TR 95/3 - Income tax and capital gains: application of subsections 160M(6) and 160M(7) to restrictive covenants and trade ties

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This document has changed over time. This is a consolidated version of the ruling which was published on *29 October 2006*

Generated on: 5 June 2026, 04:09:57 AM

Taxation Ruling
Capital gains: application of subsections 160M(6) and 160M(7) to restrictive covenants and trade ties

other Rulings on this topic:

IT 105; IT 2328; TD 93/238; TR 92/3; TR 1999/16

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

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What this Ruling is about

Class of person/arrangement

1. This Ruling is one in a series of Taxation Rulings and Taxation Determinations which provide interpretations of particular aspects of subsections 160M(6) and (7) of Part IIIA of the *Income Tax Assessment Act 1936* (the Act).

2. The Ruling considers the capital gains tax implications of consideration received for granting restrictive covenants and trade ties. It outlines the implications both before and after the amendments to subsections 160M(6) and (7) made by the *Taxation Laws Amendment Act (No 4) 1992* (the TLAA (No 4)) effective from 26 June 1992.

3. The Ruling also explains the implications of the decisions of the Full High Court of Australia in *Hepples v. FC of T* (1991) 173 CLR 492; 91 ATC 4808; (1991) 22 ATR 465 (*Hepples'* case) and of the Federal Court of Australia (Heerey J) in *Paykel v. FC of T* 94 ATC 4176; (1994) 28 ATR 92 (*Paykel's* case) for the treatment of consideration received in respect of restrictive covenants.

4. The types of covenants addressed in this Ruling are:

   (a) restrictive covenants in the context of either contracts of service between employer and employee or employment-related contracts; and

(b) agreements between a vendor and purchaser for the sale of business by contract where the vendor agrees not to compete in trade; and

(c) (i) exclusive trade ties in which an agreement is entered into by a business entity not to trade within a specified geographical region, or for a period of time or both; or

(ii) exclusive dealing contracts tied to a product or to the supply of services.

5. The Ruling does not cover:

(a) in any detail, the possible assessability of consideration received for restrictive covenants under general income tax provisions (refer to paragraphs 14-19);

(b) exclusions in section 160MA; and

(c) the possible application of the miscellaneous roll-over provisions in Division 17 of Part IIIA to subsections 160M(6) and (7).

6. For the purposes of this Ruling:

(a) a 'restrictive covenant' is 'an agreement between two or more parties to refrain from doing some act or thing'; and

(b) the word 'received' is used to include 'entitled to receive'.

Ruling

Restrictive covenants and goodwill

Restrictive covenant may be a separate asset from goodwill

7. [Deleted]

Restrictive covenant has value

8. [Deleted]

Apportionment of consideration

9. [Deleted]

Restrictive covenant may form part of goodwill

10. [Deleted]

Restrictive covenants pre 1992 amendments made by the TLAA (No 4)

11. [Deleted]

Restrictive covenants post 1992 amendments made by the TLAA (No 4)

12. [Deleted]

Covenants relating both to current employment and afterwards

13. The proper taxation treatment of consideration for granting a restrictive covenant that relates both to a period of current employment and to a period after the end of that employment differs before and after the 1992 amendments made by the TLAA (No 4).

Pre 1992 amendments made by the TLAA (No 4)

14. We consider that if a restrictive covenant relates both to a current period of employment and to a period after the end of that employment, the portion of the consideration received that relates to the period of employment is assessable under subsection 25(1) or paragraph 26(e). That portion also comes within the former subsection 160M(7) if the restrictive covenant was entered into before 26 June 1992. This assumes (following *Hepples*) that there is an existing asset at the time of entry into the covenant - e.g. trade secrets, trade connections or goodwill of value. The covenant must affect an existing asset, that is, not an asset which is, as McHugh J stated in *Hepples*, future property (91 ATC at 4836; 22 ATR at 498). Subsection 160ZA(4) applies to reduce any capital gain to the extent that the amount is assessable as ordinary income.

15. Neither the former subsection 160M(6) nor the former subsection 160M(7) applies to the portion of the consideration that relates to the period after the end of the employment. If the restrictive covenant was granted before 26 June 1992, that portion of the consideration is not subject to Part IIIA.

16. If the contract does not apportion the payment, the amount reasonably attributable to the period of employment needs to be estimated by the parties to the contract, according to the terms of the contract and any other relevant facts. If it is not possible to make any reasonable apportionment, the whole amount is assessable under the former subsection 160M(7) if the restrictive covenant was entered into before 26 June 1992.

Post 1992 amendments made by the TLAA (No 4)

17. Again, if a restrictive covenant relates both to a current period of employment and to a period after the end of that employment, the portion of the consideration received that relates to the period of employment is assessable under subsection 25(1) or paragraph 26(e). That portion also comes within the new subsection 160M(6) (with the new subsection 160M(7) as a backup) if the restrictive covenant was entered into on or after 26 June 1992. However, the application of the new subsection 160M(7) requires that there is an existing asset at the time of entry into the covenant - e.g. trade secrets, trade connections or goodwill of value. Subsection 160ZA(4) applies to reduce any capital gain to the extent that the amount is assessable as ordinary income.

18. The portion of the consideration that relates to the period after the end of the employment is assessable under the new subsection 160M(6).

19. If the contract does not apportion the payment, the amount reasonably attributable to the period of employment needs to be estimated by the parties to the contract, according to the terms of the contract and any other relevant facts. If it is not possible to make any reasonable apportionment, the whole amount is assessable under the new subsection 160M(6) if the restrictive covenant was entered into on or after 26 June 1992.

Our view of the *Hepples* and *Paykel* cases

20. In our opinion, the decision of the High Court in *Hepples* applies only to those agreements between employers and employees that were entered into before 26 June 1992 (the date from which the relevant amendments made by the TLAA (No 4) apply).

