TR 1999/D8 - Income tax: insurance registers

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Draft Taxation Ruling
Income tax: insurance registers

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Preamble

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

Class of person/arrangement

1. This Ruling provides guidelines on the taxation consequences of acquiring or disposing of an insurance register for the purposes of the *Income Tax Assessment Act 1997* ('the Act'). The Ruling applies to both general and life insurance companies.

2. For the purposes of this Ruling an insurance register records the rights of an insurance agent to future renewal, CPI, and/or orphan policy commissions in accordance with the terms of an agency agreement with an insurance company. The register is also a record of the policyholders that an agent has an exclusive right to deal with on behalf of an insurance company. From a legal perspective, the crucial elements of an insurance register are the contractual rights of an agent under the agency agreement with the insurance company. The rights and obligations that attach to an insurance register depend on the particular terms of the agency agreement.

3. An agent may be a sole agent exclusively tied to one insurance company or a multi-agent who has agency agreements, and corresponding insurance registers, with several insurance companies.

4. The contractual rights of an agent under an agency agreement constitute a legal chose in action. The contractual rights to future renewal, CPI and/or orphan policy commissions are part of this legal chose in action. Whether the rights to these commissions can be severed from the legal chose in action and assigned as presently existing property, depends on the terms of the agency agreement. When an agency agreement provides for the termination of an agent's rights to commissions upon the cessation of the agreement, the contractual rights would not be capable of assignment as presently existing property. However, where the right to renewal or other

commissions can continue after the cessation of the agency agreement, such as where the right can pass to the trustee of the deceased estate of an agent, then the right would be capable of assignment as presently existing property.

5. Dealings with an insurance register can take the following different legal forms:

- an assignment of presently existing property;
- a contract that purports to assign an expectancy;
- a novation of an agency agreement; and/or,
- a variation of agency agreements.

Ruling

Assessability of sales proceeds of a register under section 6-5

6. Irrespective of the legal form of the transaction, an amount received by an agent for the sale of an insurance register would be of a capital nature, except in the circumstances outlined in paragraphs 8 to 12 of this Ruling and, consequently, not assessable as ordinary income under section 6-5 of the Act.

Assignment of property

7. In Taxation Ruling IT 2408 we accepted that an insurance register was an income producing asset in its own right. Consequently, a register (comprising the right to future renewal, CPI and orphan policy commissions) could be effectively assigned for income tax purposes. In contrast, initial commissions, production volume bonuses, overriding commissions and recruiting commissions were categorised as income derived by an agent from the rendering of personal services. Taxation benefits arising from an assignment of such personal exertion income are cancelled under Part IVA of the *Income Tax Assessment Act 1936* ('the 1936 Act').

8. We have now come to the view that not all insurance registers created under insurance agency agreements commonly used in Australia can be regarded as presently existing property. We continue to accept that an insurance register is an income producing asset in its own right when the right to future renewal, CPI and/or orphan policy commissions is severable from the remainder of the agency agreement, and the severed contractual right is founded on the provision of past consideration, and not the future personal exertion of the agent. An amount received for the outright sale of such a contractual right is of a capital nature, providing the sale does not

occur in the ordinary course of business of a multi-agent, or as part of a profit-making venture or transaction.

Purported assignment of an expectancy

9. Where an agency agreement provides that the commissions of an agent are to be received for the agent's agreement to perform, or the performance of, the entire contract, a right to future renewal, CPI and/or orphan policy commissions cannot be severed from the remainder of the agency agreement. An agent under such an agreement cannot pass to an assignee property that is presently existing.

10. Where a purported assignment of a right to renewal, CPI and/or orphan policy commissions is ineffective to transfer presently existing property, and the assignee has paid valuable consideration, the contract between the agent and the assignee operates in equity to effect a transfer of the commissions assigned, as the commissions are derived as income by the assignor. When the commissions come into existence, the assignor agent *eo instanti* becomes trustee of them for the assignee. Such an assignment is not effective to prevent the commissions being derived as ordinary income of the assignor agent, who holds the commissions as the corpus of a trust estate on behalf of the assignee. The amount received by an agent as consideration for such a purported assignment would be a capital receipt, providing it was not received in the ordinary course of business of an agent, or as part of a profit-making venture or transaction.

Novations and variations of agency agreements

11. An amount received by a sole agent exclusively tied to one insurance company, for the cancellation of the agency agreement as part of a novation arrangement to sell the insurance register, would be of a capital nature. Similarly, an amount received by a sole agent or a multi-agent for the variation of an agency agreement to effect a sale of the register would be a capital receipt, providing the amount was not derived by the agent in the ordinary course of the agency business and was not part of an isolated profit-making transaction.

12. However, an amount received by a multi-agent from the sale of an insurance register would constitute ordinary income for the purposes of section 6-5 of the Act, when received for the cancellation or variation of an agency agreement that had been entered into in the ordinary course of the business of the multi-agent, where the agency agreement did not form part of the profit-making structure of that business.

Deductibility of cost of insurance register

13. Expenditure incurred by an agent acquiring an insurance register would be of a capital nature, subject to paragraphs 14 and 15 of this Ruling, irrespective of the legal form of the transaction and, consequently, not allowable as a deduction under section 8-1 of the Act.

14. However, a multi-agent who enters into agency agreements or variations of agency agreements in the ordinary course of business, would be allowed deductions for such expenditure, where those agreements do not form part of the profit-making structure of the business, and amounts received from the sale of registers are included in ordinary income in accordance with paragraph 12 of this Ruling.

15. A deduction would also be available for a loss incurred by an agent on the sale of property acquired for the purpose of profit making by sale.

