



THE TAX INSTITUTE

8 August 2018

Mr Peter Hawkins
Australian Taxation Office
GPO Box 9977
ADELAIDE SA 5001

By email: peter.hawkins@ato.gov.au

Dear Mr Hawkins,

Draft Tax Determination TD 2018/D3 Income Tax: will a trust split arrangement of the type described in this draft Determination cause a new trust to be settled over some but not all assets of the original trust with the result that CGT Event E1 in subsection 104-55(1) of the *Income Tax Assessment Act 1997* happens?

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (ATO) in relation to the *Draft Tax Determination TD 2018/D3 Income Tax: will a trust split arrangement of the type described in this draft Determination cause a new trust to be settled over some but not all assets of the original trust with the result that CGT Event E1 in subsection 104-55(1) of the Income Tax Assessment Act 1997 happens? (Draft TD)*.

The Tax Institute has numerous comments in relation to the Draft TD which we have noted below.

Discussion

- The Draft TD is too prescriptive to be of practical assistance.
- The Draft TD is based on an assumed 'expectation' of how a court is likely to handle a trust splitting case.
- The Draft TD is too limited in its scope to provide guidance on the differing complexity of trusts. In its current form, many current trust splits will be differentiated based on the particular facts of the trust split.
- The Draft TD only considers CGT event E1 and not other CGT events that could potentially apply (or not apply). However, the Draft TD does not outline how the event applies to the example in the Draft TD. The Draft TD should be amended to state how CGT event E1 applies to the example.

- The Commissioner does not rely on specific authority for his views. The leading case law authority relevant to this issue is distinguished in the Draft TD.
- Parts of the Draft TD appear inconsistent with Taxation Determination TD 2012/21 *Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?* and the decisions in *FCT v Commercial Nominees Australia Ltd* (1999) 43 ATR 42 (FCAFC) and *FCT v Clark* (2011) 190 FCR 206 that there can be changes to a trust over its life.
- The example given in the TD is very specific. More examples should be included illustrating how the factors contained in paragraph 2 of the Draft TD apply (because case law suggests that those factors in isolation do not cause a resettlement while the sole example includes all seven factors).
- The Draft TD does not discuss the use of trustees holding assets through a bare trust for the original trustee. This is a common situation (for example, solicitors trust accounts, real estate agents) and the facts of these types of arrangements will often exhibit most of the characteristics described in the Draft TD.
- Further, many trusts have multiple trustees for practical reasons such as when assets are held in different jurisdictions. For example, one trust asset is located in a jurisdiction outside of Australia and a beneficiary resides in the same jurisdiction who looks after the asset and may enjoy the benefits of the asset (eg income) though any actions they take in respect of the asset would be subject to the trustee/appointor. Other situations giving rise to a practical trust split include when assets take on a risk profile that needs to be mitigated. In these cases, for pragmatic reasons, a trust split occurs. These arrangements will often have all the trustees undertaking (at least) a yearly review of activities and then subsequently endorsing the actions of individual trustees. It would be useful if the ATO could provide examples of how they will administer these kinds of situations.
- The discussion of collaboration amongst trustees is not addressed clearly enough in the Draft TD. The Draft TD intimates that the trustees effectively terminate their ongoing discussions with each other.
- Also, many trust split arrangements will continue to present a yearly set of accounts and a single tax return which also is indicative of collaboration. A positive example of a successful trust split – where a new trustee is appointed, practical control was delegated/transferred though an overarching control was retained and a CGT event does not arise - should be included in the Draft TD.

- The types of actions discussed in the Draft TD, like the change of appointor and the change to the deeds as discussed might typically happen decades after the new trustee is appointed. It is difficult to know when the CGT event actually takes place.
- The reasoning in the Draft TD could be applied more widely as it can be applied to any appointment of a new trustee who may exercise discretions in a different manner to the previous trustee. Will the Commissioner still seek to apply the Draft TD to arrangements that are inconsistent with those described in the Draft TD but in effect amount to a “trust split”?
- At paragraph 27, the Commissioner makes reference to the existence of two funds as leading to the conclusion that there are now two trusts. The concept of a trust fund is distinct from the concept of a trust estate itself. The existence of two trust funds therefore does not mean there are two trust estates. CGT event E1 happens when a new trust is created over a CGT asset by declaration or settlement. The test is the creation of a new trust, not the existence of more than one trust fund. Whether the actions of the trustee give effect to the creation of a new trust over the relevant assets or merely the separation of trust funds is something that will, arguably, need to be determined on a case by case basis (the *Oswal*¹ decision explores this concept). The Draft TD does not explore this in sufficient detail.
- The example used in the Draft TD assumes that the Deed is amended. What happens if a separate trustee controlled by one side of the family is appointed in relation to specific assets and the existing trustee remains in relation to the balance of the assets without there being an amendment to the trust deed? There is no change to the trust. There is only a change in the way the trust is administered.
- There should be a statement in the Draft TD to say that the Draft TD does not apply to deceased estates or trusts set up under a deceased estate where the assets are divided amongst the beneficiaries under a family arrangement (whether it is a deed of family arrangement or an agreed arrangement between the parties) or they are divided up amongst the beneficiaries in accordance with the terms of the will. Eg A deceased parent’s Will states that Blackacre and Whiteacre will be held on trust by the Executor under a testamentary trust that is a discretionary trust for the son’s family and daughter’s family in equal shares.

The son and daughter decide that the son’s family will take Blackacre and the daughter’s family will take Whiteacre in satisfaction of their entitlements under the Will. The Executors and trustees are the son and the daughter respectively. They transfer their title in the property that they hold as executors and trustees of the property to each other. The Draft TD could not apply to this example as a variety of provisions including Division 128 of the *Income Tax Assessment Act 1997* (Cth) would need to be considered which fall outside the scope of the Draft TD. Therefore, this should be made clear in the Draft TD.

¹ *Oswal v FCT* [2013] FCA 745

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tracey Rens'. The signature is fluid and cursive, with the first name 'Tracey' written in a larger, more prominent script than the last name 'Rens'.

Tracey Rens
President