


TD 2005/1A1 - Addendum - Income tax: what amount of deduction is available under section 40-25 of the Income Tax Assessment Act 1997 for the decline in value of copyright in patient records in respect of arrangements similar to those described in Taxpayer Alert 2004/5?

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Addendum

Taxation Determination

Income tax: what amount of deduction is available under section 40-25 of the *Income tax Assessment Act 1997* for the decline in value of copyright in patient records in respect of arrangements similar to those described in Taxpayer Alert 2004/5?

This Addendum amends Taxation Determination TD 2005/1 to take into account the decision of the Federal Court of Australia in *Primary Health Care Limited v. Federal Commissioner of Taxation* 186 FCR 301;2010 ATC 20-181; 76 ATR 749.

TD 2005/1 is amended as follows:

1. Paragraph 9

- (a) Omit 'subsists'; substitute 'may subsist'.
- (b) Omit 'are literary works'; substitute 'can be literary works'.
- (c) After the paragraph, insert:

9A. However the decision in *Primary Health Care Limited v. Federal Commissioner of Taxation* (2010) 186 FCR 301; 2010 ATC 20-181; (2010) 76 ATR 749 (*Primary Health Care*) demonstrates the evidentiary difficulties that exist in proving the existence of copyright in patient records. Justice Stone said (186 FCR 301 at 314; 2010 ATC 20-181 at 10924; 76 ATR 749 at 764):

... to show that copyright subsisted in the patient records...[the taxpayer] must not only identify the works in which it says copyright exists but must also show that those works were original literary works of identified authors who are qualified persons ...

On the facts of that case, Justice Stone was unable to find evidence to support the existence of copyright in the majority of the patient records.

TD 2005/1

2. Paragraph 11

After the paragraph, insert:

11A. However, it is not necessary for any copyright in the patient records to be transferred to Company A in order for it to control the patient records and to carry on its business. In *Primary Health Care*, Justice Stone found that, to the extent to which copying of the patient records may have been necessary, that copying may be possible through the copyright owner 'giving, expressly or by implication and independent of the sale agreement, gratuitous permission (a licence) for the copying' (186 FCR 301 at 349; 2010 ATC 20-181 at 10953; 76 ATR 749 at 796).

3. Paragraph 21

After the paragraph, insert:

21A. In *Primary Health Care*, Justice Stone accepted that, where the parties agreed in the sale contract to a full apportionment of purchase price to the goodwill and named assets which did not include an allocation to copyright, there was no reason for the Court to interfere with the apportionment made by the parties on entering into the contract.

4. Paragraph 23

Omit:

The assignment of the copyright in any documents transferred to Company A would therefore be ancillary or incidental to that transfer.

Substitute:

However, it does not follow that the transfer of an interest in any copyright in those patient records would similarly be required.

5. Paragraph 25

Omit the paragraph.

6. Case References

Insert:

- *Primary Health Care Limited v. Commissioner of Taxation* (2010) 186 FCR 301; 2010 ATC 20-181; 76 ATR 749

7. Other References

Insert:

- Decision Impact Statement VID911/2005, NSD2169/2005, NSD1790/2005, NSD2467/2005, NSD193/2006 & NSD195/2006: *Primary Health Care Limited v. Commissioner of Taxation*

This Addendum applies on and from 4 May 2010.

Commissioner of Taxation

29 June 2011

ATO references

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Income Tax ~~ Deductions ~~ other business and professional expenses