CGT consequences of disposal

16. The CGT consequences of a disposal of an insurance register will vary, depending on the legal form of the transaction:

Transaction	CGT Event	Section of 1997 Act
Assignment of property	A1	104-10
Contract purporting to assign an expectancy	D1 or E9	104-35 or 104-105
Novation of contracts	C2	104-25
Variation of contracts	H2	104-155

Assignment of property

17. A sale of an insurance register constitutes an assignment of property when an agent assigns a presently existing right to future renewal, CPI and/or orphan policy commissions, which has been severed from the remainder of the agent's interest under the agency agreement. Such an assignment confers an immediate entitlement on an assignee with respect to those future commissions.

18. When a chose in action consisting of a right to renewal, CPI and/or orphan policy commissions is severed from an agency agreement and assigned to a purchaser, there is a disposal of a CGT asset (section 104-10, CGT event A1). The cost base of the severed chose in action is worked out under subsections 112-30(2) and (3). The capital proceeds for the CGT event are the amount received from the purchaser, or, if no amount is received, the market value of the

CGT asset at the time of the event (section 116-30). The capital gain (or loss) is then worked out under subsection 104-10(4) by subtracting the (reduced) cost base from the capital proceeds. However, a capital gain (or loss) is disregarded if the agency agreement was entered into before 20 September 1985 (paragraph 104-10(5)(a)).

Contract purporting to assign an expectancy

19. Where an agent creates a contractual right in an entity (including an entity that is a trustee of a trust estate) to receive future renewal, CPI, or orphan policy commissions upon derivation by the agent, then section 104-35, CGT event D1 (about creating contractual or other rights), would apply. The capital gain (loss) would be measured as the amount by which the capital proceeds received by the agent are greater (less) than the incidental costs relating to the event (subsection 104-35(3)).

20. It is arguable that section 104-35, CGT event D1, may not apply where an agent agrees to hold future renewal, CPI or orphan policy commissions as trustee of a discretionary trust and, at the time of the agreement, no potential beneficiary has a beneficial interest in the rights created by the agreement because no right to receive future commissions has been created in another entity (refer, paragraphs 8.11 and 8.12 of the explanatory memorandum to *Taxation Laws Amendment Act (No 1) 1995* concerning amendments to the former subsection 160M(6) of the 1936 Act, which has been rewritten as section 104-35, CGT event D1, of the Act).

21. However, where an agent agrees for consideration to hold future renewal, CPI or orphan policy commissions as trustee of a discretionary trust and, at the time of the agreement, no potential beneficiary under the trust has a beneficial interest in the rights created by the agreement, then section 104-105, CGT event E9 (about creating a trust over future property), would apply.

22. When section 104-105, CGT event E9, applies, the agent would make a capital gain (loss) if the market value of the commissions received (assuming the commissions had existed at the time of making the agreement) is more (less) than the incidental costs incurred by the agent that relate to the event (subsection 104-105(3)).

Novations and variations of agency agreements

23. A sale of an insurance register (in whole or part) from one insurance agent to another is not properly categorised as an assignment of presently existing property or of an expectancy when, in addition to the benefits flowing from the acquisition of the register, the purchaser incurs an obligation to service properly those clients in

accordance with an agency agreement and/or the vendor is released from such an obligation.

24. Where an insurance company consents to discharge the vendor agent from liability or continuing obligations under an agency agreement in respect of the clients listed on the register, and to accept the purchaser agent as the party liable in respect of the proper servicing of these clients on the terms and conditions in an agency agreement between the purchaser agent and the insurance company, there has been either a novation of contracts, or a variation of contracts.

25. Whether there is a novation involving cancellations of agency agreements and substitution of new agency agreements, or variations of continuing agency agreements, depends on the intention of the parties.

Novation of contracts

26. Where an agent wants to retire and disposes of an agency business to a purchaser who is not already an agent of the insurance company, the sale would generally involve a novation of agency agreements. While the purchaser has paid the vendor to acquire an insurance register, the legal form of the sale is that the purchaser has paid the vendor to enter into a novation whereby the vendor has surrendered an agency contract (including the insurance register) to the insurance company, and the insurance company has agreed to substitute a new agency agreement (including the insurance register of the vendor) with the purchaser.

27. The cancellation or surrender of the agency agreement by the retiring agent is a CGT event (section 104-25, CGT event C2). The money received from the purchaser of the insurance register is the capital proceeds for the ending of the agency agreement (section 116-20). If the retiring agent is also selling an agency business, an undissected amount received from the purchaser would have to be apportioned between CGT assets, on a reasonable attribution basis (section 116-40).

28. The amount of the capital gain from the cancellation of the agency agreement would depend on the cost base of the asset disposed of. Where the agency agreement was entered into after 19 September 1985, and the insurance register was built up over time (rather than through acquisitions), there is ordinarily no or, at best, a minimal cost base for the purposes of calculating any capital gain. If consideration had been paid to enlarge a post-CGT register, that consideration forms part of the cost base of the agency agreement, providing the expenditure is reflected in the state or nature of the agency agreement at the time of the subsequent CGT event (subsection 110-25(5)).

29. In certain circumstances, cancelling an agency agreement entered into prior to 20 September 1985 gives rise to a capital gains tax liability. Section 108-70 deals with capital improvements on or after 20 September 1985 to an asset (other than a periodic roll-over asset) acquired before that date. Adding new policyholders to a register under a pre-CGT agency contract, by varying that contract to acquire another register on or after 20 September 1985, is an improvement of a capital nature to the pre-CGT agency agreement. When an improved pre-CGT agency agreement is ultimately ended by cancellation (section 104-25, event C2), and the value of the improvement is greater than the improvement threshold for the income year in which the event happened, the improvement is deemed to be a separate asset to the pre-CGT agency agreement and is subject to the ordinary operation of the CGT provisions. In practice, this means the part of the register acquired on or after 20 September 1985, when sold as part of the enhanced register, is treated as a separate asset acquired on or after 20 September 1985 and any capital gain attributable to that part of the register is subject to taxation.

