TR 2005/6 - Income tax: lease surrender receipts and payments

Taxation Ruling

Income tax: lease surrender receipts and payments

Contents Para

Preamble

*The number, subject heading, **What this Ruling is about** (including **Class of person/arrangement** section), **Date of effect**, and **Ruling** parts of this document are a 'public ruling' for the purposes of **Part IVAAA of the Taxation Administration Act 1953** and are 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.*

What this Ruling is about

Class of person/arrangement

1. This Ruling explains the circumstances where it is considered that:

   (a) a lease surrender receipt is assessable income under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997); and

   (b) a lease surrender payment is deductible under section 8-1 of the ITAA 1997.

2. This Ruling also addresses the application of the provisions of the ITAA 1997 covering capital gains and capital losses (CGT).

3. The table at paragraph 102 of this Ruling cross references the provisions of the ITAA 1997 referred to in this Ruling to the corresponding provisions of the *Income Tax Assessment Act 1936* (ITAA 1936). References to provisions of the ITAA 1997 should be read as also including, unless a contrary intention appears, references to corresponding provisions of the ITAA 1936. Cases relied upon in this Ruling that deal with issues in terms of provisions of the ITAA 1936 are considered to have equal application to the corresponding provisions of the ITAA 1997. Legislative references, unless otherwise stated, are to the ITAA 1997.

4. A lease surrender amount refers to the consideration given or received for surrendering a lease. A lease surrender constitutes a disposal of a CGT asset (that is, the lease) and the ending of contractual rights under the lease. A lease surrender is to be contrasted with a mere variation or waiver of a term of a lease, where the lease remains on foot despite the amendment or alteration to its terms. For CGT purposes, expenditure incurred in obtaining a variation or waiver of a term of a lease falls for consideration under Subdivision 104-F of the ITAA 1997 (about leases).

5. While this Ruling does not consider variations or waivers of a term of a lease, it is noted that similar commercial outcomes *may* be achieved through a surrender and a variation or waiver of a term of a lease, but with different tax outcomes. For example, CGT event F3 crystallises an immediate capital loss for a lessor who pays to obtain a lessee's agreement to vary or waive a term of a lease, whereas under this Ruling, a lessor who pays for the lessee to surrender the lease, has the expenditure included in the cost base of the property. The general anti-avoidance provisions in Part IVA of the ITAA 1936 may apply where a technical variation or waiver of a term of a lease is used to effect a substantive surrender, predominantly for the purpose of gaining a tax benefit.

6. This Ruling applies only to the surrender of leases of land and buildings and does not apply to the surrenders of leases that still come within the operation of Division 4 of Part III of the ITAA 1936.

Date of effect

7. This Ruling applies to years of income commencing both before and after its date of issue. However, the Ruling 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 issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). The Ruling also does not apply if the surrender arrangement was entered into before 23 March 2003 (the date Taxation Ruling TR 1999/18 was withdrawn) and the outcome provided by this Ruling is less favourable than that provided by the withdrawn Taxation Ruling TR 1999/18. In that case, this Ruling does not apply (and Taxation Ruling TR 1999/18 does). An example of a less favourable outcome under this Ruling is if a lessor accepts the surrender of a valuable lease but does not receive any actual consideration, then there would be no capital proceeds under CGT event H2 (as ruled in Taxation Ruling TR 1999/18) but there would be deemed capital proceeds under CGT event C2. A taxpayer in this situation can continue to apply Taxation Ruling TR 1999/18.

Previous Rulings

8. This Ruling replaces Taxation Ruling TR 1999/18, which was withdrawn on 26 March 2003.

Ruling

Tax consequences for a lessee who derives a lease surrender receipt

Section 6-5

9. A lease surrender receipt of a lessee would be of a capital nature when received for the surrender of a lease that formed part of the profit-yielding structure of the business of the lessee. However, a lease surrender receipt of a lessee would constitute assessable income under section 6-5 if received:

(a) in the ordinary course of carrying on a business of trading in leases;

(b) as an ordinary incident of business activity (even though it was unusual or extraordinary compared to the usual transactions of the business); or

(c) as a profit or gain from an isolated business operation or commercial transaction entered into by the lessee (otherwise than in the ordinary course of carrying on a business), with the intention or purpose of making the relevant profit or gain.

CGT

10. A lessee makes a capital gain from surrendering a lease acquired after 19 September 1985 (CGT event A1, section 104-10, about the disposal of a CGT asset) to the extent that the surrender receipt exceeds the cost base of the lease (including any non-deductible premium paid by the lessee for the grant of the lease). Note that in limited circumstances the market value substitution rule (section 116-30) may determine the capital proceeds for the event.

11. A lessee makes a capital loss upon surrendering a lease acquired after 19 September 1985, to the extent that the reduced cost base of the lease exceeds the surrender receipt, provided the lease was used solely or mainly for the purpose of producing assessable income (section 118-40). In limited circumstances the market value substitution rule (section 116-30) may determine the capital proceeds for the event, however it is unlikely that the market value would be other than a negligible amount.

Tax consequences for a lessee who makes a lease surrender payment

Section 8-1

12. Where a lessee makes a lease surrender payment to dispose of an onerous lease that is part of the profit-making structure of the lessee's business or income producing activity, the payment is of a capital nature and is not deductible under section 8-1.

13. In these circumstances, the lessee disposes of the whole of the lease including the right to possession of the leased premises. While the lessee also obtains a release from the obligation to pay rentals that would have been deductible under section 8-1, the lease surrender payment is still of a capital nature because there is a surrender of the whole of the lessee's interest under the lease.

14. However, where a lessee carries on a business of entering into and surrendering leases, lease surrender payments would be revenue rather than capital in nature.

Section 40-880

15. No deduction is available under subsection 40-880(2) to a lessee who makes a lease surrender payment that is capital in nature, as paragraph 40-880(3)(d) specifically excludes any expenditure in relation to a lease.

CGT

16. A lease surrender payment made by a lessee cannot be included in the cost base or reduced cost base of the lease disposed of because it is not a cost of acquiring the lease (subsection 110-25(1)), it is not an incidental cost that relates to the CGT event (section 110-35), and nor does it qualify under any other element of cost base (section 110-25). The lessee receives no actual capital proceeds from the disposal of the lease. In limited circumstances the market value substitution rule (section 116-30) may determine the capital proceeds for the event, however it is unlikely that the market value would be other than a negligible amount.

