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NEWSLETTER

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The Bright-line Test

In 2015, the government introduced the “bright-line test”, a method which attempts to tighten the property investment rules.

The bright-line test states that (subject to exemptions) any gain from disposing of residential land within two years of acquiring it will be taxable. The test only applies to residential land. Residential land is land that has a dwelling on it or could have a dwelling on it and does not include farms or business premises.

The bright-line test applies where a person’s “first interest” in residential land is acquired on or after 1 October 2015. Generally, a person acquires their “first interest” on the day they enter into an agreement to purchase residential land. The start and end dates may vary depending on the circumstances of each transaction.

For standard sales, the two year bright-line period starts when title for the residential land is

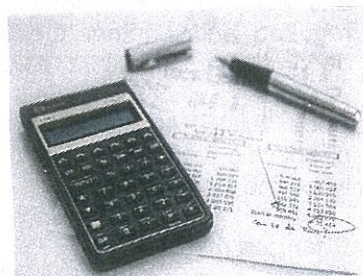
transferred to a person under the Land Transfer Act 1952 and ends when the person signs a contract to sell the land. In other situations, such as gifts, the date of “first interest” is the date the title is registered by the donor and the end date is when the donee acquires registered title.

In simple terms, when a person purchases their main home after 1 October 2015 and then sells it within two years, the income they receive for the sale is not taxable. A person can only have one main home to which the bright-line test does not apply. If a person has more than one home, it is the home that the person has the greatest connection with that is considered the main home for the purposes of the test. Factors to assess when determining what constitutes a main home include; how often a person uses the home, where their immediate family is, where their social and economic ties are and whether their personal property is in the home.

The test is based on actual use of the property and not just a person’s intention to use the property as a main home. This exemption cannot be applied on a proportionate basis; therefore, if a house is used only partly as a main home, the exemption does not apply. Where a main home is held in a trust, the exemption is usually available; however, additional information is required to ensure trusts are not used to avoid tax.

A habitual seller cannot use the main home exemption. If a person has used the main home exemption more than twice in the previous two years at the time of selling their property, they are considered a habitual seller. A habitual seller also includes a person who regularly acquires and disposes of residential land.

Where property is inherited by a person as a beneficiary and they subsequently sell the property, the disposal will not be subject to tax under the bright-line test.



Where property is transferred between partners or spouses under a property relationship agreement, there are no tax implications. However, if the property is subsequently sold; the bright-line test may apply.

There have been cases where tax obligations arose through the disposal of residential property which did not result in financial gain to the seller. As a result, it is highly recommended that specialist advice is obtained in respect of all property transactions.



Enduring Powers of Attorney – Recent Changes

Amendments to the Protection of Personal and Property Rights Act 1988 introduced plain language forms of Enduring Powers of Attorney (EPA) and standard explanation documents outlining the effects of appointing an attorney. These changes came into effect on 16 March 2017.

EPAs defined

An EPA is a legal document that allows an individual (called the Donor) to appoint another person or persons (called the Attorney(s)) to take care of their personal care and welfare and/or property if the Donor loses the ability to do so themselves. This appointment does not prevent the Donor from managing their own affairs.

In contrast, a General Power of Attorney is valid only when the Donor has the legal capacity to instruct the Attorney(s).

Property

An EPA for property allows the Attorney(s) to deal with the Donor's property: for example, shares, land and money. The Donor may wish the EPA to take effect once signed and continue to apply if he/she is mentally incapable; or only to take effect if he/she becomes mentally incapable.

Personal care and welfare

This EPA allows an Attorney (only one Attorney may be appointed at any one time in respect of personal care and welfare) to make decisions about the Donor's personal care and welfare if he/she becomes mentally incapable. This power is subject to various safeguards and extends to decisions on any medical treatment required and whether the Donor attends hospital or becomes a resident in a residential care facility.

Under this EPA, the Attorney's powers can be general or specific depending on the Donor's wishes and ends when the Donor dies.

Changes made

The key change to the law is that instead of instructing a lawyer to create the EPA document itself, there are

now forms available for both types of EPAs. The EPA forms can be downloaded, completed and witnessed by a lawyer, qualified legal executive or representative of a trustee corporation. However, it is still essential to obtain legal advice before certifying the form.

