

TD 2003/D21 - Income tax: capital gains: does CGT event E2 in section 104-60 of the Income Tax Assessment Act 1997 (ITAA 1997) happen if a CGT asset is transferred between two trusts and the beneficiaries and terms of both trusts are the same?

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This document has been finalised by TD 2004/14.

Draft Taxation Determination

Income tax: capital gains: does CGT event E2 in section 104-60 of the *Income Tax Assessment Act 1997* (ITAA 1997) happen if a CGT asset is transferred between two trusts and the beneficiaries and terms of both trusts are the same?

Preamble

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

1. No. The exception in paragraph 104-60(5)(b) applies in this case with the result that CGT event E2 does not happen. CGT event A1 in section 104-10 also does not happen because of the exception for a mere change of trustee in paragraph 104-10(2)(b). This exception is not limited to a change of trustee of a single trust.

2. We take the same view in respect of the operation of subparagraph 160M(3)(a)(ii) and other corresponding provisions of the *Income Tax Assessment Act 1936* (ITAA 1936). Paragraph 6.14 of the Explanatory Memorandum to *Tax Laws Amendment Act (No.2) 1994* may have suggested that the subparagraph only applied to a change in trustee of an existing trust.

A further exception applies where there is a settlement of an asset to a trustee to hold on terms of an existing trust where the only change that occurs is a change of trustee. The effect of this exception is that where property is transferred from one trustee to another to be held under the same trust arrangements without any change at all in the trust arrangements including the interest of each beneficiary in the trust income and assets, there will be no change of ownership for CGT purposes.

3. However, on a proper construction, the words of the subparagraph, and of the corresponding rewritten provisions in the ITAA 1997, are not so limited, and effect must be given to their plain meaning.

Acquisition and cost base implications

4. As a change of ownership does not occur for CGT purposes by paragraph 104-10(2)(b), it follows that the trustee of the second trust (which may be the same person who is the trustee of the first trust) is treated as having always owned the asset and to have incurred relevant costs in respect of it, including costs in respect of its acquisition.

5. The asset therefore has the same acquisition date and elements of cost base or reduced cost base in the hands of the trustee of the second trust as it did in the hands of the trustee of the first trust. Any consideration given by the trustee of the second trust for the transfer has no effect on the cost base or reduced cost base of the asset in the hands of that trustee. This is the same outcome as is obtained where there is a change of trustee of a single trust.

Acquisition and cost base implications – alternative view

6. An alternative contention is that the trustee of the second trust acquires the asset at the time of the transfer under subsection 109-5(1) of the ITAA 1997 because this is when it ‘becomes’ the owner of the asset. The result of this analysis would be a loss of pre-CGT status where relevant and, because no CGT event happens, the acquisition cost to the trustee of the second trust would be nil if no money or property were given in respect of its acquisition (subsections 112-20(1) and (2) of the ITAA 1997). Under this approach, if the trustee paid an amount equal to the market value of the asset, an inappropriate ‘step-up’ in cost base is arguably obtained which might allow a tax free disposal of the asset by the trustee of the second trust.

7. The ATO considers that, while the legislation is amenable to two constructions, this alternative view does not accord with the purpose or object underlying the exceptions to CGT events E2 and A1, whereas the view in paragraphs 4 and 5 of this Determination does. Therefore, in accordance with section 15AA of the *Acts Interpretation Act 1901*, the ATO prefers the view in paragraphs 4 and 5.

Date of Effect

8. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

9. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

Comments by Date: 20 November 2003

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Commissioner of Taxation
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Previous draft:

Not previously issued in draft form

Subject references:

- acquisition of CGT assets
- beneficiary
- capital gains tax
- CGT event A1 - disposal of a CGT asset
- CGT events E1-E9 - trusts
- cost base
- trust
- trustee
- reduced cost base

Legislative references:

- ITAA 1936 160M(3)(a)(ii)
- ITAA 1997 104-10
- ITAA 1997 104-10(2)(b)
- ITAA 1997 104-60
- ITAA 1997 104-60(5)(b)
- ITAA 1997 109-5(1)
- ITAA 1997 112-20(1)
- ITAA 1997 112-20(2)
- AIA 1901 15AA

ATO references

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