Tax consequences for a lessor who derives a lease surrender receipt

Section 6-5

17. A lease surrender receipt of a lessor would constitute assessable income under section 6-5 if received:

(a) in the ordinary course of carrying on a business of granting and surrendering leases;

(b) as an ordinary incident of business activity (even though it was unusual or extraordinary compared to the usual transactions of the business); or

(c) as a profit or gain from an isolated business operation or commercial transaction entered into by the lessor (otherwise than in the ordinary course of carrying on a business), with the intention or purpose of making the relevant profit or gain.

Otherwise the lease surrender receipt is of a capital nature.

CGT

18. The entry into a lease by a lessor and lessee constitutes the acquisition of an asset by the lessor. The asset comprises the contractual rights vested in the lessor under the lease agreement, including the right to receive the nominated rent, but subject to the provision of possession.

19. Upon the surrender of the lease by the lessee, CGT event C2 under section 104-25 of the ITAA 1997 happens to the lessor in relation to the discharge of its rights (as a single asset) under the lease agreement. The lease surrender receipt usually constitutes the capital proceeds for the event happening to the asset. Note that if the market value of the rights asset is different from the actual capital proceeds, then the market value amount is the capital proceeds (subsection 116-30(3A)). In practise, it is considered unlikely that there will be a difference between the receipt and the market value of the rights.

20. A lessor makes a capital gain if the capital proceeds from the surrender of its rights are more than the asset's cost base (including, for example, any non-deductible lease incentive paid to the lessee on the grant of the lease).

21. The lessor makes a capital loss if those capital proceeds are less than the asset's reduced cost base.

Tax consequences for a lessor who makes a lease surrender payment

Section 8-1

22. Where a lessor, who does not carry on a business of granting and surrendering leases, makes a 'once and for all' payment to obtain a permanent advantage, namely the surrender of the lease, the payment is of a capital nature and is not deductible under section 8-1.

23. Although a lessor may make a lease surrender payment in order to re-let the property at a higher rental and so derive more assessable income, the payment is still of a capital nature because of this permanent advantage.

24. However, where a lessor carries on a business that involves granting and surrendering leases as a normal incident of it, or that involves incurring recurrent outlays to obtain lease surrenders as part of the constant demand of its business which have to be met out of circulating capital, then the lease surrender payments would be a revenue rather than a capital outgoing.

Section 40-880

25. No deduction is available under subsection 40-880(2) to a lessor who makes a lease surrender payment that is capital in nature, as paragraph 40-880(3)(d) specifically excludes any expenditure in relation to a lease.

CGT

26. A lessor who makes a lease surrender payment obtains a conveyance or transfer of a lease and can include the payment in the cost base of that CGT asset (being the lease) under paragraph 110-25(2)(a). The lease surrender payment is the money paid in respect of acquiring that asset from the lessee. Generally, when a lease is transferred to a lessor who owns the reversionary interest in the land, the term of the lease merges into the land. The cost base of the merged asset is calculated in accordance with subsection 112-25(4) and includes the cost bases of the land and the lease acquired from the lessee.

27. CGT event C2 in section 104-25 of the ITAA 1997 also happens to the lessor in relation to the discharge of its contractual rights under the lease agreement. As no capital proceeds are received for the discharge, the lessor may make a capital loss to the extent to which the reduced cost base of the rights asset (which could include incidental costs and any non-deductible incentive paid to the lessee on the grant of the lease) exceeds its market value, if any (section 116-30), however it is unlikely that the market value would be other than a negligible amount.

Tax consequences for a third party who makes a lease surrender payment

Section 8-1

28. Where a third party makes a lease surrender payment to a lessee to induce it to surrender its lease and procure the grant of a new lease to the third party, the payment is capital in nature and is not deductible under section 8-1.

Section 40-880

29. No deduction is available under subsection 40-880(2) to a third party who makes a lease surrender payment that is capital in nature, as paragraph 40-880(3)(d) specifically excludes any expenditure in relation to a lease.

CGT

30. A third party who makes a lease surrender payment and thereby acquires a lease over the premises, is able to include the payment in the first element of the cost base of the lease acquired under subsection 110-25(2).

Avoidance of double tax and denial of double benefit

31. The amount of any capital gain accruing to a lessee or lessor that arises from the surrender of a lease is reduced in accordance with section 118-20, to the extent that the lease surrender receipt is assessable under section 6-5. Deductible amounts (for example lease document expenses deductible under section 25-20 of the ITAA 1997) may also be excluded from the cost base or reduced cost base of relevant assets.

Explanation

Tax consequences for a lessee who derives a lease surrender receipt

Surrender of lease as a disposal of a capital asset

32. A lease surrender receipt of a lessee would be of a capital nature when the lease formed part of the profit-yielding-structure of the lessee's business. In *Westfair Foods Limited v. The Queen*[1] the Federal Court of Canada held that two lease termination amounts received by a large food retailer with numerous distribution outlets were of a capital nature as the amounts were received for the realisation of capital assets. The leases had originally been for terms of 25 years with rights to renew for further 10-year periods and the taxpayer, as lessee, had used the premises as food stores for many years before surrendering the leases at the initiative of separate lessors.

33. In the following circumstances, a lease surrender receipt of a lessee would constitute assessable income under section 6-5 of the ITAA 1997.

[1] 91 DTC 5073.

Lease surrender receipts as ordinary income

34. A lease surrender receipt of a lessee may be income according to ordinary concepts, such as when the taxpayer carries on a business of trading in leases or the receipt occurs as an ordinary incident of business activity. The fact that a taxpayer's business encompasses leasing premises from which to operate a business is not enough to make a lease surrender receipt income under ordinary concepts. Whether a lease surrender receipt is received in the ordinary course of business is a question of fact and degree to be determined in the circumstances of each case.

35. In *FC of T v. Montgomery*[2] (*Montgomery's* case) the High Court of Australia held that a lease incentive receipt was assessable income. The receipt was a profit or gain severed from the capital invested in the business of the firm that had come in to the recipient for his separate use, benefit and disposal. Also, the firm had used or exploited its capital in the course of carrying on its business to obtain the incentive receipt (albeit in a transaction properly regarded as singular or extraordinary). The Court noted[3] that the transaction was not analogous to a taxpayer agreeing to give up, or modify, part of its profit-earning structure, and so the principle of the case will not apply where the lease is part of the capital structure of the business and the taxpayer receives the payment for surrendering the lease.

36. In *FC of T v. Myer Emporium Ltd*[4] the High Court confirmed that a receipt may constitute income where it arises from an isolated business operation or commercial transaction entered into otherwise than in the ordinary course of business provided that the taxpayer entered into the transaction with the intention or purpose of making the relevant profit or gain.