21. The former subsection 160M(6) was interpreted by the Full Court of the Federal Court of Australia in *Hepples* to apply only if assets are created out of, or over, existing assets (the 'carving out' approach). In *Reuter v. FC of T* 93 ATC 4037 at 4051; (1993) 24 ATR 527 at 545, Hill J found that in *Hepples* the judgment of McHugh J (with which Mason CJ agreed) represented the majority view of the High Court on the aspect of subsection 160M(6) being limited to the 'carving out' approach. We therefore accept that the former subsection 160M(6) applies only to assets created out of, or over, an existing asset. Accordingly, this subsection does not apply to restrictive covenants in the context of agreements between employers and employees, because there is no existing asset out of, or over, which the new covenant and rights are carved or created.

22. We do not consider the *Paykel* decision to be authority for the view that the former subsection 160M(7) applies only in relation to an asset owned by the taxpayer.

Aspects of subsection 160M(6)

23. The new subsection 160M(6) operates only if the other provisions of Part IIIA (excluding subsection 160M(7)) do not apply.

24. In the case of a restrictive covenant, the person who receives the consideration for the covenant creates certain rights on entering into the covenant. Those rights comprise an asset in terms of section 160A.

Non-resident recipients

25. A non-resident who receives consideration under a restrictive covenant before the 1992 amendments made by the TLAA (No 4) is not subject to the capital gains tax provisions. This is because we now consider that there is no disposal of a taxable Australian asset in terms of section 160T. After the 1992 amendments, paragraphs 160T(1)(l) and (m) provide that the newly created asset for subsection 160M(6) is deemed to be a taxable Australian asset. The non-resident is subject to tax on any capital gain.

Aspects of subsection 160M(7)

Underlying Asset

26. Subsection 160M(7) applies in relation to an act, transaction or event affecting 'an asset', where money or other consideration is received by reason of the act, transaction or event. This underlying asset is an asset that falls within section 160A whether it was acquired before 20 September 1985 or on or after that date. In the case of a restrictive covenant, the underlying asset is generally the goodwill of the business. Goodwill is an asset for the purposes of Part IIIA by the former paragraph (a) of the definition of 'asset' in section 160A (it is a form of property) and now paragraph (aa) of section 160A.

Notional or fictional asset for subsection 160M(7)

27. If subsection 160M(7) applies to the grant of a restrictive covenant it is not the underlying asset, namely the goodwill, which is disposed of, but a notional or fictional asset that arises by operation of that subsection. The time when this notional asset is deemed to have been created and disposed of is, in our view, the time of the act, transaction or event affecting the existing underlying asset, not the

time the money or other consideration is received. In the case of restrictive covenants, it is the date of the entry into the covenant.

Relevant act, transaction or event

28. For subsection 160M(7) to apply, either an act or transaction must have taken place in relation to an asset, or an event 'affecting' an asset must have occurred, and money or other consideration is received by reason of the act, transaction or event. It is the act, transaction or event which most directly relates to the consideration received which is the subject of the subsection. The act, transaction or event must take place 'in relation to' or 'affect' an existing asset. There must be a nexus between the act, transaction or event giving rise to the receipt, or entitlement to receive the amount, of money or other consideration and an asset. In the case of a restrictive covenant, the relevant act, transaction or event is the entering into of the covenant.

Consideration

29. We consider that the phrase 'money or other consideration' in subsection 160M(7) is interpreted more widely than the terms 'money' or 'property other than money' as they appear in section 160ZD and section 160ZH. This broad scope is supported by the context of subsection 160M(7) and its place in the scheme of the Act. The purpose and effect of subsection 160M(7) extends to recognise as consideration the benefit of mutual promises flowing to the parties, even if those promises are not in themselves property.

Non-resident recipients

30. We now accept that the former subsection 160M(7) does not apply to non-residents.

31. Restrictive covenants entered into by non-residents after the 1992 amendments made by the TLAA (No 4) are specifically subject to tax under paragraph 160T(1)(l).

Date of effect

32. Subject to the exception mentioned in paragraph 33 below, this Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

33. Paragraph 29 of this Ruling states the view that 'consideration' for the purposes of subsection 160M(7) is not limited to money or property. Rather, 'consideration' extends to measurable mutual promises flowing to the parties, even if those promises are not in themselves property. This interpretation is less favourable to taxpayers than our earlier view that 'consideration' was limited to money or property. Our earlier view appears in the minutes of the meeting of the Capital Gains Tax Subcommittee of the Taxation Liaison Group that was held on 2 June 1993. The broader view taken in this Ruling applies only to consideration other than money or property that is received after the date of this Ruling.

Note: The Partial Withdrawal to this Ruling that issued on 24 November 1999 applies from 24 November 1999.

Explanations

General law

34. Restrictive covenants may at general law amount to a covenant in restraint of trade. In the leading House of Lords decision of *Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd* [1968] AC 269 (at 298), Lord Reid said that a 'restraint of trade' implies that a person has contracted 'to give up some freedom which otherwise he would have had': (approved and followed in Australia by the High Court in *Amoco Australia Pty Limited v. Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288).

35. Examples of restrictive covenants include:

(a) a covenant by an employee to an employer in which the employee promises to refrain from doing some act (e.g. not to disclose special processes, trade connections and trade secrets of the employer);

(b) a restrictive (negative) covenant preventing an employee from competing in another business or opening a new business;

(c) a restriction on competition enforced by an agreement separate from an employment agreement which comes into effect after employment ceases;

(d) a contract of employment stipulating exclusive service by the employee during its term; and

(e) a covenant given by a sub-contractor, a professional or some other individual (such as a sportsperson or an entertainer) to endorse exclusively products or services.

Employment related covenants

36. As to the characterisation of employment related covenants, and payments made under a contract of service, Mitchell J in *FC of T v. Woite* 82 ATC 4578; (1982) 13 ATR 579 (*Woite's* case) referred to the decision of the English Court of Appeal in *Jarrold v. Boustead* (1964) 3 All ER 76 (*Jarrold's* case).

