



Public advice and guidance compendium – TD 2024/9

❗ Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Taxation Determination 2024/D2 *Income tax: factors taken into account in applying the exceptions to section 99B of the Income Tax Assessment Act 1936 contained in paragraphs 99B(2)(a) and 99B(2)(b)*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Income Tax Assessment Act 1936* (ITAA 1936), unless otherwise indicated.

Issue number	Issue raised	ATO response
1	Application of section 99B to resident trusts The final Determination should specify whether and how section 99B applies to Australian-resident trusts, including managed investment trusts. It should also include an example illustrating the application of section 99B and the hypothetical resident taxpayer tests where a non-resident trust becomes an Australian-resident trust.	Consideration of the scope of section 99B and its general operation in a domestic setting is outside the scope of this Determination and Practical Compliance Guideline PCG 2024/3 <i>Section 99B of the Income Tax Assessment Act 1936 – ATO compliance approach</i> – refer to Issue 1 of the Compendium for PCG 2024/3. However, in the final Determination, we have included a new example (Example 7) setting out the application of section 99B where a non-resident trust becomes a resident trust.
2	The concept of corpus In the final Determination, the definition of corpus should be revised to clarify that corpus refers to trust capital, which is often represented by the assets of the trust.	Corpus is not defined in section 99B. The Determination sets out our view that corpus, in the context in which the term is used in section 99B and Division 6 more broadly, refers to trust capital. Trust capital will be represented by the assets of the trust excluding income which has not been accumulated. We were not intending to include assets of the trust representing income (other than accumulated income) in the concept of corpus. In the final Determination, paragraphs 19 and 20 have been clarified to indicate this.

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		If, having regard to this definition, an amount distributed represents corpus paragraph 99B(2)(a) requires you to determine whether the amount is attributable to an amount which would be included in the assessable income of a hypothetical resident taxpayer.
3	Corpus and the relevance of accounting treatment Payments are not always sourced from the disposal of an asset and could instead be sourced from other non-assessable amounts (for example, asset revaluation reserves). Unless a payment of trust property is ultimately being debited against (reducing) accumulated earnings, then it must be a non-assessable amount under paragraphs 99B(2)(a) and (b). Further support should also be provided as to why corpus has been defined in this way and why the draft Determination has focused on the assets of the trust rather than on trust accounting concepts, which encompass concepts like 'net assets' and asset revaluation reserves.	We agree that payments may be sourced from amounts other than the proceeds of disposal of an asset. In the final Determination, paragraph 19 has been clarified to indicate that in determining whether an amount distributed represents corpus for the purposes of paragraph 99B(2)(a), regard is to be had to the trust property distributed. We also do not consider that an asset revaluation reserve is a separate asset of the trust for the purposes of the definition of corpus. See our comments at Issue 4 of this Compendium and new Example 4 in the final Determination.
4	Evidencing corpus In applying the corpus exception, taxpayers should be able to evidence the source of amounts received in an approach analogous to a liquidator applying the principle in <i>Archer Bros Pty Ltd v Commissioner of Taxation (Cth)</i> [1953] HCA 23. If the non-resident trust's financial accounts have been kept so that a resident beneficiary can clearly identify a specific amount or property as belonging to trust corpus, and it is clear from either the accounts or statement of distribution that the resident beneficiary has sourced the specific amount or property received from that trust corpus, then that is evidence of whether there has been a distribution of corpus.	The final Determination and PCG 2024/3 make it clear that in determining whether an amount distributed represents corpus, regard is to be had to the trust property distributed. The accounts and distribution statements may assist in demonstrating that a distribution represents corpus but will not be determinative. Simply establishing that a distribution represents corpus is insufficient to exclude an amount from tax under subsection 99B(1). The taxpayer would need to establish that the amount is not attributable to accumulated income or other amounts which would be assessable in the hands of a resident taxpayer. The accounting treatment will not be determinative of this further question. In the final Determination, new Example 4 makes clear that merely debiting an account such as an asset revaluation account is not sufficient to establish that a distribution is of corpus or is attributable to amounts which would not be assessable income of a hypothetical resident taxpayer.

