

TD 1999/D75 - Income tax: capital gains: is roll-over under sections 126-5 and 126-15 of the Income Tax Assessment Act 1997 dependent on there being a marriage breakdown between the spouses?



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This document has been finalised by TD 1999/49.

Draft Taxation Determination

Income tax: capital gains: is roll-over under sections 126-5 and 126-15 of the *Income Tax Assessment Act 1997* dependent on there being a marriage breakdown between the spouses?

Preamble

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

1. Yes.
2. Sections 126-5 and 126-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) do not expressly require that there be a marriage breakdown. Marriage breakdown is, however, implicitly required by the sections. The intention of the legislature is to limit their operation to situations of marriage breakdown. This intention is evident having regard to the heading to Subdivision 126-A of the ITAA 1997, namely 'Marriage Breakdown', and to the reference to *de facto* marriage breakdowns in paragraphs 126-5(1)(c) and 126-15(1)(c) of the ITAA 1997. The explanatory memorandum to the Income Tax Assessment Amendment (Capital Gains) Bill 1986 supports that view. It states that section 160ZZM of the *Income Tax Assessment Act 1936* (now rewritten as section 126-5 of the ITAA 1997) affords roll-over to asset transfers between spouses 'upon the breakdown of their marriage'. To construe sections 126-5 and 126-15 of the ITAA 1997 confining their operation to situations of marriage breakdown (or *de facto* marriage breakdown) is to promote the underlying purpose or object of the sections.

Note

3. 'Marriage breakdown' for the purpose of sections 126-5 and 126-15 of the ITAA 1997 means that one, or both of, the spouses forms an intention to sever or not to resume the marital relationship and act on that intention or, alternatively, act as if the marital relationship has been severed: *Pavey v Pavey* (1976) FLC 90-051.

Your comments

4. 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:

15 September 1999

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Commissioner of Taxation

18 August 1999

Subject references:

de facto marriage breakdown; marriage breakdown; roll-over; spouses; transfer

Legislative references:

ITAA 1997 126-5; ITAA 1997 126-5(1)(c); ITAA 1997 126-15; ITAA 1997 126-15(1)(c); ITAA 1997 Subdiv 126-A; ITAA 1936 160ZZM

Case references:

Pavey v Pavey (1976) FLC 90-051

ATO references:

NO 99/19509-6

BO CGT marriage breakdown summit 1999

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