

Regulatory Impact Statement

Exempting councils from the land tainting tax rules

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Inland Revenue.

It provides an analysis of options to address problems with the “land tainting rules” in the Income Tax Act 2007. The land tainting rules were introduced to combat tax avoidance, but overreach by taxing land that is used in business where there is no tax avoidance concern. As a result, these rules distort decision making – for example, a decision to keep or sell land may be driven by tax, rather than what makes the most economic sense. Further, the rules increase compliance costs as businesses obtain legal advice to mitigate the impact of the rules, and monitor purchase dates and the length of land ownership in order to determine whether a disposal is taxable under the rules. An example, discussed in this RIS, of where this is occurring is in the context of Auckland Council.

The preferred option removes the overreach of the rules and the associated economic distortions and compliance costs for council groups by exempting them from the associated persons provisions in the tainting rules. However, this option would not resolve the issue for other taxpayers affected by the rules.

A key gap in the analysis is that Inland Revenue does not hold sufficient data to provide an estimate of the fiscal impact of the options. An assumption made was that council groups would restructure if an amendment is not made. Without this assumption, options 1 and 2 would have fiscal impacts.

Inland Revenue has consulted the Treasury, the Department of Internal Affairs, Auckland Council, and Auckland Council’s tax advisors. These parties are supportive of the conclusion reached in this RIS.

Other affected taxpayers were not consulted because of time constraints – Auckland Council seeks assurance as soon as possible that a legislative amendment will be made in order to provide certainty of tax treatment, so that development activities proposed to be undertaken by Development Auckland do not distort the decision making of the Auckland Council group. This time constraint has meant that one of the options – extending the business premises exclusion in the land tainting rules - was not able to be fully considered.

None of the policy options would impose additional costs on businesses, impair private property rights, restrict market competition, reduce the incentives for businesses to innovate and invest, or override fundamental common law principles.

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4 February 2016

STATUS QUO AND PROBLEM DEFINITION

Current tax rules

1. Generally, the proceeds from the disposal of land held on capital account are not taxable. However, in certain circumstances, the proceeds are taxable under the land disposal provisions contained in sections CB 6 to CB 23B of the Income Tax Act 2007. The sections that most commonly apply to land owners who are not land dealers, developers or builders, provide that the proceeds from the disposal of land are generally taxable if:

- the land was acquired for the purpose or with the intention of disposal (section CB 6); or
- the land was acquired for the purposes of a business relating to land (section CB 7).

2. Part of the land disposal provisions are the “land tainting rules” which are contained in sections CB 9 to CB 11 of the Income Tax Act. For the purposes of this RIS, the relevant parts of the legislation are sections CB 9(2), CB 10(2) and CB 11(2) of the Income Tax Act 2007. These provisions include in the tax base land owned by an associated person of a land dealer, developer or builder, if it is acquired or improved at the time the dealer, developer or builder was in business and is disposed of within 10 years of acquisition or improvement.

3. The Income Tax Act provides rules that govern where a person is associated with another person¹. Generally speaking, a person is associated with another where there is a sufficiently close relationship between the two parties. The most relevant test for the purposes of this RIS is the company association rule, which provides that two companies are associated where a group of persons hold voting interests in each company of 50% or more.

Policy intention behind the land tainting rules

4. Before the land tainting rules were introduced there were evidentiary problems with proving a person’s purpose or intention, which meant that a developer was able to avoid tax by claiming that properties were held as investments² or by holding properties in the name of an associated person³.

5. To combat this tax avoidance, in 1973, the Government introduced the land tainting rules.⁴ These rules supplement the purpose/intention test⁵ by providing an objective “bright line” rule under which developers and persons associated with them are taxed on land disposals made within 10 years of purchase or improvement. As purpose or intention are not part of the tainting rules, the associated evidentiary problems and tax avoidance no longer occur.

1 “Person” is used in a broad sense encompassing companies, persons acting in capacity as a trustee etc., as well as natural persons.

2 Dealers would buy and sell regularly under the “purpose” of acquiring better investments and thereby avoid tax.

3 The associated person would not be assessed on the sale as the taxing provisions required them to acquire the land for the purpose of selling it or to have acquired the land for a business of dealing in property. As both of these factors are established by a pattern of activity (among other things), it was very difficult to apply these provisions to a one-off venture.