30. The amount of a capital gain attributable to the cancellation of an agency agreement is reduced, by section 118-20, to the extent that an amount would be included in the assessable income of the retiring agent under a provision of the Act (other than the CGT provisions) for any income year because of the CGT event.

31. A retiring agent may be able to claim the CGT retirement exemption provided by Division 17B of Part IIIA of the 1936 Act that applies to the disposal of active business assets on or after 1 July 1997. The cancellation of an agency agreement would qualify as a disposal of an active asset for the purposes of this Division because it is an intangible asset that is inherently connected with the agency business carried on by the agent (see, paragraph 160ZZPL(3)(b) of the 1936 Act).

Variation of contracts

32. A vendor may want to continue carrying on business as an insurance agent and sell only part of an insurance register to a purchaser who already carries on an agency business. The intention of the vendor and purchaser agents and the insurance company may be to vary their respective agency agreements so that the vendor is released from the rights and obligations arising from the part of the insurance register being sold, while the purchaser becomes subject to rights and obligations in respect of those policyholders. In these circumstances, there would be a variation of agency agreements rather than a novation of contracts.

33. An agent who receives an amount for selling part of an insurance register to another agent or the insurance company, by

entering into a contractual variation of the agency agreement with the insurance company, would make a capital gain to the extent that the amount is greater than the incidental costs of that event (section 104-155, event H2). The contractual variation is an act, transaction or event that occurs in relation to a CGT asset (the agency agreement). A capital loss would be made where the incidental costs exceed the amount received. A payment received for a variation to a contract comes within section 104-155, irrespective of whether the agency agreement being varied was entered into before or after 20 September 1985.

CGT consequences of acquisition

Assignment of property

34. An assignment of part of a legal chose in action (the severable contractual right to commission under an agency agreement) is only effective in equity, except in Western Australia[1]. For CGT purposes, the chose in action is acquired when the written contract is entered into (section 109-5, event A1).

Purported assignment of an expectancy

35. The entity (including an entity that is a trustee of a trust estate) that acquires the contractual right to future renewal, CPI, or orphan policy commissions from an agent, acquires an asset (the contractual right) when the contract is entered into (section 109-5, event D1). However, where CGT event E9 (section 104-105) applies because no right to future commissions has been created in another entity, then the agent acquires the asset when the agreement is made (section 109-5, CGT event E9).

Novations and variations of agency agreements

36. A novation of contracts involves a purchaser making a payment to a vendor to acquire from an insurance company the contractual rights foregone by the vendor who has surrendered an agency agreement. A variation of contracts involves a purchaser making a payment to a vendor to acquire from the insurance company the contractual rights foregone by a vendor who has varied an agency agreement. In both cases, the purchaser makes the payment either to increase the value of an existing agency agreement or to acquire valuable rights under a new agreement. A payment made to increase the value of an existing agency agreement is included in the cost base

1 Under subsection 20(3) of the *Property Law Act 1969* (WA) the assignment of part of a legal chose in action is effective at law.

of that asset under subsection 110-25(5), to the extent that the expenditure is reflected in the state or nature of the agency agreement at the time when it is surrendered or cancelled. A payment made to acquire a new agency agreement is included in the cost base of that asset under subsection 110-25(2).

Goodwill

37. An insurance register does not constitute, or contain, goodwill. Goodwill may derive from identifiable assets of an agency business, such as an agency agreement, but is legally distinct from such assets.

38. Where an agent sells an agency business to another agent as a going concern, the sales proceeds of the agent's business would have to be apportioned on a reasonable attribution basis between tangible and intangible assets, any insurance registers, other things such as the business name, logos, symbols, know-how, other knowledge or information and the goodwill of the business (see, section 116-40).

39. Where an agent disposes of part of an insurance register and continues to carry on an agency business, there would not be a disposal of goodwill.

Lapses

40. There are no capital gains implications for an insurance agent when a policy of a client listed on a register lapses (i.e., discontinues with an existing policy). We do not consider an agent's rights in respect of each policy a separate asset such that there is a disposal of that asset when a lapse occurs.

Date of effect

41. This Ruling applies from its date of issue. The Ruling does not apply prior to this date to the extent that taxpayers have relied on Taxation Ruling IT 2408.

Explanations

42. The relationship between an insurance company and an agent is usually governed by a written agency agreement that covers obtaining insurance proposals, payments of commission, conduct of the agent, advertising, receipt of monies, claims, agent's expenses, accounting procedures, termination of the agency, and other matters.

43. Various kinds of commissions may be received by an agent. Rates of commissions, and the circumstances under which they become payable, are set out in the agency agreement and depend on the type of policy 'sold'. A particular policy sold by an agent may generate a single premium, or a stream of premiums, for the insurance company. The commissions to the agent are calculated having regard to the type of policy sold. Insurance companies differ in the types and descriptions of commissions they pay, but some generic terms include:

- initial commissions;
- renewal commissions;
- CPI commissions;
- persistency bonuses;
- production volume bonuses;
- overriding commissions; and
- deferred commissions.

44. An insurance company records the name of the agent who first sells a policy as the originating agent in the 'insurance register'. This register lists all the policies sold to the named policyholders by that agent. In addition, the register may include details of orphan policies allocated to the agent by the insurance company because there is no longer an originating agent.

