

TD 96/35 - 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 changed over time. This is a consolidated version of the ruling which was published on 21 August 1996

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: 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 for the purposes of Part IIIA of the *Income Tax Assessment Act 1936* 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 and Ors v. FC of T* 94 ATC 4549; (1994) 28 ATR 512; *Australian Softwood Forests Pty Ltd and Ors 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 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* (94 ATC at 4562; 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* (94 ATC at 4562; 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. 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. 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*.

Note 2: This Taxation Determination deals with the **application of Part IIIA** to a grant of a profit à prendre. It applies to grants 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. For more views on how Part IIIA applies to profits 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.

Note 3: The ordinary income provisions and subsection 160ZA(4) also need to be considered if the particular agreement arises in the context of the carrying on of a business of timber operations or amounts to an isolated profit-making transaction.

Example

Chris acquired 'Wytlaidee' in April 1990. The property comprised 1,000 hectares of forest timber. In 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. Chris was not carrying on a business of timber operations nor was the grant of the profit à prendre an isolated profit-making transaction. A capital gain accrued 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 other asset, for the purposes of Part IIIA, when George later enters 'Wytlaidee' and fells the trees. Although the value of 'Wytlaidee' declined as a result of the granting of the profit à prendre, there were no further CGT consequences for Chris on the felling of the trees, there being no asset disposed of at that stage.

Commissioner of Taxation

21 August 1996

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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 160ZA(4)

Case Ref: Ashgrove Pty Ltd and Ors v. FC of T 94 ATC 4549; (1994) 28 ATR 512; Australian Softwood Forests Pty Ltd and Ors 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

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