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5	Corpus and asset value Paragraphs 48 to 49 of the draft Determination appear to suggest that corpus equates to the value of an asset when it is acquired by the trust, rather than the value of the asset as at the date of disposal.	Paragraphs 48 and 49 of the draft Determination were intended to illustrate that where a non-resident trust disposes of a capital asset, the cost base of the asset will be taken into account in applying the hypothetical resident taxpayer tests to determine whether proceeds from the disposal of the asset would be assessable income of a hypothetical resident taxpayer. If this comment was intended to suggest that the result of the hypothetical resident taxpayer tests in the scenario covered in Example 5 of the draft Determination is that only part of the corpus represented by the distribution – reflecting the cost base of the asset when acquired by the trust – reduces the assessable amount under subsection 99B(1) as a result of the corpus exception in paragraph 99B(2)(a), we agree. However, that is not to say that the asset itself – or the proceeds received on realisation of the asset – do not represent corpus. The effect of the hypothetical resident taxpayer test is that not all of the corpus represented by a distribution to a beneficiary can be taken to reduce the amount assessed under subsection 99B(1).
6	Characteristics of the hypothetical resident taxpayer The effect of the hypothetical resident taxpayer tests as demonstrated in Example 1 of the draft Determination is that a gain from a pre-CGT asset is disregarded because the capital gains tax (CGT) exemption applies to any resident taxpayer. Conversely payments attributable to the CGT discount might not be ignored because the discount is not available to all taxpayers. In the context of deceased estates, you could not assume the hypothetical resident taxpayer was a trustee of a deceased estate and so exemptions such as section 118-195 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) would not be taken into account (although the cost base would be calculated in accordance with subsection 128-15(3) of the ITAA 1997, when considering the circumstances giving rise to the amount.	We agree, and in the final Determination, have clarified in paragraph 32 that the CGT discount is not relevant because it is not available to all resident taxpayers and to note that similarly the concessions afforded to an executor or legal personal representative under section 118-195 of the ITAA 1997 would not be taken into account.

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7	Hypothetical resident taxpayer tests and CGT provisions Additional guidance is needed on how the hypothetical resident taxpayer tests interacts with various CGT provisions, including pre-CGT assets, cost base step-up considerations, and small business CGT concessions.	The Determination already deals with pre-CGT assets (Example 1), cost base step up under Division 128 of the ITAA 1997 (Example 2) and notes that the CGT discount is not taken into account (Example 3). The final Determination includes new Example 7, dealing with the cost base uplift for a non-resident trust which becomes a resident trust and we note at paragraph 32 that other taxpayer-specific concessions, including section 118-195 of the ITAA 1997 are not relevant.
8	Circumstances giving rise to the amount – derivation of funds The Determination provides that it is only the circumstances giving rise to the derivation of funds which are relevant in applying the hypothetical resident taxpayer tests in paragraphs 99B(2)(a) and (b). However, paragraph 99B(2)(b) does not require the taxpayer to determine the assessability of an amount by reference to when the trust estate derived it. The characteristics of an amount in paragraph 99B(2)(b) is determined by reference to the characteristics of the amount at the time the amount is paid to, or applied for the benefit of, a beneficiary of the trust estate.	Clarifications have been made in the final Determination to address the potential confusion caused by the reference to amounts derived, including at paragraphs 6, 33 and 34. In the final Determination, we have also replaced the reference to Jessup J's observations in <i>Howard v Commissioner of Taxation (No 2)</i> [2011] FCA 1421 with new paragraph 35 to clarify our position.
9	Circumstances giving rise to the amount – capital gains and the distribution of capital proceeds Further support is required for the approach taken in the Determination regarding capital gains and the distribution of capital proceeds. The approach being suggested by the draft Determination (paragraph 40) is that it is the 'quality' of the capital gain that characterises the entire payment rather than attributing the part of the payment to their origin.	The Determination sets out our view that the circumstances giving rise to an amount are relevant in applying the hypothetical resident taxpayer tests. We use an example where the distribution represents, and is attributable to, the proceeds from the disposal of a capital asset of the trust. In such a case, the distribution will be of corpus and engage paragraph 99B(2)(a). The hypothetical resident taxpayer tests would then consider whether any of that amount (the capital proceeds) is actually excluded from paragraph 99B(2)(a) and cannot reduce the amount taxed under subsection 99B(1). Having regard to the clarified explanation of corpus at paragraph 19 of the final Determination, we have made our reasoning clearer that the cost base does not represent a separate amount of trust property and is merely an attribute of the amount paid or applied for the beneficiary.