4 Sections CB 9 and CB 11 were introduced in 1973. Section CB 10 was introduced in 1983 to ensure that land developers and subdividers were also caught by the land tainting rules.

5 “Intention” was not introduced into the rules until 1973. Before 1973 there was a “purpose of sale” rule.

6. Although it was recognised that such a blanket rule could result in capital account land being subject to tax in certain circumstances, it was a deliberate decision by Parliament that all gains on land sold by property developers and associated persons within 10 years of acquisition should generally be taxed.

Exclusions from the rules

7. In order to reduce the circumstances in which the tainting rules would tax capital account land, residential land and business premises are excluded from the rules. For the purposes of this RIS, the business premises exclusion contained in section CB 19 is the most relevant. Put simply, this provision excludes from the tainting rules premises that are occupied mainly to carry on a substantial business.

The problem

8. The tainting rules are overreaching by taxing capital account land used in businesses of persons associated to a property developer in situations where there is no tax avoidance concern.

Capital account land used in business

9. The business premises exclusion is narrower than is required to ensure the tainting rules achieve their objective of combating tax avoidance. For example, it has been held that:

- The provision only applies to land with buildings on them, not to a business solely involving land.
- The land must be physically occupied by the taxpayer.
- The taxpayer is required to be carrying out their business operations from the property because of the definition of “occupation” and that “carry on” implies a repetition of acts or a habitual course of conduct, which is to occur “from” the premises.
- Substantial business must be carried on from the land – for example, it has been held that a storage facility does not fall within the exemption.

10. It is fact specific as to what falls within the ambit of this provision. For the most part, a person associated with a developer would not be taxed on land they dispose of that has been used as their business premises. However, there could be circumstances in which capital account land used in the business does not fall within the exemption and, therefore, is subject to tax. It is recognised that capital account land should be subject to tax to a certain extent as it would not be possible to create a workable rule to determine whether the land is held on capital account in every scenario unless purpose and intention are introduced into the rules.⁶ Even so, it is considered that the business premises exclusion results in capital account land being subject to tax more than is necessary to prevent tax avoidance.

11. Therefore, capital account land that is used in business could be taxable in circumstances when there is no tax avoidance concern. For example, an ice-cream manufacturer (who is associated with a property developer) purchases a storage facility to store materials used in his

⁶ This would result in some of the original problems that the tainting rules were designed to prevent – that is, people avoiding tax because of the evidentiary problems with proving purpose or intention.

business. He sells the storage facility 9 years later because a downturn in business means it is no longer required. Even though it is clear that no tax avoidance is occurring, this transaction would be subject to tax under the tainting rules because it has been held that the business premises exemption does not apply to storage facilities.

Application of the tainting rules to Auckland Council

12. A further example of the rules taxing capital account land genuinely used in business occurs in the context of Auckland Council (AC) subsidiaries⁷. AC, through its subsidiary Development Auckland (DA),⁸ will be undertaking land development activities that seek to increase housing supply by creating infrastructure that allows for intensification of development in the Auckland region. It could also be involved in social housing developments in the Auckland region, although this would only form part of its development role.

13. Council subsidiaries are subject to tax, whereas councils themselves are exempt as local authorities. Therefore, as DA will be undertaking land developments, it is likely to be considered to be carrying on a business of dealing in land, developing land or erecting buildings. The result of this is that any gain on the disposal of land by other council-controlled organisations (“CCOs”) and port, energy and electricity companies controlled by AC could be taxable if the land has not been held for more than 10 years or if the disposal is made within 10 years of completing improvements to the land. Put simply, land held by other entities in the group that would not ordinarily be taxable upon disposal may be taxable simply by virtue of these entities’ association to the development entity.

Overreach in the context of Auckland Council

14. The tainting rules are overreaching by taxing capital account land that is genuinely used in the business of AC’s subsidiaries. The tainting rules were introduced to prevent avoidance, however it is clear that the land held by the subsidiaries is not held in order to avoid tax for DA, because:

- The subsidiaries of AC are holding land necessary for their operations to ensure that they are individually accountable for its use and able to more easily make commercial decisions in relation to the land;
- They have held land prior to any entity in the group being considered a developer;
- If the AC group were intending to avoid tax, it would not develop land in a taxable entity such as DA, nor would it hold land in its taxable subsidiaries. Instead, AC would undertake the development itself and lease all necessary land to its subsidiaries. This would have no tax effect, as AC is exempt;
- The subsidiaries of AC are operated independently of each other, with distinct businesses and objectives. They are so independent that each subsidiary has its own separate board and makes decisions without reference to AC or the other subsidiaries.

