


TD 94/D92 - Income tax: capital gains: in what year of income is a taxpayer required for tax purposes to include a capital gain or loss in relation to land disposed of under a contract which is made in one year of income, but which is settled in a later year of income?

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This document has been finalised by TD 94/89.

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Draft Taxation Determination

Income tax: capital gains: in what year of income is a taxpayer required for tax purposes to include a capital gain or loss in relation to land disposed of under a contract which is made in one year of income, but which is settled in a later year of income?

1. Where the contract is settled in a later year of income, a taxpayer is required to include a capital gain or loss in the year of income in which the contract is made, not in the year of income in which the contract is settled.
2. Where land is disposed of under a contract, subsection 160U(3) of the *Income Tax Assessment Act 1936* deems the disposal to have taken place when the contract is made (see Note).
3. However, a taxpayer is not required for tax purposes to take action to include any capital gain or loss until settlement has occurred. Settlement effects a change of ownership and a disposal (subsection 160M(1)) which triggers the operation of the capital gains provisions. When settlement occurs, the taxpayer is then required to include any capital gain or loss in the year of income in which the contract was made (subsection 160U(3)). If an assessment has already been made for that year of income, the taxpayer may need to have that assessment amended.
4. Although it is not required, a taxpayer may, for his or her own convenience, include any capital gain or loss in a return which is lodged before settlement.

Note: The time a contract is made depends on a proper construction of the terms of the contract. If a contract is subject to a condition, it does not affect the time of the making of the contract unless it is a condition precedent to the formation of the contract. Most conditions (eg. standard 'subject to finance' clauses) operate as conditions subsequent to formation of the contract and do not affect the time of making of the contract. See AAT Deputy President Dr P Gerber's discussion in *Case 24/94 94 ATC 234* at 246-248; *AAT Case 9451* (1994) 28 ATR 1108 at 1116-1118.

Example:

Jill sells land under a contract made on 30 June 1994. The contract is settled on 31 August 1994. A capital gain of \$50,000 accrues to her on the disposal. Jill is required to include the \$50,000 in her income tax return for the 1993/94 year (not the 1994/95 year). If Jill had already lodged her 1993/1994 income tax return before the date of settlement she should, within a reasonable period of time after settlement, take any action necessary to either:

- (a) change her income tax return if an assessment has not yet issued; or*
- (b) have her assessment amended if the assessment has been made.*

Commissioner of Taxation

18/8/94

FOI INDEX DETAIL: Reference No.

Related Rulings: TR 94/D1

Subject Ref: contract; disposal of land; time of disposal

Legislative Ref: ITAA 160M(1); ITAA 160U(3)

Case Ref: Case 24/94 94 ATC 234; AAT Case 9451 (1994) 28 ATR 1108

ATO Ref: CGT Cell (CGDET105)

ISSN 1038 - 8982