

TD 94/89 - 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 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in [TR 2006/10](#) provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

! This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*

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).

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 (1)).
3. However, a taxpayer is not required to include any capital gain or loss in the appropriate year until an actual change of ownership occurs. Settlement effects a change of ownership and a disposal (subsection 160M(1)) which then triggers the operation of subsection 160U(3). 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 who before settlement, lodges his or her return for the income year in which the contract was made may, for convenience, at that time include in the return any (net) capital gain arising from the sale of the land or offset any capital loss arising from the sale of the land against a capital gain.
5. Where an assessment is amended to include a net capital gain, and a liability for interest arises under subsection 170AA(1), the remission of interest will be dealt with in each case on its own merits. We would expect, however, that the discretion in subsection 170AA(11) would ordinarily be exercised to remit the interest in full where requests for amendment are lodged, and where relevant, self-amendments are made, within a reasonable time after the date of settlement. In most cases, we would consider a period of one month after settlement to be a reasonable period.

Notes:

(1) The time a contract is made depends upon the terms of the contract and any relevant legislation in each State. 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 (e.g. 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 239 at 246-248; *AAT Case 9451* (1994) 28 ATR 1108 at 1116-1118.

(2) Taxation Determination TD23 provides that incidental costs (e.g. legal fees, agent's commission) incurred after the time of disposal of an asset may be included in the relevant cost base of that asset.

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

24/11/94

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Case Ref: Case 24/94 94 ATC 239; AAT Case 9451 (1994) 28 ATR 1108

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