⁷ The term “subsidiary” is used in this RIS to denote CCOs as well as port, energy and electricity companies controlled by councils. These entities do not fall within the CCO definition for tax purposes. The tax definition of “council-controlled organisation” is wider than the ordinary meaning of subsidiary, as it includes entities controlled by councils through means other than an ownership interest.

⁸ Development Auckland was established on 1 September 2015.

Therefore, any land held by a subsidiary is likely to be unrelated to the development activities of DA.

15. Some of the land held by the council group may fall under the business premises exemption in CB 19. However, we have been made aware of numerous examples of land that may not fall within the exemption, resulting in a potential tax liability of multi-million dollar value.

16. In order for DA to proceed with its development activities with any certainty about the tax implications for the AC group, AC's subsidiaries would need to seek a binding ruling on each individual premises that is on the borderline of the exemption. This would have significant compliance costs and delay essential developments. Even then, capital account land that does not fall within the exemption could still be tainted.

17. AC has suggested that assurance that an amendment will be made to resolve this issue should be provided as soon as possible so that DA can undertake its development activities with certainty of tax treatment.

Consequences arising from the rules

18. The tainting rules distort the decision making of businesses and result in excessive compliance costs. The extent of these consequences is described below in the context of Auckland Council.

Distortions to decision making

19. In the past, the AC group has specifically restricted the operations of its subsidiaries to prevent them from being considered land developers due to the tainting implications.

20. Following the formation of DA (which will be considered a developer) and without any legislative change to address the issue, the AC group may structure land holdings in a way that minimises the impact of the tainting rules even where (ignoring tax) doing so does not make economic sense. For example, if AC owns all group land and leases it back to the relevant subsidiaries it will not be taxable on any disposals. The property would still be tainted, but there would be no tax effect, as AC is exempt from tax. This type of structuring would not lead to good governance as AC subsidiaries would need approval from the council board in order to make commercial decisions in relation to land leased to them.

21. Even if this were not to occur, the tainting rules would affect business decisions in other ways – for example, a decision to keep or sell property could be dictated by tax rather than by what makes the most economic sense. Furthermore, the AC group may refrain from undertaking certain activities because of the tax effect.

22. Although taxes generally impose economic costs because they induce individuals to make decisions that they would not have made in absence of the tax, a principle of the Government's broad-base, low rate tax policy framework is that tax should not, as far as possible, affect people's decisions.

Excessive compliance costs

23. In addition to affecting commercial decisions, the tainting rules as they currently operate increase compliance costs for AC. AC is likely to continue to obtain expensive legal advice in order to mitigate the tax effects of the rules unless an amendment is made. Furthermore, there is the added compliance cost of having to consider the impact that the transactions and activities undertaken by one subsidiary have on the tax position of the others. This is particularly burdensome given the autonomy and independence of the council subsidiaries.

Wider implications

24. We consider that these impacts apply to any situation where the land tainting rules tax capital account land genuinely used in business by a person associated with a builder or developer. This mainly occurs in council groups and large corporate structures where many different businesses (as long as one of them involves property development) are owned by the same parent. DIA have informed us of other council groups who are negatively impacted by the tainting rules; we have no measure of the scale of the problem in relation to the private sector, although we have received anecdotal evidence suggesting it is a problem.

OBJECTIVES

25. The objectives against which the options are to be assessed are to:

- (a) Remove tax impediments to Auckland Council's development and housing objectives;
- (b) Improve the coherence of the tax system overall;
- (c) Improve the equity of the tax system;
- (d) Improve the economic efficiency of the tax system and minimise deadweight costs as far as practicable; and
- (e) Reduce compliance costs.

26. All objectives are weighted equally. There may be trade-offs amongst the various objectives. For example, a specific exemption for councils would best meet objective (a), but would be inconsistent with objective (c) as it provides preferential treatment to councils over other entities.

