IT 2363 - Income tax: capital gains provisions: interpretation and operation

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TAXATION RULING NO. IT 2363

INCOME TAX : CAPITAL GAINS PROVISIONS : INTERPRETATION AND OPERATION

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1208999	CAPITAL GAINS - INTERACTION OF SECTIONS 160ZZS AND - ISSUE OF UNITS IN UNIT TRUSTS - LEASES	160ZZS 160ZZT 160ZZT

OTHER RULINGS ON TOPIC : IT 2328, IT 2340

PREAMBLE The purpose of this Ruling is to clarify a number of issues which have been raised in relation to the interpretation and operation of the provisions of Part IIIA of the Income Tax Assessment Act 1936 (the Act).

RULING Issue of Units in Unit Trusts

2. A question has been raised as to whether the issue by the trustee of a unit trust, after 19 September 1985, of units in the unit trust, constitutes the disposal of an asset by the trustee and, if so, whether a capital gain equal to the consideration received arises. In response to this question, it has been advised that it is not considered that the issue of units by the trustee of a unit trust constitutes the disposal of an asset by the trustee. Accordingly, in these circumstances, the trustee will not be taken to have realised a capital gain.

The interaction of sections 160ZZS and 160ZZT

3. Sections 160ZZS and 160ZZT of the Act are general anti-avoidance provisions aimed at preventing circumvention of the limitation of the tax on capital gains to assets acquired after 19 September 1985. Taxation Ruling No. IT 2340 deals with situations where an asset is deemed by section 160ZZS to have been acquired after 19 September 1985 because of a change, after that date, of 50 per cent or more in the interests underlying the asset (broadly, the beneficial ownership of the asset).

4. Section 160ZZT applies where a taxpayer disposes of an asset consisting of an interest in a partnership or private trust estate, or shares in a private company, where the asset was acquired before 20 September 1985 and part of the disposal proceeds are attributable to an increase in the value of underlying property acquired by the partnership, trust estate or private company after 19 September 1985. Where it applies, the section may operate to deem a capital gain to have accrued to a taxpayer in the year of income in which the taxpayer disposed of

the interest or shares. It is a prerequisite to the application of section 160ZZT that the value of the underlying property acquired after 19 September 1985 by the company, partnership or trust was not less than 75% of the net worth of the company, partnership or trust estate. The capital gain is determined as the excess of that part of the proceeds on disposal of the interest or shares as is reasonably attributable to the underlying property over the indexed cost base of that property.

5. It has been suggested that where a taxpayer - e.g., a private company - is deemed by section 160ZZS to have acquired assets after 19 September 1985, those assets will also be deemed to have been acquired after 19 September 1985 in determining the application of section 160ZZT in relation to a shareholder who disposes of shares in the private company. In response, it is considered that the application of section 160ZZS to a company or other taxpayer in relation to its assets, is limited to the purpose of applying the capital gains provisions to that taxpayer. Where in application of section 160ZZS an asset is taken to have been acquired by a taxpayer (e.g., a company) after 19 September 1985, that fact does not require the asset also to be treated as one acquired after that date for the purposes of the application of section 160ZZT in relation to another taxpayer (e.g., a shareholder) on disposal of an interest (such as shares) in the first taxpayer.

Leases

6. Advice has been sought in relation to the surrender for consideration by a lessee after 19 September 1985 of a lease granted to the lessee before 20 September 1985, the question being whether the consideration paid by the lessor to the lessee for the surrender of the lease would give rise to a capital gain in the hands of the lessee.

7. It is considered that the payment of an amount for the surrender of a lease is to be regarded as consideration for the disposal of an asset, being the lease, and therefore the capital gains provisions have no application where the lease was granted before 20 September 1985. Where, however, an amount is received by a lessee for the surrender of a lease granted after 19 September 1985 a capital gain may accrue.

COMMISSIONER OF TAXATION
18 September 1986