THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TAXATION LAWS AMENDMENT BILL (No.2) 1992

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Circulated by the authority of the Treasurer, the Hon J. Dawkins M.P.)

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General outline and financial impact of the amendment

Amendment to Depreciation changes

This amendment will amend Taxation Laws Amendment Bill (No.2) 1992 introduced into Parliament on 2 April 1992 to correct a deficiency in the transitional rules dealing with the application of depreciation measures contained in that Bill. Those measures allow higher depreciation deductions for plant acquired after 26 February 1992.

The amendment bolsters measures to prevent taxpayers obtaining higher depreciation rates in relation to property ordered or commenced to be constructed before 27 February 1992.

The amendment gives effect to the Government's announced intentions and will prevent a potentially significant but unquantifiable loss to the revenue.

Amendment to the disposal of consideration on the Expiry of an Asset

The amendment will change the date of effect of the amendment to subsection 160ZD(2) proposed by **clause 28** of the Taxation Laws Amendment Bill (No.2) 1992. The amendment proposed by clause 28 will now apply to disposals of assets occurring after 15 August 1989.

The amendment will have no significant impact on the revenue.

Depreciation Changes

Summary of the proposed amendment

The amendment will ensure that the higher rates will not apply in relation to sale-leasebacks and transactions between associated parties occurring after 26 February 1992 which involve plant ordered, commenced to be constructed, or owned by a taxpayer, before 27 February 1992, but not used by that taxpayer before the sale-leaseback or associated-party transaction.

The amendment will apply from the same time as the original amendments; that is, it applies to relevant transactions occurring after 26 February 1992.

Explanation of proposed amendment

Summary of the depreciation changes contained in the Bill

Chapter 1 of the Explanatory Memorandum to the Bill explains the proposed higher depreciation rates for plant with effective lives of 5 years or longer. Those higher rates will be available for plant acquired under a

contract entered into after 26 February 1992, or commenced to be constructed after that date.

Subclause 66(3) of the Bill contains a transitional rule to prevent taxpayers from obtaining the higher depreciation rates for property acquired before 27 February 1992 by arranging sale-leasebacks or transfers to associates after 26 February 1992.

Broadly, that rule specifies that property acquired after 26 February 1992 will be taken to have been acquired before 27 February 1992 if the taxpayers using the property immediately before and after the change in ownership are the same taxpayer or associates of each other, and the taxpayer owning the property immediately before the change in ownership had acquired it under a pre-27 February 1992 contract, or constructed it with construction commencing before 27 February 1992.

Reason for the amendment

A number of arrangements involving property ordered, commenced to be constructed or owned before 27 February 1992 have been identified which permit taxpayers to obtain the higher depreciation rates inappropriately.

Those arrangements involve sale-leasebacks or transfers to associates of property that has not been used by the taxpayer who ordered, or commenced to construct, or owned that property before 27 February 1992.

For example, a taxpayer who entered into a contract to acquire plant before 27 February 1992 might, before taking delivery of the plant, assign the contract to a leasing company after 26 February 1992. The leasing company acquires the plant and leases it back to the taxpayer.

Under the amendments contained in the Bill, the leasing company would be treated as acquiring the plant after 26 February 1992 because that plant had not been used before 27 February 1992, and would be entitled to the higher depreciation rates.

However, if the taxpayer in that example had instead purchased the plant, the higher rates would not apply because the plant was ordered by the taxpayer before 27 February 1992.

Similarly, taxpayers who had commenced to construct plant or who owned plant before 27 February 1992 and had not used the plant could arrange a sale and leaseback and the leasing company would obtain the higher depreciation rates. Similar outcomes could occur where plant is transferred to related parties.

In some instances, the general anti-avoidance provisions of Part IVA might preclude some claims for depreciation at higher rates, eg. a taxpayer completing the purchase of goods ordered by an associate to obtain higher depreciation deductions.

However, there are instances where tax avoidance is not a motive; for example, it appears to be a common business practice to order goods and then arrange for their sale and leaseback about the time of delivery.

