TR 2000/D5 - Income tax: taxation of retirement village owners

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Generated on: 29 November 2026, 10:08:11 PM

Draft Taxation Ruling
Income tax: taxation of retirement village owners

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Preamble

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. This Ruling contains the Commissioner's opinion on the way in which a tax law or tax laws apply to the class of persons and class of arrangements described below.

Class of person/arrangement

2. The class of persons to which this Ruling applies are the owners of commercial retirement villages.

3. The class of arrangements to which this Ruling applies are arrangements by which commercial retirement village owners:

(a) acquire or develop a retirement village;

(b) grant occupancy rights to retirement village residents;

(c) operate or manage a retirement village; and

(d) dispose of a retirement village.

This Ruling does not consider the taxation treatment of income derived by government-approved and funded nursing homes and hostel accommodation, although such facilities may be situated within a retirement village complex. Neither does this Ruling consider the taxation implications for village residents.

5. Section references are to the *Income Tax Assessment Act 1997* (the 1997 Act) unless otherwise indicated.

Previous Ruling

6. Taxation Ruling TR 94/24 issued on 30 June 1994 and expressed our previous views on the taxation treatment of the owners of commercial retirement villages. That Ruling is now withdrawn, with effect from (date to be inserted, to match the date notice of the withdrawal is published in the *Gazette*.)

7. To the extent that our views in Taxation Ruling TR 94/24 still apply, they have been incorporated in this Draft Ruling.

Ruling

Taxpayer who builds a village to sell in its entirety

8. Where a property developer develops a retirement village for the purpose of sale to a village operator, the land and buildings are trading stock of the property developer. This treatment is unchanged from Taxation Ruling TR 94/24.

Retirement village operator who sells strata titled units

9. Where a retirement village operator develops or buys the strata title to the residential units for sale the trading stock provisions apply. This treatment is unchanged from Taxation Ruling TR 94/24.

10. Where title to common areas is to pass to strata title residents, or to a body corporate owned by the residents, the cost of those common areas should be treated as part of the cost of trading stock of strata title units.

11. Where common facilities will continue to be owned by the village operator after strata units are sold, the village operator will have stopped holding the common facilities as trading stock immediately after separate title to them has been created on subdivision. Section 70-110 will operate to treat the village operator as having sold the common facilities, in the ordinary course of business, at their cost. Proceeds will be assessable income, and the common facilities will not be included in closing stock at the end of the financial year. The operator will be taken to have immediately reacquired the common facilities for the same amount, and that amount will be treated as an outgoing of a capital nature.

12. Where a village operator does not exercise an option to repurchase a strata title unit, and instead sells the unit to a new resident on behalf of the old resident, any fee or commission derived will be assessable income under section 6-5. Deferred management

fees received on sale are assessable in accordance with paragraph 26 below.

Village operators who grant occupancy rights

13. Where a village owner develops or acquires a retirement village to operate **an ongoing business**, and grants occupancy rights to village residents, the costs of acquiring or developing the village are capital or of a capital nature. The view expressed in Taxation Ruling TR 94/24 that the cost of development or acquisition of a village was on revenue account in these circumstances was not correct.

Deductions for capital works under Division 43

14. Where the costs of development or acquisition are capital in nature, deductions would be allowable to a village operator under Division 43 for capital works.

15. Village owners who have been allowed a deduction for construction costs under Taxation Ruling TR 94/24 will not be entitled to deductions under Division 43 for capital works.

Deductions for depreciation under Division 42

16. Deductions for depreciation of plant would be allowable under Division 42.

Prepaid rent

17. To the extent that receipts are in form genuinely rent in advance, and non-refundable, the rent will be assessable in full on receipt. Where the rent is fully abatable, it will be assessable over the period of the advance, as amounts come home to the village owner.

Licence fee

18. Where paid for the use of a village dwelling, licence fees are assessable in the same way as rent in advance, except to the extent it is a premium for the grant of a lease.

Premiums received for grant of leases

19. To the extent that receipts are premiums they are regarded as capital in nature.[1]

[1] The Capital Gains Tax consequences of granting a lease are dealt with below.

Interest free loan or security deposit

20. To the extent that receipts are in form genuinely an interest free loan or security deposit, fully refundable at the end of the period of occupancy, they will be treated as capital in nature. Where the amount refunded is to be offset by deferred management or other fees, those fees will be assessable in accordance with paragraph 26.

21. However, to the extent that "loan" amounts are not refundable, they are regarded as prepayments of rent or other fees. These amounts will be assessable in full on receipt, except to the extent they are subject to abatement, or the refund varies with the actual period of occupancy. In those circumstances, these amounts will be assessable as they come home to the village owner. This will occur as amounts become non-repayable.

22. Alternatively, the non-refundable amounts are regarded as in substance rent for the use of a village dwelling. In the application of Part IVA of the *Income Tax Assessment Act 1936* (the 1936 Act) regard must of course be had to the individual circumstances of each taxpayer. However, consideration will be given to the possible application of Part IVA to include amounts equal to the non-refundable amounts in the village owner's assessable income, in the same way that rent or other fees would be included in assessable income.

Moneys received by company on issue of redeemable preference shares

23. The money received by way of issue price of shares issued by a company are capital receipts.

24. However, to the extent that an arrangement is structured so that amounts to be paid on redemption at the end of the period of occupancy will be calculated by reference to the actual period of occupancy, the difference between the amount received by the company on the issue of shares and the amount repaid by the company on redemption is regarded in substance as rent for the use of the village dwelling. In those circumstances consideration will be given to applying Part IVA of the 1936 Act. Amounts equal to those amounts may be included in the village owner's assessable income over the period of the occupancy in the same way that rent or other fees would be included in assessable income.

Commissions for sale of shares on behalf of residents

25. Where the redeemable preference shares of an outgoing resident are not redeemed, and instead sold to a new resident on behalf of the outgoing resident, the commission will be assessable income under section 6-5.

Deferred management or other fees

26. Where payment of management or other fees is deferred until the expiry of a lease, or other occupancy arrangement, and offset against amounts payable to the outgoing resident, those fees are nevertheless assessable on an accruals basis as income under section 6-5.

Periodic management or other fees

27. These are periodic payments from residents which are made for the upkeep of the village and for the provision of services. These are assessable when received or receivable, under section 6-5.

