

# ***TR 97/3 - Income tax: capital gains: compensation received by landowners from public authorities***

⚠ This cover sheet is provided for information only. It does not form part of *TR 97/3 - Income tax: capital gains: compensation received by landowners from public authorities*

⚠ This ruling contains references to repealed provisions, some of which may have been rewritten.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32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.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*



## Taxation Ruling

### Income tax: capital gains: compensation received by landowners from public authorities

#### other Rulings on this topic

IT 2328; IT 2561; TD 14;  
TD 15; TD 31; TD 57;  
TD 92/130; TD 93/44;  
TD 93/82; TD 93/178;  
TD 93/235; TD 93/236;  
TR 95/35

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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.*

## What this Ruling is about

### Class of person/arrangement

1. This Ruling applies to a landowner who receives certain compensation from a public authority. It considers the capital gains tax consequences for the recipient of the amount and whether the amount should be included in the assessable income of the recipient under Part IIIA of the *Income Tax Assessment Act 1936* ('the Act').

2. This Ruling extends the application of Taxation Ruling TR 95/35 and should be read with that Ruling.

### Date of effect

3. 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).

## Ruling and explanations

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### Compensation received from a public authority for the compulsory acquisition of an easement

4. Compensation in respect of an easement created by statute in favour of a public authority cannot be said to have been received for the grant of the easement. The *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) and similar Acts in other jurisdictions<sup>1</sup> enable public authorities to take land or an interest in land (including an easement) for specified purposes and confer on the affected landowner a right to compensation. In these circumstances, the landowner cannot be said to have created an asset as required for subsection 160M(6) of the Act to apply. The easement is created by operation of the relevant statute and is vested in the public authority. This constitutes a compulsory acquisition of the easement.

5. The compensation received by a landowner from a public authority that compulsorily acquires an easement is not excluded from the scope of TR 95/35 by paragraph 2 of that Ruling which states that:

'This Ruling does not consider:

- .....
- amounts received for the grant of easements, profits a prendre and licences - these are covered in detail in Taxation Ruling IT 2561 and in Taxation Determinations TD 93/235 and TD 93/236'.

6. A strict application of Part IIIA would require the compensation received from a public authority to be treated as consideration in respect of the disposal by the landowner of the right to compensation. However, TR 95/35 focuses on the asset to which the compensation receipt most directly relates. In the case of easements acquired under statute and the consequential disposal of the right to compensation, the most relevant asset is the landowner's pre-existing land with its rights of ownership including, for example, a right to exclude all others. This right to exclude all others is forfeited in part when the easement comes into existence. The loss of part of this right constitutes the disposal of part of the underlying asset (the land) for Part IIIA

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<sup>1</sup> *Lands Acquisition Act 1989*  
*Acquisition of Land Act 1967* (Qld)  
*Land Acquisition and Compensation Act 1986* (Vic)  
*Land Acquisition Act 1969* (SA)  
*Land Acquisition Act 1993* (Tas)  
*Public Works Act (1902)* (WA)  
*Lands Acquisition Act 1994* (ACT)  
*Lands Acquisition Act* (NT)

purposes (paragraph 160M(3)(b), subsection 160M(1) and section 160R).

7. Paragraph 4 of TR 95/35 states that:

'If an amount of compensation is received by a taxpayer wholly in respect of the disposal of an underlying asset, or part of an underlying asset, of the taxpayer the compensation represents consideration received on the disposal of that asset. In these circumstances, we consider that the amount is not consideration received for the disposal of any other asset, such as the right to seek compensation.'

8. Applying this approach, an amount of compensation received by a landowner for the loss of part of the rights of ownership is accepted as being consideration received in respect of the part disposal of the underlying asset (the land). The amount is not consideration for disposal of the right to seek compensation.

#### **Easements granted to a public authority which has the statutory power to compulsorily acquire the easement**

9. The acquisition of an easement by a public authority using the compulsory process provided in the relevant statute culminates in a declaration by notice in the *Gazette* that the easement has been acquired. However, it is possible that a public authority may acquire an easement by agreement with the landowner. One of the features which the various statutes have in common is encouragement of acquisition by agreement.

10. Because the easement is created in these circumstances by grant by the landowner there is scope for an argument that subsection 160M(6) applies. However, because the grantee of the easement (the public authority) has available, if it chooses to exercise it, the power to compulsorily acquire the easement, the amount received, in our view, takes on the same character as compensation for a compulsorily acquired easement. It is therefore appropriate that Part IIIA apply in the same way, that is, the consideration (compensation) is paid in respect of the part disposal of the land and not in respect of the grant of the easement.

