



Taxation Determination

Income tax: what amount of deduction is available under section 40-25 of the *Income Tax Assessment Act 1997* for the decline in value of copyright in patient records in respect of arrangements similar to those described in Taxpayer Alert 2004/5?

Preamble

*The number, subject heading, date of effect and paragraphs 1 to 8 of this Taxation Determination are a 'public ruling' for the purposes of Part IVA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner.*

[Note: This is a consolidated version of this document. Refer to the ATO Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

1. Nil, as the cost of the Intellectual Property – Copyright is nil under section 40-180 of the *Income Tax Assessment Act 1997* (ITAA 1997).
2. This determination does not deal with arrangements that differ materially from those described below. For the purposes of this determination, an arrangement similar to those described in Taxpayer Alert 2004/5 has the following features.
3. Company A carries on the business of medical practice that employs practitioners who create patient records as part of their daily work. On 1 July 2001, Company A purchased all of the business assets of another medical practice from an unrelated entity. The Sale of Practice Agreement specified that all of the assets of the business were transferred, including specifically the goodwill of the business, the furniture and fittings and the patient records.
4. The consideration payable under the Sale of Practice Agreement for the business assets was a specific sum, for example, \$2.1 million. A specific amount was attributed to the goodwill, for example, \$2 million with the balance attributed to the furniture and fittings that is, \$100,000. No amount was attributed to patient records or any copyright subsisting in the patient records. Company A did not recognise any copyright in the patient records as an asset in its statutory accounts and did not claim an income tax deduction for the copyright as a depreciating asset.
5. On 1 July 2002, Company A transferred the record keeping function of its medical practice business to a fully owned subsidiary, Company B. Company A and Company B had not elected to consolidate. Company B claims a deduction under the capital allowance provisions for the entire amount it paid as consideration for the assignment of the patient records and any copyright subsisting in the records.

6. Company A is not taken to have paid an amount under section 40-180 of the ITAA 1997 to hold the copyright in the patient records as a result of the acquisition of other medical practices.

7. For the purpose of section 40-180 of the ITAA 1997, the cost of any new copyright generated during the carrying on of Company A's business is nil. Any expenditure incurred in the general business activities through which the copyright would normally be generated is generally deductible under the general deductions provisions in section 8-1 of the ITAA 1997.

8. The cost of a depreciating asset where there is automatic rollover relief under section 40-340 is prescribed by item 6 in the table in subsection 40-180(2) of the ITAA 1997. The first element of cost for the copyright in the patient records for Company B is therefore nil.

Explanation

Does copyright subsist in the patient records?

9. In respect of those patient records (the general practitioner's notes/records relating to a patient's consultation) that are considered to be original literary works within the meaning of section 32 of the *Copyright Act 1968*, the Commissioner accepts that copyright may subsist in those records. *Breen v. Williams* (1996) 186 CLR 71; (1996) 138 ALR 259 is support for the position that the general practitioner's notes/records relating to a patient's consultation may be literary works for the purposes of the *Copyright Act 1968*. According to Gummow J (138 ALR 259 at 300, 186 CLR 71 at 127):

The composition by the medical practitioner of the material shown on the records may have involved the authorship by him of what, whilst not of literary quality, were nevertheless literary works for the purposes of copyright law. This would vest in him various exclusive proprietary rights, including that to reproduce the work in a material form.

9A. However the decision in *Primary Health Care Limited v. Federal Commissioner of Taxation* (2010) 186 FCR 301; 2010 ATC 20-181; (2010) 76 ATR 749 (*Primary Health Care*) demonstrates the evidentiary difficulties that exist in proving the existence of copyright in patient records. Justice Stone said (186 FCR 301 at 314; 2010 ATC 20-181 at 10924; 76 ATR 749 at 764):

... to show that copyright subsisted in the patient records...[the taxpayer] must not only identify the works in which it says copyright exists but must also show that those works were original literary works of identified authors who are qualified persons ...

On the facts of that case, Justice Stone was unable to find evidence to support the existence of copyright in the majority of the patient records.

Who owns the copyright?

10. Where the general practitioners are employed by Company A under a contract of service, Company A owns the copyright in the patient records (the general practitioner's notes/records relating to a patient's consultation) under subsection 35(6) of the *Copyright Act 1968*. Note, the ownership of specialist reports such as pathology reports or x-rays may vest in the patient according to Dawson and Toohey JJ in *Breen v. Williams* (138 ALR 259 at 270, 186 CLR 71 at 88):

The appellant did not claim ownership of the actual documents comprising her medical records. It is understandable that she did not do so, because they do not include any

documents obtained on her behalf and paid for by her such as x-ray photographs or pathology reports, the ownership of which she may well be able to claim.

