



TR 97/4 - Income tax: capital gains: roll-over relief for buildings subdivided under strata title law into stratum units and common property

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Taxation Ruling

Income tax: capital gains: roll-over relief for buildings subdivided under strata title law into stratum units and common property

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TD 7

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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. Section 160ZZPG of the *Income Tax Assessment Act 1936* ('the Act') applies if, under a strata title law, land on which one or more buildings is erected is subdivided into stratum units (or into stratum units and common property) and a taxpayer immediately before the subdivision held an asset in relation to the land. Section 160ZZPG empowers the Commissioner to grant capital gains tax (CGT) roll-over relief to the taxpayer in respect of the strata title subdivision.
2. This Ruling considers how section 160ZZPG applies if land and a building or buildings under the following stratum unit ownership arrangements are subdivided, under a strata title law, into stratum units or into stratum units and common property, namely:
 - (a) home unit companies; and
 - (b) long term leases of stratum units; and
 - (c) tenancy in common arrangements which have collateral agreements that grant to participants exclusive occupancy, use and enjoyment rights over particular stratum units.
3. The Ruling applies to commercial or industrial buildings in the same way as for residential (home unit) buildings where those commercial or industrial buildings are subject to similar ownership arrangements to those in paragraph 2 above.

4. In this Ruling, the expression 'subdivided into stratum units, or into stratum units and common property' in paragraph 160ZZPG(1)(a) is abbreviated for convenience to 'subdivided into relevant stratum units'. Also, the words 'company' or 'companies' are used for brevity instead of the expressions 'stratum unit company' or 'stratum unit companies'. See also the definitions of 'building', 'later transfer', 'lease' and 'stratum unit company' in paragraphs 18 and 19 of this Ruling.

Ruling

Roll-over relief for companies and lessors which subdivide land and a building under a strata title law

5. If a company or a long-term lessor:
- (a) holds an asset in relation to land, being a building erected on the land; and
 - (b) subdivides the land on which the building is erected into relevant stratum units; and
 - (c) then transfers all of the stratum units:
 - (i) in the case of a company - to those shareholders in the company whose shares give them the right to occupy the particular stratum units transferred to them;
 - (ii) in the case of a lessor - to those lessees who held long-term leases over the particular stratum units transferred to them; and
 - (d) elects that subsection 160ZZPG(2) applies in respect of the subdivision,

CGT roll-over relief is granted to the company or lessor under section 160ZZPG in respect of any disposal of:

- (e) the land and building; or
- (f) the land and building and the common property; or
- (g) the individual stratum units; or
- (h) the common property;

that occurs on the transfer of the relevant stratum units after the strata title subdivision of the land and building.

Effect of roll-over relief for stratum unit companies and lessors

6. The disposal of the land and building and, where applicable, the common property, by way of transfer of the stratum units and common property, is treated as if Part IIIA does not apply to the disposal (paragraph 160ZZPG(3)(a)).

Roll-over relief for members of companies and lessees when a company or lessor subdivides land and a building under a strata title law

7. If:
- (a) a member of a company or a lessee holds an asset in relation to land, being:
 - (i) in the case of a member - a share or shares in the company that entitles the member to a right of occupancy to, or to a part of, a building erected on the land; or
 - (ii) in the case of a lessee - a long-term lease over a unit in a building; and
 - (b) the company or lessor subdivides the land and building owned by it into the relevant stratum units; and
 - (c) the company or lessor then transfers legal ownership of the units so that:
 - (i) in the case of a company - each member owns the stratum unit which corresponds with the particular unit occupied by the member in accordance with the rights attached to the company shares owned by the member; or
 - (ii) in the case of a lessor - each lessee owns the stratum unit which corresponds with the unit over which the lessee holds a lease; and
 - (d) the member or lessee elects that subsection 160ZZPG(2) applies,

CGT roll-over relief is granted to the member or lessee in respect of any disposal of the asset in relation to the land or acquisition by the member or lessee of a stratum unit and interest in common property resulting from the subdivision and later transfer.

