

A brief outline of capital gains tax ('CGT')

1. Income tax is paid for each financial year and is worked out by reference to your taxable income for the income year. $\text{Income tax} = (\text{taxable income} \times \text{rate}) - \text{tax offsets}$. $\text{Taxable income} = \text{assessable income} - \text{deductions}$.¹
2. Your assessable income includes your net capital gains for the income year.² Your net capital gains = your capital gains for the income year, reduced by certain capital losses you have made.³ Capital gains are capital proceeds from a CGT event less your total costs associated with that event (generally the cost base of the relevant capital asset.)⁴ Your net capital loss = your capital gains made during the income year subtracted from your capital losses made during that year.⁵ Net capital losses and capital losses can only be used to reduce capital gains; however, to the extent that a net capital loss cannot be applied in an income year, it can be carried forward to a later income year.⁶ Capital proceeds can consist of the receipt of property as well as of money and an entitlement to receive money.⁷
3. Provisions dealing with ordinary income are contained in Div 6 of the *Income Tax Assessment Act 1997* ('ITAA97'); those dealing with CGT are contained in Parts 3-1 and 3-3 of that Act. Besides the ITAA97, there is also an *Income Tax Assessment Act 1936*, which contains provisions that may be relevant to various circumstances. Other provisions in the ITAA97 besides those already mentioned, may also be relevant.
4. In cases of the kind under consideration, there are 2 questions you must always ask: first, did a CGT event happen?⁸ If it did, and more than one event applies, choose the one most specific to your situation.⁹ This, however, is subject to the rule that CGT event H2 is a last resort, and CGT event D1 a second last resort.¹⁰ The second question is Does an exemption or concession apply? For example, there are exempt transactions and replacement asset roll-overs for certain involuntary losses or disposals.
5. Most CGT events involve a CGT asset. For a full explanation of what things are CGT assets, see Div 108.¹¹ A liberty, eg, to compete, is not a CGT asset.¹² For many CGT events, there is an exemption if the CGT asset was acquired before 20

¹ See Division 4 of the *Income Tax Assessment Act 1997* ('ITAA97'). References to sections of Acts are to sections of the ITAA97, unless otherwise indicated.

² See s102-5.

³ See s100-10.

⁴ See ss100-35 and 100-40.

⁵ See ss100-50 and 102-10.

⁶ See ss100-50, 102-5 and 102-15.

⁷ See s116-20.

⁸ See s104-5.

⁹ See s102-25.

¹⁰ See s102-25.

¹¹ See s100-25.

¹² See *Hepples v FCT* (1991) 173 CLR 492.

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- September, 1985.¹³ Some capital gains tax assets are exempt assets; for example, in certain circumstances, main residences and cars.¹⁴
6. If you derive an amount that is assessable as ordinary income under Div 6, in general your capital gains are correspondingly reduced.¹⁵
 7. There are certain concessions and advantages pertaining to the characterization of amounts as capital gains rather than as ordinary income. For example, where the taxpayer is an individual, trustee, or the trustee of a superannuation fund, or small business active assets are involved, the capital gain remaining after the application of any capital losses and net capital losses from previous income years is reduced by a substantial discount (50% in the case of individuals) when working out net capital gains.¹⁶ In effect this can substantially reduce the rate of tax.¹⁷ Alternatively, if a CGT asset was acquired on or before 21 September, 1999, indexation of its cost base may be available.¹⁸ In either case, to get the discount or indexation, the entity making the gain must have acquired the asset at least a year before the CGT event causing the gain.¹⁹ There are other exemptions and concessions peculiar to capital gains.

*The assessment of damages*²⁰

8. The fundamental principle, is that the tribunal should award the injured party such sum as will put it in the same position it would have been in had it not sustained the injury.²¹ Another principle is that damages are assessed once and for all by reference to the probabilities proved by the relevant evidence.²² It is trite law that the assessment of damages is subject to various limiting factors such as remoteness and the duty to mitigate. Damages can be awarded for the loss of an opportunity or chance,²³ from which it may be inferred that damages can be awarded for exposure to a risk of loss. From these principles, one can deduce the following rules applying to the relevance of taxation to the assessment of damages:
 - (a) Where taking into effect the award of damages or compensation, the defendant's wrongful conduct does not affect, ie, increase, reduce, hasten or delay the incidence of tax borne by the plaintiff, the taxation of damages is irrelevant to their assessment.²⁴

¹³ See s100-25.

