TD 2004/3 - Income tax: capital gains: does an asset 'pass' to a beneficiary of a deceased estate under section 128-20 of the Income Tax Assessment Act 1997 if the beneficiary becomes absolutely entitled to the asset as against the trustee of the estate?

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Taxation Determination

Income tax: capital gains: does an asset 'pass' to a beneficiary of a deceased estate under section 128-20 of the *Income Tax Assessment Act 1997* if the beneficiary becomes absolutely entitled to the asset as against the trustee of the estate?

Preamble

The number, subject heading, date of effect and paragraphs 1 to 5 of 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.*

1. Yes. An asset will 'pass' to the beneficiary of a deceased estate when the beneficiary becomes absolutely entitled to the asset as against the estate's trustee (whether or not the asset is later transmitted or transferred to the beneficiary).

2. A CGT asset owned by a deceased person at the time of their death passes to a beneficiary of the deceased's estate if the beneficiary becomes the owner of the asset under the will or in one of the other ways set out in subsection 128-20(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

3. Any capital gain or loss made when the asset passes to a beneficiary of the deceased estate is disregarded under subsection 128-15(3) of the ITAA 1997 (unless CGT event K3 in section 104-215 of the ITAA 1997 happens as a result of the asset passing to a tax-advantaged beneficiary). However, the beneficiary will be the relevant taxpayer if a CGT event happens to the asset after it has passed to the beneficiary.

4. While it is clear that an asset has passed to a beneficiary once legal ownership of the asset has transferred to the beneficiary, we consider that an asset can pass to a beneficiary prior to transfer if the beneficiary becomes absolutely entitled to the asset as against the trustee. It is considered that there is nothing in section 128-20 of the ITAA 1997 that makes 'passing' dependent upon the acquisition of legal ownership.

5. CGT event E5 in section 104-75 of ITAA 1997 does not happen when a beneficiary becomes absolutely entitled to an asset that a deceased person owned at the time of their death.

Example

6. *John bought a block of land after 20 September 1985. John died on 21 June 2002. In his will John appointed his solicitor, Maria, as his executor and trustee of his estate and left the land to his son Peter.*

7. *Following the period of administration, during which Maria collected in all of John's assets and paid all of his debts, Peter had a vested, indefeasible and absolute interest in the land and was able to direct how it was dealt with. Therefore, he became absolutely entitled to the land and the land 'passed' to him.*

8. *At Peter's suggestion Maria sold the land and paid the proceeds to Peter rather than transfer the land to him. The capital gain from the sale of the land is made by Peter because at the time it was sold the land had passed to him. The capital gain does not form part of the net income of the trust arising under John's will.*

9. *Note: Even if Peter was presently entitled to the income of the trust when the land was sold, the net income of the trust estate would not have included the capital gain because Peter was absolutely entitled to the land at that time (section 106-50 of the ITAA 1997).*

Alternative view

10. It has been contended that an asset does not pass to a beneficiary until the beneficiary obtains legal ownership of it - this view relies on the words following paragraph 128-20(1)(d) of the ITAA 1997 which refer to the transfer or transmission of an asset to a beneficiary.

11. We do not agree with this view. We consider that it may have the effect that neither the trustee nor the beneficiary would make a capital gain or loss if a CGT event happened to an asset to which the beneficiary was absolutely entitled but did not have legal title. The trustee could argue, on the basis of section 106-50 of the ITAA 1997, that they do not make a capital gain or loss because any act done by them in connection with the event is taken to have been done by the beneficiary. The beneficiary could argue they do not make a capital gain or loss because the asset has not passed to them.

Date of effect

12. 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
17 March 2004

Previous draft:
TD 2003/D23

Related Rulings/Determinations:
TR 92/1; TR 92/20; TR 97/16

Subject references:
- CGT deceased estates

Legislative references:

- ITAA 1997 104-75
- ITAA 1997 104-215
- ITAA 1997 106-50
- ITAA 1997 128-15(3)
- ITAA 1997 128-20
- ITAA 1997 128-20(1)
- ITAA 1997 128-20(1)(d)
- TAA 1953 Pt IVAAA

ATO references
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