


TD 1999/D39 - Income tax: capital gains: can the term 'dwelling' as defined in section 118-115 of the Income Tax Assessment Act 1997 include more than one unit of accommodation?

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This document has been finalised by TD 1999/69.

Draft Taxation Determination

Income tax: capital gains: can the term 'dwelling' as defined in section 118–115 of the *Income Tax Assessment Act 1997* include more than one unit of accommodation?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs should not be relied on; only final TDs represent authoritative statements by the ATO.

1. Yes, if the units of accommodation are used together as one place of residence or abode.
2. The word 'dwelling' is defined in the *Macquarie Dictionary* as 'a place of residence or abode; a house'.
3. In *Campbell v O'Sullivan* [1947] SASR 195 at 201, May J stated that:
'... "dwelling" ordinarily signifies a place of abode or residence, a tenement, habitation, or house, which premises a person or persons are using as a place for sleeping and usually for the provision of some meals.'
4. Whether two or more units of accommodation are used together as one place of residence or abode for the purposes of the definition of 'dwelling' is a question of fact which depends on the particular circumstances of each case. Factors relevant in considering whether units of accommodation are used together as one place of residence or abode include:
 - (a) whether the occupants sleep, eat and live in them;
 - (b) the distance between and the proximity of the units of accommodation;
 - (c) whether the units are connected;
 - (d) whether the units are capable of being sold separately;
 - (e) the extent to which the daily activities of the occupants in the units are integrated;
 - (f) how the units are shared by the occupants; and
 - (g) how costs of the units are shared by the occupants.

Note:

5. We stress that the examples which follow are intended to be indicative only and the presence or absence of any factor specified in them would not necessarily be determinative of a change in result. They are just examples and should not be used as a substitute for the test whether the units of accommodation are used together as one place of residence or abode.

Example 1

6. *Mr and Mrs Brown reside with their three children in a suburban house. Mrs Brown's mother (Dora) resides in a detached granny flat built for her in the backyard. Although the flat is fully self-contained, and Dora eats and sleeps there, Dora's daily life and activities are closely integrated with those of the Browns. She spends considerable time in the main house and family members regularly spend time in Dora's flat. In the circumstances, having regard to the proximity of the flat and the integration of activities, the house and the flat are the Browns' dwelling for the purposes of section 118–115.*

Example 2

7. *Mary decides to build a duplex. Mary lives in one unit and her 30 year old daughter, Elizabeth, lives in the other. There is a connecting door from one unit to the other via the garages with Mary and Elizabeth having unrestricted access to each other's unit. They generally use the main entrance to each other's unit. Mary and Elizabeth have dinner together usually once a week. Mary maintains the whole of the surrounding garden. All other costs of maintenance and other costs of the duplex are paid separately.*

8. *Each unit is a separate 'dwelling' in terms of section 118–115 because Mary and Elizabeth use each unit as a separate place of residence.*

Example 3

9. *William owns a large farming property. He employs his brother Henry to help him. As the house on the farm is not large enough to accommodate both William and Henry's families, Henry and his family sleep in William's caravan at the rear of the property. Both families live and eat in the house and use and enjoy it for their domestic purposes. They all spend most of their daily lives on the farm and in the house. The caravan is connected to electricity from the house*

10. *The caravan and the house are considered to be one dwelling because the activities of the families in them are so integrated that they use them together as one place of residence.*

Example 4

11. *Margaret and Andrew own a home at 10 Smith Street. They also own a house at 12 Smith Street. This house is occupied by their twin daughters, Celia and Sarah, who are both 24 years of age. Both daughters have full time work. The daughters do not pay rent to their parents and all maintenance costs of the houses are paid for by Margaret and Andrew. Celia and Sarah pay for the daily running costs of the house at 12 Smith Street and all of their food costs. They each have a busy social life but occasionally share a meal with their parents.*

12. *Each house is a separate dwelling in terms of section 118–115.*

Your comments

We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date: 25 August 1999
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Commissioner of Taxation

28 July 1999

Related Rulings/Determinations:

TD 51; TD 92/158

Subject references:

abode; accommodation; capital gains; exemption; dwelling; main residence; units of accommodation

Legislative references:

ITAA 1997 118–115

Case references:

Campbell v O’Sullivan [1947] SASR 195

ATO references:

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