

QUESTIONS WE'VE BEEN ASKED | PĀTAI KUA UIA MAI

When is a subdivision project a taxable activity for GST purposes?

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This Question We've Been Asked sets out when a subdivision project is an activity carried on continuously or regularly in the definition of "taxable activity" for GST purposes. It also sets out when the sale of subdivided land is a supply made in the course or furtherance of a taxable activity.

Key provisions | Whakaratonga tāpua

Goods and Services Tax Act 1985 – s 6

REPLACES | WHAKAKAPIA: Tax Information Bulletin Vol 7 No 2 (August 1995), "GST and subdivisions – Court of Appeal decision in the *Newman* case", Tax Information Bulletin Vol 7, No 2 (August 1995): 10.

All legislative references are to the Goods and Services Tax Act 1985 (GST Act) unless otherwise stated.

Question | Pātai

When is a subdivision project a taxable activity for GST purposes?

Answer | Whakautu

A subdivision project is a taxable activity when it is carried on continuously or regularly and involves, or is intended to involve, the making of supplies to another person for consideration.

Whether a subdivision project is carried on continuously or regularly needs to be considered on a case-by-case basis.

There are two steps to determining whether a subdivision project is continuous or regular. These are to consider:

- the number of lots created and sold; and
- the level of activity involved in the subdivision project, such as the scale of the subdivision and level of development work involved.

Broadly, the more lots created and sold (and therefore the more supplies made), the less activity is needed for a taxable activity to be continuous or regular. Generally, a subdivision leading to only one supply will not be a taxable activity unless the scale of the activity and level of work involved is very high. This is because cases indicate an activity leading to one supply that is not repeated is a “one-off” activity and therefore not continuous or regular. On the other hand, a subdivision leading to four or more supplies is likely to be a taxable activity unless the level of activity is very low.

This does not mean a subdivision activity leading to only one sale can never be a taxable activity or a subdivision activity leading to four or more sales will always be a taxable activity. The facts of each case must be considered individually. An example of an activity leading to one supply that would be a taxable activity is the construction and sale of a large office building. However, the construction and sale of a regular residential dwelling as part of a subdivision will generally not be a taxable activity.

Key terms | Kīanga tau tāpua

Subdivision means dividing a parcel of land into two or more, or changing an existing boundary location. For the purpose of this item, references to a subdivision also include any development or building work on the land carried out as part of a subdivision project, unless otherwise specified.

Explanation | Whakamāramatanga

1. A policy statement titled “GST and subdivisions – Court of Appeal decision in the *Newman case*” was published in *Tax Information Bulletin* Vol 7, No 2 (August 1995): 10.
2. That policy statement outlined the Commissioner of Inland Revenue’s position following the decision in *Newman v CIR* (1995) 17 NZTC 12,097 (CA). According to the statement, whether a subdivision project is a taxable activity for GST purposes depends on the facts of each case, considering factors such as the scale of the subdivision, level of development work, time and effort involved, amount of financial investment, and commerciality of the transaction.
3. The Commissioner considers many of these factors are still relevant when considering whether a subdivision is a taxable activity. This Question We’ve Been Asked outlines factors that might affect whether a subdivision project is continuous or regular, provides guidance on factors that are not likely to be relevant, and addresses some other related considerations regarding subdivisions and GST registration.

Legislation

4. Section 8(1) imposes GST on the supply of goods and services in New Zealand by a registered person in the course or furtherance of a taxable activity. A Taxpayer who is carrying on a taxable activity may be required to register for GST.¹ For general guidance on GST registration and requirements, see the Inland Revenue guide IR 375, *GST Guide: Working with GST*.
5. “Taxable activity” is defined in s 6. Under s 6(1)(a), the main features of a taxable activity are:
 - there is an activity;
 - the activity is carried on “continuously” or “regularly”; and
 - the activity involves, or is intended to involve, the supply of goods and services to another person for a consideration.
6. The courts have held that an “activity” is a broad concept involving a combination of tasks undertaken, or a series of acts or course of conduct pursued by a person.² Subdividing land is almost always an activity for GST purposes.

¹ The requirements and conditions for GST registration are set out in ss 51 and 51B.

² See, for example, *CIR v Bayly* (1998) 18 NZTC 14,073 (CA) at 14,078, and *Case 14/2016* (2016) 27 NZTC 3,036 at [63].

7. Subdivision is also usually an activity that involves, or is intended to involve, the supply of goods or services to another person for a consideration. This is usually satisfied as, in most instances, some or all of the subdivided land is sold or otherwise used for supplying goods and services. However, this is not always the case, such as where the subdivided land is kept for private use or for making exempt supplies.
8. This means that, in the context of a subdivision project, the most relevant factor will generally be whether the activity is carried on continuously or regularly. This Question We've Been Asked focuses on this factor.

