


***TD 94/61 - Income tax: to what extent are tax deductions available under subsection 51(1) of the Income Tax Assessment Act 1936 (the Act) for payments made under an agreement to lease car park surfacing where the car park surfacing is on land owned by the lessee and the car park surfacing 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 94/61 - Income tax: to what extent are tax deductions available under subsection 51(1) of the Income Tax Assessment Act 1936 (the Act) for payments made under an agreement to lease car park surfacing where the car park surfacing is on land owned by the lessee and the car park surfacing is used in carrying on the lessee's business operations?*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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## Taxation Determination

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**Income tax: to what extent are tax deductions available under subsection 51(1) of the *Income Tax Assessment Act 1936* (the Act) for payments made under an agreement to lease car park surfacing where the car park surfacing is on land owned by the lessee and the car park surfacing is used in carrying on the lessee's business operations?**

1. Payments made to lease the car park surfacing are only deductible under subsection 51(1) of the Act to the extent of any interest component. The remainder of the lease payments represents outgoings of capital.
2. 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. Where a taxpayer carries on a business and wishes to lease car park surfacing used in that business (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 surfacing to have a separate identity as property distinct from the land on which it rests.
3. Whether the car park surfacing is a chattel, having a separate identity from the underlying land, or a fixture that has become part of the land, is a question of fact, the answer to which depends on the mode, extent and purpose of its annexation: *Halsbury's Laws of England*, 4th ed. Vol. 27 at para 143; *Hellawell v. Eastwood* (1851) 6 Exch 295 at 312; *Hobson v. Gorringe* [1897] 1 Ch 182 at 193; *Belgrave Nominees Pty Ltd and Ors v. Barlin-Scott Airconditioning (Aust) Pty Ltd* (1984) VR 947 at 950-1. While regard must be had to the circumstances of each particular case, an intention that an item will remain in position permanently or for an indefinite or substantial period; or the fact that an item cannot be detached without substantial injury to the item or to that to which it is attached, provides strong evidence that an item is a fixture: *Australian Provincial Assurance Co Ltd v. Coroneo* (1938) 38 SR (NSW) 700 at 712-3; *Holland and Anor v. Hodgson and Anor* (1861-73) All ER 237 at 242-3.
4. In the case of car park surfacing it is unlikely that the lessor or lessee will dismantle the 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 underlying land. It has no identity as

property independent from the land on which it rests and thus belongs to the owner of the land: *Case K96* (1959) 10 TBRD 519 at 521; *Case 108* (1959) 8 CTBRD (NS) 623 at 625. As the car park surfacing cannot have separate ownership to the underlying land, and cannot be leased from someone who is not the owner of the land, it is incapable of being leased separately by the owner of the land.

5. The conclusion drawn at paragraph 4 does not change notwithstanding that a right to remove the car park surfacing may be included in the relevant lease agreement: *Eon Metals NL v. Commissioner of State Taxation (WA)* (1991-92) 22 ATR 601, 91 ATC 4841.

6. Where 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 surfacing. Apart from any interest components, the payments are capital and not deductible under subsection 51(1) of the Act.

#### *Example*

*A taxpayer has bitumen car park surfacing laid on land that he owns. The car park surfacing is used by the taxpayer in carrying on his business. The taxpayer enters into a lease agreement with a finance company which has no interest in the underlying land. That is, the finance company does not own the land or have any leasehold interest in any portion of the land.*

*Payments made to lease the car park surfacing by the taxpayer are only deductible under subsection 51(1) of the Act to the extent of any interest component.*

#### **Commissioner of Taxation**

07/07/94

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