


IT 2666 - Income tax: capital gains tax - application of twelve month non-indexation where asset deemed to have been acquired

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 This ruling contains references to repealed provisions, some of which may have been rewritten.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32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.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 IT 2666

FOI Embargo: May be released

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NO Ref.: 90/628-0

Date of effect: Immediate

BO Ref.:

Date original memo issued: 4 April 1990

EDR Ref.: 15

FOI INDEX DETAIL

Reference no.:

Subject refs:

Legislative refs:

I 1013018

**CAPITAL GAINS TAX
- NON-INDEXATION ON
DISPOSAL WHERE ASSET
DEEMED ACQUIRED**

**160Z(3)
160ZZS**

OTHER RULINGS ON THIS TOPIC: IT 2340, 2361, 2530

**TITLE: INCOME TAX: CAPITAL GAINS TAX - APPLICATION OF TWELVE
MONTH NON-INDEXATION WHERE ASSET DEEMED TO
HAVE BEEN ACQUIRED**

NOTE: . Income Tax Rulings do not have the force of law.
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. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Ruling.

PREAMBLE

The purpose of this Ruling is to consider the application of the 12 month non-indexation rule in subsection 160Z(3) of the Income Tax Assessment Act 1936 in a situation in which section 160ZZS operates to deem assets to have been acquired after 19 September 1985.

2. Section 160ZZS is a transitional safeguarding provision designed to prevent circumvention of the limitation of the capital gains provisions of Part IIIA to assets acquired after 19 September 1985. It applies in cases where, although no change occurs after 19 September 1985 in the direct ownership of an asset, there is in fact a substantial change after that date in the underlying beneficial interests of natural persons in the asset.

3. By the provisions of subsection 160ZZS(1), an asset in fact acquired by a taxpayer on or before 19 September 1985 is deemed to be acquired by the taxpayer after that date unless the Commissioner is satisfied, or considers it reasonable to assume, that at all times after 19 September 1985 when the asset was held by the taxpayer, majority underlying interests" in the asset were held by natural persons who, immediately before 20 September 1985, held majority underlying interests in the asset. The expression "majority underlying interests" has the same meaning as it has in relation to property in Subdivision G of Division 3 of Part III (the "negative gearing" provisions).

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4. In calculating the amount of any capital gain arising on the disposal of an asset the indexed cost base of an asset (i.e. the cost base of the asset indexed in accordance with section 160ZJ) is deducted from the consideration received, or entitled to be received, in respect of the disposal of the asset. However, if the disposal of the asset occurs within 12 months after the day on which the asset was acquired by the taxpayer, subsection 160Z(3) requires the cost base of the asset to be used in the calculation without the benefit of indexation. In this Ruling, the rule contained in subsection 160Z(3) is referred to as the "12 month non-indexation rule".

5. The question has been raised with this Office whether, in a situation in which section 160ZZS applies, the 12 month non-indexation rule in subsection 160Z(3) commences:

- . on the day on which the asset concerned was actually acquired by the taxpayer (i.e. on a day on or before 19 September 1985); or
- . on the day on which the asset is deemed by section 160ZZS to have been acquired by the taxpayer (i.e. on a day after 19 September 1985).

RULING

6. The answer to the question raised in paragraph 5 above is that the 12 month non-indexation rule in subsection 160Z(3) commences on the day on which the asset is deemed by section 160ZZS to have been acquired by the taxpayer. Indexation does not apply, therefore, if that asset is disposed of within 12 months of the date deemed by section 160ZZS to be its acquisition date.

7. While subsection 160ZZS(1), where it does apply, deems the asset concerned to have been acquired "after" 19 September 1985, the subsection is silent on the particular day on which the asset is deemed to have been acquired. As Taxation Ruling IT 2340 indicates, this Office adopts the view that the time of deemed acquisition is the date on which the relevant change in underlying interests occurred and that the cost base is the market value of the asset at that time. This view is supported by the decision of the Administrative Appeals Tribunal in Case Y59 91 ATC 502; AAT Case 7529 (1991) 22 ATR 3532.

8. A suggestion has been made to this Office that subsection 160Z(3) operates only where assets are actually acquired, i.e. in relation to a disposal of an asset occurring within 12 months after the day on which the asset was actually acquired by a taxpayer. On this view, the subsection does not operate where assets are deemed by subsection 160ZZS(1) to have been acquired, i.e. in relation to a disposal of an asset occurring within 12 months after an asset is deemed by subsection 160ZZS(1) to have been acquired by a taxpayer.

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9. On a proper construction of subsection 160Z(3), however, that subsection operates both in relation to assets actually acquired by a taxpayer and assets deemed by subsection 160ZZS(1) to have been acquired by the taxpayer. The presence of subsection 160Z(5) in the statute affords strong support for this construction of subsection 160Z(3). If the view suggested in paragraph 8 above was correct there would have been no need for subsection 160Z(5) to have been inserted into the legislation.

10. It has also been suggested to this Office that the 12 month non-indexation rule in subsection 160Z(3) had its genesis in the operation of section 26AAA. In that section there was no provision for indexation. On the introduction of the capital gains provisions into the income tax law, where section 26AAA applied, the provisions of Part IIIA did not. In the limited circumstances in which Part IIIA did apply at that time to the disposal of an asset within 12 months of its acquisition, it was consistent with section 26AAA that there should be no indexation of the cost basis.

11. In the view of this Office, the suggestion referred to in paragraph 10 above is not correct. When subsection 26AAA(1A) was inserted into the legislation to, in effect, repeal section 26AAA, subsection 160Z(3) was left unaltered. The legislative intention is therefore clear that non-indexation is to continue where an asset is disposed of within 12 months of its acquisition or deemed acquisition, notwithstanding the effective repeal of section 26AAA. Furthermore, any support sought to be gained by the suggestion referred to in paragraph 10 above for the view that subsection 160Z(3) operates only where assets are actually acquired by a taxpayer (and not where they are deemed to have been acquired) is not accepted by this Office.

12. If an asset is deemed by section 160ZZS to have been acquired after 19 September 1985 and is disposed of within 12 months of the date of that deemed acquisition, subsection 160Z(3) therefore operates to deny indexation of the cost base of the asset.

COMMISSIONER OF TAXATION
6 February 1992