37. In *Jarrold* the capital amount received was for giving up an amateur status for life, whereas in *Woite* the amount was for depriving the player of an opportunity which would otherwise have been open to him. The case of *Woite* was a decision cited with approval by Heerey J in *Paykel* with the observation that had the payment been followed by a contract for services then the character of the restrictive covenant may have changed.

38. It is a question of fact whether the amount is received for the one restrictive covenant or for separate positive and negative covenants, where at least part of the receipt may represent assessable income. Refer to Example 3.

Exclusive trade ties and agreements not to compete in trade

39. A restraint of trade which is valid at common law and which is not held to be an unreasonable restraint by the courts, entitles the covenantee to protect an interest. This will usually be an interest in property, typically the goodwill of a business (see *Bacchus Marsh Concentrated Milk Co Ltd (in liquidation) and Anor v. Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 438).

40. Examples of exclusive trade ties, exclusive dealing contracts and agreements not to compete in trade include:

(a) an agreement restricting competition where the entire payment under the covenant is the non competition monetary value and no amount is attributable to goodwill for the sale of a business;

(b) an agreement to take supplies of a product exclusively from a particular supplier for a particular period; or

(c) an agreement to sell a specific product exclusively from particular premises.

41. Trade ties may contain two aspects, both negative and positive. Kitto J in *BP Australia Limited v. FC of T* (1964) 110 CLR 387; (1964) 13 ATD 268 stated at CLR 412-413; ATD 274:

> '...a promise by a service station operator not to deal with oil companies other than the appellant or its allies was only the negative side of the substantial positive advantage which...was the purpose and practical effect of the agreement to produce, namely the advantage of a practical certainty that the whole of the custom of the service station, for motor spirit, would be given to the appellant or its allies for the agreed period; and what the appellant really paid its money for was that positive advantage.' (Refer to Example 5.)

Restrictive covenants and sale of a business

42. [Deleted]

Restrictive covenant may be a separate asset from goodwill

43. [Deleted]

44. [Deleted]

45. [Deleted]

Apportionment of consideration

46. [Deleted]

47. [Deleted]

48. [Deleted]

49. [Deleted]

50. [Deleted]

51. [Deleted]

52. [Deleted]

53. [Deleted]

54. [Deleted]

55. [Deleted]

56. [Deleted]

Application of subsection 160M(6)

Pre 1992 amendments made by the TLAA (No 4)

An asset in terms of subsection 160M(6)

57. The former subsection 160M(6) provided that a disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset by the person who disposed of the asset. The person who disposed of the asset is deemed not to have paid or given any consideration or incurred any incidental costs or expenditure other than the amount of the non-deductible incidental costs of the disposal of the asset.

58. The 'carving out' approach referred to in paragraph 21 of this Ruling implies that the underlying asset from which another asset is carved out must exist before the carving out.

59. In the High Court case of *Hepples*, Toohey J agreed with Mason CJ and with Deane and McHugh JJ that subsection 160M(6) did not apply because there must be an asset which is created and disposed of. He states that 'it is necessary to identify something the taxpayer owned or something that the taxpayer did in the capacity of owner, which is the subject of disposal': (91 ATC at 4827; 22 ATR at 487). The mere agreement not to exercise personal rights otherwise available to him is not sufficient to attract subsection 160M(6): (91 ATC at 4828; 22 ATR at 488). Thus, subsection 160M(6) was held not to apply.

60. Accordingly we consider that the former subsection 160M(6) does not apply to any transaction where an amount (whether money or property) is received for entering into any restrictive covenant, in the context of agreements between employers and employees.

Post 1992 amendments made by the TLAA (No 4)

61. The expanded definition of 'asset' in subsection 160A extends to created personal rights, since they would be 'any other right whether or not legal or equitable and whether or not a form of property'. Goodwill or any other form of incorporeal property is specifically included. The Explanatory Memorandum to the Bill that later became TLAA (No 4) states at page 65 that:

> 'To be an asset, a right must be recognised and protected by law - a court of law or equity will assist in enforcing it. Personal liberties and freedoms, such as the freedom to work or trade or to play amateur sport, are not legal or equitable rights and accordingly will not be assets for CGT purposes. [But this does not mean that money or other consideration received in relation

to personal liberties and freedoms cannot be taxed under the CGT provisions...]'.

62. In the context of the giving of a restrictive covenant, an asset is created and vested in another person as described in paragraphs 160M(6)(a) and (b). That asset is the contractual right brought into existence by the entering into the contract or deed. If the facts in *Hepples* applied after 25 June 1992, Mr Hepples would have created the right to enforce the restrictive covenant and would have acquired it immediately before disposing of it to his employer. The employer would have received the benefit of that contractual right which would have vested in the employer on the signing of the agreement or deed by the parties. The effect of the covenant in that case would be to protect the goodwill of the employer Hunter Douglas Limited and the benefit of the covenant would enhance the goodwill of the employer and become part of that goodwill.

New subsections 160M(6) to 160M(6D)

63. The new subsections 160M(6) to (6D) apply to an asset which is created by a person if:

- that asset is not a form of corporeal property; and
- on the creation of the asset it is **vested** in another person.

64. The new subsection 160M(6) operates only if the other provisions of Part IIIA (excluding subsection 160M(7)) do not apply.

65. In the case of a restrictive covenant, the person who receives the consideration for the covenant creates, in terms of subsections 160M(6) to (6D), certain rights on entering into the covenant. Those rights comprise an asset that is not a form of corporeal property and which, on its creation, vests in the payer. The recipient of the consideration is taken to have acquired, and to have commenced to own, the asset immediately before the time of the making of the covenant (paragraph 160M(6A)(a) and subparagraph 160U(6)(a)(ii)). The recipient is then taken to have disposed of the asset to the payer at the time of the making of the covenant (paragraph 160M(6A)(b) and subparagraph 160U(6)(a)(iii)). The consideration for the disposal of the asset is the amount received for granting the restrictive covenant.

66. The person creating the asset is taken not to have paid or given any consideration in respect of the acquisition of the asset, or incurred any costs or expenditure other than non-deductible expenditure incurred incidental to the disposal: paragraph 160M(6A)(c) and subsection 160ZH(6).