37. The receipt of a lease surrender amount by a taxpayer who operates a business from leased premises would also constitute assessable income where:

(a) the receipt arises in the course of business activity (albeit from a relatively unusual or extraordinary transaction); and/or

(b) the lessee enters into an isolated business operation or commercial transaction (other than in the ordinary course of business) with a purpose of making a profit or gain from the surrender of the lease.

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[2] [1999] HCA 34.
[3] At paragraphs 100-101.
[4] (1987) 163 CLR 199; 87 ATC 4363; (1987) 18 ATR 693.

38. A lease surrender receipt of a lessee for the surrender of a lease which occurs as a singular transaction (other than one that occurs as an ordinary incident of business activity) would not constitute assessable income unless the transaction involved a business operation, commercial operation or adventure in the nature of trade.[5]

39. For the lease surrender receipt to constitute assessable income as a gain from a profit-making undertaking or scheme, the lessee must also have entered into the transaction with the intention or purpose of making the relevant profit or gain. In *Case 57/94*; *AAT Case 9787*[6] a taxpayer exercised an option to renew a lease of premises from which he carried on his business with the intention of making a profit from vacating the premises before the expiry of the lease term. The Administrative Appeals Tribunal held that the taxpayer derived income according to ordinary concepts from a profit-making venture when he received an amount for varying the duration of the lease term.

40. In *Rotherwood Pty Ltd v. FC of T*[7] the Full Federal Court held that a lease surrender amount of $6 million received by a lessee who carried on a business that included subleasing premises to a firm of solicitors constituted income according to ordinary concepts. The amount was received as part of a profit-making transaction under which the lessee surrendered the lease so that the premises could be let to an associate at an increased rental for a ten-year period. The lease surrender receipt was not received as a consequence of an independent transaction to dispose of a capital asset. The surrender was one step in a business operation to carry out a profit-making scheme. In these circumstances, the fact that the lease was a capital asset not acquired for a profit-making purpose did not prevent the receipt being characterised as of a revenue nature.

41. The same principles outlined above would also apply to a payment accepted by a lessee from a third party under an agreement between them that the lessee is to surrender its lease and procure a lease of the premises between the third party and the lessor.

Is a lease surrender receipt of a lessee assessable under the CGT provisions?

42. A CGT event happens when a lessee surrenders a lease (CGT event A1 (section 104-10) about the disposal of a CGT asset, rather than CGT event C2 (section 104-25) about the ownership of an asset ending by the asset being surrendered).[8]

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[5] *Montgomery's* case at paragraph 106.
[6] 94 ATC 491; (1994) 29 ATR 1191.
[7] 96 ATC 4203; (1996) 32 ATR 276.
[8] Although we accept that CGT event C2 appears to apply on its terms, we consider that CGT event A1 is the more relevant event, as there is a change of ownership of the lease term from the lessee to the lessor, as explained at paragraphs 85-95 (addressing the implications for the lessor).

43. A lessee makes a capital gain from surrendering a lease acquired after 19 September 1985, to the extent that the surrender receipt[9] exceeds the cost base of the lease. Note that in limited circumstances a market value substitution rule may determine the capital proceeds for the event.

44. The cost base of the lease is typically constituted by incidental costs paid by the lessee on the grant and surrender of the lease, but will also include any non-deductible premium paid to the lessor to acquire the lease. Rent payable under the lease is not considered to be money paid or required to be paid in respect of acquiring the lease.[10]

45. The lessee makes a capital loss if the reduced cost base of the lease exceeds the surrender receipt, provided that the lease was used solely or mainly for the purpose of producing assessable income (section 118-40). Note that in limited circumstances a market value substitution rule may determine the capital proceeds for the event.

Tax consequences for a lessee who makes a lease surrender payment

Is a payment by a lessee to obtain the consent of a lessor to the surrender of a lease deductible under section 8-1?

46. A lease surrender payment made by a lessee qualifies as a deduction under section 8-1 of the ITAA 1997 only if it is incurred in gaining or producing the lessee's assessable income or it is necessarily incurred in carrying on a business for that purpose, and it is not an outgoing of capital, or of a capital nature.

47. A lease of business premises is generally an affair of capital. In *Montgomery's* case,[11] a case concerning the assessability of a lease incentive payment received by partners in a large firm of solicitors, Gaudron, Gummow, Kirby and Hayne JJ made the following statement about the characterisation of a lease on the facts of the case:

> That the lease of the premises was part of the profit-yielding structure is beyond question.

[9] The surrender receipt would also include any payment made by a third party to induce the lessee to surrender its lease as the receipt would be 'money received in respect of the event happening' in accordance with subsection 116-20(1).

[10] See *Australian National Hotels Ltd v. FC of T* (1988) 88 ATC 4627 at 4633-4; (1988) 19 ATR 417 at 424: 'Rent … and interest are both periodic payments for the use, but not the permanent acquisition, of a capital item.' Refer also *Frazier v. Commissioner of Stamp Duties (NSW)* 85 ATC 4735 where it was held that payments in respect of leased property are either rent paid for the use of the property, or a premium paid for the grant of the lease. The payment cannot be an amalgam of both.

[11] At paragraphs 91-92.

48. Of course, as observed by their Honours immediately after the quoted passage, this does not mean that every outgoing associated with a lease will be on capital account,[12] and rent paid under a lease is a prime example of an outgoing associated with a lease which is typically on revenue account.

49. We do not accept that the comments of Hill J in *FC of T v. Cooling*[13] that:

> (w)here a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income

establishes a general principle that leasing transactions are on revenue account. Hill J's conclusion was coupled with the finding that incentive payments were an ordinary incident of leasing premises in new city buildings at that time. On that basis he went on to say:

> Why then should a profit received during the course of business *where the making of such a profit was an ordinary incident of the business activity of the firm* not be seen to be income in ordinary concepts? (emphasis added)

Thus the fact that leasing of premises are acts of the taxpayer in the course of its business was not sufficient, by itself, to make the incentive payment assessable, there needed to be the additional finding that incentive payments were an ordinary incident of leasing premises and therefore the profit made from the incentive payment was also an ordinary incident of the business activity of the firm.

