



***TD 97/15 - Income tax: capital gains: does section 104-70 of the Income Tax Assessment Act 1997 apply to a non-assessable payment made by a trustee to a beneficiary of a discretionary trust?***

 This cover sheet is provided for information only. It does not form part of *TD 97/15 - Income tax: capital gains: does section 104-70 of the Income Tax Assessment Act 1997 apply to a non-assessable payment made by a trustee to a beneficiary of a discretionary trust?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *10 March 1999*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

[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.]

## Taxation Determination

### **Income tax: capital gains: does section 104-70 of the *Income Tax Assessment Act 1997* apply to a non-assessable payment made by a trustee to a beneficiary of a discretionary trust?**

1. No. Section 104-70 applies if a trustee of a trust pays an amount to a taxpayer that is not assessable income of the taxpayer in respect of an interest or unit in the trust, except for CGT events A1, C2, E1, E2, E6 and E7 happening in relation to the interest or unit. Section 104-70 does not apply to a non-assessable payment made by a trustee of a discretionary trust to a member of the class of beneficiaries of the trust who is an object of a power of appointment vested in the trustee ('a discretionary beneficiary'). This is because:

- (i) a discretionary beneficiary does not hold an 'interest ... in the trust' of the nature or character referred to in subsection 104-70(1); and
- (ii) any payment made to a discretionary beneficiary is not an amount paid to the discretionary beneficiary 'in respect of' the interest that the discretionary beneficiary holds in the trust (namely, a right of due administration of the trust, including a right to have his or her interest protected by a court of equity, and a right to be considered by the trustee as a potential recipient of trust income or corpus).

2. The word 'interest' has different meanings depending on the context in which it is used. In subsection 104-70(1), the expression used is 'interest ... in the trust'. It is not 'interest in the income of the trust', 'interest in the corpus of the trust' or 'interest in the property of the trust'. In its context in subsection 104-70(1), the interest in the trust that is contemplated is one in which a taxpayer can invest, one that is capable of being acquired and disposed of, one the precise extent of which is quantifiable and one in which the rights attaching to it are defined with particularity in the terms of the deed of settlement. Subsection 104-70(1) excludes a payment in respect of the happening of CGT event A1, C2, E1, E2, E6 or E7 in relation to the interest, and thus, envisages that the relevant interest is one that is capable of having CGT event A1, C2, E1, E2, E6 or E7 happen in relation to it. It is also one that is capable of having a cost base, or reduced cost base because subsection 104-70(6) is predicated on there being a reduction (or step down) in the relevant cost base and subsection 104-70(4) is predicated on there being an excess over the cost base of the interest. 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. An example of an 'interest ... in the trust' in subsection 104-70(1) is the interest that a beneficiary holds in a fixed trust.

3. The interest that a discretionary beneficiary has in a discretionary trust (to have the trust estate properly administered and to be considered by the trustee in exercising a power of appointment to distribute income or corpus of the trust) is of a different nature from the type of interest in a trust referred to in subsection 104-70(1). A discretionary beneficiary's interest is not one in which a person can invest, nor one that is capable of being acquired and disposed of, nor one in which the rights attaching to it (for example, rights to vote, to distributions of income, to redemption or assignment or to entitlement to corpus distributions on winding up) are defined with particularity in the terms of the discretionary trust deed. It is not a precisely quantifiable interest because it depends on which beneficiaries the trustee favours in exercising its discretion, on the quantum of income or corpus to be distributed in exercise of the discretion or on both. The interest of a discretionary beneficiary is not, therefore, sufficient to constitute an 'interest ... in the trust' for the purposes of subsection 104-70(1).

#### **Technical notes:**

1. This Taxation Determination does not address the question whether a non-assessable payment made by a trustee to a discretionary beneficiary comes within any other provision of Parts 3-1, 3-3 and 3-5. Other provisions in Parts 3-1, 3-3 and 3-5 may apply to the discretionary beneficiary depending on whether the payment is a distribution of income of the trust or whether it is a distribution of corpus of the trust.

2. It is not necessary to consider in this Taxation Determination whether the interest that a member of a class of beneficiaries has in a discretionary trust is a CGT asset as defined in Parts 3-1, 3-3 and 3-5 or what, if any, implications arise under the general provisions of Parts 3-1, 3-3 and 3-5 if the member disposes of that interest.

3. This Taxation Determination does not address the question whether a taker in default (or a default beneficiary) in a discretionary trust has an interest in the trust in terms of subsection 104-70(1).

**Note:** The Addendum to this Determination that issued on 10 March 1999 amends the Determination from the beginning of the 1998-1999 income year to change section references and terms to those contained in the *Income Tax Assessment Act 1997*. The Addendum does not change the views expressed in the Determination.

#### **Commissioner of Taxation**

25 June 1997

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FOI INDEX DETAIL: Reference No. I 1015400

Previously issued as Draft TD 95/D23

Related Determinations:

Related Rulings:

Subject Ref: assets; beneficiary; default beneficiary; discretionary beneficiary; discretionary trust; disposal; taker in default; trust; units; unit trust

Legislative Ref: ITAA 1997 104-70; ITAA 1997 104-70(1); ITAA 1997 104-70(4); ITAA 1997 104-70(6)

Case Ref:

ATO Ref: CGT Cell (CGDET113); UMGCGTTD 96-23; NAT 95/9530-9

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ISSN 1038 - 8982