing, is required for completion of the undertaking or scheme, then this will indicate that the development or division work is not minor. The introduction of an additional professional activity (beyond minimal surveying and conveyancing) that is a significant part of the undertaking may be enough to make the work more than minor.

108. In *Costello v CIR* (1993) 15 NZTC 10,285 (HC), the taxpayer engaged a surveyor to facilitate the subdivision of land. The plan produced showed more than 30 separate

areas delineated with their respective entitlements. Work was also done by a valuer, so that an appropriate valuation could be made for each unit (as required under the Unit Titles Act 1972), and a solicitor undertook additional work. Speight J, in the High Court, held that while the fees the professionals charged were modest, a complicated series of steps was undertaken in three separate professional disciplines (law, surveying and valuation). The scheme could not have been finalised and unit titles made available for issue unless each step undertaken by the professionals was accurately completed. This was a factor that led Speight J to the conclusion that the division work the taxpayer undertook was not minor. In the subsequent Court of Appeal case[12], it was concluded that Speight J did not err in his overall approach to the question or in his conclusion.

109. *K v CIR* involved complex legal work in the subdivision of two properties and, despite no fees being charged, the complexity of this legal work indicated that the division work was more than minor. 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.

110. Similarly, in *Case N59,* subdivision work was held not to be minor, in part due to the considerable legal work involved. Judge Barber held, at 3,464:

> There was no evidence as to cost of the development or subdivision work. It appears that the development work must have been contour work for access and foundations and landscaping work. Apart from landscaping, development work may have been completed prior to the formulation of the intention to also sell the second flat. However, in my view, the division work in such a project cannot normally be regarded as work of a minor nature. The minimum division work involved surveying, preparation of the flat plans, lodging and depositing same at a Land Transfer Office, drafting and execution of cross-leases, and obtaining of separate composite titles. **I do not think that a conveyancing solicitor would regard such work as of a minor nature in relation to these two sale transactions even though it may be routine.** [Emphasis added]

111. In other cases, the development or division work a professional undertook was straightforward, and this was a factor in the court's decision that the development or division work was minor. For example, in *Case P61*, two lots of land were amalgamated and then subdivided. The taxpayer's subdivision expenditure comprised only a modest amount for survey and legal work. The subdivision involved the creation of easements to give access and to convey power and water. Judge Barber decided that these easements were undertaken in the standard way and were quite straightforward from a legal point of view, needing little time to complete. Considering the complexity of the work, Judge Barber decided that the professional work needed was much less than was needed in another subdivision case (*Wellington*), so the development or division work was minor.

112. Another example is *Case R7* which also concerned an amalgamation and subdivision. Judge Barber held that the development and division work was minor because it involved uncomplicated and quite minor survey work and legal work.

113. Example 1 of this Interpretation Statement features uncomplicated division work.

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[12] *Costello v CIR* (1994) 16 NZTC 11,253 (CA).

Inland Revenue
Te Tari Taake

Extent of physical work done

114. The more physical work undertaken as part of the development or division work, the more likely it is that a court will conclude that the work is not minor. However, a lack of physical work does not necessarily mean that the work will be minor. For example, in *O'Toole* no physical work was done, yet the division work was held to be more than minor.

115. Physical work involved in a development or division scheme could include:

- fencing;
- planting trees or hedges;
- demolition and site clearance;
- connection of water, sewerage, telecommunications and electricity;
- creation of access, such as roading or driveways; and
- earthworks to level land before building.

116. In *Case E41*, the court considered the extent of the physical work undertaken. The taxpayer owned a 279-acre property and created a subdivision of six lots out of a block of 177 acres. To undertake the subdivision, the taxpayer built 120 chains of new fencing, doing much of the work himself, including removing gorse on the boundaries with a tractor. This was the only physical work required. Judge Barber concluded that this physical work was a necessary part of the subdivision and that although the division work was not that extensive by comparison with subdivision work in general, the combination of survey, legal and fencing work meant the division work was more than minor.

117. Example 3 of this Interpretation Statement features extensive physical work.

Significance of changes to the physical nature and character of the land

118. The significance of the changes to the physical nature and character of the land is a factor that has been considered by the courts in establishing whether the development or division work is minor. The more significant the changes to the physical nature and character of the land since the development or division work began, the less likely it is that the development or division work will be minor.