Effect of roll-over relief for members and lessees

8. If the company is wound up after it has transferred all of the relevant stratum units to members of the company, the shares in the company held by individual members are treated as if Part IIIA does not apply to any disposal of the shares which occurs on the winding up of the company (paragraph 160ZZPG(3)(a)).

9. The lease held by an individual lessee is treated as if Part IIIA does not apply to any disposal of it which occurs as a result of its surrender by the lessee when an individual stratum unit is transferred to the lessee (paragraph 160ZZPG(3)(a)).

10. If a member acquired shares, or a lessee entered into a lease, before 20 September 1985, the relevant stratum unit held by the member or lessee is treated as having been acquired by that member or lessee before 20 September 1985 (paragraph 160ZZPG(3)(b)).

11. If the shares were acquired, or the lease entered into, on or after 20 September 1985, the member or lessee is treated as having paid for the relevant stratum unit an amount equal to the cost base, indexed cost base, or reduced cost base ('the relevant cost base'):

- (a) in the case of a member - attributable to the member's shares in the company as at the time of the transfer by the stratum unit company of the relevant stratum unit to the member; or
- (b) in the case of a lessee - attributable to the premium paid to the lessor on entering the lease as at the time of the transfer of the individual relevant stratum unit to the lessee (paragraph 160ZZPG(3)(c)).

Roll-over relief for tenants in common who subdivide land and a building under a strata title law

12. If two or more persons:

- (a) hold an asset in relation to land, being land and a building, as tenants in common; and
- (b) enter into an agreement or understanding, whether evidenced in writing or not (see paragraphs 44 to 48), which grants each tenant in common an exclusive right of occupation, use and enjoyment of a particular stratum unit; and
- (c) subdivide the land and building into relevant stratum units; and

- (d) then transfer their interests as tenants in common and rights over their particular stratum unit so that each tenant in common becomes the registered proprietor of the relevant stratum unit which corresponds with that stratum unit; and
 - (e) elect that subsection 160ZZPG(2) applies,
- then
- (f) CGT roll-over relief is granted in respect of any disposal or acquisition of:
 - (i) any interest in the land and building; or
 - (ii) any interest in the land, building and the common property; or
 - (iii) any interest in the individual stratum units; or
 - (iv) the common property;that occurs on the strata title subdivision of the land and building or the later transfer by the tenants in common of any interest and rights in the stratum units in return for the relevant stratum units.

Effect of roll-over relief for tenants in common

13. The interest in land and a building and rights to occupy, use and enjoy a particular stratum unit held by a tenant in common before subdivision are treated as if Part IIIA does not apply to any disposal of them, or part of them, which occurs as a result of the subdivision (paragraph 160ZZPG(3)(a)).

14. If a person acquired his or her interest as a tenant in common and rights before 20 September 1985, the relevant stratum unit is treated as having been acquired by the person before 20 September 1985 (paragraph 160ZZPG(3)(b)).

15. If the interest as a tenant in common and rights were acquired on or after 20 September 1985, the person is treated as having paid for the relevant stratum unit he or she owns an amount equal to the relevant cost base attributable to that person's interest in the tenancy in common and rights as at the time of the transfer of the interests and rights (paragraph 160ZZPG(3)(c)).

Roll-over relief extends to newly constructed buildings

16. Section 160ZZPG is sufficiently wide in its terms to apply to:

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- (a) buildings in existence when the section was first inserted in the Act and commenced to operate (the year of income in which 20 September 1985 occurred and all later years); and
- (b) newly constructed buildings (whether residential or otherwise).

Date of effect

17. 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). The application of this Ruling is subject to the statutory limits of section 170 of the Act.

Definitions

18. In this Ruling:

'building' includes any residential (home unit), commercial or industrial building consisting of two or more self-contained dwellings or commercial or industrial premises;

'later transfer' includes a transfer which occurs at the time of subdivision if the person or persons carrying out the subdivision specify those persons who are to be registered proprietors of the relevant stratum units created by the subdivision and the relevant strata title law;

'stratum unit company' includes any home unit company and the equivalent entity for ownership arrangements involving commercial or industrial buildings.

19. A reference to a **'lease'** which is converted to strata title ownership, is a reference to a long-term lease. For these purposes, a lease granted for a period of 99 years or more can be taken to be a long-term lease.

