TR 95/32 - Income tax: development allowance: investment allowance: meaning of 'rights to use'

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Taxation Ruling

Income tax: development allowance: investment allowance: meaning of 'rights to use'

other Rulings on this topic

IT 69; IT 190; IT 2278; IT 2383; TR 94/11

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*This Ruling, 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 Ruling is a public ruling and how it is binding on the Commissioner.*

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What this Ruling is about

1. This Ruling considers the meaning of the phrase 'rights to use' and its related term '...contract or arrangement with another person for the use of the property by that other person' used in the Development Allowance, General Investment Allowance and Drought Investment Allowance ('the investment allowance') provisions of the *Income Tax Assessment Act 1936* ('the Act') (Subdivisions B and BA, Div 3 of Part III and Part XII respectively). (See legislative references at the end of this Ruling.)

Class of person/arrangement

2. The Ruling may affect a person seeking to claim any of the above allowances.

Ruling

3. The words 'rights to use' in section 82AA of the Act are to be given their ordinary and natural meaning (*Tourapark Pty Ltd v. FC of T* 82 ATC 4105 at 4107-4108; (1982) 12 ATR 842 at 845-846).

4. The ordinary and natural meaning of the word 'use' is of 'wide import' and 'its meaning in any particular case depends to a great extent on the context in which it is employed' (*Ryde Municipal Council v. Macquarie University* (1978) 139 CLR 633 per Gibbs ACJ

at 637, see also *Council of the City of Newcastle v. Royal Newcastle Hospital* (1956-57) 96 CLR 493 (High Court); (1959) 100 CLR 1 (Privy Council)).

5. Where the owner of eligible property grants to another person rights to use that property, the owner is not entitled to the benefit of the investment allowance provisions. This restriction is not limited simply to situations where there is a direct payment for the use of eligible property (*Ryde Municipal Council v. Macquarie University* (1978) 139 CLR 633 at 638; *Glasgow Corporation v. Johnstone* [1965] AC 609). The restriction potentially applies where the owner of the eligible property has given a right to use the property to another person. The restriction may apply even if the use of the eligible property by the other person directly facilitates the carrying out of the owner's income-earning activities. (See the example at paragraph 25 of this Ruling.) Whether the property is being used in such a way must be determined having regard to the circumstances of the particular situation.

6. There is a continuum of situations starting with those which clearly trigger the operation of the rights to use restriction and ending with those situations which clearly do not trigger the restriction. The precise dividing line between the two situations has to be determined on all the facts of a particular case.

7. There must be a careful analysis of the relationship between the owner of the eligible property and any person who may use that eligible property (see the Full Federal Court's approach in *Hamilton Island Enterprises Pty Ltd v. FC of T* 82 ATC 4302 at 4306-7; (1983) 13 ATR 220 at 225-226, where the court had regard to both the specific contractual terms and to the overall effect of the arrangement. See also *International Cellars Pty Ltd v. FC of T* 92 ATC 4624; (1992) 23 ATR 512).

8. By way of illustration, situations where the owner of eligible property clearly will be entitled to the investment allowance include:

(a) the use of eligible property by an employee or agent of the owner of the property for the purpose of producing the owner's trading stock. In such cases, the employee's or agent's action can, in law, be viewed as the action of the owner, i.e. there is no granting of a right to use in the relevant sense. (See *Watteau v. Fenwick* [1893] 1 QB 346; *Performing Right Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 768; *Bugge v. Brown* (1919) 26 CLR 110; *Petersen v. Moloney* (1951) 84 CLR 91 at 94; *Attorney-General for NSW v. The Perpetual Trustee Company Ltd* (1951-1952) 85 CLR 237 at 299-300.)

(b) the use of eligible property by an independent contractor to produce the trading stock of the owner of the eligible property, where the contract is essentially for the provision of labour. In such a case, the owner of the eligible property provides the whole or part of the plant used in the production process, supplies the raw materials used to produce the trading stock and generally will be liable under the terms of the contract in respect of the quality of the raw materials. Such a contract is for the provision of services rather than the granting of a right to use. The owner of the eligible property is using the property directly, albeit with contract labour, to produce their own trading stock. The services may be provided on the premises of the owner of the eligible property or on the premises of the independent contractor. Provided the eligible property does not become a fixture in the premises of the independent contractor, the actual physical location of the eligible property is not relevant.