119. This factor was discussed in *Dobson*. In this case, a taxpayer had demolished the buildings on three properties and replaced them with new flats. The subdivision work involved demolition, clearing of sites, surveys, plan deposits, preparation of cross leases and obtaining composite titles. Hardie Boys J commented on the significance of the development in terms of how it had changed the land, at 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.

120. Similarly, in *Case E90*, a subdivision made a significant change to the character of the land by dividing the land and buildings into five separate units and creating a section of land as common property. Judge Bathgate concluded, at 59,476:

Inland Revenue
Te Tari Taake

> **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.**
>
> ...
>
> I do not consider that in this case the division of the land into lots is of a minor nature. I agree the surveyor's costs and legal costs in this case for urban, industrial land division are of a minor nature. I do not know what the total costs of the division are, or whether or not there was any "development" necessary for that purpose. **However even if a person were able to subdivide his land at no cost to himself, I do not believe that would automatically take the case out of [what is now s CB 12]. In my view the effect of the development and division undertaken on the land in question is an important factor in deciding whether or not it is work of a minor nature.** The nature of the work may have far reaching consequences on the land without significant costs. Not a great deal of activity may be required.
>
> 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 [the taxpayer] satisfied me on the balance of probabilities that the division work alone is of a minor nature. [Emphasis added]

121. Example 4 of this Interpretation Statement features a significant change to the physical nature and character of the land.

Examples

122. The following five examples explain the application of s CB 12. They do not consider the potential application of other provisions, and the exclusions to s CB 12 listed at [19] are assumed **not** to apply.

123. Appendix 2 of this Interpretation Statement provides a summary of cases that considered whether development or division work was minor. These may also be of assistance to taxpayers in explaining the application of s CB 12.

Inland Revenue
Te Tari Taake

Example 1 – Straightforward subdivision of a farm

Mohammed owns a 75-acre farm he purchased six years ago. In addition to the house he lives in, there is an old farmhouse situated at one end of the property. Mohammed decides to subdivide off the old farmhouse and 2 acres of surrounding land. He arranges for a valuer to value the 75-acre farm shortly before the subdivision begins. The valuer estimates the value of the farm to be $1,800,000.

Mohammed spends $20,000 on professional services to create the subdivision. The survey work and legal work is straightforward as it is a simple division of one parcel of land into two.

No physical work is required as existing fencing and hedges separate the old farmhouse and surrounding land from the rest of Mohammed's property. No easements for access or services are required.

Mohammed sells the farmhouse and the surrounding 2 acres for $795,000.

Is the sale of the farmhouse and the 2 acres of surrounding land taxable under s CB 12?

- There was an undertaking or scheme to divide the land into lots.
- The cost was low in absolute terms ($20,000) and in relative terms (1% of the pre-division value of the land, being $1,800,000).
- The nature of the professional services used was straightforward.
- No physical work was required.
- The character or nature of the land did not change.
- The undertaking or scheme was begun within 10 years of the date on which Mohammed acquired the land.

On the facts, the division work was minor. Therefore, the sale of the farmhouse and the 2 acres of surrounding land is not taxable under s CB 12.

Example 2 – Subdivision with use of professional services and additional physical work and with land value unknown

Elisapeta purchased 10 acres of land seven years ago for $500,000. She began to build her dream home on the land, but building costs exceeded her expectations and she decided to subdivide the land to help finance the construction: one lot of 3 acres with her home on it and one lot of 7 acres to sell.

Elisapeta used the professional services of a surveyor, a solicitor and a geotechnical engineer. She also organised a landscaper to fence between the two lots and had an earthworks company excavate a driveway to one of the lots. An arborist felled several trees and cleared the site, as this was necessary for the subdivision of the land. The total cost of the division work was $60,000.

Elisapeta did not know how much the 10-acre block was worth before she started the development. However, a council rating valuation from the year before for the undivided land was $1,000,000.

Elisapeta sold the 7-acre block of land for $700,000, which allowed her to complete construction of her home.

Is the sale of the 7-acre block taxable under s CB 12?

Inland Revenue
Te Tari Taake

- There was an undertaking or scheme to develop and/or divide the land into lots.
- The cost was high in absolute terms ($60,000). The cost was also high in relative terms, being 6% of the pre-division value of the land.
- The use of several different professional services was required.
- Physical work was required, including site clearance, excavation of a driveway and installation of fencing.
- The character and nature of the land has changed, with the site cleared and trees felled.
- The undertaking or scheme was begun within 10 years of the date on which Elisapeta acquired the land.

