TR 2007/D4 - Income tax: circumstances when an item used to create a particular atmosphere or ambience for premises used in a cafe, restaurant, licensed club, hotel, motel or retail shopping business constitutes an item of plant

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Draft Taxation Ruling

Income tax: circumstances when an item used to create a particular atmosphere or ambience for premises used in a cafe, restaurant, licensed club, hotel, motel or retail shopping business constitutes an item of plant

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What this Ruling is about

1. This Ruling sets out the Commissioner's view on the circumstances when an item used to create a particular atmosphere or ambience for premises used in a cafe, restaurant, licensed club, hotel, motel or retail shopping business[1] constitutes an item of plant. This issue is relevant in determining whether a deduction is available under either Division 40 (for depreciating assets) or Division 43 (for capital works) of the *Income Tax Assessment Act 1997* (ITAA 1997).[2]

2. This Ruling does not consider whether expenditure incurred in relation to premises used in these businesses is deductible under section 8-1. This Ruling also does not consider whether such expenditure is for repairs to 'premises (or part of premises) or a depreciating asset' under section 25-10. Taxation Ruling TR 97/23 sets out the circumstances in which a deduction for repairs is available under that section.

[1] Hereafter referred to as 'the types of business discussed in this Ruling'.
[2] All legislative references are to the ITAA 1997 unless otherwise stated.

Background

3. Deductions for capital expenditure on assets associated with premises used in the types of business discussed in this Ruling will generally only be available under either:

(a) Division 40 (for depreciating assets); or

(b) Division 43 (for capital works).

Depreciating assets

4. Division 40 contains the rules for the uniform capital allowance system which applies to most depreciating assets, including plant. Broadly speaking, Division 40 provides a deduction for the decline in value of depreciating assets. Division 40 generally allows a deduction for the cost of a depreciating asset based on its effective life.

5. However, Division 40 does not apply to capital works for which a deduction is available under Division 43 or would be available under Division 43 but for the capital works being started before a particular day or used for a relevant purpose.[3]

Capital works

6. Broadly speaking, Division 43 provides a deduction for construction expenditure on capital works (including buildings) used for other than residential accommodation if the construction of the capital works commenced after 19 July 1982[4] and the capital works are used to produce assessable income. The basic rate of deduction is 2.5% of the capital expenditure able to be deducted.[5] However, construction expenditure excludes expenditure on plant.[6] Therefore, a deduction for expenditure on plant is not available under Division 43.

[3] Subsection 40-45(2).
[4] Hotel buildings and apartment buildings (providing short-term accommodation for travellers) commenced to be constructed in Australia after 21 August 1979 are also covered: see paragraph 43-20(1)(a), section 43-90 and section 43-95.
[5] A rate of 4% is available for capital works commenced to be constructed between 22 August 1984 and 15 September 1987 (inclusive) and for parts of certain buildings (including hotel buildings and apartment buildings) commenced to be constructed after 26 February 1992: see section 43-25 and section 43-145.
[6] Paragraph 43-70(2)(e).

7. Division 43 applies to capital works that are buildings or structural improvements and to extensions, alterations or improvements to those buildings or structural improvements. If an item in premises used in the types of business discussed in this Ruling is capital works then generally a deduction will not be available under Division 40 unless the item is both plant and a depreciating asset and the other conditions of Division 40 are met.[7]

Ruling

Ordinary meaning of plant

8. An item that forms part of the premises does not come within the ordinary meaning of plant, except in the rare case where the premises are themselves plant.

9. It is a question of fact and degree as to whether an item forms part of the premises. The following are relevant matters to consider when determining that question:

- whether the item appears visually to retain a separate identity;
- the degree of permanence with which it has been attached;
- the incompleteness of the structure without it; and
- the extent to which it was intended to be permanent or whether it was likely to be replaced within a relatively short period.

10. Where an item on the premises does not form part of the premises and also does not fall within the extended meaning of plant (for example, as an article or machinery), it will come within the ordinary meaning of plant where the function performed by the item is so related to the particular taxpayer's income earning activities or special that it warrants the item being held to be plant.

11. An item used to create a particular atmosphere or ambience for premises used in a cafe, restaurant, licensed club, hotel, motel or retail shopping business performs a function that is so related to that business to warrant the item being held to come within the ordinary meaning of plant for that business where that atmosphere or ambience is intended to attract customers and is a definable element in the service which the business provides and for which its customers are prepared to pay.