Explanations

Background - home unit ownership schemes

20. Before 1960 when the States and Territories began to enact legislation allowing strata title ownership of home units, no provision was made in real property law for the freehold ownership of a unit in a building. A number of home unit ownership schemes were devised to enable individual ownership of home units. The object of the schemes was to create rights of exclusive occupancy in relation to individual home units and give 'owners' a *de facto* title to the units. The main home unit ownership schemes, which are dealt with in this Ruling, are:

- (i) **Stratum unit companies** - under this scheme, a company is the registered proprietor of the building. The unit 'owner' owns a block of shares in the company carrying with it the right to occupy a defined portion of the building. Each member has contractual rights arising from his or her ownership of the shares in the company but has no interest in the land or building.
- (ii) **Long-term leases** - under this scheme, the purchaser holds a lease for a long term (e.g., 99 - 999 years) at a nominal rental, with the purchase price comprising a premium for the grant of the lease. The lease is registrable as a Torrens title interest in the land. However, the unit owner does not hold a freehold estate. The original developer of the land remains as lessor, often with active duties to perform.
- (iii) **Tenancy in common** - under this scheme, all unit purchasers own the whole of the premises as tenants in common. As tenants in common, each purchaser is entitled to possession of the whole premises subject to co-ownership and not to exclusive possession of a defined portion of the premises (*Moisley v. Mahony* [1950] VLR 318). In many cases this feature of co-ownership has been overcome by an agreement between all tenants in common, under which each 'owner' has rights of exclusive occupation of a particular home unit.

Strata title subdivision

21. Strata title subdivision is achieved by registering a strata plan. Strata title legislation provides for the grant of a separate Torrens title for individual parts of a building. On registering a strata plan, a separate title is created for each lot or each lot and common property

in much the same way as separate titles are created for lots in a subdivision of land. A strata title subdivision must involve two or more lots and almost always involves common property. On registering the plan, an entity known as the 'body corporate' is created. The body corporate is constituted by the registered proprietors of the stratum units and is a separate legal entity. Each lot is allocated a 'unit entitlement' on subdivision. The unit entitlement of each lot in relation to the aggregate entitlement of all lots is specified in the registered strata plan and determines the voting rights of the proprietor, the share of the proprietor in the common property and the proportion of contributions levied by the body corporate to cover administrative and other expenses.

The subdivision and transfer process

22. Broadly speaking, the conversion of the three stratum unit ownership schemes to strata title ownership covered in this Ruling involves the following two steps:

- (i) the originally registered proprietor (that is, the company, lessor or tenants in common) subdivides the land and building erected on the land (referred to throughout this Ruling as the 'building') into relevant stratum units and becomes the owner of the stratum units and common property, if any, created; and
- (ii) the originally registered proprietor transfers the stratum units to the shareholders, lessees or tenants in common so that each shareholder, lessee or tenant in common owns the unit which he, she or it occupied, used or enjoyed immediately before subdivision (the 'later transfer').

23. However, in some jurisdictions it is possible, in limited circumstances, for the originally registered proprietor to specify at the time of strata title subdivision the persons who are to be the registered proprietors of the stratum units after subdivision (see, for example, section 223mc of the *Real Property Act, 1886 - 1975* (SA)). In these circumstances, the second step outlined above does not need to be taken. For the purpose of simplicity, 'later transfer' by an originally registered proprietor of a stratum unit has therefore been defined in this Ruling to include a transfer which occurs at the time of subdivision by virtue of the originally registered proprietor specifying those persons who are to be the registered proprietors of the stratum units created on subdivision.

