



Decision impact statement

Commissioner of Taxation v Morton [2026] FCAFC 31

❗ Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

Table of Contents	Paragraph
Summary of decision	1
Overview of facts	5
Issues decided	15
ATO view of this decision	26
Comments	29

Venue:	Full Federal Court
Venue reference No:	VID 578 of 2025
Judgment date:	27 March 2026

Summary of decision

1. This Decision impact statement outlines the ATO's response to the Full Federal Court's decision in *Commissioner of Taxation v Morton* [2026] FCAFC 31, which affirmed the Federal Court's decision of 11 April 2025.¹
2. The Court found Mr Morton did not embark on a business of developing land nor did he venture the land into a profit-making scheme. Accordingly, no part of the proceeds was assessable income.
3. All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.
4. All judgment references in this Decision impact statement are to the judgment of *Commissioner of Taxation v Morton* [2026] FCAFC 31, unless otherwise indicated.

¹ *Morton v Commissioner of Taxation* [2025] FCA 336 (*Morton – at first instance*).

Decision impact statement

Overview of facts

5. Mr Morton (taxpayer) is a retired farmer who owned a 10-acre parcel of land in Tarneit, Victoria known as Dave's Block. It was part of a larger family farm (Morton Farm) that had been bought by his family in the 1950s. The taxpayer acquired Dave's Block from his father in 1980 and continued to use it for farming and grazing until the mid-2010s.²

6. In 2010, the Morton Farm was rezoned from rural to residential land, resulting in increased rates and land tax that led the taxpayer to form the view that farming Dave's Block would eventually become unviable.³ The farm had also been difficult to manage because of the urban encroachment and his concerns about safety due to increasing traffic.⁴

7. The taxpayer and his family then entered into 3 property development agreements with a property development group, Dacland (developer), for the Morton Farm to be developed, subdivided and sold as individual allotments as part of a residential estate.⁵ The taxpayer retained ownership of Dave's Block until the lots were sold.

8. The 3 agreements were entered into in 2012 with the agreement relating to Dave's Block being entered into on 23 November 2012. In his negotiations with the developer, the taxpayer proceeded on the basis of 2 key 'tenets' – that the land should not be used as security for loans taken out by the developer to fund the development, and that the Morton family should receive a fixed percentage of the proceeds from each subdivided lot, so that the developer could not artificially inflate expenses so as to reduce the entitlements of the family.⁶ The development agreement included further clauses to the effect that⁷:

- The developer undertook all planning, construction, and marketing activities for the land. The developer had exclusive right to subdivide and sell the land. The subdivision works included
 - obtaining development approvals
 - installation of infrastructure (for example, roads, services), and
 - sale of subdivided lots over time.Much of the development work was undertaken by the developer and outsourced to external professionals.
- The developer was 'solely responsible for incurring and paying all Development Costs'.⁸
- The agreement stated no partnership or joint venture was created.
- The developer's Development Fee was calculated on a tiered percentage basis of Sales Proceeds per Lot
 - 57.9% up to and including \$464 million
 - 30.9% from \$464 million – \$596 million, and
 - 51.9% from \$596 million.
- The taxpayer, as owner of the land, must also pay any GST on the fee.

² At [1]; *Morton – at first instance* at [7–8].

³ At [19].

⁴ *Morton – at first instance* at [102].

⁵ At [20–24].

⁶ At [100]; *Morton – at first instance* at [76].

⁷ At [21–63].

⁸ At [45].

Decision impact statement

- The taxpayer, as owner of the land, was to be provided monthly reports in relation to the development and appointed Tarneit East Development Project Pty Ltd (a Dacland company) power of attorney to do anything required to be done by the taxpayer with respect to his land to facilitate the development.
- The land was to be subdivided and sold in stages.

