


TD 95/D27 - Income tax: capital gains: does subsection 160ZZQ(8) of the Income Tax Assessment Act 1936 allow a principal residence exemption for two dwellings, for a period of up to three months, if a taxpayer makes an election that either subsection 160ZZQ(5) or 160ZZQ(11) applies to one of the dwellings?

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This document has been finalised by TD 96/20.

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: does subsection 160ZZQ(8) of the *Income Tax Assessment Act 1936* allow a principal residence exemption for two dwellings, for a period of up to three months, if a taxpayer makes an election that either subsection 160ZZQ(5) or 160ZZQ(11) applies to one of the dwellings?

1. Yes. If the requirements of subsection 160ZZQ(8) are satisfied, exemption is available for two dwellings for up to 3 months.
2. Ordinarily an election for the purposes of subsection 160ZZQ(5) (erection of dwelling by taxpayer) or subsection 160ZZQ(11) (absence from sole or principal residence) has the effect that no other dwelling is to be treated as a taxpayer's sole or principal residence during the period to which the election relates (see subparagraphs 160ZZQ(5)(e)(ii) and 160ZZQ(5)(f)(iii) and paragraph 160ZZQ(11)(f)).
3. However, because subsection 160ZZQ(8) contemplates that two dwellings may qualify for exemption during a period if all the conditions of that subsection are satisfied, we take the view that the subsection applies even though an election has been made for the purposes of subsection 160ZZQ(5) or subsection 160ZZQ(11).

Note: This Taxation Determination varies Taxation Determination TD 53 to the extent that subsection 160ZZQ(8) will apply where the requirements of that subsection are satisfied. This Determination, being more favourable to taxpayers than TD 53 in this respect, has both a past and future application, subject to the statutory limits in section 170.

Example 1

Anne acquired a home on 1 January 1986 which was her sole residence until she acquired a second home on 1 July 1994. She moved into the second home on 1 July 1994 but did not dispose of the first home until 31 December 1994.

Anne makes an election for the purposes of subsection 160ZZQ(11) to treat the first home as her sole or principal residence for the entire period of ownership. Any gain on disposal is fully exempt from capital gains tax.

As a result of making the election, Anne is not able to treat the second home as her sole or principal residence during the period 1 July 1994 to 30 September 1994. However, subsection

160ZZQ(8) allows the principal residence exemption on both the old and new home for the period 1 October 1994 to 31 December 1994.

Example 2

David acquired his first home on 1 July 1987. Before he disposed of it on 31 January 1994, he acquired a vacant block of land on 1 March 1989 on which he erected a new home. The home was completed on 31 December 1993. He moved in on 1 February 1994 (which, on the facts, was as soon as was practicable to do so) and continues to live there. David makes an election for the purposes of subsection 160ZZQ(5) that the new home be treated as his sole or principal residence for the period 1 February 1990 to 31 January 1994 (the 'construction period').

David, of course, may treat the first home as his sole or principal residence from 1 July 1987 to 31 January 1990. As a result of making the election, David is not able to treat the first home as his sole or principal residence for the period 1 February 1990 to 31 October 1993. However, subsection 160ZZQ(8) allows an exemption on both homes for the period 1 November 1993 to 31 January 1994.

Note: *As a general rule, the 'construction period' under subsection 160ZZQ(5) is the shorter of either the period from which the taxpayer acquired the interest in the land to the date the dwelling was completed, or 4 years before the dwelling became the taxpayer's sole or principal residence.*

Commissioner of Taxation

29/11/95

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Related Determinations: TD 53

Subject Ref: election; exemption; principal residence; sole residence

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