PS LA 2003/12 - Capital gains tax treatment of a trustee of a testamentary trust for the purposes of Division 128 of the Income Tax Assessment Act 1997 ('the ITAA 1997')

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ATO Practice Statement Law Administration

PS LA 2003/12

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This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

The Government announced in the 2011-12 Budget that it would amend the capital gains tax (CGT) provisions in order to provide greater certainty for taxpayers by fixing technical deficiencies, removing anomalies and addressing unintended outcomes in the law. One such amendment is intended to ensure that no CGT taxing point happens when an asset passes from a testamentary trustee. The amendment is intended to apply to CGT events happening on or after the day the amending legislation receives Royal Assent. This Practice Statement will be withdrawn after that time.

For further information see *Treasury Proposals Paper – Minor Amendments to the Capital Gains tax Law*, May 2011.

SUBJECT: **Capital gains tax treatment of a trustee of a testamentary trust for the purposes of Division 128 of the *Income Tax Assessment Act 1997* ('the ITAA 1997')**

PURPOSE: **To inform staff that the Commissioner will not depart from the long-standing administrative practice of treating the trustee of a testamentary trust in the same way that a 'legal personal representative' is treated for the purposes of Division 128 of the ITAA 1997.**

STATEMENT

1. The Review of Business Tax (RBT) created some uncertainty about the Tax Office's practice in relation to the treatment of assets passing from a trustee of a testamentary trust to a beneficiary of the trust: see paragraph 22.89 of a *Platform for Consultation* and recommendation 13.6 of *A Tax System Redesigned.*

2. This Practice Statement informs staff that the Commissioner will not depart from the Tax Office's long-standing administrative practice of treating the trustee of a testamentary trust in the same way that a legal personal representative is treated for the purposes of Division 128 of the ITAA 1997, in particular subsection 128-15(3).

3. Accordingly, subject to the operation of CGT event K3 in section 104-215 of the ITAA 1997 (about assets passing to a tax-advantaged entity), any capital gain or capital loss that arises when an asset owned by a deceased person passes to the ultimate beneficiary of a trust created under the deceased's will is disregarded.

EXPLANATION

4. The Explanatory Memorandum to the Bill which introduced section 160X of the *Income Tax Assessment Act 1936* (which is now repealed but was the predecessor to Division 128 of the ITAA 1997) states that 'any liability to tax on capital gains will not arise until the relevant assets are disposed of by the legal personal representative or the beneficiary as the case may be.' In addition, the Treasurer's Reform of the Australian Tax System announcement on 19 September 1985 states:

> Capital gains tax will not be levied following the death of a taxpayer unless his or her assets are actually realised by the administrator of the deceased estate or disposed of by the beneficiary of the estate.

5. This concession for deceased estates was in contrast to the position announced in the Government's draft White Paper of June 1985 which specified that death would result in a realisation for the purpose of the proposed capital gains tax regime.

6. Limiting the operation of subsection 128-15(3) of the ITAA 1997 to an asset passing from a legal personal representative to a testamentary trustee (as a beneficiary) would not achieve Parliament's intention for the application of the capital gains tax provisions to deceased estates. This was to ensure that there would be no taxing point until the asset was actually disposed of by the intended beneficiary.

7. Notwithstanding the comments in the RBT publications, the Commissioner does not consider there are sufficient grounds to move away from the long-standing practice. Although this is a difficult issue, particularly given the wording in section 128-15 of the ITAA 1997, it is open to the Commissioner to follow a long-standing practice that promotes the policy intent of the provisions and that might be adopted by a court.[1]

8. There is a widespread understanding in the tax community of the Tax Office's practice not to recognise any taxing point in respect of assets owned by a deceased person until they cease to be owned by the beneficiaries named in the will (unless there is an earlier disposal by the legal personal representative or testamentary trustee to a third party or CGT event K3 applies). To adopt a different approach now would result in a general unsettling of the community and an increase in compliance costs.

[1] See for example the approach taken by the High Court in refusing the Commissioner's application for special leave to appeal in the matter of *Federal Commissioner of Taxation v. CSR Ltd* S278/2000 23 November 2001. The High Court would not agree to reconsider the decisions in *McLaurin v. Federal Commissioner of Taxation* (1961) 104 CLR 381; [1961] ALR 471; (1961) 12 ATD 273; *Allsop v. Federal Commissioner of Taxation* (1965) 113 CLR 341; [1966] ALR 1105; (1965) 14 ATD 62 because they were longstanding decisions which taxpayers were entitled to rely on.

subject references:	beneficiary; capital gains tax; deceased estates; legal personal representative; trustee; testamentary trust
legislative references:	*Income Tax Assessment Act 1997* section 104-215 *Income Tax Assessment Act 1997* Division 128 *Income Tax Assessment Act 1997* section 128-15(3)
related public rulings:	
related practice statements:	
case references:	*Allsop v. Federal Commissioner of Taxation* (1965) 113 CLR 341; [1966] ALR 1105; (1965) 14 ATD 62 *Federal Commissioner of Taxation v. CSR Ltd* S278/2000 23 November 2001 *McLaurin v. Federal Commissioner of Taxation* (1961) 104 CLR 381; [1961] ALR 471; (1961) 12 ATD 273
file references:	

Date issued:	**12/11/2003**
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Other Business Lines consulted	
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