Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKAWĀ

Disposal of property and shortfall penalties

Decision date | Rā o te Whakatau: 24 March 2026

Issue date | Rā Tuku: DD Month 23 July 2026

TDS 26/08

Subjects | Kaupapa

This item summarises an adjudication that considered whether the sale of property was subject to s CB 6 of the Income Tax Act 2007 and whether the Taxpayer was liable for a shortfall penalty for gross carelessness or taking an unacceptable tax position.

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007, unless otherwise stated.

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer was a company (Company). The Taxpayer's business activity was residential property development.
2. The Taxpayer settled the purchase of a property (Property) about 20 years ago.
3. About 11 years ago, the director of the Company (Director) engaged architects to draw up house plans for a part (Section) of the Property.
4. The Property was subdivided about 8 years ago into five lots. Only the Section was subject to the dispute.
5. The Taxpayer sold the Section to a third party 3 years after subdivision.
6. The Taxpayer accounted for the sale of the Section in its GST return, but not in its income tax return for the relevant tax year.

Issues | Take

7. The issues considered in this dispute were:
    - Whether the Taxpayer had a purpose or intention to dispose of the Section at the time of acquisition; and
    - Whether either of the following shortfall penalties applied:
        - gross carelessness; or
        - an unacceptable tax position.
8. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakatau

9. The Tax Counsel Office (TCO) concluded as follows:

- The Taxpayer had a purpose or intention to dispose of the Section under s CB 6, as it did not prove otherwise.
- A shortfall penalty for gross carelessness was not applicable in this instance.
- A shortfall penalty for taking an unacceptable tax position was applicable.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Onus of proof

10. Except for proceedings relating to evasion or similar act or obstruction, the onus of proof is on the taxpayer to show an assessment is wrong, why it is wrong, and by how much it is wrong.[1] However, if the taxpayer proves, on the balance of probabilities, that the amount of an assessment is excessive by a specific amount, the taxpayer's assessment must be reduced by the specific amount.[2]

11. The standard of proof is the balance of probabilities.[3]

12. It is appropriate that the same onus and standard of proof be applied in the disputes process as in challenge proceedings. TCO considered whether the Taxpayer has discharged the onus of proof in the context of the issues raised by the parties in the dispute, based on the documentary evidence put before it.

[1] Section 149A(2) of the Tax Administration Act 1994. See also *Case V17* (2002) 20 NZTC 10,192, *Accent Management Ltd v CIR* (2005) 22 NZTC 19,027 (HC) and *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

[2] Section 138P(1B) of the Tax Administration Act 1994.

[3] *Yew v CIR* (1984) 6 NZTC 61,710 (CA), *Case Y3* (2007) 23 NZTC 13,028, and *Case X16* (2005) 22 NZTC 12,216.

Issue 1 | Take tuatahi: Purpose or intention of disposal at the time of acquisition

13. The issue was whether the Taxpayer acquired the Section with a purpose or intention of disposing of it, so that the disposal proceeds are income under s CB 6. The Taxpayer asserted the Section was intended as the Director's family home. Inland Revenue's Customer & Compliance Services had explained to the Director shortly after the acquisition of the Property that the Director and the taxpayer were separate persons.

14. TCO summarised its analysis of s CB 6 as follows:

    - Section CB 6 provides that an amount a person derives from disposing of land is income of the person if they acquired the land for a purpose or with an intention of disposing of it.
    - Purpose or intention is to be ascertained when the land is acquired. The date of acquisition for the subdivided land is the date of acquisition for the original undivided piece of land.[4]
    - For a corporate taxpayer, in the absence of any other contemporaneous evidence, it is generally the directors' purpose or intention that is relevant in determining whether s CB 6 applies.[5]
    - The starting point in ascertaining a taxpayer's purpose or intention is the subjective evidence. The subjective evidence is then assessed and tested against the totality of the circumstances. The totality of the circumstances includes the asset's nature, the Taxpayer's vocation, the circumstances of the purchase, the number of similar transactions, the length of time the property was held, and the circumstances of the asset's use and disposal.[6]

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[4] *Paul Stephens Construction Ltd v CIR* (1990) 12 NZTC 7,192 (HC).

[5] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA), *Trustees of the B Trust v CIR* [2013] NZTRA 5, *FCT v Whitfords Beach Pty Ltd* 82 ATC 4031 (HCAFC), *Allied Pastoral Holdings Pty Ltd v FCT* 83 ATC 4015 (SCNSW) and *Aotea Group Securities Ltd v CIR* (1986) 8 NZTC 5,052 (HC).

[6] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA).

Application

15. TCO considered the Taxpayer's statements and actions and assessed them against the totality of the circumstances.[7] Ultimately, TCO considered the Taxpayer had not satisfied the onus of proof.

