

Bond University

Bond Law Review

Volume 37

Issue 2

2025

Capital Gains Tax and Bankruptcy: A Minefield for Trustees in Bankruptcy

Aaron Whittenbury

Bond University

Follow this and additional works at: <https://blr.scholasticahq.com/>



© Copyright the authors.

This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivative 4.0 International Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Capital Gains Tax and Bankruptcy: A Minefield for Trustees in Bankruptcy

AARON WHITTENBURY*

Abstract

The imposition of capital gains tax on trustees in bankruptcy has become a contentious issue following the Federal Court's decision in Robson as trustee for the bankrupt estate of Lanning v Commissioner of Taxation [2024] FCA 720. Historically, trustees in bankruptcy were not held liable for capital gains tax on asset disposals during bankruptcy; rather, the liability was attributed to the bankrupt individual. However, the court's interpretation of s 254 of the Income Tax Assessment Act 1936 (Cth) has altered the established position, making trustees in bankruptcy personally liable for CGT arising from post-appointment disposals. This article examines the shift in legal interpretation by analysing the rationale in Robson and its departure from established practice. It further discusses the practical challenges and commercial implications of the decision, and identifies strategies adopted by trustees to mitigate personal liability, including reliance on pre-appointment disposals. Ultimately, this article concludes that reform is required to address the inequities and inefficiencies arising from the Robson decision, in order to ensure the fair and efficient administration of bankrupt estates.

I THE ISSUE IN CONTEXT

A *Trustee CGT Liability: The Prior Approach*

In circumstances where a trustee in bankruptcy ('trustee') disposes of a capital gains tax ('CGT') asset previously owned by a bankrupt individual, the long-standing position was that the trustee was not personally liable for any CGT obligations arising from the sale.¹ The rationale behind this, is that any capital gain or loss arising during bankruptcy is attributed to the bankrupt individual, not the trustee.

* LLB (Hons 1) Graduate, Bond University. The author is grateful to the anonymous reviewers who provided valuable feedback. The usual caveats apply.

¹ Practical Law Commercial Real Estate, 'Real Estate Recap: 29 July – 2 August 2024' (Legal Update, Practical Law Australia, 2 August 2024) Resource ID W-044-0671; Macpherson Kelly, 'liability of trustees in bankruptcy for cgt on real property' (Web Page) <<https://mk.com.au/liability-of-trustees-in-bankruptcy-for-cgt-on-real-property/>> ('*Liability of Trustees for CGT*').

Accordingly, s 254 of the *Income Tax Assessment Act 1936 (Cth)* ('ITAA36')² was not understood to impose a separate liability requiring the trustee to withhold CGT upon the realisation of the asset.³ This view was consistent with historic guidance and practice of the Australian Taxation Office ('ATO').⁴

B Relevant Legislative Provisions

1 Section 254

Section 254 of the ITAA36 imposes specific obligations on agents and trustees in relation to income, profits, or capital gains derived in a representative capacity.⁵ Subsection 254(1) provides that trustees are treated as taxpayers and are required to:

1. Act as the taxpayer and fulfil all associated obligations, including the payment of tax on amounts derived in a representative capacity;
2. Retain sufficient funds from the estate to satisfy any tax liability arising from the income, profits, or gains; and
3. Bear personal liability for tax where they fail to retain and remit funds from the estate to meet that liability.

However, practitioners have traditionally taken the view that s 254 does not apply to CGT realised during bankruptcy, the standpoint being that trustees are not responsible for CGT arising from disposals undertaken in the course of administering a bankrupt estate.⁶ This interpretation was supported by ATO guidance, which stated that CGT events occurring during bankruptcy did not give rise to taxation obligations on the part of trustees.⁷

2 Section 106-30

Section 106-30 of the *Income Tax Assessment Act 1997 (Cth)* ('ITAA97') provides an additional rule in relation to CGT.⁸ In the context of bankruptcy, s 106-30 affirms that while CGT assets vest in the trustee, any resulting gain or loss remains attributable to the

² *Income Tax Assessment Act 1936* (Cth) s 254 ('ITAA36').

³ *Ibid* s 254(1).

⁴ Australian Taxation Office, 'A reinvented tax office gets the evidence for phoenix behaviour' (2015) 27(3) *Australian Insolvency Journal* 43 ('ATO Article').

⁵ ITAA36 (n 2).

