

13 February 2025

Inland Revenue Department

By email: public.consultation@ird.govt.nz

Tēnā koutou,

Re: PUB00519 – application of section CB 3 to amounts derived from disposal of land

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**the Law Society**) welcomes the opportunity to comment on *Exposure Draft PUB00519: Can section CB 3 apply to amounts derived from the disposal of land? (the Exposure Draft)*.
2. The cases bearing on the question of whether section CB 3 of the Income Tax Act 2007 can apply to the proceeds of sales of land are less than definitive, leaving doubt as to several aspects of the question the Exposure Draft seeks to answer. The Law Society respectfully suggests, however, that the views expressed in the Exposure Draft are questionable in several respects.

Inland Revenue's position

3. Page 1 of the Exposure Draft summarises the Department's position as comprising three main propositions.
 - a. First, that section CB 3 *does* apply to the proceeds of sales of land in some circumstances.
 - b. Second, that section CB 3 *does not*, however, apply to "any amount derived from an undertaking or scheme involving the development of land or division of land into lots".
 - c. Third, that the scope of s CB 3 is further constrained in that it does not apply to amounts of a *capital* nature.
4. Given the lack of direct legal authority, all three propositions are debatable. However, the Law Society is of the view that while the first and second propositions are probably sound, the third is likely incorrect.

The first proposition: section CB 3 applies in some circumstances

5. The first proposition — that section CB 3 might apply to the proceeds of sale of land in some circumstances — is based on the further proposition at [3] that the "land sale rules" (meaning sections CB 6A – CB 23B) "are not a code", and so do not exclude the possibility that the proceeds of a sale of land might be caught by section CB 3.
6. The Law Society agrees this is a reasonable interpretation, and it may be correct.

7. However, as the Exposure Draft itself observes at [6], “it is not clear from the legislative history that Parliament intended the land sale rules to be a code, or that Parliament intended to remove land from the scope of what is now s CB 3”. It is also arguable, therefore, that sections CB 6A – CB 23B *are* a code; and that they therefore exclude the application of section CB 3 to the proceeds of sales of land. In other words, it is arguable that Parliament’s intention, when it enacted sections CB 6A – CB 23B, was that the proceeds of sales of land should either be assessable under one or other (or several) of those sections, or not at all.
8. One weakness in the view that sections CB 6A – CB 23B are a code is that it seems to be broadly agreed that if a taxpayer carries on a business of dealing in land, the profits are assessable under section CB 1. In other words, the generally accepted view as to the scope of section CB 1 seems to entail that, if sections CB 6A – CB 23B constitute a code, they nonetheless do not constitute a code for the purpose of interpreting section CB 1.

The second proposition: section CB 3 does not apply to undertakings or schemes involving the development of land or the division of land into lots

9. The summary to the Exposure Draft (titled ‘Answer’) states that section CB 3 does not apply to “any amount derived from an undertaking or scheme involving the development of land or division of land into lots”. It stated this is because there is a presumption of statutory interpretation that “specific provisions override general provisions,” and section CB 3 “is a general provision relating to undertakings or schemes, whereas sections CB 12 and CB 13 are specific provisions relating to undertakings or schemes of a particular type — those involving land development or division”.
10. Again, there seems to be no authority that speaks directly to this point, but it seems likely a court would endorse the Exposure Draft’s position on this aspect of the scope of section CB 3. However, it could also be argued that Parliament did not intend for that presumption of statutory interpretation to apply.
11. That is, it is arguable that Parliament’s intention was that the proceeds of a sale of land should be assessable where any of sections CB 3, CB 12 or CB 13 is met. The Law Society considers this unlikely, however, because it would seem to render sections CB 12 and CB 13 entirely otiose. If section CB 3 were to be interpreted as applying to undertakings and schemes “involving the development of land or division of land into lots,” it would seem to catch all taxpayers who would be caught by section CB 12 or section CB 13; and section CB 3 would also catch much more, because of the additional constraints provided for by sections CB 12 and CB 13. In other words, if section CB 3 is interpreted as applying to undertakings and schemes “involving the development of land or division of land into lots” then there would seem to be no conceivable case in which an amount assessable under section CB 12 or section CB 13 would not also be assessable under section CB 3.

The third proposition: section CB 3 does not apply to capital receipts

12. According to the Exposure Draft (at the ‘Answer’ and at [20]), “In most instances where no land sale rule applies it will also be the case that section CB 3 cannot apply because the land is likely to be a capital asset and the amount derived the mere realisation of that capital asset.” In other words, the official view is that the proceeds of a sale of land are not assessable under section CB 3 unless they are of a revenue nature. In support of this interpretation, the Exposure Draft cites *Duff v CIR* (1982) 5 NZTC 61,131, a 1982 decision in

which the New Zealand Court of Appeal followed the decision of the Privy Council in *McClelland v FCT* (1970) 70 ATC 4115 (PC), an appeal from Australia.

13. It is not clear, however, that that is correct. It may be that, if a court today were called upon to interpret section CB 3, it would be less inclined to follow *McClelland*, a decision of the Privy Council on the interpretation of an Australian statute. Moreover, the tax authority in *McClelland* conceded that the Australian statute there in issue did not catch capital gains; and for this reason, it seems possible that a New Zealand court would decline to regard the case as authoritative as to this aspect of section CB 3. The official view — that section CB 3 does not catch receipts of a capital nature — renders the section redundant because, if the proceeds of a sale are of a revenue nature, they are assessable anyway, as income under ordinary concepts under section CA 1(2), without recourse to section CB 3.
14. The better view would seem to be that the principal point of sections CB 3 to CB 23B is to extend the definition of income (and so render assessable) *in some circumstances* amounts that would otherwise be regarded as being of a capital nature. More specifically, the principal point of section CB 3 is to extend the definition of income (and so render assessable) *in some circumstances* amounts that would otherwise be regarded as being of a capital nature. If section CB 3 is interpreted as only applying to amounts of a revenue nature, then there are no circumstances in which an amount assessable under section CB 3 would not in any event be assessable under section CA 1(2). This interpretation would seem to be supported by *Lowe v CIR* [1981] 1 NZLR 326 and *CIR v National Distributors Ltd* [1989] 3 NZLR 661 CA, and by the Supreme Court's apparent willingness not to follow Privy Council and House of Lords decisions concerning other jurisdictions' taxation statutes: see for example *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115 and *Frucor Suntory New Zealand Ltd v CIR* [2022] NZSC 113.
15. Finally, we note that some form of challenge may be necessary to settle the position on the first and third propositions set out above. Should that eventuate, the Law Society encourages Inland Revenue to bear in mind that a taxpayer ought not to bear the cost of Inland Revenue seeking clarity on the correct interpretation. Depending on circumstances, it may be appropriate for Inland Revenue to cover the costs of both parties.

Next steps

16. Should you wish to discuss any aspect of this feedback, please contact Aimee Bryant, Manager Law Reform and Advocacy (aimee.bryant@lawsociety.org.nz).

Nāku noa, nā



David Campbell
Vice President