

TR 1999/19A - Addendum - Income tax: capital gains: treatment of forfeited deposits

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Addendum

Income tax: capital gains: treatment of forfeited deposits

1. Taxation Ruling 1999/19 has been affected by the decision of the Full Court of the Federal Court of Australia in *Brooks v FC of T* [2000] FCA 721; 2000 ATC 4362; (2000) 44 ATR 352 on 9 June 2000 and should be applied in the light of that decision.

2. The Commissioner, faced with the Full Federal Court decision in *FC of T v Guy* 96 ATC 4520; (1996) 32 ATR 590, took the view in this Ruling that a contract for the sale of real estate was not a 'prospective purchase or other transaction' in terms of subsection 160ZZC(12) of the *Income Tax Assessment Act 1936* (ITAA 1936). The effect of this was that the Ruling expressed the opinion (paragraph 7) that neither subsection 160ZZC(12) of ITAA 1936 nor section 104-150 of the *Income Tax Assessment Act 1997* (ITAA 1997) applied to a deposit forfeited under an actual contract for the sale of real estate. The Ruling went on, however, to say that other capital gains provisions (in particular CGT event A1 in section 104-10 of ITAA 1997 or CGT event C2 in section 104-25 of ITAA 1997) applied to these forfeited deposits on the sale of post-CGT real estate (other than a main residence) so that they are assessable as a capital gain in the circumstances stated in paragraphs 9 and 11 of the Ruling.

3. The Federal Court in the *Brooks* case has now decided that the decision in the *Guy* case was – in the words of the Court – 'plainly wrong' and 'should not be followed'. The Court in the *Brooks* case had no difficulty in applying subsection 160ZZC(12) of ITAA 1936 to a deposit forfeited under an ordinary contract for the sale of real estate. As the Court said:

'Although, in the view we take, all of ss 160M(6), (7) and s 160ZZC(12) have application, because both ss 160M(6) and (7) are subject to the other provisions of Part IIIA, the consequence is that the provisions of s 160ZZC(12) will apply to bring into operation s 160ZZC(3).'

4. Accordingly, the main effect of the decision in the *Brooks* case on TR 1999/19 is that it clarifies that if the forfeiture of a deposit under a contract for the sale of real estate does not occur within a 'continuum of events' as that expression is used in TR 1999/19, the forfeited deposit is assessable under CGT event H1 in section 104-150 of ITAA 1997 (or subsection 160ZZC(12) of ITAA 1936 if the

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forfeiture occurred before the beginning of the 1998-99 income year). This is the case whether the contract is for the sale of pre-CGT real estate, post-CGT real estate or a main residence. The deposit (to the extent that it is more than any expenditure the vendor incurs in connection with the sale) is assessable as a capital gain in accordance with subsection 104-150(3) of ITAA 1997. This alters the position taken in TR 1999/19 (paragraphs 7, 12, 15 and 25) that the forfeited deposit in this situation was assessable as a result of CGT event C2 in section 104-25 of ITAA 1997 happening to the vendor's contractual rights and not under CGT event H1 in 104-150 of ITAA 1997.

5. If a deposit is forfeited under a contract for the sale of a main residence or pre-CGT real estate where the forfeiture occurs within a continuum of events constituting a later disposal of the main residence or pre-CGT real estate, the position taken in TR 1999/19 (paragraphs 9, 10 and 25) remains that the deposit is not assessable. In the ITAA 1997, this principle has, in the context of the main residence exemption, been given express statutory recognition in paragraphs 118-110(2)(b) and 118-195(2)(b). It also continues to apply (although by reference to general principles) for pre-CGT real estate.

6. If a deposit is forfeited under a contract for the sale of post-CGT real estate where the forfeiture occurs within a continuum of events constituting a later disposal of the post-CGT real estate, the position taken in TR 1999/19 (paragraphs 9, 11 and 25) remains that the deposit forms part of the capital proceeds from CGT event A1 in section 104-10 of ITAA 1997 happening to the post-CGT real estate. Paragraph 47 of the judgment in the *Brooks* case supports, by way of obiter dicta, this position: 2000 ATC at 4373; 44 ATR at 364.

7. Apart from these aspects, no other change to TR 1999/19 is necessitated by the decision in the *Brooks* case.

8. In this addendum 'pre-CGT real estate' means real estate acquired before 20 September 1985 and 'post-CGT real estate' means real estate acquired on or after 20 September 1985.

Note 1:

9. This addendum is incorporated into, and is to be read as one with, TR 1999/19. This addendum 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 Ruling is a public ruling and how it is binding on the Commissioner.

Note 2:

10. This addendum applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before its date of issue (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Also, if a taxpayer has obtained a more favourable private ruling (whether legally or administratively binding) this addendum applies to that taxpayer to the extent of the inconsistency only from its date of issue.

11. In the unlikely event that the application of TR 1999/19 without this addendum would result in a smaller tax liability for a taxpayer than its application incorporating this addendum, the taxpayer is entitled to apply Taxation Ruling TR 1999/19 without this addendum for deposits forfeited on or before the issue date of this addendum.

Commissioner of Taxation11 October 2000

ATO references:

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