

## **QUESTION WE'VE BEEN ASKED 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**

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

This Question We've Been Asked is about ss CB 12 and CB 13.

#### **Question**

1. If an undertaking or scheme involving development or division of land is carried on by or for a person and the undertaking or scheme:
  - was begun within 10 years of the person acquiring the land, and involves more than minor work (s CB 12); or
  - involves significant expenditure on the types of work specified in s CB 13,is it possible that the amount derived on the disposal of some of the land is not income, even if none of the statutory exclusions from s CB 12 or s CB 13 apply?

#### **Answer**

2. Yes, it is possible that the disposal of land that is part of an undertaking or scheme involving development or division of land will not give rise to income under s CB 12 or s CB 13, even if none of the exclusions apply.
3. In many circumstances that are outside of the intended scope of ss CB 12 and CB 13 there will be an applicable exclusion. Therefore, in practice the need to satisfy the Commissioner that the provision should not apply, for the reasons discussed in this QWBA, may not arise. However it has been an area of uncertainty on which guidance has been sought, and arises from time to time.
4. If land is involved in an undertaking or scheme of development of land or division of land into lots, the amount derived on the disposal of the land might be income under s CB 12 or s CB 13 (the criteria of those provisions are set out below). There are exclusions<sup>1</sup> to those provisions that could be applicable.
5. But even if none of those exclusions apply (the situation we have been asked about), it is still possible that the disposal of some of the land will not give rise to income under s CB 12 or s CB 13. The Commissioner will accept that s CB 12 or s CB 13 does not apply to the disposal of any given part of the land if the taxpayer can provide satisfactory evidence that the undertaking or scheme was not carried on with a view to the disposal of that land. The Commissioner would expect to see evidence that there had been some other demonstrable plan in relation to the land in question.
6. The types of things that may be relevant in establishing that an undertaking or scheme was not carried on with a view to the disposal of the land in question include:
  - the details of the development or subdivision plans, resource consent applications etc;
  - any contracts or agreements entered into;
  - evidence as to the intended use of particular parts of the land;

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<sup>1</sup> These are: the residential exclusion (s CB 17), the business exclusion (s CB 20), the farm land exclusion (s CB 21) and the investment exclusion (s CB 23).

- whether the taxpayer apportioned costs relating to the development or division work between land they had a view to disposal of and land they are claiming they did not;
  - what ultimately happened in respect of the land in question; and
  - the reason(s) for the ultimate disposal of the land in question.
7. It should be emphasised that if an undertaking or scheme meeting the criteria in s CB 12 or s CB 13 is carried on, it does not matter when the disposal of land occurs. The mere passage of time will not, without other supporting evidence, necessarily be sufficient to show that the undertaking or scheme was not carried on with a view to the disposal of the land in question.
8. It should also be noted that 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 meeting the relevant criteria was carried on but was subsequently abandoned, the ultimate disposal of the land will still be caught by the relevant provision 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.

***Division of land***

9. In the case of an undertaking or scheme of division of land into lots, the undertaking or scheme necessarily involves the whole original block. If the undertaking or scheme was not carried on with a view to disposal of some of the land, the taxpayer would need to show that when the land in question is ultimately sold.

***Development of land without division***

10. If there has been development work but no division work, it does not matter if part of the block of land was not itself physically subject to the development work. It is not possible to contend that only the part of the block that was physically subject to the development work was involved in the undertaking or scheme of development. If an undertaking or scheme involving development work on a block was carried on, all of the land is involved in the undertaking or scheme.

***Development and division of land***

11. Similarly, where there has been an undertaking or scheme involving development work on some of a block of land, followed by the division off of part of the block, all of the original piece of land is regarded as involved in the undertaking or scheme. The undertaking or scheme may not have been carried on with a view to disposal of all of the land, but all of the land remains involved in the undertaking or scheme. In order to fall outside the relevant provision (presuming no exclusion applies) the taxpayer would need to show, at the time any particular part of the land is ultimately sold, that the undertaking or scheme was never carried on with a view to the disposal of that land.

***A subsequent undertaking or scheme***

12. Of course, if an undertaking or scheme involving development or division of land was not carried on with a view to the disposal of some of the land, the owner could still potentially derive income under s CB 12 or s CB 13 in relation to that land. It may be that there was a subsequent undertaking or scheme meeting the criteria in s CB 12 or CB 13. Where that is the case, the amount derived on disposal of that land would be income, subject to any exclusion applying or the

taxpayer being able to satisfy the Commissioner that the subsequent undertaking or scheme was also not carried on with a view to disposal of the land in question.

13. On the other hand, it may be that land is involved in an undertaking or scheme meeting the criteria in s CB 12 or s CB 13 and then that land is subsequently involved in another undertaking or scheme involving development or division that is outside of the parameters of s CB 12 or s CB 13. This would not preclude the disposal of that land from giving rise to income. If land is involved in an undertaking or scheme of division that falls within either s CB 12 or s CB 13, it does not matter when the land is sold (as noted above) or if the land is subsequently developed or divided further.

#### ***Qualification to IG0010 "Work of a minor nature"***

14. This item qualifies IG0010 **"Work of a minor nature"** *Tax Information Bulletin* Vol 17, No 1 (February 2005) in one respect. IG0010 is regarded as incorrect in stating that when any of the lots resulting from a boundary adjustment are disposed of, any amount derived on the disposition will necessarily be income under s CB 12<sup>2</sup>. On this point, see further from [95].

#### **Explanation**

15. An amount is income of a person under s CB 12 if it is derived by them from disposing of land in circumstances where:
- an undertaking or scheme (not necessarily in the nature of a business) is carried on by the person (or by someone for them),
  - the undertaking or scheme involves the development of the land or the division of the land into lots,
  - the development or division work is not minor, and
  - the undertaking or scheme was commenced within 10 years of the person acquiring the land.
16. An amount is income of a person under s CB 13<sup>3</sup> if it is derived by them from disposing of land in circumstances where:
- an undertaking or scheme (not necessarily in the nature of a business) is carried on by the person (or by someone for them),
  - the undertaking or scheme involves the development of the land or the division of the land into lots, and
  - the development or division work involves significant expenditure on certain specified activities<sup>4</sup>.
17. In a situation where land has been divided, some of the land may be sold, while some is retained by the owner. The question we have been asked requires consideration of **whether this retained land is effectively "tainted" by the division work**, such that the amount derived on the eventual disposal of that land will be income if none of the exclusions apply.
18. In a situation where land has been developed but not divided, the issue is whether it is possible that the amount derived when the land is ultimately sold is not income, even if none of the exclusions apply.

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<sup>2</sup> Provided that the other requirements of s CB 12 are satisfied, and no exclusions are applicable.