¹⁴ See Div 118.

¹⁵ See s118-20.

¹⁶ See Div 115.

¹⁷ Under the Rating Acts, in general, the rate does not differ depending on whether a receipt is ordinary income or capital gains.

¹⁸ See Div 114.

¹⁹ See Divs 115-25 and 114-10.

²⁰ For a more detailed discussion of this and the remaining matters dealt with herein, see the author's article, 'The Impact of Capital Gains Tax on Damages,' (2002) 31 Aust Tax Rev 233.

²¹ See *Cullen v Trappell* (1980) 146 CLR 1, 11. See also *Haines v Bendall* 172 CLR 60, 63.

²² See *Osric Investments Pty Ltd v Woburn* [2001] FCA 1402 and cases therein referred to.

²³ See *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

²⁴ See *Spencer v Macmillans Trustees* [1959] SLT 41.

- (b) Where the defendant's conduct does have such an effect, subject to considerations of remoteness, the altered incidence of taxation is relevant to the assessment of damages. Its incidence may provide an additional head of loss. Or its incidence may furnish a ground of reduction, because the lost income would have been taxed but the damages will not be.²⁵ In either case, I refer to the adjustment to the assessment of damages as a 'taxation adjustment.' Thus in *Cullen v Trappell*,²⁶ the incidence of income tax on the income that the plaintiff would have earned (but for the defendant's wrongful act) was relevant to the assessment of damages for loss of earning capacity and had the effect of reducing those damages.
- (c) In order to determine whether or not the defendant's conduct does have an effect on the plaintiff's liability to tax, it's necessary to work out what tax the plaintiff would have paid but for the defendant's conduct, and what tax the plaintiff will pay on the damages. Because of the complexity of the CGT provisions and the way in which they operate,²⁷ this can be difficult.

The taxation of damages

- 9. There are several specific provisions in both the ITAA97 and the *Income Tax Assessment Act 1936* dealing with the taxation of damages which are of limited application. Examples of these are given in fn 14 of the Article referred to in fn 20. In addition, there are exemptions applying to CGT in Div 118 (see especially, s118-37) and in Pt 3-3 of the ITAA97.
- 10. Damages may be taxable as ordinary income under Div 6 of the ITAA97, or as capital gains. The categorization of damages as one or the other may affect:
 - (a) The availability of exemptions; eg, if the relevant asset was acquired before 20 September, 1985, there may be an exemption from CGT.²⁸
 - (b) The availability of discount capital gains or of indexation of the cost base.²⁹
 - (c) The ability to off-set gains and losses. Capital losses and net capital losses can be deducted only from capital gains, not assessable income.³⁰
- 11. How do you tell whether damages are to be categorized as ordinary income or as capital gains? First, this depends on the character of the receipt in the hands of the plaintiff.³¹ In general, one asks, For what were the damages paid? This can be referred to as the quid pro quo, replacement or hole principle.³² Were they paid for something on capital account, or for something pertaining to income, eg, loss of profits or lost wages? If the damages were paid for something pertaining

²⁵ See *Cullen v Trappell*, supra.

²⁶ Ibid.

²⁷ Eg, the fact that net capital gains for an income year may depend on losses of previous years; the fact that the benefit of net capital losses depends on capital gains in future.

²⁸ See above.

²⁹ See above.

³⁰ See above.

³¹ *FCT v Slaven* (1984) 15 ATR 242.

³² See *FCT v Slaven*, supra; *Carapark Holdings Ltd v FCT* (1967) 115 CLR 653; *FCT v Wade* (1951) 84 CLR 105; *Dickenson v FCT* (1958) 98 CLR 460.

