


TD 1999/D34 - Income tax: capital gains: if a public entity partly owns, directly or indirectly, a non-public entity, when for the purposes of Subdivision 149-B of the Income Tax Assessment Act 1997 does the non-public entity have to take into account results of the public entity's tracing of underlying interests in examining underlying interests in its own pre-CGT assets?

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This document has been finalised by TD 2000/1, TD 2000/8.



Draft Taxation Determination

Income tax: capital gains: if a public entity partly owns, directly or indirectly, a non-public entity, when for the purposes of Subdivision 149-B of the *Income Tax Assessment Act 1997* does the non-public entity have to take into account results of the public entity's tracing of underlying interests in examining underlying interests in its own pre-CGT assets?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs should not be relied on. Only final TDs represent authoritative statements by the ATO.

1. If a non-public entity - being an entity to which Subdivision 149-B of the *Income Tax Assessment Act 1997* ('the 1997 Act') applies - is partly owned, directly or indirectly, by a public entity, the partly owned non-public entity should take into account all available results of the public entity's tracing of underlying interests in the public entity's pre-CGT assets at its most recent test day. The results that are relevant are the public entity's findings about what percentage of the underlying interests in its assets were held on the test day by the same ultimate owners who had underlying interests at its starting day. This percentage indicates the extent to which ultimate owners who have underlying interests, indirectly through the public entity, in the non-public entity's pre-CGT assets at the test day are the same ultimate owners who had underlying interests in those assets immediately before 20 September 1985.
2. The partly owned non-public entity should take into account the public entity's results at the most recent test day whether that day was a day when there was abnormal trading of the shares or units of the public entity or whether it was a day that was a test day for all public entities under Division 149 of the 1997 Act or under Division 20 of Part IIIA of the *Income Tax Assessment Act 1936* ('the 1936 Act').
3. If a non-public entity is partly owned, directly or indirectly, by more than one public entity, the non-public entity should use the most recent results of each public entity's tracing of underlying interests in their assets.
4. For the purpose of determining under subsection 149-30(1) whether the majority underlying interests in a partly owned non-public entity's pre-CGT assets have changed, or giving information about underlying interests to the Commissioner under subsection 149-30(2), the partly owned non-

public entity may disregard any changes in underlying interests in the public entity's assets that have occurred since its most recent test day.

5. On the finalisation of this draft Taxation Determination, the final Taxation Determination applies to entities from the date it is issued as a final Determination.

6. Paragraph 9 of Taxation Ruling IT 2530 will be withdrawn with effect from the date this draft Taxation Determination is issued as a final Taxation Determination.

Explanation

7. Under subsection 149-30(1), a pre-CGT asset of a non-public entity stops being a pre-CGT asset at the earliest time when majority underlying interests in the asset were not had by ultimate owners who had majority underlying interests in the asset immediately before 20 September 1985. The asset does not stop being a pre-CGT asset if the Commissioner is satisfied, or thinks it reasonable to assume, that the majority underlying interests have not changed: subsection 149-30(2).

8. Paragraph 9 of Taxation Ruling IT 2530 previously advised that an entity that was partly owned by a listed public company or publicly traded unit trust could assume for these purposes that the continuity of majority underlying interests in the assets of the listed public company or publicly traded unit trust had been maintained if there had only been normal transactions in its shares or units that were not associated with takeover or merger activities. IT 2530 was issued at a time when listed public companies and publicly traded unit trusts were only required to test for changes in majority underlying interests if there were takeover or merger activities or other abnormal trading of their shares or units. Consequently, they only had results available from tracing of underlying interests in assets at these times.

9. The law has since been amended to require all public entities to examine the underlying interests in their pre-CGT assets on designated test days. Public companies and publicly traded unit trusts are also required to examine the underlying interests in their pre-CGT assets if there is abnormal trading of their shares or units. As a result of this change, the advice in paragraph 9 of IT 2530 is no longer appropriate.

10. A non-public entity that is partly owned by one or more public entities should use the most recent results of their tracing of underlying interests in their pre-CGT assets that each public entity has when the non-public entity examines changes in the majority underlying interests in its own pre-CGT assets. Generally, these are the results that the public entity compiled at its most recent test day under Division 149 of the 1997 Act, or under Division 20 of Part IIIA of the 1936 Act. The partly owned non-public entity should take these results into account from that test day, or from the date of this Determination (if later).

Note: In this draft Taxation Determination:

- the term 'public entity' refers to the entities listed in paragraphs 149-50(1)(a) to 149-50(1)(f) of the 1997 Act – which entities include a company shares in which (except shares that carry the right to a fixed rate of dividend) are listed for quotation in the official list of an approved stock exchange, a publicly traded unit trust, a mutual insurance company and a mutual affiliate company;
- the term 'non-public entity' refers to an entity which is not a public entity; and
- the expression 'underlying interests' refers to an underlying interest in a CGT asset as defined in subsection 149-15(2) of the 1997 Act (that is, a beneficial interest that an ultimate owner has, whether directly or indirectly, in the asset or in any ordinary

income that may be derived from that asset) construed in conjunction with the definition of 'ultimate owner' in subsection 149-15(3) of the 1997 Act and with subsections 149-15(4) and 149-15(5) of the 1997 Act.

Example:

11. 40% of the shares in Private Pty Ltd have been owned by a public company, Public Ltd, since before 20 September 1985. Of the remaining shares in Private Pty Ltd, half are owned by Individual who acquired the shares before 20 September 1985, and half by Trust, which acquired the shares in 1990.

12. Public Ltd examines the underlying interests in its pre-CGT assets at 20 January 1997 under Division 20 of Part IIIA of the 1936 Act and determines that the majority underlying interests are no longer held by the same ultimate owners who held the majority underlying interests immediately before 20 September 1985.

13. Assume that Public Ltd has not experienced any takeover or merger activity or any abnormal trading of its shares at any time since 19 September 1985. From the date of this Determination (when it is finalised), Private Pty Ltd must take into account the results of tracing underlying interests that Public Ltd used to make its determination as at 20 January 1997. Unless the Commissioner is satisfied, or thinks it reasonable to assume, under subsection 149-30(2) of the 1997 Act that the majority underlying interests in Private Pty Ltd's assets are still held by the same ultimate owners, Private Pty Ltd's pre-CGT assets will stop being pre-CGT assets on the date of this Determination (when it is finalised).

14. If, however, Public Ltd had experienced abnormal trading of its shares on 1 February 1998, Private Pty Ltd's pre-CGT assets would have stopped being pre-CGT assets on that date (subject to any decision of the Commissioner under subsection 149-30(2)). From 1 February 1998, Private Pty Ltd would no longer have been entitled to assume, under paragraph 9 of Taxation Ruling IT 2530, that Public Ltd had maintained the continuity of majority underlying interests in its assets.

Your comments

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Commissioner of Taxation

14 July 1999

Subject references:

[abnormal trading](#); [continuity of majority underlying interests](#); [interposed entity](#); [majority underlying interests](#); [non-public entity](#); [pre-CGT assets](#); [public entity](#); [test time](#); [tracing of ownership and interests](#); [underlying ownership and interests](#).

Legislative references:

TD 1999/D34

[ITAA 1997 149-30](#); [ITAA 1997 Subdivision 149-B](#); [ITAA 1936 Division 20 of Part IIIA](#).

ATO references:

NO 99/9743-1

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ISSN: 1038-8982