[7] A deduction may be available under Division 40 in respect of such an item even though it is not plant where the expenditure incurred in respect of the construction of the relevant capital works is excluded from being construction expenditure other than by reason of paragraph 43-70(2)(e) (as expenditure on plant).

12. Describing an item as decor does not of itself mean that the item comes within the ordinary meaning of plant for one of these businesses. An item used to create a particular atmosphere or ambience for premises used in one of these businesses must not form part of those premises and must satisfy paragraph 11 of this Ruling to come within the ordinary meaning of plant for that business.

Extended meaning of plant – articles

13. If an item is an 'article' it will come within the extended meaning of plant by that fact alone.

14. An item cannot be an article if it is a structure erected or built on, or into, land.

15. An item may be an article even though it is attached to the premises.

16. However, a finding that an item forms part of the premises will preclude characterisation of the item as an article.

Extended meaning of plant – machinery

17. Machinery is plant whether or not it forms an integral part of a building or is a part of the setting for the taxpayer's income-earning activities.

18. The process of determining whether something is machinery in the context of the definition of plant involves:

- identifying the relevant thing (unit) or things (units) based on a consideration of functionality; and
- then deciding whether that thing or each of those things comes within the ordinary meaning of machinery.

19. The ordinary meaning of machinery includes devices, such as computers and microprocessors, which utilise in various processes minute amounts of energy in the form of electrical impulses.

20. The ordinary meaning of machinery also includes heating appliances, such as stoves, cooktops, ovens and hot water cisterns.

21. The ordinary meaning of machinery does not include anything that is merely a reservoir or conduit, such as ducting, piping or wiring, although connected with something that is machinery. In other words, if the ducting, piping or wiring forms part of a unit that is a machine then it is machinery but if it is merely connected to, but not part of, a unit that is a machine then it is not machinery.

Example 1

22. A restaurant has decorated its dining area as a medieval banquet hall in order to attract customers. As part of the medieval theme, replicas of stone walls are constructed out of painted polystyrene and are fastened to the walls. Themed lights shaped as flaming torches are also installed. These lights are in addition to the down lights that were already installed in the restaurant prior to the installation of the replica walls. The polystyrene walls and the themed lights do not form part of the premises. They retain a separate visual identity and are not necessary to complete the premises. The degree of attachment is slight but adequate. These factors outweigh any intention that the items might remain in place for an indefinite period of time. Their sole purpose is to create an atmosphere or ambience which is a definable element of the customers' dining experience. The function of these items is so related to the restaurant's business to warrant being held to come within the ordinary meaning of plant. The down lights installed prior to the creation of this medieval theme merely form part of the premises and are not plant.

Example 2

23. A hotel has decorated one of its bar areas with sporting memorabilia from a particular sport to assist in creating the atmosphere that is marketed to the public to encourage patronage. Some items have been securely fastened to the walls and floors to prevent theft while others are suspended from the ceiling. In the circumstances the Commissioner considers that these items do not form part of the premises and retain their separate identity as articles. The items retain their separate visual identity and do not add to the completeness of the premises. These factors outweigh the differing degrees of attachment of the memorabilia and any intention that they might remain in place for an indefinite period of time. Since these articles fall within the extended meaning of plant in subsection 45-40(1) it is not necessary to consider the relationship of the items to the hotel business, although in this case the items are likely to have a function that is so related to the hotel business to warrant being held to come within the ordinary meaning of plant.

Example 3

24. A replica of a historical building is built for use as a hotel. The building contributes to the ambience and experience provided to patrons of the hotel. This building is not plant. It functions simply as premises within which the hotel operations take place. It is no more than specialised premises used for those operations.

Example 4

25. A retail clothing store has redecorated in order to stay abreast of the current fashion. This included painting the walls in a soft pastel colour and adding matching ceramic tiles. The purpose of the restyling is to provide customers with an impression of exclusiveness. While the paint and the ceramic tiles attached to the walls do contribute to the atmosphere of the store, they form part of the premises. The tiles and paint lose their separate identity, are permanently attached and add to the completeness of the building. These factors outweigh any intention to replace the tiles and paint in response to changes in fashion. They are therefore not plant.

