TAXING THE PROPERTY SPECULATOR

The Shorter Oxford English Dictionary defines 'to speculate' as meaning *inter alia:*

> "To engage in the buying and selling of commodities or effects in order to profit by a rise or fall in their market value; to undertake, or take part or invest in a business enterprise or transaction of a risky nature in the expectation of considerable gain."

A speculator is one who engages in such activities. The words of the dictionary fail, however, to convey the emotive and opprobrious sense with which the word is now used.

Property speculation is a political issue. In a time of inflation and shortage of housing, the property speculator has been held to have added to the economic ills:

> "There have been abnormally large increases in land and property prices. The Government believes that this in part is due to the activities of property speculators. As a result people are finding it difficult to buy their own homes and farms. The demand for new houses at present exceeds the capacity of the building industry and the Government intends to ensure that this situation is not exploited by speculators who buy and sell for a quick profit."[1]

The Government's response to these perceived evils has been in the form of new tax laws, the Property Speculation Tax Act 1973 and Section 8 of the Land and Income Tax Amendment Act 1973. These will be considered in this article. It is not intended to provide either an exhaustive description or analysis of the Act and the Amendment. It is merely hoped to provide some general conception of these new laws, together with the writer's own views on particular points.

It should be made clear from the outset that most of the "speculators" criticized by the Government were taxed on their "speculation" activities prior to 1973. Sections 81(1)(a) and 88(1)(c) of the Land and Income Tax Act 1954 were the key provisions in this area. Section 88(1)(c) did, however, prove a difficult provision, both as to interpretation and application.[2] If one wishes to be uncharitable, such difficulties did tend to provide a measure of taxation relief for those engaged in land "speculation", or if the term is now too sullied, land "development", and s. 8 of the Land and Income Tax Amendment Act 1973 was enacted ostensibly to remedy the shortcomings of s. 88(1)(c).

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1. Hon. W. E. Rowling, Budget Speech. House of Representatives, 14 June, 1973.
2. The problems that have arisen with s. 88(1)(c) will be considered later.

A. THE PROPERTY SPECULATION TAX ACT 1973

Conceptually, the tax imposed by this Act is interesting for two reasons. Firstly, taxation provisions, at least in the layman's terms, are invariably linked with the raising of revenue. The taxation system is, however, well recognised as something more than a mere money gatherer; it is an important instrument for effecting Government's economic and social policies and revenue and policy considerations usually co-exist in any one tax. The property speculation tax is in this respect unusual. It is not thought of by its creators as a source of revenue, but is a purely deterrent provision designed to discourage speculation. So prohibitive are the rates of tax imposed, the Act is likely to remain forever a purely deterrent measure.

Secondly, our system of personal taxation is based in income. The source of wealth is not taxed but the flow of wealth from such source is. The taxpayer who organizes his affairs so that his economic gains are in the form of capital accretions generally cannot, during his lifetime, be taxed under the Land and Income Tax Act 1954 on such gains.[3] Thus ss. 88(1)(a) and 88(1)(c), together with the new amendment, while taxing *inter alia* the profits from certain types of property "speculation", do so simply on the basis of equity with other taxpayers. Gains caught by these provisions are declared to be in the nature of income and are taxed accordingly. The property speculation tax departs from this taxation base. In the case of one particular taxpayer it might tax what could be called an income gain and in the case of a different taxpayer a capital gain. It is not an income tax, nor a capital gains tax. It is a specialised profits tax, a tax on what the Act terms the "assessable profit"[4] resulting from property speculation.

1. The Act:

A danger period of two years[5] is created for those acquiring any land within the meaning of the Act. Land is defined to include all estates and interests in land (excluding mortgages) and options to purchase the same.[6] Any disposition of land within this two year period will attract tax liability where a profit has been made.[7] Both "acquisition" and "disposition" are extensively defined in the Act,[8] bringing in for the Commissioner's consideration *all* land transactions.

3. As its title implies, the Land and Income Tax Act 1954 does impose an annual tax on the value of land. The tax is on the unimproved value and the exemptions are such that the tax is of little economic significance.
4. Property Speculation Tax Act 1973, ss. 3(2), 4.
5. Ibid., s. 15.
6. Ibid., s. 2. See also s. 13 which deals with shares in a company owing land.
7. The rate of tax varies from a maximum of 90% for properties disposed of within 6 months of acquisition to a minimum of 60% for properties disposed of 21 months after acquisition. Property Speculation Tax Act 1973, Schedule.
8. Section 2.

While the Act seeks to tax the profits from land "speculation", speculation is nowhere defined in the Act. Those that are taxed as "speculators" are found by the application of negatives. A taxation net is thrown over all land transactions within the two year period and the taxpayer, if he is to escape tax liability for a profit made, must bring himself within one of the exemption provisions of the Act. The exemption provisions are thus of crucial significance and property speculators can be no better defined than those unable to satisfy any of the Act's exemption provisions.

It is thought that the dependence on negatives in an Act designed to be a positive disincentive to speculation is not entirely satisfactory. Almost all land sales will realise a profit due to the inflationary age in which we live and while the Government's definitional problems as to what exactly is "speculation" can be appreciated, the Act contains within it the danger that transactions, which could not be termed speculative, might be trapped due simply to the inability of the taxpayer to bring the facts of his particular case neatly within the wording of any exemption. The Government is apparently alive to this danger, as s. 22 of the Act provides for the creation of new exemptions by Order in Council. Exemption based on hindsight is, at least to the taxpayer, no substitute for foresight and is at best a last ditch method of ensuring that the tax does not strike at non-speculative transactions.

2. The Exemption Provisions:

The most significant exemption is that in s. 18, which is designed to protect the "homeowner" from the tax. As this is the area in which the tax impinges the most on everyday life, this particular exemption will be accorded the closest attention.

Section 18 provides as follows:

> 18. Exemption of residential land in certain circumstances —
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> (1) Where, in relation to any disposition of land by any person, the Commissioner is satisfied that —
>
> (a) Either —
>
> (i) The land was acquired and occupied, or intended to be occupied, primarily and principally as a residence for that person and any member of his family living with him; or
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> (ii) The land was acquired by that person primarily and principally for the purpose of erecting a dwellinghouse on that land to be occupied as a residence for that person and any member of his family living with him; and
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> (b) The land was not acquired by that person for the purpose or intention, or for purposes or intentions including the purpose or intention, of realising any profit from the disposition of that land; and
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> (c) The principal reason for the disposition of the land was

not the realisation of any profit from that disposition; and

(d) The disposition of the land was due to circumstances which had arisen since the date of acquisition of the land by that person, —

any profit derived by that person from that disposition shall be exempt from property speculation tax.

(2) For the purposes of subsection (1) of this section, where, in relation to any disposition of land, the land to which that subsection would otherwise apply exceeds 4,000 square metres, or such larger area as, in the opinion of the Commissioner, is required for the reasonable occupation of the land, having regard to the size and character of the dwellinghouse on the land, that subsection shall not apply in respect of the disposition of that excess, and the Commissioner may apportion the profit accordingly in such manner as he thinks fair and equitable.

(3) For the purposes of paragraph (d) of subsection (1) of this section, in any case where a person has entered into a binding contract to acquire land, the date of acquisition of the land by that person shall be deemed to be the date on which that person entered into the binding contract.

Section 18 should be read subject to the Property Speculation Tax Exemption Order 1973 which liberalises the requirement as to personal occupation in favour of occupation by "associated persons", who are close relatives of the taxpayer such as children, parents and in-laws.

It can immediately be seen that the requirements are numerous, and *all* must be satisfied.[9] Depending on the interpretation accorded to key words, the obligation cast upon the "homeowner" to exculpate himself from the tax could be very onerous.

(a) s. 18(1)(a)(i)

This requires *an intention at the time of acquisition* to use the land primarily and principally as a residence, followed by such occupation after acquisition, or at least, an intention to so occupy. Thus, is a property is acquired initially for reasons other than use as a residence, even though the property might subsequently be occupied as a residence by the owner, the owner will not be able to bring a disposition of the property within the "homeowner's" exemption.

