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## WEEKLY COMMENT: FRIDAY 12 FEBRUARY 2016

1. Over the next few weeks I am going to look at the property taxation measures announced in last year's budget that have since been legislated or are in the process of being legislated. These comprise the amendments contained in:
  - (a) The *Land Transfer Amendment Act 2015* with a date of assent of 22 September 2015;
  - (b) The *Tax Administration Amendment Act 2015* with a date of assent of 22 September 2015;
  - (c) The *Taxation (Bright-line Test for Residential Land) Act 2015* with a date of assent of 16 November 2015;
  - (d) The *Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill* introduced on 16 November 2015 and referred to the Finance and Expenditure Committee, which is expected to report back by 8 June 2016.
2. This week I review the amendments relating to information requirements when land is transferred contained in the *Land Transfer Amendment Act 2015* and the *Tax Administration Amendment Act 2015*.

### **When the new "tax statement" information requirement applies from**

3. From 1 October 2015, a requirement for registration of an instrument to transfer a "specified estate in land" is that each of the transferors and the transferees must complete a tax statement, required by s. 156B and s. 156C of the *Land Transfer Act 1952* ("the LTA") and provide the tax statement to the Chief Executive of Land Information New Zealand ("LINZ").
4. However, this new requirement does not apply to a transfer of land if the contract for the transfer of land was entered into before 1 October 2015 and the transfer is registered on or before 1 April 2016 (Schedule 1AA to the LTA).

### **Requirement to attach tax statement or retain it for 10 years**

5. If the instrument is a paper instrument, the tax statement must be attached to the instrument when the instrument is lodged for registration. If the instrument is an electronic instrument, the tax statement must be provided to the "certifier", the person who provides the certification for the transferor or transferee for a transfer of a specified estate in land, and the certifier must retain the tax statement for 10 years, under s. 156G. The statement can be retained in electronic form as provided for in the *Electronic Transactions Act 2002*.

### **Land transfers that are covered**

6. The information requirements apply to a transfer of a “specified estate in land”, which is defined in s. 156A of the LTA as meaning:
- (a) Freehold estates and leasehold estates (which includes cross lease properties);
  - (b) Stratum estates in freehold or leasehold created upon deposit of a unit plan under the *Unit Titles Act 2010*;
  - (c) Licences to occupy, as defined in s. 121A of the LTA, granting a right of occupation to a shareholder in a flat- or office-owning company; and
  - (d) Other estates declared to be specified estates under regulations.

### **Completion of a tax statement**

7. Therefore, essentially all land transfers involve the completion of tax statements. Officials stated in the *Officials’ Report to the Finance and Expenditure Committee on the Bill* (“the Officials’ Report”) that LINZ and Inland Revenue intend to produce a standard form. Under s. 156C of the LTA, tax statements must contain:
- (a) The name and signature of the transferor or transferee and the date on which it was signed;
  - (b) Whether the transfer is of land that has a home (defined as a “dwelling mainly used as a residence”) on it – apparently so that information collected in the tax statement could be useful for understanding the housing market;
  - (c) Whether the transferor or transferee or a member of that person’s immediate family, is a New Zealand citizen or a holder of a resident’s visa, work visa, or student visa;
  - (d) If the transferee or a member of the transferee’s immediate family, is a holder of a work visa or student visa, a statement as to whether any of those persons intends living on the land;
  - (e) If the transfer instrument is for a “non-notifiable transfer” (see paragraph 9 below), or is a non-notifiable transfer in respect of the transferor or the transferee, a statement of the category of that non-notifiable transfer;
  - (f) If the transfer instrument is not for a non-notifiable transfer, or is not a non-notifiable transfer in respect of the transferor or the transferee:
    - (i) The transferor or transferee’s IRD number;
    - (ii) Whether the transferor or transferee is, or is not, treated as a tax resident of a foreign country (ignoring any double tax agreement) as at the date of the statement;
    - (iii) If the transferor or transferee is treated as a tax resident of a foreign country as at the date of the statement (ignoring any double tax agreement), the name of that jurisdiction, the country code for that jurisdiction as prescribed by the Commissioner of Inland Revenue, and the equivalent of the person’s IRD number in that jurisdiction. Officials stated that the intent is that a person who is tax resident in more than one jurisdiction will have to provide all of their foreign tax information numbers.

8. If the transferor or transferee is acting in the capacity of a trustee, a nominee, a partner in a partnership or a member of an unincorporated body, the information in the tax statement must relate to that capacity.

