



TD 2019/D11 - Income tax: where a liability is assumed on acquisition of a CGT asset, is the assumed liability excluded from the cost base of the asset if expenditure on discharge of the liability is deductible?

 This cover sheet is provided for information only. It does not form part of *TD 2019/D11 - Income tax: where a liability is assumed on acquisition of a CGT asset, is the assumed liability excluded from the cost base of the asset if expenditure on discharge of the liability is deductible?*

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Draft Taxation Determination

Income tax: where a liability is assumed on acquisition of a CGT asset, is the assumed liability excluded from the cost base of the asset if expenditure on discharge of the liability is deductible?

❶ Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Ruling

1. Yes. If:

- you acquire a CGT asset from another entity, and
- that asset is subject to a liability, and
- the first element of the cost base of that asset includes the amount of the liability you assume by virtue of section 112-35¹,

that liability subsequently does not form part of the cost base of the asset to the extent that you have deducted, or can deduct, your expenditure in discharging that liability, in accordance with subsection 110-45(2).

2. Note that this draft Determination does not consider the scope of section 112-35 itself. It is considered that there will be limited circumstances in which a deduction is available for discharge of a liability to which section 112-35 applies.

Date of effect

3. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
30 October 2019

¹ All legislative references in this draft Determination are to the *Income Tax Assessment Act 1997*.

Appendix 1 – Explanation

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

4. Section 112-35 extends the first element of the cost base to recognise that the assumption of a liability on an encumbered asset is a cost to the acquirer. The cost is in the form of the obligation the acquirer assumes when it acquires the asset. In the absence of the encumbrance (whether secured or not), the purchase price (and therefore the money paid or required to be paid) would have been higher. This draft Determination does not consider the circumstances when section 112-35 is engaged.

5. An amount of expenditure that is initially included in the cost base can later be excluded due to the operation of a cost base modification provision.² Accordingly, cost base is a fluid concept and the intention of Division 110 was that the cost base should be able to be worked out at any particular time.³ Section 112-35 does not operate to necessarily fix the cost base upon acquisition of the relevant asset. The discharge of the liability mentioned in section 112-35 will change the constituent components of the first element of the cost base at the time the liability is discharged. This is because the expenditure in discharging the liability is the latest representation of the same liability referred to in section 112-35.

6. In principle, an item of expenditure should either be deductible for income tax purposes or included in the cost base of an underlying asset for CGT purposes, but not both.⁴

7. For CGT assets acquired after 7:30pm ACT legal time on 13 May 1997, where you subsequently claim a deduction for expenditure, subsection 110-45(2) applies to exclude the expenditure from the asset cost base:

Expenditure (except expenditure excluded by subsection (1B)) does *not* form part of the **cost base** to the extent that you have deducted or can deduct it for an income year, except so far as:

- (a) the deduction has been reversed by an amount being included in your assessable income for an income year by a provision of this Act (outside this Part and Part 3-3 and Division 243); or

Note: Division 20 contains some of the provisions that reverse deductions. Section 20-5 lists some others.

- (ab) the deduction is under Division 243; or
- (b) the deduction would have been reversed apart from a provision listed in the table (relief from including a balancing change in your assessable income).

8. The discharge of the assumed liability is expenditure that is relevant for subsection 110-45(2). Where you have deducted, or can deduct the expenditure for an income year it will not form part of the cost base, provided it does not fall under one of the listed exceptions.

² Section 110-37.

³ Paragraph 2.193 of the Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No.2) Bill 2004.

⁴ Paragraph 6.3 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No 2) 1998.

9. Consequently subsection 110-45(2) can apply to reduce the amount included in cost base by section 112-35.
10. Section 110-37 confirms that where expenditure does not form part of an asset's cost base due to the operation of a later provision, you are required to reduce the cost base by the amount of the expenditure just before a CGT event happens in relation to the asset.

Appendix 2 – Your comments

11. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

12. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 13 December 2019
Contact officer: Matt Miller
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Telephone: (07) 3213 6658

References

Previous draft:

Not previously issued as a draft

- ITAA 1997 110-45(2)
- ITAA 1997 112-35

Related Rulings/Determinations:

TD 2017/10; TR 2006/10

Other references:

- Explanatory Memorandum to the Taxation Laws Amendment Bill (No 2) 1998
- Explanatory Memorandum to the Tax Laws Amendment (2004 Measures No.2) Bill 2004

Legislative references:

- ITAA 1997 Div 110
- ITAA 1997 110-37

ATO references

NO: 1-JPO8R00

ISSN: 2205-6211

BSL: PGI

ATOlaw topic: Income tax ~~ Capital gains tax ~~ CGT assets ~~ General

Income tax ~~ Capital gains tax ~~ Cost base and reduced cost base

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