TD 2003/D23 - Income tax: capital gains: does an asset 'pass' to a beneficiary of a deceased estate under section 128-20 of the Income Tax Assessment Act 1997 (ITAA 1997) if the beneficiary becomes absolutely entitled to the asset as against the trustee of the estate?

This cover sheet is provided for information only. It does not form part of *TD 2003/D23 - Income tax: capital gains: does an asset 'pass' to a beneficiary of a deceased estate under section 128-20 of the Income Tax Assessment Act 1997 (ITAA 1997) if the beneficiary becomes absolutely entitled to the asset as against the trustee of the estate?*

This document has been finalised by TD 2004/3.

Draft Taxation Determination

Income tax: capital gains: does an asset 'pass' to a beneficiary of a deceased estate under section 128-20 of the *Income Tax Assessment Act 1997* (ITAA 1997) if the beneficiary becomes absolutely entitled to the asset as against the trustee of the estate?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Yes. An asset will 'pass' to the beneficiary of a deceased estate when the beneficiary becomes absolutely entitled to the asset as against the estate's trustee (whether or not the asset is later transmitted or transferred to the beneficiary).

2. A CGT asset owned by a deceased person at the time of their death passes to a beneficiary of the deceased's estate if the beneficiary becomes the owner of the asset under the will or in one of the other ways set out in subsection 128-20(1) of the ITAA 1997.

3. Any capital gain or loss made when the asset passes to a beneficiary of the deceased estate is disregarded under subsection 128-15(3) of the ITAA 1997 (unless CGT event K3 in section 104-215 of the ITAA 1997 happens as a result of the asset passing to a tax-advantaged beneficiary). However, the beneficiary will be the relevant taxpayer if a CGT event happens to the asset after it has passed to the beneficiary.

4. While it is clear that an asset has passed to a beneficiary once legal ownership of the asset has transferred to the beneficiary, we consider that an asset can pass to a beneficiary prior to transfer if the beneficiary becomes absolutely entitled to the asset as against the trustee. It is considered that there is nothing in section 128-20 of the ITAA 1997 that makes 'passing' dependent upon the acquisition of legal ownership.

5. CGT event E5 in section 104-75 of ITAA 1997 does not happen when a beneficiary becomes absolutely entitled to an asset that a deceased person owned at the time of their death.

Example

6. *John bought a block of land after 20 September 1985. John died on 21 June 2002. In his will John appointed his solicitor, Maria, as his executor and trustee of his estate and left the land to his son Peter.*

7. *Maria collected in all of John's assets and paid all of his debts. At Peter's suggestion Maria sold the land and paid the proceeds to Peter rather than transfer the land to him. The capital gain from the sale of the land is made by Peter because at the time it was sold the land had passed to him. The capital gain does not form part of the net income of the trust arising under John's will.*

Alternative view

8. It has been contended that an asset does not pass to a beneficiary until the beneficiary obtains legal ownership of it - this view relies on the words following paragraph 128-20(1)(d) of the ITAA 1997 which refer to the transfer or transmission of an asset to a beneficiary.

9. We do not agree with this view. We consider that it may have the effect that neither the trustee nor the beneficiary would make a capital gain or loss if a CGT event happened to an asset to which the beneficiary was absolutely entitled but did not have legal title. The trustee could argue, on the basis of section 106-50 of the ITAA 1997, that they do not make a capital gain or loss because any act done by them in connection with the event is taken to have been done by the beneficiary. The beneficiary could argue they do not make a capital gain or loss because the asset has not passed to them.

Date of Effect

10. 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

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

Due date: **24 December 2003**

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Commissioner of Taxation
26 November 2003

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
TR 92/20

Subject References
- CGT deceased estates

Legislative references:
- ITAA 1997 104-75
- ITAA 1997 104-215
- ITAA 1997 106-50
- ITAA 1997 128-15(3)
- ITAA 1997 128-20
- ITAA 1997 128-20(1)
- ITAA 1997 128-20(1)(d)
- TAA 1953 Pt IVAAA

ATO References
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