On the facts, Elisapeta's subdivision involved development or division work that was more than minor. Accordingly, s CB 12 applies, and the sale price of $700,000 is taxable.

Example 3 – Non-straightforward subdivision with work done on behalf of the owner at a discounted cost and with changes to the character and nature of the land

Kimiora acquired a house on a 1-acre section on the outskirts of a city six months ago for $1,000,000. Most of the land is native bush on a slope, with the house at the front of the section. Kimiora had planned to rent the house to tenants, but after buying the land she decided to subdivide the land into four parcels and sell them.

The professional work required was not straightforward because a shared driveway needed to be created from the street to the three new parcels of land. Buried under one parcel of land was a council-owned storm-water drainage pipe, so legal work was required to manage the easements for this and for the shared driveway. The professional services of a surveyor were also required. Despite the complexity, the cost of professional services was only $30,000.

Kimiora owns a landscaping business, Bushbusters Ltd. Bushbusters cleared the bush on the property and undertook earthworks to clear the way for a driveway and to create three platforms on which houses could be built. The company didn't charge Kimiora for this work.

Kimiora's brother Hemi owns an asphalt and paving company. The company created the shared driveway for a discount, costing Kimiora only $5,000.

Kimiora sold the four newly created lots (including the lot with the house on it) as soon as the work was finished for a total of $1,600,000.

Is this sale taxable under s CB 12?

- There was an undertaking or scheme to develop and divide the land into lots.
- The cost was low in absolute terms, with total costs of $35,000. The cost was also low in relative terms, at 3.5% of the pre-division value of the land ($1,000,000). However, the Commissioner will not give this factor much weight, given that Kimiora performed some of the work herself and obtained other services at a considerable discount (see from [95]).
- The professional work required to undertake the development was not straightforward due to the complexities of creating a shared driveway and easements.
- Extensive physical work was undertaken on the land, including earthworks.

Inland Revenue
Te Tari Taake

- The nature and character of the land changed significantly – from native bush on a slope to cleared, flattened land suitable for housing.
- The undertaking or scheme was begun within 10 years of the date on which Kimiora acquired the land.

On the facts, despite the low cost of the work, Kimiora's development and subdivision involved development and division work that was more than minor. Accordingly, s CB 12 applies, and the sale price of $1,600,000 is taxable.

Example 4 – Boundary adjustment

While preparing to sell her quarter-acre residential property (which she had owned for 5 years), Michelle obtained a valuation and found it was worth $750,000. Michelle also discovered from the valuation report that she and her neighbour Daneka had been mistaken about where the boundary was between their properties. As a result, Michelle's prized rose garden extends a little over the boundary into Daneka's land.

This garden adds value to Michelle's property. After negotiating, Michelle and Daneka agree that they will adjust the boundary to add a small corner from the rear of Daneka's property to Michelle's, so Michelle can keep her rose garden. In consideration for this, Michelle pays Daneka $6,000. The only work involved is straightforward survey and legal work, which is completed without any difficulty at a cost of $15,000. Once the boundary adjustment is completed, Michelle sells the land for $761,000.

Is this sale taxable under s CB 12?

- There was an undertaking or scheme to divide the land into lots (being the boundary adjustment).
- Although there was a cost in undertaking the division work of $15,000, it was low in absolute terms and in relative terms (2%).
- The professional work required to undertake the division work was straightforward.
- No physical work was required.
- The nature and character of the land were unchanged.

From the facts, the division work was minor. Accordingly, the sale price of $761,000 is not taxable under s CB 12.

Example 5 – A subdivision with some physical work required

Nick acquired a 50-hectare farm property at a cost of $1,400,000. The farm comprises two connected parcels of land. Within one month of Nick's acquisition of the property, the power was connected for farm development purposes at a cost of $15,000, paid to the power company. This resulted in the erection of a transformer structure on the land. Two months later he accepted an offer of $175,000 for a 0.5-hectare parcel of the land.

As a condition of the subdivision consent, the Council required Nick to construct an entranceway to the subdivided lot. A power supply to the subdivided lot already existed.

Constructing an entrance way to the lot cost $2,000 and was very straightforward. The creation of the entranceway is development work.