- to income according to ordinary concepts, s6-5 of the ITAA97 will apply.³³ In some cases, the quid pro quo, replacement or hole principle is overridden by other considerations. For example, the damages or compensation may arguably constitute income because it is received in the form of income, such as an annuity.³⁴ Pre-judgment interest presents problems of characterization.³⁵ Although there is an exemption from income tax for post-judgment interest on judgment debts relating to personal injury,³⁶ post-judgment interest is ordinary income.³⁷
12. Another principle of importance, is that in a proper case, a single payment or receipt of a mixed capital and income nature may be apportioned between capital and income respectively. Such a payment or receipt cannot, however, be thus apportioned, where the payment is in respect of a claim or claims for unliquidated damages only and is made under a compromise which treats it as a single, undissected amount of damages.³⁸ The question is whether, from the matrix of surrounding facts, there is any basis for apportionment.³⁹ All this is subject to s116-40, under which, if you receive a payment in connection with a transaction that relates to more than one CGT event, or one CGT event and something else, the capital proceeds must be reasonably apportioned.⁴⁰

Taxation of damages which are capital

13. The Commissioner has published a number of public rulings on the taxation of damages under the CGT provisions; namely, TR 95/35 (capital gains: treatment of compensation receipts), TR 97/3 (capital gains: compensation received by landowners from public authorities), TR 99/19 (capital gains: treatment of forfeited deposits, instalments and damages), and TR 94/29 (CGT consequences of a contract for the sale of land falling through.) These are binding on the Commissioner until withdrawn.⁴¹ They are not binding on taxpayers.
14. The following are the main general rules or guidelines governing the taxation of damages which are capital.

Rule: personal wrongs

15. A capital gain you make from a CGT event relating directly to compensation or damages you receive for any wrong or injury you suffer in your occupation, or for any wrong, injury or illness you or your relative suffers personally, is disregarded.⁴² The Commissioner interprets illness as including psychological

³³ Thus, for example, worker's compensation may be taxed as ordinary income: see Tax Determination TD 14.

³⁴ One cannot assume that the converse applies.

³⁵ See *Whitaker v FCT* (1998) 98 ATC 4285.

³⁶ See s51-55.

³⁷ See *Whitaker v FCT*, supra and see also, *Riches v Westminster Bank Ltd* [1947] AC 402.

³⁸ See *McLaurin v FCT* (1961) 104 CLR 381; *Allsop v FCT* (1965) 113 CLR 341; *Sommer v FCT* [2002] ATC 4815.

³⁹ See *FCT v CSR* (2000) 104 FCR 44; *Sommer v FCT*, supra.

⁴⁰ As to apportionment of the cost base, see s112-30.

⁴¹ See TR 92/1 and the legislation referred to therein.

⁴² See s118-37(1).

damage or mental injury.⁴³ He has ruled that ‘you’ is limited to natural persons, and that ‘wrong’ covers defamation, breach of privacy, sexual harassment, professional negligence of a solicitor in failing to institute a personal injury claim, unlawful discrimination and wrongful dismissal.⁴⁴ In some of these cases, the plaintiff can take a tax exempt annuity (called a personal injury annuity) rather than a lump sum by way of compensation.⁴⁵

16. It follows from the rule that the capital gain is disregarded, that CGT on the damages will be reduced to the extent to which the damages can be apportioned to damages received for wrong, injury or illness within the section. For examples, see Egs 14 to 17 of TR95/35. Whether this would call for a taxation adjustment to be made to the amount of damages, would depend on the circumstances.