### **Non-notifiable transfers**

9. A “non-notifiable transfer”, under s. 156A(2) of the LTA, means:
- (a) In relation to a transferee, who is a natural person and is not acting as a trustee and is not an “offshore person”, the transfer of land that is intended to be used predominantly for a dwelling that will be the transferee’s “main home”;
  - (b) In relation to a transferor, who is a natural person and is not acting as a trustee and is not an “offshore person”:
    - (i) The transfer of land that has been used predominantly, for most of the time the transferor owned the land, for a dwelling that was the transferor’s “main home”; but
    - (ii) Not including a transfer if the transferor has had at least 2 non-notifiable transfers using the main home exemption in the 2 years immediately preceding the date of the transfer;
  - (c) A transfer specified in regulations to be a non-notifiable transfer (see paragraph 31 below).
10. A non-notifiable transfer will not mean that there is no liability for tax. It relates only to the collection of information.
11. Non-notifiable transfers do not apply to trusts. Officials noted that all trusts, including trusts that only hold a family home, will be required to provide an IRD number. There will be no instances where the main home exemption can be claimed by a trust for these information gathering purposes. However, many trusts will be able to claim the main home exemption from the bright-line test (i.e. there will be no liability to tax). Transfers from executors (upon a person’s death) and transfers from mortgagees are exempt from the requirement to provide an IRD number under regulations (see paragraph 33 below).
12. Land transactions that are the result of a change in the trustees of a trust will not be exempt transfers. A land transfer transaction is already required where there is a change in trustee, and the same IRD number will be used. Officials stated that it is possible that a change in trustees could result in a change in the tax residence of a trust for overseas tax purposes, and in such a situation any new foreign tax information number should be captured.
13. In short, the information exemption is not available where any one of the following applies:
- (a) The person is an “offshore person”;
  - (b) Where the property is to be owned via a trust (in the case of a transferee);
  - (c) Where the property was owned via a trust (in the case of a transferor); or
  - (d) The person is a transferor in relation to the sale of a property and has used the main home exemption twice or more in the two years immediately preceding the date of transfer.

### **Offshore person**

14. “Offshore person” in s. 156A of the LTA has the same meaning as in s. 4(3) of the *Tax Administration Amendment Act 2015* which is as follows:
- (a) For an individual:

- (i) A New Zealand citizen who is outside New Zealand and has not been in New Zealand within the last 3 years;
  - (ii) A person who holds a residence class visa granted under the Immigration Act 2009, and who is outside New Zealand and has not been in New Zealand within the last 12 months;
  - (iii) A person who is not a New Zealand citizen and who does not hold a residence class visa granted under the *Immigration Act 2009*;
- (b) For a body corporate or an unincorporated body of persons, including a trust or a unit trust, a person who would be an overseas person under s. 7(2)(b) to (f) of the *Overseas Investment Act 2005*, treating references to an overseas person or persons in that section as including individuals defined above as “offshore persons”.
15. Officials stated that the expression “been in New Zealand” is intended to be interpreted at face value. It is not intended to impose a time limit on a person’s stay in the country, merely provide recognition for having entered the country.
16. Under s. 7(2)(b) to (f) of the *Overseas Investment Act 2005*, the following non-individuals are “overseas persons” and are, therefore, “offshore persons” for the purposes of completing tax statements. Note that an individual who is an “offshore person”, as set out in paragraph 14 above, is an “overseas person” for the purposes of the following tests:
- (a) A body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand; or
  - (b) A body corporate if an overseas person or persons have 25% or more of any class of its securities, or have the power to control the composition of 25% or more of its governing body, or have the right to exercise or control the exercise of 25% or more of the voting power at a meeting;
  - (c) A partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust) if 25% or more of the partners or members are overseas persons, or an overseas person or persons have a beneficial interest in or entitlement to 25% or more of the entity’s profits or assets (including upon winding up), or have the right to exercise or control the exercise of 25% or more of the voting power at a meeting;
  - (d) A trust if 25% or more of the trust’s governing body are overseas persons, or an overseas person or persons have a beneficial interest in or entitlement to 25% or more of the trust property, or comprise 25% or more of the persons having the right to amend or control the amendment of the trust deed, or have the power to control the composition of 25% or more of the trust’s governing body;
  - (e) A unit trust if the manager or trustee or both are overseas persons, or an overseas person or persons have a beneficial interest in or entitlement to 25% or more of the trust property.

