


TD 1999/49 - Income tax: capital gains: is roll-over under sections 126-5 and 126-15 of the Income Tax Assessment Act 1997 dependent on there being a marriage breakdown between the spouses?

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Taxation Determination

Income tax: capital gains: is roll-over under sections 126-5 and 126-15 of the *Income Tax Assessment Act 1997* dependent on there being a marriage breakdown between the spouses?

Preamble

*This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding on the Commissioner.*

Date of effect

This Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. Yes.
2. Sections 126-5 and 126-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) do not expressly require that there be a marriage breakdown. Marriage breakdown is, however, implicitly required by the sections. The intention of the legislature is to limit their operation to situations of marriage breakdown. This intention is evident having regard to the heading to Subdivision 126-A of the ITAA 1997, namely 'Marriage Breakdown', and to the reference to *de facto* marriage breakdowns in paragraphs 126-5(1)(c) and 126-15(1)(c) of the ITAA 1997. The explanatory memorandum to the Income Tax Assessment Amendment (Capital Gains) Bill 1986 supports that view. It states that section 160ZZM of the *Income Tax Assessment Act 1936* (now rewritten as section 126-5 of the ITAA 1997) affords roll-over to asset transfers between spouses 'upon the breakdown of their marriage'. To confine sections 126-5 and 126-15 of the ITAA 1997 to situations of marriage breakdown (or *de facto* marriage breakdown) promotes the underlying purpose or object of the sections.

Note

3. 'Marriage breakdown' for the purpose of sections 126-5 and 126-15 of the ITAA 1997 means that one, or both of, the spouses forms an intention to sever or not to resume the marital relationship and act on that intention or, alternatively, act as if the marital relationship has been severed: *Pavey v. Pavey* (1976) FLC 90-051. 'Marriage breakdown' for the purpose of these sections includes a decree of dissolution of marriage and a decree of nullity of marriage. As to

‘marriage breakdown’ in an overseas jurisdiction, it includes a dissolution or an annulment of marriage and a legal separation effected in accordance with the law of that jurisdiction if the dissolution, annulment or legal separation is recognised as valid in Australia under the *Family Law Act 1975*.

Commissioner of Taxation

3 November 1999

Previous draft:

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Subject references:

de facto marriage breakdown; marriage breakdown; roll-over; spouses; transfer

Legislative references:

ITAA 1997 126-A; ITAA 1997 126-5; ITAA 1997 126-5(1)(c); ITAA 1997 126-15; ITAA 1997 126-15(1)(c); ITAA 1936 160ZZM

Case references:

Pavey v. Pavey (1976) FLC 90-051

ATO references:

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