



## COMMISSIONER'S PRACTICE

### LT 4.2

## LAND TAX – PRIMARY RESIDENCE

This Commissioner's practice details the factors the Commissioner will consider when determining whether private residential property is a person's primary residence.

### Background

Section 17 of the *Land Tax Assessment Act 2002* ('LTA Act') provides land is exempt from land tax for an assessment year if:

- the Commissioner grants an exemption for the assessment year under section 20; or
- it is exempt for the assessment year under another provision of Part 3 of the LTA Act.

Division 2 of Part 3 of the LTA Act contains a number of provisions that provide an exemption from land tax for *private residential property* that is used by certain individuals as their *primary residence*.

The Glossary to the LTA Act defines *private residential property* as:

- a lot of land on which there is a *private residence*; or
- a parcel of land on which there is a private residence constructed so that part of the residence stands on each of the lots of land that constitute the parcel; or
- an interest in a home unit; or
- for the purposes of sections 24, 24A, 27, 27A and 28 — a lot of land on which a private residence is being or has been constructed.

The Glossary to the LTA Act defines *private residence* as a building or part of a building that was occupied, or was fit to be occupied and intended by the owner to be occupied, as a place of residence of one or more individuals, except a building or part of a building that is:

- used as a hotel, motel, hostel, lodging house or boarding house;
- ordinarily used for holiday accommodation;
- used as an educational institution, college, hospital or nursing home;
- used as a club;
- used as a home for aged or disabled persons by an eligible organisation within the meaning of the *Aged or Disabled Persons Care Act 1954* (Cth); or
- prescribed or of a prescribed class.

The Glossary to the LTA Act defines *primary residence*, in relation to an individual, as the individual's *sole or principal place of residence*.

Section 18 of the LTA Act allows for a partial exemption if all relevant requirements of the provision do not apply in respect of the whole of the property. For example, if part of the

property is not used as the individual's primary residence, the exemption will only apply to the portion of the property used as their primary residence.

If private residential property is owned jointly by two or more individuals and one or more of those people do not use the property as their primary residence, the exemption will only apply to the extent of the residing owner's (or owners') interest in the land.

### **Commissioner's Practice**

1. For the purposes of this practice, a reference to a person means the individual required to use the property as their primary residence.
2. The phrase 'principal place of residence' denotes a person may have more than one place of residence,<sup>1</sup> however, only one residence can be regarded as a person's primary or principal place of residence.<sup>2</sup>
3. Where a notice of assessment has been issued on the grounds the property is not the person's primary residence, but the person believes it is, the person must make an application for exemption.
4. Generally, an application for exemption can be made by telephone. However, the Commissioner may request a written application together with supporting evidence, and may inspect properties and/or seek additional documentary evidence, to assist in determining whether the property qualifies for exemption.

### **Private Residential Property**

5. Commissioner's Practice [LT 1 'Private Residential Property: Two or More Lots of Land Established and Used as a Single Property'](#) addresses the assessment of two or more lots of land established and used as one integrated area that constitutes the place of residence.
6. For the whole of a private residential property to be exempt, the entire property must be used by the person solely for residential purposes. There must be sufficient connection between the use of the property and what is generally regarded as residential use or purpose. Where the appearance and physical characteristics of a part of the property suggest that the portion is unused, the person must be able to satisfactorily demonstrate they use that part of the property as their place of residence.<sup>3</sup>

### **Private Residence**

7. A private residence may include sheds, other semi-permanent structures and park homes, provided they are occupied, or fit to be occupied and intended by the owner to be occupied, as a place of residence of one or more individuals.

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<sup>1</sup> *Aronstan v Chief Commissioner of State Revenue* [2008] NSWADT 8; *Chief Commissioner of State Revenue v Paspaley* [2008] NSWCA 184; *Chief Commissioner of State Revenue v Mesiti* [2003] NSWADTAP 57; *Carey v Chief Commissioner of State Revenue* [2010] NSWADT 78.