Recurring operating costs and sinking fund contributions

28. Residents usually make contributions towards operating costs, either directly or into a sinking fund. Where the village owner is responsible for the outgoing, the contributions will be assessable income under section 6-5 when they are due and payable by the resident. Operating expenditure, including holding charges, will be deductible to the village owner under section 8-1 when incurred.

Capital Gains Tax consequences on grant of a long term lease

29. CGT Event F1 happens if a lessor grants a lease: section 104-110. The capital proceeds are any premium paid or payable for the grant of the lease: sub-section 116-20(2). Expenditure incurred on the grant of the lease is deducted from the capital proceeds in working out whether the taxpayer has made a capital gain or loss on the grant of the lease: Sub-section 104-110(3). Expenditure incurred on the grant of the lease would not include any part of the cost of the underlying asset.[2]

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[2] See the leading judgment of Hill J in *FC of T v. Krakos Investments Pty Ltd* 96 ATC 4063, at 4065; 32 ATR 7 at 10 where the similarly worded section 160ZS(2) of the 1936 Act was considered.

30. Double taxation of the premium will be prevented by section 118-20.[3]

Election to treat long term lease as a sale is unavailable

31. The leases granted to retirement village residents are usually of 99 years, but invariably terminate on the death of the resident. Accordingly the grant of these leases should be treated as a CGT event F1, rather than CGT event F2.[4]

Termination of occupancy

32. Where a deposit or loan received on grant of the lease is held to be capital in nature, it follows that repayment or refund of those amounts to outgoing residents ought also to be regarded as capital in nature.

33. Refunds of unused rent in advance are also regarded as capital in nature, as are amounts paid on redemption of redeemable preference shares.

34. Where a village operator makes payment to an outgoing resident of a share of any increase in the entry price payable by a replacement resident (sometimes referred to as lease surrender fees), such payments are capital in nature and not deductible.

Sale of a retirement village

35. Where a village is not trading stock of the village operator, and the costs of development or acquisition are capital in nature, it follows that the proceeds on sale of the village should be treated as capital in nature.

36. Some prepayments such as rent in advance will not be assessable in full on receipt, but assessable over time when earned, or when the amounts can be said to have "come home". When a village is sold the new owner may pay a lesser purchase price by undertaking to meet contingent liabilities for prepaid rent or other amounts repayable to outgoing residents in the future on termination of their leases.

37. Where the seller of a retirement village remains contractually liable to village residents to repay unused rent in advance, or other unused prepayments, the seller will be assessable for rent as and when those amounts cease to be refundable or repayable.

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[3] Rewrite of sub-section 160ZA(4) of the 1936 Act.
[4] Sections 104-110 and 104-115 of the 1997 Act.

38. However, where the contract to repay unused rent in advance is novated, the rent in advance might be said to have come home to the seller of the village on novation. The seller would be assessable on that rent in the year of the novation, under section 6-5.

Capital Gains Tax on the sale of a retirement village

39. The sale of the village would be a CGT event A1, under section 104-10.

40. The capital proceeds from the event include the following:

- any money received for the sale (paragraph 116-20(1)(a));
- the amount of any secured liabilities assumed by the new village owner (section 116-55); and
- the market value of any other property received, such as a right in the nature of a contractual promise by the purchaser of the village to pay amounts to outgoing residents for unused rent in advance (paragraph 116-20(1)(b)).[5]

41. Taxation Ruling TR 1999/16 explains the tax treatment for a taxpayer who conducts a business with goodwill, and makes a capital gain or loss if a CGT event happens to goodwill of a business.

42. The cost base for a village owner includes the money paid in respect of acquiring it, under sub-section 110-25(2). Purchasers of an existing retirement village business would include the amount of any assumed liabilities in the first element of his or her cost base, under section 112-35. However, where the new owner undertakes to meet contingent liabilities, such as the potential refund of any unexpired portion of rent in advance paid by existing residents to the outgoing owner, only amounts subsequently paid in satisfaction of that obligation would then form part of the cost base: see Taxation Ruling TR 93/15.

43. For CGT assets acquired **at or before** 7.30pm (Australian Capital Territory time) on 13 May 1997, expenditure does not form part of the second and third elements of the cost base (i.e. incidental costs and non-capital holding costs respectively) to the extent a taxpayer has deducted or can deduct it: section 110-40.

44. Subject to the special rule in section 110-53,[6] for CGT assets acquired **after** 7.30pm (ACT time) on 13 May 1997, the cost base

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[5] See also *Taxation Ruling TR 93/15*, which deals with similar provisions in the 1936 Act.

[6] See paragraph 47 below.

does not include expenditure to the extent it has been deducted or can be deducted: sub-section 110-45(2).

45. Accordingly where a deduction has been allowed for the cost of development or acquisition of a village under Taxation Ruling TR94/24, those amounts will not be included in the cost base.

46. Similarly, any amounts allowed under Division 43 for capital works will also be excluded from the cost base.

47. Subsection 110-53(3) modifies the application of subsection 110-45(2) in certain circumstances. Where a taxpayer acquires land at or before 7.30pm (ACT time) on 13 May 1997, and after that time but before 1 July 1999 acquires a separate asset for the purposes of section 160P the 1936 Act, section 110-40 will apply to that separate asset instead of subsection 110-45(2). Commencement of construction of a stage of a retirement village constitutes acquisition of a CGT asset (Item 1 section 109-10).

48. The reduced cost base will not include any amount allowed (or allowable) as a deduction: sub-section 110-55(4). Accordingly where a deduction has been allowed for the cost of development or acquisition of a village under Taxation Ruling TR 94/24, those amounts will not be included in the reduced cost base.[7]

49. Similarly, any amounts allowed under Division 43 for capital works will also be excluded from the reduced cost base.

Transitional issues

50. A village owner may seek to amend previous years' assessments or recast accounts consistently with this Ruling. They will be able to do so, in any manner chosen, subject to any limitation on amendment contained in section 170 of the 1936 Act. However there may be situations where a taxpayer has complied with Taxation Ruling TR 94/24 and does not seek to amend previous years' assessments.