9. Dave's Block was subdivided into 48 residential lots and 2 commercial lots. Settlement for the residential lots occurred in the 2019 income year. Settlement for the first commercial lot occurred on 19 October 2020 and settlement for the second commercial lot occurred on 2 July 2021.⁹

10. The Commissioner of Taxation issued amended assessments to the taxpayer for the 2019 and 2021 income years, which brought proceeds from the sales of the allotments on Dave's Block into account as assessable income. The taxpayer lodged objections to the assessments, which were disallowed.¹⁰

11. The taxpayer appealed to the Federal Court. At first instance, the taxpayer claimed the assessments were excessive, because the proceeds from the sales of the allotments that comprised Dave's Block were capital receipts derived upon the realisation of an asset, and were therefore not assessable as income.

12. The Commissioner contended that the amounts were assessable income, namely that:

- in developing, subdividing, and selling the land that comprised Dave's Block, the taxpayer carried on a business, and therefore the land was trading stock for the purposes of Division 70¹¹, or
- the amounts were income according to ordinary concepts for the purposes of section 6-5, or
- the amounts were profit arising from the carrying on or carrying out of a profit-making undertaking or plan under section 15-15.

13. The primary judge allowed the taxpayer's appeal, finding the sale proceeds resulted from the mere realisation of a capital asset and were not assessable in his hands.¹² The primary judge concluded that the taxpayer had not embarked on a business of developing land nor had he ventured Dave's Block into a profit-making scheme.

14. The Commissioner appealed the decision to the Full Federal Court.

Issues decided

15. The issues on appeal before the Full Federal Court were whether the primary judge erred in finding:

- that the taxpayer at no stage embarked on a business of developing, subdividing and selling Dave's Block
- in the alternative, that the taxpayer never ventured Dave's Block into a profit-making undertaking or plan.

⁹ At [89].

¹⁰ At [90–95].

¹¹ For example, under section 70-80 or section 70-90.

¹² *Morton – at first instance* at [182].

Decision impact statement

16. It was agreed by both parties that the primary judge had not misstated the relevant legal principles, but it was the Commissioner's main contention that the learned judge had mischaracterised the effect of the terms of the Dave's Block development agreement.¹³

17. The Court outlined that the central question for determination, in line with established principles from long-standing authorities was whether, in seeking to maximise the amount of money which he received from the sale of Dave's Block, the taxpayer had committed the land to a business venture or to a profit-making undertaking or plan or whether he merely sold the land to the best advantage.¹⁴

18. The Court confirmed the following long-standing principles:

- Profits obtained from the realisation of property are to be treated on revenue account and as assessable to tax 'where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on or carrying out of a business'.¹⁵
- The question of whether a person is carrying on a business is a matter of fact and degree and is a conclusion to be drawn from all relevant facts and circumstances.¹⁶
- It is not necessary that a person carry on the activities personally. It is also relevant to consider activities carried on for or on behalf of the taxpayer, whether as agent, employee or pursuant to some other contractual or other arrangement. A person may appoint another to take the steps which constitute the business activity.¹⁷
- When determining whether a business is being carried on, relevant factors to consider include the profit motive (although a non-profit company may still carry on a business), acting in a business-like way (although many businesses may be found which operate in a non-business-like way), the keeping of books of account and records (although the fact that there are none will not necessitate the conclusion that a business is not carried on), and repetition (although a fixed-term project may still be a business).¹⁸ While no one indicia is determinative, it is possible that collectively they will demonstrate a business. It will be relevant in deciding whether a business is carried on that there is some repetition of acts and that the activities in question have something of a permanent character and what is required is that activities be engaged upon on a continuous and repetitive basis.¹⁹
- The Commissioner does not need to show that the taxpayer was carrying on a business and it is enough to answer the statutory description that there was a profit-making undertaking or scheme which exhibited the characteristics of a business deal, even though it did not amount to the carrying on of a business. If what has happened amounted to no more than the mere realization of an asset then it was not a profit-making undertaking or scheme.²⁰

¹³ At [157].

¹⁴ At [158] citing *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* [1982] HCA 8 (*Whitfords Beach*); 150 CLR 355 at [400], per Wilson J.

¹⁵ At [159] citing *Crow, D.M. v Commissioner of Taxation* [1988] FCA 447; 19 ATR 1565 at [1573].

