

When does the business premises exclusion to the bright-line test apply?

PUB00316

7 June 2019



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Dear Grant

PUB00316 Income Tax – When does the business premises exclusion to the bright-line test apply?

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to provide feedback on the draft Question We've Been Asked (QWBA) explaining the “business premises” exclusion that applies for the purposes of the bright-line test.

CA ANZ supports the publication of the QWBA. It will be a useful resource for practitioners and taxpayers.

The bright-line test, s CB 6A, does not apply to land used predominantly as “business premises”¹. The draft QWBA takes the view:

1. “Business premises” means *a building and any surrounding associated land from which a person carries on a business.*
2. Land will have been used predominantly as “business premises” where:

¹ s YA 1 definition “residential land”

- *more than 50% of the area of land has been used as business premises; and*
- *the land has been used as business premises for more than 50% of the time the seller owned it.*²

Our comments on the draft QWBA are set out below:

Is a building necessary for the s CB 6A business premises exclusion?

The definition of “residential land” for s CB 6A excludes land “*used predominantly as business premises*”. The term “*business premises*” is not defined, therefore should be interpreted based on its plain ordinary meaning. We appreciate in most situations, business premises will mean a building and the associated land from which a business is carried on. However, in our view the exclusion should not be limited to land with a building. Each case should be considered on its own facts and circumstances. For example, a car yard should qualify as “business premises” even if there is no building. A car yard is one of many businesses that may occupy land but does not require a building. We note, a building does not include a portacom, a temporary building or a caravan.

Our view is supported by comparing the s CB 6A exclusion with the “business premises” exclusion in s CB 19(1)(b). Section CB 19 requires that premises must be “acquired and occupied or erected and occupied.” The word “erected” implies that a building or some sort of structure is necessary. Given the different wording, it cannot be presumed that the s CB 6A exclusion was intended to be interpreted in the same way as s CB 19.

Thames Water Limited v Hampstead Homes Limited [2003] 1 WLR 198 supports the proposition that a building should not be necessary for the s CB 6A exclusion to apply :

“Premises”, it seems to me, will usually include buildings but may not be limited to buildings and

² Draft QWBA Answer page 1

might in some circumstances refer to a place with few or no buildings on it. Premises may in its context also consist of a part of a larger building. A garden centre of a builder’s merchant may have premises which include one or more buildings but the premises may extend to the larger site used for the keeping of plants or bricks and sand. A garden centre might conceivably have premises with no buildings on it at all. The premises of a farming business might consist of a group of farm buildings but it would be a somewhat strange context perhaps, though not impossible, which included 100 acres of fields as part of the farm premises. The premises of a large corporation might in context consist of the entirety of a large office block.” (at 208)

The Special Report - Bright-line test for Residential Land commentary on the “business premises” exclusion also validates our view. It states: *“This will **generally require** there to be a building on the land ...”³ (emphasis added).*

Does “used predominantly” mean more than 50% of the total area and more than 50% of the time the land has been owned?”

In our view the QWBA should be extended to consider an alternative option. “[U]sed predominantly as business premises” should not be determined solely on area and time. Another measurement basis may be more appropriate. For example, where land is used for both commercial and residential purposes, the rental income receivable for the respective areas could take precedence over land area. To illustrate, two buildings are situated on the land, a residential dwelling and a commercial building. The square metre area of the commercial building is significantly larger than the dwelling but more than 50% of the land area is used for the dwelling and its grounds. The rental income received pa is \$80,000 for the commercial building and \$35,000 for the residential dwelling. In this case, we would argue that the land is used predominantly as “business premises”.

³ Bright-line test for Residential Land, Special Report from Policy and Strategy, Inland Revenue, November 2015

As a variation, the square metre area of the commercial building is smaller than the dwelling but due to the site location, a premium is paid for the commercial building. Again, it is arguable that the land is predominantly used for “business premises”.

Paragraph 17 which states, “...*the nature and the importance of the land’s different uses should be considered to determine which of the uses is the predominant*” supports an alternative option.

Mixed use asset or short-term accommodation

It would be helpful if the QWBA provided guidance on how the “business premises” exclusion applies to a mixed-use asset or a residence used to provide short-term accommodation.

Editorial

Paragraph 15, 3rd line, replace “*all or*” with “all of.”

We would be happy to discuss our submission with you.

Yours sincerely



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