51. A village owner may have complied with Taxation Ruling TR 94/24 and returned rent in advance as assessable income when paid by an incoming resident, notwithstanding the rent is fully abatable, and properly assessable following the principle in *Arthur Murray*. On the view expressed in this draft, rent would be assessable as it comes home, after this ruling becomes effective. In these circumstances a village owner is potentially taxable twice on the same income.

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[7] See *TR 94/24* par.13, where the same position was adopted in respect of the operation of section 160ZK of the 1936 Act.

52. This treatment would produce an undesirable result, especially where it is no longer possible for earlier assessments to be amended to exclude the rent in advance.

53. Accordingly, where a village owner has complied with Taxation Ruling TR 94/24 and returned rent in advance as assessable income when paid by an incoming resident, notwithstanding the rent is fully abatable, and properly assessable following the principle in *Arthur Murray*, the rent will not be assessed a second time when the rent might be said to have "come home" in a period after this ruling comes into effect.

54. A similar treatment will be afforded to deferred management fees to prevent double taxation.

Extent to which Taxation Ruling TR 94/24 may continue to be relied upon

55. Taxation Ruling TR 94/24 will continue to apply to arrangements begun to be carried out before its withdrawal: section 14ZAAL *Taxation Administration Act 1953*. For this purpose, each of the following is a separate "arrangement":

(a) **Construction or acquisition of a village; grant of first occupancy rights; sale of village:** A village owner who comes within the terms of Taxation Ruling TR 94/24, and was irrevocably committed to building or acquiring a retirement village prior to the date of withdrawal of Taxation Ruling TR 94/24, may continue to rely on the ruling after the date of its withdrawal in respect of claiming deductions for planned construction costs or costs of acquisition. This is on the basis that lump sums payable by the first residents are included in assessable income, and that the gross proceeds on sale of the village are also included in assessable income in the year of sale.

(b) **Construction by stages:** Where development or construction of a retirement village is staged, each stage constitutes a separate arrangement. A village owner who comes within the terms of Taxation Ruling TR 94/24, and was irrevocably committed to constructing a stage of a retirement village prior to the date of withdrawal of Taxation Ruling TR 94/24, may continue to rely on the ruling after the date of its withdrawal in respect of claiming deductions for construction costs when incurred. This is on the basis that lump sums payable by the first residents of that stage are included

in assessable income, and that the gross proceeds on sale of the village are also included in assessable income in the year of sale.

(c) **Subsequent rollover of occupancy:** A village owner who comes within the terms of Taxation Ruling TR 94/24 may continue to rely on the ruling after the date of its withdrawal in respect of rollover of occupancy, described in paragraph 8 of TR 94/24, where the new occupancy arrangement was entered into prior to the ruling's withdrawal. For rollovers where the new occupancy arrangement was entered into after the ruling's withdrawal, receipts from the incoming resident, and payments to the outgoing resident, should be treated in accordance with this ruling.

56. The arrangements described in paragraph 52 above will also be treated as separate arrangements for the purposes of withdrawal of private rulings. To the extent this public ruling is inconsistent with a private ruling, the Commissioner will be taken to have withdrawn the private ruling so far as there is any inconsistency and withdrawal is allowed: see sections 14ZAU and 14ZAW of the *Taxation Administration Act 1953*. [8]

Date of effect

57. This Ruling applies from 19 April 2000, However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before that date.

Explanations

Background

58. Historically, retirement villages were constructed and operated by churches and charitable organisations to provide residential accommodation for retired people. Those organisations generally were exempt bodies, and no taxation consequences arose. However, in recent years there has been a significant expansion in the development of retirement villages, the majority of which have been constructed by commercial developers.

[8] The Commissioner may withdraw a private ruling if the arrangement to which it relates has not begun to be carried out, except to the extent it relates to a year of income that has commenced or ended: *Taxation Administration Act 1953*, subsections 14ZAU(2) and (4).

59. Generally, a developer acquires land, constructs a retirement village complex, and then recovers the cost of the development from the incoming residents. These projects are usually referred to as "resident-funded" retirement villages. The individual dwellings, whether they be apartments, units, or villas, are either purchased, or occupied under a lease or other form of agreement. Usually, to be eligible to purchase or occupy a dwelling, persons must be aged 55 years or over. The operator provides various degrees of services to the residents of these retirement villages which often include different levels of community facilities. Some retirement villages are situated in complexes which include nursing home facilities and/or hostel accommodation.

60. Retirement villages constructed by commercial developers have been marketed in several ways. New arrangements are being devised to meet the demands of a growing industry.

61. There are three broad types of occupancy arrangements for retirement villages.

(a) Strata title arrangements. Residents buy the dwellings outright, and the village operator manages the village and often provides other services to the residents.

(b) Rights to occupy, fully funded by residents Legal title to the village stays with the village operator. The owner recoups the full development cost of the village from the initial occupants. Residents pay the equivalent to the market value of the residence on taking up residence. At the end of the occupancy residents or their estates often share in any capital appreciation of their dwelling, and usually are required to pay deferred management fees. In addition, residents pay regular maintenance fees and usually also sinking fund contributions.

(c) Rights to occupy, partly funded by residents Legal ownership of the village remains with the owner/operator of the village. The owner does not recoup all of the development costs of the village from the initial occupants. Residents pay less than market value of the dwelling on taking up residence and may pay a periodic rental (usually subsidised with rent assistance from the Commonwealth) as well as regular maintenance fees, sinking fund contributions and deferred management fees. This type of arrangement was not covered by Taxation Ruling TR 94/24.

62. In arrangements other than strata title villages, a variety of occupancy rights may be granted. These include a non-transferable 99 years lease, lifetime lease, loan agreement, loan/license, preference

share and other similar arrangements. Under all these arrangements residents usually pay a lump sum on entry, which is wholly or partly refundable at the end of the occupancy (usually after a new tenant is found). Residents also pay regular maintenance fees (monthly, fortnightly or other), sinking fund contributions for periodic maintenance and improvements, and deferred management fees.

Description of some existing arrangements

63. **Strata Title**: This involves the sale of dwellings in a retirement village on a strata title basis. Generally, the developer has an option to repurchase from the resident (or their personal representative), or is entitled to receive a commission upon the resale of the dwelling by the resident. The village operator acts as the manager of the body corporate in relation to the community facilities and may also provide other services to the residents.