Ownership after completion of the subdivision and transfer process***Ownership of stratum units***

24. Stratum units are owned both legally and, unless held on trust, beneficially by each individual stratum unit owner.

Ownership of common property

25. The legal ownership of common property varies under different State and Territory Acts. However, beneficial ownership is universally vested in the stratum unit owners:

- (i) in Queensland, Victoria, Tasmania and Western Australia the ownership is vested in the individual unit owners as tenants in common in proportions equal to their lot entitlements (*Building Units and Group Titles Act 1980* (Qld); *Strata Titles Act 1967* (Vic) replaced by the *Subdivision Act 1988* (Vic); *Conveyancing and Law of Property Act 1984* (Tas); *Strata Titles Act 1985* (WA));
- (ii) in New South Wales the ownership is vested in the body corporate as agent for the proprietors as tenants in common in proportions equal to their lot entitlements (*Strata Titles Act 1973* (NSW)); and
- (iii) in South Australia, the Northern Territory and the Australian Capital Territory the ownership is vested in the body corporate as trustee for the proprietors as tenants in common in proportions equal to their lot entitlements (*Real Property Act 1886-1975* (SA); *Unit Titles Act* (NT); *Unit Titles Act 1970* (ACT)).

Section 160ZZPG***Who can be granted roll-over relief under section 160ZZPG?***

26. In the stratum unit ownership schemes outlined in this Ruling, it is generally only the originally registered proprietor of the building (i.e., the company, lessor or tenants in common) who is a party to the strata title subdivision of the building. However, this does not mean that taxpayers (for example, shareholders or lessees) who acquire units from the originally registered proprietor after subdivision cannot be granted roll-over relief.

27. Section 160ZZPG empowers the Commissioner to grant CGT roll-over relief in relation to a taxpayer **in respect of a subdivision** (subsection 160ZZPG(2)).

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28. In *The Trustees Executors & Agency Co Ltd v. Reilly* [1941] VLR 110, Mann CJ said at 111:

'The words "in respect of" are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the subject-matters to which the words refer.'

See also *FC of T v. Guy* 96 ATC 4520 at 4531; (1996) 32 ATR 590 at 601.

29. The phrase 'gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends' (per Deane, Dawson and Toohey JJ in *The Workers' Compensation Board of Queensland v. Technical Products Proprietary Limited* (1988) 165 CLR 642 at 653-654).

30. We consider that, in the context of section 160ZZPG, the words 'in respect of' in subsection 160ZZPG(2) are wide enough for a stratum unit ownership scheme converting to strata title to cover both:

- (a) the disposal of the 'original asset' (that is, the building and common property) and the acquisition of the relevant stratum units: and
- (b) the transfer of the relevant stratum units after subdivision.

31. Therefore, roll-over relief can be granted to both the originally registered proprietor of the building and the registered proprietors of the relevant stratum units immediately after the completion of the subdivision and transfer process.

What does section 160ZZPG require?

32. Section 160ZZPG contains three criteria which must be satisfied before the Commissioner can grant roll-over relief to a taxpayer in respect of a subdivision:

- (a) before the subdivision, the taxpayer must hold a particular asset, being 'an asset in relation to the land' which is being subdivided (subsection 160ZZPG(1)); and
- (b) the taxpayer must elect to apply subsection 160ZZPG(2) (paragraph 160ZZPG(2)(a) and subsection 160ZZPG(5)); and
- (c) the Commissioner must be satisfied that it is appropriate to grant roll-over relief having regard to:
 - (i) the extent (if any) to which any interests in relation to the stratum units are or were held by persons who did not hold assets in relation to the land

immediately before the subdivision (subparagraph 160ZZPG(2)(b)(i)); and

- (ii) the extent (if any) to which the rights of occupancy in relation to the stratum units differ from the rights of occupancy held immediately before the subdivision (subparagraph 160ZZPG(2)(b)(ii)); and
- (iii) any other matters the Commissioner considers relevant.

33. If there has been a material change in the identity of the persons who hold interests in the stratum units before and after the conversion, or the rights of occupancy, before and after the conversion, the Commissioner would not ordinarily be satisfied that it is appropriate to grant rollover relief. In saying this, the Commissioner is only intending to provide guidance to officers authorised to exercise the discretion in paragraph 160ZZPG(2)(b) and not to restrict those officers in exercising that discretion. Each case should be considered by the authorised officer on the basis of its own particular facts and circumstances.