50. However, even though rent paid under a lease is on revenue account, a lease surrender payment made by a lessee is not like rent. It takes its character from the character of the lease, and this is so even if an advantage sought to be gained by the lessee is a reduction in future rental outgoings. Thus it was held by the House of Lords in *Tucker v. Granada Motorway Services Ltd*[14] that a payment made by a lessee to have the rent payable under the lease reduced was nevertheless capital in nature as the lease was an asset of the taxpayer and the payment was made to modify the conditions of the lease. Lord Fraser of Tullybelton said:[15]

> The effect of the lump sum payment was to modify the conditions of the lease by reducing the rent payable in future and so to make the lease less burdensome or … more advantageous to the appellants. … The advantage obtained by making the payments was thus tied to a capital asset … It seems to me to be indistinguishable in principle from a premium paid at the beginning of a lease. Of course, one of the consequences of paying such a premium is to reduce the rent

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[12] In *Lister Blackstone Pty Ltd v. FCT* (1976) 134 CLR 457 it was held that the cost of moving trading stock between leased premises was deductible, but the costs of preparing the new premises and moving plant thereto was capital in nature.
[13] 90 ATC 4472 at 4484.
[14] [1979] 2 All ER 801.
[15] At page 812.

> below the level that otherwise would have been demanded, but the premium is unquestionably a capital payment.

51. The House of Lords held that, even though the payment might be made as a commutation of part of the liability for rent, it was still stamped with the character of capital, as the lease was a capital asset of the business. Given that a lease surrender payment involves the termination of the lease, as opposed to a mere variation of it, this line of argument is even stronger in that context. As Rowlatt J said in the *Anglo-Persian Oil Co* case (as confirmed by the House of Lords),[16] addressing the capital nature of payments made for the enduring benefit of trade:

> … not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment. It means a thing which endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that *getting rid of a lease* or getting rid of onerous capital assets … endures. (emphasis added)

52. The House of Lords in that case applied the earlier decision of *Mallett v. Staveley Coal & Iron Co*[17] in which it was held that lease surrender payments made were not deductible even though, in making the payments, the company was thereby freed from ongoing expenses which would otherwise have been deductible. The decision in the *Anglo-Persian Oil* case was also cited with approval in Rich J's judgment in *W Nevill & Co v. FC of T*.[18]

53. The High Court of Australia in *Mount Isa Mines Ltd v. FCT*[19] specifically cited the *Granada Motorway Services* case in support of the proposition that expenditure on the removal of a disadvantageous asset will generally be capital in nature. Similarly, the High Court in *Montgomery's* case, observed[20] that payments relating to the giving up or modification of a taxpayer's capital structure were likely to be capital in nature.

54. The characterisation of a lease surrender payment was considered in New Zealand in *Commissioner of Inland Revenue v. McKenzies New Zealand Limited*[21] *(McKenzies* case). Judgment of the Court was delivered by Richardson J who stated in response to a submission that the payment was on revenue account, being for the commutation of future lease payments:

> The surrender of a lease is a surrender of the whole interest of the lessee under the lease and it is fallacious to focus narrowly on the extinguishment of the rental obligation without recognising that at the same time the right of possession has been relinquished.[22]

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[16] *Anglo-Persian Oil Co v. Dale* [1932] 1 KB 124.
[17] [1928] 2 KB 405.
[18] (1937) 56 CLR 290.
[19] (1992) 176 CLR 141.
[20] At paragraphs 100-101.
[21] (1988) 10 NZTC 5233.
[22] At page 5237.

55. This conclusion applies in the context of Australian income tax law even though (in the case of the lessor) the CGT event structure focuses on the discharge of the lessor's contractual rights under the lease agreement, being *inter alia* the right to receive rent subject to the provision of possession (see paragraphs 70 to 75).

56. It has been suggested that our acceptance of deductibility for certain expenses considered comparable to lease surrender payments is inconsistent with this approach. In Taxation Ruling TR 93/7 and Taxation Ruling TR 2004/4 we acknowledged that a borrower who pays penalty interest under a loan agreement in consideration for a lender agreeing to accept an early repayment of a loan may be allowed a deduction under subsection 51(1) of the ITAA 1936 and section 8-1 of the ITAA 1997 respectively. In our view, the particular nature of a leasehold estate requires a different approach for lessees' surrender payments, and the cases mentioned above, which deal specifically with leasing transactions, support the different approach.

57. It has also been put to us that the deductibility of interest incurred after the cessation of a business (see Taxation Ruling TR 2004/4) suggests that other expenses associated with the ending of a business, such as a lease surrender payment, must also be deductible. We do not agree with this suggestion, because the Taxation Ruling merely confirms that some outgoings that would have been deductible had a business not ceased, remain deductible notwithstanding the cessation. It says nothing about deductibility of outgoings that would have been capital in nature during the currency of the business.

58. It has been suggested that the decision in *National Australia Bank Ltd v. FCT*[23] (*NAB*) indicates a trend in judicial thinking away from the identification of assets that might form part of a business's profit-making structure, with greater emphasis being given to the commercial outcomes of expenditure. Whether or not that is true, we do not agree that the decision in *NAB* alters any of the judicial analysis relied on in this Ruling. The Full Court of the Federal Court held that the character of the advantage sought by the payment (under which the bank acquired an exclusive right for 15 years to offer loans to defence force personnel) was to obtain income from the loans then provided and was incurred as part of the 'process' by which the bank operated to obtain regular returns by means of regular outlays. That process was outlined in detail in the judgment and involved huge and recurrent[24] outlays of funds in areas such as marketing, advertising and sponsorship and it was accepted that the payment (to become exclusive lender to the defence forces personnel) came under the same umbrella – spending money in order to generate business in a market segment that the bank considered to be a worthwhile source of profitable customers. The surrender of a lease of premises from which a business is conducted is most

[23] (1997) 37 ATR 378; 97 ATC 5153.
[24] But note that 'recurrent' means more than simply 'repeated' per the extract from *FC of T v. Email* at paragraph 83.

unlikely to be part of a process by which a taxpayer operates to obtain regular returns, and is, in any case not directly involved in generating any business.

59. A significant (though perhaps relatively rare) exception to the capital characterisation of surrender payments made by lessees is where the lessee carries on a business of dealing in leases. Whether a lessee carries on such a business is a question of fact. In *London Australia Investment Co Ltd v. FCT*[25] Jacobs J held that the relevant question to be answered in determining whether a business of acquisition and disposal exists is whether acquisitions are made *with a purpose or intention or expectation of resale with consequent profit.*

60. Most lessees use leased premises as offices, warehouses, factories or shops as part of the profit-making structure of their businesses and do not enter into their leases with such a purpose or intention or expectation. The surrender of a lease that has been used as part of the profit-making structure of a business is not characterised as a revenue transaction merely because the lessee carries on business from many leased premises and, therefore, surrenders leases on a regular or frequent basis.[26] As Richardson J stated in *McKenzie's* case:[27]

> A lease will be held on revenue account if the taxpayer trades in leases so that the leases form part of its trading stock or are otherwise regarded as circulating capital. Here [a lease surrender payment by a retail company] as in the case of most taxpayers, the lease was part of the profit making structure of the business.

