IT 2328 - Income tax: capital gains provisions: interpretation and operation

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This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

TAXATION RULING NO. IT 2328

INCOME TAX : CAPITAL GAINS PROVISIONS : INTERPRETATION AND OPERATION

F.O.I. EMBARGO: May be released

REF H.O. REF: L85/6-7 DATE OF EFFECT: Immediate

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1209531	CAPITAL GAINS	
	- BENEFICIARIES IN TRUST ESTATES	160U
		160ZC
	- GOODWILL	160ZO
	- PRINCIPAL RESIDENCE	160ZQ
	- LEASES	160ZW
	- TRUSTS	160ZZQ
		160ZZR
		INCOME TAX (RATES) ACT 1982

PREAMBLE The purpose of this ruling is to clarify a number of issues which have been raised in relation to the interpretation and operation of the provisions of Part IIIA of the Income Tax Assessment Act 1936 (the Assessment Act), which requires certain capital gains to be taken into account as assessable income.

RULING Date of acquisition of Goodwill

2. The date of acquisition of the goodwill of a business that was founded by the taxpayer who is disposing of it is determined, for the purposes of the capital gains provisions, by paragraph 160U(6)(b) of the Assessment Act. That is, the goodwill is taken to be acquired at the time of the commencement of the business. This is so, irrespective of whether or not the goodwill was included in the formal accounts of the business before the date of disposal.

3. Where a taxpayer disposes of a business that was acquired by the taxpayer before 20 September 1985 the whole of the goodwill of the business will be taken to be acquired before that date.

4. Where a taxpayer who founded or purchased a business before 20 September 1985 (the "original business"), adds to that business an additional business (the "acquisition") purchased after 19 September 1985, the part of the goodwill of the consolidated business attributable to the original business will be taken to have been acquired before 20 September 1985. The goodwill attributable to the acquisition will be taken to have been acquired at the time of the acquisition. The taxpayer

would have a cost base for the goodwill of that part of the business, i.e., the acquisition, of the amount paid to acquire the goodwill or, if no amount was paid for it, the market value of the goodwill at the date of the acquisition.

5. For example, assume a taxpayer who had acquired a supermarket before 20 September 1985 acquires a liquor outlet after that date and intregrates it with the supermarket. If the taxpayer disposes of the integrated business the proportion of the total amount received as goodwill for the integrated business that is attributable to the supermarket would be taken to have been acquired before 20 September 1985. The proportionate amount so attributable would not be liable for the tax on capital gains.

6. Any real capital gain after inflation adjustments attributable to the goodwill of the liquor outlet, as reduced by 20 per cent by the operation of section 160ZZR where the net value of the taxpayer's business interests is less than $1M, would be liable for tax on capital gains.

Change of trustee - not a disposal

7. As with the other provisions of the income tax law, where there is merely a change of trustees of a trust estate, that change will not be taken to constitute a change in the ownership of the assets of the trust estate for purposes of the capital gains provisions.

Principal Residence : Lease for a term of 99 years in land

8. Under sub-section 160ZZQ(2) of the Assessment Act a person is to be taken to own a dwelling if the person owns or has acquired a lease in perpetuity, or a lease granted for a term of not less than 99 years, in the land on which the dwelling is erected.

9. For this sub-section to apply in relation to a lease at a particular time, it is not necessary for the lease to have been granted in perpetuity or for 99 years or more to the person who is the lessee at that time. The sub-section will apply where the lease was granted to the original lessee in perpetuity or for a term of 99 years or more.

Acquisition by lessee of reversionary interest of lessor

10. Section 160ZW of the Assessment Act applies in relation to an acquisition by a lessee of the reversionary interest in land of a lessor. Where a lessee of land, the lease of which was granted in perpetuity or for a period of 99 years or more, acquires the reversionary interest, sub-section 160ZW(2) deems the lessee to have acquired the "merged" asset when the lease was granted, or assigned, to the lessee.

11. For sub-section 160ZW(2) to apply, it is not necessary for the lease to have been granted in perpetuity or for 99 years or more to the lessee who is acquiring the reversionary

interest. What is relevant is whether the lease was granted to the original lessee in perpetuity or for a term of 99 years or more.

Income of Trusts

12. Section 160ZO of the Assessment Act requires a net capital gain realised by a taxpayer in a year of income to be included in assessable income while section 160ZC allows a capital loss incurred in the same year or a net capital loss incurred in the preceding year to be taken into account in determining the net capital gain.

13. For income tax purposes, where a beneficiary in a trust estate is presently entitled to the net income or a share of the net income of the trust estate, that income, as a general principle, has the same character in the hands of the beneficiary as it had in the hands of the trustee. Accordingly, where a beneficiary is presently entitled to the net income or a share of the net income of a trust estate that is income that was included in the net income of the trust estate under section 160ZO, the amount will be treated as a capital gain in the hands of the beneficiary, against which may be offset capital losses or net capital losses that the beneficiary may have incurred.

14. Similarly, any part of a net capital gain of a trust that was a listed personal-use asset gain of the trust for the purposes of section 160ZQ of the Assessment Act will be a listed personal-use asset gain of a beneficiary who is presently entitled to that gain. (Listed personal-use assets include such things as works of art, jewellery and collectibles).

15. For the purpose of determining the part of the net capital gain of a trust that was a listed personal-use asset gain of the trust in circumstances where the trust incurred a capital loss on an asset in the year of income or had incurred a net capital loss in the preceding year of income the following procedure will apply unless such rules would be contrary to the provisions of the trust deed. Those losses shall be taken to have been offset first against any capital gains of the trust in that year of income that accrued on assets other than listed personal-use assets and then to the extent the losses have not been fully absorbed by such gains to have been offset against the capital gain that accrued on the listed personal-use asset.

16. For the purposes of the Income Tax (Rates) Act 1982, the amount of the net income of a trust estate that was included in the net income of the trust estate under section 160ZO to which a beneficiary is presently entitled (less any capital losses or listed personal-use asset losses that the beneficiary may have offset against that income) is to be taken as an amount included in the assessable income of the beneficiary under section 160ZO.

COMMISSIONER OF TAXATION
27 June 1986

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