<sup>2</sup> *Aronstan v Chief Commissioner of State Revenue* [2008] NSWADT 8; *Chief Commissioner of State Revenue v Paspaley* [2008] NSWCA 184 at 19; *Chief Commissioner of State Revenue v Mesiti* [2003] NSWADTAP 57 at 37; *Carey v Chief Commissioner of State Revenue* [2010] NSWADT 78.

<sup>3</sup> *Rapp v Commissioner of State Revenue* [2006] WASAT 135, at 28; *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4

8. Caravans, mobile homes and other similar structures do not satisfy the definition of a private residence as they do not comprise a building or part of a building.

### **Use as a Primary Residence**

9. For a property to be a person's primary residence, it is essential the property be physically and actively occupied by the person as their place of residence,<sup>4</sup> and the person's use of the property must be sufficient to establish such a connection with the property.<sup>5</sup> It is not sufficient for members of the person's family, but not the person, to use the property as their primary residence.
10. To be considered the person's primary residence, the person's occupation of the property as a residence must have a degree of permanence, continuity and regularity. A connection to the property of a transient, temporary, contingent or passing nature is not sufficient, nor is occupation for some other purpose.<sup>6</sup>
11. Determining whether a property is used as a person's residence is a question of fact and degree,<sup>7</sup> with the intention of the person, gauged objectively, being relevant but not determinative of the issue.<sup>8</sup> Factors regarding the person's strength of ties and connection with the residence that will be considered in determining whether it is the person's primary residence include:<sup>9</sup>
- 11.1 where the person sleeps, eats meals, and entertains friends and family;
  - 11.2 the amount of time that the person occupies the property and the pattern of occupation;
  - 11.3 the place of residence of the person's immediate family, especially a spouse, de facto partner or children;
  - 11.4 whether there are other occupants of the property, and their rights to and control over the property;
  - 11.5 the connection of utilities such as telephone, gas and electricity under the person's name, and whether the use of those utilities is consistent with the person occupying the property as a place of residence;
  - 11.6 the listing of the address of the person for official purposes such as on a licence or an electoral roll;
  - 11.7 whether the person's clothing, furniture and possessions are located at the property;

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<sup>4</sup> *Chief Commissioner of State Revenue v Ferrington* [2004] NSWADTAP 41

<sup>5</sup> *Fletcher v Commissioner of State Revenue* Appeal No. 25 of 1998/1999; *Roberts v Commissioner of State Revenue* Appeal No. 37 of 1997/1998

<sup>6</sup> *Chief Commissioner of State Revenue v Ferrington* [2004] NSWADTAP 41

<sup>7</sup> *Lavene v IRC* (1928) AC 217 at 225; *Downie v Chief Commissioner of State Revenue* [2003] NSWADT 233 at 26

<sup>8</sup> *Chief Commissioner of State Revenue v Ferrington* [2004] NSWADTAP 41

<sup>9</sup> *Kiotaki Para Rubber Estates Limited v The Federal Commissioner of Taxation* 64 CLR 241; *Unkovich v Commissioner of State Taxation* Appeal No. 82 of 1992-93; *IRC v Lysgh* [1928] AC 234; *Browne v Commissioner of State Revenue* Appeal No. 15 of 2000/2001; *Aronstan v Chief Commissioner of State Revenue* [2008] NSWADT 8; *Deane v Commissioner of Stamp Duties (Qld)(No 2)* [1996] 2 Qd R 557; *Chief Commissioner of State Revenue v Ferrington* [2004] NSWADTAP 41; *Black v Chief Commissioner of State Revenue* [2011] NSWADT 66; *Chief Commissioner of State Revenue v McIlroy* [2009] NSWADTAP 21; *Chief Commissioner of State Revenue v Mesiti* [2003] NSWADTAP 57; *Yen-Cheng Chuang v Chief Commissioner of State Revenue* [2009] NSWADT 160; *Tobin v Chief Commissioner of State Revenue* [2009] NSWADT 188; *Homisan v Commissioner of State Revenue* [2011] WASAT 22

- 11.8 whether the residence is used as the person's mailing address. If another residence is used, the reasons for using that other residence;
- 11.9 the length of time the person has resided at the property;
- 11.10 the nature of insurance held for the property;
- 11.11 the type of finance acquired by the person for the residence. For example, whether finance was obtained under an owner/occupier or investment loan;
- 11.12 whether the person's purpose for occupying the residence is other than to make it their home;
- 11.13 whether the majority of a person's outgoing phone calls originate from the residence; and
- 11.14 whether the majority of a person's spending is in the vicinity of the residence.

