

22 March 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Supplementary Order Paper on Taxation (Annual Rates for 2020–21, Feasibility Expenditure, and Remedial Matters) Bill

Purpose

1. We have considered whether the extension of the bright-line test that applies to residential property in the Supplementary Order Paper (SOP) on the Taxation (Annual Rates for 2020–21, Feasibility Expenditure, and Remedial Matters) Bill (the SOP) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. You have also received our advice on the consistency with the Bill of Rights Act of other matters that are to be included in the SOP on 17 March 2021 (based on IRD 22553-/1).
3. We have not yet received a final version of the SOP. This advice has been prepared in relation to the latest version of the SOP (IRD 22553-/1.42). This advice has been prepared in a short timeframe. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
4. We have concluded that the SOP appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the SOP with s 18(1) (freedom of movement and residence). Our analysis is set out below.

The SOP

5. The SOP amends the Income Tax Act 2007 (the principal Act) to extend from five to 10 years the bright-line test that determines what (if any) tax is paid on residential property acquired and sold within a specified timeframe.
6. The SOP continues a main home exclusion for the bright-line test, but makes changes so that the exclusion only applies for the period during which the property is actually used as the person's main home. Currently, the main home exception applies where it was used as a main home for most of the bright-line period.¹
7. In addition to the main home exception, two other exceptions in the current law continue to apply:
 - disposal of property inherited following the death of the owner; and

¹ Income Tax Act 2007, s CB16A(1).

- the seller has engaged in a regular pattern of acquiring and disposing of residential land used as their main home (new s CB16A(3)(b)).
14. Because the first exception in new s CB16A(3)(a) is limited to considering the two-year period before the bright-line date where the person disposes of the property, this exception is not greatly affected by the extended bright-line period. This is because for the exception to apply the person must have already sold their home at least twice within two years – meaning it does not apply where the person has owned the property for three or more years.
 15. In relation to the second exception in new s CB16A(3)(b), whether someone has engaged in a regular pattern of acquiring and disposing of residential property will now be relevant for a longer 10-year period.⁵ The principal Act does not define what constitutes a regular pattern of acquiring and disposing of property. Potentially it could cover someone who sells their house every two to three years where the circumstances are sufficiently similar to constitute a pattern. Because of this broader scope for this exception, we consider this constitutes a *prima facie* limitation on the right to freedom of movement.
 16. However, where a provision limits a right affirmed in the Bill of Rights Act, this limit may be reasonably justified in terms of s 5 of the Bill of Rights Act. The s 5 inquiry asks if the limit serves a sufficiently important objective to justify limiting the right; and if so whether the limit is rationally connected to achieving that objective, proportionate to the importance of the objective, and limits the right no more than is reasonably necessary to achieve that objective.⁶
 17. The SOP is intended to reduce investor demand for property in order to address pressing issues of housing affordability. Imposing additional tax obligations on people who have a pattern of acquiring and selling land which they use as residential property is rationally connected to this objective. It ensures that people who are habitually buying and selling residential property cannot be exempt from tax because they were residing in the property.
 18. We also consider that the nature of the change is proportionate to the importance of the objective and limits the right no more than is reasonably necessary. Supporting affordable home ownership is an important goal that is connected to protecting the right in international law to adequate housing. However, the exception targets people who can afford to regularly buy and sell residential property. Ensuring these people pay tax on these transactions is unlikely to seriously impair their right to freedom of movement.

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- (a) the earliest of—
 - (i) the date that the person enters into an agreement for the disposal;
 - (ii) the date on which the person makes a gift of the residential land;
 - (iii) the date on which the person's residential land is compulsorily acquired under any Act by the Crown, a local authority, or a public authority;
 - (iv) if there is a mortgage secured on the residential land, the date on which the land is disposed of by or for the mortgagee as a result of the mortgagor's defaulting; or
 - (b) if none of paragraph (a)(i) to (iv) apply, the date on which the estate or interest in the residential land is disposed of

⁵ This exception was not included in the 2015 introduction version of the Taxation (Bright-line Test for Residential Land) Bill because it was added through the Select Committee process so this was not discussed in the advice to the Attorney-General on the consistency of that Bill with the Bill of Rights Act.

⁶ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

19. Inland Revenue’s 2016 guidance on the application of the two-year bright-line test shows how the test is targeted to people who are likely to be buying and selling property they reside in as a form of property speculation.⁷ For example:
- generally, at least three prior transactions would be needed for there to be a regular pattern
 - a “pattern” requires a similarity or likeness between the transactions
 - for a pattern to be “regular” the transactions must occur at sufficiently uniform or consistent intervals.
20. There is nothing to suggest that these factors would not be relevant to the extended bright-line test. Further, decisions on whether a seller has engaged in a regular pattern of acquiring and disposing of property would be subject to judicial review.
21. Income on the sale of a property is also taxable if a person acquires the property with an intention of disposing of it, and the main home exclusion does not apply because even though the property is their main home they have engaged in a regular pattern of buying and selling property they reside in. The bright-line test facilitates the enforcement of these rules.

Conclusion

22. We have concluded that the SOP appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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⁷ Inland Revenue, “*Question We’ve Been Asked QB 16/07: Income Tax – Land Sale Rules – Main Home and Residential Exclusions – Regular Pattern of Acquiring and Disposing, or Building and Disposing* (31 August 2016) [INCOME TAX – LAND SALE RULES – MAIN HOME AND RESIDENTIAL EXCLUSIONS – REGULAR PATTERN OF ACQUIRING AND DISPOSING, OR BUILDING AND DISPOSING \(ird.govt.nz\)](https://www.ird.govt.nz/income-tax-land-sale-rules-main-home-and-residential-exclusions-regular-pattern-of-acquiring-and-disposing-or-building-and-disposing).”