


TD 94/D105 - Income tax: capital gains: when is an option, that is deemed by paragraph 160ZZC(12)(a) of the Income Tax Assessment Act 1936 to have been granted, disposed of in terms of paragraph 160ZZC(3)(a)?

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This document has been finalised by TD 95/22.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: capital gains: when is an option, that is deemed by paragraph 160ZZC(12)(a) of the *Income Tax Assessment Act 1936* to have been granted, disposed of in terms of paragraph 160ZZC(3)(a)?

Our View:

1. We consider that the option is disposed of in terms of paragraph 160ZZC(3)(a) when the grant of the option took effect, namely, at the time of the forfeiture of the deposit.

Reasons:

2. Subsection 160ZZC(12) applies if a deposit of money or other consideration:

- (a) was made in respect of a prospective purchase or other transaction and the purchase or the other transaction is cancelled or otherwise abandoned; and
- (b) the deposit is forfeited.

3. When the deposit is forfeited, paragraph 160ZZC(12)(a) deems the deposit to have been paid or given as consideration in respect of the grant, by the person who received the benefit of the forfeiture, of an option that bound the grantor to dispose of an asset and was not exercised. A paragraph 160ZZC(12)(a) option is an asset in accordance with subparagraph (a)(i) of the definition of 'asset' in section 160A.

4. By paragraph 160ZZC(3)(a), the grant of a paragraph 160ZZC(12)(a) option is deemed to have constituted the disposal of that option when the grant took effect.

5. The grant of a paragraph 160ZZC(12)(a) option takes effect when the deposit is forfeited: Case 32/94 94 ATC 298; AAT Case 9538 28 ATC 1230. A forfeited deposit will therefore give rise to a capital gain or capital loss to the grantor in the year in which the deposit is forfeited.

6. When finalised, this Taxation Determination will overrule Taxation Determination TD 92/116 in which we took the view that the grant of a paragraph 160ZZC(12)(a) option takes effect when the prospective purchase or other transaction was entered into. Taxation Determination TD 92/116 will accordingly be withdrawn. We now agree, for the reasons given by the Administrative Appeals Tribunal in Case 32/94; AAT Case 9538, that TD 92/116 is not correct.

Date of effect:

7. This Taxation Determination is considered to be more favourable to taxpayers than Taxation Determination TD 92/116. This Taxation Determination therefore has both a past and future application in accordance with the guidelines in Taxation Ruling TR 92/20, subject to the statutory time limits in section 170 for the amendment of assessments.

Example:

Alexandria agrees on 24 February 1993 to sell property to Beatrice for \$326,000 with Beatrice paying the required \$50,000 deposit to Alexandria on 6 March 1993 in accordance with the terms of the contract.

On 7 August 1993, Beatrice tells Alexandria that she cannot proceed and accepts that the deposit paid earlier is forfeited.

The \$50,000 forfeited deposit is taken to be consideration paid or given in respect of the grant by Alexandria of a paragraph 160ZZC(12)(a) option. The grant of the option is deemed by paragraph 160ZZC(3)(a) to be a disposal of the option when the grant took effect. The grant took effect in this case when the deposit was forfeited on 7 August 1993 and gave rise to a capital gain in the 1993-94 income year.

Commissioner of Taxation
24/11/94

FOI INDEX DETAIL:

Related Determinations:

Related Rulings:

Subject Ref: forfeiture of deposit; grant of deemed option; option; prospective purchase or other transaction

Legislative Ref: ITAA 160A(a)(i); ITAA 160ZZC(3)(a); ITAA 160ZZC(12); ITAA 160ZZC(12)(a); ITAA 170

Case Ref: Case 32/94 94 ATC 298; Case 9538 (1994) 28 ATR 1230

ATO Ref: NAT 94/8259-8; APPE HOB (CGT Cell CGDET110)

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