67. Paragraph 160ZD(2)(a) does not apply to deem any market value consideration in respect of the disposal of the asset to have been

received by the person creating the asset if there is no form of consideration received: paragraph 160M(6A)(d) and paragraph 160ZD(2)(a). The Explanatory Memorandum states at page 58:

> 'This will ensure that the person who creates the asset will only have a capital gain if he or she actually receives as consideration an amount of money or property for creating that asset'.

68. However, paragraph 160ZD(2)(b) and paragraph 160ZD(2)(c) are not so excluded, where the consideration received cannot be valued, or the consideration received is greater or less than the market value of the asset at the time of the disposal, and the taxpayer and the other person to whom the asset is disposed of are not dealing with each other at arm's length in connection with the disposal.

69. The word 'vested' as used in paragraph 160M(6)(b) is described in the Explanatory Memorandum as having:

> '...the broader meaning of the person being placed in possession or control of the asset. The use of this broader meaning is dictated by the fact that "asset" will now include rights which are not forms of property'.

Application of subsection 160M(7)

The underlying asset in subsection 160M(7)

70. In *Hepples,* the Full Federal Court (90 ATC 4497; (1990) 21 ATR 42) and the High Court considered the application of subsections 160M(6) and(7) to the payment from an employer to an employee to accept a restrictive covenant.

71. Their Honours in the Full Federal Court and the High Court identified a number of possible assets including:

(a) Goodwill of the employer. All the judges of the High Court (except Gaudron J) regarded the relevant asset as being the goodwill of the employer.

(b) The rights of the employer under the existing employment contract (per Gummow J, 90 ATC at 4519-4520; 21 ATR at 69); compare with Gaudron J in the High Court at 173 CLR 528; 91 ATC 4828; 22 ATR 488 where her Honour speaks of the right of the employer and its associated companies to enforce the promise of the appellant as the relevant asset for subsection 160A).

(c) Trade connections and trade secrets.

72. Under the former subsection 160M(7), in the case of a restrictive covenant, the most relevant underlying asset is likely to be the pre-existing goodwill of the payer.

73. However, depending upon the facts of each individual case there may be underlying assets other than goodwill. For example, the shares in the *Paykel* case were argued to be underlying assets in respect to which the lump sum payment might be apportioned. See also the English Court of Appeal decision in *Kirby v. Thorn EMI* [1987] BTC 462; (1987) 60 TC 519; [1987] STC 621; [1988] 2 All ER 947. Also, in the case of *Tuite v. Exelby & Ors* 93 ATC 4293; (1992) 25 ATR 81 the plaintiffs were entitled to damages for the reduction in the capital value of their shares.

74. It is immaterial whether the underlying asset was acquired before 20 September 1985 or on or after that date; provided that the underlying asset falls within the definition of 'asset' in section 160A.

75. Entering into an exclusive trade tie, exclusive dealing contract or an exclusive agreement not to compete in trade, including a covenant granting a right to market a particular product, is an act, transaction or event affecting the goodwill of the business, provided the nexus requirement (see paragraphs 83 to 96) is met.

76. The majority of the High Court in *Hepples* (Mason CJ, Deane, Brennan and McHugh JJ) held that subsection 160M(7) did not apply to the receipt of consideration for the restrictive covenant. Their Honours determined that there must be an existing asset, and the relevant act, transaction or event must have taken place, in the words of the subsection, 'in relation to', or have 'affected' that existing asset: (see McHugh J, 173 CLR at 544; 91 ATC at 4838; 22 ATR at 501).

The notional asset

77. McHugh J in *Hepples* states that the concluding words of paragraph 160M(7)(b) show that paragraph is not concerned with the actual or deemed disposal of an existing asset; it deems a relevant act or transaction in relation to, or an event affecting, an existing asset to be the disposal of a notional asset: (91 ATC at 4834; 22 ATR at 495).

78. The asset which is disposed of by the operation of subsection 160M(7) was considered by Hill J in *Cooling's* case, who stated (90 ATC at 4493; 21 ATR at 36):

> '...the **consequence** of the operation of the subsection is to constitute or deem there to be a disposal of an asset created by the disposal. The effect of that deeming would seem to be that the "asset" created by the disposal is not an actual asset (and in particular is not the asset referred to in para. (a) of the subsection) but a fictitious asset.'

79. It follows that the asset that arises by the operation of subsection 160M(7) is a 'fictitious' asset. Accordingly, the concessional treatment afforded by section 160ZZR is not available in respect of

the disposal of this notional asset. The goodwill for which the concessional treatment operates is in fact the underlying asset for the purposes of subsection 160M(7).

Ownership of the asset

80. On the question whether the asset needs to be owned by the taxpayer, Heerey J found in *Paykel* that the reasoning of Deane J in the High Court decision in *Hepples* was persuasive on the point that the asset must be an asset of the taxpayer. His Honour also referred to the dissent of Hill J in that case in the Full Federal Court and his discussion of the issue in *FC of T v. Cooling* 90 ATC 4472 at 4491-4494; (1990) 21 ATR 13 at 34-38. However, we respectfully consider that there is greater judicial support for the contrary view to be found in the *Hepples'* judgments.

81. Of the judgments of the Full High Court, only Deane J expressed the view that the asset must be an asset of the taxpayer. McHugh J agreed with the views of the majority of the Full Federal Court on the point (Gummow and Lockhart JJ, Hill J dissenting) that the asset need not be an asset of the taxpayer. Brennan J (with whom Mason CJ agreed) declined to express a view on the question. All other members of the Full High Court (Dawson, Gaudron and Toohey JJ) held that the asset need not be an asset of the taxpayer.

82. Accordingly, we consider that the former subsection 160M(7) does not require the asset to be owned by the taxpayer. This contrasts with the requirements of the new subsection 160M(7) that the underlying asset be owned by the taxpayer.

