14 September 2021

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Australian Taxation Office (ATO)

By email: Michelle.gainford@ato.gov.au

Dear Michelle,

Re: National Tax and Accountants' Association (NTAA) comments on TR 2021/D5 (Vacant Land)

Please find below the NTAA's comments relating to TR 2021/D5 as a supplement to earlier feedback (dated 3 February 2021) to the originally proposed draft Law Companion Ruling ('LCR').

The National Tax and Accountants' Association ('NTAA') is a national member-based not-for-profit association, which currently represents the interests of (and is dedicated to providing support to) over 10,000 member firms, which include tax agents, accountants and BAS agents. The NTAA is also dedicated to ensuring that the interests of Australian taxpayers are always at the forefront of any potential change to taxation law or the administration of the taxation system.

Since the introduction of the new vacant land provision, we have received a number of queries from our tax agent and accountant membership base in relation to the operation of these new restrictions relating to otherwise deductible holding costs.

As a result, we find ourselves well placed to offer a number of practical comments in relation to TR 2021/D5, as outlined below for your consideration.

1. **Clarification of when commercial premises are *"in use or available for use"***

   Paragraphs 16 to 20 of TR 2021/D5 confirm that in order to be *"available for use",* premises must be *"capable of being occupied"*.

   While the clarification of this term is welcomed, unfortunately it is only provided in the context of **residential** premises, with no specific guidance offered with respect to **commercial** premises.

   It is therefore suggested the final ruling should also clearly address the meaning of being *"available for use"* in the context of **commercial** premises (i.e., non-residential premises).

   This will provide clarity as to exactly *when* a taxpayer who has constructed commercial rental premises may be permitted to claim otherwise deductible holding costs (i.e., when the vacant land provision of S.26-102 of the ITAA 1997 would no longer apply to deny such deductions).

   Presumably this will be based on the same conclusion made in relation to residential premises, being when the premises are ***capable of being occupied*** (e.g., for newly constructed commercial premises, perhaps upon the issuance of an occupancy certificate or something similar).

2. **Loss or outgoing relating to holding land**

   At ***paragraphs 26 to 28*** of TR 2021/D5, the ATO has clarified that any interest (and borrowing costs) directly relating to the costs of **constructing** a substantial and permanent structure on land is **not** a loss or outgoing related to holding land.

   As a result, on the basis that a deduction would be otherwise available for construction loan interest and associated borrowing costs, the draft ruling clarifies that where applicable, S.26-102 of the ITAA 1997 would **not** prevent a taxpayer from deducting these expenses.

   In light of these comments contained in the draft ruling, the NTAA respectfully requests that the final ruling confirm the same analysis would apply to interest and borrowing expenses for loans obtained not only for construction costs of a substantial and permanent structure, but also for:

   - loans obtained to fund substantial renovation costs to a substantial and permanent structure; and/or
   - loans obtained to fund repairs or improvements to a substantial and permanent structure.

3. **Constructed and substantially renovated residential premises and periods of subsequent repairs and renovations between tenancies**

   In ***paragraphs 46 to 48*** of TR 2021/D5 it is pleasing to see the ATO's pragmatic compliance approach in recognising that throughout the life-cycle of a rental property there will be short periods of time where residential premises (including those constructed or substantially renovated whilst a taxpayer held the property) may be unavailable for lease, hire or licence such as where *"minor maintenance and repairs"* are undertaken between tenancies.

   Despite this, it is suggested that further clarity be provided with respect to a common variation to this scenario, being where a landlord conducts **improvements** (as opposed to repairs) to the property between tenancies. More specifically, it is suggested that the final ruling clarify whether the ATO would also consider **not** apply resources to review compliance with S.26-102(4) where, for example, a landlord decides to replace a kitchen or bathroom in-between tenancies, as opposed to simply conducting minor repairs and maintenance.

   Furthermore, it is also suggested that more explanation (and examples) be provided with respect to the reference in ***paragraph 46*** to *"minor"* maintenance and repairs undertaken between tenancies of a residential rental property. Unfortunately, in its draft form, the draft ruling is not clear if maintenance would be considered *"minor"* where, for example, a landlord paints the entire property (i.e., internal and external) during a vacancy period longer than the four weeks suggested in Example 12 of TR 2021/D5.

   Ultimately, for these purposes, the NTAA would suggest that consideration be given to the removal of the word "minor".

4. **Interest incurred after the sale of constructed and/or substantially renovated residential premises**

   In ***paragraphs 30 to 33*** of TR 2021/D5 it is noted that S.26-102 does **not** deny interest deductions such as post-cessation interest **after** the sale of land if the interest was deductible (and not denied by the vacant land rules) immediately prior to the sale. More specifically, the draft ruling states (at paragraph 32) that *"the interest will continue to be deductible if the land was not vacant immediately before you* (the taxpayer) *ceased to hold the land".*

   It is suggested that an example be included in the final ruling as a warning for taxpayers who sell residential property that was constructed or substantially renovated while they held the land, where the property is sold without a tenant (and is not available for rent at the time of sale) so as to provide 'vacant possession' of the property to potential purchasers.

In such circumstances, the vacant land provision and the deeming rule in S.26-102(4) for constructed and/or substantially renovated residential premises whilst the landholder held the land would apply to effectively treat the property as vacant land just before the time of sale.

As a result, our understanding is that a deduction would be denied for any post-cessation interest expenses in such common situations.

That is, unless the ATO is willing to apply a more pragmatic compliance approach in the final ruling (similar to that applies during period of minor maintenance and repairs) to the period just prior to the sale of such a property, recognising that such a period of vacancy will commonly occur throughout the life-cycle of a rental property.

5. **Carrying on a business of leasing (i.e., a rental property business)**

   Finally, it is suggested that the discussion in the TR 2021/D5 as to when land is *"in use or available for use in carrying on a business"* (i.e., ***paragraphs 34 to 38***) should also make reference to the scenario of when a taxpayer is regarded as being in the business of leasing properties (i.e., conducting a rental property business – e.g., based on both the number of rental property owned and the level of involvement the taxpayer has in relation to the ongoing management of the properties).

Again, thank you again for the opportunity to submit our comments in relation to TR 2021/D5 on the vacant land provision.

Yours faithfully

Geoff Boxer
Chief Executive Officer
NTAA