64. **Lease premium (non-assignable lease)** : Under this arrangement, a resident is granted a long-term lease, generally for a period of 99 years, of a dwelling in the retirement village, conditional upon immediate payment to the owner of a lease premium or lease "deposit'" equal to the market value of the dwelling. Upon termination or surrender of the lease, the owner is obliged to make a payment to the resident (or personal representative) equivalent to the original premium paid by the resident, less a "deferred management fee" which is calculated as a percentage of the lease premium for each year of occupancy. Generally, the outgoing resident shares in any capital 'gain' or 'loss'; that is, the difference between the original lease premium paid and the lease premium paid by the new resident.

65. **Lease premium (assignable lease)** : Under this arrangement, a resident is granted a long-term lease, generally for a period of 99 years, of a dwelling in the retirement village, conditional upon immediate payment to the owner of a lease premium equal to the market value of the dwelling. The terms of the lease enable the resident (or personal representative) to assign the lease to someone over 55 years of age and who is approved by the owner of the village. Upon assignment of the lease, the new resident pays to the outgoing resident an amount equivalent to the market value of the dwelling at the time of the assignment. At the same time, the outgoing resident is obliged to pay the village owner the "deferred management fee" and also a commission for services which may have been rendered in connection with the assignment of the lease.

66. **Loan/lease** : Under this arrangement, a resident is granted a long-term lease, generally for a period of 99 years, of a dwelling in the retirement village, conditional upon immediate payment to the owner of an "interest-free loan" equal to the market value of the dwelling. Upon termination or surrender of the lease, the owner is obliged to

make a payment to the resident (or personal representative) equivalent to the original "loan" given by the resident, less a "deferred management fee", calculated as a percentage of the "loan" for each year of occupancy. Generally, the outgoing resident shares in any capital "gain" or "loss"; that is, the difference between the "loan" originally provided by the outgoing resident and the replacement "loan" given by the new resident.

67. **Loan/Licence** : Under this arrangement, a resident is granted a "licence" to occupy a dwelling in the village upon immediate payment of an "interest-free loan" equal to the market value of the dwelling. Upon termination of the "licence" the owner is obliged to make a payment to the resident (or personal representative) equivalent to the original "loan" given by the resident, less a "deferred management fee", calculated as a percentage of the "loan" for each year of occupancy. Generally, the outgoing resident will share in any capital "gain" or "loss"; that is, the difference between the "loan" originally provided by the outgoing resident and the replacement "loan" given by the new resident.

68. **Prepaid rental**: Under this arrangement, a resident is granted a lease, generally for a period of 99 years, upon payment of rent in advance (typically stated to be for a period of 20 years), subject to a pro rata refund upon early termination of the lease. The resident generally is required also to provide an "interest-free loan" or "lease deposit". The total of the two amounts payable usually is equivalent to the market value of the dwelling. Payment of the "loan" or "deposit" may be made directly to the owner, or, alternatively, to a trustee, who, under the terms of a trust deed, agrees to give to the village owner an interest-free loan to the extent of the amount received from a resident. Upon termination or surrender of the lease, the owner is obliged to refund advance rental on a pro rata basis and also make a payment to the outgoing resident equivalent to the original "loan" or "deposit" made by the resident. Where the "loan" or "deposit" is made to the trustee, upon termination of the lease, the owner is required to repay the funds obtained from the trustee and the trustee is obliged to make a payment to the outgoing resident equivalent to the amount of the "loan" or "deposit" originally advanced by the resident.

69. **Redeemable Preference Share** : Under this arrangement, a company which owns a retirement village issues redeemable preference shares. The articles of association confer a right to a resident shareholder to be granted a long-term lease (for 50 years or more) or a "licence" of a dwelling in the village, conditional upon payment of a share premium, or the issue price of the shares, equal to the market value of the dwelling. The articles also confer upon an outgoing resident shareholder a right, upon redemption of the preference share by the company and termination or surrender of the lease, to be paid an amount equivalent to the original share premium

or issue price, reduced by a percentage for each year the shareholder occupies a dwelling in the village.

70. In relation to each of these arrangements other than a strata title sale and the assignable lease, the payment to the outgoing resident may be conditional upon a new resident being found, who also must make a lump sum payment (a lease premium or deposit, interest-free loan or share purchase) equivalent to the market value of the dwelling at that time. The outgoing resident (or their estate) generally shares in any capital "gain" or "loss"; that is, the difference between the initial lump sum received from the outgoing resident and the lump sum received from the new resident. These arrangements effectively give residents an equity interest in the village units and have many features in common with a strata title sale.

71. The owner of the village usually derives income also from a management fee for providing maintenance and other services to the residents. Those fees are payable by residents on a regular, recurrent basis (usually monthly) and are similar to fees levied by a body corporate.

72. With respect to each type of arrangement, it is proposed to consider what amounts a village owner should include in assessable income and what expenditure is allowable as a deduction in order to determine their income tax liability.

Strata title

73. Strata title transactions involve the sale of dwellings within a retirement village complex. The owner generally has an option to repurchase individual dwellings from residents or their personal representatives for subsequent resale, or is entitled to receive a commission if they arrange for the resale of a dwelling on behalf of an outgoing resident or their personal representative. Commission fees generally are secured by a charge over the property.

74. The tax treatment for strata title operators is essentially the same as that under *Taxation Ruling TR 94/24*. Where a developer constructs a retirement village and sells the individual units on a strata title basis, the owner will be required to account for the sale of those units under the trading stock provisions of the Act. Similarly, where the owner of the village repurchases a unit from an outgoing resident and sells it to another retiree, the unit will be treated as the trading stock of the owner and the trading stock provisions of the Act will apply.

75. Where the village owner acts as agent for the resident upon the resale of a dwelling, any commission received by the owner is assessable income under section 6-5 in the year in which the income

is derived. Deferred management fees received on sale are assessable in accordance with paragraph 26 above.

76. Generally, the owner will dispose of the common property of the village, including what are known as community facilities, to, for example, a body corporate comprising the residents of the village. In that situation, the common property will be treated as a separate item of trading stock and the trading stock provisions will apply. However, if the owner retains ownership of part of the common property, expenditure attributable to that property cannot be absorbed into the cost of trading stock. Deductions will be allowable under Division 43 in respect of that expenditure, to the extent that it satisfies the requirements of that Division.