(c) the eligible property is operated by the customer in the course of purchasing goods dispensed from the eligible property. The use of the eligible property by the customer is permitted by the owner simply to complete the sale. The use of the machine by the customer is simply incidental to the completion of a contract of sale. It is a misuse of language to describe the position as being one where the owner of the property produces assessable income by granting to a customer a right to use the property. (*International Cellars*.)

(d) the use of the eligible property under an arrangement where the owner has contracted to perform a service and in order to meet that contract provides both the equipment and operators. In such a case, the equipment is not used by the customer of the owner in the relevant sense. The equipment is used by the owner in the course of carrying on the business of providing particular services. (See the examples at paragraphs 21(e), 22 and 26 of this Ruling.)

(e) the use of eligible property owned privately by one of the partners in a partnership business, where no fee or other payment is payable to the partner for the use of that property, and the partnership uses the property for the purpose of producing its assessable income. The restriction does not apply in such a case, because there is no assessable income flowing directly to the owner of the property as a result of the decision by the partner to use the property in the partnership business.

(f) where the owner of a building leases rooms on a suite by suite basis, the owner is not considered to have granted a right to use eligible property that is associated with the common areas; such as lifts, escalators, kitchens and the central air-conditioning system in the building. Under such a contract, the owner earns income from leasing individual suites, not from leasing the common areas of the building. Such common areas are 'used' in the relevant sense by the owner of the building as they provide the means of access for both the persons renting the property and their customers and visitors. The common areas are essential to the means by which the building owner carries on the business of leasing suites. In this situation, the lifts, escalators, etc., are considered to be used, in the relevant sense, by the owner in his or her income-earning activity. The owner does not, in the relevant sense, earn income from granting to other persons a right to use that property.

9. Again by way of illustration, situations where the owner of eligible property clearly is not entitled to the benefit of the investment allowance include:

(a) where the owner derives assessable income by way of fee or charge directly from the granting of a right to use. (In *Case U231* 87 ATC 1276; *AAT Case 3994* (1987-88) 19 ATR 3026*,* the proprietor of the laundromat derived income by the granting of rights to use washing machines. The right to use the washing machines was the core of the contract.)

(b) where the owner derives assessable income indirectly (no direct payment for the use) from the granting of a right to use an item of eligible property. The exclusion may apply even if the use of the eligible property by another person directly facilitates the carrying out of the owner's assessable income-earning activities. For example, where, under a contract for the sale of goods, the owner of eligible property allows another person to use the property to produce the goods which then may be purchased by the owner of the eligible property under the terms of the contract. This is particularly the case where the vendor supplies the raw materials and uses their own equipment in conjunction with the purchaser's eligible property to produce trading stock of the vendor which is to be or may be sold to the purchaser. In such cases, the vendor is likely to be responsible for both the quality of the work and the raw materials used. The vendor is also responsible

for ensuring that the goods meet the standards specified in the particular contract (provided the purchaser's equipment produces a product of the specified standard). It does not matter whether the vendor uses the purchaser's eligible property to produce goods only for the purchaser, or also uses the property to produce goods for sale to other parties. In both situations, the essential character of the contract includes the owner granting to another person a right to use that property in the relevant sense.

(c) deriving assessable income from regular and recurrent hiring (or otherwise granting the right to use) of eligible property to casual or occasional users. Where the contract is one of hire, rather than one for the provision of a particular service, then it does not matter if the owner provides a person to operate the property. In such a case, the use of the property is at the direction and under the control of the hirer. For example, if plant is hired with a licensed operator, the contract is still one of hire. The investment allowance is available only in relation to owner-operated eligible plant or eligible plant held by a taxpayer who is operating it under a hiring or leasing agreement for a period of 4 years or more with a 'leasing company' as defined in the relevant provisions of the income tax law. (Sections 82AA and 82AQ.)

