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Ms D Jablanovic
Australian Taxation Office

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By email only: danijela.jablanovic@ato.gov.au

Dear Danijela

Additional Comments on Draft Taxation Determination TD 2026/D1

Since our email of 16 February, one of my senior consultants has returned from leave and has further considered the views expressed in the draft TD. We wish to offer some additional observations.

'Under the deceased's will'

1. Paragraph [16] of the draft TD relies on the High Court decision in *Thomson v Deputy Federal Commissioner of Land Tax for Tasmania* [1915] HCA 4 (*Thomson's case*) as supporting the proposition that '[a]n individual will only have a right to occupy a dwelling under the deceased's will if this right was granted in accordance with the terms of the Will itself without the aid or intervention of any subsequent or intermediate transaction'. (emphasis added). With respect, the draft TD takes the reasoning in *Thomson* out of context.

2. *Thomson's Case* is one of a series of four High Court cases concerning a statutory land tax concession which, inter alia, applied to land vested in a trustee of a trust constituted by a testator's will for the joint benefit of the testator's relatives. The other three cases are *Archer v Federal Commissioner of* Land *Tax* [1912] HCA 5 (*Archer's case*), *Neill v Federal Commissioner of Land Tax* [1912] HCA 19 (*Neill's case*) and *Wilson v Federal Commissioner of Land Tax* [1916] HCA 16 (*Wilson's case*). *Wilson's case* is also cited in the draft TD, at paragraph [13].

3. As first enacted, the land tax concession applied, annually, to reduce the tax payable by the trustee as owner of the land for each 'share into which the land is in the first instance distributed under the will' (emphasis added). The statute was subsequently amended and the words 'in the first instance' were replaced with the words an 'original

share'. However, the change of wording did not displace the earlier statutory meaning; according to the High Court 'original share' conveyed the 'same idea' as 'in the first instance' (*Wilson's case*).

4. The question in each case was whether persons who had acquired beneficial interests in land held on trusts constituted by a will, had acquired their interests 'in the first instance' (or as 'original shares'), under the will. The High Court reasoned that the 'first instance' / 'original share' requirement was satisfied if a person acquired an interest in the land directly as a primary beneficiary specified in the trusts of the will, but not if they acquired the interest indirectly by conveyance or transmission from a person who had acquired the interest in the first instance. Hence the Court's dicta, most clearly expressed by Issacs J in *Archer's Case*, that 'in the first instance' meant 'that the beneficiary for whose benefit the land is held' under the trusts of the will must have 'derive[d] the title to his share directly from the instrument itself [ie the will] and independently of any intermediate transaction operating on [the] share derived directly from the instrument'.

5. Item 2(b) of column 3 of the table in subsection 118-195(1) (item 2(b)) does not contain a 'first instance' or 'original share' qualification with respect to the 'right to occupy'. The High Court's reasoning about the meaning of those expressions cannot therefore have any bearing on the interpretation of item 2(b). What is relevant, however, is that the High Court had no qualms characterising beneficial interests arising under the trusts of wills as interests that had been 'derived directly' under the wills, 'by force' of their provisions. Paragraphs [31]-[34] of the draft TD are at odds with this reasoning.

6. Further note, none of these cases had anything to say about whether an interest appointed to a beneficiary by exercise of a power of appointment conferred on the trustee of a trust constituted by a will, is properly characterised as an interest acquired by the beneficiary under the will (cf/ paragraph [34] and Example 5 of the draft TD). As Griffith CJ stressed in *Thomson's case*, the High Court expressed no opinion on mere powers of appointment. It did, however, hold that contingent interests under trusts constituted by the terms of a will were interests 'under the will' notwithstanding the condition precedents had yet to be fulfilled and the interests were not therefore vested (*Neill's case*). That finding is significant and calls into question paragraph [17] and Example 2 of the draft TD.

7. Analytically, neither a contingent beneficiary nor a discretionary object can lawfully benefit from trust assets unless and until a prescribed event occurs; that is, until the conditions for the vesting of the contingent interest are met or the power of appointment is exercised in favour of the object. Until that time, the beneficiary and object simply hold in-personam rights to enforce the due administration of the trust and, in the case of the discretionary object, the right to be considered for appointment. Although these rights are unstable, they nonetheless operate as concrete rights from which the benefit of trust assets will emerge should the prescribed events occur.

8. Applying the logic of *Neill's Case*, the rights held by a contingent beneficiary and a discretionary object are both sourced in the trust obligations imposed on trustees by the

trusts of the will. They are not sourced in the fulfillment of conditions precedent or exercises of the discretion. A right to occupy which arises when the prescribed event occurs is therefore a right to occupy 'under the deceased's will'.