⁶ *Liability of Trustees for CGT* (n 1).

⁷ ATO Article (n 4).

⁸ *Income Tax Assessment Act 1997* (Cth) s 106-30 ('ITAA97').

bankrupt individual. For clarity, the following points summarise the effect of s 106-30 in the context of bankruptcy administration:

1. The CGT asset is taken to be owned by the bankrupt, notwithstanding that it has vested in the trustee;⁹ and
2. The vesting of the asset does not itself constitute a CGT event. If the trustee disposes of the asset, any resulting capital gain or loss is attributed to the bankrupt, rather than the trustee.¹⁰

C The ATO's 2015 Position on Trustee CGT Liability

The Australian Taxation Office expressed its position on the treatment of CGT for trustees in bankruptcy in a 2015 article published in the *Australian Insolvency Journal*.¹¹ In that article, published by the ATO, its position was that a capital gain or loss arising in the context of bankruptcy is attributable to the individual, not the trustee. Relevantly, the article provided:

“...the CGT provisions apply to an act done by a trustee in relation to an individual’s CGT assets as if it had been done by the individual.

...

This means that any capital gain or loss which arises belongs to the individual, not the trustee...”¹²

This publication confirmed the longstanding approach to the treatment of CGT in the context of bankruptcy.

D ATO Private Ruling 2017: Capital Gains in Bankruptcy

Thereafter, a 2017 private ruling issued by the ATO reaffirmed the position that capital gains arising from post-appointment disposals are attributable to the bankrupt, not the trustee.¹³ The ruling addressed the treatment of CGT following a trustee’s appointment and effectively endorsed the position already adopted by the ATO. Rather than advancing a new interpretation, the ruling confirmed the existing approach.¹⁴ The ruling addressed questions concerning CGT liability

⁹ Ibid.

¹⁰ Ibid.

¹¹ *ATO Article* (n 4).

¹² Ibid 43; Underlining added.

¹³ Australian Taxation Office, Private Ruling No 1051201090098 (Edited Version), <https://www.ato.gov.au/law/view/document?src=qa&pit=99991231235958&arc=true&start=1&pageSize=10&total=1&num=0&docid=EV%2F1051201090098&dc=false&qaid=qa_ev&stype=find&cat=WA&tm=phrase-docref-1051201090098>, accessed 17 November 2024.

¹⁴ *ATO Article* (n 4).

where a trustee disposes of property held by the bankrupt estate, and confirmed that:

1. Any capital gain realised on the sale of property by the trustee is assessable to the individual. Acts undertaken by the trustee in relation to vested property are treated as acts of the individual, thereby attributing the CGT event to the individual;¹⁵
2. Responsibility for lodging the income tax return, including CGT disclosures, remains with the individual;
3. The trustee does not assume liability for CGT incurred upon disposal of the individual's property. That liability remains solely with the individual; and
4. The trustee is not required to retain funds for any CGT liability under s 254 of the ITAA36.

Furthermore, the ruling addressed s 106-30(2) of the ITAA97 and its role in attributing CGT obligations to the individual, rather than to the trustee, by disregarding the vesting of CGT assets in the trustee under the *Bankruptcy Act 1966* (Cth) ('BA66').¹⁶ The 2017 ruling again confirmed that any act performed by a trustee in relation to a CGT asset held in a bankrupt estate is to be treated as an act of the individual.

E *AFSA's 2021 Guidance and the Emerging Shift in Approach*

In a 2021 newsletter published by the Australian Financial Security Authority ('AFSA') titled '*ATO and Tax Practitioners Board Update*,' the ATO sought to clarify the interaction between s 254 and s 106-30 in relation to CGT obligations for trustees.¹⁷ The newsletter set out that where a trustee disposes of a CGT asset and realises a net capital gain, s 254 renders the trustee responsible for remitting the CGT payable on that gain.

Furthermore, the newsletter provided that s 254 must be read in conjunction with s 106-30, specifically that while s 106-30 attributes any capital gain or loss realised by a trustee to the individual for CGT purposes, s 254 imposes a distinct ancillary obligation on the trustee, rendering them answerable as if they were the taxpayer. This was a departure from the previously accepted position whereby trustees were required to:

¹⁵ *ITAA97*(n 8) s 106-30(2).

¹⁶ *Bankruptcy Act 1966* (Cth) ('BA66').

