


***TD 95/D23 - Income tax: capital gains: does section 160ZM of the Income Tax Assessment Act 1936 apply to a non-assessable payment made by a trustee to a beneficiary of a discretionary trust?***

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This document has been finalised by TD 97/15.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

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## Draft Taxation Determination

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### **Income tax: capital gains: does section 160ZM of the *Income Tax Assessment Act 1936* apply to a non-assessable payment made by a trustee to a beneficiary of a discretionary trust?**

1. No. Section 160ZM applies if a trustee of a trust pays an amount to a taxpayer that is not assessable income of the taxpayer in respect of an interest or unit in the trust, other than as proceeds of disposal of the interest or unit. Section 160ZM does not apply to a non-assessable payment made by a trustee of a discretionary trust to a member of the class of beneficiaries of the trust who only has a right to be considered by the trustee in exercising a power of appointment to distribute income or corpus of the trust. Section 160ZM only applies to a non-assessable payment made by a trustee of a unit trust or by a trustee of a trust where a beneficiary has defined rights (other than that described) under the terms of the deed of settlement.

2. The reference to an 'interest' in a trust in section 160ZM is qualified by its statutory context to mean an interest in a trust analogous to a unit in a unit trust or to a share in a company (see section 160ZL). Section 160ZM contemplates an interest (like a unit in a unit trust or a share in a company) in which a taxpayer can invest and an interest (like a unit in a unit trust or a share in a company) that can be disposed of by a taxpayer.

3. Section 160ZM applies if a taxpayer has an interest in a trust comprising a bundle of rights which are similar to those attached to a unit in a unit trust (eg., rights in respect to voting, distributions of income, redemption or assignment of units, and entitlement to corpus on the vesting day) or to a share in a company.

4. The interest that a member of the class of beneficiaries of a discretionary trust has, to have the trust estate properly administered, is of a different nature from the defined rights of a unit holder or shareholder. That type of interest is insufficient to constitute an 'interest' in a trust for the purposes of section 160ZM.

**Technical note:** It is not necessary to consider in this Taxation Determination whether the interest that a member of a class of beneficiaries has in a discretionary trust is an 'asset' as defined in Part IIIA or what, if any, implications arise under the general provisions of Part IIIA if the member disposes of that interest.

FOI INDEX DETAIL: Reference No.

Related Determinations:

Subject Ref: assets; beneficiary; discretionary trust; disposal; share; trust; unit trust; units

Legislative Ref: ITAA 160ZL; ITAA 160ZM

ATO Ref: CGT Cell (CGDET113); NAT 95/9530-9

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ISSN 1038 - 8982