The farm had two 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:

Inland Revenue
Te Tari Taake

	$
Surveying (including):	
• Scheme plan preparation and submissions	
• Field Work and LT plan preparation	$20,000
Entrance Way	$2,000
Legal fees	$7,000
TOTAL	$29,000

Is this sale taxable under s CB 12?

- There was an undertaking or scheme to develop and divide the land into lots.
- Although there was a cost in undertaking the division work of $29,000, it was low in absolute terms ($29,000) and in relative terms (2.6%).
- 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.
- Physical work was required to be carried out on the land. This was the construction of the entranceway. This work was not extensive.
- The erection of the transformer structure by the power company was an expensive procedure. It was work of a physical 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.
- The nature and character of the land were not changed.
- The undertaking or scheme was begun within 10 years of the date on which Nick purchased the land.

On the facts, the division work was minor. Accordingly, the sale price of $175,000 is not taxable under s CB 12.

However, if Nick had incurred significant expenditure in dividing the farm into say three or more titles, 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 be more than minor. In that case, the proceeds of the sale of the land would be taxable.

Inland Revenue
Te Tari Taake

References

Subject references

development of the land
division of the land into lots
dispose
land
not minor
undertaking or scheme

Legislative references

Goods and Services Tax Act 1985
Income Tax Act 1976, s 67(4)
Income Tax Act 1994, s CD 1(2)(f), YB 4(3)
Income Tax Act 2004, s CB 10, YA 3(3) and (4)
Income Tax Act 2007, subpart CB (ss CB 6, CB 6A, CB 7–CB 14, CB 15, CB 17–CB 23, CB 23B), s CC 1, YA 1 ("dispose", "land"), ZA 3
Land and Income Tax Act 1954, s 88AA
Land and Income Tax Amendment Act 1973, s 9(1)
Resource Management Act 1991, s (2)(c)
Unit Titles Act 1972

Case references

Anzamco Ltd (in liq) v CIR (1983) 6 NZTC 61,522 (HC)
Aubrey v CIR (1984) 6 NZTC 61,765 (HC)
Case D24 (1979) 4 NZTC 60,597
Case E41 (1982) 5 NZTC 59,255
Case E90 (1982) 5 NZTC 59,471
Case N59 (1991) 13 NZTC 3,457
Case P61 (1992) 14 NZTC 4,416
Case R7 (1994) 16 NZTC 6,035
Case S86 (1996) 17 NZTC 7,538
Costello v CIR (1993) 15 NZTC 10,285 (HC)
Costello v CIR (1994) 16 NZTC 11,253 (CA)
Cross v CIR (1985) 7 NZTC 5,054 (HC)
Cross v *CIR* (1987) 9 NZTC 6,101(CA)
Duff v CIR (1982) 5 NZTC 61,131 (CA)
Dobson v CIR (1987) 9 NZTC 6,025 (HC)
K v CIR (1991) 13 NZTC 8,216 (HC)
Lowe v CIR (1981) 5 NZTC 61,006 (CA)
Mee v CIR (1988) 10 NZTC 5,073 (HC)
O'Toole v CIR (1985) 7 NZTC 5,045 (HC)
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"QB 15/02: Income tax – major development or division - what is 'significant expenditure' for section CB 13 purposes?", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 20.

"QB 15/04: Income tax — whether it is possible that the disposal of land that is part of an undertaking or scheme involving development or division will not give rise to income, even if no exclusion applies", *Tax Information Bulletin* Vol 27, No 4 (May 2015): 37.

"QB 17/02: Income tax – date of acquisition of land, and start date for 2-year bright-line test", *Tax Information Bulletin* Vol 29, No 4 (May 2017): 125.

"Work of a minor nature", *Tax Information Bulletin* Vol 17, No 1 (February 2005): 5.

Inland Revenue
Te Tari Taake

Appendix 1: Legislation

1. Section CB 12 provides:

CB 12 Disposal: schemes for development or division begun within 10 years

Income

(1) An amount that a person derives from disposing of land is income of the person if the amount is derived in the following circumstances:

(a) an undertaking or scheme, which is not necessarily in the nature of a business, is carried on; and

(b) the undertaking or scheme involves the development of the land or the division of the land into lots; and

(c) the person, or another person for them, carries on development or division work on or relating to the land; and

(d) the development or division work is not minor; and

(e) the undertaking or scheme was begun within 10 years of the date on which the person acquired the land.