¹⁷ Australian Financial Security Authority, PIR Newsletter – June 2021 (23 June 2021) <<https://www.afsa.gov.au/newsroom/pir-newsletter-june-2021>>.

1. Report the net capital gain by lodging a tax return in their representative capacity;
2. Retain funds from the estate sufficient to meet the CGT liability upon receipt of a notice of assessment; and
3. Remit any CGT shortfall to the ATO.

The newsletter did not offer further clarification and was inconsistent with the ATO's previously advanced position on CGT liability in bankruptcy.¹⁸ An issue underlying the shift, is the ATO's lack of reasoning as to why it departed from its long-standing guidance. While the ATO did not release a formal policy paper explaining the change, the most plausible inference is that the ATO reconsidered the operation of s 254 in light of concerns about unrealised CGT liabilities during the administration of bankrupt estates.

II FEDERAL COURT IN *ROBSON*: TRUSTEE LIABILITY FOR CGT

On 4 July 2024, in *Robson as trustee for the bankrupt estate of Lanning v Commissioner of Taxation* ('*Robson*'), Downes J of the Federal Court held that the Commissioner of Taxation ('Commissioner') had properly rejected an objection to a private ruling.¹⁹

A *Background*

In 2015, Mr Clifford Lanning purchased two properties in Noosa.²⁰ In 2019, Mr William Robson, by way of court order, was appointed as Mr Lanning's trustee in bankruptcy.²¹ Mr Robson subsequently arranged for the sale of the two properties.²² In light of the conflicting positions taken by the ATO, Mr Robson lodged an application for a private ruling, following the settlement of the properties.²³ The application sought clarification as to whether the trustee or the bankrupt was liable for the CGT obligations arising from the sale of the properties.²⁴

¹⁸ ATO Article (n 4).

¹⁹ [2024] FCA 720 (Downes J) ('*Robson*').

²⁰ Ibid 1 [3].

²¹ Ibid 1 [4].

²² Ibid 1 [5].

²³ *Taxation Administration Act 1953* (Cth) Division 359 of Schedule 1 ('*TAA*').

²⁴ *Robson* (n 19) 1 [6].

B Initial Private Ruling

In the first instance, the Commissioner ruled that Mr Robson was liable to pay CGT arising from the sale of properties. The Commissioner relied on s 254(1), which requires every ‘agent’ and ‘trustee’ to be answerable ‘as a taxpayer’ for certain obligations arising in a representative capacity.²⁵ On 31 October 2022, the Commissioner issued the private ruling,²⁶ which can be summarised as follows:

1. The trustee was liable for CGT payable on the gain made from the sale of the properties, in their capacity as trustee for the bankrupt estate;²⁷ and
2. In their capacity as trustee for the bankrupt estate:
 - a. The trustee was answerable in respect of the income or capital gains made from the sale of the properties;²⁸
 - b. The trustee was subject to the retention obligations under s 254(1);²⁹ and
 - c. The trustee would be personally liable if they failed to retain funds or paid away funds that had been retained in respect of the tax liability.³⁰

C Objection to the Private Ruling

Mr Robson lodged an objection to the private ruling,³¹ which was ultimately disallowed by the Commissioner.³² It is unnecessary to address the objection in detail, as the same arguments and reasoning were advanced in the subsequent appeal to the Federal Court.

D Appeal to the Federal Court

Mr Robson appealed the objection decision,³³ and was required to establish that the taxation decision should have been made differently.³⁴

²⁵ *ITAA36* (n 2) s 254.

²⁶ Australian Taxation Office, Private Ruling No 1052050531325, 28 October 2022 (‘*Robson Private Ruling*’).

²⁷ *ITAA97* (n 8) s 106-30.

²⁸ *ITAA36* (n 2) s 254(1).

²⁹ *Ibid* s 254(1)(d).

³⁰ *Ibid* s 254(1)(e).

³¹ *Robson* (n 19) 2 [8].

³² *Ibid* 3 [9].

³³ *Ibid* 3 [10].

³⁴ *TAA* (n 23) s 14ZZO(b)(ii).

