


Bowerman and Commissioner of Taxation -

Decision impact statement

Bowerman and Commissioner of Taxation

| | |
|----------------------------|----------------------------------|
| AAT citation: | [2023] AATA 3547 |
| Venue: | Administrative Appeals Tribunal |
| Venue reference no: | 2022/3436 |
| AAT member name: | Senior Member G Lazanas |
| Judgment date: | 31 October 2023 |
| Appeals on foot: | No |
| Decision outcome: | Unfavourable to the Commissioner |

Impacted advice

 The ATO is reviewing the impact of this decision on related advice and guidance products.

Relevant ruling

[Taxation Ruling TR 97/7 *Income tax: section 8-1 – meaning of ‘incurred’ – timing of deductions*](#)

Summary

This Decision impact statement outlines the ATO’s response to this case, about the deductibility under section 8-1 of the *Income Tax Assessment Act 1997* of a loss incurred by an individual on the sale of her home, which she acquired with the purpose of making a profit in a commercial manner.

All judgment paragraph references in this Decision impact statement are to the judgment of *Bowerman and Commissioner of Taxation* [2023] AATA 3547, unless otherwise indicated.

All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1997* (ITAA 1997).

Brief summary of facts

The facts of the case are unusual, and are as follows:

- The Applicant was a retiree who, with her husband, spent her career running successful businesses and investing in property. She lived in a large water-front matrimonial home which she described as ‘inconvenient’.¹
- In July 2015, within weeks of her husband’s passing, the Applicant entered into a contract to purchase an apartment (the Foreshore

¹ At [22–24].

Boulevard apartment) that was under development in a new complex located near her matrimonial home. The Applicant bought the Foreshore Boulevard apartment intending simpler living and planned to sell her matrimonial home to fund the acquisition of the apartment once built. Construction of the Foreshore Boulevard apartment was expected to be completed in June 2019.²

- In November 2017, after being advised that construction of the Foreshore Boulevard apartment would now extend into 2020, the Applicant acquired a similar off-the-plan apartment to be built at an earlier stage in the same development (the Dune Walk apartment).³
- In May 2018, when construction of the Dune Walk apartment was completed, the Applicant sold her matrimonial home and moved into the Dune Walk apartment.⁴ She resided there for approximately 2 years.⁵
- The Applicant considered, due to the attractiveness of the new development, that she could make a profit on the acquisition and resale of the Dune Walk apartment when it was time to move into her ultimate residence.⁶
- In July 2020, when construction of the Foreshore Boulevard apartment was completed, the Applicant sold the Dune Walk apartment, incurred a loss on the sale, and moved into the Foreshore Boulevard apartment, where she still resides.⁷ The Applicant needed to sell the Dune Walk apartment because she required the proceeds of sale to complete the purchase of the Foreshore Boulevard apartment.
- The Applicant objected to the Notice of Assessment in respect of the year ended 30 June 2020, claiming she had an allowable deduction for the loss (of \$265,936) on the sale of the Dune Walk apartment. The Commissioner disallowed the objection on the basis that the sale of the Dune Walk apartment was a mere realisation of a capital asset, and the loss was to be disregarded as a capital loss as the Dune Walk apartment was the Applicant's main residence. The Applicant subsequently filed an application for review with the AAT.

Issues decided by the Tribunal

The decision involved 3 issues.

Issue 1

The Applicant contended that the Dune Walk apartment was held on revenue account given that she acquired it for a profit-making purpose in a business operation or commercial transaction. The Applicant's argument relied upon the principles established in *Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18 (*Myer Emporium*). Accordingly, she asserted that the loss was incurred in gaining or

² At [25–30].

³ At [31].

⁴ At [42–43].

⁵ At [43].

⁶ At [32], [34], [37–38] and [86]. The Administrative Appeals Tribunal (AAT) found that was her primary purpose in acquiring the Dune Walk apartment. She was found to have acted in the same manner as a businessperson would have in relation to that transaction.

⁷ At [45–46] and [51].

producing assessable income and should thereby be deductible under paragraph 8-1(1)(a).⁸

The Commissioner contended that it was a capital loss as it did not satisfy the principles enunciated in *Myer Emporium*. Consequently, the Commissioner argued that the loss should be disregarded under the capital gains tax (CGT) main residence exemption within section 118-100.⁹

Issue 2

The Commissioner also submitted that the loss was of a private or domestic nature such that a deduction was prevented by paragraph 8-1(2)(b).

Issue 3

The Commissioner did not agree with the Applicant's contention that the loss was 'incurred' in the 2020 income year when the contract for the sale of the Dune Walk apartment became unconditional. The Commissioner instead submitted that the loss was incurred in the 2021 income year upon the completion of the conveyance.

Each of the 3 issues were decided against the Commissioner.

Tribunal's findings

While the AAT accepted that one of the Applicant's purposes for acquiring the Dune Walk apartment was to live in it, this was considered to be secondary to her more significant profit-making purpose.¹⁰ This profit-making purpose was dispositive of the first requirement of the test established by *Myer Emporium*.

In finding that the Applicant satisfied the second requirement established by *Myer Emporium*, the AAT found that she had demonstrated that she was a businessperson and was opportunistic in the purchase of the Dune Walk apartment.¹¹ The acquisition and sale of the apartment was considered to be a 'commercial transaction'.¹² The AAT's finding that the Applicant's acquisition and sale of the apartment was the sort of thing a business person would do was based on Steward J's consideration of that concept in *Greig v Commissioner of Taxation*.¹³ Issue 1 was resolved in favour of the Applicant on this basis.

