TD 93/D263 - Income tax: capital gains: does the principal residence exemption apply to the amount received for the granting of an easement or profits a prendre over land adjacent to a dwelling?

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This document has been finalised by TD 93/236.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: capital gains: does the principal residence exemption apply to the amount received for the granting of an easement or profits à prendre over land adjacent to a dwelling?

1. No. Proceeds from the granting of easements and profits à prendre are considered to be assessable capital gains, even if the underlying asset was acquired before 20 September 1985. Income Tax Ruling IT 2561 states the Commissioner's current policy in respect of easements and profits à prendre. They are not a part disposal of the land, but are the creation of new interests in the land. This policy applies from 21 September 1989, being the date of that ruling.

2. Prior to 21 September 1989, the granting of an easement or profit à prendre was considered to be a part disposal of the underlying property. Subsection 160ZZQ(4) of the *Income Tax Assessment Act 1936,* states that the principal residence exemption does not apply to land adjacent to a sole or principal residence if it is disposed of separately from the residence. Therefore, proceeds from the granting of easements or profits à prendre over land adjacent to a dwelling may be subject to capital gains tax if granted on or after 20 September 1985 over land which was also acquired after that date.

Examples:

1. A person buys a principal residence with 1 hectare curtilage on 1 January 1985 and grants an easement over part of it to the Electricity Commission for $15 000 on 1 August 1989. The Commissioner would not assess the gains arising from the granting of the easement as the underlying asset was acquired prior to 20 September 1985 and the granting of the easement was prior to 21 September 1989.

2. A person buys a principal residence with 1 hectare curtilage on 1 January 1985 and grants an easement over part of it to the Electricity Commission for $15 000 on 1 December 1989. The Commissioner would assess the gains arising from the granting of the easement. Although the underlying asset was acquired prior to 20 September 1985, the granting of the easement was on or after 21 September 1989.

3. A person buys a principal residence with 1 hectare curtilage on 1 January 1986 and grants an easement over part of it to the Electricity Commission for $15 000 on 1 August 1989. The Commissioner would assess any gain arising from the granting of the easement as the underlying asset was acquired on or after 20 September 1985.

Commissioner of Taxation
14/10/93

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