What are the CGT consequences for a lessee who makes a lease surrender payment?

61. CGT event A1 in section 104-10 of the ITAA 1997 happens when a lessee surrenders a lease.[28]

62. However, the lessee receives no capital proceeds from this CGT event. The lessee makes the lease surrender payment to obtain the lessor's acceptance of the surrender of the leasehold estate and to obtain an extinguishment of the covenants of the lease, such as the obligation to pay rent and to repair and maintain the leased property. While the lessee receives contractual consideration in the form of the consent of the lessor to the surrender, the lessee does not receive money or property for the purposes of the general rules about capital proceeds in section 116-20.

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[25] (1977) 138 CLR 106.
[26] Lord Morris in *Regent Oil Co Ltd v. Strick (Inspector of Taxes)* [1966] AC 295 at 333; [1965] 3 All ER 174 at 192.
[27] At page 5237.
[28] See further paragraph 42, footnote 8 and paragraphs 85-95 as to why CGT event A1, rather than CGT event C2, is considered to be the more relevant event.

63. As the lessee receives no capital proceeds from the CGT event, section 116-30 would apply. Under this section the lessee is deemed to have received the market value of the lease that is the subject of the event. The market value is worked out at the time of the event.

64. However, where the market conditions governing rental properties are such that a lessee who is dealing at arm's length with a lessor has to make a lease surrender payment in order to obtain the consent of the lessor to the disposal of the lease, we would accept that the market value of the lease is likely to be a negligible amount.

65. The cost base of the lease is determined in accordance with Subdivision 110-A and includes the cost of acquiring the lease (for example a non-deductible premium paid for the grant of the lease), certain incidental costs of acquiring the lease, and incidental costs that relate to the CGT event that happens to the lease. However, a lessee who makes a lease surrender payment cannot include the amount of the payment in the cost base of the lease. The payment is not a cost of acquiring the lease for the purposes of subsection 110-25(1) and it cannot be properly characterised as an incidental cost under section 110-35, which limits incidental costs to, among other things, costs of transfer, stamp duty or other similar duty. Nor does the payment fit into any other element of cost base listed in section 110-25.

66. A surrender payment which is said to be a commutation of rent payable under the lease, but is not deductible under section 8-1 of the ITAA 1997, does not become part of the cost base of the lease, because rent payable under a lease is not money paid or required to be paid in respect of the acquisition of the lease (rent is paid for the right to occupy the premises and not for the grant of the lease).[29] Nor is such a payment a 'non-capital cost of ownership' of the lease because the commuted amount is for future rent payable, at which time ownership of the lease (the right of possession per *McKenzie's* case) has been relinquished.

Tax consequences for a lessor who derives a lease surrender receipt

Is a lease surrender receipt of a lessor assessable income under section 6-5?

Receipt in the ordinary course of business

67. A lease surrender receipt of the lessor received for consenting to the surrender of the lease would be assessable income under section 6-5 if received in the ordinary course of carrying on a business of granting and surrendering leases. This is a question of fact and degree to be determined in the particular circumstances of each case.

[29] See further paragraph 44, footnote 9.

Gain from profit-making undertaking or scheme

68. A lease surrender receipt of a lessor for consenting to the surrender of a lease would constitute assessable income under section 6-5 where:

(a) the lease surrender is an ordinary incident of business activity (even though it is unusual or extraordinary compared to the usual transactions of the business); or

(b) the lessor entered into the lease surrender as an isolated business operation or commercial transaction (otherwise than in the ordinary course of carrying on its business) with the intention or purpose of making the relevant profit or gain from the transaction.

69. If the receipt for consenting to the surrender of a lease does not constitute assessable income within the above concepts it would be a capital receipt.

Is a lease surrender receipt of a lessor assessable under the CGT provisions?

70. Paragraphs 104-10(5)(b) and 104-25(5)(b) of the ITAA 1997 indicate that the law recognises a lessor's contractual rights under a lease as an asset for CGT purposes.

71. A lease is both an executory contract taking the form of promises to be performed in the future and an executed demise by the grant of the lease.

72. In *Progressive Mailing House*[30] it was held that the ordinary principles of contract, including that of termination for repudiation or fundamental breach, apply to leases. Brennan J noted:[31]

> In the present case, the lessee's breaches of covenant are said to show an intention to act, and to act only, in a manner substantially inconsistent with his obligations under the lease. For the reasons stated by Mason J, I think that the lessee did show such an intention and that the lessee repudiated the contract embodied in the lease. That conclusion makes it necessary to decide in this case what was assumed but not decided in *Shevill v. Builders' Licensing Board* (1982) 149 CLR 620 at pp 625-627 namely, whether the general contractual principles relating to recision for anticipatory breach and damages for the loss of benefit of a contract apply when a lessee, by words or conduct, repudiates his obligations under the lease. It is the character of a lease as a demise which may be thought to exclude the operation of those principles. For reasons that I shall state presently I would hold that ordinary contractual principles do apply, but that the character of a lease as a demise distinguishes the consequences of their application to a contract that it is also a demise.

[30] *The Progressive Mailing House Proprietary Limited v. Tabali Pty Ltd* (1985) 157 CLR 17.
[31] At page 40.

73. Deane J observed that:[32]

> …except perhaps in the quite exceptional case of a completely unconditional demise for a long term with no rent reserved, …, the leasehold estate cannot be divorced from its origin and basis in the law of contract …, the lease should be seen 'as resting on covenant' (or contractual promise) and it is 'the contract … not the estate which is the determining factor.' …(A)s a general matter and subject to one qualification, the ordinary principles of contract law are applicable to contractual leases.

74. In *Kennedy's* case[33] Hill J referred to[34] what Deane J said in *Progressive Mailing House* and commented:

> A lease for a term of years ordinarily possesses a duality of character which can give rise to conceptual difficulties. It is both an executory contract and an executed demise. Its origins lie in contract rather that in real property in that the lessee's remedies were originally restricted to a personal action against the lessor on his covenant to give enjoyment of the land …

75. The entry into a lease by the lessor and lessee constitutes the acquisition of an asset by the lessor. The asset comprises the contractual rights vested in the lessor under the lease agreement, including the right to receive the nominated rent, but subject to the provision of possession.