Example 5

26. A retail camping equipment shop specialising in speleological equipment (that is, equipment used in cave exploration) has a fibreglass facade attached to its shopfront. The facade was designed and constructed so that in colour, texture and shape the doorway has the appearance of a cave entrance that customers walk through to enter the shop. The interior of the shop is decorated with various items to continue the cave theme. The fibreglass facade does not form part of the premises. The facade has a separate visual identity and is not necessary to complete the premises. These factors outweigh considerations of the degree of permanence with which the facade is attached and any intention that it remain in place for a considerable period of time.

27. The sole purpose of the facade is to create a cave-like atmosphere or ambience that is intended to attract caving equipment customers. Given the nature of the equipment in which the business specialises, the presentation of the cave-like atmosphere is a definable element in the service which the business provides and for which its customers are prepared to pay. The facade's function is not as part of the premises and is so related to the business to warrant it being held to come within the ordinary meaning of plant. The shopfront to which the fibreglass facade is attached merely forms part of the premises and is not plant.

Date of effect

28. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
13 June 2007

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

29. As mentioned in paragraph 7 of this Ruling, the result of the relationship between Division 40 and Division 43 is that a deduction under Division 40 will not generally be available for a capital works item in premises used in the types of business discussed in this Ruling unless the item is both plant and a depreciating asset and the other conditions of Division 40 are met.

30. For the purposes of the ITAA 1997, 'plant' has the meaning given by section 45-40.[8] That inclusive definition is identical in effect to the definition of plant in former section 42-18 and expresses the same ideas as the definition of plant contained in subsection 54(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) (except that 'articles' were then separate from plant rather than included in the definition of plant as they are now).

31. In the context of premises used in the types of business discussed in this Ruling, the relevant aspects of the definition of plant are:

- the ordinary meaning of plant;
- articles; and
- machinery.

The ordinary meaning of plant

32. Since plant is defined in an inclusive manner, plant has its ordinary meaning as well as including the items listed in the definition. Over the years that 'ordinary meaning' has gradually diverged from its natural or dictionary meaning.[9]

33. That which is 'mere setting'[10] for the particular taxpayer's income earning activities is not within the ordinary meaning of plant.[11] The premises used in the types of business discussed in this Ruling are almost always merely the setting for the income earning activities and therefore not within the ordinary meaning of plant.

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[8] Subsection 995-1(1).

[9] *IRC v. Scottish & Newcastle Breweries Ltd* [1982] 2 All ER 230 at 232 (*Scottish & Newcastle Breweries*), per Lord Wilberforce.

[10] *Macquarie Worsteds Pty Ltd v. FC of T* 74 ATC 4121 at 4125; (1974) 4 ATR 334 at 338.

[11] *Wangaratta Woollen Mills Ltd v. Federal Commissioner of Taxation* (1969) 119 CLR 1 at 10; 69 ATC 4095 at 4101; (1970) 1 ATR 329 at 335 (*Wangaratta Woollen Mills*), *Imperial Chemical Industries of Australia and New Zealand Ltd v. Federal Commissioner of Taxation* (1970) 120 CLR 396 at 398-399; 70 ATC 4024 at 4025-4026; (1970) 1 ATR 450 at 451-452 (*ICI*) and *Macquarie Worsteds Pty Ltd v. FC of T* 74 ATC 4121 at 4125; (1974) 4 ATR 334 at 338.

34. Similarly, as Lord Lowry[12] stated in *Scottish & Newcastle Breweries*:

> something which becomes part of the premises, instead of merely embellishing them, is not plant, except in the rare case where the premises are themselves plant, like the dry dock in *IRC v. Barclay Curle & Co Ltd* or the grain silo in *Schofield (Inspector of Taxes) v. R & H Hall Ltd*.[13]

35. Thus, an item that forms part of the premises does not come within the ordinary meaning of plant, except in the rare case where the premises are themselves plant.

36. In *Wimpy International Ltd & Anor v. Warland (Inspector of Taxes)*[14] Hoffmann J[15] considered that the question whether something had become part of the premises was not 'the same as whether it has become part of the realty for the purposes of the law of real property or a fixture for the purposes of the law of landlord and tenant.'[16] That view accords with the Australian cases which clearly indicate that fixtures may be plant.[17] Further, Hoffmann J[18] usefully provided guidance as to some relevant matters to be considered to determine the question of fact and degree as to whether an item forms part of the premises or retains a separate identity. These are:

- whether the item appears visually to retain a separate identity;
- the degree of permanence with which it has been attached;
- the incompleteness of the structure without it; and
- the extent to which it was intended to be permanent or whether it was likely to be replaced within a relatively short period.[19]

No one of those factors is necessarily conclusive and the relative importance of each will vary depending on the nature of the item.