### **Main home information exemption**

17. “Main home” is defined in s. 156A of the LTA as meaning, for a person, the dwelling:
- (a) That is mainly used as a residence by the person (a home); and
  - (b) With which the person has the greatest connection, if they have more than 1 home.

18. As set out in paragraph 13 above, the main home exemption is not available to an offshore person, a trust (transferor or transferee), or to a person who has already claimed the exemption twice within the 2 years immediately preceding the transfer.
19. Following officials' recommendation in the Officials' Report, the main home exemption was simplified by removing the requirement that the land be "residential land".
20. In relation to when the exemption would apply, officials stated that it is intended that the main home exemption applies where the person did use or intended to use it as their main home. The following points can be obtained from the the explanation in *Tax Information Bulletin* Vol. 27 No. 10, November 2015 ("the TIB item"):
- (a) The time that the test should be applied is at the date of the transfer;
  - (b) A transferor will be regarded as selling a main home if the property has been used more than 50% of the time as their main home for the period the person owns the land;
  - (c) The home can be rented out for short periods (for example, if the owner is on vacation or prior to settlement of the sale) providing the time is less than the private residential use;
  - (d) For mixed use properties used as both a main home and for other commercial, investment, or farming purposes,, such as where a person's home is on a farm, or on a lifestyle block, or above a shop, the main home information exemption will be available where most of the land (i.e. at least 50%) is used for the home – this would tend to exclude the home on the farm but include the home on the lifestyle block and the home above the shop if most of the property is used for the home;
  - (e) Similarly, a person owning a 2-bedroom house who has 1 flatmate could potentially use the main home exemption, but not a person who owns and lives in a boarding house with 8 rooms;
  - (f) In some circumstances relative areas will need to be determined – for example, when a single property has been used by the owner partly as a residential home and partly as a rental property - a transferor may have already determined the apportionment for the purpose of claiming tax deductions;
  - (g) The determination of the areas includes any land used for the relevant purposes (for example, a backyard for the home);
  - (h) When less than 50 percent of the property is used for the main home of the person then the main home exception will not apply;
  - (i) The exemption would still apply when a person moves out of their home shortly before selling it – for example, when a person purchases a house intending to live in it and then moves into a new home while trying to sell the original home – and in this situation the main home exemption could potentially apply to both homes if both are used predominantly as the main home;
  - (j) The test applies for each transferor or transferee, which means that different co-owners can have different main homes - for example, a person living in one city could potentially have a different main home from their spouse living in another city;
  - (k) People who live in retirement villages will be able to use the main home exemption.
21. Officials stated in the Officials' Report that a home used solely by other family members should not be able to obtain the main home exemption. The main home exemption from providing an IRD number is intended to align with the current land sale rules to ensure that a person only

gets the exemption where it is likely that the gains from the sale of property will not be taxable. The exemption under the current land sale rules for a person's residence only applies where it is the transferor's main home.

22. Officials also stated in the Officials' Report that the "greatest connection" requirement is only necessary to determine which home obtains the main home exemption in circumstances where a person has multiple homes. The greatest connection requirement therefore operates only as a tie-breaker where a person has more than one home.
23. It is stated in the TIB item that the factors that determine these connections would include:
- (a) The time the person occupies the dwelling;
  - (b) Where their immediate family (if any) live;
  - (c) Where their social ties are strongest;
  - (d) The person's use of the dwelling;
  - (e) The person's employment, business interests and economic ties to the area where the dwelling is located; and
  - (f) Whether the person's personal property is in the dwelling.
24. It is noted in the TIB item that the greatest connection factors are similar to those used to determine if a person has a permanent place of abode under current case law. Therefore, existing guidance on the "permanent place of abode" test should assist in determining which property the person has the greatest connection with.

### **TIB Examples of the main home information exemption**

25. The 11 examples provided in the TIB item help to explain how the main home information exemption applies, and they cover the following situations:
- (a) Example 1: A person who buys a home and lives in it, and shortly afterwards decides to sell it and buy another home does not need to provide an IRD number;
  - (b) Example 2: The main home exemption will not apply to a holiday home because it is not the property with which the owner has the greatest connection;
  - (c) Example 3: The main home exemption will not apply to a city apartment bought as a second home to live in while working in the city, because it is not the property with which the owner has the greatest connection;
  - (d) Example 4: The main home exemption will not apply to a 10-year UK resident returning home to NZ, because the person is an "offshore person" and, in addition, the UK National Insurance number must be provided as well as the UK country code;
  - (e) Example 5: The main home exemption applies to the transferors, who are both NZ residents and are selling their main home, but not to the transferee couple who are NZers in the UK and are not buying their main home, and in addition, the transferees must provide their UK National Insurance numbers, and 1 transferee who is also a tax resident of France must also provide his French tax identification number;
  - (f) Example 6: The main home exemption will not apply to the sale of an apartment block on a single title, where the owner occupied 1 apartment and rented out the rest of the apartments, because the majority of the flats was used as a rental property;