27. AC seeks assurance as soon as possible that a legislative change will be included in the next available tax bill (currently scheduled for introduction in March 2016), so that DA can proceed with its developing activities without distorting the decision making of the AC group. This feature presented a timing constraint on the extent of the analysis that could be undertaken.

REGULATORY IMPACT ANALYSIS

28. Three options for change and the status quo have been considered for addressing the problem and achieving the stated objectives. The options are:

- Option 1: AC exemption – Exempt AC subsidiaries from the associated persons provisions in the land tainting rules.
- Option 2: Council exemption – Exempt council subsidiaries generally from the associated persons provisions in the land tainting rules.

- Option 3: Extension of the business premises exclusion – Extend the business premises exclusion in the land tainting rules to ensure that more capital account land used in business falls within it, while also upholding the integrity of the tainting rules.
- Option 4: No changes are made to the land tainting rules. This is the status quo option against which all other options are compared below.

Option one

29. Under this option, there would be an exemption for AC subsidiaries from sections CB 9(2), CB 10(2) and CB 11(2) of the Income Tax Act. The effect of this is that the land held by other AC subsidiaries would not be tainted by the development activities of DA.

30. The subsidiaries will still be subject to tax under the land disposal provisions in sections CB 6 to CB 13 – for example, if they:

- are considered to be developers, dealers or builders themselves (sections CB 9(1), CB 10(1) or CB 11(1)).
- undertake certain development or division work (section CB 12 or CB 13).
- acquire the land with the purpose or intent of selling it (section CB 6).
- acquire the land for the purpose of a business relating to land (section CB 7).

31. It is only the associated person aspect of the tainting rules that the subsidiaries would be exempt from – that is, the development activities of one subsidiary would not taint land owned by another subsidiary.

32. Additional property purchased by DA would still be “tainted” by its own development activities – for example, if DA purchased land that was not for development purposes, it would still be subject to tax upon sale, provided the necessary requirements in any of sections CB 9 to CB 11 were met.

Assessment against objectives – option one

- **Removal of tax impediments to Auckland Council’s development and housing objectives:** The tainting rules would not impede DA’s development objectives under this option, as the subsidiaries of AC would be exempt from the rules. This option meets this objective.
- **Coherence:** Coherence would be improved under this option. The unintended consequences of the tainting rules would no longer arise for the subsidiaries of AC (that is, they would no longer be taxed on the disposal of capital account land). This option partially meets this objective as it resolves the overreach of the tainting rules for a specific group, but does not resolve the issue for other groups.
- **Equity:** It may be seen as unfair for the subsidiaries of AC to be exempt from the tainting rules when other taxpayers are not. This could encourage other entities to lobby for similar treatment. However, this option partially meets the equity objective as it

improves the fairness of the tainting rules for Auckland Council when compared to the status quo.

- **Economic efficiency:** The distortions to decision making associated with the impact of the tainting rules would no longer affect AC. Due to this option's limited scope, it only partially meets this objective.
- **Compliance costs:** Compliance costs would be reduced as AC would no longer incur compliance costs obtaining legal advice to mitigate the impact of the rules, or from monitoring the length of land ownership. Due to this option's limited scope, it only partially meets this objective.

Option two (officials' preferred option)

33. Under this option, there would be an exemption for all council subsidiaries from sections CB 9(2), CB 10(2) and CB 11(2) of the Income Tax Act. This means that the subsidiaries of a council would not be tainted by the land development activities of one of the other subsidiaries. Council subsidiaries would still be taxable under the other land taxing provisions as outlined in paragraph 30.

34. We are aware of subsidiaries of other councils that are undertaking land developments. This option would prevent land tainting issues from arising for these entities, as all council subsidiaries would be exempt from the associated person provisions in the land tainting rules.

Assessment against objectives – option two

35. The analysis of this option against the objectives is much the same as for option one, although this option slightly better meets objectives (b), (c), (d) and (e) because of its wider application – that is, it applies to all council subsidiaries, not just AC subsidiaries.

Option three

36. Under this option, the business premises exemption would be better targeted to ensure it captures more capital account land used in business but at the same time prevents tax avoidance.

37. This option proposes that the business premises exemption should be amended to provide that the land tainting rules do not apply to a disposal of land where the land disposed of had a direct connection with the taxpayer's business, and the taxpayer's business is/was not related to a business of dealing in land, developing land, or erecting buildings.

