


TD 2000/8 - Income tax: capital gains: when a non-public entity that is partly owned by a public entity examines underlying interests in the non-public entity's pre-CGT assets for the purposes of Subdivision 149-B of the Income Tax Assessment Act 1997 , does the non-public entity have to take into account the results of the public entity's tracing of underlying interests in the public entity's pre-CGT assets?

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Taxation Determination

Income tax: capital gains: when a non-public entity that is partly owned by a public entity examines underlying interests in the non-public entity's pre-CGT assets for the purposes of Subdivision 149-B of the *Income Tax Assessment Act 1997*, does the non-public entity have to take into account the results of the public entity's tracing of underlying interests in the public entity's pre-CGT assets?

Preamble

*This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding on the Commissioner.*

Date of Effect

This Determination applies after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. Yes.

2. For the purposes of determining under subsection 149-30(1) of the *Income Tax Assessment Act 1997* ('the 1997 Act') whether the majority underlying interests in a non-public entity's pre-CGT assets have changed, or giving information about majority underlying interests to the Commissioner under subsection 149-30(2), a non-public entity that is partly owned by a public entity should take into account all available results of the public entity's tracing of underlying interests in the public entity's pre-CGT assets as at its most recent test day. The results that are relevant are the public entity's findings about what percentage of the underlying interests in its assets in accordance with subsection 149-15(2) of the 1997 Act were held on the test day by the same ultimate owners who had underlying interests at its starting day. These results indicate the extent to which ultimate owners who have underlying interests, indirectly through the public entity, in the non-public entity's pre-CGT assets at the test day are the same ultimate owners who had underlying interests in those assets immediately before 20 September 1985.

3. The non-public entity should take into account the public entity's results as at the most recent test day whether that day was a day when there was abnormal trading of the shares or units of the public entity or whether it was a day that was a test day for all public entities under Division 149 of the 1997 Act or under Division 20 of Part IIIA of the *Income Tax Assessment Act 1936* ('the 1936 Act').

4. This Taxation Determination applies to entities from the date it is issued. Pre-CGT assets of a non-public entity stop being pre-CGT assets from this date if, using the results of the public entity's tracing of underlying interests as at its most recent test day, the majority underlying interests in the assets have not been held by the same ultimate owners since before 20 September 1985. These are the results that the public entity compiled as at its most recent test day under Division 149 of the 1997 Act or under Division 20 of Part IIIA of the 1936 Act. If, using the public entity's tracing results as at its most recent test day, the non-public entity establishes that the majority underlying interests in its assets have not changed since 19 September 1985, the non-public entity should continue to monitor changes in the majority underlying interests in its assets. Whenever the public entity has a further test day, the non-public entity is required to use the public entity's new tracing results as at that further test day.

5. For the purposes of subsection 149-30(1) and 149-30(2), the non-public entity may disregard any changes in underlying interests in the public entity's assets that have occurred since the public entity's most recent test day.

6. Paragraph 9 of Taxation Ruling IT 2530 is withdrawn with effect from the date this Taxation Determination is issued.

Explanation

7. Under subsection 149-30(1), a pre-CGT asset of a non-public entity stops being a pre-CGT asset at the earliest time when majority underlying interests in the asset were not had by ultimate owners who had majority underlying interests in the asset immediately before 20 September 1985. The asset does not stop being a pre-CGT asset if the Commissioner is satisfied, or thinks it reasonable to assume, that the majority underlying interests have not changed: subsection 149-30(2). Because an asset stops being a pre-CGT asset at the earliest time when majority underlying interests in the asset are not maintained, a non-public entity needs to examine the underlying interests in its pre-CGT assets on an on-going basis to ensure that majority underlying interests in them have been maintained. A non-public entity would normally examine majority underlying interests if there is any change, direct or indirect, in its shareholdings, unitholdings or other membership interests (e.g., a change of membership interests in one or more of the public entities which own shares in the non-public entity).

8. Paragraph 9 of Taxation Ruling IT 2530 previously advised that an entity that was partly owned by a listed public company or publicly traded unit trust could assume for these purposes that the continuity of majority underlying interests in the assets of the listed public company or publicly traded unit trust had been maintained if there had only been normal transactions in its shares or units that were not associated with takeover or merger activities. IT 2530 was issued at a time when listed public companies and publicly traded unit trusts were only required to test for changes in majority underlying interests if there were takeover or merger activities or other abnormal trading of their shares or units. Consequently, they only had results available from tracing of underlying interests in assets as at these times.

