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ABOLISHING THE CAPITAL GAINS TAX (CGT) TRUST CLONING EXCEPTION AND PROVIDING A ROLL-OVER FOR FIXED TRUSTS

SUMMARY OF CONSULTATION PROCESS

The Government announced on 31 October 2008 that it would abolish the CGT trust cloning tax concession. The Government subsequently announced on 12 May 2009 that it would provide a limited CGT roll-over for the transfer of assets between 'fixed' trusts with the same beneficiaries.

This combined measure was included in Tax Laws Amendment No. 6 Bill 2009, which was introduced into Parliament on 25 November 2009.

Consultation process

Consultation on the policy design of the measure to abolish the trust cloning tax concession was conducted between 5 November 2008 and 3 December 2008. Eleven submissions were received.

Consultation on the draft legislation was conducted between 2 September 2009 and 30 September 2009. Seven submissions were received. Discussions were held with key stakeholders before and after the submission deadline.

Submissions can be viewed by clicking on the following links.

Policy design — <http://www.treasury.gov.au/contentitem.asp?ContentID=1448&NavID=037>

Draft legislation — <http://www.treasury.gov.au/contentitem.asp?ContentID=1641&NavID=037>

Summary of key issues

Most of the submissions on the policy design of the measure to abolish the CGT trust cloning exception opposed abolishing the exception. The submissions argued that there are non-tax reasons for using trust cloning, and uncertainty and integrity concerns should be addressed directly, by legislating a roll-over.

This request is contrary to the policy intent of the combined measure and the original decision to abolish the CGT trust cloning exception. Although there may be non-tax reasons for the transfer, this does not mean it should not give rise to a CGT taxing point. It is the change in underlying ownership, not the reasons for the transaction, that is the policy reason for a CGT taxing point.

A number of submissions requested transitional relief for arrangements entered into before the announcement but not completed, and for taxpayers who had submitted private ruling requests.

The removal of the trust cloning exception is an integrity measure, and transitional relief is inappropriate. Furthermore, providing protection for taxpayers who had sought a private ruling



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would create a precedent for taxpayers to seek private rulings whenever they anticipate the possibility of adverse legislative change.

Two submissions argued that a roll-over should be legislated for the transfer of assets between fixed trusts with the same beneficiaries. Such a transfer does not result in a change in underlying ownership.

In response to these concerns, the Government announced that it would provide a limited CGT roll-over for the transfer of assets between trusts with no material discretionary elements (sometimes referred to as fixed trusts) and with the same beneficiaries. The roll-over is limited to ensure the integrity of the tax system.

Public submissions on the draft legislation contained a mix of technical comments and requests to narrow or abandon the limitations and exceptions to the roll-over. Most of the technical comments were adopted, or became unnecessary because of other changes made.

Submissions argued that the structure of the legislation effectively limited the roll-over to a single asset. Although the draft legislation could have allowed a roll-over for multiple assets transferred simultaneously, changes were made to allow sequential transfers as part of a single arrangement (subject to conditions).

One submission requested that the roll-over be extended to depreciating assets, which was adopted.

A number of submissions argued that the requirement that the receiving trust be an 'empty trust' is too restrictive and should be removed or narrowed. Similarly, the submissions argued that the cancellation of all losses of a (pre-existing) receiving trust was excessive.

These proposals were not adopted. The 'empty trust' is an important integrity requirement to prevent the inappropriate sharing of gains and losses in a way that would not be possible without this roll-over. Further, the cancellation of losses of a pre-existing trust is a balanced way of providing additional flexibility in meeting the 'empty trust' requirement.

Submissions also argued that roll-over should be available if the indirect or ultimate beneficiaries of the two trusts are the same, even if the *direct* beneficiaries are different.

This proposal was not adopted. Allowing the trusts to have different direct beneficiaries but the same indirect beneficiaries would require complex tracing rules that dramatically increase compliance and administrative costs. More broadly, this is effectively a request for 'trust group' roll-over and is significantly beyond the scope of this measure and what trusts could previously achieve using the trust cloning exception.

Feedback

Feedback on the consultation process for this measure can be forwarded to consultation@treasury.gov.au. Alternatively, you can contact Paul McMahon on 02 6263 3385.

Thank you to all participants in the consultation process.