77. Fees for the provision of management services (similar to body corporate levies) that are payable by residents on a regular, recurrent basis are derived by the village owner when they become due and payable, and are included in the assessable income of the owner accordingly. A deduction will be allowed for expenditure incurred in providing those services, in the year in which they are incurred.

78. Interest expenses and other holding costs, such as rates and taxes, incurred in developing the retirement village generally are allowable as deductions in the year in which the expenditure is incurred. Similarly, costs of advertising and selling units generally are deductible in full in the year in which they are incurred.

Village operators who grant occupancy rights: characterisation of development and construction costs, or costs of acquisition

79. A village operator who incurs those costs in developing, constructing or acquiring a retirement village for the purpose of carrying on an ongoing retirement village business and grants occupancy rights to village residents, acquires a profit yielding subject. The outgoings are clearly capital or capital in nature.

80. In ***Sun Newspapers Ltd v. FC of T***,[9] Dixon J said:

> The distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity structure or organization set up or established for the earning of profit and the process by which such an organisation operates to obtain regular returns by means of regular outlay, the difference between the outlay and returns representing profit or loss.[10]

[9] (1938) 61 CLR 337.
[10] 61 CLR at 359.

81. This was described as the difference between the profit yielding subject and the process of operating it.[11] In determining the true character of the expenditure, three matters must be considered:

> … (1) the character of the advantage sought, and in this its lasting qualities may play a part, (2) the manner in which it is to be used, relied upon or enjoyed and in this and under the former head recurrence may play its part and (3) the means adopted to obtain it; that is by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.[12]

82. A retirement village constructed for operating a business over time will bring in receipts or profits over the period it is held. Profits come from granting occupancy rights to the real estate, which is at all times owned by the village operator. A significant advantage will be obtained by the operator on the grant of the first long-term leases or licences, as well as long-term benefits. Payments will be made by new residents on the grant of new leases, which may be expected to exceed payments to outgoing residents or their estates. Deferred management fees may also be deducted from the latter.

83. In the case of villages which are not fully resident-funded, because entry price is significantly less than cost recovery, the long-term benefits represent a greater part of the benefits derived from the expenditures.

84. It is clear that the cost of land, development and construction costs result in a profit yielding subject, notwithstanding that major benefits will also be obtained within the first few years. Accordingly the expenditure should be treated as capital in nature.

85. In the case of purchase of an existing village, the operator will only acquire long-term benefits, which will be realised on the termination of existing leases, when new leases (for higher entry prices) may be granted. The purchase price is clearly of a capital nature.

Characterisation of receipts on the grant of occupancy rights: form of retirement village arrangements

86. It is usually necessary for a prospective resident to enter into a number of agreements which are essential or integral to one another. Invariably, permanent possession of a retirement village dwelling is dependent on payment of the full entry price, irrespective of the several forms that may take. The agreements do not give a resident

[11] 61 CLR at 360.
[12] 61 CLR at 363.

absolute ownership equivalent to fee simple, although contractual guarantees and statutory safeguards ensure they are not far from it. They do give a resident secure long-term tenancy rights, but residents can be forced to vacate if unable to care for themselves. Residents are unable to assign their rights, or their assignment is strictly controlled.

87. Arrangements can vary from village to village, and even from resident to resident within a village. However most/all arrangements can be broken down into the following rights and obligations:

88. From the residents' point of view:

- residents are obliged to enter into all of the necessary agreements;
- before taking possession, residents will have been required to pay the full entry price, however calculated;
- residents acquire secure long-term tenancy rights, subject to conditions and restrictions;
- residents will have the right to use common areas and facilities;
- residents are obliged to contribute to budgeted village operating costs, and sometimes to a sinking fund;
- at a defined time after termination of a tenancy, the resident (or estate) will be entitled to certain repayments from the village owner, and or a trustee, and often to a share in the capital appreciation in the value of the long-term lease. The amount payable to the outgoing resident will usually be based on the entry price paid by that resident, and the entry price paid by the incoming resident, with deductions depending on the actual period of the occupancy.

89. From the village owner's point of view:

- the owner has the right to receive the entry price (including any amounts passed through a trustee);
- the owner has the right to contributions from residents to meet the costs of running the village;
- on termination, the owner may be entitled to delay payments to outgoing residents until the dwelling has been re-let;
- from the payment to outgoing residents, the owner may be entitled to retain amounts often described as "deferred management fees".

- the owner may be obliged to share with the outgoing resident any increase in value of the long term lease;
- the owner has responsibility for maintaining and running the village.

90. In form the long-term exclusive occupancy rights are a lease. A lease confers on a tenant an interest in the land and the right to exclude all persons from the leased land. A tenant may even exclude the landlord, usually subject to the right to enter and view the state of repair. Compare this with a licence, which is a mere right to occupy and, without more, confers no interest in the land and no right to exclude all persons from the land.[13]

91. Where an amount described as pre-paid rent is genuinely for the use of the premises by a resident, it will in form be "rent".

92. Where a payment by a resident, described as an "interest free loan" or "security deposit" is fully repayable at the end of the occupancy, it is in form a "loan". It is unlikely to be held to be in form a premium: see *FC of T v Krakos Investments Pty Ltd* [14]. However, to the extent that payments will be deducted from the amount repayable, to cover amounts usually described as "deferred management fees", it may be that the form of the payment by the resident is, at least in part, management fees paid in advance. Alternatively it may be in form, "rent in advance".

Specific tax consequences flowing from form

93. To the extent that a payment is rent, it is usually regarded as income according to ordinary concepts[15] i.e., a revenue receipt. However, no specific tax consequences flow from its form as rent. Nevertheless, the timing of derivation may be affected by its form.[16]

94. To the extent that a payment is in form a premium, there are no specific income tax consequences flowing under the 1997 Act.[17] However, there will be capital gains tax implications (see below).

95. To the extent that a payment is in form a deposit or a loan, no specific tax consequences flow.

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[13] Peter Butt, *Land Law*, 2nd ed, Law Book Co, Sydney, 1988, p.220.
[14] 96 ATC 4063, at 4075; 32 ATR 7 at 21.
[15] For exception, see *FC of T v Groser* 82 ATC 4478; 13 ATR 445.
[16] See below.
[17] Such a premium would have been fully assessable under s.26AB of the *Income Tax Assessment Act 1936*, but that section does not apply to assessments for the 1998 and later years, except to the extent that the premium relates to a lease granted before 20 September 1985. Section 26AB has not been rewritten in the 1997 Act.

