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# AUSTRALIAN TAX ADVISER

2406 : FEBRUARY 2024

The IFX Legal Tax Team

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## SECTION 1 – PROFESSIONAL DEVELOPMENTS

### DEDUCTIBILITY OF LOSSES ON THE SALE OF REAL ESTATE

Practitioners and commentators alike would be forgiven for thinking that arguments about the tax treatment of gains and losses arising from selling real estate would be redundant after the introduction of the capital gains tax on 20 September 1985. Sadly, that has not been the case, as there are tax benefits to be gained from treating proceeds of real property sales on capital rather than revenue account.<sup>1</sup>

#### ¶6.1 Court decisions

Recently, court decisions about the taxation of gains on the sale of real estate have largely gone against the taxpayer, but the recent AAT decision in [Bowerman and FCT](#) was decided in the taxpayer's favour (albeit about losses rather than gains). The case considered the capital/revenue nature of a capital loss arising from the sale of residential property.

In particular, the case considered the nature of the loss that arose when a taxpayer sold a residence in which she had resided. On the face of it, one would have thought that the loss would have been disallowed anyway (under either para 8-1(2)(a) (a loss or outgoing of capital or of a capital nature) or para 8(2)(b) (a loss or outgoing of a private or domestic nature)).

The issue was raised relying on the decision of the Full Federal Court in [Greig v FCT](#) in 2020. In Greig's case, the Full Court considered whether legal fees and share losses incurred by the taxpayer arising from the compulsory transfer and cancellation of his shares were deductible. The Court found that Greig was indeed entitled to a deduction for both the loss he had incurred on the cancellation of his shares and the legal expenses he had incurred. The court left open the question of whether the ATO should reassess the taxpayer's other gains or losses from share trading.

#### ¶6.2 Capital gains and losses

Whether a profit or loss arising from the disposal of an asset is a capital gain or capital loss will depend on the circumstances surrounding both the acquisition and the disposal of that asset. Specifically, was the disposal a mere realisation of a capital asset? If it was, the proceeds will be of a capital nature, and any loss made would be disallowed under s 8-1(2)(a). If it was not, then the gain would be assessable as ordinary income under s 6-5, and the loss likely deductible under s 8-1.<sup>2</sup>

More specifically, a loss arising on the sale of an asset will be deductible if that asset is:

<sup>1</sup> The two most obvious examples are the 50% CGT discount for individuals and the CGT Small Business Entity concessions.

<sup>2</sup> I say 'likely' because the rules about deductibility of a loss are not the same as those for assessing a gain.