Nevertheless, property involved in such arrangements was intended to be covered by the transitional rule if ordered before the 27 February 1992. If that was not so, taxpayers who arranged sale-leasebacks of goods ordered before 27 February 1992 could obtain an advantage over those who instead completed the purchase of goods.

Sale-leasebacks and related party transfers

This measure applies where a taxpayer who owns pre-27 February 1992 property which the taxpayer has not used, either transfers that property to an associate or sells it to another taxpayer who leases it back to the taxpayer or an associate of the taxpayer.

The effect of the measure is that the associate or other taxpayer, as appropriate, will be taken to have acquired the property under a contract entered into before 26 February 1992, and so will not be entitled to the higher depreciation rates.

The amendment applies to transactions of the type described above entered into after 26 February 1992.
[Clause 2 inserts subclause 66(3A)]

Arrangements in relation to goods on order

This measure is similar to the first except that it deals with instances where a taxpayer enters into a contract before 27 February 1992 to acquire property, and before acquiring that property, enters into a further arrangement after 26 February 1992 under which either an associate of the taxpayer becomes the owner of the property, or another taxpayer becomes the owner of the property who then leases it back to the taxpayer or an associate of the taxpayer.

The effect of the measure is that the associate or other taxpayer, as appropriate, will be taken to have acquired the property under a contract entered into before 26 February 1992, and so will not be entitled to the higher depreciation rates. ***[Clause 1 gives the meaning of an "arrangement"; clause 3 inserts subclause 66(3B)]***

Amendment to the Disposal of Consideration on the Expiry of an Asset

Summary of proposed amendment

The Bill proposes an amendment to subsection 160ZD(2) which will ensure that where an asset expires (and so there is a disposal for CGT purposes), unless the taxpayer receives some consideration for the disposal, the asset will be taken to have been disposed of for nil consideration. Originally, this amendment was to apply to disposals of assets after the date of introduction of the Bill (i.e. 2 April 1992).

However the amendment now proposed will backdate the amendment to subsection 160ZD(2) so that it applies to disposals of assets occurring after 15 August 1989.

Explanation of proposed amendment

If a taxpayer disposes of an asset and either there is no consideration for the disposal, the consideration cannot be valued, or the consideration received is greater or less than the market value of the asset and the parties are not dealing at arms-length, then for CGT purposes subsections 160ZD(2) and 160ZD(2A) deem the consideration for the disposal to be equal to the market value of the asset having no regard to its impending disposal. These provisions which have operated since 15 August 1989 produce an appropriate result in situations where the market vlaue of the asset will be affected by its disposal, for example where a debt is forgiven or a share is cancelled.

However, section 160ZD does not operate correctly where there has been a disposal of an asset for CGT purposes due to the expiry of the asset. For example, if the asset is an asset that would be expected to expire in the normal course of events (such as a lease or an option), at the point when the asset expires the actual market value of the asset is nil. However, by subsection 160ZD(2A), the market value of the asset must be determined without regard to its expiry. Obviously in these circumstances, the market value of the asset assuming the expiry is not to occur, will exceed the actual market value of the expired asset (i.e. nil).

The Bill proposes an amendment to section 160ZD(2) to ensure that where an asset expires in the normal course of events, unless the taxpayer receives some consideration for the disposal, the asset will be taken to have been disposed of for nil consideration. Originally, this amendment to subsection 160ZD(2) was to apply to assets disposed of after the date of introduction of the Bill (ie 2 April 1992).

However, the amendment now proposed will backdate the operation of amended subsection 160ZD(2) so that it applies to disposals of assets occurring after **15 August 1989.** The proposed amendment ensures that

amended subsection 160ZD(2) also applies to taxpayers who owned assets which expired during the period 15 August 1989 and 2 April 1992.

Commencement date

The amendment to section 160ZD(2) applies to disposals of assets after 15 August 1989.

Clauses involved in the proposed amendment

Clause 28: Amends subsection 160ZD(2) so that it does not apply to the expiry of an asset.

Clause 67(5A): provides that the amendment applies to disposals of assets after 15 August 1989.


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