CGT implications of conversion of ownership schemes

CGT implications for companies

34. If a company subdivides land and a building and transfers the individual stratum units created on subdivision to its members, Part IIIA could *prima facie* apply to any disposal which occurs as a result of that subdivision and transfer. If the company owns the relevant stratum units after the subdivision, no change of ownership of the land has occurred (see Taxation Determination TD 7). A disposal of the individual stratum units and the common property in a building occurs when the shareholders become the legal and beneficial owners of the relevant stratum units. There is then a change in both the legal and beneficial ownership of the relevant stratum units. Before subdivision, the company has the legal and beneficial ownership of the building. The members have no legal or equitable interest in the assets of the company - they only have their shares in the company and the rights of residence and occupation which their shares confer (*Charles v. FC of T* (1954) 10 ATD 328 at 331 per Dixon CJ, Kitto and Taylor JJ; *Fischer v. Easthaven Ltd* (1963) 80 WN (NSW) 1155 at 1158 per Else-Mitchell J). After subdivision, the members become the legal and beneficial owners of the relevant stratum units.

35. Under subsections 160M(1) and (1A), this change in legal and beneficial ownership of the stratum units constitutes a disposal of those units for the purposes of Part IIIA. In some State jurisdictions, the members also become the legal and beneficial owners of the

common property while in others, the body corporate becomes the legal owner of the common property and the owners of the stratum units become the beneficial owners of the common property. In either case, both the legal and beneficial ownership of the common property changes. Again, under subsections 160M(1) and (1A) there is a disposal of the common property for the purposes of Part IIIA. However, roll-over relief under section 160ZZPG is available in respect of these disposals if the company can satisfy the criteria in that section.

Can a company satisfy the criteria in section 160ZZPG?

36. Yes. A company satisfies the criteria in section 160ZZPG if:
- (a) before subdivision, the company holds an asset in relation to the land which is being subdivided. This will always be the case because, before subdivision, the company is the legal owner of the land and building which is being subdivided;
 - (b) the company elects that subsection 160ZZPG(2) is to apply to it in respect of the subdivision; and
 - (c) the company transfers the relevant stratum units created on subdivision to those shareholders in the company whose shares give them the right to occupy the particular stratum units transferred to them.

CGT implications for members of companies, or their equivalent

37. Each member acquires the stratum unit transferred by the company. This acquisition is deemed to occur under subsection 160M(1) and (1A) as a result of the change in the legal and beneficial ownership of the stratum units when the company transfers the stratum units to the member. In some jurisdictions, the members also acquire a share in the common property, while in others it is the body corporate which acquires the common property as the agent for the members. If the company is dissolved, the members are *prima facie* taken to have disposed of their shares in the company. Roll-over relief is available in respect of these acquisitions and disposals under section 160ZZPG if a member satisfies the criteria in that section.

Can a member of a company satisfy the criteria in section 160ZZPG?

38. Yes. A member of a company satisfies the criteria in section 160ZZPG if:

- (a) before subdivision, the member holds an asset in relation to the land which is being subdivided. Subsection 160ZZPG(6) treats a share in a company as an asset in relation to land;
- (b) the member elects that subsection 160ZZPG(2) is to apply to the member in respect of the subdivision; and
- (c) the company transfers the stratum units created on subdivision to those members of the company whose shares give them the right to occupy the particular stratum units transferred to them. In that case:
 - (i) the interests in the stratum units are held by persons who held assets in relation to the land immediately before the subdivision; and
 - (ii) the rights of occupancy in relation to the stratum units remain the same both before and after subdivision.

CGT implications for lessors of buildings

39. If a lessor subdivides a building and transfers the individual stratum units created on subdivision to lessees, the lessor is *prima facie* liable for CGT, unless roll-over relief is available, on any disposal which occurs as a result of that subdivision and transfer. The lessor disposes of the individual stratum units and the common property when the lessees become the legal and beneficial owners of the stratum units. For roll-over purposes, there is a change in both the legal and beneficial ownership of those assets. Before subdivision and transfer, a lessor has legal and beneficial ownership of the building while a lessee has legal and beneficial ownership of a leasehold interest in the building. After subdivision and transfer each lessee owns the freehold title to a unit. Under subsections 160M(1) and (1A) this change in legal and beneficial ownership of the stratum units constitutes a disposal of those units for the purposes of Part IIIA. In some State jurisdictions the lessees also become the legal and beneficial owners of the common property, while in other jurisdictions the body corporate becomes the legal owner of the common property and the owners of the stratum units become the beneficial owners of the common property. In either case, both the legal and beneficial ownership of the common property changes and there is a disposal of the common property for the purposes of Part IIIA. Roll-over relief under section 160ZZPG is available in respect of these disposals if a lessor satisfies the criteria in that section.