The intentional requirement at the time of acquisition might be said to be useful; it would prevent a person who owns several properties moving himself and family into a particular property prior to sale so that the property sold could, at the time of sale, be said to be the family residence. Be this as it may, the other requirements of s. 18

9. There is one exception. Section 18(1)(a)(i) and (ii) are phrased as alternatives.

would still need satisfying and it is not far-fetched to suggest that a person may have, in a particular case, legitimately adopted as his residence a property purchased for some other reason.

In popular language and most commonly at law, a *"residence"* is a person's home, his place of abode defined in terms of "the place where an individual eats drinks and sleeps".[10] While residence is suggestive of permanency,[11] it has never been interpreted to demand continuity, and it is well recognised that a person might have two residences at the same time. As long ago as 1817 it was said:

> "It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which he may establish his abode at any period, and for any length of time."[12]

There is nothing in the wording of s. 18 to suggest that for the purposes of the speculation tax the position is any different. In fact s. 18(1)(a)(i) contemplates the possibility of a taxpayer having more than one residence; the provision exempts the disposal of *a* residence.

Few New Zealanders are blessed with more than one home but ownership of holiday baches varying greatly in size and quality is quite common. It is thought that provided minimal criteria are met such baches would qualify as residences within the meaning of the Act. It is submitted that there would need to be evidence of actual occupation, even though occasional, by the taxpayer, or at least an intention to so use the property demonstrated by its maintenance in a habitable condition.[13] It is thought that if the meaning of residence ever arises in litigation, the Court would interpret the word liberally. A narrow interpretation would be hardly apt to further the object of the Act but could well deprive a taxpayer who owns more than one property, one of which he uses occasionally, of any chance of bringing what was a non-speculative disposition within the available exemptions.

Whether a property is to be used *"primarily and principally"* as a residence calls for a decision as to what is the foremost use to which it is intended that the property be put. If the two adverbs employed by the legislature are not to be regarded as repetitive, "primarily" might be said to add to the idea of "principal" use, a connotation of initial use. An indication as to the likely approach a court would take in applying the criterion of "primary and principal" use can be found in *Fairmaid* v. *Otago D.L.R.*[14] To qualify for registration under

10. See for example: *R.* v. *North Curry*, 4 B .& C. 953, 107 E.R. 1313; *Baxter's Case* (1969) 20 L.T. 302; *Stoke-on-Trent Borough Council* v. *Cheshire County Council* [1913] 3 K.B. 699; *Egmont National Park Board* v. *Blake* [1949] N.Z.L.R. 177.
11. Permanent in the sense that while there might be absences, there is an intention to return.
12. *A.G.* v. *Coote* (1817) 4 Price 183, 146 E.R. 433, per Wood B., at 188, 435.
13. Section 18(1)(a)(i) expressly protects a property acquired for use as a residence but never occupied as such provided the intent to so occupy is present.
14. [1952] N.Z.L.R. 782.

the Joint Family Homes Act 1964, the property must be used "exclusively and *principally*" as a home. North J. had the following to say about the requirement:[15]

> I am disposed to agree with the submission made by counsel for the defendant that the association of the three words "exclusively or principally" does indicate that Parliament still intended to make it plain that the question of fact which must arise on every application for registration where land and dwellinghouse are used for more than residential purposes should not be determined by a nice assessment of the value or extent of the relative forms of user. There must in many cases be considerable difficulty in making such an assessment, for the forms of user may be quite different, and there may be no easy basis of comparison. In my opinion, the matter must in every case be viewed broadly and as a matter of common sense. Plainly, it is no longer a bar to registration that some business is carried on on the land or in the dwellinghouse. Nor is it necessarily a bar that a room in the dwellinghouse is let to another person. It is all a question of degree. The word "principally" is defined in *7 Oxford English Dictionary*, Pt. II, p. 1375, as meaning in the chief place . . . mainly above all . . . primarily, fundamentally . . . The true test, in my opinion, must always remain: For what purpose are the dwellinghouse and land principally used? It is to be noticed, moreover, that the test is to be applied in respect of both the dwellinghouse and the land. In arriving at a proper conclusion, no doubt the space occupied for the business or other purpose, the nature of the business, and the extent of the other user are all relevant to the inquiry, but I agree any one may not be decisive.
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> Having regard to the purpose of the Act, in my opinion in every case the question that has to be posed is this: Are this land and dwellinghouse by and large being used as a home, so that any reasonable person would say that was the primary and fundamental use?

North J.'s observations are pertinent to the Property Speculation Tax Act subject to the modification that it is not only the actual use to which the property is put that is relevant but also the intended use at the time of acquisition. In most instances the former will be evidence of the latter.

At least three common usages of land will be protected by the requirement as to "*principal*" residential use. The property deal now often seen in the larger cities, the sale and purchase of a "home" containing a smaller flat would clearly satisfy this requirement. A more difficult question would arise where a property contains two or more flats equal in size, one of which is used by the taxpayer as his residence.

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15. Ibid., 787.

Arguably a taxpayer might in such circumstances still establish that the property was *acquired* primarily and principally as his residence, the income producing characteristics of the property being purely a secondary consideration, but would stumble at establishing that the property was used *subsequent* to acquisition "primarily and principally" as his residence.

A "farmlet"[16] comprising the taxpayer's residence and a small surrounding area of land used for raising animals or growing crops as a secondary source of income would seemingly qualify for protection under s. 18(1)(a)(i), as would a property used as the family residence and also, to a limited extent, to keep boarders.[17]

(b) s. 18(1)(a)(ii)

This provision, an alternative to s. 18(1)(a)(i), requires the proposed construction of a *"dwellinghouse"*. Dwellinghouse is undoubtedly one of those words that can be grasped more readily than it can be defined with exactitude and a somewhat colourless definition would be a building used for human habitation.[18] To the extent that the provision calls for an enquiry intow hether the proposed use is primarily and principally residential, the comments already offered as to this issue in regard to s. 18(1)(a)(i) are applicable.

It is thought that few, if any, problems will arise as to the meaning of "dwellinghouse", but in light of the earlier statements as to holiday baches and the fact that some such baches constitute the meanest of buildings, it is proposed briefly to consider their claim to be labelled as dwellinghouses.

A seaside bach has been held to be a dwellinghouse within the meaning of the tenancy legislation and it is thought that a similar view would prevail under the Property Speculation Tax Act. In *Blaxall* v. *Shearer*[19] the defendant, who had a permanent home elsewhere, rented

16. For an example of a "farmlet" considered in relation to the definition of a "dwellinghouse", see *Dalzell* v. *Smith* [1946] N.Z.L.R. 421, a decision under the Fair Rents Act 1936.
Note the limitation in s. 18(2) of the Property Speculation Tax Act 1973 as to the area of land protected.
17. The question must always be one of degree. See *Curtiss* v. *Devlin* [1942] N.Z.L.R. 197, also a decision under the Fair Rents Act 1936. A plethora of magisterial and Supreme Court decisions are to be found in the law reports involving the distinction drawn in the Tenancy Act 1955 and its statutory forbears between the use of a property for residential and other purposes. Such cases are only of limited use in the context of the Property Speculation Tax Act. The enquiry as to principal use is essentially one of fact and each case must, to a great extent, turn on its own particular facts. Also, many of the decisions under the tenancy legislation have turned on statutory considerations irrelevant to the enquiry under s. 18 of the Property Speculation Tax Act 1973.
18. The Tenancy Act 1955, s. 2, defines a dwellinghouse as "any building or part of a building let as a sparate dwelling . . . ". See also Northcroft J. in *McCarthy* v. *Preston* [1951] N.Z.L.R. 1091.
19. (1947) M.C.D. 61.

from the plaintiff a bach containing one room and a sun porch. The bach was used by the plaintiff during the weekends and holidays and continuously from December to Easter in each year. Thompson S.M. held the bach to be a dwellinghouse within the meaning of the Fair Rents Act 1936. It was clear to the learned Magistrate that the bach had been let for one purpose — to be used by the tenant as a dwellinghouse when he so desired.[20]