76. Subdivision 110-A provides that the cost base of the lessor's asset includes money the lessor paid to acquire the asset (for example an inducement paid by the lessor associated with granting the lease, unless that payment is deducted) together with incidental costs incurred on the acquisition or disposal of the asset. Commonly, the cost base will be limited to incidental costs.

77. Upon the surrender of the lease by the lessee, CGT event C2 in section 104-25 of the ITAA 1997 happens to the lessor in relation to the discharge of its rights under the lease agreement. The surrender receipt constitutes capital proceeds for the event happening. If the market value of the rights asset is different from the surrender receipt, then the market value determines the capital proceeds (subsection 116-30(3A)).

78. A lessor makes a capital gain if the capital proceeds from the surrender of its rights are more than that asset's cost base. The lessor makes a capital loss if those capital proceeds are less than the asset's reduced cost base.

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[32] At page 53.
[33] *Kennedy Holdings and Property Management Pty Ltd v. FCT* 92 ATC 4918; (1992) 24 ATR 321.
[34] At page 4921.

Tax consequences for a lessor who makes a lease surrender payment

Is a payment by a lessor to obtain a lease surrender deductible under section 8-1?

79. If a lessor makes a lease surrender payment and accepts the surrender of the lease in the course of gaining or producing assessable income, or in carrying on a business for the purpose of gaining or producing such income, the payment would be an allowable deduction under section 8-1 providing it is not of a capital nature.

80. Dixon J in *Sun Newspapers Limited and Associated Newspapers Limited v. FCT*[35] *(Sun Newspapers)* outlined the three matters to be considered in determining whether a payment is on capital or revenue account, including the character of the advantage sought by the payment.

81. Hill J considered the application of these matters in the context of a lease surrender payment made by a lessor in *Kennedy's* case. His Honour stated that:[36]

> By the payment, the applicant secured a permanent advantage, namely the surrender of the lease with its attendant option. It could not be said that that advantage was ephemeral merely because immediately thereafter the applicant and its co-owner were able to enter into a new lease, albeit for a more advantageous rent ...
>
> The second and third of the matters referred to by Dixon J in Sun Newspapers similarly support the view that the expenditure was of a capital nature. The payment was a once and for all payment, it was not paid by way of a periodical reward or outlay to cover use and occupation for some period commensurate with the payment, nor could it appropriately be said to have been recurrent in the sense in which that expression is used in the cases. The present is not a case of a company whose business consisted of granting leases and obtaining surrenders of them as part of the normal ebb and flow of the business, in which event a different view of the matter might be taken.

82. Accordingly, we take the view that when a lessor who does not carry on a business of granting and surrendering leases makes a once and for all payment to obtain a permanent advantage, being the surrender of the lease, the payment is of a capital nature and not deductible under section 8-1.

83. If a lessor carries on a business that involves entering into and surrendering leases as a normal incident of its business, so that lease surrender payments are a part of the normal ebb and flow of the business, the payment would be on revenue rather than capital account (see *Kennedy's* case). When a lessor carries on a business that involves incurring recurrent outlays obtaining lease surrenders, those lease surrender payments would be revenue outgoings. Recurrent expenditure in this context refers to expenditure that is part of the constant demand of the business which has to be met out of

[35] (1938) 61 CLR 337; (1938) 5 ATD 87; (1938) 1 AITR 403.
[36] At page 4921.

the returns of trade or circulating capital. In *FC of T v. Email Ltd*[37] Hill, Drummond and Sackville JJ stated that:

> By recurrent expenditure it is not meant expenditure which may be incurred more than once, even if incurred on a number of occasions. Expenditure as we have already stated may still be capital, albeit that it is repeated. Recurrent expenditure is rather expenditure which is part of 'the constant demand which must be answered out of the returns of a trade or its circulating capital': Sun Newspapers at 362. Rates, rent, interest, even premiums of insurance of capital assets (*Australian National Hotels Ltd v. FC of T* (1988) 88 ATC 4627), notwithstanding that the proceeds of the insurance would themselves be capital, are examples of recurrent expenditure ordinarily on revenue account if incurred in the course of a taxpayer's business. Whether the expenditure is, in the sense used, recurrent, will depend more upon the nature of the expenditure than the number of times it is repeated.

Example

84. *A shopping centre proprietor owns a large shopping centre complex in which there are 150 shops. The negotiation of leases is part of the normal ebb and flow of such a business. In the ordinary course of business affairs leases will expire and come up for renewal, tenants will want to sell their businesses and request permission to assign leases and other tenants may fail to make a satisfactory profit and want to break their lease. On other occasions it may be the proprietor who wants to terminate particular leases in order to attract high profile tenants or to get rid of poorly performing businesses. In these circumstances the principal asset of the proprietor from a practical and commercial point of view is the shopping centre. The building forms part of the business structure whereas the leases are part of the process by which the proprietor operates to obtain regular rental income.*[38] *In this case recurring outgoings on lease surrender payments incurred by the proprietor would form part of the normal ebb and flow of the business so that the outgoings would be on revenue rather than capital account.*

What are the CGT consequences for a lessor who makes a lease surrender payment?

85. A lessor who makes a payment to obtain the surrender of a lease, obtains a conveyance or transfer of the lease, and can include the payment in the cost base of that CGT asset under paragraph 110-25(2)(a).

[37] [1999] FCA 1177 at paragraph 39.
[38] *Sun Newspapers* at CLR 359.

86. A surrender of a lease may be either express or by operation of law. An express surrender must be by deed or in writing. A surrender by operation of law can be effected where a lessee delivers possession of the leased land that is accepted by the lessor. In both cases, the surrender consists of the yielding up of the term to the person who has the immediate estate in reversion. The lease term will then, by mutual agreement, merge in the reversion.[39]

87. In *Kennedy's* case Hill J questioned whether a surrender by operation of law amounted to a conveyance of an interest in land. His Honour made no finding on the issue but made an assumption favourable to the lessor (that is, that no capital asset was acquired) and found that, even on this basis, the lease surrender payment was not an allowable deduction under section 51 of the ITAA 1936 because it was of a capital nature.

