


CR 2017/4 - Income tax: disturbance payments by Transport for NSW in respect of the construction of the Sydney Metro City & Southwest

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Class Ruling

Income tax: disturbance payments by Transport for NSW in respect of the construction of the Sydney Metro City & Southwest

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❶ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (less the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Subdivision 20-A of the ITAA 1997
- Division 104 of the ITAA 1997
- Division 110 of the ITAA 1997
- Division 116 of the ITAA 1997, and
- section 118-20 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is any entity which holds a leasehold interest or sub-leasehold interest in, licence over or right to occupy, land (other than an estate in fee simple in the affected parcel of land) that

- is used for commercial or retail (not residential) purposes, and
- is acquired, or will be acquired, by Transport for NSW (TfNSW) for the purpose of, or in connection with, the construction of the Sydney Metro City & Southwest (the Project),

where the entity:

- does not carry on a business of trading in leases, sub-leases, licences or rights to occupy land
- does not enter into a contract with TfNSW to sell, or otherwise cease to own, their leasehold interest or sub-leasehold interest in, licence over or right to occupy, land with a purpose of making a profit or gain
- is not an exempt entity specified in section 11-5, and
- is not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their interests in, or rights over, land.

(Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

4. In this Ruling, a person belonging to this class of entities is referred to as a 'relevant land holder'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 22 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and

- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 July 2015 to 30 June 2020. The Ruling continues to apply after 30 June 2020 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant (Ashurst).

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

Sydney Metro City & Southwest

10. TfNSW is undertaking the construction of the Project. It will consist of a metro railway line between Chatswood and Bankstown, including a new crossing beneath Sydney Harbour, new railway stations in the lower North Shore and central Sydney, and the upgrade and conversion of the current heavy railway line between Sydenham and Bankstown.

11. Under section 3C of the *Transport Administration Act 1988* (NSW), TfNSW is constituted as a corporation, and is declared to be a NSW Government agency.

Acquisition of land

12. In order to complete the Project, TfNSW will need to acquire various parcels of land throughout the affected areas of Sydney. This will involve the acquisition of an estate in fee simple in each affected parcel of land.

13. Where land is occupied by an entity holding a leasehold interest or sub-leasehold interest in, licence over or right to occupy, the land (other than an estate in fee simple in the affected parcel of land), TfNSW will then have to acquire or extinguish those interests in, or rights over, land.

14. TfNSW will first endeavour to negotiate the acquisition or extinguishment of the interests in, or rights over, land. If negotiations are successfully concluded, TfNSW will enter into a deed or other contract with the affected entity that embodies the terms of the acquisition or extinguishment.

15. Where a negotiated outcome cannot be reached, TfNSW will exercise its power of compulsory acquisition under item 11 of Schedule 1 to the *Transport Administration Act 1988* (NSW).

16. The amount of money which TfNSW must pay to an affected entity when it exercises its power of compulsory acquisition is governed by the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). An acquisition notice must be published in the NSW Gazette pursuant to section 19 of that Act, and the land described in the notice is vested in TfNSW on the date of publication pursuant to section 20 of that Act.

17. Whether interests in, or rights over, land are acquired or extinguished by means of negotiation or compulsory acquisition, TfNSW will pay the affected entity an amount consisting of at least two components:

- (a) the market value of the interest in, or right over, land, and
- (b) compensation for anticipated costs to the affected entity of relocating to new premises (a disturbance payment).

18. This Ruling only considers the income tax consequences of a disturbance payment for an affected entity that is a relevant land holder (as defined in paragraph 3).

Calculation of the disturbance payment

19. The disturbance payment will be calculated as an estimate of the expenses that the affected entity will incur in relocating to new premises. The affected entity will be required to provide substantiation and quotes for the various expenses that they may incur in relocating. There is no obligation to either actually incur these expenses, or repay any part of the disturbance payment that is not expended.

20. These expenses include legal and consulting fees, removal fees, the costs of fitting out and furnishing the new premises, and increased rent. It may also include compensation for loss of profits as a result of relocating.

21. If interests in, or rights over, land are acquired or extinguished by means of negotiation between TfNSW and the affected entity, the amount of the disturbance payment will also be negotiated between them.