A similar decision[21] was reached shortly afterwards in respect of what was called a "seaside cottage" used during school holidays and occasionally during weekends. Luxford S.M. rejected the contention that to 'dwell', as in dwellinghouse, postulated continuous residence.[22] While it is not stated in the report, it can be implied from counsel's reliance on the argument as to continuous residence that the seaside cottage would have otherwise qualified as what would be termed a dwellinghouse. Also, the bach in *Blaxall* v. *Shearer,* while being very basic, was provided with the amenities generally thought essential to human habitation, a water supply and sanitation facilities. A point might, however, be reached where a construction cannot reasonably be termed a dwellinghouse as the term appears suggestive of some minimal standard of construction. In respect of a bach, this occurred in an Australia ncase, *Bakes* v. *Huckle.*[23] Mr Justice Barry in the Supreme Court of Victoria held a three room "seaside shack", devoid of all amenities, unlined in one room, unventilated in the other two and only occupied for short periods, not to be a dwellinghouse within the Australian National Security Regulations:

> It afforlds privacy and protection from the eements in the summer months, but is without the facilities that are necessary to make a building reasonably habitable as a dwelling.[24]

The enquiry under s. 18(1)(a)(ii) is into the purpose for which the land was acquired and it is certain that a taxpayer's plans for a seaside section will at least be for a bach similar to that in *Blaxall* v. *Shearer,* although the realisation of his purpose, if he had not disposed of the land, might have been something akin to the shack in *Bakes* v. *Huckle.*

(c) s. 18(1)(b)

This provision prevents the person who acquires property with the *"purpose"* or *"intention"* of selling it at a profit from seeking the protection of the homeowner's exemption. Two preliminary observations need to be made. Very few people buy land with the intent of retaining it forever. But this fact coupled with the realisation that on any subsequent sale a profit will be made is clearly insufficient to take the homeowner outside the exemption. An actual purpose or intent

20. Ibid., 63.
21. *Crump* v. *de Clive Lowe* (1947) 5 M.C.D. 210.
22. Ibid., 211.
23. [1948] V.L.R. 159.
24. Idem.

to dispose of the land at a profit must be the factor or at least one of the factors inducing the acquisition.

The purpose or intention the provision attacks is that relating to the land actually disposed of. A person might acquire a property for a number of reasons, and the mere fact that he wishes to use the property primarily as a residence will not bring him within the exemption if a different purpose or intent can be discerned in respect of part of the land.[25]

The distinction between "purpose" and "intention" was argued and pronounced upon with some regularity, if not consistency, in respect of s. 88(1)(c) of the Land and Income Tax Act 1954,[26] since under the two most important limbs of that provision something less than a "purpose" of selling the property or making a profit would not attract tax liability.

The legislature in requiring the homeowner to negative both an intent as well as a purpoes of profit making has resolved, for the speculation tax and in favour of the Commissioner, much of the legal subtlety evident in case law on s. 88(1)(c).

If a particular consequence, here the making of a profit, is desired, it is intended. Purpose has been said to be something more than intent: it is added to intent and means the object which the taxpayer has in view or in mind.[27]

A purchaser might wish to buy as a family home a dwellinghouse standing in an acre of ground, a section he considers too large and capable of subdivision but one nevertheless the vendor insists must be sold with the house. If the purchaser acquires the whole property planning to sell off the unwanted portion of the land, it can be said that *his object in view* in purchasing the land he subsequently sells was not to sell it at a profit, but to enable the acquisition of the family home. Be this as it may, an *intent* to realise the land at a profit would exist if the homeowner could be said to have desired to sell the land at a price over its proportional cost.[28]

(d) s. 18(1)(c)

This provision is complementary to s. 18(1)(b) in the sense that it strikes at properties disposed of for the *"principal reason"* of profit making whereas s. 18(1)(b) strikes at the profit making purpose or intent at the time of acquisition.

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25. *Plimmer* v. *C.I.R.* [1958] N.Z.L.R. 147 at 149, 150, per Barrowclough C.J.; *C.I.R.* v. *Walker* [1963] N.Z.L.R. 339 at 362 per North J.; 366 per Turner J.
26. *Bedford Investments Ltd* v. *C.I.R.* [1955] N.Z.L.R. 978; *Plimmer* v. *C.I.R.* [1958] N.Z.L.R. 147; *Davis* v. *C.I.R.* [1959] N.Z.L.R. 635; *Land Projects Ltd* v. *C.I.R.* [1964] N.Z.L.R. 723; *C.I.R.* v. *Walker* [1963] N.Z.L.R. 339; *C.I.R.* v. *Hunter* [1970] N.Z.L.R. 116.
27. *Plimmer* v. *C.I.R.* [1958] N.Z.L.R. 147 at 151 per Barrowclough C.J.
28. See also the example offered by Hutchison J., *Davis* v. *C.I.R.* [1959] N.Z.L.R. 635, 638.

An expectation of a profit should not be confused with a reason for sale, and the disposal of a family home, even where there is no better reason for the change than the homeowner's desire to acquire a residence more in keeping with his views as to his station in life would satisfy this requirement.[29]

(e) s. 18(1)(d)

It is suggested that this provision will cause little difficulty in practice, as any 'homeowner' in all likelihood will be able to point to strong reasons arising since the acquisition of his home that have necessitated its disposition even if such reasons might in some instances disguise knowledge had prior to the acquisition of the property.

It is not, however, beyond the bounds of possibility that some non-speculative transactions might be trapped by this requirement. A person might be temporarily resident in a particular locality for a determinable period of time, say 18 months, and is desirous of buying a residential home to avoid the erosion of his wealth that would result from renting a property. Section 18(1)(c) would, it appears, compel him to either rent a property, or retain a property purchased for two years to avoid tax on any realised profit. It might be argued that in such circumstances a distinction can be drawn between knowledge of future circumstances and "circumstances which had arisen", as used in s. 18(1)(c). Such an approach would, however, empty the requirement of any content because in every situation some final operative circumstance, after the date of acquisition, could be pointed to.

(f) s. 18(2)

While this provision is designed to ensure that land protected by the homeowner's exemption is in reality of a "residential character", it is submitted that the provision is deficient in important respects.

It is assumed in the subsection that there *is* a dwellinghouse on the land. If a homeowner purchased a section in excess of 4,000 square metres that he subsequently sells within the two year period for non-speculative reasons, tax will be payable on the disposal of the excess land over 4,000 square metres. Protestations as to a proposed large home and accompanying amenities evidenced by an ample bank account at the time of acquisition, would be insufficient to overcome the plain wording of the section.

The subsection further assumes that any dwellinghouse on the land will be retained, and maintained in its present form. Once again proposed use of the property is excluded from the Commissioner's enquiry.

Finally, the provision fails to recognise that large sections might be acquired for reasons other than as an accompaniment for an

29. This particular point arose in a Parliamentary question. 1973, N.Z. Parl. Debates No. 27, p. 3560.

ostentatious dwellinghouse. Land has an intrinsic value of its own quite divorced from a dwellinghouse and might be bought as such. Tracts of land purchased to provide a family home in a wilderness or rural setting are not an uncommon example.

In all fairness it might be said that such tracts of land are not residential in character and should not qualify for protection under a homeowner's exemption. But this will not take matters much further because if such properties are not protected by the homeowner's exemption, the other exemptions will be generally inappropriate.

Of the other exemptions, the most significant is that in s. 19 for the sale of business properties.[30] The considerations to be taken into account in deciding whether or not a particular disposition is exempt under s. 19 are similar to those in s. 18. To guard against possible abuse of this exemption, those that are principally engaged in the business of

(a) buying and selling land

(b) developing land or buildings for sale

(c) erecting buildings on land for sale

must not only satisfy the basic requirements of the section as to a non-speculative sale, but must satisfy the Commissioner that the land disposed of was used as a permanent location for the management and administration of the business.[31]

The most striking feature of the businessman's exemption is the requirement that the land be *"occupied"* by the owner or an associated person. While the meaning of occupation can vary greatly according to context, in its most general sense, occupation refers to actual physical enjoyment of the property.[32]

It is apparent that the requirement of occupation in the exemption will prove controversial in respect of one type of business. The writer has in mind the landlord whose business, it might be claimed, is to divest himself of the occupation of his properties in favour of tenants. Can the landlord be said, for the purposes of the Property Speculation Tax Act, to be in "occupation" of his properties? The Commissioner thinks not:

> [t]he requirement of occupancy by the business is not deemed to disqualify the case of a house purchased for the use of a employee. This is considered to be a form of occupancy and to be directly related to the carrying on of the business.