Carried on continuously or regularly

9. "Carried on" has been described as "the habitual pursuit of a course of conduct, and as implying "a repetition of acts, and excluding the case of an association formed for doing one particular act which is never to be repeated."³
10. In general terms, an activity is carried on continuously if it is carried on over a period or in a sequence uninterrupted in time or if it is connected.⁴ An activity is carried on regularly if it is carried on accordance with a definite course or a uniform principle of action or conduct, or if a proper correspondence exists between the elements of the activity.⁵
11. It can be difficult to work out whether a subdivision project is a continuous or regular activity. This is because activities involving land usually involve a lot of work, time, and cost, but the number of supplies made is often low.
12. Cases confirm it is the activity that must be continuous or regular, not the making of supplies. However, the meaning of "continuously or regularly" must be considered in the context of the definition of taxable activity and the wider scheme of the GST Act.⁶ In this context, the types of activities contemplated seem to be those leading to the making of multiple supplies over time.⁷
13. The following guidance has been developed from comparing the facts, analysis, and outcomes of cases concerning the GST treatment of subdivisions. This is designed to assist taxpayers in working out whether a subdivision project they are involved in or

³ *Newman* (CA) per Richardson J at 12,100, citing *Premier Automatic Ticket Issues Ltd v Federal Commissioner of Taxation* (1933) 50 CLR 268 at 298; *Smith v Anderson* (1880) 15 CH D 247 at 277, 278 respectively.

⁴ *Wakelin v CIR* (1997) 18 NZTC 13,182 (HC).

⁵ *Wakelin* at 13,185-13,186.

⁶ *Newman* (CA) per Gault J at 12,102.

⁷ Consistent with the position taken in *Newman* (CA).

plan to be involved in is an activity carried on continuously or regularly, potentially requiring GST registration.

14. This item first provides a brief overview of the reasoning in the two most prominent cases concerning whether a subdivision activity is a taxable activity. It then outlines the relevant factors when determining whether a subdivision project is a taxable activity following the reasoning in these cases and other subsequent Taxation Review Authority decisions. The QWBA then briefly addresses some other relevant considerations.
15. Before *Newman*, courts and the Taxation Review Authority found almost all subdivisions to be taxable activities. The Commissioner considers these cases are no longer relevant as the interpretation of “continuously or regularly” differs from that taken in *Newman* and later cases.

Newman

16. The leading case on the meaning of “carried on continuously or regularly” in the context of subdivisions is *Newman* (CA).
17. The taxpayer in *Newman* was a GST-registered builder who bought 2.7 hectares of land to build a family home. Due to financial difficulties, he subdivided the land to fund the completion of the family home. Minimal development work was undertaken, but some drainage and electrical work was done. Eventually, the taxpayer sold the subdivided lot.
18. The Commissioner determined this subdivision was a taxable supply. The Taxation Review Authority and High Court both found that the sale of the subdivided lot was a taxable supply.⁸ This was consistent with most cases before *Newman*, where almost all subdivisions were found to be taxable activities.
19. However, on appeal, the Court of Appeal unanimously allowed the taxpayer’s appeal and found the sale of the subdivided land was not, by itself, a taxable activity as it was not an activity carried on continuously or regularly.
20. In reaching its decision, the Court of Appeal stated that dissection of what was done into a series of sequential steps does not answer the statutory test of whether the activity was carried on continuously.⁹ The Court used examples of shopping or selling a car as activities which, if broken down into a series of steps, could be described as carried on continuously. Instead, what is relevant is whether the activity (of which the

⁸ *Case P4* (1992) 14 NZTC 4,024, *Newman v CIR* (1994) 16 NZTC 11,229 (HC).

⁹ *Newman* (CA) per Richardson J at 12,101.

series of steps formed part) was one that was carried on continuously or regularly. On the topic of sale of a motor car, McKay J considered that if the sale was of only one car, the amount of work, time, and effort required to effect the sale cannot determine whether the activity of selling the car was continuous or regular. Instead, the one-off nature of the transaction prevents the activity from being continuous.¹⁰

21. The Court of Appeal in *Newman* deliberately did not express a view as to what would make a particular subdivision a taxable activity.¹¹ The Court acknowledged that some factual circumstances will be hard to classify but stated it will be a matter of fact and degree.¹²

Wakelin

22. The High Court decision in *Wakelin v CIR* is often contrasted with *Newman*.¹³ The taxpayer in *Wakelin* carried out subdivision work on a block of land. The taxpayer subdivided the land into six residential lots over a period of three years, and then sold all of the lots over the following six years. The case concerned five of the sales.
23. The High Court found that although there was not a “great deal” of work involved, and it could have been done in a relatively short time, the taxpayer continuously and regularly subdivided a portion of land and supplied five sections to the market over several years.¹⁴
24. The High Court distinguished *Newman* primarily based on the number of supplies made. While Paterson J acknowledged it is the activity that must be continuous or regular, not the supply of goods, the number of supplies made is still relevant.¹⁵
25. Following *Newman*, there have been several Taxation Review Authority cases concerning the GST treatment of subdivisions. Where relevant, these cases have been referenced and relied on in the guidance below.

Relevant factors

26. *Newman* and *Wakelin* provide contrasting examples of what is and is not a taxable activity in the context of subdivision projects. The taxpayers in both cases did a similar

¹⁰ *Newman* (CA) per McKay J at 12,104.

¹¹ *Newman* (CA) per Richardson J at 12,101.

¹² *Newman* (CA) per Richardson J at 12,101, per Gault J at 12,103, per McKay J at 12,104.