37. However, if an item does not form part of the premises that does not mean that the item is therefore plant.

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[12] With whom Lord Salmon, Lord Fraser and Lord Bridge agreed.
[13] [1982] 2 All ER 230 at 238.
[14] [1988] STC 149 (*Wimpy*).
[15] Now Lord Hoffmann of the House of Lords.
[16] [1988] STC 149 at 173.
[17] See *Pearce v. FC of T* 89 ATC 4064; (1988) 20 ATR 113, *Negative Instruments Pty Ltd v. FC of T (No. 2)* 94 ATC 4813; (1994) 29 ATR 429 and *Case 11/97* 97 ATC 173; *AAT Case 11,655*; (1997) 35 ATR 1022.
[18] Whose judgment was affirmed by the Court of Appeal at [1989] STC 273.
[19] [1988] STC 149 at 173.

38. Whether 'buildings, structures or the like, or parts of them'[20] that are 'more than mere setting'[21] come within the ordinary meaning of plant depends upon 'whether the function performed by the thing [the building, structure, or part of it] is so related to the taxpayer's operations or special that it warrants it being held to be plant.'[22]

39. Thus, where an item on the premises does not form part of the premises, it will come within the ordinary meaning of plant where the function performed by the item is so related to the particular taxpayer's income-earning activities or special that it warrants the item being held to be plant.

40. Passages from leading Australian cases such as *Wangaratta Woollen Mills* and *ICI* demonstrate the closeness of the relationship that must exist between the function performed by an item and the particular taxpayer's income-earning activities for the item to come within the ordinary meaning of plant.

41. In *Wangaratta Woollen Mills* McTiernan J said:

> The complex ventilation system including the cavity wall does more than merely clear the atmosphere. Its structure is an active tool in preventing spoiling of material, and in enabling the operatives to carry out their tasks. *It would be completely unnecessary in almost every other industry and quite useless to any buyer except a dyer*.[23] [Emphasis added]

42. In *ICI* Kitto J said:

> The truth is that the ceilings with which we are concerned do nothing for the appellant's business that they would not do for the business of any other occupier.[24]

43. The Commissioner considers that an item used to create a particular atmosphere or ambience for premises used in a cafe, restaurant, licensed club, hotel, motel or retail shopping business will in certain circumstances have a function that is so related to that business to warrant the item being held to come within the ordinary meaning of plant for that business.

44. There have been a number of court decisions on the circumstances when an item used to create a particular atmosphere or ambience in a business constitutes an item of plant.

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[20] *Macquarie Worsteds Pty Ltd v. FC of T* 74 ATC 4121 at 4125; (1974) 4 ATR 334 at 338.
[21] *Macquarie Worsteds Pty Ltd v. FC of T* 74 ATC 4121 at 4125; (1974) 4 ATR 334 at 338.
[22] *Macquarie Worsteds Pty Ltd v. FC of T* 74 ATC 4121 at 4125; (1974) 4 ATR 334 at 338. Followed in *Carpentaria Transport Pty Ltd v. FC of T* 90 ATC 4590 at 4592; (1990) 21 ATR 513 at 514.
[23] (1969) 119 CLR 1 at 10; 69 ATC 4095 at 4101; (1970) 1 ATR 329 at 335.
[24] (1970) 120 CLR 396 at 398; 70 ATC 4024 at 4025; (1970) 1 ATR 450 at 451.

45. *Scottish & Newcastle Breweries* was the first case to articulate that items used to create a particular atmosphere or ambience for premises used in certain businesses may come within the ordinary meaning of plant. In that case Lord Lowry[25] stated:

> Now the creation of the right atmosphere is a means to an end in the carrying on of such a trade [of hotelier]; it is not a trade in itself or a separate part of the trade. This objective can be achieved by a combination of things, a beautiful or unusual or historic building, attractive views, gardens, shrubberies and waterfalls, ornaments, the equipment used by the staff and the glasses, china, cutlery, table linen, and the tables and chairs used by the customers. Everything in this list, from the ornaments onwards, is apparatus used in the hotel business and the ornaments are used purely to create atmosphere. The mere fact that some of the ornaments are freestanding on the floor or on shelves or tables and that others are suspended from or affixed to walls or ceilings is quite beside the point. They are all part of the hotelier's plant as defined in *Yarmouth v. France.*[26]