1 *The Liability of Trustees for CGT*

Mr Robson argued that he was not personally liable for CGT arising from the sale of the properties, contending that s 106-30 provided a “carve out” from such liability.³⁵ Mr Robson relied on the wording of s 106-30(2), specifically, the provision that “*any capital gain or loss is made by the individual, not the [bankruptcy] trustee*”, to argue that this shielded him from CGT obligations.³⁶ However, Downes J rejected this interpretation. Her Honour held that the “carve out” in s 106-30(2) was not relevant to the operation of s 254, which imposes liability and collection obligations on every trustee in respect of any income, profits, or capital gains derived in a representative capacity.³⁷ Instead, Downes J explained that s 106-30(2) operates solely to attribute any capital gain or loss to the individual for the purposes of calculating tax liability under “*Part 3-1, Part 3-3, and Subdivision 328-C*” of the ITAA97.³⁸ While the primary tax liability rests with the individual, her Honour found that s 254(1) imposes an ancillary obligation on the trustee to withhold and remit CGT on behalf of the individual.³⁹

2 *Preferential Treatment*

Mr Robson argued that imposing CGT obligations on the trustee would result in ‘preferential treatment’ for the Commissioner in the bankruptcy, as the CGT liability would be paid in full, from the proceeds of the property sales.⁴⁰ Justice Downes rejected this argument, finding that the CGT liability formed part of the trustee’s costs incurred in disposing of the properties. Consequently, the CGT payment was treated as a priority expense of the administration.⁴¹

3 *The Outcome*

The appeal was dismissed.⁴² Justice Downes ruled that s 254 imposes specific obligations on trustees in bankruptcy,⁴³ including that, upon the issuance of a notice of assessment, a trustee becomes personally liable for the payment of tax to the extent that the income, profits or gains have been retained.⁴⁴

Justice Downes’ reasoning and approach were advanced in three parts. First, s 254 was construed to impose ancillary liability and to

³⁵ *Robson* (n 19) 7 [29].

³⁶ *ITAA97* (n 8) s 106-30(2).

³⁷ *Robson* (n 19) 8 [30].

³⁸ *Ibid* 8 [31].

³⁹ *Ibid* 8 [32].

⁴⁰ *Ibid* 9 [36].

⁴¹ *BA66* (n 16) s 109.

⁴² *Robson* (n 19) 11 [45].

⁴³ *Ibid* 10 [39].

⁴⁴ *Ibid* 10 [40].

operate as a collection mechanism to protect the revenue. Accordingly, trustees are “answerable as a taxpayer” for amounts derived in a representative capacity. In turn, this treatment bears a parallel obligation to the trustee, which exists alongside (rather than displacing) the individual’s primary liability under s 106-30. Secondly, her Honour took a broad view of the statutory definition of “trustee” under s 6 of the ITAA36, thereby rejecting the argument that a trustee is conceptually different from an ordinary trustee. Instead, the judgment treats “representative capacity” broadly, concluding that a trustee derives income or gains in the way contemplated by s 254. Thirdly, Downes J held that s 106-30 applies only for the purpose of calculating the capital gain within the ITAA97, whereas s 254 sits within a separate tax framework governing assessment, retention and remittance. These principles create a general rule that any controller of property who disposes of assets and receives proceeds in a representative capacity may fall within s 254. This suggests that *Robson* is not limited to trustees, but may have wider application to receivers, administrators and liquidators involved in post-appointment sales giving rise to capital gains.⁴⁵

III PRACTICAL CHALLENGES ARISING FROM *ROBSON*

The decision in *Robson* confirms that the Commissioner may claim priority over ordinary unsecured creditors in respect of assets vested in the trustee as at the date of bankruptcy.⁴⁶ The priority is limited to the CGT that is applied from any property sale. It introduces the need for careful assessment of which assets may be distributed to unsecured creditors, as any CGT must first be applied towards satisfying tax liabilities owed to the ATO. This is significant when evaluating alternatives to bankruptcy, as such options depend on the extent of assets available for distribution.⁴⁷

A *Practical Example: Application of Robson to Trustee Asset Realisations*

To illustrate the practical implications of CGT liability arising from asset disposals by a trustee, the following example is provided:

An individual purchased an investment property for \$350,000.00 in 2020. Due to rising market, the property appreciated in value, enabling the individual to leverage the property by refinancing the mortgage. The individual subsequently declared bankruptcy. By the time of bankruptcy

⁴⁵ Australian Taxation Office, Private Ruling No 1013137227472, 8 December 2016.

⁴⁶ *BA66* (n 16) s 109.

