



Tax Tonic March 2020

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Apology: Webinar Quality

We apologise for the technical problems we had with this webinar. We believe this was caused by broadband overload due to Covid-19 and people working remotely as part of self-isolation. We are going to test the sound and slides before our next Webinar on 1 May. If there is still an issue then we will figure out a work around (even that means pre-recording in the middle of the night!)

Update on Covid 19 Tax Concessions

The government is passing special legislation so the wage concession will not be subject to GST.

Thanks Jason for the update!

Legal fees on buying & selling rentals

Q: But the words "in any income year" do not appear in the legislation now following the rewrite

A: Correct. However the rewrite was not intended to change the intent of the legislation and the numerous court decisions on this issue prevail.

Q: Can you get under \$10k legal fees by apportioning some off to private first?

A: Unfortunately no. The \$10,000 limit applies to the total legal fees incurred by the taxpayer during the income year, including private legal fees.

Q: Legal Fees - nexus on sale - what if you return depreciation recovered - does that mean there is a nexus?? Does this remove IRD's argument.

A: I agree that depreciation recovery (or even a loss on sale) is a good example of a nexus to income right up to the settlement date. The sale of depreciable assets gives rise to assessable income.

Q: So we can deduct legal fees on buying and selling rental property whether or not in business of residential renting?

A: In our view yes. The legal fees on sale are still connected to the income earning activity of rental income, and deriving assessable income in any income year. The income earning activity goes right up to settlement date.

As mentioned in our webinar, IRD staff are likely to disagree based on their website information and sometimes it might not be worth arguing with them. It doesn't mean you have taken an unacceptable tax position however. (I suspect most of these legal fee claims will fly below the radar and never be noticed).

Q: Does the answer change if the tenancy ended before the property was sold.

A: Good question. I think it is "fact and degree" – how long before the sale did the tenancy end. Most tenants will be given notice to vacate before the property is put on the market, and this would be OK.

Air BnB and GST

Q: Does the property itself fall into the GS net? Or is it just short-term hire income we need to add GST

A: Yes the property is clawed in to the GST net which can be the real issue if it has been owned for a long time or purchased off an associated person and subject to the associated person second hand good limitation.

Q: Julie, when a short term supply was purchased as an exempt supply originally, upon registration, do we claim the GST on the market value of the property?

A: It would be a change of use. A change of use is based on the GST content of the original cost (this includes second hand good claims too) and would be claimable over the next two balance dates. There is a real problem where the property has been transferred between associated person and the original purchase was from an unregistered person. In those cases the associated person second good claim limitation would be no input claim even though there would be output tax on the market value on deregistration or sale

Profit-making schemes – CB 3 and land rules

Q: CB 3 and land - what if it was only one section/house for sale instead of two? Still C B3 apply?

A: In my view yes. The construction of even one house is a relatively large scale project carried on with a view to profit. It is still akin to a "spec home" development.

Q: So the sale of the subdivided land wouldn't be taxed (income), but once the build goes ahead – yes?

A: Correct. The subdivision by itself is not taxable under s CB 12 or s CB 13, and if Annie just sold the bare sections there would be no tax. The building project brings it into the tax net. The land comes into the tax net at the market value on the date the building project begins (ie. so just the "builder's profit" is taxed).

Ring-fencing and portfolio with trust

Q: Trust owns family home - say \$30K of Air BnB earned on the family home. Income is returned by the Trustee, not by the Trust - therefore Air BnB income can become part of the Trustees property portfolio?

A: The trustee can't return the income in their capacity as trustee. The Trust is the legal owner (via the trustees who hold title) and the income belongs to the Trust unless it is allocated to the trustee (in their personal capacity) because they are a beneficiary. Then, it is beneficiary income. As beneficiary income it can't be part of the person's rental portfolio.

The only other possible way (?) might be if the Trust leases (or makes the property available) to the trustee in their personal activity, and the trustee conducts the Air BnB as a 'sole trader'. The problem here is that "residential rental property" is defined to mean "residential land for which a person who owns the land is allowed a deduction relating to the use or disposal of the land." The trustee in this capacity does not own the land – so it is still excluded from their portfolio.

Private use of phones and ED0001

Q: EE001 - are you implying this should apply to shareholder employees as well, in terms of private use. Most people claim 100% for mobile phones

A: Good observation. Technically, FBT would apply if there is a cost of private use of a shareholder/employee phone for calls or use of the data for private purposes. If the employer has not utilised the other benefits exemption of \$300 per quarter per person this would probably cover it. If that is already being used for other benefits then there is a benefit. Where a plan has a fixed amount for unlimited calls and a fixed amount of data it is tempting to argue there is no extra cost for the private use. Based on case law that isn't correct because the cost applies to both uses and should be apportioned. Use cell phones vary considerable. Personally I use my cell phone primarily for work purposes but I cannot say exclusively. I also use up the \$300 de minimis. Currently I do not make any adjustment. I do not file FBT returns so there is no time bar on how far IRD could reassess if they chose. Practically, it would be difficult to quantify and in the scheme of things is not a significant amount. Having said that, now the IRD have signalled they are interested in this issue by release of that determination it might be prudent to put through a small adjustment for 2020 as insurance to hopefully put a line under the past. {Kevin you better note my file!} Front footing these issues and making a small but reasonable adjustment is always more cost effective and less risky than trying to defend them later. As always it's a cost / risk assessment and the risk has just gone up a fraction in my view.

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