45. An insurance register is a record of the policyholders of an insurance company who have been sold policies by a particular agent. Under the terms of the agency agreement, the agent may have rights to renewal and other commissions, and servicing rights and obligations in respect of these policyholders. From time to time, an insurance register is sold by one agent to another agent. What is being sold depends on the circumstances of each case. There may be a sale of an insurance agency business, a sale of access rights and/or certain commissions based on the expectation that the clients listed on the register will continue with their existing policies and take out new policies, or a sale of property (i.e., a chose in action). Agency agreements normally require the consent of the insurance company to all these types of sales.

When a register is presently existing property

46. Taxation Ruling IT 2408 identifies renewal commissions, CPI commissions and orphan policy commissions as income flowing from ownership of the insurance register, while initial commissions, production volume bonuses, overriding commissions and recruiting commissions are regarded as income flowing from the rendering of personal services.

47. However, the distinction drawn in IT 2408 does not apply in respect of all insurance agency agreements commonly used in Australia. IT 2408 does not address whether the rights to renewal commissions, CPI commissions and/or orphan policy commissions are capable of severance from the other bundled rights that comprise the legal chose in action of an agent under an agency agreement.

48. Under some agency agreements, the legal chose in action of the agent is an undivided totality of contractual rights that cannot be severed on the basis of separate rights to different types of commissions. An agent under such an agreement could only assign the whole or a fraction of the chose in action, but could not identify a separate right to a particular type of commission that could be severed from the remainder of the agreement. Other agency agreements are severable in this way. Whether a right to a commission can be severed from an agency agreement would depend on the terms of that agreement.

49. In *GP International Pipecoaters Pty Ltd v FC of T*[2], the High Court rejected a submission that amounts received to reimburse the cost of plant, in accordance with the terms of a contract, were severable from the remainder of the contract that provided for receipts of amounts for the coating of pipes. The Court stated that[3]:

> 'The contract defines both what the taxpayer was bound to do and the consideration for doing it. It bound the taxpayer to construct the plant and to coat the pipe required by SECWA, and conferred on the taxpayer a right to receive the moneys payable thereunder including the establishment costs. The terms of cl. 3 and 4 of the contract show that the entirety of the obligations on one side were to be performed in consideration of the agreement to perform the entirety of the obligation on the other. The establishment costs were received by the taxpayer under the contract as part of the monetary consideration payable for the taxpayer's agreement to perform, or its performance of, the entire contract. It is impossible to treat the business of the taxpayer as limited to the coating of the pipe when the construction of the pipe-coating plant was an integral part of the work which the taxpayer was bound to perform. The establishment costs were not received under a severable part of the contract relating to the construction of the plant.'

50. In *FC of T v Everett*[4] the High Court said it was unable to agree with the proposition that the right to receive profits was separate

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2 90 ATC 4413; 21 ATR 1.

3 at 90 ATC 4413 at 4421; 21 ATR 1 at 8.

4 (1980) 80 ATC 4046 at 4080; 10 ATR 608 at 612-613.

from the partner's interest in the partnership as such. The right to receive profits is inherent in the partner's interest in the partnership unless it be excluded by the partnership agreement.

> 'We do not doubt that a partner may enter into a contract or otherwise bind himself to deal with his future profits from the partnership so that others may acquire enforceable rights to those profits as and when they are derived. Whether he can sever his entitlement to receive future profits from his interest in the partnership so as to confer an immediate entitlement on an assignee with respect to those profits as distinct from assigning future profits and thereby binding those profits if and when they arise, is another question …
>
> The fundamental consideration, as we see it, is that the partner's fractional interest is an entire chose in action; it is capable of division by assignment into further fractions, but it is not capable of division by assignment so that the right to participate in the partnership profits which is inherent in the interest is hived off from the rest of that interest. Consequently, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.'

51. We accept that the terms of an agency agreement can effectively provide that the right of an agent to renewal, CPI and/or orphan policy commissions is severable from the other terms of the agency agreement. An agent under such an agreement can assign the right to these commissions, as presently existing property.

52. The right to renewal, CPI and/or orphan policy commissions would only be severable when the right to these commissions is founded on past consideration provided under the agency agreement, and not on consideration in the form of personal services to be provided by the agent in the future.

53. This view is consistent with the way in which some agency agreements in the United States have been drafted. For example, the agency contracts in *Helvering v. Eubank*[5] contained terms 'entitling the agent to commissions on renewal premiums paid after termination of the agency, without the performance of any further services'[6]. The renewal commissions in *Hall v. Burnet*[7] would have been payable after the cessation of the agency agreement upon the death of the insurance agent. In *Van Meter v. Commissioner*[8] the agency agreement expressly provided for the on going payment of renewal

5 (1940) 311 US 122.

6 At 126 (dissenting judgement of McReynolds J).

7 54 F (2d) 443.

8 (1932) 61 F 2d 817.

commissions to the agent 'or its assigns'[9]. The rights to renewal commissions in these cases would constitute property capable of being assigned under Australian law.

54. However, where an agency agreement does not provide for the rights to renewal, CPI and/or orphan policy commissions to be independent and severable from the promise of the agent to perform future obligations under the insurance contract, including the obligation to service all the clients of the agency business, there is no presently existing property that is capable of assignment.

Legal form of sale

Assignment of presently existing property

55. An agent can assign a contractual right to renewal, CPI and/or orphan policy commissions that is severable from the remainder of the agency agreement. There is an assignment of part of a legal chose in action that is effective in equity in all Australian States and Territories (*Shepherd v. F C of T*[10]; *FC of T v. Everett*[11]) and at law in Western Australia[12].

