


***TD 2004/D9 - Income tax: is a deduction available in respect of capital expenditure incurred after 30 June 2001 in obtaining or in seeking to obtain the grant or extension of the term of a patent, the registration or extension of the registration period of a design, or the registration of a copyright under section 68A of the Income Tax Assessment Act 1936 or Division 40 of the Income Tax Assessment Act 1997?***

 This cover sheet is provided for information only. It does not form part of *TD 2004/D9 - Income tax: is a deduction available in respect of capital expenditure incurred after 30 June 2001 in obtaining or in seeking to obtain the grant or extension of the term of a patent, the registration or extension of the registration period of a design, or the registration of a copyright under section 68A of the Income Tax Assessment Act 1936 or Division 40 of the Income Tax Assessment Act 1997?*

This document has been finalised by TD 2004/32.



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## Draft Taxation Determination

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Income tax: is a deduction available in respect of capital expenditure incurred after 30 June 2001 in obtaining or in seeking to obtain the grant or extension of the term of a patent, the registration or extension of the registration period of a design, or the registration of a copyright under section 68A of the *Income Tax Assessment Act 1936* or Division 40 of the *Income Tax Assessment Act 1997*?

### **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. No deduction is available under section 68A of the *Income Tax Assessment Act 1936* (ITAA 1936). A deduction in respect of such expenditure may be available under Division 40 of the *Income Tax Assessment Act 1997* (ITAA 1997).
2. Section 68A, in general terms, allowed a deduction of expenditure incurred in obtaining or in seeking to obtain the grant of a patent (or an extension of its term), the registration of a design (or the extension of its registration period) or the registration of a copyright wholly for the purpose of producing assessable income. Where the grant, registration or extension was sought or obtained only partly for that purpose, only so much of the expenditure as in the opinion of the Commissioner was reasonable was an allowable deduction.
3. As part of the Tax Law Improvement Project, section 68A and the provisions relating to industrial property in Division 10B of the ITAA 1936 were rewritten in Division 373 of the ITAA 1997. Section 68A was rewritten in section 373-5. A substantive difference in effect was that the discretion of the Commissioner referred to above was replaced with an objective test. A deduction was available for the expenditure only to the extent that it was incurred for the purpose of producing assessable income.
4. When Division 373 was introduced, section 373-1 of the *Income Tax (Transitional Provisions) Act 1997* was also introduced. That section provided that Division 373 of the

ITAA 1997 applied to assessments for the 1998-99 income year and later income years. However, no legislation provided that section 68A would not apply to the 1998-99 income year and later income years.

5. At the time of the introduction of the uniform capital allowance provisions of Division 40 in the *New Business Tax System (Capital Allowances) Act 2001*, Division 373 was repealed in the *New Business Tax System (Capital Allowances – Transitional and Consequential) Act 2001* with effect from 30 June 2001. The question has arisen whether the repeal of Division 373 means that section 68A could have application again.

6. In *ISPT Nominees Pty Ltd v. Chief Commissioner of State Revenue (NSW)* 2003 ATC 4697 at 4721-4724; (2003) 53 ATR 527 at 557-560, Barrett J discussed the law in Australia relating to the implied repeal of provisions of an Act by a later enactment. His Honour concluded that the test to be applied was one of contrariety or repugnancy, the test adopted by a majority of the High Court justices in *Butler v. Attorney-General (Vic)* (1961) 106 CLR 268. Section 373-5 of the ITAA 1997 and section 68A of the ITAA 1936 deal with the same expenditure but section 373-5 is inconsistent with section 68A because the Commissioner's discretion has been replaced with an objective test. It is clear that the discretion and the objective test are inconsistent or repugnant and cannot stand together. Because section 68A and section 373-5 deal with the same expenditure but are inconsistent, section 373-5 impliedly repealed section 68A.

7. The *Acts Interpretation Act 1901* (AIA) provides in section 7 that the repeal of an Act or part of an Act which itself repealed a previous Act or part of an Act 'shall not have the effect of reviving such last-mentioned Act or part thereof without express words'. Section 8A of the AIA ensures that a reference in section 7 to 'the repeal of an Act or of a part of an Act' includes a reference to 'a repeal effected by implication'. As the repeal of Division 373 was not accompanied by any express words in relation to reviving section 68A, section 68A was not revived.

8. Accordingly, the relevant expenditure falls for consideration under Division 40 of the ITAA 1997.

## Date of Effect

9. This Determination, in final form, will 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).

## Your comments

10. 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**

12 May 2004

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

TR 92/20

*Subject references:*

- capital allowances
- intellectual property

*Legislative references:*

- ITAA 1936 68A
- ITAA 1936 Div 10B
- ITAA 1997 Div 40
- ITAA 1997 Div 373
- ITAA 1997 373-5
- Income Tax (Transitional Provisions) Act 1997 373-1
- New Business Tax System (Capital Allowances) Act 2001
- New Business Tax System (Capital Allowances – Transitional and Consequential) Act 2001
- Acts Interpretation Act 1901 7
- Acts Interpretation Act 1901 8A
- TAA 1953 Pt IVA

*Case references:*

- *Butler v. Attorney-General (Vic)* (1961) 106 CLR 268
- *ISPT Nominees Pty Ltd v. Chief Commissioner of State Revenue (NSW)* 2003 ATC 4697; (2003) 53 ATR 527

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ATO references

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