(d) where the owner of a building leases out the whole building to one lessee, the owner is considered to have granted a right to use the eligible property located in the building. Under such a contract the owner is granting the lessee the use of all of the building, including such things as the lifts, escalators, air conditioning, etc. The owner earns income, under the contract, from the lessee's 'use' of the building, including the lifts etc. In our view, the owner is earning income from the grant of a 'right to use' the eligible property in the relevant sense.

10. The phrase 'a contract or arrangement with another person for the use of property by that other person' has substantially the same meaning as the phrase 'rights to use'. Accordingly, for the purposes of this Ruling, no distinction is made between these phrases and the Ruling applies to both.

Date of effect

11. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling 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 Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). To the extent that the principles stated in Taxation Ruling IT 49, "Investment allowance - plant used in premises leased or let to others" are inconsistent with the principles outlined in this Ruling then this Ruling will only apply in respect of eligible property acquired or constructed on or after 18 October 1995.

Explanations

Background

12. In all material respects, the present investment allowance provisions are identical to the former investment allowance provisions. Consequently, the cases dealing with the former investment allowance are equally relevant to the present provisions. Likewise, the 'rights to use' restrictions in the current development allowance provisions and the drought investment allowance provisions are substantially the same, and were introduced for essentially the same reasons, as the restrictions in the investment allowance. Therefore, cases dealing with the former investment allowance provisions are also of assistance in interpreting the development allowance provisions and the drought investment allowance provisions.

Meaning of the word 'use'

13. In *Council of the City of Newcastle v. Royal Newcastle Hospital* (1956-57) 96 CLR 493, Taylor J stated at 515:

> 'The word "use" is, of course, a word of wide import and its meaning in any particular case will depend to a greater extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute "use" will depend to a great extent upon the purpose for which it has been acquired or created.'

14. Both Gibbs ACJ's comments in *Ryde Municipal Council* (see paragraph 4) and the High Court's comments on the meaning of 'use' in *Council of the City of Newcastle* which were cited with approval in *International Cellars* (92 ATC 4624 at 4627; (1992) 23 ATR 512 at

515) are of assistance in understanding the meaning of 'use' in the context of the former investment allowance.

15. In *Ryde Municipal Council* (1978) CLR 633 Gibbs ACJ stated at 638 that:

> 'In the ordinary accepted meaning of the word a building is "used" for the purposes of acquiring income if rents are derived from it, and the owner of the premises who leases them is making use of those premises by employing or applying them for the purpose of letting... But that is not the only way in which an owner of land may use it by letting it to someone else.'

16. In *Knowles v. The Council of the Municipality of Newcastle* (1909) 9 CLR 534 a house was occupied by a railway station-master rent free. The station-master was required to live there as a condition of his employment, so that he might be available in case of emergency. Nevertheless, the High Court held that the house was 'used' for the purpose of Government railways. O'Connor J stated (at 543) that:

> 'It is said that the actual use is by the station-master, not by the Commissioners [of State Railways], but if the station-master actually does use the house under the direction of the Commissioners, I find it difficult to see how it can be said that it is the station-master and not the commissioners who uses the house.'

17. In *Glasgow Corporation* the House of Lords considered whether a house occupied rent free by a church officer, who was required to occupy the house during the course of his employment with the church, was 'wholly or mainly used for charitable purposes'. Lord Reid (at 622) stated:

> 'They [the congregational board of the church] use the house to have a servant on the spot to assist them in the more efficient performance of their charitable activities. I think that it is much too narrow a view simply to see whether any charitable activity is carried on in the house... If the use which the charity makes of the premises is directly to facilitate the carrying out of its main charitable purposes, that is, in my view, sufficient to satisfy the requirement that the premises are used for charitable purposes.'

18. If the approaches in the cases discussed above were applied to the investment allowance, then a taxpayer could be viewed as using eligible property for the purpose of producing assessable income '...by granting to other persons of rights to use the eligible property' even though no assessable income, by way of rent, fee, or charge, is directly produced. Therefore, the restriction will be triggered if the use to which the other person puts the eligible property can be said to

facilitate directly the carrying out of the owner's assessable income earning activities.