11. Company A will have acquired the copyright in the patient records in which copyright subsists by the operation of the Sale of Practice Agreement. In such cases where copyright is assigned via a contract, for example to Company A, Company A owns all of the copyright originally owned by the owner of the acquired business.

11A. However, it is not necessary for any copyright in the patient records to be transferred to Company A in order for it to control the patient records and to carry on its business. In *Primary Health Care*, Justice Stone found that, to the extent to which copying of the patient records may have been necessary, that copying may be possible through the copyright owner 'giving, expressly or by implication and independent of the sale agreement, gratuitous permission (a licence) for the copying' (186 FCR 301 at 349; 2010 ATC 20-181 at 10953; 76 ATR 749 at 796).

What is the nature of copyright in patient records?

12. Coexisting as the physical patient record are three separate components:

- (i) the medium on which the record is stored;
- (ii) the information or know how contained within the records; and
- (iii) any copyright in the records.

13. When considering the nature of information as compared to the medium on which the record is stored, Lord Radcliffe in *Rolls-Royce Ltd v. Jeffrey (Inspector of Taxes), Same v. Inland Revenue Commissioners* [1962] 1 All ER 801 held that the know how itself is the valuable asset. The essential characteristic of the transaction was considered to be the passing across of know how.

14. The decision in *FC of T v. United Aircraft Corporation* (1943) 68 CLR 525 supports the position that information or know how about existing or potential clients contained in patient records is not property. In the *United Aircraft Corporation* case Latham CJ said, 'Knowledge is valuable, but knowledge is neither real nor personal property' (68 CLR 525 at 534).

15. The mere fact that title to property (for example, the copyright that subsists in the patient records) may pass does not necessarily determine the outcome of the characterisation. The Full Court of the Supreme Court of Queensland in *Pancontinental Mining Ltd v. Commissioner of Stamp Duties (Qld)* 88 ATC 4190; (1988) 19 ATR 948 decided that the passing of title to property was merely ancillary or incidental to what it regarded as the provision of a service.

16. This determination deals with a transaction which facilitates the transfer of valuable knowledge or information. The essential character of the transaction by which the information is transferred is not the transfer of a 'literary work' (analogous to the sale of copyrighted works such as books or computer programs). Rather, the transaction facilitates the sale and purchase of a medical practice business. In this regard, the essential character of the transaction is the passing across of information or know how about existing or potential clients contained in the patient records to ensure effective control, possession and enjoyment of the medical practice passed from the owners of the acquired medical practices to Company A.

17. By the very nature of the patient records, the rights held as copyright owner in these documents remained a component of the patient records separate from the information or

know how contained in the records. The rights held as copyright owner provided no significant net benefit or significant net inconvenience to their owner. They were of no commercial value and were merely ancillary or incidental to the conduct of the business of the medical practice.

18. The rights of the copyright owner under Commonwealth Law were ancillary or incidental to the sale of the medical practice to Company A and remained ancillary or incidental to the conduct of the business of the medical practice following their transfer to Company A.

What is the deduction available to Company A under Division 40 of the ITAA 1997 for the decline in the value of copyright in the patient records it acquired?

19. The rights an owner of copyright holds under a Commonwealth law is an item of intellectual property pursuant to the definition of that term in subsection 995-1(1) of the ITAA 1997. An item of intellectual property is a depreciating asset pursuant to the definition of that term in section 40-30 of the ITAA 1997.

20. The costs of a depreciating asset include capital amounts that are taken to have been paid to hold the asset (section 40-185 and 40-220 of the ITAA 1997). If an amount is paid for two or more things that include at least one depreciating asset, the cost of the depreciating asset must take into account that part of the amount paid that is reasonably attributable to the depreciating asset (section 40-195 of the ITAA 1997).

21. The first element of the depreciating asset's cost is worked out as at the time when the taxpayer began to hold the depreciating asset (section 40-180 of the ITAA 1997). The amount of the asset's cost worked out under section 40-180 is either; if a particular case stated in the table to the section applies, then the amount of cost is the amount specified in the table; or the amount the taxpayer has paid or is taken to have paid to hold the asset (such as its acquisition price).

21A. In *Primary Health Care*, Justice Stone accepted that, where the parties agreed in the sale contract to a full apportionment of purchase price to the goodwill and named assets which did not include an allocation to copyright, there was no reason for the Court to interfere with the apportionment made by the parties on entering into the contract.

22. Company A is not taken to have paid an amount under section 40-180 of the ITAA 1997 to hold the copyright in the patient records as a result of the acquisition of the medical practice. The amount of cost of the depreciating asset is nil. The definition of the word 'amount' in subsection 995-1(1) of the ITAA 1997 includes a nil amount. The deduction available to Company A for the decline in value of the depreciating asset is therefore nil.