Exclusions

(2) Subsection (1) is overridden by the exclusions for residential land in section CB 17, for business premises in section CB 20, for farm land in section CB 21, and for investment land in section CB 23.

2. Section CB 17 provides:

CB 17 Residential exclusion from sections CB 12 and CB 13

Exclusion: developing or dividing land for residential use

(1) Sections CB 12 and CB 13 do not apply if—

(a) the work involved in the undertaking or scheme is to create or effect a development, division, or improvement; and

(b) the development, division, or improvement is for use in, and for the purposes of, the residing on the land of,—

(i) the person:

(ii) if members of the person's family live with them, the person and members of the person's family living with them.

Exclusion: dividing residential land

(2) Sections CB 12 and CB 13 do not apply if—

(a) the land is a lot that came out of a larger area of land that the person divided into 2 or more lots; and

(b) the larger area of land was 4,500 square metres or less immediately before it was divided and was occupied mainly as residential land for,—

(i) the person:

(ii) if members of the person's family live with them, the person and members of their family living with them.

3. Section CB 20 provides:

Inland Revenue
Te Tari Taake

CB 20 Business exclusion from sections CB 12 and CB 13

Sections CB 12 and CB 13 do not apply if—

(a) the work involved in the undertaking or scheme is to create or effect a development, division, or improvement; and

(b) the development, division, or improvement is for use in, and for the purposes of, the carrying on of a business by the person on the land; and

(c) the business does not consist of the undertaking or scheme.

4. Section CB 21 provides:

CB 21 Farm land exclusion from sections CB 12 and CB 13

Exclusion

(1) Sections CB 12 and CB 13 do not apply if—

(a) the land is a lot resulting from the division of a larger area of land into 2 or more lots; and

(b) immediately before the land was divided, the larger area of land was occupied or used by the person, their spouse, civil union partner or de facto partner, or both of them, mainly for the purposes of a farming or agricultural business carried on by either or both of them; and

(c) the area and nature of the land disposed of mean that it is then capable of being worked as an economic unit as a farming or agricultural business; and

(d) the land was disposed of mainly for the purpose of using it in a farming or agricultural business.

Circumstances for purposes of subsection (1)(d)

(2) The circumstances of the disposal of the land are relevant to the decision on whether the land was disposed of mainly for the purpose of using it in a farming or agricultural business. The circumstances include—

(a) the consideration for the disposal of the land:

(b) current prices paid for land in that area:

(c) the terms of the disposal:

(d) a zoning or other classification relating to the land:

(e) the proximity of the land to any other land being used or developed for uses other than farming or agricultural uses.

5. Section CB 23 provides:

CB 23 Investment exclusion from sections CB 12 and CB 13

Sections CB 12 and CB 13 do not apply if—

(a) the work involved in the undertaking or scheme is to create or effect a development, division, or improvement; and

(b) the development, division, or improvement is for use in, and for the purposes of, the person's deriving from the land income of the kind described in section CC 1 (Land).

6. Section CB 23B provides:

Inland Revenue
Te Tari Taake

CB 23B Land partially disposed of or disposed of with other land

Sections CB 6A to CB 23 apply to an amount derived from the disposal of land if the land is—

(a) part of the land to which the relevant section applies:

(b) the whole of the land to which the relevant section applies:

(c) disposed of together with other land.

7. "Dispose" is defined in s YA 1. The relevant parts of the definition state:

dispose—

(a) In sections CB 6A to CB 16, CB 18, CB 19, CB 21, CB 22, and subpart EL (which relate to the disposal of land), for land, includes—

(i) compulsory acquisition under any Act by the Crown, a local authority, or a public authority:

(ii) if there is a mortgage secured on the land, a disposal by or for the mortgagee as a result of the mortgagor's defaulting under the mortgage:

8. "Estate" is defined in s YA 1 in relation to land:

estate in relation to land, **interest** in relation to land, **estate or interest in land**, **estate in land, interest in land**, and similar terms—

(a) mean an estate or interest in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and

(b) Include a right, whether direct or through a trustee or otherwise, to—

(i) the possession of the land (for example: a licence to occupy, as that term is defined in section 122 of the Land Transfer Act 2017):

(ii) the receipt of the rents or profits from the land:

(iii) the proceeds of the disposal of the land; and

(c) do not include a mortgage

9. "Interest" is defined in s YA 1. The relevant part of the definition states:

interest,—

...