88. Whether a lease surrender by operation of law constitutes a conveyance of the lease term at common law was briefly considered by the High Court of Australia in *Bagnall v. White*.[40] Griffiths CJ acknowledged that the exception in the Statute of Frauds for lease surrenders that can take effect without writing (such as surrenders by operation of law) may operate to make the surrender good as a matter of conveyancing, but then went on to find against the appellant on other grounds (see also *Phene v. Popplewell*).[41]

89. The form and effect of both express lease surrenders and surrenders by operation of law are described in *Halsbury's Laws of England*[42] in the following terms:

> The surrender consists of the yielding up of the term to him who has the immediate estate in reversion in order that the term may, by mutual agreement, merge in the reversion ... The surrender vests the estate immediately in the surrenderee without express acceptance, but is made void by his dissent.

90. It was also noted in *Mallett v. Staveley Coal & Iron Co*[43] that the lease in that case was surrendered:

> to the intent that the residue of the term of years created by the lease … and all other estate interest and rights of the company thereunder might, as to the surrendered hereditaments, merge and be extinguished in the reversion …

91. On the basis of these authorities, we accept that a lease surrender operates to convey or transfer the lease from the lessee to the lessor irrespective of whether there is an express surrender or surrender by operation of law. Consequently, for CGT purposes, the lessor acquires a CGT asset being the lease and is able to include the lease surrender payment in the cost base of that asset.

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[39] *Halsbury's Laws of England* (3rd ed) Volume 23 at paragraphs 1412 to 1414; (4th ed) Volume 27 at paragraph 444.
[40] (1906) 4 CLR 89; 13 ALR 58; 7 SR (NSW) 184.
[41] (1862) 12 CB (NS) 334; 31 LJ (CP) 235; 142 ER 1171.
[42] (3rd ed) Volume 23 at paragraph 1413.
[43] At page 416 of the case report as cited at paragraph 52 of this Ruling.

92. When a lease is surrendered to a lessor who owns the land, the lease merges into the land.[44] The law of merger of a lease term at law and in equity is described in *Halsbury's Laws of England*[45] in the following terms:

> ... where a term of years becomes vested in the owner for the time being of the reversion immediately expectant on the term, the term is merged in the reversion ... Where the term merges the covenants attached to it are extinguished.

93. The law on merger was summarised by Cozens-Hardy LJ in *Capital and Counties Bank Ltd v. Rhodes*:[46]

> The rule of the former [Courts of Law] was rigid, that whenever a term of years and a freehold estate, whether for life or in fee, immediately expectant upon the term, vested in the same person in his own right, the term was merged in the freehold, whatever may have been the intention of the parties to the transaction which resulted in the union. The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place.

94. Thus, after the lease vests in the lessor, the leasehold estate merges into the reversion unless this would be contrary to the intention of the parties.

95. The statutes establishing the Torrens system are primarily concerned with the registration of titles to land and with the evidence by which titles are established, and do not change property law concepts such as the law of mergers.[47] For example, subsection 69(2) of the *Transfer of Land Act 1958* (Vic) confirms that when the Registrar of Titles records the surrender of a lease on a title '... the estate and interest of the lessee shall vest in the lessor or other proprietor of the reversion immediately expectant on the term'. In *Shell Co of Australia Ltd v. Zanelli & Ors*[48] the NSW Court of Appeal held that a lease did not merge into the fee simple of Torrens title land until the Registrar-General noted the merger on the title.

96. The cost base of the merged asset is calculated in accordance with section 112-25 and would include the original cost bases of the lessor in the reversion and leasehold.

97. If the land was acquired before 20 September 1985 the merger of a lease into the freehold or the extinguishment of a lease created after 19 September 1985, does not affect the pre-CGT status of the land.

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[44] *Burton v. Barclay* (1831) 7 Bing 745 at page 746.
[45] (4th ed) Volume 27 at paragraph 453.
[46] [1903] 1 Ch 631 at page 652.
[47] Maugham AJ in *Lewis v. Keene* [1936] 36 NSWLR 493 at page 500.
[48] [1973] 1 NSWLR 216.

98. CGT event C2 in section 104-25 of the ITAA 1997 also happens to the lessor in relation to the discharge of its contractual rights under the lease agreement. As no capital proceeds are received for the discharge, the lessor may make a capital loss to the extent to which the reduced cost base of the rights asset (which could include incidental costs and any non-deductible incentive paid to the lessee on the grant of the lease) exceeds its market value (if any) (subsection 116-30(3A)). Whilst, in theory, a capital gain could arise, this is considered unlikely.

Tax consequences for a third party who makes a lease surrender payment

Is a payment by a third party to induce a lessee to surrender its lease deductible under section 8-1?

99. A third party who induces a lessee to surrender its lease (in the circumstances outlined at paragraph 41) is making a payment that is equivalent to a lease premium payment – it is designed to induce the grant of a lease to the third party. On the same basis that regular lease premiums are on capital account,[49] so too would be the inducement payment made by the third party. Therefore no deduction would be allowable under section 8-1 of the ITAA 1997.

What are the CGT consequences for a third party who makes a lease surrender payment?

100. Consistent with Taxation Determination TD 2003/1, where a third party makes a payment to the lessee which entitles the third party to be granted a lease over the premises, the payment would form part of the cost base of the lease acquired, as money paid in respect of its acquisition.

101. The following table summarises the income and capital gains tax consequences of lease surrender receipts and payments for both lessees and lessors.

[49] Refer quote from *Granada Motorway Services* case at paragraph 50.

Lessee derives lease surrender receipt	
Assessable section 6-5?	**CGT**
No, unless: (a) received in ordinary course of business of trading in leases; (b) received as an ordinary incident of business activity; or (c) received from a profit-making business operation or commercial transaction. Otherwise a capital receipt. (Paragraphs 9, 32-41)	Capital gain (CGT event A1 for the lease) (if receipt exceeds cost base); or Capital loss (if reduced cost base exceeds receipt) provided lease was used in producing assessable income. (Paragraphs 10-11, 42-45)

Lessee makes lease surrender payment	
Deductible section 8-1?	**CGT**
Generally not, as a capital outgoing (compare with on revenue account if taxpayer in business of entering into and surrendering leases). (Paragraphs 12-14, 46-60)	Not included in cost base of lease (no capital loss). (Paragraphs 16, 61-66)
Lessor derives lease surrender receipt	
Assessable section 6-5?	**CGT**
Yes, if: (a) received in ordinary course of carrying on a business of granting and surrendering leases; (b) as an ordinary incident of business activity; or (c) received from a profit-making business operation or commercial transaction. Otherwise a capital receipt. (Paragraphs 17, 67-69)	Possible capital gain or capital loss (CGT event C2 for the contractual rights under the lease). (Paragraphs 18-21, 70-78)
Lessor makes lease surrender payment	
Deductible section 8-1?	**CGT**
Generally not, as a capital outgoing (compare with on revenue account if taxpayer in business of entering into and surrendering leases). (Paragraphs 22-24, 79-84)	Forms part of cost base of land. (Paragraphs 26, 85-97) Possible capital loss (CGT event C2 for the contractual rights under the lease). (Paragraphs 27 and 98)

102. The following table cross references the provisions of the ITAA 1997 referred to in this Ruling to the corresponding provisions of the ITAA 1936.