Can a lessor satisfy the criteria in section 160ZZPG?

40. Yes. A lessor satisfies the criteria in section 160ZZPG if:
- (a) before subdivision, the lessor holds an asset in relation to the land which is being subdivided. This is always the case because, before subdivision, the lessor is the legal owner of the land and building which is being subdivided;
 - (b) the lessor elects that subsection 160ZZPG(2) is to apply to the lessor in respect of the subdivision; and
 - (c) the lessor transfers the stratum units created on subdivision to those lessees who held leases over the part of the land covered by the particular stratum units transferred to them.

CGT implications for lessees

41. Each lessee acquires the stratum unit transferred by the lessor. This acquisition is deemed to occur under subsection 160M(1) and (1A) as a result of the change in the legal and beneficial ownership of the stratum unit when the lessor transfers the stratum unit to the lessee. In some jurisdictions, the lessees also acquire a share in the common property, while in others it is the body corporate which acquires a share in the common property. The lessees may also surrender, and therefore dispose of, their leases when they acquire the individual stratum units transferred to them. Roll-over relief under section 160ZZPG will be available in respect of these disposals and acquisitions if a lessee satisfies the criteria in that section.

Can a lessee satisfy the criteria in section 160ZZPG?

42. Yes. A lessee satisfies the criteria in section 160ZZPG if:
- (a) before subdivision, the lessee holds an asset in relation to the land which is being subdivided. This is always the case because a lease falls within the definition of land for the purposes of Part IIIA (see section 160K);
 - (b) the lessee elects that subsection 160ZZPG(2) is to apply to the lessee in respect of the subdivision; and
 - (c) the lessor transfers the stratum units created on subdivision to those lessees who held leases over the particular stratum units transferred to them. In that case:
 - (i) the interests in the stratum units are held by persons who held assets in relation to the land immediately before the subdivision; and

- (ii) the rights of occupancy in relation to the stratum units remain the same both before and after subdivision.

CGT implications for tenants in common

43. If tenants in common subdivide a building and transfer their interests so that each tenant in common becomes a registered proprietor of a stratum unit, each tenant in common is *prima facie* liable for CGT, unless roll-over relief is available, on any disposal which occurs as a result of that subdivision and transfer. Disposals occur because the transfer of interests between tenants in common amount to a change in the legal and beneficial ownership of those interests. Subsections 160M(1) and (1A) deem a disposal to have occurred in these circumstances. Corresponding with these disposals are acquisitions by the tenants in common of the interests disposed of. Again, subsections 160M(1) and (1A) deem this acquisition to have occurred because of the change in legal and beneficial ownership of the interests.

44. Roll-over relief under section 160ZZPG is available in respect of these disposals and acquisitions if a tenant in common satisfies the criteria in that section. Importantly, roll-over relief is only granted if, before the conversion process, the tenants in common entered into an agreement or understanding granting each tenant in common exclusive occupation (including an exclusive right of possession) of a particular stratum unit.

45. The onus of proof is on the taxpayer to demonstrate, as a question of fact, that there was an agreement or understanding among the parties.

46. There is no legal requirement in section 160ZZPG that any agreement or understanding be in writing, although a written document would be strong evidence of the existence of such an agreement or understanding.

47. Other forms of evidence would exist if the parties can demonstrate that, immediately before the subdivision and transfer process, they:

- (a) physically occupied particular stratum units; or
- (b) received rental income in their own right from the renting of particular units rather than a share of the rental income jointly received.

