

# Pre CGT Property: or is it?



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## Quiz - is it pre CGT?

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- Amy is the principal beneficiary and trustee of a trust settled in 2018 are the assets in the trust pre CGT assets?
- Tim opened his law practice in 1980 and incorporated his practice in 2018 are his shares in the practice company pre CGT assets?
- Tony incorporated a company in 1980 and was issued 100% of the shares. He still owns those shares. Are they pre CGT assets?
- David incorporated Landholder Pty Ltd in 1980 to hold several blocks of land he bought that year. Landholder Pty Ltd still owns the land. Is the land a pre CGT asset?



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## Quiz - is it pre CGT?

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Answer - Maybe



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### Pre CGT Property: or is it?

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- Grandfathering
- Improvements
- Goodwill
- Interests and Entities
  - Division 149
  - K6
- Conclusion



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### Pre CGT Property: or is it?

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- Capital Gains tax
  - Why
  - When
  - Grandfathering



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### Pre CGT Property: or is it?

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- Pre Property
  - Timing
  - Holder
  - Estate Planning
- Improvements
  - Improvement Threshold
  - 5% proceeds



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### Pre CGT Property: or is it?

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- Goodwill
  - Economic Goodwill
  - Accounting Goodwill
  - Legal Goodwill
    - *Federal Commissioner of Taxation v Murry 1998*
    - *Commissioner of State Revenue v Placer Dome Inc. 2018*



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### Pre CGT Property: or is it?

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- Goodwill
  - New Goodwill
    - When does goodwill end and get replaced
    - The attractive force
    - Purchased Goodwill
  - TR 1999/16 – Commissioners View
    - Accepts 'attraction of custom' is central



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### Pre CGT Property: or is it?

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- TR 1999/16
 

*A business owner may expand or contract activities, or change the way in which a business is carried on, without ceasing to carry on the same business provided the business retains its essential nature or character. Organic growth, expansion or diversification of a business by, for example:*

  - adopting new compatible operations;*
  - servicing different clients; or*
  - offering improved products or services*

*does not of itself cause it to be a new business provided the business retains its essential nature or character.*



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### Pre CGT Property: or is it?

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- The Cuthbert Farm
  - Small orchard growing apples in Adelaide hills
  - Inherited by Matthew and Marilla 1984
  - Still operate an apple orchard today



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### Pre CGT Property: or is it?

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- The Cuthbert Farm
  - Changes over 30 + year timeframe
    - Retail to wholesale
    - New apple varieties
    - Change trading name
    - More land acquired
    - More employees taken on



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### Pre CGT Property: or is it?

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- The Cuthbert Farm
  - Operated by the same partners in partnership
  - Resources contributed by the same partners
  - Treated for tax & accounting as same business
  - Still growing apples
    - Same activities
    - Same product



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### Pre CGT Property: or is it?

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- The Cuthbert Farm
  - The Commissioners attitude
    - PBR 88788
    - PBR 60787
    - PBR 1012689464604

NB: *Unless you are the taxpayer to whom the ruling was addressed you cannot rely upon a private ruling; it is not necessarily up to date, merely indicate the Commissioner's attitude to a particular set of circumstances at a particular point in time.*



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### Pre CGT Property: or is it?

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- Rollovers
  - Small business restructure rollover
  - Same asset rollovers
  - Replacement asset rollovers



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### Pre CGT Property: or is it?

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- Rollover
  - Asset remains pre CGT asset in hands of the new owner
  - New Asset is pre CGT in owners hands
  - Examples:
    - Individual or Trustee to company
    - Asset compulsorily acquired, lost or destroyed
    - Marriage or relationship breakdowns



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### Pre CGT Property: or is it?

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- How to acquire pre CGT shares issued in 2019
- M & M rollover orchard business to Company
  - Each partner has pre CGT goodwill
  - 50% value of business is goodwill
  - Goodwill stays pre CGT in Company
- Shares issued to M & M
  - 50% are pre CGT shares
  - 50% are post CGT shares



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### Pre CGT Property: or is it?

