IT 2003 - Assignment of partnership interests

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TAXATION RULING NO. IT 2003

ASSIGNMENT OF PARTNERSHIP INTERESTS

F.O.I. EMBARGO: May be released

REF H.O. REF: 4 J35/526 P.2 F541 DATE OF EFFECT:

B.O. REF:

A.C.T. 01/AC 76
S.A. C90/94/1/1 Pt.3
C102B/1/1 Pt.2
QLD. 20/COR/1771
SYDNEY 27/B1/AF3077

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1102936	ASSIGNMENT OF INCOME PARTNERS TRUSTS - INCOME ASSIGNED TO	102B

OTHER RULINGS ON TOPIC: H.O. MEMO 15 SEPTEMBER 1981 4 J35/526

PREAMBLE This office has recently examined arrangements involving the assignment by members of partnerships of varying portions of their interests in partnerships to trusts in which the assignor is either a beneficiary or contingent beneficiary.

RULING Such arrangements are, of course, an extension of the situations which existed in the Everett case, 80 ATC 4076, when the assignment was effected directly to the spouse of the assignor.

In memorandum from this office of 15 September 1981, H.O. Ref. J35/526, it was stated that there was no objection in principle to the assignment of portion of a partner's interest in a partnership to a unit trust. It was also stated, however, that it was not accepted that the assignment would be effective where units in the unit trust were held by the assignor. That approach still applies.

Decided cases indicate that wherever an assignment involving income or income producing property has been held effective for income tax purposes, i.e. so as to make the income that of the assignee, it has been found that the assignor has absolutely put it out of his power to revoke the assignment or to divert the income or property back to himself. Conversely, wherever income or income arising from property assigned to others has been found to be taxable to the assignor, it has generally been for one of two reasons - either the assignor has retained such control over the income or property assigned that it is within his power to divert the income or property back to himself or else the arrangement is so clearly a mere application and disposition of income derived by the assignor that it is not possible to say that

it is not the income of the assignor but that of the assignee.

The reasons given for naming the assignor in the present cases as a beneficiary or contingent beneficiary have to do with domestic situations. It is said that the assignor may not wish to irrevocably assign part of his interest in the partnership to his wife lest at some future time he should be divorced.

Whatever the validity of the domestic reasons might be it is arguable that an assignment by a partner of portion of his interest in a partnership to a trust in which he is either a beneficiary or contingent beneficiary is not such an absolute assignment of the partnership interest as to make the income arising therefrom the income of the trust.

A beneficiary has an undoubted beneficial interest in the income and property of a trust. Where the assignor is a beneficiary the assignment is open to be attacked on the grounds that it is not an absolute assignment because the assignor has retained a beneficial interest in the subject matter of the chose in action assigned. In terms of what has been said earlier the assignment is not absolute because the income or part of it will be diverted back to the assignor.

In the case of a contingent or discretionary beneficiary the law is less clear. For the reasons already given, however, it is proposed to take the same line in these cases.

This means that, as a general rule, assignments of the type before the court in the Everett case will be accepted for income tax purposes. So also will assignments to a trust be accepted where the beneficiaries of the trust do not include the assignor. No objection will be taken if the trustee of the trust is one of the other partners. In all of these cases it must be demonstrated that the assignor has absolutely divested himself of his portion of his interest in the partnership. In individual cases there may be grounds for striking down the assignment because it is either a sham or because it comes within the concepts enunciated in the House of Lords decision in the Ramsay case (1981) 2 WLR 49. Assignments to trusts where the assignor is either a beneficiary or a contingent beneficiary will not be accepted.

There are a number of cases already in the pipeline in which the effectiveness of this sort of arrangement is in issue. Efforts are being made to have the matter tested as soon as possible but, to be realistic, it will be some time before the matter is finalised.

In the meantime where these arrangements are encountered the full interest in the partnership should be assessed to the assignor partner. Where beneficiaries other than the assignor are presently entitled to income of the trust, the relevant amounts should be included in the assessable income of beneficiaries. If there are not any beneficiaries presently entitled, assessments should be raised against the trustee. Any subsequent objections should be disallowed.

As far as the payment of tax is concerned, clearly it would not be proper to seek to obtain payment from both the assignor and the beneficiaries and/or trustee. The interest of the Revenue would be protected by endeavouring to collect the tax assessed to the assignor and to allow the tax due by the beneficiaries and/or trustee to remain outstanding. Should the assignment prove to be effective, any additional tax for late payment which may have accrued in relation to assessment of beneficiaries and/or trustee should be remitted.

COMMISSIONER OF TAXATION
6 DECEMBER 1982