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30. See also the Property Speculation Tax Exemption Order 1973, which protects the disposal of properties occupied by persons associated with the owner.

31. Property Speculation Tax Act 1973, s. 19(2).

32. See e.g. *Kerry* v. *Hughes* [1957] N.Z.L.R. 850 at 852 per McCarthy J. and *Newcastle County Council* v. *Royal Newcastle Hospital* [1959] A.C. 248 at 255 per Lord Denning.

> However, a rather different approach would be taken to a person who purchased a block of flats which he subsequently sold. In such a case the Department would not accept that the flats had been occupied by the business in the sense accepted in the case of employee accommodation. In this case the flat owner makes his income not from the personal occupancy of the flats, in the sense that a business does, but from the letting of them to others. The subsequent sale of the flat property would not be exempted under section 19.[33]

Such a view is hardly likely to convince a landlord, let alone find favour, as it is apt to deny to him any exemption under s. 19 no matter the reasons that have resulted in the sale of his property. The landlord who has purchased a property as a capital asset for his business, and is for some non-speculative reason obliged to sell within the two year period would, on the Commissioner's view, find himself liable for speculation tax unless he has by good fortune spent considerable sums on renovating the property,[34] or the property was compulsorily acquired by the Crown or a local authority.[35] The Commissioner has sought to place the landlord, by implication, in the same position as those dealers, developers and builders to whom the legislator expressly granted only limited access to the protective folds of the exemption.

It is submitted that the views of the Commissioner are too general, if not too uncompromising, and disguise what will be the probable legal position as to "occupation" by landlords.

There are various tenancy cases which deal with the meaning of "occupation" in relation to business as a landlord and such cases will be helpful in determining the position in respect of s. 19 of the Property Speculation Tax Act.

Section 36(e) of the Tenancy Act 1955 provides for the recovery of possession by the landlord of a tenanted property on the ground that the property is required for *"occupation"* by the landlord. In *Armagh Apartments, Ltd.* v. *Friedlander*[36] the landlord sought possession of an apartment house on this ground. The tenant had sublet all the apartments in the building and the landlord, if he obtained possession, had no intention of himself or his employees residing on the premises but proposed to continue letting the various apartments as had his tenant. Counsel for the tenant argued that the landlord did not require the property for his own occupation because he would "occupy" no part of the premises. Stanton J., on an appeal from the decision of McCarthy S.M., dismissed the appeal and possession was awarded to the landlord:[37]

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33. Property Speculation Tax Explanatory Notes, Head Office, Inland Revenue Department, November 1973, p. 11.
34. Property Speculation Tax Act 1973, s. 20.
35. Ibid., s. 21.
36. [1954] N.Z.L.R. 1180.
37. Ibid., 1181.

> I think that the nature of the property must be considered, and, unless apartment houses are to be put in a separate category, so that an owner can never obtain possession of one as such to enable him to carry on personally the business of such an undertaking, the words "possession" and "occupation" must be regarded as applying to the peculiar nature of the property and the business, and the owner must be treated as having a right to become the person entitled to such possession and occupation, although he does not obtain and cannot obtain the immediate right to any physical occupation of the property, or any part of it. The nature of the business carried on precludes — or may preclude — any such possibility, but the owner does not thereby lose such rights as the law gives him to become the person entitled to carry on that business on that property. It is to be observed, too, that this is the kind of "occupation' that the tenant has, and, if he may assert under the provisions of the Tenancy Acts a right to continue that occupation, the owner may, I think, with equal consistency assert a right to determine that occupation and assume it himself, subject, of course, to the provisions of those Acts.

Stanton J.'s observations are really ones of policy, related to the Tenancy Act 1955, and one might be excused for feeling that the initial aim of the exercise, to *interpret* the word "occupation", was somewhat lost.

A conclusion similar to that of Stanton J. had been reached by Luxford S.M. in an earlier case, *Rayner* v. *Tomlinson*.[38] In *Rayner* the landlord did intend to occupy one of the flats once it was vacant. The Magistrate's views as to the meaning of "occupation" were thus perhaps wider than the facts called for:[39]

> The words "for his own occupation" primarily mean "for his own physical occupation". Where a property is used solely for carrying on thereon an apartment-house business, the proprietor is in fact occupying the property for the purpose of his business, although he does not reside on the premises . . . [P]roof of an intention to carry on, for his own benefit, a business on the property, is sufficient to show that he requires the property for his own occupation.

Armagh's case was referred to with more than a little caution by the Court of Appeal in *Kerry* v. *Hughes*,[40] also a decision as to s. 36(e) of the Tenancy Act 1955. In this case the landlord sought possession of the premises containing a hall and adjoining rooms. The tenant used the hall on certain nights of each week and sublet the hall on other nights. The landlord desired possession to operate

38. (1947) 5 M.C.D. 52.
39. Ibid., 54.
40. [1957] N.Z.L.R. 850.

a business involving the hiring out of the hall together with an associated catering service. The tenant argued that the landlord did not require the premises for his own occupation. The case was heard in the Supreme Court before Stanton J., who applied to the facts of this case the principles he had enunciated in *Armagh*. Not surprisingly he found for the landlord. The Court of Appeal agreed with his conclusion, McCarthy J commenting:[41]

> [T]he question which requires to be determined is whether the facts which I have outlined justify the conclusion that the respondent has shown that he intended to "occupy" the premises. The premises involved in this dispute are, as I have said, a hall and some ancillary rooms. No doubt they could be put to a number of uses, but the proposed hiring out of them must, without question, be a use appropriate to their nature and construction, for that is the substantial use to which the appellant puts them at the present time. It is true that the respondent will not be present physically at all times, but he will, even when the premises are hired out, retain a measure of control. The cleaning and catering operations will be carried out by him or his agents, internal repairs will be effected similarly, and the choice of hirers will be in his hands. As I see it, his will be the real occupation, and the fact that the premises will be hired out for a matter of hours from time to time does not detract from the fact that he wants them for his own occupation.

The emphasis on the proposed control of the landlord over the premises is noteworthy as this factor was lacking in *Armagh*. The basis of McCarthy J.'s judgment thus appears to cast some doubt on the correctness of the decision in *Armagh*, although it can be said that the learned judge went no further than deciding on the particular facts before him that there was to be an "occupation" by the landlord.

If McCarthy J. was in form neutral towards the decision in *Armagh*, Finlay A.C.J. delivered an unmistakable warning as to the correctness of that decision:[42]

> I am in accord with the judgment of Stanton J. in *Armagh Apartments Ltd.* v. *Friedlander* . . . that, in considering whether what an owner seeks against a tenant is "occupation" or not, the nature of the property must be considered. Beyond that I express no view of the judgment in the *Armagh Apartment* case. Some question concerning it from other points of view may arise from the recent judgment of the English Court of Appeal in *Bagettes Ltd.* v. *G. P. Estates Co. Ltd.* . . . There is nothing in that case, however, which conflicts with the proposition of law from the *Armagh Apartments* case, which I accept.

41. Ibid., 852-853 North J. concurred with this judgment.
42. Ibid., 850-851.

In *Bagettes Ltd.* v. *G. P .Estates Co. Ltd.*,[43] referred to by Finlay A.C.J., the tenant carried on the business of "holders, managers and landlords of real property" on premises leased from the landlord. Under the Landlord and Tenant Act 1954 (Eng.), a tenant may apply to the Court for a new tenancy in respect of premises "occupied by the tenant and are so occupied by him for the purposes of a business carried on by him . . .". The tenant in *Bagettes* applied for a new tenancy under this Act, not on the basis of its occupation of the whole building (which had been substantially relet), but on the basis of its occupation of the basement rooms, common parts of the premises such as stairways and hallways, and vacant flats. The tenant's application was rejected due to particular considerations irrelevant to this enquiry. For present purposes the most important statement is that of Jenkins L.J. who said in the course of a judgment in which Lord Evershed M.R. and Birkett L.J. concurred:[44]

> A building wholly sublet in flats from top to bottom . . . could not qualify for protection under Part II of the Act of 1954, not because the subletting of the premises in flats would not be a business within the meaning of section 23 of that Act but *because the tenant would ex hypothesi not be in occupation of any part of the premises.*

It needs to be pointed out, however, that the Court was not called upon to decide this particular issue as the tenant conceded that he was not in occupation of the flats that had been sublet.