¹³ *Wakelin v CIR* (1997) 18 NZTC 13,182 (HC).

¹⁴ *Wakelin* at 13,186.

¹⁵ *Wakelin* at 13,185.

amount of work to effect the subdivisions, but one led to one supply and the other led to five supplies. These cases indicate the first step to consider is the number of lots created and sold.

Number of lots created and sold

27. There is no specific number of lots created that determines whether a taxable activity exists. However, *Newman* and *Wakelin*, other cases considering the meaning of continuously and regularly in this context, such as *Case S70*¹⁶ and *Case T62*,¹⁷ as well as the general scheme of the GST Act, demonstrate that ordinarily a subdivision activity leading to only one supply is not a taxable activity. Such an activity is more accurately described as a single “one-off” activity comprising many steps, rather than an activity carried on continuously or regularly.
28. For example, Paterson J in *Wakelin* was clear that in the case of an activity leading to the supply of one item or one section, “it is difficult to see how in normal circumstances, that activity can be carried on continuously or regularly, because it is in effect, a one-off transaction supplying one item”.¹⁸
29. Similarly, in *Case T62*, Judge Barber found that the subdivision of land into two, and the construction and sale of one apartment on one of the created lots, had the air of a “one-off” transaction.¹⁹ Relating the facts to *Newman*, Judge Barber considered this case did not involve repeated acts by the taxpayers, but merely the components or sequential steps of one activity.²⁰
30. On the other hand, where a subdivision activity involves the creation and sale of multiple lots, this may be a taxable activity even if the level of development work is similar to that in *Newman*.²¹ This does not mean a subdivision involving the creation and sale of multiple lots will always be a continuous activity.²² In some circumstances a

¹⁶ *Case S70* (1996) 17 NZTC 7,431.

¹⁷ *Case T62* (1998) 18 NZTC 8,468.

¹⁸ *Wakelin* at 13,185, cited with approval in *Case T62*.

¹⁹ *Case T62* at [50].

²⁰ *Case T62* at [53].

²¹ In *Wakelin*, Paterson J distinguished a one-off transaction supplying one item as in *Newman* from the sale of several sections. In *Case T40* (1997) 18 NZTC 8,267, the taxpayer intended to sell four lots but at the time had sold only two. Judge Barber stated it was not a one-off, as it was intended to involve the sale of four, or possibly five, sections. In *Case S70*, Judge Barber stated the level of development work was similar to that in *Newman*, but the increased number of resulting sections (four) was a distinguishing factor.

²² In *Case S70* Judge Barber acknowledged that the sale of more than one section may not amount to a taxable activity.

subdivision may be so straight-forward that even if multiple lots are created and sold, the activity is not continuous or regular. However, a court is much more likely to consider an activity "continuous" if it involves the sale of multiple lots.

31. The lots do not need to have already been created and sold when considering this.²³ Usually a taxpayer will need to work out whether they are going to be carrying on a taxable activity at the outset or before the bulk of the work has been done. However, if the subdivision project does not proceed as planned, the Commissioner will need to determine whether there is enough for a taxable activity to exist. See from [74] for more information about the beginning of a taxable activity.

Effect of number of supplies on other factors

32. Applying this in practice, the Commissioner considers the number of supplies made affects the relevance of other factors when determining whether a taxable activity exists. Broadly, where the activity leads to only one supply, there is a presumption that the activity is not continuous or regular, unless the level of work involved is very high. Where the activity leads to many supplies, there is a presumption that the activity is continuous or regular. While there is no specific number that will determine whether a taxable activity exists, the Commissioner considers generally a subdivision project involving the creation and sale of four or more lots will be a taxable activity, unless the level of work involved is very low.²⁴
33. Cases use the example of the construction and sale of a commercial building as an activity leading to one supply that is a taxable activity.²⁵ The Commissioner considers this is because of the usually high scale of such a project. The level of time and effort, development work, and financial investment in building something like a large office building will usually be very high. The commercial nature of such a project on its own is not relevant. Please see from [57] below on the relevance of commerciality for more information on this.
34. On the other hand, cases indicate a subdivision project that involves the construction and sale of a single residential dwelling is not, on its own, enough for an activity to be continuous or regular.²⁶

²³ Such as in *Case T40* where only two of the lots had been sold.

²⁴ This is consistent with *Case S70*, which concerned the creation and sale of four new lots.

²⁵ *Newman* (HC) at 11,233; *Newman* (CA) at 12,103; *Case S70* at 7,440; *Case T62* at [53].

²⁶ Consistent with *Case T62* and comments in *Newman* (CA) and *Wakelin*. *Case 7/2012* 25 NZTC 1,019 is a case where renovation work on a single dwelling was relevant. However, that was in the context of a much larger high-end residential subdivision project that was intended to lead to multiple

35. The following diagram illustrates the relevance of the level of activity involved in the project in relation to the number of supplies made (or planned to be made):



36. In summary, when the subdivision activity leads to one supply, a very high level of activity is needed for the activity to be continuous or regular. When the subdivision activity leads to four or more supplies, only a low level of activity is needed for the activity to be continuous or regular. When the subdivision activity leads to two or three supplies, considering the level of activity involved will be particularly important.
37. The relevant factors in considering the level of activity in a subdivision project are discussed below.
38. While the same approach will generally apply to other activities involving the development of land, the same criteria may not apply for other types of activity. The level of work involved in the development of land, and the scale of projects relating to it, relative to the number of supplies made, makes land development projects distinguishable from most other activities.

supplies. *Case N59 (1991) 13 NZTC 3,457* is a case where the construction and sale of a single residential dwelling was found to be a taxable activity. However, this case predates *Newman (CA)* and is therefore no longer relevant.