⁴⁷ *Ibid* s 73.

in 2025, the property’s market value had risen to \$700,000.00, while the mortgage value had increased to \$600,000.00. Upon appointment, the trustee sold the property as part of administering the bankrupt estate. Following the sale, the trustee lodged a tax return reflecting the CGT event. The following financial position illustrates the CGT and asset realisation outcomes:

Investment Property CGT Calculation	Amount
Sale Price	\$700,000.00
Purchase Price	-(\$350,000.00)
Less Expenses (s 110-25 ITAA97) ⁴⁸	-(\$25,000.00)
Capital Gain	\$325,000.00
50% CGT Discount	-(\$162,500.00)
Gain Subject to Tax on ITR	\$162,500.00
Explanation: The investment property sold for \$700,000.00. After deducting the purchase price and associated expenses, the capital gain is calculated at \$325,000.00. Applying the 50 per cent CGT discount, the taxable capital gain reduces to \$162,500.00.	
Marginal Income Tax Payable from CGT	Income Tax on Gain + Medicare Levy on Gain = Tax Payable
No Income	\$41,463.00 + \$829.26 = \$42,292.00
Income of \$100,000.00	\$63,475.00 + \$1,269.50 = \$64,745.00
Income of \$200,000.00	\$73,125.00 + \$1,462.50 = \$74,588.00
Explanation: The CGT liability varies depending on the individual’s other assessable income. With no additional income, the tax payable on the capital gain is \$42,292.00. If the individual has \$200,000.00 of other income, the tax liability increases to \$74,588.00	

⁴⁸ ITAA97(n 8) s 110-25.

Sale Costs	Amount
Sale Price	\$700,000.00
<i>Less secured debts</i>	
Mortgage	\$600,000.00
Rates	\$3,000.00
Total Secured Debts	\$603,000.00
Estimated Equity Before Costs	\$97,000.00
<i>Less estimated selling costs</i>	
Agents Commission @ 3%	\$21,00.00
Advertising	\$1000.00
Legals	\$1,500.00
Insurance	\$1,500.00
Total Selling Costs	\$25,000.00
Estimated Equity Position	\$72,000.00
Explanation: After deducting \$603,000.00 in secured debts and \$25,000.00 in selling costs, the estimated equity available for the estate is \$72,000.00.	
Asset Realisation Costs @ 7%	\$5,040.00
Trustee fees for sale of property and administration	\$30,000.00
Total Estate Fees	\$35,040.00
Remaining for Creditors (Inc GST)	(\$72,000 - \$35,040) = \$36,960.00

Explanation: After deducting \$35,040.00 in estate costs, the amount remaining for distribution to unsecured creditors is approximately \$36,960.00 (inclusive of GST).	
Potential Shortfall Liability for CGT	Amount
No Income	–\$5,332.00
Income of \$100,000.00	–\$27,785.00
Income of \$200,000.00	–\$37,628.00
Explanation: The trustee's obligation to retain and remit CGT may create a shortfall, particularly where the individual has high levels of other income. At a taxable income of \$200,000.00, the CGT shortfall would be approximately \$37,628.00, exceeding the funds otherwise available for unsecured creditors.	

The shortfall, being the amount listed as payable at the end of the tax return, results in the funds retained by the trustee being insufficient to cover the individual's post-bankruptcy CGT liability. As a consequence, the trustee becomes personally liable to remit any CGT arising from the sale of the property.

A point requiring clarification is the extent of a trustee's potential personal liability under ss 254(1)(d) and 254(1)(e). While *Robson* does not resolve whether liability extends beyond the amount actually retained, s 254 suggests that a trustee is personally liable only to the extent that they failed to retain funds that were available and that the trustee ought to have retained. Section 254(1)(d) imposes personal liability where the trustee fails to retain sufficient money, but it does not create an obligation to satisfy the individual's entire CGT liability out of the trustee's own assets. Similarly, s 254(1)(e) applies only where the trustee has paid away amounts that should have been retained. Both provisions therefore operate as protective to prevent dissipation of estate funds, not as a penalty making trustees insurers of the individual's tax position. Accordingly, if insufficient funds were ever available to cover the CGT liability (for example, because secured creditors exhausted the proceeds), the trustee should not be personally liable for the shortfall, as there was no failure to retain amounts that did not exist.