¹⁶ At [160–161] citing *Puzey v Commissioner of Taxation* [2003] FCAFC 197 (*Puzey*) at [46–48]; *Spriggs v Commissioner of Taxation*; *Riddell v Commissioner of Taxation* [2009] HCA 22 at [59].

¹⁷ At [163] citing *Puzey* at [46] and [54].

¹⁸ At [160] citing *Puzey* at [46–48].

¹⁹ At [117] citing *Puzey* at [47].

²⁰ At [162] citing *Whitfords Beach* 150 CLR 355 at [383–384], per Mason J.

Decision impact statement

19. The Full Court accepted the evidence of the taxpayer that the²¹:

- Dave's Block development agreement involved a commercial transaction
- taxpayer intended to derive a profit from subdividing the land by recovering a percentage of the sale proceeds of the lots
- taxpayer anticipated that the value of the land, and thus the sales proceeds, would increase once the development was completed
- development works involved bringing Dave's Block within the Wyndham Planning Scheme and were designed to effect major changes to the land, and
- taxpayer appointed the developer as his agent to do and perform acts in respect of the development, and the development works, for the purpose of undertaking his obligations under the agreement (referring to express statements in clause 15.7 of the development agreement).

20. The Court did not accept the Commissioner's contention that the developer was appointed to carry out the development 'on behalf' of the taxpayer as his agent and that he therefore ventured Dave's Block to a business venture or to a profit-making undertaking or plan. The Court found when considering whether the developer was acting as agent of the land-owner the true question must involve defining the content of that relationship. On the facts of this case, the Court found that the Commissioner's agency contentions did not come to terms with specific terms of the development agreement that limited and defined the content of that relationship. The Court observed that the existence of clause 15.7 of the development agreement would not be necessary if the developer was doing the work of the land-owner.

21. The Full Court considered agency was not the relevant ultimate question²², and ultimately affirmed the primary judge's observations on this point, stating²³:

In truth, the question whether [the developer's] actions should be taken into account in deciding whether [the taxpayer] was carrying on a business of property development does not find a complete answer in the law of agency. ... **it will be a question of fact whether, and to what extent, the acts of [the developer] should be taken into account in discerning the character of the proceeds of the sale of Dave's Block in [the taxpayer's] hands.**

(Emphasis added).

22. The Court found that there were many factors that pointed to the taxpayer's realisation of Dave's Block as being motivated by factors other than those normally to be expected in a business context. This included that the:

- land was not acquired with the intention of profiting from its sale by subdivision, the circumstances of sale being motivated because farming on Dave's Block was not commercially viable for the reasons he gave (including the inclusion of the land in the Urban Growth Boundary and the consequential increase in land tax and so on)²⁴
- taxpayer did not seek to achieve the maximum available proceeds at any cost and adhered strictly to his 2 'tenets'²⁵, and

²¹ At [164].

²² At [167].

²³ At [171].

²⁴ At [172].

²⁵ At [172].

Decision impact statement

- taxpayer had little or no involvement as a practical manner in the development of the land, which tends against the notion he was engaged in any business of property development.²⁶

23. The Court did not accept the Commissioner's reliance on the 'massive' scale of the subdivision and accepted the primary judge's finding that²⁷:

"[t]he scale of the subdivision and sale of the [farm] was a product of the size and nature of [it] as an asset, in combination with forces prevailing in the market for residential property in Tarneit over the relevant period" and that he "[did] not accept that, without more, the acreage or the number of lots involved indicates that [the taxpayer] was engaged in a business of land subdivision and development"

24. The Court also did not accept the Commissioner's submission that where the activity is a fixed-term project such as a land development of the scale carried out by the taxpayer in this case, repetition holds less weight. The Court however disagreed with the primary judge's view that repetition was a significant factor in this case telling against the proceeds of sale being assessable income and considered that this factor 'was not informative in the particular circumstances of this case, and did not weigh in the balance one way or another'.²⁸

25. Ultimately, the Full Court agreed with the primary judge's conclusion that the taxpayer merely realised a capital asset and he therefore did not embark on a business of developing land nor did he venture Dave's Block into a profit-making scheme. Accordingly, no part of the proceeds of the sale of Dave's Block was assessable income in the taxpayer's hands.²⁹