Guideline 1: where disposal of underlying asset

17. The Commissioner treats⁴⁶ the receipt of damages for the disposal of an asset by the plaintiff as capital proceeds. The damages are treated as capital proceeds of the disposal albeit in a less direct sense than payment of the purchase price. This approach is called the underlying asset or look through approach.⁴⁷ It is consistent with the reasoning in *FCT v Guy*.⁴⁸ Depending on the circumstances, the relevant CGT event⁴⁹ may be A1 (disposal of a CGT asset), or C1 (loss or destruction of a CGT asset), in which case there may be a roll-over of the capital gain so that it is reduced or disregarded.⁵⁰
18. Where this guideline applies, a capital gain made from the disposal of a taxpayer’s main residence or car may be exempt,⁵¹ and a capital gain is generally disregarded where the plaintiff acquired the asset before 20 September 1985.⁵²
19. This guideline applies to such cases as a plaintiff suing his agent for causing the plaintiff to sell an asset for less than it was worth,⁵³ and compensation paid for a compulsory acquisition.⁵⁴
20. Without particular facts, it is difficult, indeed dangerous to generalize about the need for tax adjustments in a particular category of case. Nevertheless, it seems safe to say that there should be no cause for making an adjustment to the damages on account of CGT, where the proceeds lead to the same CGT consequences

⁴³ See Draft Tax Ruling (DTR) 1999/D1.

⁴⁴ See TR 95/35.

⁴⁵ See Div 54 of the ITAA97.

⁴⁶ See TR 95/35.

⁴⁷ *Ibid.* The Commissioner justifies this approach by reference, inter alia, to s118-30 (insurance policies) and Subdiv 124-B: see TR 95/35 [70ff] and *Carborundum Realty Pty Ltd v RAlA Archicentre Pty Ltd* (1993) 25 ATR 192.

⁴⁸ 96 ATC 4520, 4531 (Full Federal Court.) *Cf Brooks & Anor v FCT* 2000 ATC 4362 (FFC), not following *Guy*’s case on one, but not this point.

⁴⁹ As to which, see s104-5.

⁵⁰ See, eg, Subdiv 124-B of the ITAA97.

⁵¹ See s118-5 and Subdiv 118-B and *Guy*’s case, *supra*.

⁵² See ss104-10(5) (special rule for leases) and s104-20(4), but subject to special requirements where corporate taxpayers, see eg, Div 165 and generally, TR 95/35.

⁵³ See, as an example, the facts in *Provan v HCL Real Estate* 92 ATC 4644.

⁵⁴ See TR 95/35, but note also the roll-over provisions in Subdiv 124-B of the ITAA97.

whether paid as purchase moneys or as damages.⁵⁵ So far as I can tell, in many, if not all cases, this will be the position.

Guideline 2: where underlying asset not disposed of but permanently damaged or reduced in value

21. If there is no disposal of an underlying post CGT asset at the time of receipt of the damages, but the damages are awarded for its being permanently damaged or reduced in value, the Commissioner treats the receipt of damages as a recoupment of expenditure made on the asset, thus reducing its cost base.⁵⁶ It is as if the cost which the plaintiff has recouped was never incurred; hence, for example, only the adjusted cost base can be subject to indexation.⁵⁷ There are no CGT consequences until the underlying asset is disposed of, or is the subject of some other CGT event; moreover, to the extent that the damages exceed (if at all) the unindexed cost base of the underlying asset, there are no CGT consequences.⁵⁸
22. Examples are as follows: compensation for damage caused to the plaintiff's building by the defendant's negligent operation of machinery;⁵⁹ compensation for permanent damage caused to the plaintiff's goodwill by reason of defamation by defendant.
23. The recoupment⁶⁰ has to be a recoupment of expenditure.⁶¹ A recoupment includes an indemnity.⁶² According to the Commissioner, where a plaintiff gets damages for the actual or anticipated cost of repairing permanent damage to an underlying asset, but the plaintiff chooses not to incur the expenditure on the underlying asset for which he has been compensated, there is no recoupment, and the right to seek compensation is the most relevant asset in respect of which the damages have been received.⁶³
24. In most, if not all of these types of cases, it seems likely that a tax adjustment would not be warranted, except in certain circumstances where the damages were in excess of the unindexed cost base of the underlying asset. Where as a result of the damage caused to the underlying asset it is later sold for less than it otherwise would have been, the shortfall in the capital proceeds may correspond with the reduction in the cost base that is due to the recoupment. If the damages pay for repairs so that there is no shortfall in capital proceeds, then the plaintiff will be in the same position he would have been in had he not suffered the loss.

