



***TD 2019/D10 - Income tax: can capital gains be included under subparagraph 770-75(4)(a)(ii) of the Income Tax Assessment Act 1997 when calculating the foreign income tax offset limit?***

 This cover sheet is provided for information only. It does not form part of *TD 2019/D10 - Income tax: can capital gains be included under subparagraph 770-75(4)(a)(ii) of the Income Tax Assessment Act 1997 when calculating the foreign income tax offset limit?*

This document has been finalised by [TD 2020/7](#).

 There is a Compendium for this document: [TD 2020/7EC](#) .



## Draft Taxation Determination

### **Income tax: can capital gains be included under subparagraph 770-75(4)(a)(ii) of the *Income Tax Assessment Act 1997* when calculating the foreign income tax offset limit?**

#### **❶ Relying on this draft Ruling**

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if the draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

#### **Ruling**

1. No. Capital gains are not included under subparagraph 770-75(4)(a)(ii) of the *Income Tax Assessment Act 1997*<sup>1</sup> when calculating the foreign income tax offset limit.

#### **Explanation**

2. A foreign income tax offset (FITO) may be available under Division 770 to reduce or eliminate Australian income tax that would otherwise be payable on amounts included in your assessable income, where foreign income tax has also been paid on the same amounts. The amount of the offset is based on the foreign income tax paid that counts towards your offset, subject to the FITO limit.

3. The FITO limit is determined under section 770-75.

4. The FITO limit calculation involves a comparison between Australian tax actually payable and the Australian tax that would be payable if certain income, and deductions reasonably related to that income, were disregarded.

5. The income to be disregarded is set out in subparagraphs 770-75(4)(a)(i) and (ii) which state:

- (i) so much of any amount included in your assessable income as represents an amount in respect of which you paid foreign income tax that counts towards the tax offset for the year; and
- (ii) any other amounts of ordinary income or statutory income from a source other than an Australian source...

6. Generally, the higher the amount of income captured under paragraph 770-75(4)(a), the higher the FITO limit.

<sup>1</sup> All legislative references in this draft Determination are to the *Income Tax Assessment Act 1997*.

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7. If you have made a capital gain in respect of which you have not paid any foreign income tax, no amount in respect of that capital gain will be included under subparagraph 770-75(4)(a)(i).
8. The capital gain will also not be included under subparagraph 770-75(4)(a)(ii) for the reasons outlined in paragraphs 9 to 12 of this draft Determination.
9. Amounts are included under subparagraph 770-75(4)(a)(ii) if they are amounts of 'ordinary income' or 'statutory income' from a 'source other than an Australian source'.
10. A net capital gain is an amount of statutory income. Each capital gain is not an amount of 'statutory income'.
11. A net capital gain does not have a source. It is a product of capital gains and capital losses made during the income year from Australian and non-Australian sources, the application of unapplied net capital losses from earlier income years and applicable discounts.
12. Subparagraph 770-75(4)(a)(ii) does not allow you to disaggregate a net capital gain (the singular amount of 'statutory income') to identify capital gains that have been included in working out your net capital gain.

## **Date of effect**

13. 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 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

11 October 2019

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## **Appendix 1 – Your comments**

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14. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

15. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:**                      **22 November 2019**

Contact officer details have been removed following publication of the final determination.

## References

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*Previous draft:*

Not previously issued as a draft

- ITAA 1997 770-75
- ITAA 1997 770-75(4)(a)
- ITAA 1997 770-75(4)(a)(i)
- ITAA 1997 770-75(4)(a)(ii)

*Legislative references:*

- ITAA 1997 Div 770
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ATO references

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