


TD 93/D268 - Income tax: are tax deductions allowable for payments made under an agreement to lease car park surfacing where the car park is on land owned by the lessee and the car park is used in carrying on the lessee's business operations?

 This cover sheet is provided for information only. It does not form part of *TD 93/D268 - Income tax: are tax deductions allowable for payments made under an agreement to lease car park surfacing where the car park is on land owned by the lessee and the car park is used in carrying on the lessee's business operations?*

This document has been finalised by TD 94/61.

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: are tax deductions allowable for payments made under an agreement to lease car park surfacing where the car park is on land owned by the lessee and the car park is used in carrying on the lessee's business operations?

1. No. Broadly speaking, for a valid lease agreement to exist there must be one party, the lessor, who owns the property, and a lessee, in whom is vested a right of exclusive possession of the property for a given period, after which the lessor has the right to regain possession. It follows that car park surfacing cannot be leased from someone who is not the owner of the land. Where a taxpayer wishes to lease car park surfacing (but not the underlying land which the taxpayer owns) and claim the lease payments as allowable deductions it is therefore necessary for the car park to have a separate identity as property distinct from the land on which it rests.

2. An item may be a fixture when:

- the item is fixed by means other than its own weight;
- there is an intention that an item will remain in position permanently or for an indefinite or substantial period; and/or
- the item cannot be detached without substantial injury to the item or to that to which it is attached (cf. *APA Co Ltd v. Coroneo* (1938) 38 SR (NSW) 700 at 712-3; *Holland v. Hodgson* (1861-73) All ER 237 at 242; *Hellawell v. Eastwood* (1851) 6 Exch 295).

3. It is unlikely that the lessor or lessee will dismantle car park surfacing at the end of the lease period given the substantial damage that would result. Car park surfacing is therefore a fixture and an improvement to the land. It has no identity as property independent from the land on which it rests and thus belongs to the owner of the land (cf. *Case K96* (1959) 10 TBRD 519 at 521; *Case 108* (1959) 8 CTBRD (NS) 623 at 625). As the car park cannot have separate ownership to the underlying land, it is incapable of being leased separately.

4. Where the lessee (the person making the lease payments) is the owner of the land on which the car park surfacing is situated then the payments are, in substance, made for the acquisition of the car park. The payments are capital and not deductible under subsection 51(1) of the *Income Tax Assessment Act 1936*.

Commissioner of Taxation

21/10/93

Related Rulings: IT 28; IT 209

Subject Ref: deductions, lease payments, fixtures, car park surfacing

Legislative Ref: ITAA 51(1)

Case Ref: *APA Co Ltd v. Coroneo* (1938) 38 SR(NSW) 700; *Holland v. Hodgson* (1861-73) All ER 237; *Hellawell v. Eastwood* (1851) 6 Exch 295; *Case K96* (1959) 10 TBRD 519; *Case 108* (1959) 8 CTBRD (NS) 623

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