### ***Multiple Places of Residence***

- 12. Where a person concurrently resides in two or more residences, it will be necessary to determine which of those residences is the person's *principal* place of residence.
- 13. The word 'principal' is not defined in the LTA Act but takes its ordinary meaning of 'most important' or 'main'. Accordingly, to be a person's principal place of residence, the property must be the person's most important or main residence,<sup>10</sup> where the centre of gravity of a person's domestic life is found.<sup>11</sup>
- 14. Generally, the property the person uses the majority of the time during the assessment year will be considered the person's principal place of residence. However, in certain circumstances it may be necessary to objectively assess which of two or more residences a person uses as their principal place of residence, having regard to the extent and quality of the use and occupation of each property.<sup>12</sup>
- 15. When determining which is a person's principal place of residence, the Commissioner will consider and compare the factors listed at paragraph 11 with reference to each property, and any other evidence considered necessary.

### ***Temporary Absence from Primary Residence***

- 16. Where a person is temporarily absent<sup>13</sup> from a property at midnight on 30 June, the Commissioner will consider each case on its facts and will generally accept the property is the person's primary residence for the following assessment year provided:<sup>14</sup>
  - 16.1 the property was the person's primary residence immediately before their departure; and
  - 16.2 the person's possessions (including personal effects and furniture) remain in the property; and

<sup>10</sup> *Carey v Chief Commissioner of State Revenue* [2010] NSWADT 78

<sup>11</sup> *Geothermal Energy N.Z. Ltd v Commissioner of Inland Revenue* (1979) 2 NZLR 324

<sup>12</sup> *Cameron v Chief Commissioner of State Revenue* [2009] NSWADT 64 at 46

<sup>13</sup> Temporary absences may occur for reasons such as holidays, illness, fire, flood, business or employment commitments.

<sup>14</sup> *Stone v Commissioner of State Taxation Appeals No. 56 & 69 of 1989/1990*; *Levene v Inland Revenue Commissioners* [1928] AC 217 at 225; *Judd v Judd* (1957) 75 WN (NSW) 147 at 149; *Norman v Norman* (1969) 16 FLR 231 at 236

- 16.3 the property is available for the person to return to at any time; and
  - 16.4 no income is derived from the property during the person's absence in addition to any income that is usually derived from the property; and
  - 16.5 nothing has occurred to change the character of the person's usage of the property (for example, no steps have been taken to lease the property or store the owner's possessions on only a portion of the property); and
  - 16.6 the person has not established a new primary residence anywhere else.
17. In circumstances where not all of the criteria in paragraph 16 have been satisfied, the other criteria must be satisfied in sufficient strength to outweigh the objective view that the property ceased being used as the person's primary residence.<sup>15</sup>

**Commissioner's Discretion**

18. If a portion of private residential property is exempt to some extent because of its use as the individual's primary residence, that individual may apply to the Commissioner to exercise discretion to exempt any proportion of that property used for a non-exempt purpose. See [Commissioner's Practice LT 21 'Commissioner's Discretion'](#) for further information.

**Date of Effect**

This Commissioner's practice takes effect from 20 December 2019.

Nicki Godecke  
 COMMISSIONER OF STATE REVENUE

20 December 2019

**Commissioner's Practice History**

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 4.0	29 October 2003	29 October 2003	25 May 2017
LT 4.1	26 May 2017	26 May 2017	19 December 2019
LT 4.2	20 December 2019	20 December 2019	Current

<sup>15</sup> *Burdinat v Commissioner of State Revenue* (2012) WASAT 105; *Commissioner of State Revenue v Burdinat* (2012) WASC 359.