23. In order to take effective control, possession and enjoyment of the acquired medical practice, the patient records would be required by Company A for the information they contained. Company A would consequently seek from the owner of the medical practice acquired delivery of the information contained in the patient records. However, it does not follow that the transfer of an interest in any copyright in those patient records would similarly be required.

24. The ability of Company A to use the information in the patient records in its business was made available by access to the physical medical records. Access to the information was obtainable by Company A through a supply of a copy of the patient records by the previous owner of the acquired medical practice.

25. [Omitted.]

What is the deduction available to Company B under Division 40 of the ITAA 1997 for the decline in value of the copyright in the patient records acquired from Company A?

26. Subdivision 40-D of the ITAA 1997 contains the general balancing adjustment rules that apply to depreciating assets whose decline in value is worked out under the general provisions of Subdivision 40-B of the ITAA 1997. Under these balancing adjustment rules, the difference between the asset's termination value and its adjustable value is either included in, or deducted from, the holder's assessable income for the income year in which the balancing adjustment event occurs (section 40-285 of the ITAA 1997). However, subsection 40-345(1) of the ITAA 1997 prevents section 40-285 from applying so that no balancing adjustment arises if the taxpayer meets the conditions for automatic roll-over relief set out in subsection 40-340(1) of the ITAA 1997.

27. As Company A and B are members of the same wholly-owned group, the conditions of subsection 40-340(1) of the ITAA 1997 are satisfied and thus there is automatic roll-over relief for depreciating assets transferred to Company B.

28. The effect of section 40-345 of the ITAA 1997 is that the transferee will inherit the same method and effective life of the depreciating asset that the transferor was using. The cost of the depreciating asset to the transferee where there is rollover relief under section 40-340 is prescribed by item 6 in the table of subsection 40-180(2) of the ITAA 1997 as the adjustable value of the asset to the transferor just before the balancing adjustment event occurred.

29. As outlined above, Company A incurred no capital expenditure in acquiring copyright.

30. The amount of Company B's cost for the copyright in patient records as prescribed by item 6 in the table of subsection 40-180(2) of the ITAA 1997 is nil. Consequently the deduction for the decline in value of the depreciating asset available to Company B under Division 40 of the ITAA 1997 would be nil.

31. In relation to any new copyright generated during the business activities of Company A, the cost of this copyright would also be nil. Any expenditure incurred in the general business activities through which the copyright would normally be generated is deductible under the general deductions provisions in section 8-1 of the ITAA 1997. Therefore the adjustable value of Company A's copyright at the time of transfer to Company B would be an amount of nil.

Date of Effect

32. This Determination applies to years commencing both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation12 January 2005

Previous draft:
TD 2004/D44

Related Rulings/Determinations:
TR 92/1; TR 92/20; TR 97/16

Subject references:

- capital allowances
- copyright
- goodwill
- intellectual property

Legislative references:

- ITAA 1997 8-1
- ITAA 1997 Div 40
- ITAA 1997 Subdiv 40-B
- ITAA 1997 40-25
- ITAA 1997 40-30
- ITAA 1997 40-180
- ITAA 1997 40-180(2)
- ITAA 1997 40-185
- ITAA 1997 40-195
- ITAA 1997 40-220
- ITAA 1997 Subdiv 40-D
- ITAA 1997 40-285
- ITAA 1997 40-340
- ITAA 1997 40-340(1)
- ITAA 1997 40-345
- ITAA 1997 40-345(1)
- ITAA 1997 995-1(1)
- TAA 1953 Pt IVA
- Copyright Act 1968

- Copyright Act 1968 32
- Copyright Act 1968 35(6)

Case references:

- Breen v. Williams (1996) 186 CLR 71; (1996) 138 ALR 259
- FC of T v. United Aircraft Corporation (1943) 68 CLR 525
- Pancontinental Mining Ltd v. Commissioner of Stamp Duties (Qld) 88 ATC 4190; (1988) 19 ATR 948
- Primary Health Care Limited v. Commissioner of Taxation (2010) 186 FCR 301; 2010 ATC 20-181; 76 ATR 749
- Rolls-Royce Ltd v. Jeffrey (Inspector of Taxes), Same v. Inland Revenue Commissioners [1962] 1 All ER 801

Other references:

- Taxpayer Alert TA 2004/5
- Decision Impact Statement VID911/2005, NSD2169/2005, NSD1790/2005, NSD2467/2005, NSD193/2006 & NSD195/2006: Primary Health Care Limited v. Commissioner of Taxation

ATO references

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