TD 2003/28 - Income tax: capital gains: does CGT event E4 in section 104-70 of the Income Tax Assessment Act 1997 happen if the trustee of a discretionary trust makes a non-assessable payment to:(a) a mere object; or (b) a default beneficiary?

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Taxation Determination

Income tax: capital gains: does CGT event E4 in section 104-70 of the *Income Tax Assessment Act 1997* happen if the trustee of a discretionary trust makes a non-assessable payment to:

(a) a mere object; or

(b) a default beneficiary?

Preamble

The number, subject heading, date of effect and paragraphs 1of this document are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of this Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a 'public ruling' and how it is binding on the Commissioner.*

*[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

1. (a) No, CGT event E4 does not happen if a trustee of a discretionary trust makes a non-assessable payment to a mere object in respect of their interest in the trust.

(b) No, CGT event E4 does not happen if a trustee of a discretionary trust makes a non-assessable payment to a default beneficiary in respect of their interest in the trust if the interest was not acquired for consideration or by way of assignment.

2. In this context, a mere object refers to a member of the class of beneficiaries of the trust who is an object of a power of appointment vested in the trustee (i.e. a discretionary beneficiary). A default beneficiary refers to a beneficiary whose entitlement to income or corpus arises should the trustee decide not to exercise their discretion in favour of the objects or fail to exercise their discretion.

3. CGT event E4 does not happen in the circumstances described in paragraph 1 because a mere object or default beneficiary is not considered to have an 'interest in the trust' of the nature or character required in paragraph 104-70(1)(a).

4. The meaning to be given to the words 'interest in the trust' depends on the context in which they are used, see for example *Leedale v. Lewis* [1982] 3 All ER 808 and *Gartside v. IRC* [1968] AC 553. In its context in section 104-70, the interest in the trust is one that is coloured by the nature of a unit in a unit trust, that is, the interest in the trust is one that is akin to the interest that a unit holder has in a unit trust. The interest that is contemplated is one in which a taxpayer invests.

5. The interest that a mere object has in a trust is not one in which another person can invest – such an interest, being a bare right of action, cannot be purchased or assigned. An interest of a default beneficiary has been held to constitute a vested, but defeasible, proprietary interest in a trust (see *Queensland Trustees v. Commissioner of Stamp Duties (Queensland*) (1952) 88 CLR 54 at page 63[1]). It can be assigned and be the subject of a testamentary disposition. However, it is not an interest potentially subject to CGT event E4 where it has not been acquired for consideration or by way of assignment.

6. [Omitted]

Date of effect

7. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation
26 November 2003

Previous draft:
TD 1999/D67

Related Rulings/Determinations:
TD 2001/26

Previous Rulings/Determinations:
TD 97/15; TR 92/1; TR 92/20; TR 97/16

Subject references:
- beneficiary
- capital payments
- CGT asset
- default beneficiary
- discretionary trust
- taker in default
- trust
- trustee

[1] More recent UK authorities (for example, *Pearson v. Inland Revenue Commissioners* [1981] AC 753) tend to the view that the interest of a default beneficiary is not more significant than the interest of a mere object.

Legislative references:
- ITAA 1997 104-70
- ITAA 1997 104-70(1)(a)
- TAA 1953 Part IVAAA

Case references:
- Gartside v. IRC [1968] AC 553
- Leedale v. Lewis [1982] 3 All ER 808
- Pearson v. Inland Revenue Commissioners [1981] AC 753
- Queensland Trustees v. Commissioner of Stamp Duties (Queensland) (1952) 88 CLR 54

ATO references
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