<sup>3</sup> Provided the amount is not income under any of ss CB 6 to CB 12 or s CB 14.

<sup>4</sup> These are: channelling, contouring, drainage, earthworks, kerbing, levelling, roading, or any other amenity, service, or work customarily undertaken or provided in major projects involving the development of land for commercial, industrial, or residential purposes.

19. This has been a somewhat contentious issue over the years. On one hand, some have taken the view that if the criteria set out in the bullet points at [15] or [16] above have been satisfied, the disposal of all of the land, whenever that occurs, will be income unless one of the exclusions listed in s CB 12(2) or s CB 13(2) applies. On the other hand, some have taken the view that ss CB 12 and CB 13 are limited to disposals of land that was part of an undertaking or scheme involving development or division carried on with a view to the disposal of the land in question.
20. From a practical point of view, in many situations the issue will simply not arise, because one of the exclusions will be applicable. The exclusions from ss CB 12 and CB 13 are: the residential exclusions (s CB 17), the business exclusion (s CB 20), the farm land exclusion (s CB 21) and the investment exclusion (s CB 23). Those provisions are set out in the appendix at the end of this item, but their application is not discussed in this item.
21. In situations where none of the exclusions can be relied on, the Commissioner accepts that there may be circumstances where the disposal of any given piece of land is nonetheless not taxable under s CB 12 or s CB 13.

## Legislation

22. Sections CB 12 and CB 13 provide as follows:

### **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.

### **CB 13 Disposal: amount from major development or division and not already in income**

#### *Income*

- (1) An amount that a person derives from disposing of land is income of the person if—
  - (a) the amount is not income under any of sections CB 6 to CB 12 and CB 14; and
  - (b) the amount is derived in the following circumstances:
    - (i) an undertaking or scheme, which is not necessarily in the nature of a business, is carried on; and
    - (ii) the undertaking or scheme involves the development of the land or the division of the land into lots; and
    - (iii) the person, or another person for them, carries on development or division work on or relating to the land; and
    - (iv) the development or division work involves significant expenditure on channelling, contouring, drainage, earthworks, kerbing, levelling, roading, or any other amenity, service, or work customarily undertaken or provided

in major projects involving the development of land for commercial, industrial, or residential purposes.

*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.

*Relationship with section DB 27*

- (3) Section DB 27 (Amount from major development or division and not already in income) deals with a deduction for the value of the land.

23. Section CB 23B provides as follows:

**CB 23B Land partially sold or sold with other land**

Sections CB 6 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.

**Application of the legislation**

24. To determine whether the proceeds of disposal of any particular piece of land are taxable because of an undertaking or scheme of development or division, it is necessary to consider whether the disposal occurs in the circumstances detailed in s CB 12 or s CB 13. In relation to the question we have been asked, that requires considering whether the disposal relates to an undertaking or scheme involving the development of the land or the division of the land into lots having been carried on (s CB 12(1)(a) and (b) and s CB 13(1)(b)(i) and (ii)).
25. This is the crucial requirement in terms of the question asked. This QWBA does not consider the other requirements of ss CB 12 and CB 13 – most notably whether development or division work is of a minor nature<sup>5</sup> (s CB 12(1)(d)) or involves significant expenditure on the activities specified in s CB 13(1)(b)(iv).
26. **The following discussion considers what “land” is referred to in each part of the provisions, whether there has been an “undertaking or scheme” carried on, and what land is part of an undertaking or scheme involving development or division. The discussion then considers the circumstances in which it is considered that the disposal of land that was part of such an undertaking or scheme will not give rise to income under s CB 12 or s CB 13.**

**“The land”**

27. As can be seen at [22], **“land” is referred to in the opening words of s CB 12 and also in paras (b), (c) and (e) of subs (1). Similarly, “land” is referred to in the opening words of s CB 13 and also in the subparas (ii) and (iii) of para (b).**
28. To determine whether the amount derived on the disposition of a particular piece of land falls within the relevant provision, **it is necessary to identify the “land” referred to in each part of the provision.**
29. The opening words of ss CB 12 and CB 13 refer to an amount that a person derives from disposing of land. Logically, the land referred to here must be the land disposed of – the land the disposal of which may or may not trigger a tax liability.
30. **On the face of it, the subsequent references to “the land” in ss CB 12 and CB 13 would appear also to be the land disposed of (as the phrase used is “the land”**

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<sup>5</sup> On that, see IG0010 “Work of a minor nature” *Tax Information Bulletin* Vol 17, No 1 (February 2005) at 5.

which suggests “the land” previously referred to – ie, in the opening words of those provisions).

31. However, the Commissioner considers that those subsequent references to land should be read as referring to the land involved in the undertaking or scheme. This is supported by *Lowe v CIR* (1981) 5 NZTC 61,006 (CA), and is consistent with the existence of s CB 23B<sup>6</sup>.
32. In applying s CB 12 or s CB 13, the land involved in an undertaking or scheme involving development or division must, therefore, be identified.

### **Undertaking or scheme**

#### *What is an undertaking or scheme?*

33. In *Vuleta v CIR* [1962] NZLR 325 (SC), the Supreme Court considered the provision in the Land and Income Tax Act 1954 which included in assessable income (amongst other things) profits from the carrying on or carrying out of any “undertaking or scheme” entered into or devised for the purpose of making a profit<sup>7</sup>. Henry J accepted the *Shorter Oxford English Dictionary* meaning of the term “scheme”, being (at 329):

a plan, design or programme of action, hence a plan of action devised in order to attain some end; a project, an enterprise.

34. This broad definition has been approved in a number of land subdivision cases, including *Wellington v CIR* (1981) 5 NZTC 61,101 (HC) and *O’Toole v CIR* (1985) 7 NZTC 5,045 (HC).
35. In *Lowe v CIR* (1981) 5 NZTC 61,006 (CA), Richardson J noted that there is an element of vagueness and elasticity inherent in both the words “undertaking” and “scheme”, and in the composite expression, but considered that “scheme” connotes a plan or purpose which is coherent and has some unity of conception, and similarly an undertaking is a project or enterprise organised and directed to an end result. See also *Smith v CIR (No 2)* (1989) 11 NZTC 6,018 (CA).
36. Although an undertaking or scheme is a project, plan, programme of action or enterprise directed to an end result, that does not mean that the end result cannot be to do different things with different parts of the land. One can have devised an undertaking or scheme involving division of land in order to sell some of it and retain some of it for other purposes (*Wellington*).
37. Not a great deal is necessarily required for there to be an undertaking or scheme involving development or division, as noted by Richardson J in *Lowe*. And in *Smith v CIR* (1987) 9 NZTC 6,045 (HC) Williamson J held that there could be an undertaking or scheme despite the fact no physical work had taken place and no contractual commitment had been entered into within the ten-year period.
38. Further, the details do not have to have been settled for there to be an undertaking or scheme capable of being carried out. Also, some details may be later modified without that making the original scheme a new scheme altogether (*Cross v CIR* (1987) 9 NZTC 6,101 (CA)).

