

TAXATION OF LAND TRANSACTIONS

INTRODUCTION	1
Part 1 - obligations and implications	3
1. Implications for taxpayers OF failing to comply	5
Use of money interest	5
Civil penalties: Administrative penalties	6
<i>Late filing penalty</i>	6
<i>Late payment penalty</i>	6
Shortfall penalties	6
<i>The position of tax advisers</i>	7
<i>Standard of proof</i>	7
Criminal penalties	7
2. Lawyers' obligations to clients regarding tax advice	9
Recent cases	9
<i>Hurlingham Estates Ltd v Wilde & Partners - The Times, January 1993</i>	9
<i>Taycal Holdings Ltd v BDO Hogg Young Cathie (1996) 12 NZTC 12,527</i>	10
<i>Bayer v Balkin 95 ATC 4609, 31 ATR 295</i>	11
<i>Briar Holdings Pty Ltd and others v Capolingua 37 ATR 135</i>	13
What duty of care do New Zealand solicitors owe clients when advising on property transactions in relation to the tax implications?	13
<i>How far does that solicitor need to go in providing the advice?</i>	13
<i>What are the likely damages if the solicitor is found negligent?</i>	14
<i>How does a solicitor remove tax advice as an obligation to the client?</i>	14
<i>Conclusion</i>	14
PART 2 - Relevant GST issues	15
1. Liability to register for GST	17
Registration	17
Optional registration	17

Compulsory registration	18
<i>Supplies from all taxable activities are combined to determine whether the threshold is met</i>	18
<i>Exclude from the calculations the value of exempt supplies</i>	18
Value of supplies between associated persons	19
Deeming of open market value	20
<i>TRA Case T33 (1997) 18 NZTC 8,228</i>	21
<i>TRA Case T12 (1997) 18 NZTC 8,070</i>	21
Open market value where consideration between associated persons is not in money	22
<i>TRA Case S72 (1996) 17 NZTC 7,446</i>	22
When the open market value rule does not apply to supplies between associated persons	22
Inclusion of rates paid by lessee in value of supply	22
<i>The Trustee, Executors & Agency Co NZ Ltd & Ors v CIR (1997) 18 NZTC 13,076</i>	22
Is the position different if the lessee is the "occupier" of the property?	23
What is the Commissioner's view?	24
Other outgoings payable by the lessee	24
Relevant Binding Rulings	24
<i>Rural rental property owners - liability to register for GST - Public Ruling 97/11</i>	24
When the supply of leasehold land is an exempt supply - Public Ruling 96/7 (TIB Vol 7 : 12 April 1996)	25
2. Time of supply	26
Importance of the time of supply	26
General rule	26
How does the general rule relate to property transactions?	26
<i>Principles that have been established by case law and the Commissioner's policy:</i>	26
Relevance of the accounting basis upon which the vendor and purchaser are registered	26
<i>Three types of accounting basis:</i>	27
<i>Payments basis</i>	27

<i>Hybrid basis</i>	28
Timing of input credits when the purchaser is registered for GST on a payments basis	28
Timing of input credits when the purchaser is registered for GST on an invoice basis	28
When the vendor is required to return output tax when registered on a payments basis	28
When the vendor is required to return output tax when registered on an invoice basis	29
Types of payment	29
<i>Relevant Public Ruling</i>	29
3. GST and developers	31
<i>Cases since Newman</i>	36
The Commissioner's policy on GST and subdivisions	38
Obtaining certainty	38
4. Where residential property purchased for development or resale is subsequently rented out	39
Leasing of residential land is exempt from GST	39
Claiming of input credits where residential property is purchased	39
Where residential property purchased for development or resale is rented out pending development or resale	39
Section 21(1) adjustment even though the principal purpose of resale is unchanged	40
Calculation of the s 21(1) adjustment where there is a period-by-period adjustment - the Commissioner's policy	41
Determining the open market value where there are period-by-period adjustments	41
De minimus proviso	42
Where the property ceases to be part of the taxpayer's taxable activity (ie no longer held for resale or development but retained as a retail investment)	42
The application of s 14(d) "the five year rule"	42
Relevant Binding Ruling	43
<i>Application of s 14(D) (BR PUB 97/12) - TIB Vol 9 No 13 (December) 1997</i>	43
5. Going concerns	44