It is considered that the opinion expressed in *Bagette* is preferable to that of Stanton J. and Luxford S.M. and it is doubtful whether the latter views would prevail under the Property Speculation Tax Act. It should be conceded, however, that just as policy considerations as to the Tenancy Act 1955 have prompted the conclusions drawn by Stanton J. and Luxford S.M., policy considerations can also be advanced to support their views in the context of the Property Speculation Tax. As pointed out earlier, a landlord who is unable to satisfy the requirement as to occupation might very well find himself without an exemption for what was in fact a non-speculative transaction. Be this as it may, it is thought with respect that Stanton J. and Luxford S.M. have confused "occupation" with "use" of premises and the two, in the context of a landlord's business, are not the same thing. While it is indeed proper, as Finlay A.C.J. readily accepted in *Kerry* v. *Hughes*, to consider the nature of the property to determine what amounts to "occupation", the word must still be given a meaning that it will fairly bear and it is doubtful whether Stanton J. and Luxford S.M. have done this.

While the writer feels unable to offer any solace to the landlord who rents out a building in its entirety, there are many situations where something less than a whole building is occupied by tenants and here stronger arguments can be made on behalf of the landlord.

43. [1956] 1 Ch. 290.
44. Ibid., 300. Emphasis added.

The "control test" used by the Court of Appeal in *Kerry* v. *Hughes* is one that is flexible and, it is submitted, appropriate to a determination of what constitutes "occupation" within the meaning of the businessman's exemption. The issue of occupation becomes very much one of fact and degree, but clearly more than hall-owners, such as in *Kerry* v. *Hughes*, would be able to establish occupation on their part.

In *Lee-Verhulst Ltd.* v. *Harwood Trust*,[45] a recent decision of the English Court of Appeal, the tenant who operated a furnished apartment house applied for a new tenancy under the same provision of the Landlord and Tenant Act 1954 as had the tenant in *Bagette's* case. The tenant actually resided in the apartment house, in a basement flat. He attended to an oil fired boiler on the premises that provided hot water to all the apartments. The apartments basically consisted of furnished rooms, with minimal cooking facilities. Few apartments had their own toilet facilities. All linen was provided by the tenant who employed two chambermaids for such purposes. The only telephones on the property were in the tenant's name and all incoming calls needed to be channelled through him. The tenant also provided other small services for his sub-tenants such as storing belongings, taking messages and forwarding mail. The landlord argued that the property was not "occupied" by the tenant for the purposes of a business. This was rejected by the Court of Appeal which applied a test similar to that of our Court of Appeal in *Kerry* v. *Hughes*:[46]

> [W]ere the premises "occupied" by the tenant for the purpose of that business . . . By Mr Lee and the staff the tenant company were present in the premises for the purpose of the business day and night; in the course of their services to the occupants they pervaded every room there; control was exercised by Mr Lee over the manner in which the occupancies were conducted — a control (e.g. by limitations over the cooking that was permitted and over who would stay in each apartment) of a degree much beyond that usual when a flat is let to a tenant on a normal lease: and in addition the tenant company's furniture was in every room.

A conclusion such as that in *Lee-Verhulst* v. *Harwood Trust* involves the landlord being in occupation of the entire building for the purposes of his business, although such occupation in respect of individual apartments is shared with the tenant. It has been recognised in other decisions that there may be a sharing of occupation; different persons occupying the same premises in different ways,[47] and there

45. [1973] 1 Q.B. 204.
46. Ibid., 213 per Sachs L.J. Karminski L.J. concurred.
Note also that Sachs L.J. did not consider the facts before him to be a borderline case.
47. See *Hills (Patents) Ltd* v. *University College Hospital Board of Governors* [1965] 1 Q.B. 90. This case was cited with approval in *Kerry* v. *Hughes*, supra, n. 40 at 853 per McCarthy J.

is no requirement in s. 19 of the Property Speculation Tax Act that occupation be *exclusive*. It is considered that in factual situations similar to that in *Lee-Verhulst* the landlord would satisfy the requirement of occupation in s. 19 and would be *prima facie* able to avail himself of the businessman's exemption.

There still remains for consideration the situation that arose in *Bagette*, where the landlord lacks control such as that seen in *Lee-Verhulst* and as such cannot be said to be in occupation of the entire building but is, nevertheless, arguably in occupation of certain rooms and common parts of a building such as entrance ways, hallways and staircases. In *Bagette*, where the property was let out to sub-tenants with the exception of the basement and common stairways, Jenkins L.J. readily countenanced that as long as the tenant held a tenancy over the whole property such unlet parts of the building were *occupied* by him, and for the *purposes of his business*.[48] The retained part of the building was used to provide services to the tenants. The basement contained a boiler to provide hot water and was used for storage purposes. The common stairways, it can be implied, afforded to all tenants an equal right of entry and exit.

Would such occupation satisfy s. 19 of the Property Speculation Tax Act? Occupation of *part* of the land for the purposes of a business would clearly be insufficient to bring any disposition of the *whole* land within the businessman's exemption, but it is not unlikely that the Commissioner will need at some time to recognise the possibility of a partial exemption for a property totally committed to the owner's business purposes, but only part of which is occupied by him.

Such is the controversy that might well result as to the requirement of "occupation" in the businessman's exemption. It is considered that the legislature should have spelt out more clearly its policy as regards landlords. It is unsatisfactory that in the final analysis the application of a tax designed to discourage speculation might, in the case of landlords, turn not on the issue of speculation, but on the amount of services provided by the landlord for his tenants.

Consistent with its aim of deterring only the "speculator", the legislature has in s. 20 provided an exemption for the property "developer". Where 40% of the cost of the land is represented by improvements carried out by the taxpayer, a disposition of the property is exempt from the speculation tax. "Improvements" given its widest meaning, is something that has the effect of enhancing the land's value.[49] Where the taxpayer is engaged in the business of renovating buildings, or is a builder who numbers renovation amongst his activities, the

48. *Bagettes Ltd* v. *G.P. Estates Ltd*, supra, n. 43 at 300-301.
49. *Morrison* v. *F.C.T. of Land Tax* (1914) 17 C.L.R. 498 at 503-504 per Griffith C.J. cited with approval in *Goldsworthy Mining* v. *Com. of Taxn.* (1973) 47 A.L.J.R. 175 at 182 per Mason J. See also the definition of improvements in the Valuation of Land Act 1951, s. 2.

40% requirement as to improvements is reduced to 20% of the total cost to him of the land, provided such improvements are by way of *"renovation"*. To renovate means to replace or make new and linguistically the word can be and often is used inter-changeably with repair. The word repair has been lucidly defined by Windeyer J. in the context of a case involving substantial repairs to a building:[50]

> The works in question can all be fairly described as repairs to the building. They were done to make good a deterioration that had occurred by ordinary wear and tear or by the operation of natural causes during the passage of time. . . . understanding the concept of "repair" is not much aided by contrasting that word with other words that in themselves gain only by contrast whatever precision of meaning they have in this field. The words "repair" and "improvement" may for some purposes connote contrasting concepts; but obviously repairing a thing improves the condition it was in immediately before repair. It may sometimes be convenient for some purposes to contrast a "repair" with a "replacement" or a "renewal". But repairs to a whole are often made by the replacement of worn-out parts by new parts. Repair involves a restoration of a thing to a condition it formerly had without changing its character. But in the case of a thing considered from the point of view of its use as distinct from its appearance, it is restoration of efficiency in function rather than exact repetition of form or material that is significant.