Assignment of an expectancy

56. Where a purported assignment of a right to renewal, CPI and/or orphan policy commissions is ineffective to transfer presently existing property, and the assignee has paid valuable consideration to the agent (see, Toohey and Gaudron JJ in *Booth v. FC of T*[13]), the contract operates in equity as an agreement to assign future commissions. When the commissions come into existence the agent instantly becomes trustee of them for the assignee (Dixon J in *Palette Shoes Pty Ltd v. Krohn*[14]).

57. The income tax consequences arising from such a contract to transfer future property were considered by Mason CJ in *Booth v. FC of T*[15]:

> 'It is possible to assign immediately a present right to future income, independently of the proprietary right which generates that income, before that income arises. Shepherd is an illustration of such an assignment. But, as Norman

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9 At 818.
10 (1965) 14 ATD 127; 9 AITR 739.
11 80 ATC 4076; (1980) 10 ATR 608.
12 Subsection 20(3) of the *Property Law Act 1969* (WA).
13 87 ATC 5100 at 5107; (1987) 19 ATR 514 at 525.
14 (1937) 58 CLR 1 at 27.
15 87 ATC 5100 at 5103; (1987) 19 ATR 514 at 518.

demonstrates, in some cases it may be impossible to identify a present right to future income divorced from the proprietary right which generates that future income. In such cases an purported assignment deals with future property or an expectancy and operates to vest the future income in the assignee as and when that future income accrues due, but not before it accrues due. Accordingly, the assignment would not be effective to prevent the income being derived or being deemed to be derived by the assignor.'

58. Similarly Hill J in *Liedig v. FC of T*[16] stated that:

'Where a taxpayer … who performs services for reward, purports, for consideration, to assign the income which is to arise under a contract of service or a contract for services, there can be no immediate assignment of any property but merely an agreement to assign future property, such agreement operating to transfer the beneficial interest to the purchaser immediately upon the property being acquired but not before: Holroyd v Marshall (1862) 10 HLC 191 at 211 (11 ER 999 at 1007); Tailby v Official Receiver (1888) 13 App Cas 523; Re Lind; Industrials Finance Syndicate Limited v Lind [1915] 2 Ch 345; and Palette Shoes Pty Limited v Krohn (1937) 58 CLR 1 at 26 -27 per Dixon J. Assuming that the income in question is money, it is only when that money reaches the hands of the trustee that equity seizes upon it and binds the conscience of the assignor to hold it for the assignee. The same would be true if the income arose in the form of a debt in the case of an accruals-basis taxpayer.

Although at the point of time that the income is derived by the assignor, the assignor becomes a trustee of it eo instanto with the time of derivation, the income in question will not be "income of the trust estate". The trust estate in such a case comprises only the income and nothing else. That income is not income of any trust estate but is corpus of a trust estate. None of the provisions of ss. 96, 97, 98, 99 or 99A would be capable of operation in such a case. The matter would fall outside the provisions of Div. 6 and the income would be derived by the assignor and be assessable income under s.25(1) of the Act.'

Novation or variation of contract

59. In *Olsson v. Dyson*[17], Windeyer J analysed the distinction between a novation and an assignment of property (such as a debt):

16 94 ATC 4269 at 4277; (1994) 28 ATR 141 at 151.

> 'Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person, he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed. The debtor is given notice of it; for notice is necessary to complete an assignment pursuant to the statute or in the case of an equitable assignment to preserve priorities. But the debtor's assent is not required. He is not a party to the transaction.'

60. An insurance company only consents to the transfer of an insurance register and release the vendor from the obligation to service the policyholders, on the basis that the purchaser deals with the clients on the register in accordance with the terms of an agency agreement with the insurance company. Where the purchaser agrees to accept these obligations, the sale of the insurance register is a novation or variation of contracts and not an assignment of a chose in action or an expectancy.

61. Whether there is a novation involving cancellations of agency agreements and substitution of new agency agreements, or variations of continuing agency agreements, depends on the intention of the parties. In *Tallerman and Company Proprietary Limited v. Nathan's Merchandise (Victoria) Proprietary Limited*[18] Kitto J stated that:

> '… a long line of authorities has committed the law to an acceptance of the doctrine that an agreement which deals with subsisting rights and obligations of the same parties under an earlier contract may vary that contract without terminating it, and whether it effects a variation on the one hand or a discharge on the other is a question depending upon the intention of the parties as appearing from the new agreement. As Lord Hanworth observed in Royal Exchange Assurance v. Hope (1928) Ch 179, 191 a variation may be in strict logic a new contract, but the discharge of an old contract is a matter of intention.'

62. Similarly, Taylor J in *Tallerman*[19] stated:

> 'It is firmly established by a long line of cases commencing at least as early as Goss v Lord Nugent (1833) 5 B & Ad 58;110 E R 713 and ending with cases such as Morris v Barron & Co

17 (1968-69) 120 CLR 365 at 388.
18 (1957) 98 CLR 93 at 135.
19 At 144.

> [1918] AC 1 and British & Bennington's Ltd v North Western Cachar Tea Co Ltd [1923] AC 48 - and, indeed, including Goss v Lord Nugent itself - that the parties to an agreement may vary some of its terms by subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly of by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement. Variation, of course, may involve partial rescission as is pointed out in Salmond and Williams of Contracts, 2nd ed (1945),pp 488,489, but "Partial rescission … does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein, with or without the substitution of new rights and obligations in their place. Partial rescission is not the extinction of the contract but a variation of it." Hence it is said "A contract may be varied (1) by way of partial rescission without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial rescission at all." These passages in my view, correctly state the accepted view of the manner in which an agreement by way of variation operates.'

