
Taxation Determination

Income tax: capital gains: what is meant by the phrase ‘at least 12 months before’ in subsection 114-10(1) of the *Income Tax Assessment Act 1997* (about indexation) and subsection 115-25(1) (about the CGT discount)?

Preamble

*The number, subject heading, date of effect and paragraphs 1 to 3, 5 and 6 of this Taxation Determination are a ‘public ruling’ for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. The remainder of the Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain how a Determination is legally or administratively binding.*

Date of effect

This Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. A capital gain is only a discount capital gain if it results from a CGT asset that was acquired at least 12 months before the CGT event that gave rise to the gain (subsection 115-25(1) *Income Tax Assessment Act 1997* (‘ITAA 1997’)). Similarly, cost base indexation is only available for a CGT asset acquired at or before 11.45 am (by legal time in the Australian Capital Territory) on 21 September 1999 and at least 12 months before the CGT event (subsection 114-10(1) ITAA 1997).
2. The use of the words ‘at least’ in subsection 114-10(1) and subsection 115-25(1) requires a clear period of 12 months (that is a clear year) to expire between the acquisition of the CGT asset and the happening of the CGT event: *Carapanayoti & Co Ltd v. Comptoir Commercial Andre & Cie SA* [1972] Lloyd’s Rep 139 (cited with approval in *Forster v. Jododex Australia Pty Ltd* (1972) 127 CLR 421), *Ex parte McCance: Re Hobbs* (1926) 27 SR NSW 35 and *Halsbury’s Laws of England* 4th ed reissue, vol 45(2) at page 202, paragraph 234. In our view, both the day of acquisition and the day on which the CGT event happens must be excluded in reckoning the 12 month period. So, a period of 365 whole days (or in a leap year 366 whole days) must elapse between the day on which the CGT asset was acquired and the day on which the CGT event happens.
3. In essence, the CGT discount or cost base indexation are available if the CGT event happens on the date following the anniversary date of the acquisition of the asset.
4. It is acknowledged that this may not be the obvious interpretation of the provisions but there is a very clear body of law derived from decided cases over the last 100 years leading to the conclusion that this view must be regarded as settled law. As Gibbs J remarked in *Forster v. Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 445, ‘[w]hatever doubts may have originally existed,

and however nicely balanced the arguments may originally have been, it is now...“better...to adhere to settled rules””.

Example

5. John sold an asset on 2 February 2002 that he acquired on 2 February 2001. In deciding whether John acquired the asset at least 12 months before the CGT event it is necessary to determine whether there is clear year between 2 February 2001 (date of acquisition) and 2 February 2002 (date of CGT event). A clear year starting on 3 February 2001 (date of acquisition excluded) ends at the end of 2 February 2002. Because there is not at least 12 months between the relevant dates, John cannot apply the CGT discount to his capital gain. If John had sold the asset on 3 February 2002 his capital gain would have been a discount capital gain.

Note 1:

6. The phrase ‘within 12 months after’ in subsection 160Z(3) of the *Income Tax Assessment Act 1936* (ITAA 1936) is construed in a similar manner to the construction of ‘at least 12 months before’ in ITAA 1997. According to EL Piesse, *The Elements of Drafting* 4th ed (1968) at 142, “‘Within’ seven days after an event, also, usually does not include the day of the happening of the event; if that day is the 6th, the period ends at midnight of the 13th/14th: *Williams v Burgess* (1840) 10 LJQB 10”.

7. So, for an asset acquired on 30 June 1996 and disposed of on or before 30 June 1997, the disposal of the asset would have occurred ‘within 12 months after’ the day on which the asset was acquired (30 June 1996) and indexation under the ITAA 1936 would not have been available. The day on which the asset was acquired (30 June 1996) is excluded from the 12 month period. The relevant period of 12 months commenced on 1 July 1996 and ended at midnight on 30 June 1997/ 1 July 1997. Indexation would have been available if the asset had been disposed of on or after 1 July 1997.

Note 2:

8. There are two reasons why subsection 36(1) of the *Acts Interpretation Act 1901* (Cth) does not assist in construing subsections 114-10(1) and 115-25(1) of the ITAA 1997. First, subsection 36(1) assists with the reckoning of time if a Commonwealth Act prescribes or allows for a period of time ‘dating **from** a given day, act or event’ (emphasis added). Subsections 114-10(1) and 115-25(1) do not do that. Second, subsection 36(1) only operates ‘unless the contrary intention appears’ in the legislation. The use of words such as ‘at least’ or ‘not less than’ constitute a sufficient indication of an intention to exclude the application of subsection 36(1): *Ex parte McCance: Re Hobbs* (1926) 27 SR(NSW) 35 at 39 and *Bear v Official Receiver* (1942) 65 CLR 307 at 318. The use of the words ‘at least’ in subsections 114-10(1) and 115-25(1) therefore sufficiently indicates a contrary intention.

Note 3:

9. As a general rule, a day in law is not divisible. The law does not take account of fractions of a day. However, the rule does not apply if it is necessary to establish a sequence of events on the same day: see *Halsbury’s Laws of Australia* vol 26 paragraph 410-165.

Note 4:

10. According to *Halsbury's Laws of Australia*, the common year consists of 365 days and the leap year of 366 days (see vol 26 paragraph 410-5) and in any period of a year in which the month of February has 29 days there must be 366 days (see vol 26 paragraph 410-10).

Commissioner of Taxation15 May 2002

Previous draft:

Previously released as TD 2001/D10

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16

Subject references:

- acquire
- after
- asset
- at least
- before
- capital gain
- CGT asset
- CGT discount
- CGT event
- cost base
- day
- disposal
- from
- indexed cost base
- indexation
- not less than
- within
- year

Legislative references:

- Acts Interpretation Act 1901 36(1)
- ITAA 1997 114-10(1)
- ITAA 1997 115-25(1)
- ITAA 1936 160Z(3)
- TAA 1953 Pt IVA

Case references:

- *Bear v Official Receiver* (1942) 65 CLR 307 at 318
- *Carapanayoti & Co Ltd v. Comptoir Commercial Andre & Cie SA* [1972] Lloyd's Rep 139
- *Ex parte McCance: Re Hobbs* (1926) 27 SR(NSW) 35
- *Forster v. Jododex Aust Pty Ltd* (1972) 127 CLR 421
- *Williams v Burgess* (1840) 10 LJQB 10

ATO References

NO: T2001/017515

ISSN: 1038-8982