

PS LA 2003/12 - Capital gains tax treatment of a trustee of a testamentary trust for the purposes of Division 128 of the Income Tax Assessment Act 1997 ('the ITAA 1997')

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! This document has changed over time. This version was published on *10 April 2014*

! This practice statement was originally published on 12 November 2003. Versions published from 14 December 2011 are available electronically - refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be requested by emailing TCNLawPublishingandPolicy@ato.gov.au .



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This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

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| SUBJECT: | Capital gains tax treatment of a trustee of a testamentary trust for the purposes of Division 128 of the Income Tax Assessment Act 1997 ('the ITAA 1997') |
| PURPOSE: | To inform ATO personnel that the Commissioner will not depart from the long-standing administrative practice of treating the trustee of a testamentary trust in the same way that a 'legal personal representative' is treated for the purposes of Division 128 of the ITAA 1997. |

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STATEMENT

1. The Review of Business Tax (RBT) created some uncertainty about the ATO's practice in relation to the treatment of assets passing from a trustee of a testamentary trust to a beneficiary of the trust: see paragraph 22.89 of *A Platform for Consultation* and recommendation 13.6 of *A Tax System Redesigned*.
2. This practice statement informs ATO personnel that the Commissioner will not depart from the ATO's long-standing administrative practice of treating the trustee of a testamentary trust in the same way that a legal personal representative is treated for the purposes of Division 128 of the ITAA 1997, in particular subsection 128-15(3).
3. Accordingly, subject to the operation of CGT event K3 in section 104-215 of the ITAA 1997 (about assets passing to a tax-advantaged entity), any capital gain or capital loss that arises when an asset owned by a deceased person

passes to the ultimate beneficiary of a trust created under the deceased's will is disregarded.

4. In accordance with this practice, the cost base and reduced cost base of the asset in the hands of the ultimate beneficiary will be determined by reference to the cost base and reduced cost base of the asset in the hands of the legal personal representative. This means, for example, that if the asset was acquired by the deceased before 20 September 1985 (that is, pre-CGT) it will have an acquisition cost equal to the market value at the date of the deceased's death. Or if the asset was acquired by the deceased on or after 20 September 1985, the ultimate beneficiary's acquisition cost will be determined in accordance with items 1, 2, 3 or 3A of the table in subsection 128-15(4) of the ITAA 1997.

EXPLANATION

5. The Explanatory Memorandum to the Income Tax Assessment Amendment (Capital Gains) Bill 1986 introduced section 160X of the *Income Tax Assessment Act 1936* (which is now repealed but was the predecessor to Division 128 of the ITAA 1997) states that 'any liability to tax on capital gains will not arise until the relevant assets are disposed of by the legal personal representative or the beneficiary as the case may be.' In addition, the Treasurer's Reform of the Australian Tax System announcement on 19 September 1985 states:

Capital gains tax will not be levied following the death of a taxpayer unless his or her assets are actually realised by the administrator of the deceased estate or disposed of by the beneficiary of the estate.
6. This concession for deceased estates was in contrast to the position announced in the Government's draft White Paper of June 1985 which specified that death would result in a realisation for the purpose of the proposed capital gains tax regime.
7. Limiting the operation of subsection 128-15(3) of the ITAA 1997 to an asset passing from a legal personal representative to a testamentary trustee (as a beneficiary) would not achieve Parliament's intention for the application of the capital gains tax provisions to deceased estates. This was to ensure that there would be no taxing point until the asset was actually disposed of by the intended beneficiary.
8. Notwithstanding the comments in the RBT publications, the Commissioner does not consider there are sufficient grounds to move away from the long-standing practice. Although this is a difficult issue, particularly given the wording in section 128-15 of the ITAA 1997, it is open to the Commissioner to follow a long-standing practice that promotes the policy intent of the provisions and that might be adopted by a court.
9. There is a widespread understanding in the tax community of the ATO's practice not to recognise any taxing point in respect of assets owned by a deceased person until they cease to be owned by the beneficiaries named in the will (unless there is an earlier disposal by the legal personal representative or testamentary trustee to a third party or CGT event K3 applies). To adopt a different approach now would result in a general unsettling of the community and an increase in compliance costs.

Amendment history

| Date of amendment | Part | Comment |
|-------------------|-----------------|---|
| 10 April 2014 | Preamble | Preamble updated as announced on 13 December 2013 that the measure will not proceed. |
| | New paragraph 4 | Inserted provide further clarity on the administrative practice. |
| | Footnote 1 | Omitted. |
| 14 December 2011 | Preamble | Insert two paragraphs related to the 2011-12 Budget announced amendments to capital gains tax (CGT) provisions. |
| 29 September 2006 | Paragraph 4 | Insert 'which is now repealed, but ...' in reference to section 160X of the <i>Income Tax Assessment Act 1936</i> . |

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|------------------------|---|
| Subject references | beneficiary capital gains tax deceased estates legal personal representative testamentary trust trustee |
| ATOLaw topic | Income Tax ~~ Capital Gains Tax ~~ miscellaneous |
| Legislative references | ITAA 1997 104-215 ITAA 1997 Div 128 ITAA 1997 128-15 ITAA 1997 128-15(3) ITAA 1997 128-15(4) ITAA 1936 160X |
| Case references | Allsop v. Federal Commissioner of Taxation (1965) 113 CLR 341; [1966] ALR 1105; (1965) 14 ATD 62 Federal Commissioner of Taxation v. CSR Ltd S278/2000 23 November 2001 McLaurin v. Federal Commissioner of Taxation (1961) 104 CLR 381; [1961] ALR 471; (1961) 12 ATD 273 |
| Other references | Explanatory Memorandum to the Income Tax Assessment Amendment (Capital Gains) Bill 1986 The Treasurer P.J. Keating, <i>Reform of the Australian Taxation System</i> , 1 September 1985 Treasury 1999, A Platform for Consultation: Building on a strong foundation , February 1999 Treasury 1999, A Tax System Redesigned: More certain, equitable and durable , July 1999 |
| File references | 1-5DVJRWK |
| Date issued | 12 November 2003 |
| Date of effect | Ongoing |