The forms provide options available to the Donor and outline the responsibilities of the Attorney(s).

Further changes under the new rules are summarised below:

- With regards to witnessing, if two people appoint each other as Attorney, the same person can witness the respective Donor's signature where there is no more than a negligible risk of a conflict of interest. Witnesses must ensure that the Donor understands the nature of the EPA, the potential risks and consequences and the Donor does not act under undue pressure or duress. Further, witnesses can use the standard explanation to discuss the implications and effects to the Donor of the EPA;
- Attorneys must consult other appointed Attorneys (not including successor Attorneys) when exercising their powers; and
- A medical certificate is required to determine whether the Donor is mentally incapable. Under the old requirements, medical certificates were to be prepared in a prescribed form under particular regulations. However, some medical practitioners used their own form of medical certificates resulting in non-compliance. From 16 March 2017, medical practitioners can use their own form of medical certificates provided information from the relevant regulations is included. Previously issued certificates are still valid and do not need to be replaced – but can be if desired.

Transition provisions

Any EPAs executed by the Donor and Attorney under the old provisions still remain valid; however, EPAs signed by the Donor on or prior to 16 March 2017 and not by the Attorney will need to be re-executed under the new provisions.



Auction Preparation

Property is often purchased and sold in New Zealand, particularly in a seller's market, via auctions. However, buyers frequently underprepare for an auction and are caught out when the hammer falls.

When purchasing at auction, a buyer is making an offer unconditionally. In essence, this means that the highest bidder over the reserve (being the lowest sum that the seller determines it will sell at) is making a binding cash offer and entering a binding agreement with the seller.

Accordingly, buyers need to have completed all of their due diligence investigations and asked all of their key questions before the auction.

Talk to the agent

Before attending and bidding at an auction, buyers should obtain as much information as possible about the property by:

- Talking to the listing agent;
- Reviewing the history of the land and the buildings via reports provided by the seller, the agent or purchased via a lawyer or the local council; and
- Asking questions about the number of parties interested in bidding at auction and at what price such parties are registering their interest.

Some of the types of reports that a buyer might need will be contained in the agent's auction pack.

Any buyers considering a bid should register their interest with the agent.

If a third party makes a pre-auction offer, the auction must be brought forward. As such, interested buyers will need to be prepared to bid at the early auction, including having funds available to pay the deposit which must be paid on the auction day.

Review the auction terms and conditions

The agent should provide potential buyers with a copy of the auction terms and conditions of sale.

Buyers should review these terms carefully, to ensure that the proposed chattels list is correct and that the settlement date is practically and financially achievable.

Buyers should also be checking these terms to see whether any standard conditions have been deleted or varied, including disclaimers of warranties or information about a property. This aspect (if not the terms as a whole) should be reviewed by a lawyer for certainty.

Get legal advice on the title

In becoming the buyer, the successful bidder will have accepted the legal title to the property (the instrument that details the key legal interests and restrictions that apply to the land) and the auction terms and conditions

of sale. It is, therefore, extremely important that prospective buyers seek advice on the title before attending an auction; prudent buyers will also have taken advice on the auction terms and conditions of sale.

If, in obtaining advice, a buyer discovers an issue with the property, agreement or the title, he or she may raise such an issue as part of pre-auction negotiations. In some instances, variations may be agreed such that they apply in respect of the successful bid as between the seller and the particular buyer that negotiated such variations.

Due diligence

A Land Information Memorandum (LIM) is a report prepared by the relevant Council which provides historical and current information relating to the property, land and any buildings. Prospective buyers are strongly advised to obtain a LIM report.

A LIM report enables a buyer to ascertain whether buildings and/or structures on the land which require consent, such as a dwelling, spa pool, garage or fireplace have been approved by the local council. In addition, a LIM report may provide information on the zoning of the area and natural hazards.

Builder's report and contamination testing

Obtaining a builder's report entails engaging a qualified builder to perform a pre-purchase inspection, and provide a written report outlining any significant building defects. A comprehensive builder's report can be expected to include advice on fences, paths, retaining walls, foundations, insulation, ventilation, plumbing, drainage, structures and roofing materials.