Relevant statutory provisions	44
When is the test applied?	44
When must there be agreement between the supplier and recipient?	45
Principles relating to going concerns	45
<i>Pine v CIR</i>	45
Section 78E	47
Cases since the amendment to insert agreement requirement	48
6. Second-hand goods	49
What is a second-hand good?	49
Where the supply is between associated persons	49
When can input credit in relation to second-hand goods be claimed?	50
The decision in <i>CIR v Coveney</i>	50
7. Wording of the contract	51
GST date in contract - what does it mean?	51
Where the contract does not refer to GST	51
<i>NZ Refining Co Ltd v AG (1993) 15 NZTC 10,038</i>	51
<i>Smale v Fletcher Homes Limited (1996) 17 NZTC 12,662</i>	51
<i>Pyne Gould Guinness Ltd v O’Gorman & Anor (1990) 12 NZTC 7,001</i>	52
<i>Grosvenor Land Securities Ltd v Turvey & Anor (1989) 11 NZTC 6,235</i>	52
Plus GST (if any)	52
<i>Rivett v Cooper (1989) 11 NZTC 6,016</i>	52
When the contract is stated as being "exclusive of GST"	53
<i>Edwards & Edwards v Ditmer (1989) 11 NZTC 6,063</i>	53
Where the contract price is specified as being \$X (to be zero-rated for GST)	54
<i>Chesham Investments Ltd v Robertson (1992) 14 NZTC 9,105; 16 TRNZ 829</i>	54
Remedies outside the GST Act that may be available where there is dispute as to the application of GST to a contract	55
<i>Rectification</i>	55
<i>Eldamos Investments Ltd v Force Location Limited (1995) 17 NZTC 12,196</i> <i>Fisher J</i>	55

<i>Contractual Mistakes Act</i>	56
<i>Fair Trading Act</i>	57
<i>Estoppel</i>	57
8. GST invoices and settlement statement	59
"Tax invoices" and "invoices"	59
Settlement statement	59
The requirements for tax invoices	59
The treatment of apportionments	60
<i>Where the vendor is registered</i>	60
<i>Where the vendor is not registered</i>	60
<i>Remember!</i>	61
Buying property for a company yet to be formed	61
Where a company is already in existence	61
9. Mortgagees and GST issues	62
Mortgagee in possession	62
Sale by mortgagee	62
Where the sale is a sale of a going concern	63
<i>Returns to be filed by the mortgagee</i>	64
PART 3 - INCOME TAX CONSEQUENCES	65
1. Section CD 4 (third limb) - Scheme or undertaking	67
2. Section CD 1: Amounts derived from the sale or disposition of any land	70
Mixing of income and capital gains	71
Absence of mechanism for calculating taxable amounts	71
No indexation	72
The effect of the commencement date	72
Complexity of the provisions	73
Avoidance based on shares in companies	73
Analysis of each head of taxation	74
<i>Paragraph (a): Land acquired for the purpose of sale</i>	74

<i>Paragraph (b): Land dealers and persons associated with land dealers</i>	76
<i>Paragraph (c): The business of developing or dividing land into lots</i>	78
<i>Paragraph (d): The business of erecting buildings</i>	79
<i>Paragraph (e): Increases in value attributable to Resource Management Act consents and other matters</i>	81
<i>Paragraph (f): Undertakings or schemes of subdivision</i>	82
<i>Paragraph (g): Major subdivisions</i>	87
The definition of associated persons	88
Calculation of taxable amounts derived from the sale or disposition of land	90
Treatment of losses from sale of land in circumstances where the gross amount derived on sale or disposal is subject to s CD1(2)	92
Exemptions	93
<i>Section CD 1(3): Exemption for business premises and residences</i>	93
<i>Section CD 1(4): Exemption for farmland</i>	93
<i>Section CD 1(6): Exemption for subdivisions of residential land</i>	93
<i>Section CD 1(7): Exemption for subdivided farm land</i>	94
<i>Section FF 6 – Transfers of land in accordance with a matrimonial agreement</i>	94
3. Section CE 1(1)(e): Rents, fines and premiums and other revenues derived by the owner of land from any lease, licence or easement affecting the land	95
4. Section CE 2 : Amounts derived from the use or occupation of any land	96
5. Section CJ 1 : Sale of land with standing timber	97
Section FB 4	97
Section GD 1	97
Section GD 2	98
6. Section GD 10 : Leases for less than market rental	99
7. Accrual rules	100
Exclusions	100
Acquisition price of an agreement or option which is subject to the accrual rules	101
Purchase price is equal to core acquisition price	101

Core acquisition price more or less than the purchase price	102
Disclosure	103
Adjustment of the purchase price incorporating an interest component, for depreciation and other purposes	103
Proposed changes to the accrual rules	104
8. Stamp duty: exemption for residential land	105
Serviced apartments	106
Appendix - Case study	107