Level of activity

39. The second step is to look at the level of activity involved in the subdivision project, in light of the number of supplies made. In considering this, the following factors may be relevant when determining whether the activity is continuous or regular:
- the scale of the subdivision;
 - the level of development work;
 - the time and effort involved;
 - the level of financial investment; and
 - the level of repetition.
40. This is a general guide and is not an exhaustive list. If a taxpayer's circumstances share some elements in common with statements or examples in this QWBA, this does not necessarily mean that the taxpayer's tax treatment will be the same as that indicated by the statements or examples. Ultimately, the activity must be considered as a whole, realistically as it is carried on, and all relevant factors must be considered together.²⁷

Scale of the subdivision

41. Scale in this context means how large or extensive the subdivision is. The greater the scale of the subdivision project, the more likely it is to be an activity carried on continuously or regularly. This factor is likely to overlap with the level of development work, as the greater the scale of the project, generally the more development work that is needed.
42. Subdividing land to construct and sell a block of townhouses, or to construct an office building or apartment building, would almost certainly be a subdivision project of sufficient scale for it to be an activity carried on continuously or regularly, even if it leads to only one supply. Similarly, subdividing a large plot of land to be used as a new housing development would be an activity carried on continuously or regularly.

Level of development work

43. It is common for subdivision projects to involve some development of the land, particularly as this is often a requirement for council consent. This item only concerns development work in the context of a subdivision, but similar factors are relevant when

²⁷ *Newman* (CA) per Gault J at 12,102.

determining whether a land development project with no subdivision is a taxable activity.

44. The more development work involved in a subdivision project, the more likely it is to be an activity carried on continuously.²⁸ While *Newman* (CA) confirmed that an activity should not be broken down into sequential steps, it is still necessary to consider the steps involved in the activity to take a real and holistic view of the activity.²⁹
45. Development work might include:
 - earthworks and landscaping;
 - roading and installation of driveways and paths;
 - the installation of facility infrastructure, such as sewerage, power, wastewater drainage and so on;
 - the erection of retaining walls or dividing fences;
 - the demolition, removal, or renovation of existing structures or buildings on the land; and
 - construction of structures or buildings on the land. Larger and more complex structures and buildings usually require a higher level of activity, but this will depend on the particular facts of each case.
46. In all cases, it is the level of development work which is relevant, rather than the specific form the subdivided land takes after development is completed.

Time and effort involved

47. If a project is carried on over a long period, this might point towards the subdivision activity being continuous, particularly where the length of time is due to the level of work required. Similarly, if there is a large amount of effort involved on the taxpayer's part, this may point towards the activity being continuous. This would include any work on the taxpayer's part to effect the subdivision, such as organising consent, finance, or new titles, speaking with lawyers, surveyors and real estate agents, and any other general project management work.
48. It is noted that the time and effort involved in carrying out a subdivision project is likely to be higher if the taxpayer is carrying out development or project management work themselves, rather than hiring contractors to manage the project. This does not

²⁸ In *Newman* (CA), the low level of development work was relevant to the conclusion that a taxable activity did not exist.

²⁹ *Case S70* (1996) 17 NZTC 7,431 at 7,441.

mean work carried out by contractors is irrelevant. It may well be relevant to other factors such as the scale of the subdivision and the level of development work. However, if the taxpayer (as an individual or as an entity capable of being a registered person) is putting in very little time and effort to effect the subdivision, this is one factor that might support the view that the taxpayer's activity is not continuous or regular. On its own, this is unlikely to change whether a taxable activity exists, but it is still relevant as part of the broader enquiry.

49. If a subdivision project is interrupted in time or sequence, then it is not continuous or regular. Provided the intention to complete the activity is not interrupted, then an activity being carried on in "fits and starts" does not necessarily prevent it being continuous or regular, as Paterson J found in *Wakelin*.³⁰ That said, a continuous intention to complete the activity is not enough on its own. The more time in which there is no or only very little activity, the less likely an activity is to be continuous or regular. Tompkins J in *Allen Yacht Charters* said an activity that is intermittent or occasional does not qualify as continuous or regular.³¹ This means the amount of time taken is irrelevant if it is due to the activity being only intermittent or occasional.
50. In some cases, there may be circumstances outside the taxpayer's control preventing a subdivision from proceeding for an extended period, such as delays in obtaining resource consent. A taxable activity could in some cases continue even when facing extended delays, but each case and all the surrounding circumstances need to be considered. Relevant factors for this might include the reason for the delay, the length of the delay, the level of activity before the delay, and the steps the taxpayer is taking or has taken to ensure the subdivision proceeds as soon as possible.