38. Careful thought is required on the wording of this exemption as it could be susceptible to abuse. For example, if the exemption were drafted so as to exclude all land used in business from the tainting rules, people may acquire land and take the minimum steps necessary to show the land is used in their business, and then dispose of the land in order to avoid tax for a developer associated with them. The rule would need to provide that the land is to have a sufficient degree of connection with the business so tax avoiders would be discouraged by the amount of work required to establish such a connection. At the same time, the rule should not be so strict as to exclude land genuinely used as part of a business – for example, the storage facility in the ice-cream manufacturer example above.

39. Owing to time constraints (outlined in paragraph 27), the exact parameters of this exemption have not been able to be determined and so the extent of any unintended consequences has not been quantified.

Assessment against objectives – option three

- **Removal of tax impediments to Auckland Council’s development and housing objectives:** The tainting rules would not, for the most part, impede DA’s development objectives under this option, although this would depend on the final draft of the exemption. It could be that some capital account land used in business would still be taxable if a council subsidiary is unable to show that it is sufficiently connected to its business. Because of the inherent uncertainty of such an exemption and the potential for unintended consequences, significant consultation would be required and therefore this option would not be able to be advanced in time for the March tax bill. Further, the lack of certainty this option would provide would not enable DA to undertake developments without distorting the decision making of the AC group, even if assurance was given that a legislative change would be made. As a result, this option partially meets this objective.
- **Coherence:** This option promotes coherency in the tax system by ensuring the tainting rules are better targeted at their original problem for the majority of taxpayers, not just council subsidiaries. On the other hand, the loosening of the rule creates the risk that some tax avoidance activities may escape the tax net. Further, it would not promote certainty, as the words of the section would be open to interpretation. This option partially meets the coherence objective due to the risk of unintended consequences.
- **Equity:** This option is equitable, as taxpayers are treated equally. It also improves the fairness of the rules over and above the status quo. This option meets this objective.
- **Economic efficiency:** The distortions to decision making associated with the overreach of the tainting rules would no longer affect the majority of taxpayers. This option meets this objective.
- **Compliance costs:** This option would reduce compliance costs for the same reasons as option one (larger reduction than the other options due to the wider scope). Some compliance costs may arise for taxpayers whose activities are borderline as they may wish to obtain legal advice on whether their activities fall within the scope of the exemption.

Option four

40. The status quo does not meet objectives (a), (b) (d) and (e), but partially meets (c) because:

- The rules would impede DA’s development activities.
- The tainting rules would continue to overreach by taxing capital account land where there is no tax avoidance concern.
- The rules would operate unfairly, although they would apply consistently across the board.
- The rules would continue to distort decision making.

- The rules would result in excessive compliance costs (as outlined in paragraph 23).

Summary of analysis of options

Options	Does it meet the objectives (A, B, C, D and E)	Impacts		
		Fiscal	Administration	Risks
Option one – AC exemption	Meets A, partially meets B, C, D and E.	<p>None – there will be no revenue impact if, should the status quo persist, councils restructure so that all group land is held in the tax exempt council entity and leased to the relevant subsidiaries.</p> <p>However, there will be a revenue impact if, should the status quo persist, councils do not restructure (although we expect that AC will restructure if an amendment is not made).</p> <p>This option would also prevent AC subsidiaries from claiming losses on tainted land.</p>	Minimal – costs associated with publications to communicate the changes.	Precedent risk – other groups may lobby for similar treatment.
Option two – Council exemption (officials’ preferred option)	Meets A, partially meets B, C, D and E (a higher partially meets than option one).	None – same as option one.	Minimal – same as option one.	Precedent risk – same as option one.
Option three – extension of the business premises exclusion	Partially meets A and B, meets C, D and E	Unquantifiable reduction in revenue as more land will fall within the business premises exemption and therefore will not be subject to tax on disposal.	Moderate – same as option one but there may also be administrative costs associated with confirming how the law impacts various groups.	Unintended consequences – the loosening of the rule creates the risk that some tax avoiders may escape the tax net.
Option four – status quo	Does not meet A, B, D or E, partially meets C	None	Possible administrative costs associated with confirming how the law impacts on the arrangements entered into by the AC group.	This option will likely distort economic development decisions of the AC group (and others) and lead to excessive compliance costs.