63. Where an agent wants to retire, and disposes of an agency business to a purchaser who is not already an agent of the insurance company, the sale would generally involve a novation of agency agreements because the insurance company would agree to terminate the agency agreement of the vendor and execute an agency agreement with the purchaser. The purchaser would then carry on the business acquired from the vendor and would receive commissions flowing from, and service the clients listed on, the insurance register previously held by the vendor. While the purchaser has paid the vendor to acquire an insurance register, the legal form of the sale is that the purchaser has paid the vendor to enter into a novation whereby the vendor has surrendered an agency contract (including the insurance register) to the insurance company and the insurance company has agreed to substitute a new agency agreement (including the insurance register of the vendor) with the purchaser.

64. In contrast, a vendor may want to continue carrying on business as an insurance agent and sell only part of an insurance register to a purchaser who already carries on an agency business. The intention of the vendor and purchaser agents and the insurance company may be to vary their respective agency agreements so that the vendor is released from the rights and obligations arising from the part of the insurance register being sold, while the purchaser becomes

subject to rights and obligations in respect of those policyholders. In these circumstances, there would be a variation of agency agreements rather than a novation of contracts.

Selling a register

Assignment of presently existing property

65. Whether an amount received for the sale of part of a legal chose in action (being the severable right to renewal, CPI and /or orphan policy commissions that is presently existing property) is of a revenue or capital nature, primarily depends on whether the source of the commissions payable to the assignee is the agency agreement or the personal exertion of the insurance agent.

66. In *FC of T v. The Myer Emporium Ltd*[20] the High Court held that a covenant to pay interest on a principal sum was not the source of the interest, even where the terms of the lending agreement provided that the covenant to pay interest was independent and severable from the covenant to repay the principal sum. This was because it is of the essence of interest that it flows from, and is referable to, a principal sum. Consequently, an amount received for the sale of the chose in action representing the right to interest was of a revenue nature, being a commutation of interest income into a lump sum. The High Court contrasted this revenue receipt with an amount received for the sale of a chose in action representing the right to annuity payments under an annuity contract that would have been on capital account because it was received for the sale of a capital asset - the contractual right which produced payment of the annuity.

67. The source of commissions received by a trustee company as an insurance agent under an agency agreement with an insurance company ('NML') was discussed by the Full Federal Court in *Tupicoff v. FC of T*[21]. Fisher J found 'that the source of [all] the [interposed] company's revenue and of the income distributed by it as trustee was the personal exertion and expertise of the taxpayer [Mr Tupicoff]', and that 'The income of a taxpayer as a sole trader is the product of his personal exertion'[22]. In contrast Beaumont J said that '…whatever practical importance the parties attached to the continued participation of the taxpayer in the affairs of the company, the legal source of [all] the company's income, in the form of remuneration or commission earned by it, was the contract of agency made between NML and the company. If, in accordance with that contract, commission becomes payable to the company by NML, then at law, the operation of sec.

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20 87 ATC 4363 at 4371-2; (1987) 18 ATR 693 at 702-3.

21 84 ATC 4851; (1984) 15 ATR 1262.

22 84 ATC 4851 at 4853; (1984) 15 ATR 1262 at 1264.

260 apart, it is income derived by the company; it is not technically income derived by the taxpayer, however instrumental he may have been in the performance of the company's contract with NML'[23]. The third member of the Court, Jenkinson J, agreed that the appeal should be dismissed, but did not express an opinion on whether the source of the commissions were the personal exertions of the taxpayer or the agency agreement.

68. The Court did not have to consider whether an agency agreement could be drafted in such a way that commissions received by an insurance agent could be dissected into those flowing from past consideration as a severable chose in action, and those flowing from the provision of personal services.

69. In *Hall v. Burnet*[24] the Court of Appeals of the District of Columbia held that an assignment by an agent to his spouse of a right to renewal commissions under an agency agreement, was an assignment of property that prevented the commissions being taxed as income of the agent. There was an assignment of income producing property and not an anticipatory assignment of earnings that would have been ineffective under US tax law[25].

70. However, *Hall v. Burnet* was not followed in *Van Meter v. Commissioner of Internal Review*[26] because, even though the agent may have assigned title to the renewals as choses in action, it was the agent alone who acted under the terms of the agency agreement to produce the insurance business that was the basis of earning the renewals[27].

71. Similarly, in *Helvering v. Eubank*[28] an agent who had assigned his right to renewal commissions to assignees, was held to be taxable on the commissions that were paid to the assignees because the source of the renewal commissions under the agency agreement was the past services that he had rendered in writing the policies of insurance.

72. Australian courts have not recognised any general principle of income tax law that would make an assignment of a presently existing proprietary right to future income ineffective for tax purposes on the basis that the income arose from the past services of the assignor[29].

73. In accordance with the distinctions drawn in IT 2408, we accept that the legal source of renewal commissions, CPI commissions

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23 84 ATC at 4861; (1984) 15 ATR at 1274.

24 (1931) 54 F (2d) 443.

25 *Lucas v. Earl* 281 US 111 (1930).

26 (1932) 61 F (2d) 817.

27 At 819-820.

28 (1940) 311 US 122.

29 Hill J in *Liedig*; *FC of T v. Everett* 80 ATC 4067; (1980) 10 ATR 608.

and/or orphan policy commissions, is the agency agreement and not the personal exertion of the insurance agent, when the right to these commission are severable under the terms of the agency agreement and the severed chose in action relates to the provision of past consideration, and not the future personal exertions of the agent. An amount received for an outright and unrestricted sale of such a chose in action is of a capital nature, providing the sale does not occur in the ordinary course of business of a multi-agent, or as part of a profit-making venture or transaction.