The nexus requirement

The act, transaction or event must affect an existing asset

83. For subsection 160M(7) to apply, either an act or transaction must have taken place in relation to an asset, or an event 'affecting' an asset must have occurred. There must therefore be a nexus between the act, transaction or event giving rise to the receipt of money or other consideration and a pre-existing asset. In *Hepples'* case, the relevant act, transaction or event was Mr Hepples' entry into the deed. Their Honours then considered whether the act, transaction or event affected the asset. Of those judges who commented on this point, the court was evenly divided. However, McHugh J expressed an additional requirement (91 ATC at 4836; 22 ATR at 498):

> 'Furthermore, "an asset" in para (a) means an existing asset. The sub-section treats, as the notional disposal of an asset, an act, transaction or event which has taken place or has occurred in

> respect of another asset. Since "asset" is defined as "any form of property", the most natural reading of sec 160M(7)(a) is that the form of property which is the subject of the act, transaction or event is an existing, and not future, form of property.'

84. The application of subsection 160M(7) to restrictive covenants was more recently considered in *Paykel*. There Heerey J held, on the basis of the *Hepples* decision, that subsection 160M(7) did not apply to a payment under a restrictive covenant between an employer and employee for the employee not to compete after the termination of his or her employment.

85. Even though a distinguishing feature of *Paykel's* case was the proximity between the covenant and the termination of employment, Heerey J found that (94 ATC at 4183; 28 ATR at 100):

> 'In my opinion *Hepples* stands for the proposition that a payment by an employer to an employee in consideration of the employee's covenant not to compete after the termination of his or her employment is not within s.160M(7). That is "the judgment itself", to use the expression of Viscount Dunedin [in *Great Western Railway Company v. Owners of SS Mostyn* [1927] AC 57 at 73]. The present case is on all fours with that judgment.'

86. We accept that the former subsection 160M(7) does not apply to a restrictive covenant between an employer and an employee if the covenant takes effect, as it did in the *Paykel* case, **after** the termination of employment. However, we consider that the former subsection 160M(7) applies where the restrictive covenant takes effect **before** the termination of employment.

Effect on the asset

87. The former subsection 160M(7) is satisfied if money or other consideration is paid or given under a covenant which affects existing goodwill of a business. The decision of the Federal Court in *Paykel* acknowledges the importance of the nexus requirement.

88. The event had to **affect** the asset and in *Hepples* McHugh J (with whom Mason CJ agreed) said that it was a requirement that the event produce some **effect** or change in the asset. McHugh J stated (91 ATC at 4836; 22 ATR at 497-498):

> 'The starting point in any analysis of an act, transaction or event alleged to be within section 160M(7) is to identify whether the act, transaction or event is one by reason of which "an amount of money or other consideration" has been paid. The phrase "by reason of" requires that the act, transaction or event upon which the Commissioner relies be the cause of the receipt of or

> entitlement to the amount of money or other consideration. This means that the act, transaction or event must be precisely identified...Section 160M(7) also requires that the identified act or transaction shall have "taken place in relation to an asset" or that the identified event shall have been one "affecting an asset". The phrase "in relation to" can be of wide import, but in para. (a) the association of that phrase with the words "has taken place" show that "a coincidental or mere connexion" is not enough; there must be a direct connection between the act or transaction which has taken place and the "asset"; cf *O'Grady v. Northern Queensland Co Ltd* (1990) 169 CLR 356 at 367, 374. The words "an event affecting an asset" also require an event which produces some effect on or change in the asset...'

Cases to which the former subsection 160M(7) applies

89. Therefore, in the case of a restrictive covenant, the major question to be determined is whether the act, transaction or event presently affects an existing asset. Examples where subsection 160M(7) may be met include:

(a) entering into an exclusive trade tie agreement where the relevant asset may be:

- the goodwill of the supplier, which is immediately enhanced by the guaranteed supply through the outlet; or
- the goodwill of the retailer, because the goods to be sold have a well-known trade name and will bring in custom; and

(b) agreeing not to exercise a right, such as a right to market one product in a certain area;

and in relation to both (a) and (b) an amount of money or other consideration is received or receivable by reason of the act, transaction or event (namely, the entering into of the agreement).

Post 1992 amendments made by the TLAA (No 4)

90. Subsection 160M(7) has now been amended to lessen the required nexus between the act, transaction or event and the asset. Paragraph 160M(7)(a) provides that the effect may be beneficial, adverse or neither. The most significant change is that the relevant asset must now be owned by the taxpayer who received the consideration: paragraph 160M(7)(b).

91. Subsection 160M(7) does not have as broad a scope as formerly applied because, as the Explanatory Memorandum states at 73-74:

> 'Subsection 160M(7) will have a residual application where the other CGT provisions, including the new provisions dealing with the creation of incorporeal assets, have not applied to a transaction...This will mean that subsection 160M(7) will only apply where the receipt of an amount of money or other consideration is not in respect of the disposal of an asset or the creation of an incorporeal asset.
>
> Subsection 160M(7) will generally apply as it does at the moment. However, because most payments originally sought to be taxed under subsection 160M(7) will now fall within the new subsection 160M(6), it will apply in fewer cases.'

92. If no other provision in Part IIIA applies (such as subsection 160M(3) or (6)) then subsection 160M(7) continues to apply if, for example, a payment or consideration is given to the owner of an asset and the owner refrains from exercising a right in relation to the asset, or allows the asset to be exploited.

The relevant act, transaction or event

93. For subsection 160M(7) to apply, the owner of the asset must have received money or other consideration 'by reason of' the act, transaction or event. According to the *Macquarie Dictionary* the expression 'by reason of' means 'on account of, because of'. It is the act, transaction or event which most directly relates to the consideration received which is the subject of the subsection.