9. Further, there is no warrant to limit item 2(b) to rights to occupy which are 'expressly granted under the terms of the will to an individual specifically named in the will', as per paragraph [15] of the draft TD. Unlike section 22 of the *Land Tax Act Assessment Act 2002* (WA) (considered in *Caratti v Commissioner of State Revenue* [2017] WASCA 128 [25]-[26]), item 2(b) does not specify that the individual with the 'right to occupy under the will' must be 'an individual identified in the will'. Nor is there anything in the statutory context to justify reading down item 2(b) to exclude individuals who are granted rights to occupy by virtue of their being within a class of persons to whom such rights may be granted under the trusts of the will.

10. To summarise then, the case law cited in the draft TD does not support any of the following propositions about what 'a right to occupy … under the deceased's will' means in item 2(b) of column 3 of the table in subsection 118-195(1):

    - that a right to occupy a dwelling held on a trust constituted by the terms of a will is not a right to occupy 'under the will' (in fact the cases support the contrary view);
    - that a right to occupy a dwelling mut be expressly granted in the will to an individual named in the will; and/or
    - that a right to occupy a dwelling arising from the exercise of a power of appointment conferred on a trustee of the trusts of a will is not a right to occupy 'under the will'.

Trustee of a Deceased Estate

11. The trusts in *Archer's Case, Neill's Case, Thomson's Case* and *Wilson's case* were all trusts which attached to assets of deceased estates that had been got in by executors who did not require them for the administration of the respective estates (ie. to pay the deceased's debts, funeral and testamentary expenses and taxes). Once the executors' executorial duties with respect to the assets had ceased the executors ceased to hold the assets as executors and commenced to hold them as trustees, subject to the trusts of the wills. The trusts in question appear to have been trusts for distribution supported by powers of sale, investment and postponement.[1]

12. A useful exposition of the process by which persons transition from being executors or administrators of a deceased's assets to the trustee of the assets is set out in the recent decision of the Supreme Court of Victoria, in *Re Estate of Stagliano* [2025] VSC 39 [92] –

[1] These trusts could be called 'testamentary trusts' as can trusts established for other purposes. The term 'testamentary trust' has no normative content other than to describe a trust arising under a will.

[95].[2] That transition does not depend upon the estate being fully administered, it depends on when the executors and administrators assent to the gifts of the will. Executors and administrators may assent to specific gifts during the process of administration (if the composition of the estate permits). That means that at a single point in time, a person may be acting in different capacities in relation to different assets making up a deceased estate.[3] Notably, however, a person cannot hold a single asset in both capacities at the same time. That is because their powers and duties (and therefore the rights of beneficiaries) differ depending upon the capacity in which they hold the assets.

13. This dichotomy between executors and administrators on the one hand, and trustees on the other, exposes the latent ambiguity in the expression 'trustee of a deceased estate', as used in section 118-195(1)(a). If 'deceased estate' only means the assets of a deceased person that remain subject to administration then the general law tells us that the person administering the estate must be an executor or administrator with respect to those assets, not a trustee. Why then does the statute use the term 'trustee' alongside the expression 'deceased estate'? This is anomalous.

14. We perceive two options for removing the anomaly. The first option is to read 'trustee' down to only include executors or administrators (a bit of a reach given the ordinary meaning of 'trustee' is adopted in subsection 6(1) of the ITAA 1936). The result would be that section 118-195 only applies to ownership interests disposed of by persons in their capacity as executors or administrators. The other option is to embrace the subsection 6(1) definition of 'trustee' and apply section 118-195 to any persons who dispose of ownership interests in a dwelling, either in their capacity as executors or administrators of an unadministered estate, or as trustees under the trusts of a will (noting that a person who disposes of an ownership interest as a trustee will have typically acquired the interest as an executor or administrator).

15. The first option would limit the MRE to ownership interests disposed of to meet executorial obligations (a very narrow purpose) as part of the process of administration (a very narrow period of time). The second option would extend the concession to cover interests that are disposed of to meet executorial obligations and/or to effectuate the gifts of a will, irrespective of when the dispositions occur (that is, whilst the administration is ongoing or after the estate has been fully administered). We prefer the second option. We think it is the meaning that best serves the purposes of subdivision 118-B and Part 3-1 more generally. The first option would likely frustrate those purposes.

Tax Mischief

16. The draft TD sponsors a surprisingly narrow construction of item 2(b). It is unclear why that is. If it is because the ATO has concerns that the 'right to occupy' concession is being

[2] The position described in *Stagliano* is the same orthodox succession law position set out in *Whitby and Secretary, Department of Social Services* [2019] AATA 246 [45]-[54] (as cited at paragraph [14] of the draft TD).

[3] For example, they may be trustee of an asset the subject of a specific gift to which they have assented in their capacity as executor, whilst simultaneously being executor of other assets that they have got in but which form part of an unascertained residue.

misused in some way, then there may be other constructional approaches which would mitigate those risks without straining the statutory language. We would be happy to assist you with this.

Please do not hesitate to contact Kate Roff or me should you wish to discuss these comments in further detail.

Yours sincerely

Ian Raspin FCPA, CA, CTA, TEP
Managing Director