#### *When does an undertaking or scheme commence?*

39. The time at which an undertaking or scheme is commenced is relevant to both ss CB 12 and CB 13. Section 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. And the commencement date of an undertaking or scheme is relevant in the

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<sup>6</sup> Which recognises that the land disposed of in any given year may be only part of the land involved in the undertaking or scheme, to which the relevant section applies.

<sup>7</sup> That part of the provision is now s CB 3.

context of s CB 13 because a deduction is allowed for the value of the land at that time (s DB 27).

40. 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* (CA), *Smith (No 2)* (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.
41. There could be a variety of things that indicate that an undertaking or scheme has been commenced, for example applying for local authority consent, assent or direction to proceed being given to persons engaged to carry the work out in whole or in part, some physical activity on the land, entering into a contract or arrangement by which the undertaking or scheme is put into operation (*Cross* (HC), *Cross* (CA)). In *Smith (No 2)* (CA), it was held that the hearing of an application for planning approval by way of specified departure, which preceded any contract-letting or other steps, marked the commencement of the undertaking or scheme. In that case, Cooke P noted that it was possible that the making or notifying of a planning application could itself potentially be enough.
42. It is clear from the case law that there must be some overt act done for the purpose of implementing the undertaking or scheme. Having completed preparation of an undertaking or scheme does not necessarily lead to its immediate commencement; the undertaking or scheme may be put on hold, or the preparatory work may result in a decision not to proceed with the undertaking or scheme. For an undertaking or scheme to have been commenced there must have been some act done for the purpose of carrying it out (*Cross* (HC), *Cross* (CA), *Smith (No 2)* (CA)).
43. The fact that an undertaking or scheme may need to be modified (for example as a result of local authority requirements) or may even have to be abandoned, does not mean that it was not commenced (*Cross* (HC)). Neither s CB 12 nor s CB 13 require that the undertaking or scheme is carried out (ie, completed), just that it is carried on. If an undertaking or scheme meeting the criteria in s CB 12 or s CB 13 was commenced, the fact that it may subsequently be modified, or abandoned altogether, will not mean that the ultimate disposal will not be taxable under the relevant provision.

#### ***What land is involved in an undertaking or scheme of development or division?***

44. With an undertaking or scheme involving development, it may be that only part of a particular block of land is developed. However, the Commissioner considers that if there has been development work but no division work, it does not matter if part of the block of land was not itself physically subject to the development work. The Commissioner does not consider it correct to regard only the part of the block that was physically subject to the development work as being involved in the undertaking or scheme of development.
45. The Commissioner considers that "the land" referred to in paras (b), (c) and (e) of s CB 12(1)<sup>8</sup> is the physical land within the title (or titles) that are involved in the undertaking or scheme. If any of the land comprised in a particular title is developed, there has been development of "the land" involved in the undertaking or scheme. This accords with the fact that "land" is defined in s YA 1 (relevantly) as including any estate or interest in land. Estates and interests in land relate to physical land comprised in titles. There is nothing in the definition of "land" in s YA 1 that suggests "land" might mean something less than an estate or interest in a particular title, or, in the case of the provisions concerning physical work on

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<sup>8</sup> And similarly in subparas (ii) and (iii) of s CB 13(1)(b).

land (such as ss CB 12 and CB 13), anything less than all of the physical land comprised in a particular title.

46. In the Commissioner's view, if an undertaking or scheme involving development work on a block was carried on, all of the land is involved in the undertaking or scheme. If s CB 12 or s CB 13 applies, the entire amount derived on the disposal of the block will be income.
47. Similarly, where there has been an undertaking or scheme involving development work on some of a block of land, followed by the division off of that part of the block, all of the original piece of land is regarded as involved in the undertaking or scheme. The undertaking or scheme may not have been carried on with a view to disposal of all of the land, but all of the land remains involved in the undertaking or scheme. In order to fall outside the relevant provision (presuming no exclusion applies) the taxpayer would need to show, at the time any particular part of the land is ultimately sold, that the undertaking or scheme was never carried on with a view to the disposal of that land (see further from [53]).
48. In the case of an undertaking or scheme of division of land into lots, the undertaking or scheme necessarily involves the whole original block. There is no question that there is a project or plan to divide the whole piece of land into lots.
49. An undertaking or scheme of development or division may involve land in more than one block (or certificate of title).
50. In terms of considering whether the development or division work is more than minor (s CB 12(1)(d)) or involves significant expenditure on the relevant activities (s CB 13(1)(b)(iv)), all of the development or division work that is part of the undertaking or scheme is considered.

***When will an amount derived on the disposal of land involved in an undertaking or scheme of development or division not be income?***

***Does an exclusion apply?***

51. As noted above, there are a number of exclusions from ss CB 12 and CB 13. These are: two residential exclusions (ss CB 17(1) and CB 17(2)), a business exclusion (s CB 20), a farm land exclusion (s CB 21), and an investment exclusion (s CB 23). If any of these exclusions apply, the amount derived on the disposal of the land in question will not be income under s CB 12 or s CB 13. This item does not consider the application of the exclusions. The situation we have been asked about is where none of the exclusions apply.

***Can the taxpayer show that the undertaking or scheme was not carried on with a view to disposal of the land in question?***

52. Even if none of the exclusions apply, the Commissioner accepts that there may be circumstances where the amount derived on the disposal of land involved in an undertaking or scheme of development or division within the parameters of s CB 12(a) – (e) or s CB 13(b)(i) – (iv) does not give rise to income under s CB 12 or s CB 13.
53. For an amount derived from the disposal of land to be income under s CB 12 or s CB 13 the amount must be derived in the circumstances detailed in the relevant provision. That is, the land must be disposed of in the circumstances of an undertaking or scheme (meeting the relevant criteria) having been carried on. The Commissioner accepts that if a taxpayer can satisfactorily show that the undertaking or scheme was not carried on with a view to the disposal of some of the land, the amount derived on the ultimate disposal of that land is not derived in the circumstances of the undertaking or scheme having been carried on. In

that situation there is no correlation between what the undertaking or scheme was about, so far as that land is concerned, and the disposal of that land.

