



Taxation Determination

Income tax: capital gains: if a CGT asset is transferred by one spouse to another because of a court order under the *Family Law Act 1975*, when is the asset acquired under Division 109 of the *Income Tax Assessment Act 1997* by the transferee?

Preamble

*This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding on the Commissioner.*

Date of effect

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

1. The answer depends in part on when the CGT asset was acquired by the transferring spouse ('the transferor').

Pre-CGT assets of transferor

2. If a CGT asset acquired before 20 September 1985 is transferred by one spouse to another because of a court order under the *Family Law Act 1975* (FLA 1975), the transferee spouse is taken by subsection 126-5(6) of the *Income Tax Assessment Act 1997* (ITAA 1997) to have acquired the asset before that day.

Post-CGT assets of transferor

3. If a CGT asset acquired on or after 20 September 1985 is transferred by one spouse to another because of a court order under the FLA 1975, the time of acquisition of that asset by the transferee depends on the provisions of Part 3-1 and Part 3-3 of the ITAA 1997.
4. A court order might be silent on when an asset is to be acquired by the transferee. It might merely specify that one spouse transfer an asset to the other spouse on or by a certain date or within a certain period of time. It might specify that one spouse create certain rights in the other spouse (e.g., a lease). Regardless of the wording of the order, it is the action taken because of the court

order that must be considered to determine the time of acquisition of the asset by the transferee for capital gains purposes. Division 109 of the ITAA 1997 (about when you acquire an asset) applies and provides general acquisition rules for capital gains purposes.

Note 1

5. There is a special indexation rule for this same asset roll-over in subsection 114-10(4).

Note 2

6. A CGT event happens 'because of' a court order if the CGT event is caused by the court order.

Example 1

7. *A court order under the FLA 1975 dated 1 September 1998 requires Moira to transfer her rental property to her spouse, Aidan, three months after the date of the order. Mary is to retain the income from, and incur the expenses of, the rental property until the change of ownership. Moira transfers title to Aidan on 1 December 1998.*

8. *At general law, the property is transferred to Aidan on 1 December 1998. For capital gains purposes, CGT event A1 (about disposal of a CGT asset) also occurs on 1 December 1998, there being no contract entered into before the transfer of the property: paragraph 104-10(3)(b) of the ITAA 1997. For capital gains purposes, Aidan is taken to have acquired the rental property on 1 December 1998. For general taxation purposes, Moira would retain ownership and be entitled to the rental income from the property up until 1 December 1998. Any rental income after that date is assessable income of Aidan.*

Example 2

9. *A court order under the FLA 1975 dated 1 October 1998 requires Mary to enter into a contract by 31 October 1998 to transfer her rental property to her spouse, Wendell, three months after the date of the order. Mary is to retain the income from, and incur the expenses of, the rental property until the change of ownership. Mary and Wendell enter into the contract on 30 October 1998 and Mary transfers title to Wendell on 31 December 1998.*

10. *At general law, the property is transferred to Wendell on 31 December 1998. For capital gains purposes, CGT event A1 (about disposal of a CGT asset) occurs on 30 October 1998, the time that Mary entered the contract: paragraph 104-10(3)(a) of the ITAA 1997. For capital gains purposes, Wendell is taken to have acquired the rental property on 30 October 1998. For general taxation purposes, Mary would retain ownership and be entitled to the rental income from the property up until 31 December 1998. Any rental income after that date is assessable income of Wendell.*

Commissioner of Taxation

3 November 1999

Previous draft:

Previously issued in draft form as TD 1999/D82

Subject references:

asset; acquisition; CGT asset; CGT event A1; court order; disposal; ownership; rental income; rental property; roll-over; transfer; transferor; transferee

Legislative references:

ITAA 1997 104-10(3)(a); ITAA 1997 104-10(3)(b); ITAA 1997 Div 109; ITAA 1997 114-10(4); ITAA 1997 126-5(6); ITAA 1997 Part 3-1; ITAA 1997 Part 3-3; FLA

ATO references:

NO 99/19509-6

BO CGT marriage breakdown summit 1999

FOI Index Detail: I 1020769

ISSN: 1038 - 8982