9. The law has since been amended to require all public entities to examine the underlying interests in their pre-CGT assets on designated test days, which include days on which there is abnormal trading in shares or units of certain entities. As a result of this change, the advice in paragraph 9 of IT 2530 is no longer appropriate.

Note

10. In this Taxation Determination:

- the term 'public entity' refers to the entities listed in paragraphs 149-50(1)(a) to 149-50(1)(e) of the 1997 Act which entities include a company shares in which (except shares that carry the right to a fixed rate of dividend) are listed for quotation in the official list of an approved stock exchange, a publicly traded unit trust, a mutual insurance company and a mutual affiliate company;
- the term 'non-public entity' refers to an entity which is not a public entity but which is partly owned, directly or indirectly, by one or more public entities and is an entity to which Subdivision 149-B applies;
- the expression 'majority underlying interests' is used as it is defined in subsection 149-15(1) of the 1997 Act; and
- the expression 'underlying interests' refers to an underlying interest in a CGT asset as defined in subsection 149-15(2) of the 1997 Act (that is, a beneficial interest that an ultimate owner has, whether directly or indirectly, in the asset or in any ordinary income that may be derived from that asset) construed in conjunction with the definition of 'ultimate owner' in subsection 149-15(3) of the 1997 Act and with subsections 149-15(4) and 149-15(5) of the 1997 Act.

Example

11. *40% of the shares in Private Pty Ltd have been owned by a public company, Public Ltd, since before 20 September 1985. Of the remaining shares in Private Pty Ltd, half are owned by Individual who acquired the shares before 20 September 1985, and half by Trust, which acquired the shares in 1990.*

12. *Public Ltd examines the underlying interests in its pre-CGT assets as at 20 January 1997 under Division 20 of Part IIIA of the 1936 Act and determines that the majority underlying interests are no longer held by the same ultimate owners who held the majority underlying interests immediately before its starting day (e.g., 20 September 1985).*

13. *Assume that Public Ltd has not experienced any abnormal trading of its shares, including a takeover or merger activity, at any time since 19 September 1985. From the date of this Determination, Private Pty Ltd must take into account the results of tracing underlying interests that Public Ltd used to make its determination as at 20 January 1997. Unless the Commissioner is satisfied or thinks it reasonable to assume, under subsection 149-30(2) of the 1997 Act, that the majority underlying interests in Private Pty Ltd's assets are still held by the same ultimate owners, Private Pty Ltd's pre-CGT assets stop being pre-CGT assets on the date this Determination is issued.*

14. *If, however, Public Ltd had experienced abnormal trading of its shares on 1 February 1998, Private Pty Ltd's pre-CGT assets would have stopped being pre-CGT assets on that date (subject to any decision of the Commissioner under subsection 149-30(2)). This is the effect of Trust's 30% shareholding, which was acquired after 19 September 1985, together with the change of majority underlying interests in Public Ltd's assets as at 20 January 1997. From 1 February 1998, Private Pty Ltd would no longer have been entitled to assume, under paragraph 9 of Taxation Ruling IT 2530, that majority underlying interests in its assets had been maintained.*

Commissioner of Taxation

2 February 2000

TD 2000/8

Previous draft:

Previously issued as Draft TD 1999/D34

Related Rulings/Determinations:

IT 2530

Subject references:

abnormal trading; continuity of majority underlying interests; interposed entity; majority underlying interests; non-public entity; pre-CGT assets; public entity; test time; tracing of ownership and interests; underlying ownership and interests

Legislative references:

ITAA 1997 149-30; ITAA 1997 Subdivision 149-B; ITAA 1936 Division 20 of Part IIIA

| The 1997 Act | The 1936 Act |
|-------------------------|--|
| 1. Division 149 | 1. Division 20 |
| 2. Subdivision 149-B | 2. Section 160ZZS |
| 3. Subsection 149-15(2) | 3. Subsection 160ZZRR(1) |
| 4. Subsection 149-15(3) | 4. Subsection 160ZZRR(1) Subsection 160ZZRR(4) |
| 5. Subsection 149-15(4) | 5. Section 160ZZRS |
| 6. Subsection 149-15(5) | 6. Section 160ZZRT |
| 7. Subsection 149-30(1) | 7. Subsection 160ZZS(1) Paragraph 160ZZS(1A)(a) |
| 8. Subsection 149-30(2) | 8. Subsection 160ZZS(1) Paragraph 160ZZS(1A)(a) |
| 9. Subsection 149-50(1) | 9. Subsection 160ZZRR(1) |

ATO references:

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