54. This does not mean that any given disposal needs to in fact occur as part of the undertaking or scheme (though in many cases there will be no question that it has). As noted above, the undertaking or scheme meeting the relevant criteria only needs to have been carried on, it does not need to have been carried out (ie, brought to fruition). As noted by Hardie Boys J in **Cross** (HC), the fact that an undertaking or scheme may be abandoned does not mean that it was not commenced. Neither s CB 12 nor s CB 13 require that the undertaking or scheme is carried out (ie, completed). This was perhaps even clearer on the original wording of the predecessor provision to ss CB 12 and CB 13, which referred to **undertakings or schemes that had been "carried on or carried out" (emphasis added)**. The removal of the words "or carried out" does not lead to a different conclusion – those words were not required, as any undertaking or scheme that was carried out would necessarily have also been carried on.
55. If an undertaking or scheme meeting the relevant criteria was carried on (whether or not it was carried through to completion), the disposal (whenever it occurs) of any part of the land will *prima facie* be caught by the relevant provision. It is only where an exclusion applies or where the taxpayer can establish **to the Commissioner's satisfaction** that the undertaking or scheme was not carried on with a view to disposal of the part of the land in question that the amount derived will be income under the provision.
56. Of course, if an undertaking or scheme involving development or division of land was not carried on with a view to the disposal of some of the land, the owner could still potentially derive income under s CB 12 or s CB 13 in relation to that land. It may be that there was a subsequent undertaking or scheme meeting the criteria in s CB 12 or CB 13. Where that is the case, the amount derived on disposal of that land would be income (subject to any exclusion applying or the taxpayer being able to satisfy the Commissioner that the subsequent undertaking or scheme was also not carried on with a view to disposal of the land in question).
57. On the other hand, it may be that land is involved in an undertaking or scheme meeting the criteria in s CB 12 or s CB 13 and then subsequently involved in another undertaking or scheme involving development or division that is outside of the parameters of s CB 12 or s CB 13. This would not preclude the disposal of that land from giving rise to income. If land is involved in an undertaking or scheme of division that falls within either s CB 12 or s CB 13, it does not matter when the land is sold (as noted above) or if the land is subsequently developed or divided further.
58. The Commissioner considers that this approach is consistent with what can be ascertained about the purpose behind ss CB 12 and CB 13 (discussed from [60]). The Commissioner also considers that overall the case law supports this reading of the provisions – in particular **Church v CIR** (1992) 14 NZTC 9,196 (HC), **Cross** (HC) and **O'Toole**, and to a lesser extent **Paul Stephens Construction Limited v CIR** (1990) 12 NZTC 7,192 (HC). The relevant case law is discussed from [68].
59. The Commissioner does not consider this approach to be in conflict with s CB 23B. As noted above, s CB 23B provides that ss CB 6 to CB 23 will apply to an amount derived on the disposal of land if the land is all or part of the land to which the relevant section applies, or disposed of together with other land (see [23]). Section CB 23B ensures that the land that falls within the scope of the relevant taxing provision cannot escape taxation because it is divided and sold in parts, or sold together with other land. If a taxpayer can show that an undertaking or scheme within the parameters of s CB 12 or CB 13 was not carried on with a view to disposal of some of the land, the Commissioner accepts that s CB 12 or CB 13

will not apply to the disposal of that land. That is, that part of the land will not be within the scope of the relevant taxing provision. As such, when that particular land is sold, s CB 23B will not apply to bring the disposal to tax under the operative provision because the land **cannot be regarded as "part of the land to which the relevant section applies"**. **It was part of the land involved in the undertaking or scheme, but not part of the land to which the relevant section applies.**

#### The purpose of the provisions

60. It is acknowledged that different conclusions may be drawn about the intended scope of ss CB 12 and CB 13. On balance, the Commissioner considers the better view is that the provisions were not intended to operate to the extent that an undertaking or scheme involving development or division was not carried on with a view to disposal. The following discussion briefly discusses what the history to the provisions, and the legislative context, suggests about their intended purpose, and why the Commissioner thinks the above is the better view.
61. The provisions were first introduced in 1973 as s 88AA(1)(d) and (e) of the Land and Income Tax Act 1954. There were originally two exclusions from these provisions – one is now the residential exclusion in s CB 17(2), and the other is now the farm land exclusion in s CB 21. Section 88AA(1)(d) and (e) were introduced to give effect to the October 1967 recommendation of the Taxation Review Committee (the Ross Committee) that the legislation ought to catch undertakings or schemes aimed at making a profit but entered into or devised **after** the purchase of the land.<sup>9</sup> There is no indication from the Parliamentary debates that it was intended that the new provision would go further than the Ross Committee recommendation and extend to all land that was involved in an undertaking or scheme involving development or division, whether or not the undertaking or scheme was essentially carried on with disposal in mind.
62. This apparent intention is supported by an Inland Revenue information release<sup>10</sup> published at the time the provisions were introduced. The information release indicates that it was not intended that the provision would catch land that had been the subject of development or division if the work was part of an undertaking or scheme that **was carried on for the taxpayer's own use** – such as for a home or investment (it is noted that there was no investment exclusion at the time).
63. After the decision of *Anzamco Ltd (in liq) v CIR* (1983) 6 NZTC 61,522 (HC), additional exclusions from what is now s CB 12 were introduced. These were later extended to s CB 13. Though not contemporaneous with the introduction of what are now ss CB 12 and CB 13, Inland Revenue's **commentary** on the new exclusions at the time the legislation enacting them was introduced made it clear that Inland Revenue understood that the original intention was that what is now s CB 12 would only apply where land was developed or divided as part of an undertaking or scheme for the purpose of the subsequent disposal of the land<sup>11</sup>.
64. It could be argued that the original exclusions from what are now ss CB 12 and CB 13 were intended to be exhaustive. However, the original exclusions (concerning the division of land that the person used themselves either as residential property or as farm land) appear to have simply been aimed at clarifying the situation in relation to scenarios raised during the Parliamentary debates on the Bill that introduced the provisions. Those exclusions were not in

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<sup>9</sup> See: Hansard (14 September 1973) 386 NZPD 3653 and 3680 – 3681.

<sup>10</sup> "Taxation of profits or gains from sales of land – Section 9 of the Land and Income Tax Amendment Act 1973 – Section 88AA of Principal Act" (November 1973).

<sup>11</sup> See "Income Tax Amendment Act (No 3) 1983" (*Public Information Bulletin* No 126, May 1984).

the Bill when it was originally introduced, but were added subsequently by way of a supplementary order paper.

