

JOINT SUBMISSION BY

The Taxation Institute of Australia, The Institute of Chartered Accountants in Australia, the National Institute of Accountants, CPA Australia and Taxpayers Australia

Draft Taxation Determination TD 2009/D3

Income tax: does a taker in default of trust capital have an 'interest in the trust capital' for the purposes of CGT event E8 in section 104-90 of the Income Tax Assessment Act 1997?

Date: 7 August 2009

The Professional Bodies welcome the opportunity to comment on Draft Taxation Determination TD 2009/D3 ("the Draft Ruling").

Please note that all references are to the Income Tax Assessment Act 1997 unless otherwise referenced.

GENERAL COMMENTS

1. The Professional Bodies agree with the approach taken in the draft determination to the characterisation of situations where CGT Event E8 will apply. That is, we agree that CGT Event E8 should be limited to situations where the relevant beneficiary has a vested and indefeasible interest in the relevant share of trust capital. We agree that a taker in default of trust capital where the trustee may appoint capital to persons other than that beneficiary does not have an indefeasible interest.
2. We believe that one particular situation, although rare, may require specific comment in the draft determination. This is the situation where the taker in default is also the only surviving member of the class of capital beneficiaries and that class is closed (ie not capable of further expansion by the addition of other beneficiaries).
3. There are also two areas where, in our opinion, minor amendments to the draft determination would make the determination more easily readable or understandable. These are outlined below.
4. Further, the draft determination would have benefited from some context, in particular an attempt to rationalise the E8 outcome with the other E events and in particular E5, E6 and E7.

SPECIFIC COMMENTS

Sole Remaining Capital Beneficiary

5. There is one particular circumstance which may remain an area of uncertainty upon issue of the draft determination. This is where a taker in default is the sole remaining beneficiary in the class of capital beneficiaries and that class is effectively closed.
6. That is, the taker in default is the only member of the class of discretionary beneficiaries of capital remaining, and it is not possible for any other discretionary beneficiary of capital to be nominated or to enter the class naturally.

7. In such circumstances, it may be possible to argue that the beneficiary's interest is vested and indefeasible. As currently drafted, the determination does not consider this point.
8. We suggest that clarity around the Australian Taxation Office view of the application of CGT Event E8 in such circumstances would be appropriate.

Application of CGT Event A1

9. In paragraph 4 the draft determination discusses an example and notes that although CGT Event E8 does not apply, CGT Event A1 may apply.
10. It is our view that this qualified conclusion is correct, having regard to section 102-25(1) and the non-application of CGT Event E8 to takers in default of capital.
11. However, this point may cause some confusion and should, in our submission, be dealt with by a specific paragraph in the determination, rather than being an otherwise unreferenced statement in an example.

Wording of Current Paragraph 9

12. Currently, paragraph 9 attempts to set out in a single sentence the method statements in subsections 104-95(1) and (2). The sentence could be rendered with greater clarity by breaking it into two or more sentences or by presenting the calculation in tabular form.