48. If no such agreement or understanding exists between the tenants in common, then before conversion they will each have occupancy rights in relation to the whole building, rather than

occupancy rights in relation to a particular stratum unit. After conversion, they will have occupancy rights in relation to particular stratum units. In these circumstances, the tenants in common do not satisfy the requirement in subparagraph 160ZZPG(2)(b)(ii) that the rights of occupancy in relation to the stratum units must be the same as the rights of occupancy which existed before the subdivision and transfer process took place. The tenants in common are therefore not entitled to roll-over relief.

Can a tenant in common satisfy the criteria in section 160ZZPG?

49. Yes. A tenant in common satisfies the criteria in section 160ZZPG if:

- (a) before subdivision, the tenant in common holds an asset in relation to the land which is being subdivided. This is always the case because an interest in land as a tenant in common falls within the definition of land for the purposes of CGT (see section 160K);
- (b) the tenant in common elects that subsection 160ZZPG(2) is to apply to the tenant in common in respect of the subdivision; and
- (c) after subdivision and transfer, all of the tenants in common are the registered proprietors of the stratum units of which they had exclusive occupation under a written agreement before conversion. In that case:
 - (i) the interests in the stratum units will be held by persons who held assets in relation to the land immediately before the subdivision; and
 - (ii) the rights of occupancy in relation to the stratum units will remain the same both before and after subdivision.

The effect of roll-over relief being granted

50. Subsection 160ZZPG(3) sets out the steps which the Commissioner may take when it is appropriate to grant roll-over relief under subsection 160ZZPG(2). Those steps fall into three broad categories.

(a) Taxpayer disposes of an original asset

51. If a taxpayer disposes of an 'original asset' as a result of the subdivision and transfer process, the original asset is treated as if Part

IIIA did not apply in respect of the disposal. An original asset is an asset in relation to land which is held by the taxpayer immediately before the subdivision (paragraph 160ZZPG(1)(b)). Examples of an original asset include:

- a building and the land on which it is erected;
- shares in a company (as discussed in subparagraph 20(i) of this Ruling);
- a long-term lease over a stratum unit (as discussed in subparagraph 20(ii) of this Ruling); and
- an interest as a tenant in common in a building (as discussed in subparagraph 20(iii) of this Ruling).

(b) Original asset acquired before 20 September 1985

52. If an original asset is acquired before 20 September 1985, the Commissioner will treat an asset acquired by a taxpayer on or after 20 September 1985 as a result of a conversion as if that asset had been acquired before 20 September 1985, that is, a relevant stratum unit acquired by a taxpayer as a result of a subdivision and transfer process is treated as having been acquired before 20 September 1985.

(c) Original asset acquired after 20 September 1985

53. If an original asset was acquired after 20 September 1985, the Commissioner will attribute to an asset acquired by a taxpayer as a result of a subdivision and transfer process a cost base equal to the relevant cost base attributable to the original asset as at the date of acquisition. That is, the stratum unit acquired by a taxpayer as a result of a subdivision and transfer process will be attributed a cost base equal to the relevant cost base of the original asset as at the date the stratum unit is transferred to the taxpayer.

Examples

Example 1 - home unit strata title subdivision

54. Flatco Ltd (Flatco) owns a block of four units in Potts Point, Sydney. Flatco has four members: A, B, C and D. The shares owned by A, B, C and D give each of them exclusive occupation rights to a particular unit in the block. A, B and C bought shares in the company before 20 September 1985. D bought shares in the company on 31 March 1989.

55. A, B, C and D agree that it would be a good idea for Flatco to convert the block of units into stratum units and common property. Flatco takes the steps necessary to have a strata plan of subdivision registered. After the plan is registered, Flatco transfers to A, B, C and D the stratum unit which each of them occupied before subdivision. For example, before subdivision, A's shares gave her exclusive occupation rights to unit 1 and B's shares gave him exclusive occupation rights to unit 2 and Flatco transferred unit 1 to A and unit 2 to B. Flatco is then wound up.

56. Provided Flatco elects that subsection 160ZZPG(2) applies, it is not liable for CGT on any disposal of land or buildings which occurs as a result of the subdivision or transfer. If A, B, and C elect that subsection 160ZZPG(2) applies, the stratum units held by them are treated as if they were acquired by them before 20 September 1985. If D elects that subsection 160ZZPG(2) applies, D is treated as having paid for the stratum unit an amount equal to the relevant cost base attributable to D's shares as at the date on which the company transferred the stratum unit to D. Further, for CGT purposes, A, B, C and D are not treated as having disposed of their shares in Flatco.