65. The scenarios covered by the exclusions suggest that Parliament was not concerned with division of land owned and used by a taxpayer for farming or residential purposes, in order to maximise the amount derived on disposal (provided that in the case of farm land it would still be used for farming purposes). Nor does it appear from the scope of the original exclusions that Parliament was concerned with development or division for some reason other than disposal. The scope of the exclusions arguably indicates that the intention was to tax profits of people specifically attempting to make a profit out of the need for urban expansion, though not necessarily in the business of development or division. This is consistent with comments made in **Lowe** about the history of the provisions.
66. It has been suggested that the post-**Anzamco** legislative response shows that Inland Revenue conceded that the court applied what is now s CB 12 correctly. The Commissioner does not consider that this is the only inference that can be drawn from the post-**Anzamco** legislative response. Rather, it is considered that the addition of further exclusions was aimed at ensuring such a situation would not arise again.
67. While it is not entirely free from doubt, for the above reasons, the Commissioner considers that the apparent purpose behind ss CB 12 and CB 13 is consistent with an undertaking or scheme only giving rise to income under the provisions if it was carried on with a view to disposal of the land in question.

#### The case law

68. As noted above, the Commissioner also considers that overall the case law supports this construction of ss CB 12 and CB 13. There have been a number of cases that have considered ss CB 12 and CB 13, but they suggest different approaches to the issue at hand. Many of the cases discussed do not directly touch on the issue, however there may nonetheless be some inferences that can be drawn from the facts of those cases and from some of the comments made by the judges in those cases. On balance, the Commissioner considers that case law lends greater support to the view adopted. The following discussion summarises what the Commissioner considers can be taken from the relevant cases, including those which support interpreting ss CB 12 and CB 13 as applying more broadly.

#### Church

69. In **Church**, the High Court had to consider whether the amounts derived on the sales of two pieces of land were income under a predecessor to s CB 12. The taxpayer had purchased a block of land in August 1961. There were a number of subdivisions of the land over the years, some within the 10-year period after the **taxpayer's acquisition of the land**. The question for consideration was whether the taxpayer had formulated a scheme, before August 1971, that the disputed sales in 1983 and 1984 were part of.
70. Temm J considered that the sales in question were not part of a continuing scheme that commenced within the relevant 10-year period. The approach of the court in **Church** indicates that the fact that land was involved in an undertaking or scheme of development or division falling within s CB 12 (or s CB 13) does not necessarily mean that amounts derived on the sale of all of the land will be income. The amounts derived on the sales of land at issue in **Church** were not income because those pieces of land were not sold as part of any undertaking or scheme involving development or division commenced in the relevant timeframe (though there clearly were such undertakings or schemes).

71. If any more than minor subdivision of land within 10 years of acquisition had the effect of making the ultimate sales of all of the land taxable, regardless of whether the taxpayer had a view to the disposal of all of the land at the time the undertaking or scheme involving development or division was carried on, there would have been no question that the sales of the land in question in this case would have been taxed. The fact that the court held the sales not to be taxed under what is now s CB 12, but rather enquired as to whether the sales were part of a scheme formulated within the relevant 10-year period, indicates that the existence of a scheme of division meeting the criteria of the provision will not necessarily result in the ultimate sales of all of the land that was within the **original block giving rise to income. The court's approach suggests that there** needs to be some connection between the scheme and the sale of the land.

### Cross

72. In **Cross** (HC), the taxpayers had subdivided half of a block of land over a number of years in accordance with five successive subdivisional plans. This involved significant expenditure on work of the type specified in what is now s CB 13. The taxpayers had argued in the High Court that there were three separate undertakings or schemes, and so therefore three separate commencement dates for valuation purposes<sup>12</sup>. The commencement date of an undertaking or scheme is relevant in the context of s CB 13 because a deduction is allowed for the value of the land at that time (s DB 27). However, *Hardie Boys J* of the High Court held that on the evidence there was one scheme which was planned and implemented progressively.
73. The implication that may be drawn from **Cross** (HC), and the possibility (implicitly accepted by the court) that there had been three separate schemes, is that it is necessary to identify which scheme the disposal of any particular piece of land relates to. This would have been relevant for valuation purposes in **Cross**, had there been held to be more than one scheme, but is consistent with the approach of the court in **Church** that the disposal must relate to an undertaking or scheme falling within the relevant provision.
74. Had there been held to be three schemes in this case, it appears the court would have accepted that the deduction for the value of the land allowed in relation to the second and third schemes would be the value of the land at the date of commencement of each of those schemes. If the existence of an earlier scheme involving the division of part of a block of land was considered sufficient to bring all of the land that was part of the original block within the scope of the provision, the deduction could only be for the value of the land as at the date the original scheme was commenced. The value of the land at the time a subsequent division scheme was commenced would be irrelevant, because it would be the earlier scheme that gave rise to the tax liability on the eventual disposal of all of the land. The fact that the court apparently accepted the possibility that there may have been multiple schemes (rather than one scheme implemented in stages), and the attendant proposition that this would mean different commencement dates for valuation purposes, suggests that the existence of a scheme meeting the criteria set out at [15] (s CB 12) and [16] (s CB 13) will not necessarily give rise to a tax liability for all of the land when it is eventually sold.

### O'Toole

75. A few years after acquiring some farm land, the taxpayers in **O'Toole** had the land surveyed in order to establish its true boundaries, because they had struck some difficulties with the owner of neighbouring land. The surveyor they engaged advised them that he thought the Town and Country Planning Act was going to change, and as such he suggested that the taxpayers have the whole farm

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<sup>12</sup> This argument was not pursued in the Court of Appeal.

subdivided into blocks at that time. The taxpayers agreed with this suggestion, as they had decided to sell off some land in a few blocks to pay off their mortgage to the vendor, which was due in 1975.

76. In considering whether there was an undertaking or scheme for the purposes of what is now s CB 12, Davison CJ in the High Court commented that:

The objectors 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.**

[Emphasis added]

77. Davison CJ had earlier cited the broad dictionary definition of “scheme” referred to by Henry J in *Vuleta* with apparent approval. The Commissioner therefore considers that Davison CJ was not suggesting that an undertaking or scheme can be confined to part of a block of land. Rather, the Commissioner considers it is implicit in the judgment that Davison CJ considered that though all of the land was involved in the scheme of division, the provision was not concerned with that part of the land that the taxpayers retained for their own purposes, but rather just with the land that the taxpayers had a view to disposing of.

