



The black hole of CGT and trusts

To say that the interaction of the Capital Gains Tax (CGT) laws and trusts is complicated is probably one of the greatest understatements that anyone could make about the operation of the tax laws.

The laws of physics may be much simpler – and, in this regard, it was Einstein who apparently quipped that “the hardest thing in the world to understand is the tax law” (when filing his income tax return in the United States in the 1950s).

That being said, here are a few basic things that are worthwhile noting if you hold an asset in a trust or transfer an asset to a trust. They are as follows:

- if your home is held in the name of trust – rather than in the name of an individual or individuals – you cannot get any CGT main residence exemption regardless of what type of trust it is (unless it is a “special disability trust”);
- if you transfer an asset to a trust, or declare a trust over an asset, there will always be CGT implications (in the same way that there are always CGT implications in transferring or selling an asset to a third party);
- there are special rules (and ATO policy) that applies where the trust arrangement involves “life and remainder interests” ie, where the asset is owned by a trust for the benefit of a person while they are alive (eg, a surviving spouse) and, on that person’s death, ownership of the asset reverts to “remaindermen” (eg, children of the spouse);
- if an asset is transferred out of a trust to a beneficiary in satisfaction of their entitlement to that asset, then there are CGT implications for both the trustee and the beneficiary (and these implications are specifically set out in the CGT legislation);
- if an asset is held by trust “absolutely” for a beneficiary – so that the beneficiary has an “indefeasible” right to it – then any actions of the trust in relation to the asset are taken to be those of the beneficiary (but, first, you have to determine the extremely difficult task of whether you have such a trust); and
- where a person dies, their assets come to be owned by a trust for the purposes of administering the estate for beneficiaries – and as you may be aware the rules that apply can be complex, especially in relation to an inherited family home where a lot of tax-free capital gains may be at stake.

Finally, of course, if a family trust makes a capital gain from any dealing with a CGT asset, and the trust wishes to stream that capital to a beneficiary of the trust so that it retains its “character as a concessional capital gain” in the beneficiary’s hands, then there are very complex rules which must be followed. And these rules can impact on how much other income from the trust will be taxed – and to whom!

If nothing else, this is a matter in which you must seek our assistance, as the rules cannot be understood by the “average person” – even, if he or she were an Einstein! 💰