It is doubtful whether the legislature in using the word "renovation" had anything more in mind. Substantial repairs to a building are more appropriately termed renovations, if for no other reason than common usage. Similarly as with repairs, "renovations" need to be distinguished from "additions" to and "reconstruction" of the building. Problems are, however, unlikely to occur. While renovation is clearly something less than a reconstruction of a property, it would appear that if the limits of "renovation" were transgressed, the 40% requirement as to improvements would be satisfied anway.[51]

3. Liability to the Tax:

Tax is payable on the "assessable profit" resulting from a disposition of land. Briefly, the assessable profit is the difference between the value of the land at its date of acquisition and its value at the date of disposition taking into account expenditure incurred and revenue derived from the land that has not been considered for income tax purposes.[52]

50. *W. Thomas & Co. Pty Ltd* v. *F.C.T.* [1966] A.L.R. 915, at 925.
51. Note that the Property Speculation Tax Act 1973, ss. 17, 21, 16 also provide exemptions for land passing on a will or intestacy, land compulsorily acquired by the Crown or a local authority, and land held by public authorities exempt from income tax or by executors.
52. Property Speculation Tax Act 1973, ss. 8, 9. See s. 10 for the position where a loss rather than a profit results.

The date of acquisition and disposition have a technical meaning for the purposes of the Act, being linked to the giving and taking of *possession* of the land rather than a change in ownership.[53] The choice of such point in time for speculation tax assessment purposes is seemingly to counter avoidance of the tax by the simple expedient of having the disponee enter into a long term agreement for sale and purchase so that ownership of the property will pass outside of the two year danger period.

As regards the value of the land, the Commissioner is empowered to value "in such manner as he thinks fit."[54] Sections 5 and 6 which are concerned with valuation at the date of acquisition and disposition, respectively should, however, be borne in mind. It is there declared that when land is acquired, in the case of s. 5, and disposed of, in the case of s. 6, for its "*market price* or *true value*", the value of the land is to be the value of the consideration paid. Market price looks towards the amount the land would be expected to realise if sold on the open market on a particular date,[55] here the date of acquisition and disposition. No better guide as to market price can be obtained than an actual sale of the property to be valued, and where parties to a land transaction are at arm's length and there has been no substantial time lapse between the sale of the property and the taking of possession, the Commissioner would be almost invariably likely to find that the price actually obtained for a property was its market price.[56] "Market price" and "true value" are phrased as alternatives, but if the provisions as to assessment are not to look ridiculous, market price must be regarded as synonymous with the land's "true value". The somewhat meaningless requirement that the value established be "true" is thus only of any significance where it can be said there is no market for the land in question so that a "market price" cannot be established. Given the ready marketability of land and interests in land this would rarely occur.

The Commissioner's power to value land as he sees fit and reference to objective values such as "market price" and "true value" might seem at first sight confusing in an Act designed to tax speculation profits. The legislature has had, however, to resolve the problems that would inevitably arise from dispositions for less than adequate consideration. On the one hand the taxpayer has to be protected from being taxed on a 'fictional' profit resulting from a subsequent disposal of land acquired by way of gift, but on the other hand, the tax must be protected from avoidance by outright gifts of land to a near relative followed by a subsequent sale. Sections 5 and 6 embody

53. Property Speculation Tax Act 1973, s. 2 definitions of "Date of acquisition" and "Date of disposition". See also ss. 11, 12 as to leases.
54. Property Speculation Tax Act 1973, s. 7.
55. See the Finance Act (No. 3) 1944, s. 29(1)(a) for a definition of market price and the cases thereon, Butterworth New Zealand Annotations Vol. 2, p. 902 et seq.
56. The Commissioner has already stated as much. See Explanatory Notes, ante, n. 33 at p. 4.

the legislature's resolution of this and related problems. If the donee of a gift of land sells that land within two years he is liable, subject to the exemption provisions, for speculation tax on the difference between the value of the land when he acquired it and the price he sells it for, provided that the donor of the gift had held the land for more than two years.[57] If his donor had held the land for less than two years, the donee is in effect put in the donor's shoes. The donee will be taxed on a sale of the land within two years basically on the difference between the value of the land when it was acquired by the *donor* and the price obtained by the donee.[58]

The Commissioner's power under the Act to value land as he thinks fit is one aspect of a more general feature of the Act that provoked some controversy. This is the large number of discretions that have been granted to the Commissioner. Apart from criticisms voiced in Parliament, the past President of the Real Estate Institute is reported as having called the Commissioner's powers of valuation "totalitarian".[59] Of more substance, an article in a Wellington newspaper by a lawyer[60] criticised the Act on the basis that its reliance on discretionary provisions was apt to deprive the legislation of that degree of certainty desirable in a taxing statute, or for that matter any statute.

When the Act is examined it can be seen that there are indeed numerous discretions. It is noteworthy, however, that most relate to issues of valuation, a matter where there is clearly a need for flexibility and where it is dangerous, if not impossible, to provide absolute criteria. As asserted earlier, the exemption provisions in the Act are of crucial significance to its operation and while there are certainly difficulties with these provisions, undue reliance on discretions is not to be numbered amongst them.

A final factor to be borne in mind is that the objection procedures of the Land and Income Tax Act 1954 have been incorporated into the Act,[61] and except in a few minor matters, the Commissioner's exercise of his discretionary powers will be subject to review.

4. Tax Evasion and Avoidance:

A deterrent to be effective must not be evaded. The Property Speculation Tax Act grants to the Commissioner powerful weapons to be used against the would-be tax evader and avoider.

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57. This does, however, give rise to the oddity that if the donee sells immediately he will not, in all likelihood, have any assessable profit and will not be taxed, but if he waits say one year there will be tax payable.
58. The Commissioner's Explanatory Notes, ante n. 33 contain a helpful summary as to liability for transactions that involve some inadequacy of consideration.
59. *Dominion*, July 10, 1973.
60. *Dominion*, July 16, 1973.
61. Property Speculation Tax Act 1973, s. 30.

To prevent evasion, the Act requires the furnishing of returns by those deriving an assessable profit from the disposition of land[62] and the maintenance of records of such profits up to a maximum of seven years.[63] To counter dealings in *contracts* as to land, all instruments relating to the disposition of land lodged for stamping with the Department of Inland Revenue must be accompanied by certificates from both the disponor and disponee detailing any intermediate transactions.[64] For the speculation tax evader who is caught, the penalties are the same as those suffered by the income tax evader. There is the possibility of a $200 fine,[65] penal tax of treble his tax liability[66] (here the high rates of the speculation tax should not be forgotten!), and publication of his name.[67]

The Act contains in s. 14 a general anti-avoidance provision of considerable power. The drafting of this provision has obviously benefitted from a consideration of the large and still growing body of case law relating to its equivalent, s. 108 of the Land and Income Tax Act 1954. From the Commissioner's viewpoint, s. 14 is an improvement over s. 108 in two important respects.

Section 14 avoids arrangements as against the Commissioner that have as *one* of their purposes the avoidance of speculation tax. The Privy Council in *Mangin* v. *C.I.R.*[68] has interpreted s. 108 as requiring that tax avoidance be the *sole or principal purpose* of an arrangement. While most tax avoidance cases even prior to *Mangin* v. *C.I.R.* would have satisfied this test on the facts, a dominant purpose test is dangerous for the Commissioner as it invites the Court, where the taxpayer is able to put forward various reasons for his arrangement, to ignore what is a purpose of tax avoidance on the basis of its 'subsidiary' nature. This invitation has been accepted in two Supreme Court decisions.[69]

Section 108 has been called an "annihilating" provision; it enables the Commissioner to void arrangements but it does not allow him to create anything in their place. It is thus possible for a taxpayer, by good fortune or otherwise, to find that after his arrangement has been voided he can still not be taxed as no taxable situation in which he receives assessable income is disclosed.[70] To further complicate matters, courts have not been entirely consistent in their approach to the issue of annihilation, although they can hardly be blamed when their difficulties are considered[71]

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62. Ibid., s. 23.
63. Ibid., s. 38.
64. Ibid., s. 57.
65. Ibid., s. 37.
66. Ibid., s. 41.
67. Ibid., s. 46.
68. [1971] N.Z.L.R. 591.
69. *Grierson* v. *C.I.R.* 3 A.T.R. 3; *Wheelans & Ashton* v. *C.I.R.* 3 A.T.R. 308.
70. *Gerard* v. *C.I.R.* 3 A.T.R. 271 would be the most striking example.
71. See *Mangin* v. *C.I.R.* [1971] N.Z.L.R. 591 at 596-597, per Lord Donovan.

