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Ruling Compendium – TD 2009/19

This is a compendium of responses to the issues raised by external parties to draft TD 2009/D3 – Income tax: does a taker in default of trust capital have an 'interest in the trust capital' for the purposes of CGT event E8 in section 104-90 of the *Income Tax Assessment Act 1997*?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1.	Related Determination A reference to TD 2003/28 should be included under the heading 'Related Rulings/Determinations'. Similarly, a reference to this Determination should be included under the heading 'Related Rulings/Determinations' in TD 2003/28.	Disagree. TD 2003/28 is related to this Determination in the sense that both Determinations deal with the question of whether the interest held by a taker in default constitutes a requisite interest in a trust for the purposes of the particular CGT event which each Determination is concerned with. But while both Determinations conclude that an interest held by a taker in default is not an interest of the kind to which the respective CGT events apply, they do so for unrelated reasons. TD 2003/28 concludes that an interest held by a taker in default is outside CGT event E4 (unless it was acquired for consideration or by way of assignment) as the interest that is contemplated by that event is one in which a taxpayer invests. This Determination on the other hand concludes that such an interest is outside CGT event E8 because sections 104-90, 104-95 and 104-100 of the <i>Income Tax Assessment Act 1997</i> indicate that only those interests which constitute a vested and indefeasible interest in a share of the trust capital are within the scope of the event.

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Issue No.	Issue raised	Tax Office Response/Action taken
2.	Whether interest is a CGT asset The Determination should include an explicit statement that the interest held by the taker in default of trust capital is not a CGT asset for the purposes of CGT event E8. A similar statement should also be included in TD 2003/28.	Disagree. The interest held by a taker in default of trust capital is a 'CGT asset' for the purposes of both CGT event E4 and CGT event E8 as it is within the meaning of that term in section 108-5. Despite this, neither of those CGT events apply in relation to an interest of this kind as it is not the type of interest that is contemplated by either of those events (unless, in the case of CGT event E4, the interest was acquired for consideration or by way of assignment).
3.	The position taken in the draft Determination is incorrect as it focuses on whether or not a CGT asset is capable of being defeased. The correct position under the law is that a taker in default owns a CGT asset, being his equitable chose in action as a beneficiary of the trust, and that asset is an 'interest in the trust capital' for the purposes of CGT event E8.	See the response to issue 2 above.
4.	The second sentence in paragraph 4 of the draft Determination is open to the interpretation that the interest held by the taker in default of trust capital may be a CGT asset for the purposes of CGT event A1 even though it is not one for the purposes of CGT event E8. This leads to questions whether the interest would be a CGT asset for the purposes of other CGT events.	These issues will be referred to the relevant business line for assessment under the priority technical issue process. However, referral does not guarantee that an interpretative product will be issued absent the issues being specifically raised in the context of a private ruling or audit (both of which may require the publication of an ATO ID) or litigation.

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4. cont	To clarify this, the Commissioner should publish a public ruling to confirm: • whether the interest held by a taker in default of trust capital and the interest held by a mere object are CGT assets for the purposes of CGT events A1, C2, E5, E6 and E7, • whether Australian currency is a CGT asset of a trust for the purposes of CGT events E5, E6 and E7, and • whether section 99B of the <i>Income Tax Assessment Act 1936</i> applies in circumstances where a trustee pays an amount of Australian currency or transfers other property to either a taker in default of trust capital or a mere object.	
5.	Application of CGT event A1 In the example in paragraph 4 of the draft Determination, it is noted that although CGT event E8 does not apply, CGT event A1 may apply. While this qualified conclusion is correct, this point may cause some confusion. Because of this, it should be dealt with by a specific paragraph in the Determination rather than being an otherwise unreferenced statement in an example.	Agree. A sentence has been added to paragraph 13 in the Explanation Appendix to make it clear that the disposal of the interest will result in CGT event A1 happening unless one of the exceptions to that event applies.

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6.	Wording of paragraph 9 Paragraph 9 of the draft Determination attempts to set out in a single sentence the method statements in subsections 104-95(1) and (2). The sentence could be rendered with greater clarity by breaking it into two or more sentences or by presenting the calculation in tabular form.	Agree. Paragraph 9 has been broken up to assist readability.
7.	Determination requires some context The draft Determination would have benefited from some context, in particular an attempt to rationalise the E8 outcome with the other E events and in particular E5, E6 and E7.	Disagree. The Determination contains sufficient reasoning to allow a reader to understand the logic of the Determination. Further, the role of the Explanation Appendix is limited to supporting the conclusion stated in the Ruling section of the Determination. As this Determination is confined to the question of what constitutes an interest in the trust capital for the purposes of CGT event E8 (and not what constitutes an interest for the purposes of some or all of the E events in Part 3-1), the Explanation Appendix does not require a discussion of those other E events. The view expressed in the Determination does not rely upon the scope of those other events.

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Issue No.	Issue raised	Tax Office Response/Action taken
8.	Sole remaining capital beneficiary The draft Determination does not consider a case where the taker in default is the only member of the class of discretionary beneficiaries of capital remaining, and it is not possible for any other discretionary beneficiary of capital to be nominated or to enter the class naturally. In such circumstances, it may be possible to argue that the beneficiary's interest is vested and indefeasible. Because of this, the Tax Office should clarify whether CGT event E8 would happen in relation to a disposal of an interest of this kind.	The term 'taker in default' has not been defined for the purpose of the Determination. But, by making reference in several places in the Determination to an interest in the trust capital that 'may' be defeased by a trustee appointing it to other beneficiaries, the ruling is practically limited to those takers in default where the circumstances are such that the trustee is actually capable of making such an appointment – it is considered that this would be the usual fact pattern. It is acknowledged that there may be some circumstances, although likely to be rare, where a trustee may no longer be able to appoint the interest held by a taker in default in the trust capital to another beneficiary. A taker in default in a situation such as this is not intended to be within the scope of the Determination. While this leaves open the question of whether the interest held by the taker in default in these circumstances could be considered to be a vested and indefeasible interest (and so within the scope of CGT event E8) such questions are dependent on specific facts and circumstances and are best addressed in a private ruling (which may result in the publication of an ATO ID) rather than a public ruling.