IT 2340 - Income tax : capital gains : deemed acquisition of assets by a taxpayer after 19 September 1985 where a change occurs in the underlying ownership of assets acquired by the taxpayer on or before that date.

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This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

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TAXATION RULING NO. IT 2340

INCOME TAX : CAPITAL GAINS : DEEMED ACQUISITION OF ASSETS BY A TAXPAYER AFTER 19 SEPTEMBER 1985 WHERE A CHANGE OCCURS IN THE UNDERLYING OWNERSHIP OF ASSETS ACQUIRED BY THE TAXPAYER ON OR BEFORE THAT DATE.

F.O.I. EMBARGO: May be released

REF H.O. REF: L85/6-7 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1209783	CAPITAL GAINS - ACQUISITION DATE COST OF ACQUISITION TRUSTS	160ZZS

PREAMBLE Section 160ZZS of the Income Tax Assessment Act 1936 (the Act) is one of two general anti-avoidance provisions aimed at preventing circumvention of the limitation of the tax on capital gains to assets acquired after 19 September 1985. It applies where a taxpayer (for example, a company) has acquired assets prior to 20 September 1985 and on or after that date there is a change of 50 per cent or more in the underlying ownership of the assets (in the case of a company, a change of 50 per cent or more in the beneficial ownership of the company's shares). Where such a change occurs the provision operates to deem the assets to have been acquired after 19 September 1985 so that any subsequent real capital gain on the assets will fall within the tax base.

2. The terms "underlying interest" and "majority underlying interests", on the basis of which the provision operates, have the same meanings as they have in Subdivision G of Division 3 of Part III of the Act - which deals with the income tax treatment of interest in relation to "negatively geared" investments in rental property. In both cases (and like other provisions of the Act concerned with the measurement of ownership interests) underlying interests in relation to the assets concerned mean beneficial interests held by natural persons, whether directly or through one or more interposed companies, partnerships or trusts. The clear policy of the law thus permits and requires that, for the purposes of the relevant provisions, chains of companies, partnerships and trusts are to be "looked through" in order to determine whether there has been a change in the effective interests of natural persons in the assets.

3. Questions have been raised as to what acquisition date and cost base are to apply for assets that are deemed to have been acquired on or after 20 September 1985 by the application of section 160ZZS. There have also been questions regarding the

application of the section to assets held by trustees of family trusts where the trustees are vested with discretionary powers as to distributions from the trusts.

RULING

4. Where an asset is deemed by section 160ZZS to have been acquired after 19 September 1985, the asset will be taken to have been acquired on the date on which the continuity of beneficial ownership in the asset of more than 50% ceases to be maintained. The cost base for the purposes of determining future capital gains and losses on realisation of such an asset will be the market value of the asset on the date on which the asset is taken to have been acquired by the application of section 160ZZS.

5. In relation to what are generally referred to as discretionary trusts, i.e., family trusts, the trustees of which have discretionary powers as to the distribution of trust income or property to beneficiaries, in considering the question of whether majority underlying interests have been maintained in the assets of the trust it will be relevant to take into account the way in which the discretionary powers of the trustees are in fact exercised.

6. Where a trustee continues to administer a trust for the benefit of members of a particular family, for example, it will not bring section 160ZZS into application merely because distributions to family members who are beneficiaries are made in such amounts and to such of those beneficiaries as the trustee determines in the exercise of his discretion.

7. In such a case the Commissioner would, in terms of sub-section 160ZZS(1), find it reasonable to assume that for all practical purposes the majority underlying interests in the trust assets have not changed. That is consistent with the role of the section to close potential avenues for avoidance of tax in cases where there is a substantial change in underlying ownership of assets and the legislative guidance contained in Subdivision G of Division 3 of Part III of the Act. On that basis, trust assets acquired by the trustee before 20 September 1985 would remain outside the scope of the capital gains and losses provisions of the Act.

8. On the other hand where, by the exercise of a trustee's discretionary powers to appoint beneficiaries or by amendment of the trust deed, there is in practical effect a change of 50% or more in the underlying interests in the trust assets - such as where the members of a new family are substituted as recipients of distributions from the trust in place of persons who were formerly the object of such distributions - the section would have its intended application as described.

COMMISSIONER OF TAXATION
24 JULY 1986