



**PRACTICE  
STATEMENT No. 25  
(Revised 15/02/08)**

<b>SUBJECT</b>	<b>APPLICATION OF INCOME TAX ACT SECTION 11(a) TO PROFITS FROM PROPERTY SALES</b>
<b>DATE OF RELEASE</b>	1 March 2006
<b>DATE OF EFFECT</b>	1 July 2006
<b>CONFIDENTIALITY STATUS</b>	May be released to the public
<b>LEGISLATIVE REFERENCES</b>	<i>Income Tax Act</i> section 2,11(a) <i>Land Sales Act</i> section 4
<b>PRACTICE CO-ORDINATOR</b>	<b>National Manager Revenue Collection (IRS) Revenue Collection Division</b>

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## **INTRODUCTION**

1. This statement sets out the practice of the Fiji Islands Revenue & Customs Authority in applying paragraph (a) of section 11 of the *Income Tax Act 1974* [referred to as “section 11(a)”]. It is issued with the authority of the Chief Executive Officer of FIRCA, who is also Commissioner of Inland Revenue.
2. The policy in this statement seeks to tax certain speculative gains under section 11(a), which represents a departure from previous policy applied by the Commissioner. The effective date that the Commissioner will apply this policy is therefore set forward to 1 July 2006, so that land speculators, real estate agents and tax advisers will have advance notice of the tax effect of transactions they and their clients enter into.

## **LEGISLATIVE BASIS**

3. Section 11(a) of the Act says:

“11.... Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Act, shall include –

(a) any profit or gain accrued or derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit; but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded;...”

4. The elements of the section, each of which will be analysed in the next part of this statement, are as follows:

any profit or gain
accrued or derived
from the sale or other disposition
of any real or personal property (or interest therein)
if the business of the taxpayer comprises dealing in such property
or if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it
and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit
but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded.

## **INTERPRETATION OF SECTION 11(a)**

5. The section applies to “any profit or gain”. In calculating the profit, expenses such as cost of development, agent’s commission, legal fees etc of the taxpayer need to be deducted to arrived at a figure reflecting the net gain. However, no provision is made for inflation or changes in the time value of money as, unlike in the *Land Sales Act*, which allows a taxpayer 5% per annum, there is no equivalent mechanism in the *Income Tax Act*.
6. The profit or gain must have “accrued” or have been “derived”. Profit is “derived” when the sale takes place and settlement is made in favour of the taxpayer in cash or other value. Profit is “accrued” when it is credited in favour of the taxpayer but not actually paid.
7. The profit or gain must be from the “sale or other disposition”. Forms of “other disposition” are by way of gift, settling on a trust, etc.
8. The section applies to “real or personal property” and applies to sale of other property apart from real estate, such as shares or any other personal property. This practice statement will confine itself to sale of real property, although it should be mentioned that the interposing of a company to buy a property, then a dealing in the shares of that company, will also be caught by section 11(a). The term “or interest therein” refers to sale of a share of a jointly held property.
9. The first taxing limb of the section applies to profits “if the business of the taxpayer comprises dealing in such property”. The non-exhaustive definitions of “dealing in property” and “dealing in real and personal property” in section 2 of the Act provide further detail regarding this limb, but it is likely that such profits, if not taxed under section 11(a), would likely be taxed under the preamble to section 11, which occurs before paragraph (a) as “being profits from a trade or commercial or financial or other business or calling or otherwise howsoever”.
10. The second limb applies to profits “if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it”. This requires the Commissioner to form a view about the taxpayer’s intention at the time of purchase. There may be documentation available such as bank loan files, which will assist the Commissioner in forming this view. Contrary intention may be shown if the taxpayer purchased the property because of job relocation.
11. The third limb applies to “any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit”. In deciding whether this limb applies, the Commissioner will have regard to the indicia of a profit-making undertaking or scheme, some of which are listed in the next section of this Statement. There is a body of case law on overseas equivalents to section 11(a) that also need to be considered.

12. The section then provides an exclusion from all three taxing limbs, for “the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions”. This will exclude isolated transactions from the scope of section 11(a), but not all isolated transactions, only one “which is not in itself in the nature of trade or business”. A single purchase and sale, which is not part of a series of transaction, will still be caught under either of the three taxing limbs if they are in the nature of trade or business. In this context speculative gains (i.e. those from a profit-making undertaking or scheme) will be considered by the Commissioner as being “in the nature of business’, even if they are one-off for that taxpayer.

### **ADMINISTRATION OF SECTION 11(a)**

13. The Commissioner will usually be notified of an intended sale of land through the mechanism of impounding documents for the purposes of the *Land Sales Act*. At this stage the Commissioner will determine if section 11 (a) or any other section of the *Income Tax Act* applies, and if so, will tax the profit under the *Income Tax Act* rather than the *Land Sales Act*.

14. In determining whether section 11(a) applies, the Commissioner will look at the indicia of a profit-making undertaking or scheme, which include:

(i) purchase and sale within a short period of time, e.g. within 5 years, and sale was not due to other reasons e.g. enforced relocation; or

(ii) sale at a substantial profit relative to the period held e.g. purchased for \$200,000, held for 7 years, sold for \$800,000; or purchased for \$300,000, held for 1 year, sold for \$400,000; or

(iii) improvements made to land to enhance its value e.g. construction of a villa, so as to maximise profit made; or

(iv) property is located in an area which is well known for investment by speculators and locations where major hotels and tourist developments are carried out.

15. Where the Commissioner forms the view that section 11(a) does not apply, the Commissioner will determine whether or not the *Land Sales Act* applies (see Practice Statement no. 24).

16. Where the Commissioner forms a view that section 11(a) does apply, the profit or gain will be added to the taxpayer’s other income for the year. If the taxpayer is a non-resident whose only source of income in Fiji was the profit from the property sale, a special assessment may be raised by the Commissioner midway through the year to take just that profit, at the non-resident tax rates.

\*\*\*\*\*End of Practice Statement\*\*\*\*\*