# *TD 2001/D10 - Income tax: capital gains: what is meant by the phrase 'at least 12 months before' in subsection 115-25(1) of the Income Tax Assessment Act 1997 (about the CGT discount) and subsection 114-10(1) (about indexation)?*

# Draft Taxation Determination

## Income tax: capital gains: what is meant by the phrase 'at least 12 months before' in subsection 115-25(1) of the *Income Tax Assessment Act 1997* (about the CGT discount) and subsection 114-10(1) (about indexation)?

***Preamble***

*Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.*

1. A capital gain is only a discount capital gain if it is from a CGT asset that was acquired at least 12 months before the CGT event that gave rise to the gain (subsection 115-25(1)). Similarly, cost base indexation is only available for a CGT asset acquired at or before 11.45 am (by legal time in the Australian Capital Territory) on 21 September 1999 and at least 12 months before a CGT event (subsection 114-10(1)).

2. The use of the words 'at least' in subsection 114-10(1) and subsection 115-25(1) requires a clear period of 12 months (that is a clear year) to expire between the day on which the CGT asset was acquired and the day on which the CGT event happens: *Halsbury's Laws of Australia* vol 26 paragraph 410-155. Both the day of acquisition and the day on which the CGT event happens are excluded in reckoning the 12 month period. So, a period of 365 whole days (or in a leap year 366 whole days) must elapse between the day on which the CGT asset was acquired and the day on which the CGT event happens.

**Example**

3. *John acquires a CGT asset on 2 February 2001. The CGT discount is only available if John sells it on or after 3 February 2002. The clear 12 months that is excluded commences immediately after midnight on 2/3 February 2001 and ends at midnight on 2/3 February 2002. Neither 2 February 2001 nor 3 February 2002 falls within that clear 12 months.*

**Note:**

4. The phrase 'within 12 months after' in subsection 160Z(3) of the *Income Tax Assessment Act 1936* is construed in a similar manner. According to EL Piesse*, 'The Elements of Drafting'* 4th ed (1968) at 142, '"Within" seven days after an event, also, usually does not include the day of the happening of the event; if that day is the 6th, the period ends at midnight of the 13th/14th: *Williams v. Burgess* (1840) 10 LJQB 10'. So, using the same facts as in the example above, if a disposal of the CGT asset occurs on or after 3 February 2002 the disposal does not occur 'within

12 months after' the day on which the asset was acquired (2 February 2001) and indexation is available. The day on which the asset was acquired is excluded from the 12 month period. The relevant period of 12 months again commences immediately after midnight on 2/3 February 2001 and ends at midnight on 2/3 February 2002.

### Your comments

5. We invite you to comment on this draft Taxation Determination. We are allowing 2 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

**Comments by date:** **23 November 2001**

**Contact officer:** **Lyn Freshwater**
**E-mail address:** **lyn.freshwater@ato.gov.au**
**Telephone:** **(07) 3213 5554**
**Facsimile:** **(07) 3213 5971**
**Address:** **GPO Box 9990**
**BRISBANE QLD 4001**

**Commissioner of Taxation**
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*Subject references*:
- acquire
- after
- asset
- at least
- capital gain
- CGT asset
- CGT discount
- cost base
- disposal
- indexed cost base
- indexation
- within

*Legislative references:*
- ITAA 1997 114-10(1)
- ITAA 1997 115-25(1)
- ITAA 1936 160Z(3)

*Case references:*
- Williams v. Burgess (1840) 10 LJQB 10

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