94. It may be necessary to determine the most proximate act, transaction or event out of a series of acts or events. For example, in the decision of the Full Federal Court in *Naval, Military and Airforce Club of South Australia v. FC of T* 94 ATC 4310; (1994) 28 ATR 161, Jenkinson J found that the relevant transaction consisted of 'the making of the agreement (for transfer of rights over airspace), the execution of the deed and the entry of the memorial on the certificate of title'. Alternatively, French J preferred to look at the later registration of the agreement as the relevant event affecting the asset for the purposes of subsection 160M(7). It was, in his view, by reason of this event that an amount of money was received. Von Doussa J in dissent did not comment on this point.

95. If there are a number of acts, transactions or events, it is sufficient that any one could be identified as the most proximate causal act, transaction or event.

96. In the case of a restrictive covenant or trade tie, the most relevant act, transaction or event, broadly speaking, is the making of the covenant or trade tie agreement.

Timing issues in relation to subsection 160M(7)

97. The relevant time when the notional asset under subsection 160M(7) is disposed of is, in our view, the time of the act, transaction or event affecting the existing underlying asset. In the case of restrictive covenants, it is the date of the entry into the covenant. The amount received is included in the taxpayer's assessable income in the year of income in which the disposal of the notional asset occurs (i.e. at the time of the act, transaction or event).

98. The timing for CGT purposes is not when the consideration is received but the time of entering into the covenant. For example, if Mr X grants a restrictive covenant on 30 June 1990, resigns from employment on 1 July 1991 and payment occurs on 2 July 1991, the disposal occurs in the year ended 30 June 1990.

99. When an asset is disposed of under a contract, subsection 160U(3) operates to fix the **time** of disposal. Subsection 160U(3) only acts to determine the timing of a disposal under a contract and it otherwise does not have a substantive operation. This view is supported by the AAT decision of Dr P Gerber (Deputy President) in *Case 24/94* 94 ATC 239; C*ase 9451* (1994) 28 ATR 1108 (ATC at 248; ATR at 1119):

> '...it should be kept in mind that subsection 160U(3) does not deem the **disposal** of the relevant asset, but states that the time of disposal (or acquisition) of the relevant asset shall be taken to have been the time of the making of the contract under which that asset was disposed (or acquired).'

100. However, subsection 160M(7) operates by its own force so that the disposal of the notional asset occurs by virtue of an act, transaction or event which may or may not be under a contract. Therefore neither of subsection 160U(3) nor (4) applies.

Consideration

101. Both before and after the 1992 amendments made by TLAA (No 4), paragraph 160M(7)(b) requires that a person has received, or is entitled to receive 'an amount of money or other consideration by reason of the act, transaction or event...'

102. There are compelling reasons to interpret the word 'consideration' in subsection 160M(7) more widely than in other provisions of Part IIIA. Subsection 160M(7) is intended to apply to

certain capital payments not received in respect of the disposal of an asset. That is, it seeks to tax flows received or receivable on the happening of an event affecting an underlying asset.

103. The 'catch-all' nature of this provision of last resort is reflected in the phrase in subsection 160M(7) in which the word 'consideration' is used. That phrase is 'money or other consideration'. This is arguably wider than the terms 'money' or 'property other than money' as they appear in section 160ZD and section 160ZH. This broad scope is supported by the context of subsection 160M(7) and its place in the scheme of the Act.

104. Section 160ZD and subsection 160M(7) are two sections where the word 'consideration' appears. Section 160ZD and section 160ZH operate to further define the term 'consideration in respect of disposal' or acquisition. However, subsection 160M(7) uses the term 'other consideration' without defining that term. Our view is that section 160ZD and section 160ZH are confined in their scope to provisions such as subsections 160M(3) and 160M(6) which deal with **real assets**. This contrasts with the more specific subsection 160M(7) which deals with notional assets. As McHugh J said in *Hepples* (91 ATC at 4834; 22 ATR at 495):

> '...s160M(7) is concerned to bring to tax some classes of **receipts** [emphasis added] even though no disposition of an asset has been effected. In that respect, therefore, Pt IIIA does bring receipts to tax although they have arisen not from the actual disposal of an asset but by reason of an act or transaction which has taken place in relation to, or an event which has affected, an asset...'

105. One rule of statutory interpretation is that there is a presumption that words used consistently in legislation should be given the same meaning consistently. However, it has been observed in the case of *McGraw-Hinds (Aust) Pty Ltd v. Smith* (1979) 144 CLR 633; (1979) 53 ALJR 423 at 424; 24 ALR 175 at 178 by Gibbs ACJ that:

> '...this is not a presumption of very much weight; there is no rigid rule, it all depends on the context.'

106. The term 'consideration' has a well-settled meaning in the law of contract. We consider that this meaning is carried into subsection 160M(7). Hill J in his dissenting judgment in *FC of T v. Cooling* 90 ATC 4472 at 4492; (1990) 21 ATR 13 at 35-36 states that:

> 'The use of the word "consideration" suggests that there will be some contractual relationship between the recipient and some other person giving rise to a receipt or entitlement to receive that consideration, be it a monetary consideration or otherwise.'

107. Consideration in the law of contract has been expressed in relation to an enforceable contract as requiring the element of valuable 'consideration'. This can extend to any benefit received by one party or detriment suffered by the other party. Carter and Harland in *Contract Law in Australia* (2nd ed, 1991, Butterworths) suggest the following definition of consideration:

> '...some act or forbearance involving legal detriment to the promisee, or the promise of such an act or forbearance, furnished by the promisee as the agreed price of the promise.'

108. We consider that the purpose and effect of subsection 160M(7) extend to recognise as consideration the benefit of mutual promises flowing to the parties, even if those promises are not in themselves property.

109. This concept is illustrated by Walsh J in *Amoco Australia Pty Ltd v. Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 306 where his Honour said that the benefits to be taken into account are 'not limited' to what the covenantor 'receives in money or other property'. His Honour went on to explain, in the context of an exclusive dealing contract, that a covenantor may be regarded as 'obtaining, in return for a restraint, a benefit which consists simply in being able by this means to procure an agreement in aid of his trading'. He gave, as an example, an agreement for the regular supply of goods which the covenantor would not be able to obtain but for an agreement to sell only those goods supplied by the covenantee.