Contamination tests are also becoming more common. Contamination tests measure toxicity within a building, and provide information on whether it is safe to work or live in. High toxicity levels may result in health risks and time consuming and costly decontamination processes.

Finance

As auctions are based on potential buyers making unconditional offers to the vendor, it is essential that any necessary finance is arranged prior to bidding at auction and that buyers are in a position to draw down the funds on the designated settlement date.

Summary

In summary, buyers should gather as much knowledge as possible on a property before bidding at an auction. Doing so will enable buyers to better set a purchase price that they may be comfortable bidding to; it will also help the bank and insurance brokers to give a keen buyer the promises and backing that he or she needs to bid.



I have been named an executor of a will, what do I do now?

When a loved one passes away it can be a stressful time for the family, which can be made more difficult when the deceased has not left a Will. Where the deceased has left a Will they will have named their executor or executors (their representative(s)) in that Will.

The role of an executor is to administer the deceased's estate. This may include settling outstanding debts owed by the deceased, and distributing the deceased's estate in accordance with the deceased's Will.

Before an executor can administer the estate of the deceased, they must first obtain Probate.

What is "probate"?

Probate is a court order determining the Will of the deceased as being true and authentic. The executor(s) is/are appointed in this order. Upon the making of the order, the executor(s) then has/have the legal authority to deal with the deceased's estate.

How do I apply for probate?

The executor(s) named in a Will must make an application in writing to the Wellington High Court for probate. The application must be in a specific format, as prescribed by a set of rules called the High Court Rules.

An application for probate may be filed in one of two ways either by way of 'probate in common form' or by way of 'probate in solemn form'.

An application for 'probate in common form' is usually made on a 'without notice' basis, where the application is made without notifying anyone else, on the basis that no one will contest the Will.

In the event that it is highly likely that someone will contest the Will, an application for 'probate in solemn form' will need to be filed. In these circumstances the

relevant parties will be notified of the application and a trial at High Court will proceed, for which the parties will probably need legal advice.

What would I need to make an application for Probate?

The High Court application fee for obtaining Probate is currently \$200.00; this would need to be paid together with the filing of the following documents:

- The original Will (not a copy);
- An application for probate in common or solemn form;
- A sworn statement (affidavit) from the executor(s) which includes the following information;
- The person who made the Will has died;
- They knew the deceased;
- Where the deceased was living when they died; and
- Confirmation that the Will is the deceased's last Will.

How long does this process take?

If the Application has been drafted correctly, in the prescribed form, and filed acceptably with the Wellington High Court, it may take four to six weeks to process the application. However, it could take longer if the High Court is busy or the application is complicated. This timeframe may also be drawn-out in the event that the application has not been drafted correctly and/or the High Court raises issues with the application. Delays of this nature have the potential to cause a number of problems between the beneficiaries, and can affect an executor's ability to administer the deceased's estate, particularly if immediate action is required (which it often is).

With that in mind, legal advice should be obtained when making an application for Probate.

SNIPPET

Trusts – A Brief Summary

A trust is an arrangement in which a person (Settlor) transfers assets to selected persons (Trustees) to be held for the benefit of persons named by the Settlor (Beneficiaries).

A trust is usually established by way of a trust deed but can be created via less formal means. Once the trust is created, the Settlor loses legal ownership of the transferred assets; the Trustee then becomes the legal owner(s) of the trust assets.

The Trustees have a duty of the utmost good faith to both the Settlor and the Beneficiaries, and to deal with the trust asset in line with the terms of the trust together with the Trustee Act 1956.

The Beneficiaries are the only people entitled to benefit from the trust's assets. Any person (including corporate persons such as companies) can be a beneficiary of a trust, whether that person is alive or

unborn. A Settlor may appoint themselves as a Beneficiary.

When establishing a trust, it is vital that the Settlor considers who he or she will appoint as the Trustees and Beneficiaries, to do so, it is important to understand the roles, responsibilities and rights of each participant in the trust and to take advice from experts.

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Bruce Wyber

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