

Parliamentary Joint Committee on Law Enforcement

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Commonwealth unexplained wealth legislation and arrangements

Topic: Proceeds of crime assets
Hansard Page: 23
Question 3

Senator PARRY: That point has just raised another question. If the assets become proceeds of crime assets, at that point in time the assets then leave the ownership of the offender or the person or the owner and become assets of the state or the Commonwealth, and you do not then run an assessment on that because of that exemption we were talking about last year that went through the legislative version? But if you did have an assessment against that asset or the gain, how is it deemed to be sold or how would you deem what the capital gain would be? Let's just call it a share in a company that was valued at \$1 at the point of purchase and then at \$1 million dollars at the point of transfer to the proceeds of crime entity receiving it—that is, a \$999,999 capital gain—is that a gain? Is it a sale? Could you assess that?

Mr Cranston: I will take that on notice, but my first thought is I do not think there has been a disposal; there has to be a disposal of that share.

Senator PARRY: So that would not be regarded as a disposal if it was taken over by the Commonwealth or a state entity?

Mr Ford: We would have to take that on notice, because we would have to question whether there has been for tax purposes a legal change in ownership as compared to the asset being restrained by the Commonwealth.

Senator MASON: But it is still an asset.

Mr Ford: It is still an asset and I think it is still owned by that individual.

Senator PARRY: But that individual would never get it back again, would they? Under the Proceeds of Crime Act I think that asset would be lost forever.

Mr Ford: Once it is forfeited, that may well be the case, and then there may be a crystallisation of a capital gain at the tax event. But at restraint I am not sure that is the case. We would need to check.

Senator PARRY: It does pose some interesting questions.

Mr Ford: It does.

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Answer:

Where a restraining order is obtained in respect of an asset under the *Proceeds of Crime Act 2002*, capital gains tax does not apply. This is because a restraining order under the *Proceeds of Crime Act 2002* does not affect legal or beneficial ownership of the asset. Rather, a restraining order imposes conditions on the use of the asset and how it must be dealt with.

However, there can be capital gains tax implications where a forfeiture order is obtained in respect of an asset, or where the asset is automatically forfeited under the *Proceeds of Crime Act 2002*. When an asset is forfeited under the *Proceeds of Crime Act 2002*, the legal and beneficial ownership belongs to the Commonwealth. Such a change in legal or beneficial ownership of an asset is an event that can attract capital gains tax. Some assets, such as a principal residence, are not subject to capital gains tax.

As no capital proceeds are received in respect of forfeited property, the market value of the asset at the time of the forfeiture is deemed to have been received for the purposes of determining whether a capital gain has resulted from the forfeiture.

Consequently, the person whose property is forfeited to the Commonwealth, would make a taxable capital gain, if the deemed market value proceeds exceed their cost base for the asset. However, following amendments in 2010 to the *Taxation Administration Act 1953*, the Commissioner has the discretion to waive payment of certain tax-related liabilities, if this facilitates proceedings under the *Proceeds of Crime Act 2002*.