TR 2001/12W - Income tax and capital gains tax: capital gains in pre-CGT tax treaties

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Notice of Withdrawal

Taxation Ruling

Income tax and capital gains tax: capital gains in pre-CGT tax treaties

Taxation Ruling TR 2001/12 is withdrawn with effect from today.

1. Taxation Ruling TR 2001/12 set out the Commissioner's view on the extent and manner in which capital gains are dealt with in Australia's tax treaties negotiated before the enactment of the capital gains tax by the insertion of Part IIIA into the *Income Tax Assessment Act 1936* (ITAA 1936).

2. The view expressed in TR 2001/12 is that Australia's right to tax gains taxable in Australia exclusively under the capital gains tax regime (that is, Part IIIA of the ITAA 1936, or Part 3-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)) is not limited by tax treaties entered into by Australia prior to the introduction of the capital gains tax regime in 1985 (pre-CGT DTAs).

3. The Federal Court rejected this view in *Virgin Holdings SA v. Commissioner of Taxation* [2008] FCA 1503; 2008 ATC 20-051; (2008) 70 ATR 478 (Virgin Holdings) and *Undershaft (No. 1) Limited v. Commissioner of Taxation; Undershaft (No. 2) BV v. Commissioner of Taxation* [2009] FCA 41; (2009) 175 FCR 150; (2009) 253 ALR 280; [2010] ALMD 411; [2010] ALMD 499; (2009) 74 ATR 888; 2009 ATC 20-091 (Undershaft).

4. The Commissioner does not intend to replace the ruling given the diminishing significance of the issue due to the renegotiation of pre-CGT DTAs and the narrowing of the range of assets held by foreign residents that are subject to CGT following legislative changes enacted by the *Tax Laws Amendment (2006 Measures No 4) Act 2006* with effect from 12 December 2006.

5. The Commissioner will, where appropriate, apply the decisions in the Virgin Holdings and Undershaft cases in respect of similar matters involving entities making taxable capital gains under Part 3-1 of the ITAA 1997 which are residents of countries where a similarly worded pre-CGT DTA applies.

Commissioner of Taxation
13 October 2010

ATO references
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