Level of financial investment

51. The level of financial investment is unlikely to be a significant factor on its own. However, it may provide further support for other factors, such as the scale of the subdivision or level of development work.
52. If a subdivision project is unusually costly because of specific factors relating to the location of the land (for example, if the land is in an area with a labour or material shortage leading to increased prices or extended delays), this is unlikely to affect whether the activity is continuous or regular. Equally, if a subdivision project is particularly cheap due to the taxpayer doing some of the work themselves or receiving

³⁰ *Wakelin* at 13,186.

³¹ *Allen Yacht Charters Ltd v CIR* (1994) 16 NZTC 11,279 (HC) at 11,274.

assistance, such as if the taxpayer's solicitor is a relative who works for no fee, this is unlikely to affect whether the activity is continuous or regular.

Level of repetition

53. In the context of subdivisions, an activity is likely to be carried on "regularly" if a person carries out the subdivision process on a regular or repeated basis. This will be the case even if each individual subdivision project would not be a taxable activity on its own.
54. This could apply where a person has a pattern of acquiring land to subdivide, or where a person subdivides a single piece of land in a way that involves repeatedly supplying new lots over time. The High Court in *Wakelin* found that subdivision of the taxpayer's land and supply to market of five sections over nine years was an activity carried on both continuously and regularly.³² Similarly, the TRA in *Case 7/2012* indicated that if the taxpayer's planned subdivision project (which was to involve the development and sale of several high-end residential properties over time) had proceeded as intended, it would have been an activity carried on regularly.³³

Factors that are not likely to be relevant

55. When considering whether a subdivision activity is continuous or regular, the following factors are not likely to be relevant:
 - Commerciality;
 - Activity before there is an intention to make supplies; and
 - Actions that relate to subdivided land not used for making supplies.
56. This is not an exhaustive list of factors that are unlikely to be relevant.

Commerciality

57. The policy statement and some older cases referred to the relevance of the "commerciality" of a subdivision project, or distinguished between the sale of commercial assets and private assets, when determining whether a taxable activity exists.
58. The Commissioner considers commerciality is no longer significant following *Newman* (CA) and *Wakelin*. Richardson J in *Newman* disagreed with the approach taken by the

³² *Wakelin* at 13,186.

³³ *Case 7/2012* at [99].

Taxation Review Authority in *Case P4*. The Authority relied on the conclusion that the subdivision project was “commercial in nature” in reaching its conclusion that the taxpayer was carrying on a taxable activity.³⁴

59. Richardson J stated that determining whether a transaction was commercial in nature was not the relevant enquiry.³⁵

As I see it, it is not a matter of importing any overlay of commercial dealing or of trying to draw a distinction between the divestment of commercial assets and private assets. Rather it is whether the process engaged in, whatever the asset or its location or the occupation of the taxpayer, comes within the statutory language.

60. Judge Barber in *Case S70* later accepted the *Newman (CA)* view that whether a commercial element exists in the relevant activity is “beside the point”.³⁶
61. Similarly, Paterson J in *Wakelin* stated that lacking a commercial or businesslike flavour does not preclude a taxable activity from existing.³⁷

The fact that the venture may lack a commercial or businesslike flavour or that it may be a sale of private assets is not sufficient to preclude the application of s 6(1). A transaction which involves the sale of private assets, if carried out continuously or regularly, falls within the provisions of the section (see McKay J in *Newman v C of IR...*).

62. As previously stated, comments in *Newman (CA)* and other cases indicate that the construction and sale of a single commercial building on subdivided land is an activity carried on continuously or regularly.³⁸ The Commissioner’s view is that this does not mean the commercial nature of such a project on its own is significant, but instead this reflects the level of activity generally involved in such a project.
63. In some circumstances, constructing and selling a commercial building as part of a subdivision project will not be a taxable activity. The policy statement included an example involving the construction and sale of a tea shop on subdivided land. The example concluded the taxpayer was carrying on a taxable activity as it involved the construction and sale of a commercial building. The Commissioner now considers this example is lacking information, and may be incorrect depending on relevant facts. The level of work involved in building a tea shop may, in some cases, not be notably higher

³⁴ *Case P4* at 4,034.

³⁵ *Newman (CA)* at 12,100-12,101.

³⁶ *Case S70* at 7,440.

³⁷ *Wakelin* at 13,185.

³⁸ *Newman (CA)* at 12,101.

than that involved in constructing a residential dwelling.³⁹ As previously stated, the Commissioner considers the level of activity involved in the construction and sale of a single residential dwelling is not enough for the activity to be continuous or regular, given it leads to only one supply.