22. If interests in, or rights over, land are acquired by means of TfNSW exercising its power of compulsory acquisition, the amount of the disturbance payment that TfNSW will pay to the affected entity will be calculated by reference to the criteria in paragraph 55(d) and section 59 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

Ruling

Assessable recoupment

23. A disturbance payment, being a grant (within the definition of a 'recoupment' in subsection 20-25(1)), and to the extent that it is not ordinary income or statutory income because of another provision of the income tax legislation (subsection 20-20(1)), will be an assessable recoupment under subsection 20-20(3).

24. A part of the disturbance payment will be included in a relevant land holder's assessable income under section 20-40 for several income years. The amount of assessable income in an income year will be equal to the amount the relevant land holder can deduct (in that same income year) under Division 40 for the decline in value of any depreciating asset acquired with the disturbance payment.

25. Any part of the disturbance payment that is compensation for loss of profits is not an assessable recoupment under section 20-20. It will form part of a relevant land holder's ordinary income, which is included in their assessable income under section 6-5.

CGT consequences

The right to receive a disturbance payment

26. The right to receive a disturbance payment is subject to the CGT provisions in Parts 3-1 and 3-3.

27. A relevant land holder's right to receive a disturbance payment will be a CGT asset (subsection 108-5(1)).

28. Where TfNSW acquires interests in, or rights over, land by means of negotiation, the right to receive a disturbance payment will be acquired when the relevant land holder enters into a deed or other contract with TfNSW that gives rise to a contractual right to receive a specific amount (event number D1 in the table in subsection 109-5(2)).

29. Where TfNSW acquires interests in, or rights over, land by means of compulsory acquisition, the right to receive a disturbance payment will be acquired when TfNSW creates in the relevant land holder the legal right to receive a specific amount (event number D1 in the table in subsection 109-5(2)). This will happen on the date of publication in the NSW Gazette of an acquisition notice, pursuant to sections 19 and 20 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

CGT event C2

30. CGT event C2 will happen to the right to receive a disturbance payment when a relevant land holder receives the disturbance payment (subsection 104-25(1)). This is because their right to receive the disturbance payment will end by the right being discharged or satisfied (paragraph 104-25(1)(b)).

31. The time of CGT event C2 is when a relevant land holder receives the disturbance payment (paragraph 104-25(2)(b)).

32. The capital proceeds will consist of the amount of the disturbance payment (paragraph 116-20(1)(a)).

33. The capital gain from CGT event C2 happening is equal to the amount by which the capital proceeds (the disturbance payment) exceed the cost base of the right (subsection 104-25(3)).

34. The cost base of the right will only include any incidental costs incurred by the relevant land holder to acquire the right to receive a disturbance payment, or that relate to CGT event C2 happening to the right (subsection 110-25(3) and section 110-35). This includes remuneration for the services of a surveyor, valuer, accountant, agent, consultant or legal adviser. However, any such expenditure will not form part of the cost base of the right to the extent of any amount received by a relevant land holder as recoupment (see paragraph 39) of it (subsection 110-45(3)). This includes, but is not limited to, receiving an amount as part of the disturbance payment to cover such expenditure.

Anti-overlap rule

35. A capital gain that a relevant land holder makes from CGT event C2 in respect of the right to receive a disturbance payment, is reduced by the amount that is included in their assessable income for any income year under section 6-5 or section 20-40 (subsection 118-20(1)) – see paragraphs 24 and 25.

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

36. The income tax consequences and relevant legislative provisions concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

Assessable recoupment

37. To be an assessable recoupment, an amount cannot be ordinary income or statutory income because of a provision outside Subdivision 20-A (subsection 20-20(1)).

38. Under subsection 20-20(3), an amount you have received as 'recoupment' of a loss or outgoing (except by way of insurance or indemnity) is an assessable recoupment if:

- you can deduct an amount for the loss or outgoing for the current year, or
- you have deducted or can deduct an amount for the loss or outgoing for an earlier income year,

under a provision listed in section 20-30.

39. Subsection 20-25(1) provides that 'recoupment' of a loss or outgoing includes:

- (a) any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery, however described, and
- (b) a grant in respect of the loss or outgoing.

40. Under subsection 20-20(1), a disturbance payment will not be ordinary income (other than any part of it that is compensation for loss of profits) or statutory income because of a provision outside Subdivision 20-A.

41. The disturbance payment is a grant in respect of various outgoings within the meaning of paragraph 20-25(1)(b). Therefore, it will be an amount received by a relevant land holder as 'recoupment' of those outgoings for the purposes of Division 20.