Key: Objective A, Removal of tax impediments to Auckland’s development and housing objectives; Objective B, Coherence; Objective C, Equity; Objective D, Efficiency; Objective E, Compliance costs.

41. The economic and compliance impacts of the options have been outlined in the assessment of the options against the objectives section of this RIS. No cultural, social or environmental impacts are expected to arise directly from the options.

CONSULTATION

42. Inland Revenue officials have consulted with Auckland Council (and their tax advisors) and the Treasury on the problem definition and the objectives, as well as on the legal analysis and options. Consultation was in the form of face-to-face meetings, telephone calls and emails over the second half of 2015. All support option two.

43. One of the major concerns raised by the Treasury in consultation was that allowing a council-specific exemption may encourage others to lobby for similar treatment. Inland Revenue, Treasury and Auckland Council's tax advisors consider that the unique circumstances of council groups (see paragraph 14) and the urgency of the situation warrants a specific fix for councils.

44. The Department of Internal Affairs was also consulted and informed us that the tainting rules were impacting at least 2 other council groups.

45. Wider consultation was not conducted due to time constraints (described in paragraph 27).

CONCLUSIONS AND RECOMMENDATIONS

46. Inland Revenue prefers option two for the following reasons:

- It would result in no revenue impact because it is expected that, if the status quo remained, council groups would restructure so that the council owns the land (rather than its subsidiaries). The council would not be taxable on any land disposals because of its tax exempt status.
- It would prevent the tainting rules from operating contrary to their policy intent in relation to councils as capital account land held by council subsidiaries would no longer be tainted by the activities of other council subsidiaries.
- The distortions to decision making and excessive compliance costs brought about by the tainting rules would cease, enabling DA and other council subsidiaries to undertake developments unencumbered by the rules.
- It provides a certain and timely solution to an urgent situation.

47. Option 2 is preferable over option 1 as it would resolve the problem for all council groups, not just AC. Options 1 and 2 would not resolve the problem for other groups.

48. Although option 3 could resolve the issue for all affected parties, it is not preferred because of the potential revenue implications, the timeframe that would be required for consultation and the uncertainty and potential unintended consequences that may arise. However, it is recommended that a review of the business premises exemption is considered for inclusion on the tax policy work programme for consideration at a later date.

IMPLEMENTATION

49. Changes to the land tainting rules will require amendments to the Income Tax Act 2007. It is proposed that these amendments will be included in the tax amendment bill scheduled for introduction in March 2016 (expected to receive Royal assent by the end of 2016). This amendment will need to have retrospective application to 1 September 2015, the date DA was formed. While the legislation would not need to be retrospectively applied until when DA begins developments, it is considered appropriate to apply the legislation from the date DA was formed as it can be unclear as to when exactly a development begins. Inland Revenue will work with any council groups who have already filed their 2016 income tax by enactment date to ensure that only the correct amount of tax is paid.

50. When introduced to Parliament, commentary will be released explaining the amendments, and further explanation of their effect will be contained in a *Tax Information Bulletin*, which will be released shortly after the bill receives Royal assent. Inland Revenue also plans to write to council groups informing them of the proposed changes, following their approval by Cabinet.

51. Inland Revenue will administer the proposed changes. The proposals would have no systems implications for Inland Revenue but may result in some additional administrative costs, such as costs associated with publications to communicate the changes. These costs are expected to be insignificant and would be met within existing baselines.

MONITORING, EVALUATION AND REVIEW

52. Inland Revenue will monitor the effectiveness of the proposed changes in the first 12 months of operation. This work will be carried out by a small group within Inland Revenue that is responsible for local authorities' taxation. Policy officials will deal with any calls for Inland Revenue to expand the proposed treatment to other taxpayers that may be similarly affected.

53. In general, Inland Revenue monitoring, evaluation and review of tax changes takes place under the generic tax policy process (GTPP). The GTPP is a multi-stage policy process that has been used to design tax policy (and subsequently social policy administered by Inland Revenue) in New Zealand since 1995. The final step in the process is the implementation and review stage, which involves post-implementation review of legislation and the identification of remedial issues. Opportunities for external consultation are built into this stage. In practice, any changes identified as necessary following enactment would be added to the tax policy work programme, and proposals would go through the GTPP.