Lord Lowry went on to emphasise that the fact that different things may perform the same function of creating atmosphere or ambience is not relevant; one thing may function as part of the premises and the other as plant.[27]

46. The other important judgment in that case was that of Lord Wilberforce. Lord Wilberforce[28] emphasised that each case must be resolved 'by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade'[29] being carried on. Based on findings that the various items were not part of the premises and that:

> the taxpayer company's trade includes, and is intended to be furthered by, the provision of what may be called 'atmosphere' or 'ambience', which (rightly or wrongly) they think may attract customers,[30]

Lord Wilberforce concluded that the various decorative items came within the ordinary meaning of plant.

47. In *Cole Bros Ltd v. Phillips (Inspector of Taxes)*[31] delivered seven days after the judgment in *Scottish & Newcastle Breweries*, Lord Wilberforce summarised the decision in *Scottish & Newcastle Breweries* as follows:

> That recent appeal was … decided in the taxpayer's favour on the basis of clear and strong findings of fact by the Special Commissioners that (I summarise) the items in question were not merely the setting in which the trader carried on his business but represented or created something which he offered to his customers to resort to and enjoy.[32]

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[25] With whom Lord Salmon, Lord Fraser and Lord Bridge agreed.
[26] [1982] 2 All ER 230 at 237.
[27] [1982] 2 All ER 230 at 238.
[28] With whom Lord Salmon, Lord Fraser and Lord Bridge also agreed.
[29] [1982] 2 All ER 230 at 233.
[30] [1982] 2 All ER 230 at 233.
[31] [1982] 2 All ER 247 (*Cole Bros*).
[32] [1982] 2 All ER 247 at 254.

48. The requirement of an element of marketed ambience apparent in Lord Wilberforce's statements is also evident in the statement of Lord Hailsham LC in *Cole Bros* that 'in certain cases, notably that of a hotelier and restaurant proprietor, the very thing the trader is selling includes an "ambience" or "setting".'[33]

49. The only other case to date in which consideration was given to the relevance of the creation of atmosphere or ambience in deciding whether an item comes within the ordinary meaning of plant is *Wimpy* which involved various items in fast food restaurants. The Special Commissioners' decision in that case contains the following useful analysis for present purposes:

> It is not 'decor' as such which, in the light of the *Scottish & Newcastle* decision, is to be regarded in suitable cases as part of the thing sold by a restaurant owner, but 'ambience' or 'atmosphere'.[34]

and:

> The circumstances in which items contributing only to ambience or atmosphere will constitute plant must be uncertain since it will depend on the evidence in each case. But it seems that a finding of fact will be required that atmosphere forms a definable element in the service which the trader provides and for which his customers are prepared to pay; … Unless that element of marketed ambience is found then in our opinion the case will not come within the principle of the *Scottish & Newcastle* decision.[35]

50. The Special Commissioners also considered that:

> The creation of atmosphere must, in the nature of things, be less important in Wimpy's trade than in a hotel or a restaurant where customers will be expected to linger over their meals, but we do not think that the concept is wholly incompatible with the conduct of a fast food restaurant.[36]

51. That analysis was not challenged on appeal by Hoffmann J, who affirmed the Special Commissioners' decision,[37] or by the Court of Appeal,[38] who affirmed Hoffmann J's judgment.

52. The Commissioner agrees with the Special Commissioners' articulation of the relevant principle which is capable of extension beyond the cases, which have involved hotel, restaurant, and fast food restaurant businesses, to similar contexts such as a cafe, licensed club, motel or retail shopping business, where the creation of atmosphere or ambience is intended to attract customers and forms a definable element in the service which the business provides and for which its customers are prepared to pay. However, that will not often be the case for takeaway food shops that provide limited or no dining facilities for their customers.

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[33] [1982] 2 All ER 247 at 251.
[34] [1988] STC 149 at 165.
[35] [1988] STC 149 at 156.
[36] [1988] STC 149 at 160.
[37] Apart from one item which Hoffmann J considered should have been held to be plant based on the Special Commissioners' findings as to the role of the item in creating a particular atmosphere and that the item was not part of the premises.
[38] [1989] STC 273.