Annihilation problems have been obviated in respect of s. 14 by granting what is in effect a power of "reconstruction" to the Commissioner:[72]

> (4) Where an arrangement is void under this section, the Commissioner may make an assessment of the amount of property speculation tax that he considers would have been payable, but for that arrangement, on any person by whom he considers it would, but for that arrangement, have been payable.

The strong anti-avoidance provisions epitomise the Government's hard line towards the "speculator". It is thought that s. 14 will be rarely called upon by the Commissioner as the generally restrictive nature of the Act leaves little apparent room for avoidance.

One type of arrangement that might escape the substantive provisions of the Act but would certainly fall foul of s. 14 is the arrangement hinted at in different quarters where the would-be purchaser of land buys the property at a disproportionately low price and some other unrelated article at an inflated price.[73]

For the ingenious "speculator" able to see a way past the various provisions of the Act including s. 14 there will only be a temporary respite:

> "If they (the "speculators") try to find their way through this legislation, then we will close up the gaps."[74]

B. SECTION 8 OF THE LAND AND INCOME TAX AMENDMENT ACT 1973:

A please for the reform of s. 88(1)(c) of the Land and Income Tax Act 1954[75] was made six years ago by the Ross Committee,[76] but it has apparently taken the "speculator' 'to prompt a Government

72. Property Speculation Tax Act 1973, s. 14(4). The relationship between s. 14 and s. 108 can be seen in other respects as well. Section 14(2) contains the test of reliability most often employed in the context of s. 108, a test derived from the opinion of Lord Denning in *Newton* v. *C. of T. for Australia* [1958] A.C. 450.
73. Note in particular s. 14(3). Note also s. 7 which allows the Commissioner to apportion the consideration between land and assets disposed of *together*. Where separate contracts are concluded, the land and assets could not be said to have been sold together. For a restrictive interpretation of "together" see *Douglas* v. *Commissioner of Stamps* (1904) 24 N.Z.L.R. 716.
74. Hon. W. E. Rowling, 1973 N.Z. Parl. Debates No. 14 at p. 1806.
75. Section 88(1)(c) prior to amendment was as follows: (c) All profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of it, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit.
76. *Taxation in New Zealand,* The Report of the Taxation Review Committee (1967), para. 659.

into action. A strengthening of the provisions of s. 88 was announced as part of the Government's budget night package for curbing property speculation and this is reflected in the eventual amendment which applies only to transactions involving land.[77] Section 8 of the 1973 Amendment and the Property Speculation Tax Act form in many respects what is an interrelated code of tax laws for transactions in Land. There is an overlap in their objects, and there is much legal terminology common to both. The Property Speculation Tax is the primary of the two: where speculation tax has been paid there is no liability for income tax.[78] The taxes are, however, conceptually different and while there is an overlap in their objects, s. 8 has implications extending far beyond the control of property speculation.

Section 88(1)(c) was always productive of litigation. While this was in part due to inadequacies of drafting and some curious decisions of the Courts[79] litigation was perhaps inevitable, given the nature of the provision. It provided what was the dividing line in the Land and Income Tax Act 1954 between capital and income and where a factual situation falls close to such borders, differences of opinion can be expected as well as "hard" decisions, where subtle differences of fact result in vastly different conclusions of law and taxability.[80] In terms of general principle, s. 88(1)(c) actually straddled the division between income and capital. By striking at "casual profits" resulting from "isolated undertakings", the provision *deemed* as income for the purposes of the Land and Income Tax Act 1954 what would otherwise be a capital receipt.[81] The criticism often voiced both inside and outside of Parliament as to the new amending s. 8 being a "capital gains tax" should be considered in relation to this point. While the section most certainly pushes the boundaries of income tax further, it should not be thought that here for the first time the threshold was passed between what could, outside of the deeming provisions of income tax legislation, be legitimately called income.

1. The present status of s. 88(1)(c):

Section 8 of the Land and Income Tax Amendment Act 1973 limits s. 88(1)(c) to personal property and introduces into the Land and Income Tax Act 1954 a new provision, s. 88AA, which spells

77. The definition of land is identical with that in the Property Speculation Tax Act 1973, s. 2. See s. 88AA(4) of the Land and Income Tax Act 1954 as inserted by the Land and Income Tax Amendment Act 1973, s. 8.
78. Property Speculation Tax Act 1973, s. 56.
79. Contrast *C.I.R.* v. *Walker* [1963] N.Z.L.R. 339 with *C.I.R.* v. *Hunter* [1970] N.Z.L.R. 116.
80. This can be seen most clearly in the decisions under the "third limb" of s. 88(1)(c) as to what is an "undertaking or scheme" for the purposes of profit-making as distinct from the enterprising realisation of a capital asset. Contrast, for example, the decision in 1 N.Z.T.B.R. Case 43 with that in 5 N.Z.T.B.R. Case 17.
81. See *Taxation in New Zealand,* ante, n. 76, para. 658; *McClelland v. F.C.T.* 10 A.I.T.R. 454, at 458, per Windeyer J.

out in detail the situations in which profits derived from transactions in land will be taxed as income.[82]

2. Section 88AA:

While the new provision runs into several pages, compared to the few lines of s. 88(1)(c), it is still aimed at the same three types of transaction attacked by s. 88(1)(c), namely:

(a) The sale of a property acquired for that purpose by the taxpayer.

(b) Business deals.

(c) Profit-making undertakings or schemes.

The expanded provision is thus taken up, not by changes in principle, but changes in detail, prompted by a stiffening of Government attitude and facilitated by a Commissioner well aware of the limits of s. 88(1)(c) as then drafted and interpreted.

(a) The sale of a property acquired for that purpose by the taxpayer

Section 88AA(1)(a) substantially restates the second limb of s. 88(1)(c) but includes an *"intent"* as well as a purpose to resell the land.

Thus, the best known case on "casual profits" and probably the one that has caused the Commissioner the most headache, *C.I.R.* v. *Walker*,[83] would now be decided differently. Walker purchased a piece of land containing a valuable frontage area on the outskirts of Invercargill adjoining his farm. The price paid was considerably in excess of that payable for farm land, and Walker *intended to offset his costs by subdividing and selling part of the land as building sections.* This he did, obtaining what the Commissioner calculated to be a profit of some $17,000. While it was not contended that Walker had tried to purchase the land shorn of its most expensive parts he was nevertheless able to persuade a majority of the Court of Appeal that his *"purpose"* was the purchase of land at a reasonable price and the subdivision and sale of the sections was a step in the fulfilment of his purpose.[84]

It is anomalous, however, that the distinction between "purpose" and "intention" should continue to apply in respect of property other than land.[85] The Ross Committee rightly considered the distinction drawn in cases between "purpose" and "intention" artificial, apt to provide an avenue of tax avoidance, and recommended its removal.[86]

82. Concern for the new provisions should not, however, obscure the fact that s. 88(1)(a), the general taxation provision for "businesses", is apt to catch those who "deal" in land.
83. [1963] N.Z.L.R. 339.
84. Ibid., 363, per North J.
85. See *Plimmer* v. *C.I.R.* [1958] N.Z.L.R. 147.
86. Ante, n. 76, para. 659.

While the Government's concern with land deals can be appreciated, it is thought that the opportunity that presented itself should have been taken and the distinction nullified entirely.

(b) Business deals

The first limb of s. 88(1)(c) is replaced for the purposes of land transactions by two provisions, s. 88AA(1)(b) which taxes profits made by persons who deal in land and s. 88AA(1)(c) which taxes the profits of those engaged in the business of erecting buildings.

The business activities of such persons are of course also taxable under the general provision for business income in s. 88(1)(a) and there is an overlap between this and the new provisions. Whether or not a person "deals" in land or is in the "business of erecting buildings" is very much an issue of fact and involves no new issues to those already canvassed in the considerable body of case law relating to the meaning of business in s. 88(1)(a).[87]

The real importance of the new provisions lies in the introduction of an "associated persons" test and the taxing, subject to certain specified exemptions,[88] of profits made from the sale of *any* land by dealers, builders or associated persons within ten years of acquisition.