#### *Paul Stephens Construction*

78. In *Paul Stephens Construction*, the taxpayer had two adjacent sections (lots 66 and 67), which were deemed to have been acquired at different times. The sections were subdivided within 10 years of the deemed acquisition of lot 67, but more than 10 years after the deemed acquisition of lot 66. One of the resulting lots (lot 2) comprised some land which had formerly been in lot 66 and some which had formerly been in lot 67.
79. It was held that the taxpayer’s assessable income from the sale of lot 2 was limited to the profit relating to the part of that lot which had formerly been in lot 67.
80. *Paul Stephens Construction* is less relevant to the issue at hand, as there was no question about the undertaking or scheme of division in this case being carried on with a view to the disposal of all of the land. However it does provide some support for the view that the disposal must relate to the undertaking or scheme. *Paul Stephens Construction* indicates that the s CB 12 (or s CB 13) criteria must be considered in relation to each piece of land sold, as not all of the land will necessarily meet the criteria. The Commissioner considers that one of the criteria of ss CB 12 and CB 13 is that the amount must be **derived in the circumstances of an undertaking or scheme having been carried on**. As noted above, the Commissioner accepts that if a taxpayer can satisfactorily show that the undertaking or scheme was not carried on with a view to the disposal of some of the land, the amount derived on the ultimate disposal of that land is not derived in the circumstances of the undertaking or scheme having been carried on.

#### *Anzamco*

81. On the other hand, *Anzamco* supports the view that for the purposes of ss CB 12 and CB 13 the undertaking or scheme does not need to involve anything other than development or division (ie, it is irrelevant whether the undertaking or scheme was carried on with a view to the disposal of the land).
82. In *Anzamco*, the taxpayer company developed land over a number of years as a holiday resort or “ranch”, for the use of its shareholders. The land was always intended to be kept by the shareholders and their descendants. However, after the death of one of the major shareholders, it transpired that none of his family, nor the families of the other major shareholders, were interested in taking over

the ranch. In the end, the taxpayer decided to sell the land, some 13 years after its purchase.

83. Barker J held that what is now s CB 12 applied, and the proceeds of the sale were income. Barker J did not read the provision as requiring that the eventual sale of the land be related to the undertaking or scheme. The approach taken suggests that if ever an undertaking or scheme meeting the relevant criteria had been carried on in relation to land, the profits or gains on any subsequent sale would be assessable income, and what was in mind when the undertaking or scheme was carried on is irrelevant.
84. As discussed above, additional exclusions were introduced after *Anzamco* to directly reverse the effect of this decision.

#### Case J37

85. Similarly, *Case J37* (1987) 9 NZTC 1,219 supports the view that it is irrelevant whether the undertaking or scheme was carried on with a view to retaining rather than disposing of some of the land.
86. The finding in *Case J37* that what is now s CB 12 applied to the sale of one of the lots created by the subdivision (lot 5) is consistent with the view that disposal, or having a view to potential future disposal, does not need to be part of the undertaking or scheme. Although the other four lots created in the subdivision in this case were to be sold, that was not the position in relation to lot 5. Moore DJ did note that the **situation in relation to lot 5 was "somewhat equivocal", as it was the "residual lot"**, but he nonetheless concluded that the proceeds derived on its sale fell within what is now s CB 12, even though unlike the other four lots it was not created with future disposal in mind.

#### Wellington

87. *Wellington* may likewise be read as supporting the view that it is irrelevant whether the undertaking or scheme was carried on with a view to retaining rather than disposing of some of the land.
88. Ongley J seemed to accept that the taxpayers had set aside the part of the land that became lots 6, 7 and 8 for their own residential purposes. Ongley J commented that the proceeds from the sales of lots 7 and 8 would fall within what is now s CB 12 unless the residential exclusion applied – which he held was the case. This may be seen as indicating planning to retain rather than dispose of land does not preclude s CB 12 from applying; that the only way to escape taxation under the provision is by way of an exclusion. However, it is noted that there were various plans prepared before the subdivision in this case, and it is unclear why the taxpayers would have divided the land they resided on into three lots if they did not have a view to the sale of some or all of those lots. As it was, there was an exclusion available to the taxpayers, and in the circumstances of the case it is perhaps understandable that Ongley J considered the exclusion to be the only way in which the sales of the lots at issue would not be taxable.

#### Lowe

89. *Lowe* is sometimes referred to as suggesting that **"residual" or "retained" land will be "tainted" by an undertaking or scheme of subdivision**. The Commissioner does not consider that *Lowe* is relevant to the issue.
90. In *Lowe*, the entirety of the block in question was subdivided and sold. The taxpayer made a technical interpretive argument in relation to the wording of what is now s CB 12. The argument was that if a lot sold in any given year was not adjacent to another lot also sold that year, and no development work had been carried out on the lot sold, **it could not be "that land"** (as the reference in

the provision then was). In other words, it was submitted that there could not be an undertaking or scheme of development or division involving the land sold if the particular lot had not been *itself* developed or divided into lots, or was not adjacent to another part of the original block that was also sold in the year (so they could be said to have been divided from each other). The court did not accept that argument.

91. There was no dispute on the facts in *Low*e that all of the land was involved in and sold as part of the undertaking or scheme of division. In his judgment, McMullin J stated **that “[i]t is sufficient for the purposes of the section if the developmental or surveying work was done on the total subdivisational area of which any lot or lots sold formed part”**. This statement has sometimes been taken as indicating that the sale of any land which was part of a lot that was divided will fall within s CB 12 (the criteria being met) unless an exclusion applies. That is, that the eventual sale of all of the land in the original block will be taxed, even if the sale of some of that land was not contemplated when the undertaking or scheme of division was carried on. The Commissioner does not consider that the above statement should be read as suggesting that all of the land is necessarily **“tainted” by the undertaking or scheme, and the ultimate sales will therefore all be subject to tax**. McMullin J’s comment relates specifically to the technical **“that land”** argument that the taxpayer made. It should not be taken more broadly.

What approach do the cases suggest?

92. On one hand, *Church, Cross* (HC) and *O’Toole* may provide implicit support for the view that ss CB 12 and CB 13 should be read as not extending to amounts derived on the disposal of land if it can be shown that the undertaking or scheme was not carried on with a view to the disposal of the land in question. *Paul Stephens Construction* could also be regarded as providing some implicit support for this view. On the other hand, *Anzamco, Case J37* and *Wellington* support the view that if there has been an undertaking or scheme involving development or division, the disposal of all of the land will give rise to tax under s CB 12 or s CB 13<sup>13</sup> unless an exclusion applies (ie, it is irrelevant whether it can be shown that the taxpayer did not have the disposal of some of the land in mind when they were carrying on the undertaking or scheme).
93. All of the relevant cases are High Court or Taxation Review Authority, and the inferences that may be drawn from them are conflicting. However, it is noted that *Anzamco* was decided in 1983 and *Wellington* in 1981, both before *O’Toole* (1985), *Cross* (HC) (1985), *Paul Stephens Construction* (1990) and *Church* (1992), and *Case J37* was decided in 1987, before *Cross* (HC), *Paul Stephens Construction* and *Church*. It is also noted, as discussed above, that the result in *Anzamco* was regarded as being contrary to the original legislative intent, and so additional exclusions were introduced after that decision, to directly reverse its effect. In the circumstances, the Commissioner considers it appropriate to take direction from the legislative intent, and that it is preferable to follow the authorities which take an approach that is consistent with that – most of which were decided after *Anzamco* in any event.
94. **In the Commissioner’s view**, the approach that the courts in the preferred authorities have taken, either expressly or implicitly, is that ss CB 12 and CB 13 will not apply to the disposal of any given piece of land if it can be established that an undertaking or scheme that the land was involved in was not carried on with a view to the disposal of that land. It is considered that the wording of the provisions can legitimately bear such a construction, and that it is consistent with the purpose of the legislation.