64. These views are consistent with the requirements of s 6. No requirement exists for an activity to be commercial or business-like for it to be a taxable activity. On the contrary, s 6(1)(a) specifies that an activity need not be carried on for pecuniary profit, and non-business structures such as clubs are explicitly included as ways in which an activity can be carried on. This also means a subdivision project need not be profitable for a taxable activity to exist. Judge Barber made this clear in *Case 7/2012*.⁴⁰ However, an activity carried on essentially as a private pursuit or hobby is not a taxable activity.⁴¹

Activity before intention to make supplies

65. The definition of “taxable activity” refers to any activity that involves, or is intended to involve, the supply of goods and services for a consideration. The “or” in “involves or is intended to involve” suggests it is enough for one of these requirements to be met.
66. In *Case T62*, referred to above, two taxpayers bought land with the intention of building two units for their families to live in, but when the units were approximately 65% completed, one of the taxpayers decided to remain in their existing home. Both units were sold to the company the taxpayers operated, with one unit being used as the family home of one of the taxpayers, and the other unit being sold to a third party at a profit.⁴²
67. Judge Barber found that because the building activity of the taxpayer’s apartment led to its sale, then the activity must have “involved” that supply even though it was not contemplated when the building work began.⁴³ Judge Barber found neither of the taxpayers were carrying on a taxable activity in relation to the sale of one of the units. One reason given in support of this decision was that the unit was “by then, being built

³⁹ However, if the taxpayer operated the tea shop or leased the shop to commercial tenants, rather than selling it, the costs involved in the relevant part of the subdivision and construction would form part of any taxable activity of running or leasing the shop.

⁴⁰ *Case 7/2012* at [102].

⁴¹ Section 6(3)(a) and (aa).

⁴² Judge Barber did not treat the sale to the company as significant.

⁴³ *Case T62* at [48].

to achieve profit for S by resale, but until then had been for [the purpose of housing S's family]".⁴⁴ He considered the work done before that point was not relevant.

68. For this reason, the Commissioner considers it is not necessary for a taxpayer to intend from the outset to sell some or all of the subdivided lots. In this situation, anything done in the course or furtherance of making that supply after the intention to make supplies for consideration arose is relevant to whether the activity is carried on continuously or regularly. If a taxpayer's intention changes during a subdivision project, the taxpayer has the onus of proving that intention changed and when, as with other factual matters.

Actions that relate to subdivided land not used for making supplies

69. Subdivision and development work that does not relate to the making of supplies is not relevant in determining whether a taxable activity exists. For example, if a taxpayer builds two units on subdivided land, lives in one unit and sells the other, only work and expenditure relating to the unit and land that is sold is relevant in determining the existence of a taxable activity.⁴⁵ However, consistent with the previous paragraphs, if a taxpayer intends to live in one of the units but changes their mind and sells both, then all the work involved in the subdivision and development after that intention changed is relevant when determining whether a taxable activity exists.
70. For similar reasons, the use of the land before its subdivision is not relevant. If a taxpayer lives on the land to be subdivided, this is not treated any differently from a subdivision project on land purchased specifically for that purpose. That said, buying a piece of land to subdivide is likely to involve higher upfront cost. It is also likely to require more time and effort in finding the right piece of land, and going through the processes to acquire it. As previously stated, these factors are relevant as part of the overall enquiry.

⁴⁴ *Case T62* at [44].

⁴⁵ *Tout v Cook* (1991) 13 NZTC 8,053 (HC) concerns a similar situation where a taxpayer built a house on subdivided land but then moved into the new house and sold the existing house. The High Court found the taxpayer was not carrying on a taxable activity, and did not consider any activity relating to the new house as relevant.

Other considerations

Existing taxable activity

71. Regardless of other factors, if a taxpayer is already registered for GST, whether any subdivision activity is part of that taxable activity depends on whether the subdivision was carried on in the course or furtherance of that taxable activity. This in turn depends on its connection, if any, to the taxable activity in question.
72. A subdivision activity that might not constitute a taxable activity on its own still gives rise to GST obligations if it was done in the course or furtherance of an existing taxable activity.
73. In *Case P4*, which led to the *Newman (CA)* decision, the Taxation Review Authority found that, even though the taxpayer had a taxable activity as a builder, the subdivision activity was not done in the course or furtherance of that taxable activity.⁴⁶ This meant the existence of a taxable activity needed to be established separately, and the subdivision did not become part of the taxpayer's existing taxable activity.

Beginning of a taxable activity

74. Under s 6(2), anything done in connection with the beginning or ending of a taxable activity, including a premature ending, is treated as being carried out in the course or furtherance of the taxable activity. This means that preparatory steps to the commencement of a taxable activity can form part of the taxable activity.
75. That said, preparatory steps on their own are not enough for a taxable activity.⁴⁷ A person can register for GST if they have started preparatory steps to carry on a taxable activity, or if they plan to do so from a specific date. However, if the activity does not proceed beyond these preparatory steps, the person must notify the Commissioner, and their registration may be cancelled from the date on which the person was registered.⁴⁸ In this situation, the person will not be entitled to any inputs claimed.
76. For anyone who believes they are carrying on a taxable activity but has not registered for GST, the date GST registration takes effect will depend on when the taxpayer applies to register and whether they are liable to register or are registering voluntarily. Please see the IR 375 *GST Guide: Working with GST* for more information about GST

⁴⁶ While the Court of Appeal overturned the decisions of the Taxation Review Authority and High Court, this element of the Authority's decision was not appealed.

⁴⁷ Confirmed in *Case 7/2012*.

⁴⁸ Section 52 GST Act.

registration, and *SPS 18/03: Effective date of GST registrations* for details on effective dates for registration.