Guideline 3: the plaintiff receives damages for paying an excessive price for an asset

25. In this case, the Commissioner treats the damages as being a recoupment of the cost base, as under the last preceding guideline. An example of this case, would

⁵⁵ See *Carborundum Realty Pty Ltd v RAI Archicentre Pty Ltd* (1993) 25 ATR 192; *Namol Pty Ltd v AW Baulderstone Pty Ltd* (1993) 27 ATR 181; *Joondalup Gate Pty Ltd v Minister for Lands (WA)* (1996) 33 ATR 327; cf *Rabelais Pty Ltd v Cameron* 95 ATC 4552.

⁵⁶ See TR95/35 and Eg 6 therein.

⁵⁷ See TR 95/35 at [130].

⁵⁸ See TR 95/35.

⁵⁹ See TR 95/35, Eg 6.

⁶⁰ As to what is a recoupment, see s20-25.

⁶¹ See ss110-45(3) and 110-55(6).

⁶² See s20-25.

⁶³ See TR 95/35 at [135 to 137]. Query whether this needs to be re-examined in light of the definition of 'recoupment' in the ITAA97 referred to above. The ruling analyses the CGT provisions in the ITAA36, which have been replaced by the CGT provisions referred to above.

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be a purchaser receiving such damages by reason of his agent's having colluded with the vendor, or having failed to detect defects in the property, as in *Carborundum Realty Pty Ltd v RAI Archicentre Pty Ltd*.⁶⁴ Another example is furnished by the facts in *Duke Group (in liq) v Pilmer*⁶⁵ (excessive price paid for shares.) See also Egs 5, 20 and 24 in TR 95/35.

26. Assume A paid \$x too much for an asset and gets damages of \$x. A sells the asset. Assume further had A not paid \$x, his profit on sale (ignoring the damages) would have been greater by \$x. In such a case, because the capital gain is the same as it would have been if A had not paid \$x, no taxation adjustment in assessing the damages is called for.

Guideline 4: where no underlying asset of relevance

27. This is different from the previous cases discussed. In this category of case, the Commissioner treats damages as being capital proceeds for the release, discharge or satisfaction of the cause of action within the meaning of CGT event C2.⁶⁶ The Commissioner says that the relevant causes of action are acquired at the time of the first actionable wrong.⁶⁷
28. There are significant limitations on the elements of the cost base of the cause of action.⁶⁸ Although in *Namol Pty Ltd v AW Boulderstone Pty Ltd*,⁶⁹ the Court said that loss suffered could be considered as being part of the cost base, in the opinion of the writer, it is difficult to see any warrant for that conclusion in the cost base provisions themselves, and it is unlikely that the Commissioner would accept this view. Nevertheless, the Commissioner says that expenditure incurred by a plaintiff and claimed as a head of damages, are treated as part of the cost base, and likewise, compensation paid by a plaintiff for which he claims an indemnity from his insurer, is part of the cost base of the claim to be indemnified by the insurer.⁷⁰ The Commissioner also treats the plaintiff's legal fees and charges as being part of the cost base.⁷¹
29. There is some support in the authorities for treating the cause of action as the relevant asset in a wider category of cases than that to which it is applied by the Commissioner.⁷² Assuming the treatment has the more limited application, the following examples of cases where it would apply may be given: the plaintiff vendor receives damages by reason that a contract for the sale of land has fallen through in circumstances where there is no associated disposal of the land;⁷³ the plaintiff receives damages for breach of a covenant not to compete with the plaintiff's business.⁷⁴

⁶⁴(1993) 25 ATR 192.

⁶⁵ 31 ACSR 213.

⁶⁶ See s104-25(1) and *Hepplles v FCT* (1991) 173 CLR 492 and see TR 95/35.

⁶⁷ See TR 95/35.

⁶⁸ See s110-25(1) to (3).

⁶⁹ (1993) 27 ATR 181.

⁷⁰ See TR 95/35.

⁷¹ Ibid. See also [37.]

⁷² See, eg, *Rabelais Pty Ltd v Cameron* (1995) 95 ATC 4552.