The legislature has clearly had an eye towards tax avoidance in this area and has sought to prevent tax being escaped by the dealer or builder who cloaks the "business character" of a particular transaction behind family dealings or in a company with objects avowedly other than those of a dealer in land or an erector of buildings. The "associated persons" test drags into the taxation net, subject to the exemptions, dispositions of land by the dealer's or builder's spouse, infant children or companies he controls.[89]

In the case of dispositions by builders or their associated persons, there must have been improvements to the land other than of a minor nature before there will be tax liability under s. 88AA(1)(c).

What constitutes improvements of a "*minor*" nature is obscure.[90] While it must remain to be seen what "improvements" the Commissioner, and ultimately the Courts, are prepared to accept as minor, the extent of the improvements can seemingly only be measured by the overall increase in the value of the land as a result of such improvements. It is thus conceivable that the same improvements

87. See *Cunningham & Thompson's Taxation Laws of New Zealand.* 6th ed. (1967) para. 3042 *et seq.* For particular determinations as to dealing in land see 4 N.Z.T.B.R. Case 20; 4 N.Z.T.B.R. Case 23; 5 N.Z.T.B.R. Case 13.

88. See s. 88AA(2) which contains exemptions for land used as business premises, or a dwelling house used by the taxpayer primarily and principally as his place of residence

89. Land and Income Tax Act 1954, s. 88AA(8), as inserted by the Land and Income Tax Amendment Act 1973, s. 8.

90. See the discussion of "improvements" ante, n. 49 and text.

carried out to two different properties might in one case be minor and, in the other, something more than minor.

The new provisions would compel a different decision in *R. O. Slacke Ltd* v. *C.I.R.*[91] In this case one person owned virtually all the shares in a building company and an investment company. The investment company would often buy land to be developed as an investment and such development work was undertaken by the building company. On one occasion a property owned by the investment company was so developed but sold soon after at a profit. Quilliam J. held the profit to be outside s. 88(1)(c). The investment company was formed for the express purpose of holding investments, the property in question was acquired for that purpose only, the reason for its sale being a subsequent highly attractive offer.[92] The separate identity of the two companies would not now protect the investment company from the Commissioner. The investment company was "associated" with a company that was carrying on the business of erecting buildings, if not dealing in land. The land had been substantially improved and was sold within ten years of acquisition.

(c) Profitmaking "undertakings or schemes"

The third limb of s. 88(1)(c) has also been expanded into two separate provisions for the purpose of taxing profits from land transactions.

Section 88AA(1)(d) applies to "undertakings or schemes" entered into within 10 years of the land being acquired. It is a considerably stronger provision than the old s. 88(1)(c).[93]

All profits resulting from the disposition of land where there is an arrangement or scheme are taxed. The taxpayer will thus be taxed on the increase in the value of the land from the time of its acquisition, not only the profit resulting from the carrying out of the undertaking or scheme.[94]

What constitutes an "undertaking or scheme" is a matter that gave rise to considerable difficulty in the context of s. 88(1)(c). An undertaking was said to involve some "engagement" or the like with other persons,[95] and a "scheme" to be a plan of action devised in order to obtain some end, a project, an enterprise.[96] Such interpretations should, however, be viewed in the context of the actual case.

91. 1 A.T.R. 696.
92. Ibid., 698.
93. Some idea as to the general strengthening of the tax laws in this area can be taken from the fact that the Legislature has thought fit to expressly protect the "homeowner" who subdivides his section and the farmer who subdivides part of his farm to be sold as farm land. See Property Speculation Tax Act 1973, ss. 88AA(2A), 88AA(2B).
94. This basis of assessment was criticised in relation to the old s. 88(1)(c). See *Eunson* v. *C.I.R.* [1963] N.Z.L.R. 278, at 281, per Henry J.
95. *Eunson* v. *C.I.R.* supra, n. 94, at 280.
96. *Vuleta* v. *C.I.R.* [1962] N.Z.L.R. 325, at 329, per Henry J.

The approach adopted was invariably restrictive, in general based on the view that the tax was one on income, not capital, and as such care was needed that the mere enterprising realisation of a capital asset was not trapped by the provision. Concepts as to what was income were perhaps preserved at the expense of the plain meaning of the language. This was most learly seen in a recent decision of the Privy Council, *McClelland* v. *F.C.T.*[97] Seeking to rationalise the Australian equivalent of the third limb of s. 88(1)(c) in terms of "income" tax the Privy Council imported into the language of that provision a "business" requirement:[98]

> The undertaking or scheme, if it is to fall within s. 26(a) must be a scheme producing assessable income, not a capital gain. What criterion is to be applied to determine whether a single transaction produces assessable income rather than a capital accretion? It seems to their Lordships that an 'undertaking or scheme' to produce this result must — at any rate where the transaction is one of acquisition and re-sale — exhibit features which give it the character of a business deal. It is true that the word 'business' does not appear in the section; but given the premise that the profit produced has to be income in its character their Lordships think the notion of business is implicit in the words 'undertaking or scheme'.

A similar concern to maintain the boundaries of the tax as one on income can be seen in *Eunson* v. *C.I.R.*.[99]

> I reject any suggestion that the third limb of s. 88(c) so departs from the general scheme of income tax that it imposes what is tantamount to a capital gains tax. It does not sweep away the distinction, long recognised by the Courts, between capital gains and income gains. After all, as has been said by high authority, "income tax is a tax on "income", per Lord Macnaghten in *London County Council* v. *Attorney-General* . . . Assessable income is by s. 88 deemed to include certain specific items which either define or add to the general meaning of income. Such definition or addition does not limit the natural meaning of income. Nevertheless, the governing concept is something in the nature of income or profits from trading or dealing or the like with a view to profit.

The emphasis placed in these cases on the conceptual nature of the tax as one on income, should be considered in light of the fact that income is nowhere defined in the Land and Income Tax Act 1954 and s. 88 which sets out what constitutes a person's assessable income is expressly declared to be a "*deeming*" provision.

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97. [1971]1 All E.R. 969.
98. Ibid., 974, per Lord Donovan.
99. [1963] N.Z.L.R. 278, at 280, per Henry J. See also *C.I.R.* v. *Walker* [1963] N.Z.L.R. 339 at 361 per North J.

Whatever the validity of such a restrictive approach, the legislature has clearly sought in s. 88AA(1)(d) to counter it. The *McClelland* gloss has been rejected. Undertakings or schemes, whether or not "an adventure in the nature of trade or business" are caught and cases under s. 88(1)(c) should be treated with some caution. If conceptual issues are stripped away from the meaning of "undertaking or scheme" it will in general be difficult for the taxpayer to rebut the existence of a "scheme", if not an "undertaking", unless only modest development or divisional work has been done to the land prior to sale.[100] Apart altogether from the meaning of "undertaking or scheme" the legislature has expressely provided protection for the taxpayer in such a case. To be trapped, the undertaking or scheme must involve development or divisional work of more than a *"minor nature"*.[101]

Section 88AA(1)(e) contains a residual provision to catch certain undertakings or schemes entered into ten years or more after the land was acquired. By this time the "speculator" can be said to have well faded from the scene, and this is in fact reflected in the provision which is designed to tax the isolated but major development project.

C. CONCLUSION

Whether or not our economy has been blighted by property "speculators" is for the economists to decide and not lawyers. It could well be that the answer will never be known. Inflation and the continually increasing demand for what is a limited amount of land are seemingly apt to ensure that the present characteristics of the property market will not undergo any fundamental change.

The writer's general impression of the new tax laws engendered by concern at the activities of the speculator is favourable. While there are some difficulties as to both the Property Speculation Tax Act 1973 and s. 8 of the Land and Income Tax Amendment Act 1973, the utility of these new laws far outweighs their deficiencies. It is certain, whether or not the "speculator" has been unnecessarily maligned, that the Property Speculation Tax Act will be a powerful deterrent to short term dealings in land. Section 88(1)(c) (or 88c as it then was) has, it is submitted, been in need of reform since the decision in *C.I.R.* v. *Walker*[102] and the amendment is thus justified.

D. C. McKELVEY, LL.M.

100. For the type of case that it is considered would now be decided differently ,see 5 N.Z.T.B.R. Case 17.
101. The inscrutability of this phrase has already been referred to.
102. [1963] N.Z.L.R. 339.