TD 93/D262 - Income tax: capital gains: how are grants of easements treated for the purposes of the capital gains tax (CGT) provisions of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 93/235.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: capital gains: how are grants of easements treated for the purposes of the capital gains tax (CGT) provisions of the *Income Tax Assessment Act 1936*?

1. This determination considers this Office's interpretation of the CGT provisions both before and after the recent amendments to subsection 160M(6). These amendments were enacted in Taxation Laws Amendment Act (No. 4) 1992 and apply to the construction or creation of assets after 25 June 1992.

Pre-26 June 1992

2. Taxation Ruling IT 2561 sets out the ATO's view of the application of the CGT provisions to the granting of easements. An easement is an asset created at the time it is granted (section 160M generally). The time of acquisition is determined by section 160U.

3. Where the ownership of the asset changes - i.e., where the grantee becomes the owner of the easement - there is a disposal of the asset by the grantor (and an acquisition of the asset by the grantee) in terms of subsection 160M(1). Of course, the grant of the easement may, by reason of subsection 160M(6), constitute the disposal of the asset created by the grantor.

4. It follows that, if the grant of the easement occurs on or after 20 September 1985, there is an acquisition by the grantor of a new asset created after that date. Therefore, the CGT provisions apply on the disposal of the new asset. This is so notwithstanding that the underlying asset may have been acquired before 20 September 1985.

5. As this view differs from the interpretation previously given, IT 2561 applies only to easements granted on or after the date of that Ruling, i.e., 21 September 1989. Prior to this date the ATO had expressed the view that the grant of an easement is a part disposal of the land (i.e. the underlying asset) in terms of 160R.

Post-25 June 1992

6. The new subsection 160M(6) clearly applies to the creation of legal or equitable rights that are not a form of corporeal property. The grant of an easement, for example, constitutes the disposal of an asset created by the grantor within subsection 160M(6).

7. When an easement is granted, the asset is taken by paragraph 160M(6A)(a) to have been acquired by and commenced to be owned by the grantor. The time of acquisition is determined by subparagraphs 160U(6)(a)(ii) or (b)(ii). Further, the grantor is taken by paragraph 160M(6A)(b) to have subsequently disposed of the asset to the grantee in whom it is vested on its creation. The time of disposal is determined by subparagraphs 160U(6)(a)(iii) or (b)(iii).

8. Paragraph 160M(6B)(a) provides that the asset is vested on its creation in the grantee, the time of acquisition being as set out in subparagraphs 160U(6)(a)(i) or (b)(i).

Commissioner of Taxation
14/10/93

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