110. We consider that there must be a measurable benefit received by the person who enters into the restrictive covenant. In *Mordecai v. Mordecai* (1988) 2 NSWLR 58 at 64-65, the court rejected an argument that the goodwill of a business was valueless because the business could not be sold on the open market without the two directors entering into restrictive trading covenants which they could not be compelled to give. It was held that the market value of the goodwill was to be determined on the basis that a hypothetical vendor and purchaser would buy on reasonable terms which would require the giving of such covenants, or that the goodwill should be valued on the basis of a hypothetical sale to the directors themselves where such covenants would be unnecessary.

111. An example of a measurable benefit is the undertaking of some liability in return for the assignment of a right to receive future income. A further example from case law in this area is *Wyatt v. Kreglinger* [1933] 1 KB 793 where there was a promise to pay pension benefits, provided the other party did not enter a particular trade.

112. Alternatively it has been suggested that 'consideration' for the purposes of subsection 160M(7) is confined to money or property and

it does not extend to 'other consideration', such as an exchange of promises that are not themselves property. However, we do not agree with this view.

113. If no consideration is received, subsection 160M(7) does not apply. Market value consideration is not substituted; that is, paragraph 160ZD(2)(a) does not apply (see Taxation Determination TD 93/238). 'Consideration' in terms of subsection 160ZD(2) is limited to money or property.

114. However, subsection 160ZD(4) may be applied if the consideration payable relates to more than one asset (such as an undissected payment made in respect of a restrictive covenant and for the sale of goodwill), so that such consideration as may reasonably be attributed to the disposal of the asset shall be taken to relate to the disposal of that asset. In determining an amount which is reasonable in the circumstances, we would have regard to whether the parties were dealing at arm's length (refer paragraph 46).

115. A restrictive covenant entered into during the course of employment, where payment is made consequent on termination, often includes a claim covering restrictions on revealing trade secrets both during the course of the employment contract and for a time after termination. We consider that the payment relating to the period of employment does not change the overall character of the payment as being consideration for the grant of a restrictive covenant and on capital account. Such a clause is an implied term of general employment.

116. If, however, a clause seeks to restrict the employee from, for example, taking paid leave to which they would be entitled under an industrial award, such as rostered days off or flexi-time, we consider that the amount paid for such a restriction may also be income under ordinary concepts.

117. Consideration for entering into a restrictive covenant is ordinarily received in the form of money or property.

Non-residents

118. Part IIIA only applies to non-residents to the extent to which they dispose of taxable Australian assets: subsection 160L(2).

119. Before the 1992 amendments made by the TLAA (No 4), it was suggested that subsection 160M(7) does not apply if the taxpayer is a non-resident because the notional asset is not a taxable Australian asset within the categories listed in section 160T. The 1992 Explanatory Memorandum states that it was intended that a non-resident be taxed on disposal of a fictional asset. It is doubtful that this later expression of intention can be given any retrospective

interpretation. It is not permissible to read a statement made at a later point of time (when the legislation was being amended) in order to discern the intention of the legislature when the original statute was passed: *FC of T v. Bill Wissler (Agencies) Pty Ltd* 85 ATC 4626; (1985) 16 ATR 952 per Williams J at ATC 4631; ATR 957.

120. Restrictive covenants entered into by non-residents after the 1992 amendments made by the TLAA (No 4) are specifically subject to tax under paragraph 160T(1)(l).

121. Accordingly, we now accept that the former subsection 160M(7) does not apply to non-residents.

Examples

Example 1

122. Ben intends to build and operate a hotel on the coast. Bill operates a resort in the same area. Bill does not want Ben to compete with him. Ben enters into an agreement that, for the next 5 years, he will not own or operate a hotel, motel, resort or similar facility within 100 kilometres of Bill's resort. As consideration for that undertaking, Bill pays Ben $100,000.

Pre 1992 amendments made by the TLAA (No 4)

123. The former subsection 160M(6) does not apply because there has been no carving out from an existing asset. The goodwill of Bill's resort is a relevant underlying asset for the purpose of the former subsection 160M(7). It is beneficially affected immediately due to the absence of Ben's competition. Subsection 160M(7) brings the amount to tax.

Post 1992 amendments made by the TLAA (No 4)

124. Subsection 160M(6) applies because Ben creates contractual rights which are vested in Bill. This prevents Ben from operating within 100 kilometres from the resort owned by Bill. Subsection 160M(7) does not operate because subsection 160M(6) applies.

Example 2

125. Edwina owns exclusive rights to market a widget in Western Australia. Peter wishes to market a gadget in Western Australia. The gadget performs a similar function to the widget. Peter believes he can establish the gadget in the market place within 5 years. Peter pays

$200,000 to Edwina in return for her not exercising her rights, which she continues to own, to market the widget in Western Australia for a period of 5 years.

Pre 1992 amendments made by the TLAA (No 4)

126. Because there has not been a carving out from an existing asset, the former subsection 160M(6) does not apply. Edwina's exclusive rights to market the widget are a relevant asset for the purpose of the former subsection 160M(7). It falls within the terms of subparagraph 160M(7)(b)(i).

Post 1992 amendments made by the TLAA (No 4)

127. The agreement prevents Edwina from marketing widgets in Western Australia. It results in incorporeal property which has been created by Edwina and vested in Peter. Accordingly, subsection 160M(6) applies.

Example 3

128. Penelope enters into an employment contract with her employer Tracey Bros. The terms of the contract require her to remain with her employer for three years to develop certain trade secrets and on termination of the contract, Penelope is prevented from entering into competition with Tracey Bros for a further two years. In consideration for entering into the contract, Penelope receives $500,000; the contract states that $200,000 relates to the current period of employment and $300,000 relates to the period after employment.

