

29 May 2023

Tax Technical – Consultation

By email: [public.consultation@ird.govt.nz](mailto:public.consultation@ird.govt.nz)

**Re: PUB00429 and PUB00397-1 – Main-home exclusion to the bright-line test**

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on PUB00429 (including QWBA) and PUB00397-1, both relating to the application of the main home exclusion to the bright-line test.
2. These comments have been prepared with the assistance of the Law Society’s Tax Law Committee.<sup>1</sup>

**PUB00429 – Income Tax – Main home exclusion to the bright-line test**

3. The Law Society agrees with the conclusions and examples provided, insofar as they are consistent with our understanding of how the ‘main home’ provisions were intended to apply. That said, the Law Society notes that the drafting of the main home exclusion remains problematic, and this necessarily has implications for the certainty of the draft IS and how helpful it may be in more complex situations of regular absence from the main home.
4. Example 4 is one such situation. A person who has used a dwelling as a main home for three years loses the exclusion because she is sent overseas by her employer for two years. Twice a year she returns to the dwelling for two weeks at a time, and otherwise stays in a hotel while overseas. The rationale is that the two weeks each time do not break up the absence, because the stays are temporary. The taxpayer might consider that the periods of physical absence while on secondment are the buffer periods and each buffer period, logically being under 365 days, is immediately before or after a period where the person, having returned to New Zealand albeit for only two weeks each time, continues with the use of the property as she did before she left. If the fact scenario is approached in this way, the main home exclusion is maintained. While we do not suggest that this approach would be the correct interpretation of the main home exclusion, it is at least arguable, and if nothing else, is indicative of the difficulties with the provisions as drafted.
5. In addition, the Law Society notes:
  - Paragraph 16 should refer to ‘*acquired for the purpose or with the intention of disposal*’, to mirror the wording of section CB 6, as the term ‘re-sale’ is narrower than ‘disposal.’
  - Paragraphs 19, 45, and 57 all refer to the ‘12-month buffer,’ but do not refer to the extended period that can apply under section CB 16A(1C), where a person is constructing a dwelling on the land which will be used as a main home for one or more ‘main home persons’, provided that period is reasonable. We suggest that each of these paragraphs include a footnote referencing this extended buffer period.

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<sup>1</sup> <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/tax-law-committee/>

QWBA – If a person has two or more homes, which home is their main home for the purpose of the main home exclusion to the bright-line test?

6. The Law Society agrees with the conclusions and examples provided, and provides the following brief comments.
7. At paragraph 1, the statutory reference should be to sections CB 6A *and* CZ 39, as the draft QWBA relates to the application of the main home exclusions to both bright-line tests.
8. Paragraph 6 should refer to '*acquired for the purpose or with the intention of disposal*', to mirror the wording of section CB 6, as the term 're-sale' is narrower than 'disposal.'
9. Examples 2 and 3 should clarify that the one-bedroom apartment and Gold Coast apartment, respectively, are not 'new build land', as otherwise the bright-line test would not apply on the facts.

**Further comment – rollover relief and application of the main home exclusions**

10. In addition to the above, the Law Society notes that the recently enacted rollover relief provisions do not appear to tie in with the application of the main home exclusions, which is particularly relevant in applying the main home exclusion under section CZ 40.
11. For example, if a residential property acquired between 29 March 2018 and 27 March 2021 (subject to a 5-year bright-line period) is transferred from Trust A to Trust B (assume rollover relief applies to that transfer), and Trust B subsequently sells the property within 5 years of the date it was acquired by Trust A, then for the purpose of applying the main home exclusion to that subsequent sale:
  - i. Trust B should be deemed to have held the property since Trust A held it, and
  - ii. If a beneficiary of Trust A had occupied the property as their main home while the property was owned by Trust A, it should be deemed that a beneficiary of Trust B had occupied the property as their main home for that time.
12. This is not the case, however, as the deemed 'bright-line acquisition date' date in sections CB 6AB(1) and CZ 39(6B) is not mirrored in the wording of the main home exclusions in sections CB 16A(1) and CZ 40(2), respectively, and there is no provision deeming property to have been occupied by a beneficiary of the transferee trust as their main home in this situation.
13. Consider then a situation where:
  - i. The settlors/beneficiaries of Trust A occupied the property as their main home for the entire 3-year period that property was owned by Trust A; and
  - ii. Trust A then transferred the property to Trust B (not taxable due to the main home exclusion, but eligible for rollover relief in any event); and
  - iii. Trust B then rented the property to a third party for one year before selling it.
14. Based on the current wording of section CZ 40 it appears that Trust B will be taxed on the sale of the property under the bright-line test and the main home exclusion will not apply to Trust B. If all the actions of Trust A were attributed to Trust B (which is how rollover relief should apply), then Trust B should be able to apply the main home exclusion, as the beneficiaries of Trust B will be deemed to have occupied the property as their main home for 3 out of 4 years (i.e., more than 50% of the time). As noted above, however, there does not appear to be a tie-in between rollover relief from the bright-line tests and the application of the main exclusions.
15. It may be that this was not considered when the rollover relief provisions were drafted. The Law Society recommends that at the next available opportunity and with retrospective effect,

the main home exclusions in sections CB 16A and CZ 40 are amended to reflect the rollover relief provisions in sections CB 6AB and CZ 39(6B).

**PUB00397-1 – Income Tax – bright line test – main home exclusion – renting to flatmates**

16. The Law Society agrees with the conclusions and examples provided in this QWBA.
17. However, the usefulness of this QWBA is limited, as it does not apply where the property is owned by a trust.<sup>2</sup> We suggest it be updated so that it also applies where the property is owned by a trust and occupied by a beneficiary of the trust as their main home, and either the principal settlor of the trust does not have a main home or, if they do, the subject property is their main home.
18. If the QWBA is not updated to provide for this, an additional paragraph should be inserted between paragraphs 4 and 5, clarifying that:

*While this item assumes the person disposing of the land is not a trustee of a trust, the principles set out in this item also apply if:*

  - *the property is owned by a trust; and*
  - *the property is occupied by a beneficiary of the trust as their main home; and*
  - *either the principal settlor of the trust does not have a main home or, if they do, the subject property is their main home; and*
  - *the beneficiary (as licensee) rents out one or more rooms to flatmates.*
19. At paragraph 7, Table 1, 'Between 29 March 2018 to 26 March 2021' should read 'From 29 March 2018 to 26 March 2021' or 'Between 29 March 2018 and 26 March 2021.'
20. At paragraph 10, the second bullet point does not accurately reflect section CB 16A(1C). It should read, '... do not exceed 365 consecutive days or, in the case of a period during which the person is constructing a dwelling on the land to be used as a main home for the person, a reasonable length of time to construct the dwelling (referred to as the buffer period)....'
21. The heading before paragraph 26: Should read '... land acquired between 29 March 2018 and 26 March 2021.' Paragraph 26 should read similarly.

**Further assistance**

22. Thank you for the opportunity to provide feedback on these items. If you have any questions or wish to discuss the Law Society's feedback further, please contact [aimee.bryant@lawsociety.org.nz](mailto:aimee.bryant@lawsociety.org.nz).

Ngā mihi nui



David Campbell  
Vice President

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<sup>2</sup> See paragraph 4, second bullet-point.