


***TD 2012/21A1 - Addendum - Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?***

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## Addendum

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### Taxation Determination

Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the *Income Tax Assessment Act 1997* happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Determination TD 2012/21 to take into account recent case law, in particular *Andtrust v. Andreatta* [2015] NSWSC 38

#### TD 2012/21 is amended as follows:

##### 1. Paragraph 10

After the paragraph insert:

**Example 3A: extension of vesting date**

10A. *The Wombat Family Trust is a discretionary trust settled on 31 March 1981 to benefit the members of the Wombat family. The eligible beneficiaries of the trust are defined as Mr William Wombat, his spouse Wanda, any of his children or grandchildren born before the trust's vesting date and any spouse of his or his children or grandchildren born before the vesting date. The deed contains a clause specifying the vesting date as 31 March 2021.*

10B. *The trust deed also contains a clause granting the trustee a power of variation that can be exercised prior to the vesting date, and which includes enlarging any category of eligible beneficiaries so far as the power shall not infringe the rule against perpetuities.*

10C. *The trustee wishes to extend the vesting date of the trust so as to enlarge the class of eligible beneficiaries that may benefit under the trust to include children, grandchildren or spouses of children or grandchildren born after the vesting date.*

10D. *The trustee resolves to extend the vesting date to 31 March 2051. Extending the vesting date to 31 March 2051 will not infringe the rule against perpetuities.*

10E. *The clause governing the trustee's powers to vary the trust deed contemplates that enlarging the category of eligible beneficiaries may involve extending the vesting date of the trust, given the specific limitation of the trustee's powers to not infringing the rule against perpetuities. The trustee's resolution is a valid exercise of the amendment power.*

10F. *The making of the resolution, being a valid exercise of a power of variation contained within the trust deed, does not give rise to the happening of a CGT event. The result would be the same if the vesting date was extended with the approval of a relevant court rather than under the trust deed.*

## 2. Paragraph 16

Omit the paragraph.

## 3. Paragraph 19

Omit the paragraph and the footnote 2.

## 4. Footnote 4

Omit the footnote; substitute:

<sup>4</sup> Under many of the State and Territory Trustee (or Trusts) Acts, the trustee of a trust (or other relevantly interested person) can in certain instances approach the relevant Supreme Court to have a trust varied on behalf of certain persons (such as infants or persons suffering some other incapacity). The precise tests defining the extent of the Court's jurisdiction differ from State to State (or Territory). Commonly the Court is empowered to make such orders as it thinks fit subject to the proviso that an arrangement to vary the trust must be for the benefit of the person (or, in Western Australia, not to the person's detriment). In South Australia any person who has an interest in property held on trust (not being a charitable trust or statutory trust) may apply to the Court to have the trust varied. Before so ordering, the South Australian statute requires the Court to be satisfied as to certain things including, for example, that the variation would not unfairly favour some beneficiaries over others. The Court of Appeal in *Re Dion Investments Pty Ltd* [2014] NSWCA 367 held that section 81 of the *Trustee Act 1925* (NSW) does not confer a power on the court to grant to a trustee a general power to vary the terms of the trust deed but only enables a trustee to seek specific powers by way of supplementation or overriding of the existing trust terms. See generally sections 63 and 63A of the *Trustee Act 1958* (Vic); section 81 of the *Trustee Act 1925* (NSW); sections 94 and 95 of the *Trusts Act 1973* (Qld); sections 89 and 90 of the *Trustees Act 1962* (WA), sections 59B and 59C of the *Trustee Act 1936* (SA); section 47 of the *Trustee Act 1898* (Tas) and sections 13 and 14 of the *Variation of Trusts Act 1994* (Tas); section 50A of the *Trustee Act* (NT); and section 81 of the *Trustee Act 1925* (ACT). As to what constitutes a variation, a classic statement of the test appears in *Re Ball's Settlement Trust* [1968] 1 WLR 899 where the court described a variation as 'an arrangement, [that] while leaving the substratum, effectuates the purpose of the original trust by other means...even though the means employed are wholly different and even though the form is completely changed' (p 905).

## 5. Footnote 6

Omit the footnote; substitute:

<sup>6</sup> The scope of the relevant power is determined by the construction of the words of the trust deed, the surrounding context and any relevant admissible evidence. See for example *Jenkins v. Ellett* [2007] QSC 154 where the trustee was found not to have the power to vary the trust in the manner contended. Note further that invalid amendments, being of no effect, would not of themselves result in CGT events E1 or E2 happening.

**6. Paragraph 26**

Insert footnote 7 at the end of the paragraph.

<sup>7</sup> For example, in *Andtrust v. Andreatta* [2015] NSWSC 38, the trust deed granted the trustee power to extend the vesting date of the trust, provided the rule against perpetuities was not infringed.

**7. Case references**

Insert:

- *Andtrust v. Andreatta* [2015] NSWSC 38
- *Re Dion Investments Pty Ltd* [2014] NSWCA 367

This Addendum applies before and after date of issue.

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**Commissioner of Taxation**

31 August 2016

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## ATO references

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