


TD 2004/D3 - Income tax: capital gains: are input tax credits excluded from a CGT asset's cost base and reduced cost base worked out under sections 110-25 and 110-55 of the Income Tax Assessment Act 1997 and from other equivalent amounts used in working out a capital gain or loss?

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This document has been finalised by TD 2004/30.

Draft Taxation Determination

Income tax: capital gains: are input tax credits excluded from a CGT asset's cost base and reduced cost base worked out under sections 110-25 and 110-55 of the *Income Tax Assessment Act 1997* and from other equivalent amounts used in working out a capital gain or loss?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Input tax credits are excluded only from the first, second and third elements of the cost base of a CGT asset acquired after 7.30 pm (ACT legal time) on 13 May 1997 (subsections 110-45(3A) and 110-50(3A) of the *Income Tax Assessment Act 1997* (ITAA 1997)).

Note: An entity that makes a creditable acquisition or a creditable importation is entitled to an input tax credit. The amount of the input tax credit is equal to the GST payable on the creditable acquisition or creditable importation. See subsection 995-1(1) of the ITAA 1997 and section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

2. As there are no other specific provisions dealing with input tax credits and CGT cost base or reduced cost base, input tax credits can be included in:

- the fourth and fifth elements of the cost base of a CGT asset acquired after 7.30 pm (ACT legal time) on 13 May 1997;
- any element of the cost base of a CGT asset acquired before that time;
- any element of the reduced cost base of a CGT asset, regardless of when it was acquired.

3. Also, if a capital gain or loss is worked out by reference to an amount other than cost base or reduced cost base, GST input tax credits are included in that amount. For example, a capital gain or loss is worked out under CGT event D1 in section 104-35 of the ITAA 1997 (about creating rights in another entity) on the basis of incidental costs.

TD 2004/D3

Example

4. *A taxpayer purchased a vacant block of land after 19 September 1985. The taxpayer registered for GST and built a commercial building for rent. The land is not trading stock of the taxpayer.*

5. *The taxpayer incurred construction costs (including GST) and claimed the associated input tax credits. The taxpayer incurred legal fees (including GST) of a capital nature in defending their title to the land and again claimed the associated input tax credits.*

6. *The taxpayer subsequently sold the land and, at that time, the construction expenditure was reflected in its state or nature.*

7. *In working out whether the taxpayer made a capital gain or loss on the sale, the GST-inclusive amount of the construction costs (less the amount claimed as a capital works deduction under Division 43 of the ITAA 1997) is included in the fourth element of the land's cost base and reduced cost base and the GST-inclusive amount of the legal fees is included in the fifth element of the land's cost base and reduced cost base.*

Note: Because this example relates to the fourth and fifth elements of cost base, the outcome will be the same regardless of whether the taxpayer acquired the land before or after 7.30 pm (ACT legal time) on 13 May 1997. However, had the taxpayer sought to include GST input tax credits in the first, second or third elements of cost base they could only have done so if they had acquired the land before 7.30 pm (ACT legal time) on 13 May 1997.

Explanation

8. Input tax credits are not excluded from elements of cost base and reduced cost base (or from equivalent amounts) under a more general provision of the ITAA 1997 such as paragraph 17-15(b) (which excludes input tax credits from the calculation of an amount such as net profit included in assessable income) or subsections 110-45(3) and 110-50(3) (which exclude recouped expenditure from all elements of cost base).

9. An established principle of statutory interpretation is that specific provisions override general provisions to the extent of any inconsistency. The specific nature of subsections 110-45(3A) and 110-50(3A) of the ITAA 1997 (which only exclude input tax credits from some elements of cost base and even then only for assets acquired after a certain date) means it is inappropriate to interpret other more general provisions as excluding input tax credits from the other elements of cost base or from reduced cost base or from amounts equivalent to cost base or reduced cost base.

10. Further, it is clear that the rule in paragraph 17-15(b) of the ITAA 1997 was not intended to apply in the context of the capital gains tax provisions. Instead, specific rules were inserted in the capital gains tax provisions (and in other provisions, such as those relating to trading stock and depreciating assets) to achieve a result consistent with that provided by section 17-15. The Explanatory Memorandum to the Bill which became *A New Tax System (Indirect Tax and Consequential Amendments) Act 1999* that introduced subsections 110-45(3A) and 110-50(3A) of the ITAA 1997 states (*emphasis added*):

3.31 This Bill will amend the disposal proceeds and cost base rules *in the CGT provisions* in a way consistent with the basic rules for the treatment of assessable amounts and deductions.

Date of Effect

11. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Note: Tax Laws Amendment (2004 Measures No. 1) Bill 2004, which was introduced into the House of Representatives on 19 February 2004, proposes amendments to the law to ensure that GST input tax credits are excluded from all elements of the cost base and reduced cost base of a CGT asset (regardless of when the asset was acquired). It is also proposed to exclude them from other equivalent amounts used in working out a capital gain or loss. The amendments are proposed to apply to CGT events that happen after 19 February 2004. Therefore, if this Bill receives Royal Assent in its current form, the views expressed in this TD will only apply to CGT events that happen on or before 19 February 2004.

Your comments

12. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

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Commissioner of Taxation

25 February 2004

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20

Subject references:

- Capital gains tax
- CGT cost base
- CGT reduced cost base
- Goods and services tax

TD 2004/D3

- GST input tax credits & creditable acquisitions
- Input tax credits

Legislative references:

- GST Act 195-1
- ITAA 1997 17-15
- ITAA 1997 17-15(b)
- ITAA 1997 Div 43
- ITAA 1997 104-35
- ITAA 1997 110-25
- ITAA 1997 110-45(3)
- ITAA 1997 110-45(3A)
- ITAA 1997 110-50(3)
- ITAA 1997 110-50(3A)
- ITAA 1997 110-55
- ITAA 1997 995-1(1)
- TAA 1953 Pt IVAAA

Other references:

- Tax Laws Amendment (2004 Measures No. 1) Bill 2004

ATO references

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