77. Note that when a person is registered for GST, if they acquire land with the intention of using it to make taxable supplies, they will usually be required to disclose this to the Commissioner under s 61B of the Tax Administration Act 1994.

Income tax

78. This item addresses only GST treatment. Even if a subdivision activity is not a taxable activity for GST purposes, **the resulting sale may still be subject to income tax.**
79. For example, if a taxpayer buys land with a purpose or intention of disposing of it, an amount derived from the disposal may be taxable income under s CB 6 of the Income Tax Act 2007. Sections CB 7 to CB 15B of the Income Tax Act 2007 also include in a person's income certain amounts relating to disposal of land, including sections CB 10, CB 12, and CB 13 which specifically refer to subdivisions. They may also need to consider whether the sale is caught by the bright-line property rules.
80. The Commissioner has released several items on the treatment of a sale or disposal of land for income tax purposes. Search the Inland Revenue [Tax Technical](#) website for more information.

Avoidance

81. All of the guidance in this item is subject to the GST avoidance provision in s 76. Under s 76, a tax avoidance arrangement entered into by a person is void against the Commissioner for tax purposes. "Tax avoidance arrangement" is an arrangement which has tax avoidance as its purpose or effect, or one of its purposes or effects, if the purpose or effect is not merely incidental. If a tax avoidance arrangement is void against the Commissioner, the Commissioner may adjust the amount of tax payable by, or the amount of tax refundable to, a registered person affected by the arrangement, to counteract any tax advantage obtained.
82. Please see the Commissioner's [Interpretation Statement IS 23/01: Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007](#) for more information about tax avoidance.⁴⁹

⁴⁹ While this statement is primarily concerned with avoidance for income tax purposes, it is also relevant to s 76 as s 76 is aligned with s BG 1 of the Income Tax Act 2007. This is specified at para [1.3] of IS 23/01.

Examples | Tauria

83. These examples/tauria assume the resulting sales of subdivided land exceed the GST registration threshold of \$60,000. These examples/tauria also assume that the arrangements are not tax avoidance arrangements under s 76.

Example | Tauria 1 – Basic subdivision

Mike and Megan are not registered for GST. They have owned their own home in Auckland for 20 years. They subdivide their section into two to sell one lot and put the proceeds towards retirement savings.

Mike and Megan carry out development work to meet Auckland Council's requirements for consent. They engage contractors to:

- construct sealed road access and an extended driveway to the rear section;
- level terrain and improve drainage for stormwater management; and
- install water, wastewater, telecommunications and power infrastructure and connections.

In addition to the fees for contractors and materials, and the time and effort of managing the project, Mike and Megan incurred costs to apply for consent, as well as professional fees (for surveyors, lawyers, real estate agents and so on), development contribution fees, and Land Information New Zealand fees. Once a new certificate of title is issued for the lot, Mike and Megan put the land up for sale, and it sells within a month. Mike and Megan continue to live in their house on the front section.

Are Mike and Megan carrying on a taxable activity?

GST treatment

Mike and Megan's subdivision activity is not a taxable activity as it is not carried on continuously or regularly. The subdivision is a straight-forward subdivision into two lots. While there is development work to meet Council consent requirements, and associated time, effort, and cost to meet these requirements, this is a one-off activity leading to only one supply that is not to be repeated. The level of activity is not sufficiently high for the activity to be carried on continuously.

Example | Tauria 1B – Creation of three lots

The background is the same as that in Example | Tauria 1, but Mike and Megan have a large section that can be subdivided to create three extra lots. The work required to carry out the subdivision is similar, but on a somewhat larger scale due to the increased number of lots created and larger section. More terrain-levelling work is required, and there is more work to create the extended driveway.

As with Example | Tauria 1, Mike and Megan put the extra three lots up for sale once new certificates of title have been issued. They continue to live in their house on the front section.

Are Mike and Megan carrying on a taxable activity?

GST treatment

Mike and Megan are likely to be carrying on a taxable activity. While the facts are similar to those in the previous example, the increased number of sections created is a notable distinction. Courts are much more likely to consider an activity to be continuous or regular if it involves making multiple supplies. There is some level of development work to meet Council requirements, and the scale, time, effort, and cost is higher than that in Example | Tauria 1. Together, this may be enough for the activity to be continuous or regular. However, this is a borderline case where a more detailed factual analysis would be required, as specific facts and details may affect whether a taxable activity exists.

Example | Tauria 2 – Subdivision and small-scale development

Jensen is a GST-registered sole trader who runs a business inspecting and repairing ventilation systems.

Jensen's house is leaky and requires substantial repairs and full re-cladding. He receives advice that it would be more cost-effective to demolish the existing house and re-build two townhouses on his land, so he can sell one to offset costs.

Jensen arranges for the land to be subdivided and engages architects and contractors to design and construct the townhouses. Each is a two-storey, three-bedroom townhouse. After demolition and construction, Jensen moves into one townhouse and sells the other.

Is Jensen carrying on a taxable activity of subdivision?

GST treatment

Jensen's subdivision activity is not a taxable activity for GST purposes. This is because it is not an activity carried on continuously or regularly.