The underlying rationale of the 'right to use' exclusion

19. The policy behind the rights to use restriction in both the old and the new investment allowance provisions is set out in Gibbs CJ's judgment in *Tourapark* (82 ATC 4105 at 4108; (1982) 12 ATR 842 at 845-846):

> 'All these provisions support the view that (except in the case of leasing companies) the Parliament intended that the allowance should not be payable unless the taxpayer kept both the property and the exclusive right to use it, and did use it only for the purpose of producing assessable income.'

and also:

> 'It is apparent that the investment allowance is made available for the purpose of encouraging particular behaviour which the Parliament regarded as desirable, namely, the expenditure of money on certain plant which (except in the case of leasing companies) is intended to be used and is in fact used by the taxpayer himself wholly and exclusively for the production of assessable income and ***which others have no right to use***. The Parliament attached conditions to the right to the allowance, no doubt with a view to preventing the right being used simply as a means of tax avoidance, and ***no reason appears why the words imposing the conditions should be given any other than their ordinary and natural meaning***' (emphasis added).

20. Given that the 'rights to use' restrictions in the development allowance are substantially the same as those for the investment allowance the above passages also accurately summarise the policy behind the development allowance provisions.

The 'right to use' restriction in judicial decisions

21. The operation of the former investment allowance has been considered on a number of occasions by the Australian courts. These cases demonstrate the need to examine carefully the relevant contractual relationship between the owner of the property and any one else who may use that property. By way of illustration:

(a) in *Tourapark* the taxpayer derived assessable income from the hiring of caravans and the contract was clearly one where the owner had granted a right to use in the relevant sense.

(b) in *Case W120* (89 ATC 951 at 955, paragraph 14; *Case 5470* (1988-89) 20 ATR 4149 at 4154) the contract was essentially one for the provision of labour by New-co to Fabrico, the owner of the eligible property. This fact was recognised by Mr Roach, who said**:**

> 'The arrangements so entered into were such that Fabrico was able to procure the knitting of the yarn to its own specifications just as surely as if it had directly controlled the employees of New-co as its employees and had provided an incentive reward to the person who had managed the work.'

Fabrico supplied the raw materials. Fabrico's eligible property was used only to produce trading stock which was itself the property of Fabrico. New-co was essentially paid for the provision of labour and management services. Although we do not accept all of the theoretical discussion in that case, we accept that, given the particular facts, the correct result was obtained.

(c) in *International Cellars* there was no granting of a right to use in the relevant sense. The essential nature of the contract was the sale of cigarettes, not the granting of a right to use the cigarette machine. The taxpayer derived its income from the sale of the cigarettes, not from the granting of any right to use.

(d) in *Case U59* (87 ATC 382; (1986-87) 18 ATR 3283) the taxpayer used amusement machines for the purpose of producing its assessable income. Customers were able to use the machines upon payment. The machines were housed in hotels and clubs, and the owner of the machines was entitled to receive 50% of the takings. The owner derived income from the machines by authorising someone else to use the machines. This case is essentially no different from *Case U231*. The investment allowance was not available as the taxpayer did not retain both the property and the exclusive right to use it.

(e) in *Hamilton Island* it was held that the chartering of a helicopter with crew to a related company to carry that company's passengers on scenic and joy flights would constitute the granting of a right to use. This case is different from the situation in paragraph 8(d) above, where the owner contracted to provide particular services and, in the course of so doing, uses the equipment. In such a case, the owner of the property is earning assessable income not from granting another person a right to use that property,

but from carrying on a business which involves the provision of services. For example, where a subcontractor owns earthmoving equipment that is used by their employees in the course of carrying out the subcontract work, the subcontractor does not earn income from granting to the head contractor a right to use the equipment. The subcontractor retains both the property and the exclusive right to use it. However, in the *Hamilton Island* case, the helicopter was under the control of the related company. The helicopter was not merely used by its owner to fulfil the owner's contractual obligation to perform a particular service, but, rather, the helicopter was used by the related company to satisfy its contractual obligation to third parties to provide both scenic and joy flights.