A further issue concerns the distinction in the Ruling between the period before and after the Commissioner issues a notice of assessment for the capital gain. A trustee bears no personal liability under s 254(1)(e)

before a notice of assessment is issued.⁴⁹ Personal liability only arises after assessment, and only to the extent of amounts the trustee has retained or should have retained. Because the trustee is not personally liable pre-assessment, any capital losses or allowable deductions of the individual may reduce or eliminate the assessed net capital gain before the trustee becomes exposed. The absence of personal liability prior to assessment also means the trustee is not required to fund any hypothetical tax before the Commissioner has quantified the liability. However, once a notice of assessment is issued, the trustee's obligation crystallises and liability attaches to any funds that were available and should have been retained at the time the taxable gain was derived.

B *Considerations Following Robson*

The trustee's primary duty is to maximise returns for creditors.⁵⁰ However, the recent shift in the ATO's position, as confirmed in *Robson*, that trustees in bankruptcy are liable for CGT on assets sold during the bankruptcy, has introduced significant practical challenges. In practice, following *Robson*, trustees have increasingly avoided selling properties, instead allowing them to remain vested in the individual. These are commercial decisions made by trustees,⁵¹ to avoid exposure to a CGT shortfall, by waiting for the value of the property to appreciate before undertaking a sale.

The standard period of bankruptcy is three years. Failure by trustees to realise assets during this period may exacerbate the individual's financial strain and can lead to a second bankruptcy, thereby restarting the three-year period.⁵² This creates a situation where the individual remains responsible for maintaining payments on a property vested in the trustee, which the trustee is unable or unwilling to realise due to CGT obligations.⁵³

The imposition of CGT liability has therefore disincentivised trustees to sell assets that should be sold in administering the estate, as trustees can be made personally liable for GCT losses. This results in assets remaining unsold for extended periods or trustees delaying sales until market conditions improve.

⁴⁹ *Robson Private Ruling* (n 26) Questions 2(c)–(d).

⁵⁰ Australian Financial Security Authority, 'Proper performance of duties of a bankruptcy trustee' (Web Page) <<https://www.afsa.gov.au/professionals/resource-hub/practice-guidance/proper-performance-duties-bankruptcy-trustee>> ('AFSA Guidance').

⁵¹ Murray, M and Harris, J, '*Keays Insolvency: Personal and corporate law and practice*' (Thomson Reuters, 11th ed, 2022) [6.455].

⁵² Cathro & Partners, 'Bankruptcy', *Who is liable for the CGT?* (Web Page) <<https://cathropartners.com.au/technical-insight/bankruptcy-who-is-liable-for-the-cgt/>>.

⁵³ *AFSA Guidance* (n 50). A registered trustee in relation to an administration must realise only those assets: (a) that will give a cost-effective return to creditors; or (b) that contribute to the payment of the costs of the administration; or (c) that may be realised in accordance with a personal insolvency agreement.

C *Adaptations in Trustee Practice Post-Robson*

Following the *Robson* decision, trustees identified that Downes J did not make a determination regarding capital gains arising prior to the trustee's appointment (pre-appointment gains). In response, two trustees applied for a private ruling to explore a potential pathway for mitigating CGT liabilities arising under *Robson*.⁵⁴

On 24 June 2020, two individuals entered into an off-the-plan contract to purchase a proposed lot at a subdivision known as 'Kingscoast' in Cudgen, New South Wales. On 5 February 2024, prior to settlement of the purchase contract, the individuals entered into a contract to sell the property. On 27 February 2024, the individuals were declared bankrupt, and trustees were appointed to administer their estates. On 17 May 2024, the purchase and sale contracts for the property settled simultaneously.

The gain from the disposal of the property was attributable to the pre-bankruptcy period, as the contract for sale was executed prior to the trustees' appointment. The legal question concerned the application of s 254 of the ITAA36. Pursuant to s 104-10 of the ITAA97, the timing of a CGT event is determined at the time of contract execution. In this case, the CGT event occurred on 5 February 2024, before the trustees' appointment.

The private ruling confirmed that the capital gain from the sale of the property was not derived by the trustees in their representative capacity.⁵⁵ The timing rule determines that a capital gain is derived at the time the relevant contract for disposal is entered into, not at settlement.⁵⁶ In this case, the contract for disposal was executed prior to the bankruptcy and the appointment of the trustees.