#### **Voluntary grant of an easement to someone without any statutory power to acquire the easement**

11. If a landowner voluntarily grants an easement in circumstances where the grantee does not have any statutory power to acquire the easement, Part IIIA applies in the manner set out in Taxation Ruling IT 2561 and Taxation Determination TD 93/235. In other words, the

grant of an easement constitutes the creation and disposal of an asset (an interest in the land) to which subsection 160M(6) now applies.

**Compensation received by a landowner under a statute which imposes a limitation on the owner's use of the land**

12. An amount of compensation may be received by a landowner in respect of a reduction in the value of land resulting from limitations on the owner's use of the land imposed by statute. For example, the *Native Vegetation Act 1991* (SA), the object of which is to preserve, enhance and manage native vegetation, limits rights of certain landowners to clear their land.

13. These compensation receipts are treated in the same way as compensation for a compulsorily acquired easement. Here again, there is a loss of some of the rights of ownership of the land. The compensation is treated as consideration in respect of the disposal of those rights, that is, in respect of a part disposal of the underlying land.

14. If land is acquired **after** the limitations on use are imposed by the relevant statute, we take the view that there is no loss of any of the rights of ownership acquired with the land. What is acquired is the land with the limitation of the ownership rights already in place. Therefore, any amount that might be received by the landowner in these circumstances is not consideration in respect of the disposal of any rights which were acquired when the land was acquired. The amount received by the landowner is treated as consideration in respect of the disposal of the right to compensation under subsection 160M(1) and paragraph 160M(3)(b). Alternatively, subsection 160M(7) may apply to the amount received.

**Alternative views**

***Does the voluntary grant of an easement give rise to a paragraph 160M(3)(b) disposal rather than a subsection 160M(6) disposal?***

15. The landowner, in voluntarily granting an easement, suffers a similar loss of rights as occurs when an easement is compulsorily acquired. It might be argued therefore that consideration received for a voluntarily granted easement also constitutes consideration in respect of a part disposal of the underlying land.

16. At general law, an easement voluntarily granted is a right annexed to land (dominant tenement):

- (a) to utilise other land (servient tenement) of different ownership in a particular manner (not involving the taking of any part of the natural produce of that land or any part of its soil), e.g., a right of way; or
- (b) to prevent the owner of the other land from utilising his or her land in a particular manner, e.g., a right to receive light for a building (see *Halsbury's Laws of England*, (4th ed), Vol 14, p 4).

17. The landowner who grants an easement, in our view, receives consideration in return for creating those rights in favour of the grantee rather than for the consequential loss of his or her rights. The nature of the transaction is such that all of the consideration is in respect of the grant of the easement, that is, in respect of the disposal of an asset created under subsection 160M(6). It is true that the amount which the grantor requires as consideration might take into account the effect the voluntary granting of the easement would have on the value of the land. However, this does not mean, in our view, that the consideration is not paid by the grantee **in respect of the easement**.

***Is apportionment of disposal consideration appropriate if an easement is voluntarily granted?***

18. It has been suggested that the consideration a landowner receives in return for voluntarily granting an easement could be apportioned. The apportionment would be between the creation and vesting of the easement and the loss of rights of ownership of the land. We take the view, however, that there is no scope for section 160ZD(4) to operate to apportion the disposal consideration in these circumstances. The whole consideration is received, in terms of paragraph 160ZD(1)(a), as a result of, or in respect of, the creation of the easement and its vesting in the grantee. We do not accept, for the purposes of subsection 160ZD(4), that any part of the consideration received on the voluntary grant of an easement specifically relates to the landowner's loss of rights of ownership.

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**Commissioner of Taxation**

5 March 1997

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- acquisition
- alienation of land
- apportionment
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- capital gains tax
- compensation
- compensation receipts
- compulsory acquisition
- consideration
- disposal of assets
- easement
- grant of an easement
- public authority
- rights to use

*legislative references*

- ITAA Pt IIIA
- ITAA 160M(1)
- ITAA 160M(3)(b)
- ITAA 160M(6)
- ITAA 160M(7)
- ITAA 160R
- ITAA 160ZD(1)(a)
- ITAA 160ZD(4)

*case references*