Examples

Example 1

22. The Speedy Bus Company purchases buses for use in transporting paying passengers along its established routes. In this case, the contract with passengers is one of transportation rather than a contract for the right to use the bus. Speedy derives the relevant assessable income from transporting passengers, not from granting the passengers rights to use the buses. The passengers do not have any right to control the operation of the bus. Consequently, Speedy does not earn income from the granting of rights to use and will be entitled to the benefit of the investment allowance.

Example 2

23. The Quick Charter Bus Company charters buses without a driver to other persons who then operate the buses for their own purposes, including income-earning purposes. In this case, the owner is granting to other persons a right to use the eligible property in the relevant sense. Quick is carrying on business as a charterer of buses and, therefore, derives income from the grant of rights to use, and is not entitled to the benefit of the investment allowance.

Example 3

24. Patrol Company Ltd ('Patrol') charters a 4WD vehicle with a crew to an associated company Camping Pty Ltd ('Camping') which uses the vehicle to carry its customers on outback camping trips.

Under the terms of the contract, Patrol is entitled to a percentage of the proceeds received by Camping. Camping undertakes to construct the necessary infrastructure to be used with the 4WD vehicle. Its emblems are placed on the 4WD vehicle. Camping uses the 4WD vehicle in the course of its business activity of arranging and operating camping trips. Under that contract, Patrol, the owner of the eligible property (the 4WD vehicle), derives assessable income from the grant of a right to use or more correctly 'the use' of the 4WD vehicle by an associated company, Camping, which uses it in the course of its own business activities. Therefore, Patrol is not entitled to the benefit of the investment allowance.

Example 4

25. Manufacturing Company Ltd ('MCL') enters into a contract with an independent parts supplier for the purchase of components which will be used in MCL's own trading stock. Under the contract, MCL provides the supplier with tools and dies (the eligible property) to enable the supplier to manufacture the relevant components. The parts supplier will use its own equipment, together with the tools and dies owned by MCL, and will provide the raw materials. All production work is done by the employees of the parts supplier, and the finished products will become the trading stock of the supplier. Under the terms of the contract, the supplier may then sell its trading stock to MCL. In our view, the substance of the contract is that MCL grants to the supplier a right to use the tools and dies in the relevant sense. Consequently, MCL will not be entitled to the benefit of the investment allowance because it derives assessable income from the granting of that right to use as a result of the goods being incorporated into its trading stock. This would be equally true if the components acquired by MCL under this contract were resold separately as its trading stock of spare parts.

Example 5

26. Builders' Service Company Pty Ltd ('BSC') owns specialised pieces of equipment such as large mobile cranes and earth-moving equipment which are normally operated on a contract basis by the company. That is, BSC contracts to perform a particular service, such as preparing a building site prior to construction using its own plant. BSC also provides an employee who is licensed to operate the equipment. In such a situation, which is quite different from simply hiring the plant to another person, BSC retains the exclusive right to use the property and uses it only for the purpose of producing assessable income. Consequently, BSC will be entitled to the investment allowance. On the other hand, if a piece of equipment is

provided under an arrangement in which the plant is used by the hirer to fulfil its contractual obligation to a third party, then the investment allowance will not be available. This is irrespective of whether the owner provides a person to operate the equipment because, in essence, the contract is one where the hirer is granted a right to use the equipment. The owner of the equipment is producing assessable income from the granting of a right to use that equipment.

Example 6

27. Electricity Bank Pty Ltd ('Electricity') has constructed a power station but does not have the necessary specialised skill and expertise to run the plant. The company sought tenders from parties interested in operating the power station on its behalf. Power Station Expertise Pty Ltd ('Power') was awarded the contract to operate the plant. On the basis of both the terms of the contract and the means by which those terms are fulfilled, it is clear that Power is not operating the plant on its own behalf. It is operating the plant, as manager only, for and on behalf of Electricity. Power receives a fee for operating the plant. In this case, Electricity has not granted rights to use the eligible property in the power station and will be entitled to the allowance.

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- Watteau v. Fenwick [1893] 1 QB 346
- Case U59 87 ATC 382; Case 45 (1986-87) 18 ATR 3283
- Case U231 87 ATC 1276, AAT Case 3994 (1987-88) 19 ATR 3026
- Case W120 89 ATC 951; Case 5470 (1988-89) 20 ATR 4149