ATO view of this decision

26. The Full Federal Court's decision was an application of the existing case law and does not change the relevant legal principles concerning whether a taxpayer is carrying on a business and undertaking a profit-making undertaking or plan. The decision does not represent any departure from our long-standing approach to property development issues, as articulated in the following existing ATO guidance which continue to provide the relevant analytical framework:

- Taxation Ruling TR 97/11 *Income tax: am I carrying on of a business of primary production?*
- Taxation Ruling TR 92/3 *Income tax: whether profits on isolated transactions are income.*

27. We consider that this case turned on its own facts and circumstances and the Court's acceptance of the credibility of the taxpayer. Of significance was the fact that the taxpayer strictly adhered to his 2 'tenets', firstly that the land could not be used as security for loans taken out by the developer to fund the development and secondly, that the taxpayer should receive a fixed percentage of the proceeds from each subdivided lot, so that the developer could not artificially inflate expenses so as to reduce the entitlements of the family. The Court considered that this demonstrated that the taxpayer was not willing to take every step possible to maximise the profits received from the development which led to their finding that the taxpayer did not carry on a business of developing land or venture Dave's Block into a profit-making scheme. We do not consider that the case establishes a principle that where a taxpayer has taken steps to mitigate risk resulting in less profit is being obtained, a conclusion can always be drawn that the activities are a mere

²⁶ At [173].

²⁷ At [175].

²⁸ At [178].

²⁹ At [180].

Decision impact statement

realisation. Each case will turn on their own facts. The Court considered the relevant facts and formed a view that because the taxpayer had merely realised their asset, they therefore, did not carry on a business of developing land or venture Dave's Block into a profit-making scheme. Our view is that the following are separate tests, and each requires their own independent analysis:

- whether the taxpayer was carrying on a business of property development under **section 6-5**
- whether the profit is assessable income under **section 6-5** (an isolated profit-making transaction), **section 15-15** (profit-making undertaking or plan), or as trading stock under **Division 70** (with proceeds brought to account under section 70-80 or section 70-90).³⁰

28. We will continue to apply the established legal principles to other cases by undertaking a fact-specific assessment of whether a taxpayer's activities amount to the carrying on of a business, an isolated profit-making transaction, or the mere realisation of a capital asset. This will involve a holistic evaluation of all relevant facts and circumstances, consistent with the law and TR 97/11 and TR 92/3.

Comments

29. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Due date: 3 July 2026

Contact officer details have been removed as the comments period has ended.

Commissioner of Taxation
5 June 2026

³⁰ Section 70-80 provides that when you dispose of an item of your trading stock in the ordinary course of business, what you get for it is included in your assessable income (under section 6-5) as ordinary income. Section 70-90 applies to disposal of trading stock outside the ordinary course of your business.

Decision impact statement

References

Related rulings and determinations:

TR 97/11; TR 92/3

Legislative references:

ITAA 1997 6-5
ITAA 1997 15-15
ITAA 1997 Div 70
ITAA 1997 70-80
ITAA 1997 70-90

Cases relied on:

Commissioner of Taxation v Morton [2026]
FCAFC 31; 2026 ATC 21-007
Morton v Commissioner of Taxation [2025]
FCA 336; 2025 ATC 20-957; 122 ATR 521

Cases distinguished:

Federal Commissioner of Taxation v
Whitfords Beach Pty Ltd [1982] HCA 8; 150
CLR 355; 82 ATC 4031; 12 ATR 692
Crow, D.M. v Commissioner of Taxation
[1988] FCA 447; 19 ATR 1565; 88 ATC 4620
Puzey v Commissioner of Taxation [2003]
FCAFC 197; 131 FCR 244; 2003 ATC 4782;
201 ALR 302; 53 ATR 614
Spriggs v Commissioner of Taxation; Riddell
v Commissioner of Taxation [2009] HCA 22;
239 CLR 1; 2009 ATC 20-109; 72 ATR 148

ATO references

NO: 1-16S5MIVV
ISSN: 2653-5424
BSL: PW

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).