Prepaid rent

96. The question of whether an amount described as rent in advance paid by a resident of a retirement village should be regarded as rent rather than as a premium was considered by the Supreme Court of NSW in *Frazier v Commissioner of Stamp Duties (NSW)*.[18] An amount of about $31,000 was said to be rent in advance for 20 years. However, there was no indication of its relationship to any weekly or periodic amount of rent. The resident was told by her solicitor that the sum was to cover rent for 20 years, and that a portion would be refundable in certain events.[19] The resident also had to pay regular maintenance charges, which were agreed to be rent.[20]

97. In determining the amount payable in advance the retirement village owner's real estate agent fixed the term for the rent in advance by reference to the cost of the building, taking into account current rental values, the value to the village owner of rent in advance, and the security of tenure being granted under the lease. However these matters were seen as not pointing, one way or the other, to whether the amount was "rent" or "premium".[21]

98. Lee J said the question was to be determined by deciding whether the sum "is a payment required as a consideration for the granting of the lease or whether it is a payment for the use and enjoyment by the lessee of the land".[22]

99. The Court considered that the matter was not to be controlled by the way in which the parties described the payments.[23] The fact that the lease document granted a lease for 20 years "upon payment by the lessee (resident)… of the rent in advance as a lump sum… for the grant of this lease", pointed to the payment being made "as a consideration for the grant of the lease" and therefore a premium. However, the Court said the whole circumstances must be looked at to determine as a fact whether the amount was paid as a consideration for the granting of the lease or whether it a payment intended as rent for the use of the premises.[24]

100. The Court placed great significance on the provisions for abatement in the case of destruction or damage by fire, flood etc,

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[18] (1985) 85 ATC 4735; 17 ATR 64. *Frazier* was cited with approval by Hill J in the leading judgment of the Full Federal Court decision in *FC of T v. Cooling* 90 ATC 4472, at 4485. See also McHugh JA, in *Commissioner of Stamp Duties (NSW) v JV (Crows Nest) Pty Ltd* 86 ATC 4740, at 4747; 17 ATR at 1094.
[19] 85 ATC at 4739; 17 ATR at 69.
[20] 85 ATC at 4736; 17 ATR at 65.
[21] 85 ATC at 4739; 17 ATR at 69.
[22] 85 ATC at 4738; 17 ATR at 68. See Also *Ex parte Lathouras; Re Vendardos* [1964-5] NSWR 254, at 257, where amounts described as "premium" were held to be part of the payment for the use of the land, and therefore rent.
[23] 85 ATC at 4737; 17 ATR at 67.
[24] 85 ATC at 4740; 17 ATR at 70.

when the premises become unfit for occupation, or on early termination of the lease, such as on the death of the resident, when compensation was to be paid for the rent in advance for the unexpired term of the lease. The inference drawn was a clear intention by the parties that the amount paid is referable to the actual use and occupation of the premises by the resident, and therefore "rent".[25] The fact that the amount was paid in a lump sum, and was not quantified by reference to any periodical payment, did not affect this conclusion.[26]

101. In *Case B51,* 70 ATC 253 the taxpayer received three years rent in advance, but without provision for any abatement. The Taxation Board of Review held that the amount was in fact rent, but that it had "come home" to the taxpayer and was assessable in full in the year of receipt.[27]

102. Retirement village leases should generally be regarded as arms length transactions. Residents are protected in their dealings with village owners by the legislation and code of practice, and are expected and encouraged to obtain independent legal advice before entering into leases. The money the residents spend on their accommodation is clearly based on what the market will bear.

103. Where a resident is prepared to pay significant rent in advance, and spend that money in exchange for occupancy of a village dwelling for the period of occupancy, obtaining a pro-rata refund for the unexpired portion of the lease on termination, the rent should be accepted as both genuine and commercial. This should be so, notwithstanding the rent is frequently calculated as a percentage of the market value of the property.

104. The rent should be brought to account over the term of the lease, in accordance with the *Arthur Murray* principle.[28] This was the approach adopted by the Taxation Board of Review in *Case B47,* 70 ATC 236.

Characterisation of receipts on the grant of occupancy rights: licence fee

105. The difference between a lease and a licence was described above at paragraph 88. Most retirement village occupancy arrangements will give legal rights and obligations in the nature of a lease. In situations where an occupancy is only under licence, and the licence fee paid is paid for the use of the retirement village dwelling,

[25] 85 ATC at 4740; 17 ATR at 70.
[26] 85 ATC at 4742; 17 ATR at 72.
[27] 70 ATC at 254; Case 113 15 CTBR (NS) 736 at 738.
[28] *Arthur Murray (NSW) Pty Ltd v FC of T* (1965) 114 CLR 314.

the fee is regarded as rent, or in the nature of rent, and will be assessable as rent in advance as per paragraph 17.

Characterisation of receipts on the grant of occupancy rights: premiums received for grant of leases

106. Premiums received for the grant of a lease are usually capital receipts.[29]

107. Whether an amount is a premium or not is a question of fact, and will not be determined by the description ascribed to it by the parties: *Frazier's* case (supra). In *Radaich v. Smith*[30] the High court had to determine whether an instrument created a lease or a licence. McTiernan J said: "the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it".[31]

108. Where a payment by a resident is fully repayable at the end of the occupancy, it is unlikely to be held to be in form a premium: see *FC of T v. Krakos Investments Pty Ltd*.[32]

Characterisation of receipts on the grant of occupancy rights: interest free loan or security deposit

109. Under some arrangements, the resident is required to make an interest-free "loan" to the owner in consideration for the grant of a long-term lease. Loans may be as high as the equivalent to the market value of the dwelling. Upon termination or surrender of the lease, generally the owner is obliged to make a payment to the outgoing resident (or personal representative) equal to the amount of the original "loan', less a "deferred management fee', calculated by reference to the period of occupancy. The outgoing resident may share in any capital "gain" or "loss'; that is, the difference between the amount of the "loan" originally made by the outgoing resident and the replacement "loan" provided by the new resident.

