Australian Government
Australian Taxation Office

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Capital gains tax treatment of the trustee of a testamentary trust

This Law Administration Practice Statement outlines our administrative practice of treating the trustee of a testamentary trust in the same way as a legal personal representative for capital gains tax purposes.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

If taxpayers rely on this practice statement, they will be protected from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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1. What this practice statement is about

This practice statement confirms the Commissioner's longstanding administrative practice of treating the trustee of a testamentary trust in the same way as a legal personal representative for the purposes of Division 128 of the *Income Tax Assessment Act 1997* (ITAA 1997), in particular subsection 128-15(3).

2. What is the effect of the practice for the trustee of a testamentary trust?

Broadly stated, the ATO's practice is to not recognise any taxing point in relation to 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).

3. What is the effect of the practice for a beneficiary?

The cost base and reduced cost base of the asset in the hands of the beneficiary is calculated in the same way as it would have been if the asset had passed to them from the deceased's legal personal representative.

If the deceased acquired the asset before 20 September 1985 (that is, pre-CGT) the acquisition cost will be equal to the market value at the date of the deceased's death. If the deceased acquired the asset on or after 20 September 1985, the 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.

Example 1

Mr Smith died in 2001. At that time, he owned some land which he had acquired in 1995. His will provided that the land was to be held on trust for his two sons until they had both turned 18. At the time of his death, the children were 10 and 8.

In 2012, the trustee of the trust created by Mr Smith's will transferred the land to his sons. The Commissioner accepts that the transfer did not result in a CGT event happening to the trustee if the children agree that their acquisition cost for the asset is equal to the trustee's cost base.

Example 2

Mr Smith died in 2001. At that time, he owned a variety of assets acquired after 19 September 1985. His will provides that the assets are to be held by the trustee of a trust created under his will. The trustee can distribute those assets at his absolute discretion among a wide range of objects including trustees of various trusts.

In 2012, the trustee of the testamentary trust validly transferred some of the assets to Mr Smith's children and some to the trustee of another trust. The Commissioner accepts that the transfers did not result in a CGT event happening to the trustee of the testamentary trust if the beneficiaries agree that their acquisition cost for the assets is equal to the trustee's cost base.

In 2014, the trustee of the beneficiary trust (itself a discretionary trust) transfers one of the assets to one of its beneficiaries. CGT event A1 happens at the time of the transfer.

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Date of effect Ongoing