Pre 1992 amendments made by the TLAA (No 4)

129. The consideration is received both in relation to the current employment period and the restrictive covenant which is to apply in three years time. The portion of the receipt which relates to the current period of employment ($200,000) is assessable under subsection 25(1) or paragraph 26(e). That portion would also be assessable under the old subsection 160M(7). (However, subsection 160ZA(4) would apply to reduce the capital gain to the extent to which the amount was assessable as ordinary income.) The balance of the receipt ($300,000) is not subject to Part IIIA.

Post 1992 amendments made by the TLAA (No 4)

130. That portion of the receipt which relates to employment is assessable under subsection 25(1) because that term of the contract comes into effect immediately. The portion relating to the period following the employment is assessable as a capital gain under subsection 160M(6) (with subsection 160M(7) as a backup).

Note: If the contract did not apportion the payment and it is not possible to make any reasonable apportionment, the whole amount would be assessable under subsection 160M(6) (where a post 1992 arrangement) or subsection 160M(7) (where a pre 1992 arrangement).

Example 4

131. Janelle, a vendor of a small grocery store who is 80 years of age, is going out of business and into retirement. She does not intend to own or operate any other business. As a standard term of the sale of business agreement, she grants a covenant restricting her from competing with the purchaser in a similar business within the two years of the completion of sale date, within a geographic limit of 5 kilometres of the existing store. She receives a lump sum payment for the sale of her business. No amount is apportioned to the non competition undertaking in the contract.

Pre 1992 amendments made by the TLAA (No 4)

132. Because there has not been a carving out from an existing asset, the former subsection 160M(6) does not apply. The goodwill of Janelle's grocery store is a relevant underlying asset for the purpose of the former subsection 160M(7). It is beneficially affected immediately due to the absence of Janelle's competition. Subsection 160M(7) applies. Because the restrictive covenant has no intrinsic worth, it is reasonable to allocate the amount of consideration payable for the goodwill wholly against the existing goodwill (ignoring other payments for assets). We accept the parties' treatment of the consideration.

Post 1992 amendments made by the TLAA (No 4)

133. The restrictive covenant in the agreement for the sale of the business results in incorporeal property which has been created by Janelle and vested in the purchaser. Accordingly, subsection 160M(6) applies. Because no amount is allocated to the restrictive covenant in the contract of sale, by subsection 160M(6A) paragraph 160ZD(2)(a)

does not apply to deem market value. Again, we accept the parties' treatment of the consideration.

Example 5

134. Oil Co has made a lump sum payment to Pricecatch, the proprietor of XXON Service Station under an agreement tying Pricecatch to selling and promoting one brand of petrol to her customers. The agreement for the supply of only Oil Co's products to be sold at the service station is an exclusive trade tie. The payment is made as an inducement and Pricecatch has committed herself for the first time to the restriction of one brand trading. Under the agreement, Pricecatch covenants she will not conduct any service station business, other than at XXON; and she will not allow her land to be leased or sub-leased to any person. In consideration for accepting these restrictions, Oil Co pays the sum of $100,000 to Pricecatch.

Note: refer to the High Court case of *Dickenson v. FCT* (1958) 98 CLR 460; (1958) 7 AITR 257 (and see Taxation Ruling IT 105). These receipts are of a capital nature as distinct from periodical payments which can be linked to the business operations. Also refer to *FC of T v. Myer Emporium Ltd* (1987) 163 CLR 199; 18 ATR 693; 87 ATC 4363 and Taxation Ruling TR 92/3.

Pre 1992 amendments made by the TLAA (No 4)

135. The consideration is received as a capital amount and the relevant asset (Oil Co's right to enforce the covenant) was not carved out of, or over, an existing asset. The former subsection 160M(7) applies. The act, transaction or event (the giving of the covenant) must relate to an existing asset and it need not be owned by the taxpayer. The relevant asset affected in this example is the goodwill/business name of Oil Co. The consideration is assessable and subsection 160M(7) applies.

Post 1992 amendments made by the TLAA (No 4)

136. Since the payment is not assessable income by subsection 25(1) as a business receipt, subsection 160M(6) applies.

Example 6

137. Fashions Pty Ltd enters into an agreement to purchase a business registered in the name of Paris Frocks from the proprietor Madame Zelda for $900,000. This comprised $800,000 for disposal of her freehold shop premises and her stock, and $100,000 for existing

business goodwill. Madame Zelda had commenced the business in 1987. The directors of Fashions Pty Ltd require Madame Zelda as a condition of the contract to enter into a restrictive covenant not to compete with the business of Fashions Pty Ltd from the date of the agreement for a period of 5 years, and to assist Fashions Pty Ltd in its application for the necessary licences. No amount is allocated in the contract to the restrictive covenant. The pre-existing business goodwill is based on a commercial valuation of $70,000.

Pre 1992 amendments made by the TLAA (No 4)

138. We consider that subsection 160M(7) applies. On entering into the covenant, there is an entitlement to receive consideration and the entering into that covenant is an act, transaction or event affecting the pre-existing goodwill of the business. By a reallocation under subsection 160ZD(4), $30,000 is considered reasonably to relate to the notional asset. The payment of $70,000 for the goodwill is partially exempt. **Note**: if the business had commenced pre-CGT then the $70,000 payment for the goodwill would be exempt. (Refer Taxation Ruling IT 2328).

Post 1992 amendments made by the TLAA (No 4)

139. The newly created asset for subsection 160M(6) is the benefit of the restrictive covenant which vests on its creation by the covenantor in the payer. Subsection 160ZD(4) has effect so that $30,000 of the consideration received by the covenantor may reasonably be attributed to the disposal of that asset. Section 160ZZR operates to exempt the payment for goodwill (the $70,000) as to 50 per cent of that amount.

Commissioner of Taxation

4 May 1995

ISSN 1039 - 0731 I 1016355

ATO references
NO 95/2753-2
BO CGT Cell

Previously released in draft form as TR 94/D33

Price $2.70

FOI index detail
reference number

subject references
- capital gains
- goodwill
- restrictive covenants
- trade ties

legislative references
- ITAA 25(1)
- ITAA 26(e)
- ITAA Part IIIA
- ITAA 160A

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