

TD 96/D5 - Income tax: capital gains: when does a person, who on or after 21 September 1989 grants to another a right to cut and remove timber from the grantor's land, dispose of the right? Is it when the right is granted or when the trees are felled?

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This document has been finalised by TD 96/35.

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: when does a person, who on or after 21 September 1989 grants to another a right to cut and remove timber from the grantor's land, dispose of the right? Is it when the right is granted or when the trees are felled?

1. The short answer is that the disposal occurs when the right is granted.
2. An agreement by which a person sells timber, or grants to another a right to cut and remove timber from the grantor's land, may amount to either:
 - (a) a sale of goods (timber); or
 - (b) a creation of an interest in land (e.g., a profit à prendre or an interest in the nature of a profit à prendre): *Marshall v. Green* (1875) 1 CPD 35; *Ashgrove Pty Ltd & Ors v. FC of T* 94 ATC 4549; (1994) 28 ATR 512; *Australian Softwood Forests Pty Ltd v. Attorney-General (NSW)*; *Ex rel Corporate Affairs Commission* (1980-1981) 148 CLR 121.
3. The category into which any particular agreement falls depends on the intention of the parties determined from the terms of the agreement and the relevant circumstances.
4. If the agreement is a sale of goods (timber), the seller disposes of the timber for the purposes of Part IIIA of the *Income Tax Assessment Act 1936* when the contract is made (subsection 160U(3)), not when the trees are felled. The disposal of the timber is, in terms of section 160R, a disposal of part of an asset, namely, the realty in which the growing trees are rooted: *Ashgrove case* 94 ATC at 4562; (1994) 28 ATR at 530.
5. If the agreement results in the creation of an interest in land (e.g., a profit à prendre), there is a disposal under former subsection 160M(6) for all interests created before 26 June 1992: *Ashgrove case* 94 ATC at 4562; (1994) 28 ATR at 531. This disposal by the grantor occurs when the contract is made, granting the right to cut and remove the timber and operating to create the interest in land (subsection 160U(3)).
6. If the agreement results in the creation of an interest in land after 25 June 1992, there is a disposal by the grantor under subsection 160M(6A). This also occurs when the contract is made (subparagraph 160U(6)(a)(iii)).
7. In either situation where an interest is created, there is no further disposal by the grantor of any asset for the purposes of Part IIIA when the trees are felled. For Part IIIA purposes there is no

disposal of timber nor any part disposal of the land. The operation of felling and removing the trees is a necessary consequence, and part and parcel, of the interest created in the land.

Note 1: A profit à prendre is generally described as a right to take something off another person's land: *Duke of Sutherland v. Heathcote* (1892) 1 Ch 475; *Australian Softwood Forests* case. The right to cut and remove timber from the land of another, if the trees are to be left on the land for the advantage of the grantee so that he or she would benefit from further growth of the trees, is an example of a profit à prendre: *Australian Softwood Forests* case.

Note 2: This Taxation Determination only applies to grants of a right to cut and remove timber on or after 21 September 1989 because it is only from that date we took the view in Taxation Ruling IT 2561 that a grant of a profit à prendre involves the creation of an asset rather than a part disposal of land.

Note 3: For more views on how Part IIIA applies to a grant of a profit à prendre refer to Taxation Rulings IT 2561 and TR 95/6 and Taxation Determinations TD 93/79, TD 93/81, TD 93/235 and TD 93/236.

Example

Chris acquired 'Wytlaidee' on 17 April 1990. The property comprised 1,000 hectares of forest timber. On 10 February 1996, by deed, Chris granted to George a profit à prendre over a specified 700 hectares of trees on 'Wytlaidee'. The trees were to be left on the land for George to benefit from further growth. George had a continuing interest in the land which was to culminate in his severance and removal of the trees. A capital gain accrues to Chris when he granted the profit à prendre. [This would be so even if 'Wytlaidee' had been acquired before 20 September 1985]. Chris does not dispose of any asset, for the purposes of Part IIIA, when George later enters 'Wytlaidee' and fells the trees. Although the value of 'Wytlaidee' would have declined as a result of the granting of the profit à prendre, there would be no further CGT consequences for Chris on the felling of the trees, there being no asset disposed of at that stage.

Commissioner of Taxation

5 June 1996

FOI INDEX DETAIL: Reference No.

Related Determinations: TD 93/79; TD 93/81; TD 93/235; TD 93/236

Related Rulings: IT 2561; TR 95/6

Subject Ref: disposal; goods; interest in land; profit à prendre; timber; time of disposal

Legislative Ref: ITAA 160M(6); ITAA 160M(6A); ITAA 160R; ITAA 160U(3); ITAA 160U(6)(a)(iii);
ITAA Part IIIA

Case Ref: *Ashgrove Pty Ltd & Ors v. FC of T* 94 ATC 4549; (1994) 28 ATR 512; *Australian Softwood Forests Pty Ltd v. Attorney-General (NSW)*; *Ex rel Corporate Affairs Commission* (1980-1981) 148 CLR 121; *Duke of Sutherland v. Heathcote* (1892) 1 Ch 475; *Marshall v. Green* (1875) 1 CPD 35

ATO Ref: PUL A.1209 (CGDET 124); NAT 96/4975-1

ISSN 1038 - 8982