74. The amount received by an agent for the assignment of a severed chose in action would be of an income nature where the assignment was for a limited term and was restricted to a defined amount of income. In *SP Investments Pty Ltd v. FC of T*[30] the Full Federal Court held that an amount received by an assignor for an equitable assignment of a right to receive annual royalty payments for a short period, where the assignment was subject to restrictions which meant that the assignee would only receive a defined amount of income, was of an income nature because it represented a substitution for future income. The amount was assessable under the second strand of *The Myer Emporium* case, even though there was no difference in legal analysis between the assignment under review in that case and the assignment in *Shepherd v. FC of T*. The determining factors that gave the amount a revenue character were that the assignment did not enure for the whole of the period the subject of the assignor's rights, but merely for a limited term of relatively short duration, and the fact that the assignment was restricted to a defined amount of income, which in the present case makes it clear that the consideration was received in substitution for the income assigned[31].

Assignment of an expectancy

75. On the basis of the analysis of Mason CJ in *Booth* and Hill J in *Liedig*, we accept that the amount received for the assignment of an expectancy would be of a capital nature, except as noted in this paragraph. The amount is received for agreeing to assign future property comprising future renewal, CPI and/or orphan policy commissions that are to be derived as income by the assignor-agent, and that also constitute the corpus of a trust for the benefit of the assignee. The amount is not received for converting future income into present income for the purposes of the second limb of *The Myer Emporium* case. An amount received for the assignment of future property, as and when it comes into existence, would only be ordinary income under section 6-5 of the Act where the amount was received in

30 93 ATC 4170; (1993) 25 ATR 165.

31 ATC at 4181; ATR at 178.

the ordinary course of business of an agent, or as part of a profit-making venture or transaction within the first limb of *The Myer Emporium* case.

Novation

76. Whether an amount received by an agent from the sale of an insurance register that arises from the cancellation of an agency agreement as part of a novation, would be a revenue or capital receipt depends on whether the agency agreement cancelled was a circulating or structural asset.

77. The categorisation of the agency agreement depends on the activities and structure of the business carried on by the agent. The application of this test was considered by Bowen CJ, Lockhart and Foster JJ in *Allied Mills Industries Pty Ltd v. FC of T*[32]:

> 'The activities and structures of the appellant as a whole must be considered in determining whether the rights of the appellant which were terminated by the 1977 agreement constituted a structural asset. Normally in order for a contract to be regarded as a capital asset it must be a contract which is of substantial importance to the structure of the business itself. This is a factual matter and inevitably a matter of degree. Here the appellant was not parting with a substantial part of its business or ceasing to carry on business as was the case in Californian Oil Products. Furthermore the appellant was not disposing of part of the fixed framework of its business in the sense required by Van den Berghs v Clark. The contracts here in themselves yielded profit; they did not simply provide the means of making profit.
>
> Also, the [contractual] arrangements ... fluctuated considerably over the years of their existence in the sense that there was no element of permanence in them ... In no real sense therefore could the payment be considered as a payment for the giving up of a capital asset ...
>
> Contracts are made to be performed, not terminated, so in one sense the termination of contracts will be outside the ordinary course of business. Yet it is clear that payments made upon the termination of contracts may be of an income nature. What is important in characterising the payment is not the fact that it is made as compensation for the termination of the contract, which will often be outside the ordinary course of business, but rather the nature of the contract which generated the payment,

32 89 ATC 4365 at 4371; (1989) 20 ATR 457 at 463.

and the way in which that contract related to the structure and business of the taxpayer.'

78. The agency agreement of an agent exclusively tied to one insurance company for a lengthy period of time would be a structural asset of the agency business. This would also usually be the case with a multi-agent who deal with several insurance companies on a permanent and regular basis. However, the agency agreements of a multi-agent who regularly varies or switches insurance companies, to obtain the lowest premium or most advantageous product for clients, may not have the element of permanence required to be considered a structural asset. Whether or not this is the case would be a question of fact to be determined in the circumstances of each case.

Contractual variation

79. An amount received by an agent for the sale of part of an insurance register that takes the form of a variation to an agency agreement, is only assessable income where such variations occur in the ordinary course of the business of the vendor, are a normal incident of such a business, or the register was acquired for the purpose of profit-making by sale[33]. Where the agency agreement is a capital asset of the vendor, being the profit making structure of the agency business, an amount received in a one-off transaction for varying the terms of that agreement would be of a capital nature.

Purchasing a register

80. Amounts paid by a purchaser to acquire an income producing property, an expectancy, or the novation of rights and obligations under agency agreements, is not ordinarily deductible under section 8-1 because they are outlays of a capital nature.

Acquire an income producing property

81. The acquisition of an income producing property is ordinarily an affair of capital unless the purchase is made in the course of carrying on a business of trading or dealing in such assets, or the property is acquired for the purpose of profit-making by sale.

Acquire an expectancy

82. The purchaser of an expectancy incurs expenditure to acquire future property in the form of monies received by the agent from

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33 See Taxation Ruling TR 92/3.

renewal, CPI and/or orphan policy commissions that are to be held on trust as corpus of a trust estate for the assignee. Expenditure outlaid acquiring an interest in the corpus of a trust would be of a capital nature.