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[29] See *Kosciusko Thredbo Pty Ltd v FC of T* 84 ATC 4043, at 4052; 15 ATR 165 at 175. Where a taxpayer receives consideration in the nature of a premium for or in connexion with the grant of a lease, and the premises are not intended to be used by the lessee for the purposes of producing assessable income, the premium is assessable under sub-section 26AB(2) of *the Income Tax Assessment Act* 1936. This section only applies for the 1998 and later years for premiums in respect of leases granted before 20 September 1985. This provision was omitted from the 1997 Act.

[30] (1959) 101 CLR 209.

[31] Ibid, at 214, adopting the words of Denning LJ in *Facchini v Bryson* (1952) 1 TLR 1386. See also Taylor J at 219 and Windeyer J at 222.

[32] 96 ATC 4063, at 4075; 32 ATR 7 at 21.

110. For example, a resident moves into a village unit on 1 July 19X1 and provides a "loan" of $100,000 under the terms of the lease agreement. On 30 June 19X5, the resident leaves the village and the lease is terminated. On 1 July 19X5 a new resident moves into the unit and is required to provide a loan of $150,000.

111. The owner is entitled to retain 5% of the loan for each year the outgoing resident has occupied the unit and the resident is entitled to receive 50% of the difference between the original "loan" and the amount of the "loan" provided by the new resident. The owner will be obliged to pay to the outgoing resident (or personal representative) an amount calculated as follows:

Original 'loan'	$100,000
Less deferred management fee	20,000
Amount of 'loan' repayable	80,000
Add share of 'capital gain'	25,000
Total amount payable to outgoing resident	$105,000

112. In some of the loan/lease arrangements that have been examined, it appears that there is either no obligation to pay to the outgoing resident an amount equal to the original "loan", or the obligation to pay that amount is heavily qualified. The amount payable generally is calculated by deducting the deferred management fee and also taking account of the resident's share in the capital "gain" or "loss". Generally, the repayment is conditional upon the owner being able to find a new resident who, in turn, is required to provide a "loan" (based on the then current market value of the dwelling) as consideration for the grant of a new lease. In some instances, the payment to the outgoing resident is calculated as a percentage of the lump sum amount received from the new resident. For example, if an outgoing resident has occupied a village unit for a period in excess of three years, the outgoing resident is entitled to receive 80% of the loan advanced by the new resident.

113. A standard definition of "loan" is found in *Chitty on Contracts*,[33] which defines a loan as: "a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest".

114. In *Re Securitibank Ltd (No. 2)* (1978) 2 NZLR 136 at 167, Richardson J stated that "... the essence of a loan of money is the payment of a sum on condition that at some future time an equivalent amount will be repaid".

[33] 25th Ed., (1986) Sweet & Maxwell, 541.

115. In circumstances where the whole of the amount is not unconditionally repayable, or the amount and timing of any ultimate repayment are variable according to events which are neither fixed or determinable as to future time, some of the essential features of a loan are absent.

116. A receipt of a loan or deposit will ordinarily be regarded as capital in nature.[34] Where deferred management fees will be offset against the amount repayable, the deferred fees will be assessable in accordance with paragraph 26.

117. However, to the extent that "loan" amounts are not refundable at the end of the occupancy, they are regarded as prepayments of rent or other fees. These amounts will be assessable in full on receipt, except to the extent they are subject to abatement, or the refund varies with the actual period of occupancy. In those circumstances, the amounts will be assessable as they come home to the village owner.[35] This will occur in the year any amounts cease to be refundable or repayable.

118. Alternatively, the non-refundable amounts are regarded as in substance rent for the use of a village dwelling or management or other fees. In the application of Part IVA of the 1936 Act, regard must of course be had to the individual circumstances of each taxpayer. However, consideration will be given to the possible application of Part IVA to these arrangements. The scheme likely to be identified would include the agreements or transactions by which the fee for the use of the dwelling or provision of services has changed character. The tax benefit likely to be identified would be the rent or other fees which would have been included in the village owner's assessable income but for the scheme. The adjustment would be to include amounts equal to the non-refundable amounts in the village owner's assessable income, in the same way that rent or other fees would be included in assessable income.

Characterisation of receipts on the grant of occupancy rights: moneys received by company on issue of redeemable preference shares

119. Under this type of arrangement, an incoming resident purchases a redeemable preference share in a company which owns a retirement village. However, the resident is required to pay an issue price or purchase price equivalent to the market value of the dwelling to be occupied. Under the old corporations law, a resident was required to pay a share premium equivalent to the market value of the

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[34] See e.g. *Australian National Hotels Ltd v. FC of T* 88 ATC 4627, at 4633; 19 ATR 1575 at 1581-82.
[35] *Arthur Murray*, supra.

dwelling. Usually, there are several different classes of shares. A shareholder is entitled to the grant of a lease or "licence" of a particular type of dwelling in the retirement village to which their class of share relates. The rights and privileges attaching to the shares are personal to the shareholder and cannot be assigned or transferred.

120. Upon termination or surrender of the lease, the preference share is either redeemed or sold to a new resident on the outgoing resident's behalf. Upon redemption, the company is liable to pay the outgoing resident (or personal representative) an amount equivalent to the original issue price, less a percentage of that amount for each year the resident has occupied the particular dwelling (the "deferred management fee"). The resident also may share in the "capital gain or loss"; that is, the difference between the original share premium paid by the outgoing resident and the share premium paid by the new resident.

121. Moneys received by way of premiums on shares issued by a company are ordinarily regarded as capital receipts: see, for example, *Lowry v. Consolidated African Selection Trust Ltd* (1940) AC 648. Where deferred management fees will be offset against the amount payable to an outgoing resident on redemption of the shares, the deferred fees will be assessable in accordance with paragraph 26.

122. However, to the extent that an arrangement is structured so that amounts to be refunded at the end of the period of occupancy will be calculated by reference to the actual period of occupancy, the reduction in the refund amount is regarded in substance as rent for the use of the village unit. In those circumstances consideration will be given to the application of Part IVA of the 1936 Act. The scheme likely to be identified would include the agreements or transactions by which the fee for the use of the dwelling has changed character. The tax benefit would be identified as the rent which would have been included in the village owner's assessable income but for the scheme. Amounts equal to those amounts would be included in the village owner's assessable income over the period of the occupancy in the same way that rent or other fees would be included in assessable income.

