TD 1999/D40 - Income tax: capital gains: if a dwelling passes to you as a beneficiary or the trustee of a deceased estate and you make a capital gain or capital loss from a CGT event that happens to the dwelling, can you disregard the gain or loss despite your having used the dwelling since the deceased's death for income producing purposes if: the deceased acquired the dwelling on or after 20 September 1985; the dwelling was the deceased's main residence just before their death and was not then being used for income producing purposes; and your ownership interest in the dwelling ends within 2 years of the deceased's death?

This document has been finalised by TD 1999/70.

Draft Taxation Determination

Income tax: capital gains: if a dwelling passes to you as a beneficiary or the trustee of a deceased estate and you make a capital gain or capital loss from a CGT event that happens to the dwelling, can you disregard the gain or loss despite your having used the dwelling since the deceased's death for income producing purposes if:

- **the deceased acquired the dwelling on or after 20 September 1985;**
- **the dwelling was the deceased's main residence just before their death and was not then being used for income producing purposes; and**
- **your ownership interest in the dwelling ends within 2 years of the deceased's death?**

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. Yes.

2. Paragraphs 118–195(1)(a) and 118–195(1)(b) of the *Income Tax Assessment Act 1997* provide that if a dwelling passes to you as a beneficiary or as a trustee of a deceased estate and you make a capital gain or capital loss from a CGT event that later happens to the dwelling, you can disregard the gain or loss if:

(a) the deceased acquired the dwelling on or after 20 September 1985;
(b) the dwelling was the deceased's main residence just before their death and was not then being used for income producing purposes; and
(c) your ownership interest in the dwelling ends within 2 years of the deceased's death.

3. Section 118–190, which applies to increase a capital gain or capital loss from the happening of a CGT event to a dwelling used as your main residence if you used it for purposes of producing assessable income, does not alter the position stated in paragraph 2. Section 118–190 does not operate in that situation to increase the capital gain or capital loss which subsection 118–195(1) disregards.

4. This outcome (namely, that any capital gain or capital loss from a CGT event which later happens to the dwelling is disregarded) applies whether or not, since the deceased's death, you have used the dwelling as your main residence.

Note 1:

5. Section 118–190 would operate to increase the capital gain or capital loss which subsection 118–195(1) otherwise disregards if, among other circumstances, the beneficiary or the trustee used the dwelling for 2 years or more after the deceased's death both for income producing purposes and as their main residence.

Note 2:

6. Subsection 118–190(4) provides that if the dwelling was the main residence of the deceased just before their death and it was not then being used for any income producing purpose, any use of the dwelling by the deceased person before their death is ignored.

Your comments

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:	**25 August 1999**
Contact Officer:	**Lyn Peatfield**
E-Mail address:	**lyn.peatfield@ato.gov.au**
Telephone:	**(08) 820 81337**
Facsimile:	**(08) 820 81399**
Address:	**Australian Taxation Office GPO Box 800 ADELAIDE SA 5001**

Commissioner of Taxation

28 July 1999

Subject references:
beneficiary; capital gains; death; deceased; deceased estate; dwelling; exemption; main residence; trustee

Legislative references:
ITAA 1997 118–190; ITAA 1997 118–190(4); ITAA 1997 118–195(1); ITAA 1997 118–195(1)(a); ITAA 1997 118–195(1)(b) item 1

ATO references:
NO 99/10480-5
BO CGT main residence summit 1999
ISSN: 1038 - 8982