(d) in relation to land, **interest in land**, **estate or interest in land**, and similar terms are defined under the definition of **estate**

10. "Land" is defined in s YA 1 to include an estate or interest in land. The relevant parts of the definition state:

land—

(a) includes any estate or interest in land:

(b) includes an option to acquire land or an estate or interest in land:

(c) does not include a mortgage:

...

Inland Revenue
Te Tari Taake

Appendix 2: Summary of cases considering whether development or division work was minor

1. The following two tables summarise the cases which decided whether development or divisions work was minor (1) or was not minor (2). These cases are discussed throughout this statement.

2. In both tables, the approximate date of expenditure or receipt is shown for each case. For example, "(1974–75$)" means expenditure or receipt occurred in the 1974 and 1975 years.

Table 1: Cases that decided development or division work was minor

Case	Land division or development & total value	Work: professional & physical	Reasons for decision that work was minor
Case D24 (1979) 4 NZTC 60,597	Division of 2.429ha into six lots Total sale value of lots: $32,900 (1975–76$) Cost of land: $22,000 (1971$)	Cost of subdivision, professional services, surveyor's fees, disbursements and legal fees: $1,939 (1975–76$) Reserve contribution: $1,170 (1974$)	Reserve contribution is not work, so costs of subdivision relative to value of land were minimal Land Transfer Office deposit not considered "work" in circumstances of case
Case P61 (1992) 14 NZTC 4,416	Amalgamation of two lots of land and then subdivision into three sections, a land swap, and further subdivision to create three smaller lots Two sections sold: one for $46,137 (1984$) and one for $40,000 (1986$)	Surveying and legal work simple and straightforward Cost of survey work: $6,334 (1986$) Water, sewerage and clearing work undertaken five or six years earlier for the purposes of an orchard	While the type of work is similar to that in *Wellington*, the degree of work was relatively much less Costs of earlier work done for orchard purposes excluded

Case R7 (1994) 16 NZTC 6,035	Amalgamation of 9-acre block of land with two quarter-acre sections Total cost of land (9-acre block and two quarter-acre sections): $34,250 (1973$) House built on corner of section, small adjoining section added to it, and this part then subdivided and sold in a swap deal House site sold: $30,000 (1974$)	House site not part of development work Survey and legal work was uncomplicated and quite minor	Uncomplicated and quite minor survey and legal work

Table 2: Cases that decided development or division work was not minor

Case	Land division or development & total value	Work: professional & physical	Reasons for decision that work was not minor
Wellington v CIR (1981) 5 NZTC 61,101 (HC)	Division of land into eight blocks Three blocks amalgamated into one block Block of land later subdivided back into three original blocks, and two blocks subsequently sold Land and buildings cost $12,000 (1970$)	Subdivision work cost over $9,000 (1971–72$)	Cost of subdivision in relation to cost of land meant it was not minor

Inland Revenue
Te Tari Taake

Case	Land division or development & total value	Work: professional & physical	Reasons for decision that work was not minor
Case E41 (1982) 5 NZTC 59,255	Subdivision of part of farm (177 acres) into six lots Sale of three lots	Cost of work about 1% of sale value of three lots Total cost of work (fencing, legal and surveying work): $4,500 (1972–73$). Fencing included removing gorse bushes, creating new fences and replacing some old fences Owner carried out most of the work	Combination of survey, legal and fencing work was not minor
Case E90 (1982) 5 NZTC 59,471	Block of land divided into five lots. One lot sold	Unit title plan prepared at cost of $482 (1977–78$) Division of the block of land into three major units and two smaller units, with further piece as common property	Subdivision of land into three major units and two smaller units and definition of a further piece as common property, meant work was not minor
O'Toole v CIR (1985) 7 NZTC 5,045 (HC)	Subdivision of a farm into 18 lots (in 1974) Twelve lots sold, three kept, and six put up for sale Cost of land: $22,600 (1970$)	No physical work involved Surveyor considered subdivision work undertaken to be quite difficult Approximate cost: $7,000 (1973$)	Difficulty of survey (for reasons of topography, extent of cover on land, and age and unavailability of previous survey marks) meant it was not minor
Dobson v CIR (1987) 9 NZTC 6,025 (HC)	Development of three rental properties	Buildings demolished, site cleared, land surveyed, cross leases and subdivision plans prepared and deposited, and composite titles obtained	Totality of work involved was not minor