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<sup>13</sup> Presuming the other criteria are satisfied.

## Boundary adjustments

95. IG0010 "Work of a minor nature" *Tax Information Bulletin* Vol 17, No 1 (February 2005) at 5 states that a boundary adjustment will amount to a "division into lots" for the purposes of what is now s CB 12. IG0010 then states (at 10):

... It is therefore the Commissioner's view that, if a lot of land owned by a person is altered by transferring a part of the lot to, and including it in the title for other adjoining land owned by, another person there is a division into lots of the first-mentioned lot.

... 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; and **if any of the resulting lots is sold or otherwise disposed of any amount derived on the sale or other disposition will be gross income under section CD 1(2)(f) if the other requirements of section CD 1(2)(f) are satisfied.**

[Emphasis added]

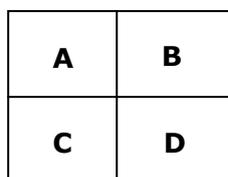
96. Although a boundary adjustment will amount to a division into lots, whether amounts derived on the disposal of any of the resulting lots will be income under s CB 12 depends on whether the undertaking or scheme involving the boundary adjustment<sup>14</sup> was carried on with a view to the disposal of the land in question. IG0010 no longer represents the Commissioner's position to the extent that it suggests otherwise.

## Examples

97. The following examples are included to assist in explaining the application of the law set out above.

### Example 1

Diagram 1



98. In 2002, Sam and Fiona bought a four acre block of land in Gisborne, where they planned to build their dream home and keep some chickens and perhaps a couple of cows. In 2003, part-way through the build, before they had moved in, they decided they did not wish to maintain such a large piece of land. Accordingly, between 2003 and 2004 they subdivided off and sold three one-acre sections (lots "B", "C" and "D" in Diagram 1). This subdivision involved work of more than a minor nature. In late 2004, Fiona's mother became terminally ill and Sam and Fiona and their 3 children moved to Wellington to care for her (Sam was able to get a contract there). Sam and Fiona envisaged that they would move back to Gisborne in a relatively short time. Fiona's mother passed away in 2006. By this stage, the family were well settled in Wellington, and enjoying life there, so they decided to stay. They sold the remaining one-acre section (lot "A") on which they had built the house.
99. The proceeds from the sale of lots "B", "C" and "D" would be income under s CB 12. There was an undertaking or scheme involving the division of the entire original block into lots, and there is no suggestion that Sam and Fiona did not carry on the undertaking or scheme with a view to the sale of lots "B", "C" and "D". The undertaking or scheme was begun within 10 years of acquisition of the land, and the division work was not minor. Neither of the residential exclusions

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<sup>14</sup> Or some other undertaking or scheme of development or division.

apply. The exclusion in s CB 17(1) does not apply because the division was not for use in and for the purposes of Sam, Fiona or their family residing on the land. The exclusion in s CB 17(2) does not apply because the area of the original block of land exceeded 4,500 square metres, and in addition it was not occupied by Sam, Fiona or their family as residential land before it was divided.

100. The result would be the same irrespective of the number of lots divided off for sale (ie, even if the land to be sold was divided off in one lot, rather than three), provided that the other requirements of s CB 12 were met – including that the division work was more than minor.
101. The proceeds from the sale of the one-acre section with the house on it (**lot "A"**) would not be income under s CB 12. Although there was an undertaking or scheme involving the division of the entire original block into lots, the undertaking or scheme was not carried on with a view to the sale of **lot "A"**. Rather, **lot "A"** was subsequently sold for reasons unrelated to the undertaking or scheme of division.

### Example 2

102. For the purposes of this example, it is presumed that there are no applicable exclusions. In particular, it is presumed that the farm land exclusion in s CB 21 would not apply because none of the land sold was capable of being worked as an economic unit as a farming or agricultural business.

Diagram 2

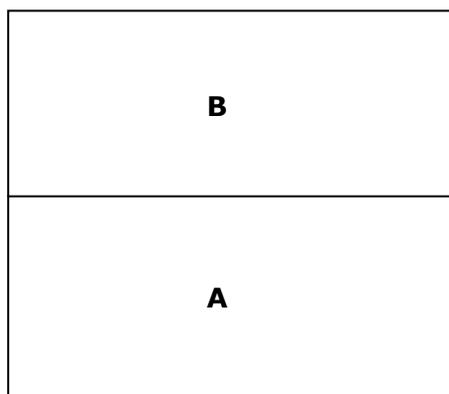
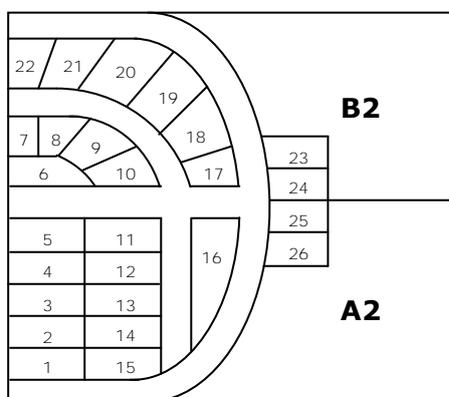


Diagram 3



103. **Mr Webster had owned lot "A" in Diagram 2, situated on the outskirts of Dunedin, since 1972, and had farmed that land from the time he acquired it. In 1997, Mr Webster purchased an adjoining block (lot "B" in Diagram 2) when it became available, as he intended to extend his farming activities in partnership with his**

son upon his son's return from the UK in a few years. However, by 2001 Mr Webster's son had decided to remain in the UK, rather than return to New Zealand.

