PRACTICE STATEMENT No. 24

2nd release 17 July 2014

SUBJECT	**LAND SALES TAX: MEANING OF "SUBSTANTIAL DEVELOPMENT"**
DATE OF RELEASE	8 February 2006
DATE OF EFFECT	8 February 2006
CONFIDENTIALITY STATUS	May be released to the public
LEGISLATIVE REFERENCES	Land Sales Act Section s 2, 4, 5, 17 Income Tax Act Section 11(a)
PRACTICE CO-ORDINATOR	National Manager Revenue Collection

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INTRODUCTION

1. This Practice Statement sets out the practice of the Fiji Revenue & Customs Authority in relation to interpretation of the term "substantial development" for the purposes of the *Land Sales Act*. It is issued with the authority of the Chief Executive Officer of FRCA, who is also Commissioner of Inland Revenue. Sections 3, 4, 5, 9 and 10, of the Land Sales Act (Cap 137) were repealed on 1st May 2011, however the repealed provisions continue to apply to land dealings prior to that date .

LEGISLATIVE BASIS

2. The *Land Sales Act* imposes land sales tax on sellers of property in certain situations. One exemption from the tax is in section 5(b), which says:

> "5. Notwithstanding the provisions of section 3, no land sales tax shall be charged on any profits arising in any of the following transactions or cases: - ……
>
> *(b)* on land on which there has been substantial development by the seller or any predecessor in title;"

3. The term "development" is defined in section 2 of the Act as:

> "development" means-
>
> *(a)* substantial building operations on any land or the laying out of plots, roads, yards, drains, sewers, parks, gardens, lawns, orchards or the like;
>
> *(b)* re-building operations, material alterations or additions to or major structural repairs to any building or structure;
>
> *(c)* subdivision of any land by dividing the same and the laying out of plots, roads, yards, drains, sewers, parks, gardens, lawns, orchards or the like,
>
> and shall include any development of land used or proposed to be used for agricultural development;"

4. The terms "substantial" or "substantial development" are not defined in the Act. Due to recent instances where the meaning has been subject to different interpretations by FRCA and lawyers/tax agents, this Practice Statement seeks to clarify the meaning of the term. The case law in which the term "substantial development" has been considered will be used for guidance.

DEFINITION OF "SUBSTANTIAL DEVELOPMENT"

5. The definition of "substantial development" is: The statutory definition of "development" in section 2 of the Act, modified by the adjective "substantial"; where the meaning of "substantial", as described by Dunckley in the 1975 Court of Review case of *Edward Poy Leong v CIR* is "considerable". The ordinary dictionary meanings of "substantial" and "considerable" should be consistent with this definition.

6. For substantial development to take place it is not necessary that a house or other building be erected on vacant land, if other development such as of roads, gardens etc takes place to a substantial degree. Where there is no other substantial development except for the construction of a building, the building will only be considered "substantial" if it is permanently fixed to the land, such as through water and power connections if these are available. Temporary structures including cottages, bures, kit homes, demountable buildings and sheds will not be considered "substantial development".

7. Where a building has not been constructed, or an existing building not substantially extended or repaired, the exemption from land sales tax may still be available if other forms of substantial development have occurred. However, expenditure on surveying the land, grass cutting and planting of a few trees would not constitute substantial development.

8. One indicator of whether the development has been substantial is the amount of money spent by the taxpayer on the development. Rooney J of the Supreme Court in the *Morris Hedstrom case* referred to the development being "substantial in money terms", where development costs (not adjusted for inflation) were 26% of the original land cost. He does not suggest that "substantial in money terms" is the only way to determine substantiality, but this is a useful benchmark, and the Commissioner will accept costs of this order of magnitude as constituting "substantial development" (over 20% of original cost). Expenditure under 20% would not be accepted, unless one of the other tests for "substantial" development is met.

PROCEDURE FOR EVALUATING SUBSTANTIAL DEVELOPMENT

9. Where a profit has been made on a property dealing, the Commissioner will first consider whether the profit is taxed under the *Income Tax Act*. Section 4 of the *Land Sales Act* is explicit in that the *Income Tax Act* takes precedence over the *Land Sales Act*:

> "4.-(1) Any profits in respect of any dealing which would be liable to tax under the provisions of the Income Tax Act shall be assessed under the provisions of that Act and not under the provisions of section 3."

10. A separate Practice Statement (Number 25) sets out the Commissioner's policy in applying section 11(a) of the *Income Tax Act*. If the profit is not taxable under section 11(a) or any other section of the *Income Tax Act*, the Commissioner will consider if the *Land Sales Act* applies to the profit. In evaluating whether or not the transaction is exempt from *Land Sales Tax* under section 5(b), the Commissioner will form an opinion as to whether "substantial development" has taken place, as defined in the preceding section of this Statement.

11. The information used by the Commissioner to make the determination on whether development is "substantial" will be drawn from some or all of the following sources:

    (i) the application for transfer, the Land Sales Tax Declaration and other correspondence received from the taxpayer, their tax agent or lawyer;

    (ii) subsequent written or verbal enquiries made of the taxpayer, their tax agent or lawyer, the purchaser or their lawyer, or any other person;

    (iii) information obtained from a site inspection, with digital photos taken for evidentiary purposes;

    (iv) information from the Registrar of Titles;

    (v) information from local authorities responsible for building approvals;

    (vi) information from builders and contractors who have developed or purportedly developed the site.

12. Where a site inspection or other further enquiry reveals that a false statement has been made on a Land Sales Tax Declaration, e.g., that substantial development has been made when it fact the land was unimproved, or any other attempt to avoid land sales tax made, the Commissioner will invoke section 17 of the Act. This section provides for a court-imposed penalty of a heavy fine and/or 5 years imprisonment for wilful contravention of the Act.

13. All property transfers involving vendors who are residents of countries having a double tax agreement with Fiji will be reported to the tax authorities of those countries under the Exchange of Information article of Fiji's Double Tax Agreement, in case there are tax implications of the sale in those countries.

End of Practice Statement