⁷³ See *ibid*; *Zim Properties v Procter* [1985] 58 TC 371; TR 94/29; TR 95/35, Egs 8 and 9; TR 99/19. As to forfeiture of deposits, see CGT event H1 in s104-5 and TR 94/21.

⁷⁴ See, eg, *Tuit v Exelby* 93 ATC 4293.

30. In such cases, as in *Duke's case*⁷⁵ and Egs 8, 9 and 11 of TR 95/31, there may be a need for a taxation adjustment to be made when assessing damages.

31. It is to be noted that, although an unsatisfied judgment could constitute sale proceeds, depending on the circumstances, the relevant capital proceeds could be nil. This would be so if the judgment were worthless,⁷⁶ and the non-receipt rule set forth in s116-45 applied.

Guideline 5: where damages relate or compensation relates to a number of different heads and can't be apportioned

32. Suppose, for example, that the damages relate both to income and to capital.

Suppose another case, where the asset underlying part of the damages is an asset other than the cause of action, but there is no asset underlying the remainder of the damages other than the cause of action. Suppose, in each case, that the damages cannot be apportioned, and that they are not covered by an exemption, such as described above.

33. In this category of case,⁷⁷ as in the last, the Commissioner treats damages as being capital proceeds for the release, discharge or satisfaction of the cause of action within the meaning of CGT event C2.⁷⁸

34. In this category of case, there may well be grounds for making a tax adjustment to the damages.

Guideline 6: cases which do not fall into any of the abovementioned categories

35. In such cases, the relevant CGT event may be D1 or if not D1, H2. These are events of last resort.⁷⁹ Depending on the circumstances, the Commissioner might treat the following as such cases: an *ex gratia* payment of compensation;⁸⁰ compensation received for an undertaking not to compete; an award of punitive damages.⁸¹

Guideline 7: tax adjustments to damages

36. The Commissioner treats these in the same way as the basic award of damages or compensation. The tax adjustment may take the form of an indemnity. An indemnity is itself a capital asset. The capital proceeds will be the market value of the indemnity.⁸²

Guideline 8: costs and recovery of costs

37. The Commissioner may treat costs as part of the relevant cost base.⁸³ Hence, he may treat the recovery of costs as a recoupment of that part of the cost base.⁸⁴

Running cases where damages claimed may be liable to CGT

⁷⁵ Supra.

⁷⁶ See Div 116.

⁷⁷ Instances are given in Egs 12 and 13 in TR 95/35.

⁷⁸ See TR 95/35, [18].

⁷⁹ See ss102-25, 104-35(5) and 104-155(5).

⁸⁰ See Eg 10 in TR 95/35.

⁸¹ See Eg 7 in TR 95/35.

⁸² See TR 95/35, [27].

⁸³ See TR 95/35, Eg 3 and TR 94/29, [63]. See also [28] above.

⁸⁴ See TR 95/35, Eg 4. As to the recoupment provisions, see paras 21 to 23 above and footnotes referred to therein.

Evidence

38. Although at least one case⁸⁵ suggests that, in order to recover additional damages for CGT, the plaintiff must prove that it is more likely than not that the plaintiff's loss and damage will include a liability to CGT, the better view⁸⁶ (in the opinion of the writer) is that the plaintiff has to prove on the balance of probabilities that there is a more than fanciful risk that his loss and damage will include such liability. As to whether the plaintiff must go further and adduce evidence that enables the court to make a realistic assessment of the extent of the risk and range of amounts involved, there is a conflict amongst the relevant authorities.⁸⁷
39. Because CGT is imposed on net capital gains, the plaintiff's capital losses, net capital losses, and capital gains – past, present and future – may affect the assessment of damages and hence be relevant. Likewise, evidence of the plaintiff's income, profits, losses, and outgoings, may be relevant. For example, the defendant may wish to adduce evidence of the plaintiff's capital losses in order to prove that there is no real risk that the award of damages will increase the plaintiff's taxable income in any year.
40. It will be advisable for a litigant wishing to gain a tax adjustment in its favour to obtain the expert opinion of a tax practitioner.⁸⁸ To the extent that such an opinion were an opinion on matters of law rather than practice, it could be adopted as a submission of the litigant rather than admitted as evidence. In addition, rulings could be tendered, and other evidence from the Australian Tax Office could be adduced. A private ruling from the Commissioner is binding on the Commissioner if he so agrees, or if the ruling states there will be no tax.⁸⁹ Otherwise, the ruling is mere evidence, which the court can reject, as it did in the *Carborundum* case.⁹⁰
41. It may be prudent for the plaintiff to seek orders for confidentiality, especially so as to protect the confidentiality of communications that could be privileged from production in proceedings with the Commissioner.

