

TD 2006/D44 - Income tax: should a taxpayer who has incurred a tax loss or made a net capital loss for an income year retain records relevant to the ascertainment of that loss only for the record retention period prescribed under income tax law?

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This document has been finalised by This draft determination has been finalised by TD 2007/2.



Draft Taxation Determination

Income tax: should a taxpayer who has incurred a tax loss or made a net capital loss for an income year retain records relevant to the ascertainment of that loss only for the record retention period prescribed under income tax law?

❗ This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. No. A taxpayer who has incurred a tax loss¹ or made a net capital loss² for an income year should, as a matter of prudence, retain records relevant to the ascertainment of that loss until the later of the following times:

- the end of the statutory record retention period (for example, under subsection 262A(4) of the *Income Tax Assessment Act 1936 (ITAA 1936)*); or
- the end of the statutory period of review for an assessment for the year of income when the tax loss is fully deducted or the net capital loss is fully applied

Further, where a formal dispute arises in relation to a loss, the taxpayer should retain records relevant to the ascertainment of that loss until any objection or appeal in relation to the loss is finally determined.

¹ As defined in section 995-1 of the *Income Tax Assessment Act 1997 (ITAA 1997)*.

² As defined in section 995-1 of the ITAA 1997.

2. Records should be kept beyond the statutory record retention period because, as a practical matter, it may be necessary to demonstrate the basis of the tax loss deducted or net capital loss applied in the event that a dispute arises, or continues on foot, outside that period in respect of the claim (paragraphs 14ZZK(b) and 14ZZO(b) of the *Taxation Administration Act 1953* (TAA)).

Example 1: Tax loss – period of review for assessment ends after statutory record retention period ends

3. Anthony makes a tax loss from carrying on a business for the income year ended 30 June 2002.

4. Anthony does not have sufficient net assessable income to fully deduct the tax loss carried forward until the income year ended 30 June 2006. The Commissioner issues a notice of assessment to Anthony for the year ended 30 June 2006 on 30 October 2006 which is received by him on 1 November 2006. Anthony is an STS taxpayer to whom a two year period of review applies. As such, the period of review in respect of that assessment ends on 1 November 2008.

5. Under paragraph 262A(4)(a) of the ITAA 1936 all records must generally be kept for a period of 5 years after the documents were prepared or obtained, or 5 years after the completion of the transaction or acts to which the records relate (whichever is the later). Assuming that all records were prepared and transactions were completed by 30 June 2002, Anthony is not required by paragraph 262A(4)(a) to keep any records as from 1 July 2007 relevant to ascertaining the tax loss.

6. As the period of review in respect of the assessment for the year ended 30 June 2006 ends later than the end of the statutory record retention period, Anthony should keep records relevant to ascertaining the tax loss until 1 November 2008.

Example 2: Net capital loss – period of review for assessment ends after statutory record keeping period ends

7. Operating Co makes a net capital loss for the year ended 30 June 2003. During that year there was only one CGT event which resulted in a capital loss on 1 June 2003. It was certain that no further CGT event could happen such that the records could reasonably be expected to be relevant to working out the amount of capital gain or loss in relation to that CGT event.

8. Operating Co does not have sufficient capital gains to fully apply the net capital loss carried forward until the year ended 30 June 2005. A deemed assessment under section 166A of the ITAA 1936 is made in relation to Operating Co for the income year ended 30 June 2005 upon lodgment of its tax return on 16 January 2006. Operating Co is not an STS taxpayer and the period of review in respect of that assessment ends on 16 January 2010 assuming no extension of this period occurs.

9. Under subsection 121-25(2) of the ITAA 1997, all records must be kept until the end of 5 years after it becomes certain that no CGT event, or no further CGT event, can happen such that the records could reasonably be expected to be relevant to working out whether there is a capital gain or capital loss from the event. Therefore, Operating Co is required to keep records relevant to working out the capital loss and resulting net capital loss until 1 June 2008.