Extended meaning of plant – articles

53. It is considered that the AAT in *Case 11/97* correctly summarised the principles relating to the meaning of 'articles' in the definition of 'plant' as follows:

(a) An item may qualify for a depreciation deduction, even if it is not [within the ordinary meaning of] 'plant', if the item can be regarded as an 'article' for the purposes of section 54: *Quarries Ltd v. FCT* (1961) 106 CLR 310. The word 'article' is also not defined in the *Income Tax Assessment Act*, but it has been given a very wide meaning in the cases. Thus Taylor J said in *Quarries Ltd v. FCT* (1961) 106 CLR 310 at 316:

> I see no reason for denying to the word 'article' the comprehensive meaning which it normally bears or for thinking that it was not used in the section by way of extension [to the word 'plant'].

(b) And Mason J (as he then was) said in *FCT v. Faichney* (1972) 129 CLR 38 at 43; 3 ATR 435 at 440:

> The word 'article' according to the Shorter Oxford Dictionary bears the meaning 'a piece of goods or property'. The word would, I think, according to its normal and ordinary meaning include a carpet or curtain, a desk and a bookshelf.

(c) However, an item cannot be an 'article' if it is a structure attached to land. Per Taylor J in *Quarries Ltd v. FCT* (1961) 106 CLR 310 at 316:

> Of course, 'article' cannot ordinarily be taken to comprehend a structure erected or built in situ ...

(d) The same would apply if the item were regarded as an integral part or the 'fabric' of such a structure. So much appears from Kitto J in *Imperial Chemicals Industries of Australia and New Zealand Ltd v. Federal Commissioner of Taxation* (1970) 120 CLR 396; 1 ATR 450, where his Honour said in relation to false ceilings found to be part of the structure of the building (at CLR 398; ATR 451):

> In my opinion, while they are in position they are plainly not 'articles'.
>
> This is not to say, however, that an item simply attached to a building will not qualify as 'articles': the carpet held to be an 'article' in FCT v. Faichney (1972) 129 CLR 38; 3 ATR 435 was more than likely in some way attached, though it was clearly not an integral part of the home there under consideration.

> Thus, as a finding that an item is part of the 'fabric' of a structure (where the structure is itself the 'setting' of the taxpayer's operations), will result in it being held to not be 'plant'; such a finding will also preclude any characterisation of the item as 'articles'.[39]

Extended meaning of plant – machinery

54. Machinery is plant whether or not it forms an integral part of a building or is a part of the setting for the particular taxpayer's income-earning activities.[40]

55. The process of determining whether something is 'machinery' in the context of the definition of plant involves:

- identifying the relevant thing (unit) or things (units) based on a consideration of functionality; and
- then deciding whether that thing or each of those things comes within the ordinary meaning of 'machinery'.

Identifying the relevant thing(s) or unit(s)

56. The requirement to identify a 'unit' of plant dates back to the beginning of the ITAA 1936.[41] A similar requirement to identify the relevant depreciating asset or assets continues today.[42] Since machinery is included in the definition of plant and references to plant refer to units of plant,[43] it follows that the first step in determining whether something is machinery is to identify the relevant thing (unit) that is, or things (units) that are, the subject of that determination.

57. A similar process of reasoning seems to have been adopted in another context in 1995 when it was said:

> [A] length of hydraulic tubing in itself may not be a machine but once it forms an integral part of a diesel engine, it can properly be regarded as 'machinery'. I accept Telecom's point that whether or not one might regard wire cables and optic fibres as machines in themselves, they can properly be regarded as 'machinery' if they are constituent parts of some larger entity which is a machine.[44]

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[39] 97 ATC 173 at 184-185; *AAT Case 11,655* (1997) 35 ATR 1022 at 1034-1035.
[40] *Carpentaria Transport Pty Ltd v. FC of T* 90 ATC 4590 at 4593; (1990) 21 ATR 513 at 515.
[41] See the concept of 'unit of property' in sections 55 and 56 of the ITAA 1936 as originally enacted.
[42] See subsection 40-30(4).
[43] See for example the former section 42-19.
[44] *Telecom Auckland Ltd v. Auckland City Council* [1995] 3 NZLR 489 at 502, per Fisher J.