Remedy or relief

42. Where the litigant proves that there is a real risk that CGT will have an impact on damages, there is controversy as to what relief is meet. Because of the system of self-assessment applying to taxpayers, a plaintiff's liability to tax may take years to be fixed with finality.⁹¹ This is so even if the plaintiff agrees to conditions, or obligations are imposed on the plaintiff, in either case requiring the plaintiff to

⁸⁵ *Tuite v Exelby* 93 ATC 4293, 4303.

⁸⁶ See *Duke Group Pty Ltd (in liq) v Pilmer* (1999) 31 ACSR 213, 319; *Turner v TR Nominees Pty Ltd* (1995) 31 ATR 578, 596.

⁸⁷ In the *Duke Group* case, supra the plaintiff did not need to go further, but in *Osrice Investments Pty Ltd v Woburn* [2001] FCA 1402, the Court rejected that approach. See also the *Carborundum* case, supra.

⁸⁸ See the *Osrice* case, supra and *Namol's* case, supra.

⁸⁹ See *Taxation Administration Act 1953*, Part IVAA.

⁹⁰ Supra.

⁹¹ According to TR 95/35 and TR 94/29, the plaintiff may be required to amend an earlier return on the receipt of damages or interest.

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- expose the issues to the Commissioner in such a way as enable the plaintiff to contest an adverse assessment.⁹²
43. Having regard to these difficulties, in various of the cases cited, the court has granted one of the parties an indemnity,⁹³ or reserved liberty to apply.⁹⁴ Arguably, however, the grant of such relief offends against the principle that damages are to be granted once and for all. Nevertheless, where a plaintiff seeks an increase in damages owing to a tax adjustment, the plaintiff would be wise to apply for an indemnity as well. Furthermore, it may be prudent for the party granted any such relief (whether plaintiff or defendant) to apply for security.

Joinder of Commissioner

44. In the *Carborundum* case,⁹⁵ the Court commented that the Commissioner had not been joined as a party, so of course he was not bound by the result. There is authority that the Commissioner cannot be joined in such cases,⁹⁶ presumably because he is not a party to any interest in the case. Of course, he could be approached for agreement to be bound by the result in the case, and offered as a condition of his agreeing to do so, the opportunity of making submissions as *amicus curiae*.

Michael Hines is a member of the Victorian Bar Professional Standards Scheme approved under Professional Standards Legislation. His liability is limited under that Scheme. A copy of the Scheme will be supplied on request.

⁹² One option for the plaintiff may be to include the possible capital gain in his return, and if the return constitutes the assessment, or he receives a notice of assessment, object to it under the relevant statutory provisions in the *Taxation Administration Act 1953*.

⁹³ As in *Provan's* case and *Duke's* case, both *supra*. But an indemnity was refused in the *Carborundum* case, *supra* and in *Namol's* case, *supra*.

⁹⁴ As in *Rabelais Pty Ltd v Cameron* 95 ATC 4552 and *Turner's* case, *supra*. Another possibility is for the court to grant a stay or to require an undertaking.

⁹⁵ *Supra*.

⁹⁶ See *Provan's* case, *supra* at 4645 per Rolfe J citing *Gill v Australian Wheat Board* [1980] 2 NSWLR 795, 797; and *Spencer v Macmillans Trustees* [1959] SLT 41, 44, 49 and *Riches v Westminster Bank Ltd* [1947] AC 390.