Regarding Issue 2, the AAT reasoned that paragraph 8-1(2)(b) did not apply to prevent the Applicant from claiming a deduction given that the loss had not lost its connection with her profit-making intention. The reasoning turned on the finding that the Applicant's profit-making purpose was more significant than her intention to live in the apartment.¹⁴ The loss was found not to be essentially private or domestic in nature, having regard to the High Court's decision in *Commissioner of Taxation v Anstis*.¹⁵

In relation to Issue 3, the AAT accepted the legal basis of the Commissioner's submission that a loss was not 'incurred' until the settlement of the conveyance was completed in 2021.¹⁶ However, it found that the Commissioner was required to

⁸ At [65].

⁹ At [56], [66–68] and [81–84].

¹⁰ At [69–73].

¹¹ At [85].

¹² At [74–86].

¹³ At [85], citing *Greig v Commissioner of Taxation* [2020] FCAFC 25 at [235].

¹⁴ At [89–90].

¹⁵ [2010] HCA 40 at [32–38].

¹⁶ At [102–122].

assess the loss as having been incurred in 2020¹⁷ because the Commissioner was bound to do so by a statement in TR 97/7 on which the Applicant had relied.

ATO view of decision

The Commissioner notes that, consistent with the AAT's observation, both the facts of the case, and the result, were 'unusual'.¹⁸ The Commissioner acknowledges that the AAT's factual findings were open on the evidence.

The Commissioner's view is that the AAT's finely balanced conclusion in respect to Issue 1 was open on the particular facts of this case and was an available application of the established *Myer Emporium* principles. The decision must be read in the context of the clear statements of principle from the courts that a profit-making purpose alone is insufficient to engage the *Myer Emporium* principle.¹⁹ The decision applies the approach of Steward J in *Greig v Commissioner of Taxation*²⁰, which remains the most authoritative explanation of the concept of a 'business operation or commercial transaction' within the meaning of the principle established in *Myer Emporium*.

The Commissioner observes that cases concerning the application of the principles in *Myer Emporium* always turn on the facts of the particular case, and that the unusual factual findings in this case will limit the application of the AAT's decision in future cases.

In circumstances where the principles in *Myer Emporium* (that is, a profit-making purpose and a commercial element to the transaction) do not apply, the Commissioner will continue to apply the CGT rules to gains and losses on the sale of real property including a person's main residence. Accordingly, the Commissioner considers that this decision does not represent a departure from established principles concerning the sale of real property. Nor will it change how the ATO applies the CGT main residence exemption under section 118-100 where the principles in *Myer Emporium* do not apply.

The Commissioner reads the AAT's commentary regarding the non-operation of paragraph 8-1(2)(b) as having been informed by its finding that the Applicant's most significant reason for acquiring and selling the Dune Walk apartment was her profit-making purpose.

Regarding Issue 3, the Commissioner agrees with the AAT's observation that existing authority supports the conclusion that the Applicant did not 'incur' the loss until the contract of sale of the Dune Walk apartment had completed²¹ and that her loss was necessarily only realised²² upon the receipt of proceeds of settlement. The Commissioner takes a different view to the AAT as to the interpretation of TR 97/7, but is considering whether to update TR 97/7 to remove any perceived ambiguity or uncertainty as to its interpretation.

Implications for impacted advice or guidance

The ATO will review the impact of this decision, if any, on related advice and guidance products. We will review TR 97/7, considering whether to resolve any apparent inconsistency with legal principle as identified by the AAT, to clarify when a

¹⁷ At [102–122].

¹⁸ At [2] and [123].

¹⁹ See *Greig v Commissioner of Taxation* [2020] FCAFC 25 at [31], [141] and [225].

²⁰ See *Greig v Commissioner of Taxation* [2020] FCAFC 25 at [186–253].

²¹ At [121].

²² Being a precondition identified in *Sole Luna Pty Ltd as trustee for the PA Wade No 2 Settlement Trust v Commissioner of Taxation* [2019] FCA 1195 at [65].

loss (as distinct from an outgoing) has been 'incurred' for the purposes of subsection 8-1(1).

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 13 March 2024

Due date: 12 April 2024

Contact officer details have been removed as the comments period has expired.

Legislative references

ITAA 1997 8-1

ITAA 1997 8-1(1)(a)

ITAA 1997 8-1(2)(b)

ITAA 1997 118-100

Case references

Bowerman and Commissioner of Taxation [2023] AATA 3547; 2023 ATC 10-693

Commissioner of Taxation v Anstis [2010] HCA 40; 241 CLR 443; 85 ALJR 122; 272 ALR 1

Commissioner of Taxation v Myer Emporium Ltd [1987] HCA 18; 163 CLR 199; 61 ALJR 270; 71 ALR 28; 18 ATR 693; 87 ATC 4363

Greig v Commissioner of Taxation [2020] FCAFC 25; 275 FCR 445; 2020 ATC 20-733; 111 ATR 342

Sole Luna Pty Ltd as trustee for the PA Wade No 2 Settlement Trust v Commissioner of Taxation [2019] FCA 1195; 2019 ATC 20-703; 110 ATR 307

ATO references

NO: 1-TCSKJYW

ISSN: 2653-5424

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).