- (g) Example 7: The main home exemption will apply to a 2-hectare lifestyle block containing the owner's main home and where the remaining land is used by the family for some family horses and a handful of sheep;
- (h) Example 8: The main home exemption will not apply to a large factory with a small apartment attached because the land is not used predominantly as the owner's main home;
- (i) Example 9: The main home exemption applies to a country store with living quarters attached where the living quarters comprise 55% of the property;
- (j) Example 10: A person intending to buy a shop with an attached dwelling must estimate the proportion of land used for the dwelling in order to see if the main home exemption applies, and if the shop comprises more than 50% of the land the main home exemption will not apply;
- (k) Example 11: The main home exemption applies to a 6-hectare block in the country which will be the buyers' main home upon acquisition, but later the block is predominantly leased out for horse grazing and the main home exemption is, consequently, not available upon the sale of the property.

#### **New Zealand bank account required for IRD number to be issued to offshore person**

- 26. Section 24BA of the *Tax Administration Act 1994* ("the TAA") states that the Commissioner must not issue an IRD number to an offshore person unless the Commissioner first receives a current bank account number for the offshore person. The provision applies only to people that apply for an IRD number on or after 1 October 2015.
- 27. In addition, a non-individual that already has an IRD number, and that becomes an offshore person after 1 October 2015 for the purposes of these rules (i.e. if the non-individual is an overseas person as explained above), must immediately give their current bank account number to the Commissioner (if the bank account number has not been previously provided). For example, if New Zealand shareholders of a New Zealand-registered company sell their shares to offshore individuals, a bank account must be provided (if it has not been previously provided).
- 28. The bank must be a registered (i.e. registered in New Zealand) bank or a licensed NBDT (i.e. non-bank deposit taker), and if customer due diligence is required under the *Anti-Money Laundering and Countering Financing of Terrorism Act 2009*, identity information has been obtained and identity verification completed in accordance with that Act.
- 29. Officials expressed concern in the Officials' Report that the anti-money laundering rules allow a bank to open an account and then require/examine all the identity material sometime later. Hence, only an account on which customer due diligence had been completed can be used to obtain the IRD number.
- 30. The bank account requirement will only apply in cases when a person has applied for an IRD number, as opposed to situations where one has been assigned to them for administrative reasons – for example, a parent with child support obligations that does not otherwise have an IRD number.

### **Regulations can be made**

31. Regulations can be made, under s. 236 of the LTA:
- (a) Specifying transfers of specified estates in land that are exempt from the requirement to complete a tax statement; or
  - (b) Specifying transfers of specified estates in land that are non-notifiable transfers; or
  - (c) Declaring estates to be specified estates in land.
32. The regulations may be made only on the recommendation of the Minister of Land Information if the Minister is satisfied that:
- (a) Requiring persons to comply with the requirements in the case of transfers proposed to be specified to be exempt from the requirement to complete a tax statement or to be a non-notifiable transfer would be impractical or involve high compliance costs; or
  - (b) There is a low risk of tax avoidance in relation to the transfers proposed to be specified as exempt or non-notifiable.
33. Cabinet has approved regulations that will exempt transfers in the following situations:
- (a) Mortgagee sales: where a transfer is the result of a mortgagee sale, a rating sale under the *Local Government (Rating) Act 2002*, a court-ordered or statute-ordered sale, the transferor does not need to provide an IRD number, apparently because the transferor in this circumstance is the mortgagee or creditor and there is a low risk of tax avoidance in this context.
  - (b) Transfers from executors: in the case of death, the executors of the person's estate are exempted from the requirement to provide an IRD number because estate sales will not be taxed under the proposed bright-line test, and requiring all executors to get an IRD number would also add compliance costs.
  - (c) Public and local authorities: tax-exempt public authorities and tax-exempt local authorities (not including Crown Entities or Council Controlled Organisations), as defined in the *Income Tax Act 2007*, would not need to provide an IRD number when transferring land.

### **Consequential amendments**

34. Officials stated in Officials' Report that consequential amendments to the LTA may be necessary once detailed proposals for the bright-line test and withholding tax have been developed, so as to maintain coherence between the proposals.



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