1997 Act provision referred to	**Corresponding 1936 Act provision**
Section 6-5	Subsection 25(1)
Section 8-1	Subsection 51(1)
Subdivision 104-F	Section 160ZT
Section 104-10, CGT event A1	Subsection 160M(1)
Paragraph 104-10(5)(b)	Paragraph 160L(1)(b)
Subsection 104-20(1) CGT event C2	Section 160N
Paragraph 104-25(5)(b)	Paragraph 160L(1)(b)
Subdivision 110-A	Section 160ZH
Section 110-25	Subsections 160ZH(1) to (3)
Section 110-35	Subsection 160ZH(7)
Section 112-25	Subsections 160ZH(12) and (13)
Section 116-20	Subsection 160ZD(1)
Section 116-30	Paragraph 160ZD(2)(a)
Subsection 116-30(3A)	Subsection 160ZD(2A)
Section 118-20	Subsection 160ZA(4)
Section 118-40	Paragraph 160Z(9)(d)

Detailed contents list

103. Below is a detailed contents list for this draft Taxation Ruling:

Commissioner of Taxation
11 May 2005

Previous draft:

TR 2004/D18

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 93/7; TR 97/16; TR 1999/18; TR 1999/18W; TR 2004/4; TD 2003/1

Subject references:

- allowable deductions
- assessable income
- capital gains
- capital payments
- CGT event C1-C3
- cost base
- lease surrender payments
- lease surrender receipts
- leases
- rights
- surrender payments
- surrender receipts

Legislative references:

- ITAA 1936 25(1)
- ITAA 1936 51
- ITAA 1936 51(1)
- ITAA 1936 Pt III Div 4
- ITAA 1936 160L(1)(b)
- ITAA 1936 160M(1)
- ITAA 1936 160N
- ITAA 1936 160Z(9)(d)
- ITAA 1936 160ZA(4)
- ITAA 1936 160ZD(1)
- ITAA 1936 160ZD(2)(a)
- ITAA 1936 160ZD(2A)
- ITAA 1936 160ZH
- ITAA 1936 160ZH(1)
- ITAA 1936 160ZH(2)
- ITAA 1936 160ZH(3)
- ITAA 1936 160ZH(7)
- ITAA 1936 160ZH(12)
- ITAA 1936 160ZH(13)
- ITAA 1936 160ZT
- ITAA 1936 Pt IVA
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 25-20
- ITAA 1997 40-880(2)
- ITAA 1997 40-880(3)(d)
- ITAA 1997 104-10
- ITAA 1997 104-10(5)(b)
- ITAA 1997 104-20(1)
- ITAA 1997 104-25
- ITAA 1997 104-25(5)(b)
- ITAA 1997 Subdiv 104-F
- ITAA 1997 Subdiv 110-A
- ITAA 1997 110-25
- ITAA 1997 110-25(1)

- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(a)
- ITAA 1997 110-35
- ITAA 1997 112-25
- ITAA 1997 112-25(4)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 116-30
- ITAA 1997 116-30(3A)
- ITAA 1997 118-20
- ITAA 1997 118-40
- TAA 1953 Pt IVAAA
- Transfer of Land Act 1958 (Vic) 69(2)

Case references:

- Anglo-Persian Oil Co v. Dale [1932] 1 KB 124
- Australian National Hotels Ltd v. FC of T (1988) 19 ATR 417; (1988) 88 ATC 4627
- Bagnall v. White (1906) 4 CLR 89; 13 ALR 58; 7 SR (NSW) 184
- Burton v. Barclay (1831) 7 Bing 745
- Capital and Counties Bank Ltd v. Rhodes [1903] 1 Ch 631
- Case 57/94 94 ATC 491; AAT Case 9787 (1994) 29 ATR 1191
- Commissioner of Inland Revenue v. McKenzies New Zealand Limited (1988) 10 NZTC 5233
- Commissioner of Taxation v. Montgomery [1999] HCA 34
- FC of T v. Cooling 90 ATC 4472
- FC of T v. Email Ltd [1999] FCA 1177
- FC of T v. Myer Emporium Ltd (1987) 163 CLR 199; 87 ATC 4363; (1987) 18 ATR 693
- Frazier v. Commissioner of Stamp Duties (NSW) 85 ATC 4735
- Kennedy Holdings and Property Management Pty Ltd v. FCT 92 ATC 4918; (1992) 24 ATR 321
- Lewis v. Keene [1936] 36 NSWLR 493
- Lister Blackstone Pty Ltd v. FCT (1976) 134 CLR 457
- London Australia Investment Co Ltd v. FCT (1977) 138 CLR 106
- Mallett v. Staveley Coal & Iron Co [1928] 2 KB 405
- Mount Isa Mines Ltd v. FCT (1992) 176 CLR 141
- National Australia Bank Ltd v. FCT (1997) 37 ATR 378; 97 ATC 5153
- Phene v. Popplewell (1862) 12 CB (NS) 334; 31 LJ (CP) 235; 142 ER 1171
- The Progressive Mailing House Proprietary Limited v. Tabali Pty Ltd (1985) 157 CLR 17
- Regent Oil Co Ltd v. Strick (Inspector of Taxes) [1966] AC 295; [1965] 3 All ER 174
- Rotherwood Pty Ltd v. FC of T 96 ATC 4203; (1996) 32 ATR 276
- Shell Co of Australia Ltd v. Zanelli & Ors [1973] 1 NSWLR 216
- Shevill v. Builders' Licensing Board (1982) 149 CLR 620
- Sun Newspapers Limited and Associated Newspapers Limited v. FCT (1938) 61 CLR 337; (1938) 5 ATD 87; (1938) 1 AITR 403
- Tucker v. Granada Motorway Services Ltd [1979] 2 All ER 801
- Westfair Foods Limited v. The Queen 91 DTC 5073
- W Nevill & Co v. FC of T (1937) 56 CLR 290

Other references:

- Halsbury's Laws of England (3rd ed) Volume 23
- Halsbury's Laws of England (4th ed) Volume 27

ATO references

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