TD 1999/D67 - Income tax: capital gains: is the interest of a default beneficiary in a discretionary trust an interest to which section 104-70 of the Income Tax Assessment Act 1997 applies?

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Australian Taxation Office

Draft Taxation Determination

TD 1999/D67

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Income tax: capital gains: is the interest of a default beneficiary in a discretionary trust an interest to which section 104-70 of the *Income Tax Assessment Act 1997* applies?

Preamble

Draft Taxation determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the ATO.

1. No.

2. A default beneficiary (or 'taker in default') refers to a beneficiary whose entitlement to income or corpus arises should the trustee decide not to exercise their discretion in favour of discretionary beneficiaries or fail to exercise their discretion. It does not refer to those in whom the trust fund vests when the trust comes to an end.

3. The word 'interest' has different meanings depending on the context in which it is used. In subsection 104-70(1) the expression used is 'interest in the trust'. It is not 'interest in the income of the trust', 'interest in the corpus of the trust' or 'interest in the property of the trust'. In its context in subsection 104-70(1), the interest in the trust that is contemplated is one in which a taxpayer can invest, one that is capable of being acquired and disposed of, one the precise extent of which is quantifiable and one in which the rights attaching to it are defined with particularity in the terms of the deed of settlement. Subsection 104-70(1) excludes a payment in respect of CGT event A1 (disposal) happening to the interest and, thus, envisages that the relevant interest is one that is capable of being disposed of. It is also one that is capable of having a cost base or reduced cost base because subsection 104-70(6) is predicated on there being a reduction (or step down) in the relevant cost base and subsection 104-70(4) is predicated on there being an excess over the cost base of the interest. In its context in section 104-70, the interest in the trust is one that is coloured by the nature of a unit in a unit trust, that is, the interest in the trust is one that is akin to the interest that a unit holder has in a unit trust.

4. The interest that a default beneficiary has in a discretionary trust is of a different nature from the type of interest in a trust referred to in subsection 104-70(1). A default beneficiary's interest is not one in which a person can invest, nor one that is capable of being acquired and disposed of, nor one in which the rights attaching to it (for example, rights to vote, to distributions of income, to redemption or assignment or to entitlement to corpus distributions on winding up) are

defined with particularity in the terms of the discretionary trust deed. It is not a precisely quantifiable interest because it depends on whether the trustee exercises their discretion, on the quantum of income or corpus to be distributed in exercise of the discretion, or on both. The interest of a default beneficiary is not, therefore, sufficient to constitute an 'interest in the trust' for the purposes of subsection 104-70(1).

Note

5. Section 104-70 also does not apply to a non-assessable payment made by a trustee to a discretionary beneficiary (a mere object) of a discretionary trust – see Taxation Determination TD 97/15.

Your comments

6. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by date:	10 September 1999
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Commissioner of Taxation
11 August 1999

Subject references:
beneficiary; capital payments; CGT asset; default beneficiary; discretionary trust; taker in default; trust; trustee

Legislative references:
ITAA 1997 104-70; ITAA 1997 104-70(1); ITAA 1997 104-70(4); ITAA 1997 104-70(6)

ATO references:
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