Although s 254 imposes obligations on trustees,⁵⁷ those obligations are limited to income, profits or gains derived after their appointment.⁵⁸ Gains realised before a trustee's appointment remain the responsibility of the bankrupt estate and rank alongside other pre-bankruptcy debts.⁵⁹

The term 'derived' under s 254 aligns with the timing provisions in the ITAA97. Here, the trustees were not deemed to have derived the gain, as their involvement commenced only after the disposal was effectuated by the individuals. This ruling confirms that trustees are not liable for pre-appointment gains, even where the settlement and realisation occur during the trustees' administration.⁶⁰

⁵⁴ Australian Taxation Office, Private Ruling No 1052306362670, 21 October 2024.

⁵⁵ *ITAA36* (n 2) s 254(1)(a).

⁵⁶ *ITAA97* (n 8) s 104-10(3).

⁵⁷ *Robson* (n 19) 1-2 [7].

⁵⁸ *Ibid* 9-10 [38].

⁵⁹ The ruling made a distinction between gains or income derived by a trustee through post-appointment activities subject to s 254 obligations and gains realised before appointment, which fall outside the purview of s 254.

⁶⁰ *ITAA36* (n 2) s 254.

D *Strategic Development*

A potential strategy for trustees involves requesting individuals to dispose of property prior to the trustee's appointment. This approach ensures that the CGT liability remains with the individual, thereby preventing the trustee from becoming personally liable for any capital gains. While this strategy provides a potential workaround to the issues raised in *Robson*, it also introduces challenges, including timing constraints and the risk that individuals may refuse to cooperate. This makes the process more complex compared to the previous approach, under which trustees were not held liable for post-appointment gains. A further issue that arises in connection with pre-bankruptcy disposals is whether the relation-back doctrine under s 115 of the *BA66* might undermine such a strategy by rendering the transaction void. The doctrine causes the trustee's title to relate back to the date of the earliest act of bankruptcy, potentially invalidating transactions entered into between the act of bankruptcy and the date of the sequestration order. However, the relevance of the doctrine is limited in the present context for two reasons. First, a pre-bankruptcy contract for sale will generally remain effective where it constitutes a bona fide, arm's-length transaction for market value, as the doctrine does not automatically unwind genuine commercial dealings that do not defeat or prejudice creditors. Secondly, even where relation-back might otherwise apply, the key timing rule in s 104-10 of the *ITAA 1997*, that a CGT event occurs at the time of contract, still determines when the gain is "derived" for the purpose of s 254. Accordingly, while the doctrine is an important insolvency consideration, it does not ordinarily displace the tax outcome identified in the private ruling, nor does it preclude trustees from relying on pre-appointment disposals to avoid exposure to personal CGT liability. Nevertheless, the effectiveness of the strategy remains contingent on the absence of voidable transaction issues under Pt VI of the *Bankruptcy Act*.

Nevertheless, with AFSAs acceptance of the *Robson* decision,⁶¹ and with the appeal period exhausted, *Robson* now stands as the settled position trustees must navigate unless revisited in a future proceeding. As a result, trustees may increasingly seek to rely on pre-appointment strategies to mitigate potential personal liability for CGT. It should be noted, however, that the recent private ruling is not binding in other cases.⁶² Rather, it provides an indication of how the law may develop and offers guidance to trustees managing similar circumstances.

⁶¹ Australian Financial Security Authority, 'Federal Court Confirms IG Position on treatment of Capital Gains' (Web Page) <<https://www.afsa.gov.au/newsroom/federal-court-confirms-ig-position-treatment-capital-gains>>.

⁶² John Azzi, 'Practical Injustice in the Context of Private Tax Rulings' (2016) 39(3) *UNSW Law Journal* 1096.

IV CONCLUSION

The decision in *Robson* establishes that trustees are personally liable for CGT under s 254 of the *ITAA36*. The interpretation adopted by Downes J represents a significant departure from the earlier approach, with the effect that trustees may now face personal exposure for CGT liabilities arising in the course of administering a bankrupt estate. This represents a notable development in the law, as previous practice generally treated CGT as liability of the individual, that effectively shielded trustees from personal exposure.

As a result, the *Robson* decision has created issues for trustees in their application of CGT when administering bankrupt estates. The shifting tax obligations introduce additional complexity into the administration of estates and may influence the strategies trustees adopt for asset realisation and distributions to creditors. Trustees may consider alternative approaches, such as relying on pre-appointment disposals, to manage the potential for personal liability. Given the lapse of the appeal period for *Robson*, the decision now operates as the leading authority, and trustees will need to administer estates in accordance with it unless a later case revisits the issue.