Example 2 - lessor converting to strata title

57. Capitalist Co Ltd (Capco) owns a block of ten flats in inner Melbourne. In March 1960, Capco leased each flat to various lessees for a period of 999 years. Each lessee paid a premium on entering the lease. In addition, a nominal rental of \$60 per annum is payable by lessees. Mr Apart (A) entered into a lease over flat 1 in March 1960. Ms Ment (M) purchased the lease over flat 7 from an original lessee in January 1986.

58. In January 1990, Capco and all of the lessees agree that the building should be converted to stratum units and common property. A strata plan of subdivision is registered and on 10 April 1990, Capco transfers to each lessee the unit over which that lessee holds a lease. Therefore, A now owns the strata title to flat 1 and M owns the strata title to flat 7.

59. Provided that Capco elects that subsection 160ZZPG(2) applies, it is not liable for CGT on any disposal of land or buildings which occurs as a result of the subdivision or transfer. If A elects that subsection 160ZZPG(2) applies, the stratum unit held by him is treated as having been acquired by him before 20 September 1985. If M elects that subsection 160ZZPG(2) applies, she is treated as having paid for her stratum unit an amount equal to the relevant cost base attributable to the premium she paid to purchase the lease as at 10 April 1990 (i.e., the date of transfer of the unit from the lessor to M).

For CGT purposes, neither A nor M are treated as having disposed of their leases as a result of the conversion.

Example 3 - conversion of a duplex owned by tenants in common

60. Ms Land (L) and Mr Develop (D) bought a new duplex building in Brisbane in July 1987 as tenants in common in equal shares. They entered into a written agreement which gave D exclusive occupation of unit 1 and L exclusive occupation of unit 2.

61. In March 1989, D and L agree to convert the property into stratum units. They register a strata plan of subdivision. After subdivision, L and D own each unit as tenants in common. On 10 June 1989 (a short time after subdivision is complete), D transfers his half interest in unit 2 to L and L transfers her half interest in unit 1 to D.

62. If L and D each elect that subsection 160ZZPG(2) applies, they are not liable for CGT on any disposal of land or buildings which occurs as a result of the subdivision or transfers. Further, L and D are each treated as having paid for their stratum units an amount equal to the relevant cost base attributable to their interests in the duplex as tenants in common as at 10 June 1989 (i.e., the date at which the transfers occurred).

Example 4 - joint venture development

63. Adam and Eve individually own adjoining vacant land of the same size and value at Eden on the NSW south coast. They are approached by D Adder with a proposal to develop the properties into 20 stratum unit apartments. It is agreed between the parties that Adder will acquire an interest in the land from Adam and Eve for consideration being the transfer of 2 stratum units to each of them on completion. Adder will incur all development costs and in recognition of this the remaining 16 units will be transferred to him.

64. The parties agreed that Adam and Eve will have exclusive rights of occupancy of 2 units each and Adder the other 16 until such time as the land and building is subdivided under the relevant NSW strata title law. Title to the relevant stratum units will then pass to each of the parties.

65. Before the development can proceed, the Eden City Council require the merging of the adjoining properties.

66. In these circumstances there are 2 disposals (and acquisitions) for CGT purposes prior to the transfer of the stratum units. Firstly, at the point of merging of the adjoining properties where ownership is

changed such that Adam and Eve now own both properties as tenants in common in equal shares. Secondly, when Adder acquires an interest in the land also as tenant in common with Adam and Eve.

67. No rollover relief will be available on the first two disposals. Roll-over relief under section 160ZZPG will be available to Adam, Eve and Adder, if they so elect under subsection 160ZZPG(2), on the subdivision of the land and building and later transfer of the stratum units.

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- FC of T v. Guy 96 ATC 4520; (1996) 32 ATR 590

subject references

- capital gains tax
- CGT
- common property
- long term lease
- roll-over relief
- strata title
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