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Draft Taxation Determination

Income tax: capital gains: in working out the ‘net value’ of a company or trust for the purposes of subsection 104-230(2) of the *Income Tax Assessment Act 1997*, does the word ‘assets’ in the definition of ‘net value’, for an entity, in subsection 995-1(1) include

- (a) assets, capital gains and capital losses from which are disregarded for capital gains purposes;**
- (b) trading stock; and**
- (c) ‘off-balance sheet’ assets**

and does the word ‘liabilities’ include contingent liabilities?

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.

Assets

1. The expression ‘net value’ used in subsection 104-230(2) is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* to mean, for an entity, ‘the amount by which the sum of the market values of the assets of the entity exceeds the sum of its liabilities’. The word ‘assets’ in its context in the definition of ‘net value’ has its ordinary meaning. The *Macquarie Dictionary* defines ‘asset’ to mean ‘a useful thing or quality; ... a single item of property’. So the word encompasses the entity’s items of property. It extends to items of property of any kind.
2. The word ‘assets’ includes assets capital gains or capital losses from which are disregarded for capital gains purposes, for example cars, motor cycles or similar vehicles and plant: sections 118-5 and 118-24). It extends to active assets as defined in Subdivision 152-A.
3. The word ‘assets’ includes trading stock.

4. It extends to so-called ‘off-balance sheet’ assets such as plant fully depreciated under the depreciation provisions of the income tax law and internally generated goodwill.
5. The word ‘assets’ encompasses items of property whether or not they were acquired on or after 20 September 1985.

Liabilities

6. The word ‘liabilities’ in its context in the definition of ‘net value’, as that expression is used in subsection 104-230(2), also has its ordinary meaning. The Macquarie Dictionary defines ‘liability’ to mean ‘an obligation, especially for payment; debt or pecuniary obligations (opposed to asset)’. So the word encompasses the entity’s debts and pecuniary obligations.
7. The word ‘liabilities’ in the definition of ‘net value’ extends to a legally enforceable debt which is due for payment and to a presently existing obligation to pay either a sum certain or an ascertainable sum. It does not extend to a contingent liability, a future obligation or an expectancy. Contingent liabilities are not taken into account in determining the ‘net value’ of a company or trust.
8. Support for the construction of the word ‘liabilities’ in this draft Taxation Determination comes from the following judicial statements.
9. Lord Greene MR, in *Re Duffy; Lakeman v. Attorney General* [1949] Ch 28; [1948] 2 All ER 756, said (at Ch 36-38; All ER 759-760):

‘What is the meaning of “liabilities”, and, in particular, what is its meaning in the phrase “contingent liabilities”? ... It appears to me that, in the absence of some context justifying a limitation of those words or some qualification being imposed upon them, all we can do is to construe them in their natural and ordinary meaning. ... [T]aking the construction of these words, I find it impossible to give them a meaning extending beyond what is always perfectly ascertainable without any doubt whatsoever, namely, an existing legal liability, actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision but which in law does not become a liability until a subsequent date’.
10. A ‘contingent liability’, according to Lord Reid in *Winter v. Inland Revenue Commissioners* [1961] 3 All ER 855, is not an existing legal liability. He said (at 859):

‘I would ... find it impossible to hold that in Scots law a contingent liability is merely a species of existing liability. It is a liability which, by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur’.

Note 1:

11. For the purposes of the 75% test in subsection 104-230(2), the ‘net value’ of a company or trust includes the market value of trading stock (because trading stock comes within the word ‘assets’ in the definition of ‘net value’) but the market value with which it is compared is of post-CGT property that does not include trading stock (because paragraphs 104-230(2)(a) and 104-230(2)(b) specify this).

Note 2:

12. In this draft Taxation Determination ‘*post-CGT property*’ means property (that is not trading stock) acquired on or after 20 September 1985.

Your comments

13. 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: 22 September 2000
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Commissioner of Taxation23 August 2000

Previous draft:

Not previously issued in draft form.

Related Rulings/Determinations:

TD 2000/D13; TD 2000/D15; TD 2000/D16; TD 2000/D17; TD 2000/D18; TD 2000/D19

Subject references:

- active assets
- asset
- capital gains
- contingent liabilities
- liabilities
- net value
- off-balance sheet assets
- property

Legislative references:

- ITAA 1997 104-230(2)
- ITAA 1997 104-230(2)(a)
- ITAA 1997 104-230(2)(b)
- ITAA 1997 118-5
- ITAA 1997 118-24
- ITAA 1997 995-1(1)
- ITAA 1997 Subdivision 152-A

Case References

- *Re Duffy; Lakeman v. AG* [1949] Ch 28; [1948] 2 All ER 756;
- *Winter v. IRC* [1961] 3 All ER 855;

ATO references:

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