58. Similarly, the determination as to whether an item in premises used in the types of business discussed in this Ruling is machinery is likely to involve consideration of whether a particular item is itself a unit, part of a larger unit or whether its components are separate units. Taxation Ruling TR 94/11 and the cases referred to in that ruling explain that a determination of this nature is a question of fact and degree which can only be determined in the light of all of the circumstances of the particular case.[45] That ruling and those cases also provide guidelines (relating to functionality) that are intended to assist in making that factual determination.[46]

Determining whether the relevant thing(s) or unit(s) are machinery

59. In 1919 it was said:

> The word 'machinery' has no definite legal meaning and … the general rule is, in dealing with matters relating to the general public, that statutes are presumed to use words in their popular sense … The Ratings Act is such a statute, and, as there is no context to suggest any other meaning, the term 'machinery' ought to be treated as having been used therein in its popular sense.[47]

60. Similarly, there is nothing to indicate that machinery, in the context of the definition of plant, was intended to have other than its ordinary meaning.

61. It was also said in that 1919 case that machinery in its popular sense:

> means primarily a number of machines, taken collectively, and a machine in its popular sense is a piece of mechanism which, by means of its inter-related parts, serves to utilise or apply power, but does not include anything that is merely a reservoir or conduit, although connected with something which is without doubt a machine.[48]

62. It was therefore concluded in that case that the mains laid and used for supplying gas were not parts of a machine or properly included under the term machinery.

63. Similarly, in 1949 it was said:

> it would be using the word 'machinery' in a figurative or metaphorical sense, and not in an ordinary or popular sense, to describe as machinery the means by which [energy or matter] is so made available or conveyed, where that means itself contains no element of motion or action.[49]

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[45] The same principle is also embodied in subsection 40-30(4) in the context of identifying depreciating assets.
[46] See particularly paragraphs 3 to 7 of that Ruling.
[47] *Auckland City Corporation v. Auckland Gas Co Ltd* [1919] NZLR 561 at 586, per Sim J.
[48] *Auckland City Corporation v. Auckland Gas Co Ltd* [1919] NZLR 561 at 586, per Sim J.
[49] *Hutt Valley Electric Power Board v. Lower Hutt City Corporation* [1949] NZLR 611 at 636-637, per Hutchinson J.

64. Thus, the ordinary meaning of machinery does not include anything that is merely a reservoir or conduit, such as ducting, piping or wiring, although connected with something that is machinery. In other words, if the ducting, piping or wiring forms part of a unit that is a machine then it is machinery but if it is merely connected to, but not part of, a unit that is a machine then it is not machinery.

65. The *Australian Concise Oxford Dictionary*, 4th edn, 2004, relevantly defines machinery as:

> 1. machines collectively.
>
> 2. the components of a machine; a mechanism.

and machine as:

> 1. an apparatus using or applying mechanical power, having several parts each with a definite function and together performing certain kinds of work.
>
> 2. a particular kind of machine, esp. a vehicle, a piece of electrical or electronic apparatus, a computer, etc.
>
> 3. an instrument that transmits a force or directs its application.

66. Similarly, *The Macquarie Dictionary*, 3rd edn, 1999, relevantly defines machinery as:

> 1. machines or mechanical apparatus.
>
> 2. the parts of a machine, collectively: *the machinery of a watch*.

and machine as:

> 1. an apparatus consisting of interrelated parts with separate functions, which is used in the performance of some kind of work: *a sewing machine.*
>
> 2. a mechanical apparatus or contrivance; a mechanism.
>
> 3. something operated by a mechanical apparatus, as a motor vehicle, a bicycle, or an aeroplane.
>
> 4. *Mechanics*
>
> > a. a device which transmits and modifies force or motion.
> >
> > b. simple machines, the six (sometimes more) elementary mechanisms, that is, the lever, wheel and axle, pulley, screw, wedge, and inclined plane.

67. In 1992 it was said that the modern ordinary meaning of machinery and machine indicates that machines, and therefore machinery, include devices that do not involve the application of mechanical power but instead 'utilise in various processes minute amounts of energy, in the form of electrical impulses' (for example, computers and microprocessors).[50]

[50] *Toyota Tsusho Australia Pty Ltd & Anor v. Collector of Customs* (unreported, Federal Court, No. VG113 of 1991, 14 May 1992), per Gray J at paragraph 4.