Deferred management or other fees

123. Taxation Ruling TR 98/1 considers when income should be returned on a receipts basis and when on an earnings basis. Some specific situations are listed at paragraphs 18-20 of that Ruling. Cases not falling clearly within those descriptions are to be decided using the factors set out in paragraphs 52-59 of Taxation Ruling TR 98/1.

124. Retirement village owners will invariably receive all amounts up front, on grant of long term occupancy rights. However, depending on the arrangement entered into, fees may be regarded as having been

received in advance as part of the entry price on commencement of an occupancy, or as a setoff at the end of the occupancy. In either case, the fees are properly assessable when earned. Prepayments will be assessable on "an *Arthur Murray* principles" approach i.e. as earned. Deferred fees will be assessable as earned or accrued.

Sale of a retirement village

Treatment of rent in advance, or other prepayments, which new village owner undertakes to pay to outgoing residents

125. Some prepayments such as rent in advance will not be assessable in full on receipt, but assessable over time when earned, or when the amounts can be said to have "come home". When a village is sold the new owner may pay a lesser purchase price by undertaking to meet contingent liabilities for prepaid rent or other amounts repayable to outgoing residents in the future on termination of their leases.

126. Where the seller of a retirement village remains contractually liable to village residents to repay unused rent in advance, or other unused prepayments, the seller will be assessable for rent as and when those amounts cease to be refundable or repayable.

127. However, where the contract to repay unused rent in advance is novated, the rent in advance might be said to have come home to the seller of the village on novation. The seller would be assessable on that rent in the year of the novation, under section 6-5.

128. The liability of the seller of a retirement village to refund the prepaid rent is governed by the law of landlord and tenant. The seller, as original lessor, would be a party to a contract, constituted by the lease, between itself and the resident as original lessee. This is because a lease is both a contract between the original parties thereto and an estate in the land. Thus, the original parties to the lease have both privity of contract and privity of estate.

129. The existence of privity of contract means that both the original lessor and the original lessee remain liable for the performance of their respective covenants in the lease even after they have assigned their respective interests in the land. This means that not only may the original lessor enforce all the covenants in the lease to be performed by the lessee while the original lessee retains the lease but also that the original lessee remains liable on those covenants even after he or she has assigned the lease to a third party.

130. By the same token, the original lessor remains liable on the lessor's covenants in the lease notwithstanding any disposal by the

original lessor of their reversion.[36] Thus under the ordinary law of landlord and tenant the original lessor would remain liable to refund any unused portion of the prepaid rent to an existing resident (or their estate) upon the resident vacating their dwelling or dying, even though the original lessor had disposed of the reversion.

131. The liability of the original lessor could only be extinguished by an agreement with the original lessee. Presumably a novation would have to be entered into between the original lessor, the original lessee and the purchaser under which the original lessee released the original lessor from their liability to refund unused rent in advance upon the purchaser undertaking to take over this liability.

132. There would, of course, be no privity of contract between the purchaser and the lessee (whether the original lessee or an assignee from the original lessee) although there would be privity of estate. Where there is only privity of estate the purchaser of the reversion is only liable in respect of lessor's covenants which "run with the land", i.e., covenants which "touch and concern the land" or, put slightly differently "have reference to the subject matter of the lease". It was held in *Re Hunter's Lease* [1942] Ch 124 that a covenant by a lessor to pay the tenant £500 at the end of the lease unless a new lease was granted was not a covenant which ran with the land so as to enable the lessee to sue the assignee of the reversion for the amount on termination of the lease without a new lease being granted.

133. It is our view that a covenant by a lessor to refund to the lessee unused rent in advance upon early termination of the lease is not a covenant which runs with the land so as to be enforceable by the original lessee against a purchaser of the reversion. The original lessee's rights would be against the original lessor only. It should be noted that in some States legislation may make the new village owner liable to residents for existing obligations of the outgoing owner (the original lessor).

134. If the purchaser of the reversion were liable under such a covenant**,** this would not mean that the original lessor would not also be liable. The original lessee in such circumstances would have the ability to recover against either the original lessor or the purchaser of the reversion although the original lessee would not be able to recover more than once. If the purchaser were required to pay, they would have a right of indemnity against the original lessor.

135. Unless the original lessor were to require the purchaser of the reversion to indemnify them against any payment they were required to make to the original lessee by way of refund of unused rent in advance, the original lessor would have no right of indemnity against

[36] *Stuart v. Joy* [1904] 1 KB 362 referred to by *Megarry and Wade-Law of Real Property,* Stevens & Sons, 1957, at 654.

the purchaser (and this would be the case whether or not the purchaser were also liable under the covenant by virtue of it being one which ran with the land.

136. If the original lessor wished to make the purchaser liable for the refunding of the unused rent in advance, it would be necessary for the original lessor, the residents and the purchaser to enter into a novation agreement or to have the purchaser indemnify the seller (original lessor) against all claims made on it by residents.

137. In the absence of novation, the original lessor would remain liable to the residents to make the refunds if and when required to do so, even though it had a right of indemnity against the purchaser. In these circumstances it could not be said that the original lessor was in a position where it could be said that it had done everything necessary to earn the rent paid in advance and therefore had derived the same. It would remain liable to refund the unused portion of any such payment and the right of indemnity against the purchaser would not change this situation.

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Your comments

139. We invite you to comment on this Draft Taxation Ruling. We are allowing 6 weeks for comments before we finalise the Ruling. If you want your comments to be considered, please provide them to us within this period.

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Commissioner of Taxation
19 April 2000

Previous draft:
Not previously issued in draft form

Subject references:
- interest-free loan
- security deposit
- lease
- lease premium
- licence
- prepaid rental
- redeemable preference share
- retirement village
- share premium
- strata title

Legislative references:
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- ITAA 1997 Div 43
- ITAA 1997 6-5
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- ITAA 1997 104-115
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- ITAA 1997 110-25(2)
- ITAA 1997 110-40
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- Case B51 70 ATC 253; 15 CTBR (NS) Case 113 p.736

ATO references:
NO T2000/005926
BO
FOI Reference No:
ISSN: 1039-0731