10. *As the period of review in respect of the assessment for the income year ended 30 June 2005 ends later than the end of the statutory record retention period, Operating Co should keep records relevant to working out the capital loss and resulting net capital loss until 16 January 2010.*

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 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

8 November 2006

Appendix 1 – Explanation

❶ *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.*

Explanation

The statutory requirements

12. Section 262A of the ITAA 1936 provides general rules in respect of the keeping of records. A person carrying on a business is required to keep records of all transactions and acts relevant for the purposes of the tax law.

13. Generally those records must be kept for a period of 5 years commencing from the time when they were prepared/obtained or when the transactions or acts to which they relate are completed, whichever is the later – refer to paragraph 262A(4)(a) of the ITAA 1936. This period can be extended where the period of review for an assessment is extended under subsection 170(7) of the ITAA 1936 – refer to paragraph 262A(4)(b) of the ITAA 1936.

14. Part 3-1 of the ITAA 1997 provides special rules in respect of the taxation of capital gains and losses. Records in respect of acts, transactions, events or circumstances that can reasonably be expected to be relevant to working out whether a person has made a capital gain or capital loss from a CGT event must be kept under subsection 121-25(2) of the ITAA 1997 for 5 years:

... after it becomes certain that no *CGT event (or no further *CGT event) can happen such that the records could reasonably be expected to be relevant to working out whether you have made a *capital gain or *capital loss from the event.

15. This requirement applies despite subsection 262A(4) of the ITAA 1936 which requires records to be retained for a different period. The capital gains tax record retention rules in Part 3-1 of the ITAA 1997 prevail over subsection 262A(4) of the ITAA 1936 because of subsection 121-25(3) of the ITAA 1997.

16. Section 262A of the ITAA 1936 does not apply to taxpayers who did not carry on a business for an income year. However, specific statutory record retention rules may apply to those taxpayers, such as those contained within Division 900 of the ITAA 1997, in relation to claims for work related expenses.

The burden of proof

17. Paragraphs 14ZZK(b) and 14ZZO(b) of the TAA provide that the burden is on the taxpayer to show that an assessment is excessive (upon any review or appeal proceedings). This basic principle operates independently of any record keeping or substantiation requirements, statutory or otherwise.

18. It will often be the case that a taxpayer who has incurred a tax loss or made a net capital loss does not deduct or apply that loss for a number of years. The period in which the Commissioner can issue an original assessment or an amended assessment (as applicable) in respect of the deduction or application year of income will often extend beyond the statutory record retention period in respect of the tax loss and the constituent capital losses and capital gains (as applicable) that comprise the net capital loss. It follows that the period for which records should be retained in order to establish the basis of the tax loss deducted or net capital loss applied may in practice extend to the end of the relevant period of review for an assessment, subject to a possible separate extension in the event of an objection or appeal in relation to a disputed loss.

19. Accordingly, a taxpayer who has made a tax loss or net capital loss should retain records relevant to the ascertainment of that loss until the later of the following times:

- the end of the statutory retention period; or
- the end of the period of review for the year of income when the tax loss is fully deducted or net capital loss is fully applied.

Further, a taxpayer should retain relevant records until any objection or appeal in relation to a loss has been finally determined.

Appendix 2 – Your comments

20. We invite you to comment on this draft Taxation Determination. 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. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date: 8 December 2006

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital gains tax
- capital loss
- net capital loss
- tax loss

- TAA 1953 14ZZ0(b)
- ITAA 1936 170(7)
- ITAA 1936 262A
- ITAA 1936 262A(4)
- ITAA 1936 262A(4)(a)
- ITAA 1936 262A(4)(b)
- ITAA 1997 Pt 3-1
- ITAA 1997 121-25
- ITAA 1997 121-25(2)
- ITAA 1997 121-25(3)
- ITAA 1997 Div 900
- ITAA 1997 995-1

Legislative references:

- TAA 1953 14ZZK(b)
-

ATO references

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Income Tax ~~ Losses ~~ deferred capital losses or deductions