42. A part of the disturbance payment will be an assessable recoupment under subsection 20-20(3). This is because some of the expenses (or outgoings) that a relevant land holder may incur in relocating to new premises – specifically in relation to fitting out and furnishing the new premises – can be deducted in the income year in which those outgoings are incurred and subsequent income years, under Division 40 (which is a provision listed in section 20-30) for the decline in value of any depreciating assets acquired with the disturbance payment.

43. Where an outgoing is deductible under Division 40 over two or more income years, section 20-40 applies. The amount that is assessable for an income year is to be worked out according to the following method statement (subsection 20-40(2)):

Step 1	Add up all the assessable recoupments of the loss or outgoing that you have received (in the current year or earlier). The result is the 'total assessable recoupment'.
Step 2	Add up the amounts (if any) included in your assessable income for earlier income years, in respect of the loss or outgoing, by section 20-40. The result is the 'recoupment already assessed'. (If no amount was included, the 'recoupment already assessed' is nil.)
Step 3	Subtract the 'recoupment already assessed' from the 'total assessable recoupment'. The result is the 'unassessed recoupment'.
Step 4	Add up each amount that you can deduct for the loss or outgoing for the current year, or you have deducted or can deduct for the loss or outgoing for an earlier income year. The result is the 'total deductions for the loss or outgoing'.
Step 5	Subtract the 'recoupment already assessed' from the 'total deductions for the loss or outgoing'. The result is the 'outstanding deductions'.
Step 6	The 'unassessed recoupment' is included in your assessable income, unless it is greater than the 'outstanding deductions'. In that case, the amount of the 'outstanding deductions' is included instead.

44. Where a Division 40 deduction is limited to only a proportion of the outgoing in acquiring a depreciating asset because only part of the depreciating asset was used for a taxable purpose (defined in subsection 40-25(7) to include the purpose of producing assessable income), section 20-50 modifies how section 20-40 applies.

CGT event C2 and anti-overlap rule

45. The capital gain from CGT event C2 will be reduced to the extent that any part of the disturbance payment is included, either in the income year the disturbance payment is received or any subsequent income year, in a relevant land holder's assessable income under section 6-5 or section 20-40 (subsection 118-20(1)).

46. In respect of section 20-40, this means that the capital gain must be reduced by the part of the disturbance payment that was used by the relevant land holder to acquire any depreciating asset, to the extent that the depreciating asset is used for a taxable purpose (defined in subsection 40-25(7) to include the purpose of producing assessable income). This will require the relevant land holder to

forecast the future use of a depreciating asset, and seek an amendment of their assessment (within the time limits set by section 170 of the *Income Tax Assessment Act 1936*) for the income year in which the disturbance payment is received if the actual use of the depreciating asset in a subsequent income year is different from the forecast.

47. The capital gain is reduced by the amount included in the relevant land holder's assessable income if the capital gain exceeds that assessable amount (subsection 118-20(3)).

48. If the capital gain is less than the amount included in the relevant land holder's assessable income, the capital gain can only be reduced to zero (subsection 118-20(2)).

Appendix 2 – Detailed contents list

49. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936
- ITAA 1936 170
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 Subdiv 20-A
- ITAA 1997 20-20(1)
- ITAA 1997 20-20(3)
- ITAA 1997 20-25(1)
- ITAA 1997 20-25(1)(b)
- ITAA 1997 20-30
- ITAA 1997 20-40
- ITAA 1997 20-40(2)
- ITAA 1997 20-50
- ITAA 1997 Div 40
- ITAA 1997 40-25(7)
- ITAA 1997 Part 3-1
- ITAA 1997 Part 3-3
- ITAA 1997 108-5(1)
- ITAA 1997 109-5(2)
- ITAA 1997 Div 104
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(1)(b)
- ITAA 1997 104-25(2)(b)
- ITAA 1997 104-25(3)
- ITAA 1997 Div 110
- ITAA 1997 110-25(3)
- ITAA 1997 110-35
- ITAA 1997 110-45(3)
- ITAA 1997 Div 116
- ITAA 1997 116-20(1)(a)
- ITAA 1997 118-20
- ITAA 1997 118-20(1)
- ITAA 1997 118-20(2)
- ITAA 1997 118-20(3)
- TAA 1953
- Transport Administration Act 1988 (NSW)
- Land Acquisition (Just Terms Compensation) Act 1991 (NSW)

ATO references

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