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*"Since the 1960's the legislative drafting of Australian income tax has adopted a peculiarly turgid and convoluted style so that it may now lay claim to the dubious twin titles of being the longest income tax statute in the world and the most unreadable."*

Vann, R (1997)



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### Pre CGT Property: or is it?

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- Division 149
  - Indirect interests in asset change
    - Shares or units in entity
  - Majority underlying interest >50%
    - More than half the shares/ units change hands
- Tracing rules
- Deems assets held by entity to be post CGT



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**Pre CGT Property: or is it?**

19

- Division 149
  - Changes to shareholdings can change status assets in company
  - Exclusions
    - s 149-30(3) "*stand in the shoes of*"
    - Death
    - Marriage breakdown



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**Pre CGT Property: or is it?**

20

- The Cuthbert Farm
  - Incorporated 1980 holding two lots of land

| Shareholder | Shares |
|-------------|--------|
| Matthew     | 50     |
| Marilla     | 20     |
| Anne        | 14     |
| Rachel      | 8      |
| Thomas      | 8      |



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**Pre CGT Property: or is it?**

21

- The Cuthbert Farm
  - Share Transfers

| Date | Transferee         | Shares | Transferor |
|------|--------------------|--------|------------|
| 1987 | Rachel             | 8      | Matthew    |
| 1987 | Thomas             | 8      | Matthew    |
| 1995 | Matthew (on death) | 66     | Anne       |
| 2000 | Anne               | 1      | Gilbert    |



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### Pre CGT Property: or is it?

22

- The Cuthbert Farm today

| Shareholder | Shares | Treatment                  |
|-------------|--------|----------------------------|
| Marilla     | 20     | Pre CGT - actually         |
| Anne        | 13     | Pre CGT – actually         |
| Anne        | 50     | Pre CGT – only for Div 149 |
| Anne        | 16     | Post CGT                   |
| Gilbert     | 1      | Post CGT                   |



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### Pre CGT Property: or is it?

23

- K6
  - Shareholder / unit holder has interests acquired pre 20 September 1985
  - Assets in entity are acquired
    - some pre 1985
    - some post 1985
  - Investigation is needed to determine if the interests are treated as partially acquired after 20 September 1985



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### Pre CGT Property: or is it?

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- K6
  - Applies to interests in entities
    - Shares or units
  - Triggered when another CGT event occurs
    - You sell pre CGT shares – gain disregarded BUT
  - Only some CGT events relevant
    - A1, C2, E1, E2, E3, E5, E6, E7, E8, J1 or K3



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### Pre CGT Property: or is it?

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- K6
  - Look at underlying assets
    - Market value of post CGT property
    - Net value of entity (after take off debts)
    - 75% or more
  - Interaction Division 149
  - Valuation of assets
    - Goodwill
    - Trading stock not included



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### Pre CGT Property: or is it?

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- The Cuthbert Farm
  - Incorporated in 1980
  - Matthew and Marilla issued 1 share each in 1980
  - More land bought in 1999
  - Matthew and Marilla now want to retire
  - Transfer all shares to Anne



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### Pre CGT Property: or is it?

27

- The Cuthbert Farm

| Asset               | Market Value  |
|---------------------|---------------|
| Land – lot 1        | \$1 million   |
| Land – lot 2        | \$2 million   |
| Goodwill            | \$1.5 million |
| Debt (overdraft)    | \$.5 million  |
| Apples              | \$.5 million  |
| Plant and Equipment | \$.5 million  |



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### Pre CGT Property: or is it?

28

- The Cuthbert Farm
  - Post CGT Assets \$2.5 million
    - Land
    - Plant
  - Net Value \$5 million
  - 75% of \$5 million = \$3.75 million
- Matthew dies prior to transfer
  - No K6 if rollover applies – Division 128



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### Pre CGT Property: or is it?

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- Considerations
  - Date of acquisition
    - **How acquired**
    - **Events since acquisition**
- Maintaining pre CGT status
  - **Rollovers**



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### Questions

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