16. TCO's view was as follows:

- While the Taxpayer had provided explanations and assertions about the relevant transactions, TCO's conclusions were reached on the basis of the documentary evidence and legal submissions provided in the disputes process.
- Having reviewed the evidence provided by both Customer & Compliance Services and the Taxpayer, TCO considered it had not been provided with documentary evidence that clearly showed the Taxpayer did not have a purpose or intention to dispose of the Section at the time of acquisition. TCO noted the Taxpayer had also acknowledged in its Statement of Position that there were evidential difficulties.
- Even if it was accepted that there was an intention to build a family home on the Section, the Section was owned by the taxpayer (a property development company and a separate legal entity from the Director), and it was not established on the evidence provided that the taxpayer did not intend to sell the Section to the Director at the time of acquisition.

Conclusion

17. TCO concluded that the Taxpayer was liable to income tax on the disposal of the Section under s CB 6.

Issue 2 | Take tuarua: Application of shortfall penalties

18. The issue was whether a shortfall penalty applied under ss 141C and 141B of the Tax Administration Act 1994 (TAA).

Gross carelessness (s 141C of the TAA)

19. TCO summarised its analysis of s 141C of the TAA as follows:

[7] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA).

 See page 1 for details.

- Gross carelessness means doing or not doing something in a way that, in all the circumstances, suggests or implies a complete or high level of disregard for the consequences.[8]
- Gross carelessness is characterised by conduct which creates a high risk of a tax shortfall occurring where that risk and its consequences would have been foreseen by a reasonable person in the circumstances.[9]
- The test for gross carelessness is not whether the taxpayer actually foresaw the probability that their act or omission would cause a tax shortfall but whether a reasonable person would have foreseen that probability. Whether the taxpayer acted intentionally is not a consideration.[10]
- A taxpayer who adequately informed and followed the advice of a qualified tax agent took reasonable care and was not careless under s 141A(2B) of the TAA.
- A taxpayer who took an acceptable tax position would not have been grossly careless in taking their tax position under s 141C(4) of the TAA.

Unacceptable tax position (s 141B of the TAA)

20. TCO considered the following had to apply for the penalty to apply:
    - The tax position, viewed objectively, failed to meet the standard of being "about as likely as not to be correct"; and
    - No relevant exceptions applied.
21. TCO considered a tax position was "about as likely as not to be correct" if:
    - the tax position was close to or around 50% likely to be correct;
    - the merits of the arguments supporting the tax position were substantial;
    - on balance, the tax position was one that, while wrong, could be argued on rational grounds to be right;
    - room existed for a real and rational difference of opinion; and
    - the taxpayer's tax position was one about which "reasonable minds could differ".[11]

[8] Section 141C(3) of the TAA.
[9] *Case W4* (2003) 21 NZTC 11,034 (TRA).
[10] *TRA 026/11* [2014] NZTRA 09 and *Case 9/2014* (2014) 26 NZTC 2-019 (TRA).
[11] *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, (2009) 24 NZTC 23,188 (TRA).

Application

22. The Taxpayer took a tax position in its income tax return that the proceeds from the disposal of the Section were not taxable. This was incorrect and resulted in a tax shortfall.

Gross carelessness

23. TCO accepted the Taxpayer may not have fully understood tax matters. It was possible the Director may have thought he already owned the Section, meaning the Taxpayer had no intention to dispose of the Section at the time of acquisition. However, the Taxpayer did not discharge the burden of proof in relation to this matter.

24. Further, that the Director, on behalf of the Taxpayer, sought advice before the Taxpayer took its tax position, suggested that a court or the Taxation and Charities Review Authority would conclude the Taxpayer had not shown a high level of disregard for the tax consequences.

25. The Taxpayer had also included the profits of other property sales in its return, which supported the view that the Taxpayer had not been reckless in managing its overall affairs. There did not appear to be a complete or high level of disregard for tax consequences generally.

26. Consideration was also given to the elapsed time since acquisition and lack of records from that period. TCO accepted that a reasonable person may not have remembered the statements made to Inland Revenue regarding the property acquisition about 15 years ago, particularly since the person would not have had access to Inland Revenue's records of those statements. Therefore, it was possible a reasonable person in the Taxpayer's position might not have foreseen the risk of a tax shortfall.

Unacceptable tax position

27. TCO found the Taxpayer had not satisfied the evidential onus of proving on the balance of probabilities that it did not have a purpose or intention of disposing the Section at the time of acquisition.

28. It follows that the Taxpayer's tax position is incorrect. The position is not something on which reasonable minds could differ, and no room exists for a real and rational difference of opinion about it.

29. The tax law is clear that if a taxpayer acquires land with a purpose or intention of disposal, the proceeds are subject to income tax under s CB 6.

30. It is acknowledged that where factual issues turn on questions of evaluation or assessment, whether a taxpayer's view of the facts is "about as likely as not to be correct" may be considered. In this regard, considering the Taxpayer is a property development company and a separate legal entity from the Director and their assertion that the Section is to be used for building their family home, it is difficult to consider the Taxpayer's view of the facts (that is, that there was no intention or purpose to dispose of the Section at the time acquisition) as being "about as likely as not to be correct".

Conclusion

31. TCO concluded the unacceptable tax position penalty applied, and the gross carelessness penalty did not apply.