Only one new lot was created and sold. Therefore, even though the level of financial investment and development work for the units is fairly high compared to subdividing and selling a bare lot, the work involved is still part of a single one-off activity, and should not be broken down into individual steps. The level of activity is not so large as to make it continuous or regular despite this. Further, the cost and level of work involved in constructing the unit he later lives in is not relevant when considering whether the activity was one carried on continuously or regularly.

While Jensen is GST registered, the subdivision activity was not an activity carried on in the course or furtherance of his taxable activity of ventilation maintenance. It was not done as part of his business and had no connection with it.

Example | Taurira 2B – Subsequent sale of residence

Jensen from Example | Taurira 2 lived in his new house for a few months before deciding to sell it to move to the United States to expand his business.

Is the later sale of his house relevant when determining whether his subdivision project is a taxable activity?

GST treatment

No, the sale of Jensen's house is not relevant when determining whether his subdivision project is a taxable activity. The subdivision, development, and building of Jensen's house was not part of an activity involving, or intending to involve, the supply of goods for consideration. It was not until after the activity concluded that the intention to sell the house formed.

If the intention to sell both houses formed earlier in the project, the work done on Jensen's house after that point would need to be considered. There are many variables that could affect whether this would be enough to be a taxable activity, but the sale of two lots means more relevance would be placed on the level of activity than in Example | Taurira 2, where only one lot was sold.

Example | Tauria 3 – Subdivision and large development

Manaia is not registered for GST. They inherited a run-down block of farmland from a relative years ago. After retiring, they take the opportunity to get the land in good working order, including renovating the farmhouse, with the intention of keeping some animals and running a lifestyle block. However, part-way through renovation, Manaia decides instead to move closer to their elderly mother who has fallen ill. While the exterior and roof still need work, the kitchen and bathroom have been completely upgraded and a dividing wall has been removed to make the living area open plan.

Given the location of the land, Manaia, who has received several enquiries from developers, knows the land would be perfect for extending a new housing development in the area.

Rather than selling the land to another developer, Manaia decides to subdivide the land and sell the lots directly to potential owner-occupiers looking to build. Manaia:

- arranges for a surveyor to prepare a site plan;
- obtains the necessary approvals from the local council;
- engages contractors to construct a new road and driveways, and to level parts of the terrain to enable foundations to be laid; and
- organises the installation of water and power infrastructure.

The land is subdivided into six lots, one of which contains the partially renovated farmhouse. As Manaia is busy looking after their mother, work on the project continues on and off over three years. After new titles are issued, four of the new lots are sold but Manaia is unable to sell the others due to a recent downturn in the market.

Is Manaia carrying on a taxable activity for GST purposes?

GST treatment

Yes, Manaia is carrying on a taxable activity of subdivision. While the level of development work is similar to that in Example | Tauria 1, the number of lots created is a distinguishing factor. As the subdivision involved the intention to supply six lots, it is very likely to be continuous or regular. The level of activity, the large scale, and corresponding cost, time and effort are relevant factors. Work on the final two lots is relevant even though they have not yet sold. Any renovation work on the farmhouse done after the intention to subdivide and sell arose is also relevant.

The length of time taken and the fact the work was done on-and-off does not mean the activity was not carried on continuously, as Manaia always intended to complete the project and it did not cease at any point. The activity was more than intermittent or occasional.

Example | Taura 4 – Part of existing taxable activity

Loammi and Marissa are GST registered as a partnership with a taxable activity of residential property development. They buy dilapidated houses and renovate them to sell for a profit. When considering purchasing an old dwelling in Island Bay, Loammi realises that with the large backyard, she and Marissa could make a greater profit if they subdivided the land before sale. They purchase the property and begin work.

Loammi and Marissa focus most of their time and money on renovating the existing dwelling, and do only the minimum required to get resource consent and approval from Wellington City Council for the subdivision. Once they obtain a certificate for the new lot, they manage to secure a quick sale, which helps them fund the remainder of the renovation work on the dwelling.

Is the sale of the subdivided lot a taxable supply for GST purposes?

GST treatment

Yes, the sale of the subdivided lot is a taxable supply for GST purposes. Even though the level of work, effort, and cost involved in the subdivision was relatively low, and the subdivision and sale would not be a taxable activity on its own (ignoring the wider renovation project), the subdivision was done in the course or furtherance of Loammi and Marissa's existing taxable activity of property development.

Example | Taura 5 – Regularly subdividing land

Mario-Ken discovers he can make a good profit from subdividing beachfront land, as prices are getting cheaper due to coastal erosion and global warming. He buys a parcel of land, subdivides it in two, carrying out no development on the land beyond installing water and creating easements for stormwater discharge, and then sells the bare lots.

Mario-Ken makes a good profit from the sales, so he decides to buy another lot further down the coast and subdivides it for sale, using the profits from his last subdivision to help fund the purchase. A year later he finds a good price on the neighbouring lot and subdivides it into three, again doing little development work and selling the subdivided land.

Is Mario-Ken carrying on a taxable activity?

GST treatment

Yes, Mario-Ken is carrying on a taxable activity. Even though the first subdivision would likely not be enough on its own to be a taxable activity, the repeating pattern of buying and subdividing land indicates the activity is one carried on regularly.

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