68. In that 1992 case it was also said:

> It is even easier to characterise as machinery items such as hot drink dispensers and appliances for heating food or drinks or for cooking. In each case, energy in the form of heat is transferred to some substance which, at the outset, is of a lower temperature. The temperature of that substance is thus raised. The heat source may be an electrical element, or the combustion of some gas or solid fuel. It may even be energy derived from solar light or heat.[51]

69. Thus, it was said in that case, a boiler ('in which hot gases, heated by a furnace, are brought into close proximity to water, and energy in the form of heat is passed through a conductive material, to raise the temperature of the water and vaporise it')[52] is machinery.

70. In the context of items in premises used in the types of business discussed in this Ruling, these comments about heating appliances indicate that items such as stoves, cooktops, ovens and hot water cisterns are machinery.

[51] *Toyota Tsusho Australia Pty Ltd & Anor v. Collector of Customs* (unreported, Federal Court, No. VG113 of 1991, 14 May 1992), per Gray J at paragraph 4.
[52] *Toyota Tsusho Australia Pty Ltd & Anor v. Collector of Customs* (unreported, Federal Court, No. VG113 of 1991, 14 May 1992), per Gray J at paragraph 6.

Appendix 2 – Your comments

71. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date:	**27 July 2007**
Contact officer:	**Ken Walker**
Email address:	**Ken.Walker@ato.gov.au**
Telephone:	**(07) 3213 6657**
Facsimile:	**(07) 3213 5971**
Address:	**Level 20** **140 Creek St** **Brisbane Qld 4000**

Appendix 3 – Detailed contents list

72. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/11; TR 97/23; TR 2006/10

Subject references:

- articles
- capital allowances
- capital works
- depreciating asset
- machinery
- plant

Legislative references:

- ITAA 1936 54(2)
- ITAA 1936 55
- ITAA 1936 56
- ITAA 1997 8-1
- ITAA 1997 25-10
- ITAA 1997 Div 40
- ITAA 1997 40-30(4)
- ITAA 1997 40-45(2)
- ITAA 1997 42-18
- ITAA 1997 42-19
- ITAA 1997 Div 43
- ITAA 1997 43-20(1)(a)
- ITAA 1997 43-25
- ITAA 1997 43-70(2)(e)
- ITAA 1997 43-90
- ITAA 1997 43-95
- ITAA 1997 43-145
- ITAA 1997 45-40
- ITAA 1997 45-40(1)
- ITAA 1997 995-1(1)

Case references:

- Auckland City Corporation v. Auckland Gas Co Ltd [1919] NZLR 561
- Carpentaria Transport Pty Ltd v. FC of T 90 ATC 4590; (1990) 21 ATR 513
- Case 11/97 97 ATC 173
- AAT Case 11,655 (1997) 35 ATR 1022
- Cole Brothers Ltd v. Phillips (Inspector of Taxes) [1982] 2 All ER 247
- FC of T v. Faichney (1972) 129 CLR 38; 3 ATR 435
- Hutt Valley Electric Power Board v. Lower Hutt City Corporation [1949] NZLR 611
- Imperial Chemical Industries of Australia and New Zealand Ltd v. Federal Commissioner of Taxation (1970) 120 CLR 396; 70 ATC 4024; (1970) 1 ATR 450
- IRC v. Scottish & Newcastle Breweries Ltd [1982] 2 All ER 230
- Macquarie Worsteds Pty Ltd v. FC of T 74 ATC 4121; (1974) 4 ATR 334
- Negative Instruments Pty Ltd v. FC of T (No. 2) 94 ATC 4813; (1994) 29 ATR 429
- Pearce v. FC of T 89 ATC 4064; (1988) 20 ATR 113
- Quarries Ltd v. FC of T (1961) 106 CLR 310
- Schofield (Inspector of Taxes) v. R & H Hall Ltd [1982] 2 All ER 230
- Telecom Auckland Ltd v. Auckland City Council [1995] 3 NZLR 489
- Toyota Tsusho Australia Pty Ltd & Anor v. Collector of Customs (unreported, Federal Court, No. VG113 of 1991, 14 May 1992)
- Wangaratta Woollen Mills Ltd v. Federal Commissioner of Taxation (1969) 119 CLR 1; 69 ATC 4095; (1970) 1 ATR 329
- Wimpy International Ltd & Anor v. Warland (Inspector of Taxes) [1988] STC 149
- Wimpy International Ltd & Anor v. Warland (Inspector of Taxes) [1989] STC 273

Other references:

- Australian Concise Oxford Dictionary, 4th edn, 2004
- The Macquarie Dictionary, 3rd edn, 1999

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