104. In light of sharply appreciating property values, and given that he was unable to farm all of the land on his own, Mr Webster decided to subdivide some of the land for residential sections (lots 1 – 26 in Diagram 3) and retain an area of what had **been lot "A" (lot "A2" in Diagram 3)** which he would continue farming, and an area of what had been lot "B" (lot "B2" in Diagram 3), which was never considered suitable for residential subdivision due to subsidence risks. Although **not suitable for residential subdivision, lot "B2" would be able to be farmed**, and Mr Webster intended to do so. **The combined area of lots "A2" and "B2" was similar to that of original lot "A", which Mr Webster had been able to farm on his own.**
105. From 2002 to 2005 the land to be subdivided (lots 1 – 26) was subdivided and most of it (lots 1 – 22) was sold as residential sections. However, over the **course of the subdivision it became clear that, in addition to lot "B2", which had** always been known to have substantial subsidence risks, four of the newly formed residential lots (lots 23 to 26) also had subsidence issues. Accordingly, lots 23 to 26 were not sold as residential sections, as originally planned.
106. In 2010, Mr Webster found a purchaser for lots 23 to 26 who wished to use the land for alpaca farming. However, the purchaser was only keen to buy lots 23 to 26 if he could also buy **the adjoining lot "B2"**, and he made an attractive offer to do so. Given the appeal of the offer, **and Mr Webster's declining health (and therefore inability to continue farming such a large area on his own for much longer)**, Mr Webster agreed to sell **lot "B2" together with lots 23 to 26.**
107. The land comprising the roads in the subdivision was transferred to the Council for nil consideration, as part of the consent process for the subdivision.
108. The proceeds from the sale of the residential sections situated on the land **purchased in 1997 (lot "B" in Diagram 2)** (lots 6 – 10 and 17 – 22) would be income under s CB 12. There was an undertaking or scheme involving the division of **the entire original lots "A" and "B" into lots**, and this division work was not minor. There is no suggestion that the undertaking or scheme was not carried on with a view to the sale of lots 6 – 10 and 17 – 22, and the undertaking or scheme was begun within 10 years of **Mr Webster's** acquisition of the land contained in those lots.
109. The proceeds from the sale of the residential sections situated on the land **Mr Webster had owned since 1972 (lot "A" in Diagram 2)** (lots 1 – 5 and 11 – 16) would not be income under s CB 12. Although the undertaking or scheme **involved the division of the entire original lots "A" and "B" into lots**, it was not begun within 10 **years of Mr Webster's acquisition of the land** in the original lot "A". The proceeds from the sale of those sections (lots 1 – 5 and 11 – 16), however, may be income under s CB 13 if the work on, or relating to, all of the **original lots "A" and "B"** involved significant expenditure of the type referred to in s CB 13(1)(b)(iv).
110. **The proceeds on the sale of lot "B2" would not be income under s CB 12.** There was an undertaking or scheme involving the division of the entire original lots "A" and "B" into lots, and this division work was not minor. However, the undertaking or scheme was not carried on with a view to **the sale of lot "B2"**. Lot "B2" was subsequently sold for reasons unrelated to the undertaking or scheme of division. It was known from the planning stages of the undertaking or scheme of division that **lot "B2" was not suitable for residential subdivision, and Mr Webster had intended to keep and farm that section.** He ended up selling it some

five years after the sale of the residential sections, due to his declining health, and the fact that the purchaser interested in buying lots 23 to 26 was only **interested if he could also buy lot "B2"**, and he made an attractive offer to do so.

111. The proceeds from the sale of lots 23 and 24 would be income under s CB 12. There was an undertaking or scheme involving the division of the entire original **lots "A" and "B" into lots, and this division work was not minor**. The undertaking or scheme was begun within 10 years of acquisition of the land contained in lots 23 and 24. There is no suggestion that the undertaking or scheme was not carried on with a view to the sale of lots 23 and 24. It is irrelevant that those lots could not ultimately be sold as residential sections as originally anticipated, and that it took some years for Mr Webster to find a purchaser for those sections.
112. The proceeds from the sale of lots 25 and 26 would not be income under s CB 12. Although the undertaking or scheme involved the division of the entire original **lots "A" and "B" into lots, it was not begun within 10 years of Mr Webster's acquisition of the land in the original lot "A"**. However, the proceeds from the sale of those sections (lots 25 and 26) may be income under s CB 13 if the work on, or relating to, **all of the original lots "A" and "B" involved significant expenditure of the type referred to in s CB 13(1)(b)(iv)**.
113. There was no amount derived on the disposition of the land comprising the roads and so there is no income to tax under either s CB 12 or s CB 13 for that land.

## References

### Related rulings/statements

IG0010 "Work of a minor nature" *Tax Information Bulletin* Vol 17, No 1 (February 2005)  
"Income Tax Amendment Act (No 3) 1983" *Public Information Bulletin* No 126 (May 1984)

### Subject references

Income tax, undertakings or schemes involving development of land or division of land into lots

### Legislative references

Income Tax Act 2007 – ss CB 12, CB 13, CB 17, CB 20, CB 21, CB 23, CB 23B and DB 27

### Case references

*Anzamco Ltd (in liq) v CIR* (1983) 6 NZTC 61,522 (HC)  
*Case E90* (1982) 5 NZTC 59,471  
*Case J37* (1987) 9 NZTC 1,219  
*Church v CIR* (1992) 14 NZTC 9,196 (HC)  
*Cross v CIR* (1987) 9 NZTC 6,101 (CA)

*Cross v CIR* (1985) 7 NZTC 5,054 (HC)  
*Dobson v CIR* (1987) 9 NZTC 6,025  
*Lowe v CIR* (1981) 5 NZTC 61,006 (CA)  
*O'Toole v CIR* (1985) 7 NZTC 5,045 (HC)  
*Paul Stephens Construction Limited v CIR* (1990) 12 NZTC 7,192 (HC)  
*Smith v CIR* (1987) 9 NZTC 6,045 (HC)  
*Smith v CIR (No 2)* (1989) 11 NZTC 6,018 (CA)  
*Vuleta v CIR* [1962] NZLR 325 (SC)  
*Wellington v CIR* (1981) 5 NZTC 61,101 (HC)  
*Woolston v CIR* (1987) 9 NZTC 6,010 (HC)

### Other references

*Hansard* (14 September 1973) 386 NZPD 3653 and 3680 – 3681  
Report of the Taxation Review Committee (October 1967)  
Inland Revenue information release "Taxation of profits or gains from sales of land – Section 9 of the Land and Income Tax Amendment Act 1973 – Section 88AA of Principal Act" (November 1973)

## **Appendix – exclusions from ss CB 12 and CB 13**

### **Income Tax Act 2007**

A1. The exclusions to ss CB 12 and CB 13 are as follows:

#### **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 the person or any member of their 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—
    - (i) was 4,500 square metres or less immediately before it was divided; and
    - (ii) was occupied by the person mainly as residential land for themselves and a member of their family living with them.

...

#### **CB 20 Business exclusion from sections CB 12 and CB 13**

Sections CB 12 and CB 13 do does 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.

...

#### **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.

...

**CB 23 Investment exclusion from sections CB 12 and CB 13**

Sections CB 12 and CB 13 do does 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).