Novation

83. A payment by an agent under a novation arrangement to acquire an insurance register is a one-off outlay made to bring into existence an asset or advantage for the enduring benefit of trade (*British Insulated and Helsby Cables v. Atherton*[34]). This advantage would arise when the insurance company consents to the insurance register that existed under the terms of the cancelled agency agreement being held for the purchaser under the terms of the new or varied agency agreement.

84. In *Sun Newspapers Ltd v. Federal Commissioner of Taxation*[35] the Full High Court determined that a payment to buy-out opposition was an outgoing on capital account and was not deductible for income tax purposes. In deciding whether the amount was a capital or revenue outgoing, Latham J pointed to a number of features of the payment. In particular, he indicated that the payment produced a situation of advantage to the taxpayer, the agreement proved profitable to the business of the taxpayer and the expenditure was a large non-recurrent and unusual event made for the purpose of obtaining an advantage for the enduring benefit of the taxpayer's trade. These features are also usually to be found when consideration is given for the acquisition of an insurance register.

85. It might be argued that expenditure in acquiring a register is not an outgoing of capital. When acquiring a client base, the expenditure would be expected, but not guaranteed, to produce the results alluded to by Latham J in *Sun Newspapers*. Despite the existence of that purpose or effect, one could argue that there is no necessarily enduring benefit to an agency business because the expected, or hoped for, result may not eventuate. Indeed, some or all of the new clients may not renew their existing policies and it may be that they do not take out any new policies at all. While this is most unlikely, the response to such an argument is, again, to be found in *Sun Newspapers*. Latham J said[36]:

> 'It is true that the payments did not result in a new capital asset of a material nature, but they did obtain a very real benefit or advantage for the companies, namely, the exclusion of what

34 [1926] AC 205 at 213-4.

35 (1938) 61 CLR 337; 1 AITR 403; 5 ATD 87.

36 At 5 ATD 90.

> might have been serious competition. When the words permanent or enduring are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole.'

86. A multi-agent who regularly enters into agency agreements or variations of agency agreements in the ordinary course of business, would be allowed deductions for such expenditure, where those agreements do not form part of the profit-making structure of the business, and amounts received from the sale of registers are included as ordinary income in accordance with paragraph 12 of this Ruling.

Contractual variation

87. A purchaser agent may pay an amount to a vendor agent to acquire part of an insurance register, where the legal form of the transaction is a variation to the agency agreements between the vendor and purchaser agents and the insurance company. Where the purchaser is a multi-agent who holds agency agreements as circulating capital, the amount expended to obtain the contractual variation would be an allowable deduction under section 8-1 of the Act. However, except in this situation, the expenditure is of a capital nature. This is because the payment is being made to enhance the agency agreement of the purchaser, which is a capital asset that is part of the profit-making structure of the agency business.

Goodwill

88. It has been suggested the sale of an insurance register can involve the disposal of the goodwill of an agency business and that at least part of the consideration received on the sale of a register ought to be taxed concessional, as a result of the operation of section 118-250. We disagree with that view.

89. An insurance register does not constitute, or contain, goodwill. Goodwill may derive from identifiable assets of an agency business, such as an agency agreement, but is legally distinct from such assets (*FC of T v. Murry*[37]).

90. The name of an insurance agent is unlikely to contribute much as a source of goodwill of an insurance agency business, except possibly in the case of larger agency businesses. The customers would be attracted to the names and reputations of the insurance

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37 [1998] 72 ALJR 1065; 98 ATC 4585; (1998) 39 ATR 129.

companies, rather than the names and reputations of the agents who introduce clients to them.

91. We understand that within the insurance industry today there are no restrictions within a State as to the location or area within which a particular agent may attempt to generate new business. If there is any goodwill associated with an agent's business, locality is not one of its sources, unless there is a clear geographical location in which the agency business operates with little or no competition from other agents linked to the same insurer. This may arise, for example, in a country area. Given the nature of an insurance agent's business, it is difficult to discern any goodwill emanating from locality that attaches to an agency business conducted primarily in a metropolitan area.

92. We accept that an agent's personality and reputation may, to some degree, be a source of goodwill. If an agent decides to sell their business to another agent, we accept that some aspect of what is sold is goodwill for the purposes of the CGT provisions. The sales proceeds of the agent's business would have to be apportioned on a reasonable attribution basis between CGT assets (such as office equipment), tangible and intangible assets, any insurance registers, other things such as the business name, logos, symbols, know-how, other knowledge and information and the goodwill of the business (section 116-40). The partial exemption in section 118-250 applies to a capital gain attributable to goodwill of the business if the business exemption threshold is not exceeded.

93. Where an agent receives an amount from an insurance company or from a purchaser for the sale of part of a register, and the agent continues to carry on the agency business, no part of the sales proceeds can be attributed to the disposal of goodwill.

94. Where an agent receives an amount from an insurance company for relinquishing an agency with that insurance company and then enters into an agency agreement with another insurance company, it would be a question of fact whether there has been a cessation of the former business and the commencement of a new business, or a continuation of an existing business. In either case, the amount is received for the insurance register and not for goodwill attributable to the former business.

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Your comments

96. If you wish to comment on this draft Ruling, please send your comments promptly by Friday 30 July 1999 to:

Contact Officer: Mark Lyburn
Telephone: (03) 9275 2595
Facsimile: (03) 9275 2606
Address: Mr Mark Lyburn
Australian Taxation Office
P O Box 9990
Box Hill VIC 3128.

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- commission
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- insurance
- insurance registers

Legislative references:
- ITAA1936 160M(6)
- ITAA1936 160ZZPL(3)(b)
- ITAA1936 Pt IIIA Div 17B
- ITAA1936 Pt IVA
- ITAA1997 6-5
- ITAA1997 8-1
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