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10	Circumstances giving rise to the amount – trustee impacts Paragraph 42 of the draft Determination provides that things that happen to the trustee after acquiring an asset are not relevant. This could be clarified in the final Determination as actions by the trustee are attributes of the taxpayer rather than attributes of the asset.	In the final Determination, paragraphs 37 to 38 now clarify that when you apply the tests to proceeds from the realisation of the asset, it is the character of those proceeds and therefore attributes of the asset that are relevant, rather than circumstances impacting the trustee.
11	Tracing and source – methods for tracing Tracing poses practical challenges. Guidance and further examples are required on acceptable methods for tracing and evidencing that a distribution from corpus is not attributable to amounts derived by the trust estate which would be included in assessable income if they had been derived by a resident taxpayer. Possible approaches include: • a split or apportioned approach • an income first or capital first approach • a de minimis threshold below which tracing is not required, or • a rebuttable presumption based on the immediate source of the distribution.	Neither the draft Determination nor the draft Guideline included a compliance approach for evidencing the ultimate source of a distribution. As noted in Issue 27 of the Compendium for PCG 2024/3, the onus is on the beneficiary to objectively evidence the source of an amount or benefit received. The Guideline provides guidance on the types of information which may be provided or relied on to establish that paragraph 99B(2)(a) applies. Similar evidence may be provided to establish that paragraph 99B(2)(b) applies. In the final Determination, Example 8 has been retained and illustrates the principles relevant to determining whether an amount represents or is attributable to an amount which would be assessable if derived by a resident. Adjustments have been made to clarify the example and address other feedback.
12	Tracing and source – ‘ultimate source’ and ‘tracing’ It is unclear what is meant by the use of the words ‘ultimate source’ and ‘tracing’ in paragraphs 6 and 51 of the draft Determination.	We have made some adjustments to seek to ensure that, in the final Determination, paragraphs 2, 6, 51 and 52, when read together with Example 8, convey our view that determining whether an amount is ‘attributable to’ amounts derived by the trust estate which would be assessable if derived by a hypothetical resident taxpayer or ‘represents’ amounts which would not be included in the assessable income of a hypothetical resident taxpayer involves identifying the original or ultimate source of the amount. In other words, and as Example 8 highlights, the analysis does not stop at the most recent transaction but looks behind it. This involves looking at how the property distributed came to be an asset of the trust to determine what the distribution is attributable to or represents.

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		If the property dealt with was income or proceeds realised from an asset acquired with income, such amounts will not reduce the amount taxed under subsection 99B(1). In the final Determination, paragraph 6 and Example 8 now clarify this point. In the final Determination, Example 8 also now shows the contrasting position with settled property.
13	Tracing and source – <i>Howard v Commissioner of Taxation</i> [2012] FCAFC 149 <i>Howard v Commissioner of Taxation</i> [2012] FCAFC 149 is not itself authority for tracing or looking behind an amount distributed.	We accept that <i>Howard v Commissioner of Taxation</i> [2012] FCAFC 149 is not authority for tracing and the final Determination does not rely on that decision for that proposition. Our view is supported by a plain reading of the words in paragraphs 99B(2)(a) and (b) in the context of section 99B. We have further refined what is meant by ‘attributable to’ in the final Determination at paragraphs 51 and 52 of the final Determination.
14	Example 1 – CGT asset acquired before 20 September 1985 Example 1 of the draft Determination is too simplistic. The risk is that people think Example 1 says that any amount sourced from disposing of a pre-CGT asset will not attract section 99B. An improvement would be to make it clear that you still need to consider the cost base of the pre-CGT asset that is being distributed out as well. It could be also clarified that: - the CGT provisions disregard a capital gain in these circumstances for all taxpayers, and - no part of the distribution of capital proceeds is included in the beneficiary’s assessable income.	Example 1 of the Determination has been drafted in this way because it seeks to cover the operation of the hypothetical resident taxpayer tests as that test might be applied to the circumstances of the distribution by application of either paragraph 99B(2)(a) or (b). The distribution represents or is attributable to proceeds from the sale of a pre-CGT asset. For the purposes of paragraph 99B(2)(a), there is a distribution of corpus. Applying the hypothetical resident taxpayer tests, no part of the proceeds would be assessable in the hands of the hypothetical resident and so the corpus exception applies to reduce the amount otherwise taxed under subsection 99B(1) completely. For the purposes of paragraph 99B(2)(b), no part of the proceeds would be assessable in the hands of a hypothetical resident, again reducing the amount otherwise taxed under subsection 99B(1) completely. In the final Determination, Example 1 has been clarified to state that the amount received by the resident beneficiary is attributable to or represents the capital proceeds from the pre-CGT asset. We have also clarified that the CGT provisions disregard a capital gain on disposal of pre-CGT assets for all taxpayers (see Issue 7 of this Compendium).

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15	Example 2 – distribution from a non-resident deceased estate. It would be helpful if, in the final Determination, Example 2 states the specific outcome under section 99B. It may also help to clarify that the outcome would be different where the deceased was an Australian resident and the assets passed to a foreign executor. The example could be amended to provide that the market value of the assets of the deceased on the date of death forms part of the ‘non-assessable’ corpus of the estate and therefore reduced under paragraph 99B(2)(a). The wording should be changed to refer to ‘legal personal representative’.	The principles remain the same regardless of the residence of the deceased, although it will impact the cost base of the asset taken into account under the hypothetical resident taxpayer tests as noted in footnote 4 of the final Determination. While we have not changed the example to refer to a deceased who was a resident, in the final Determination, we have further refined footnote 4 to clearly state that the cost base taken into account will depend on the residency status of the deceased. In the final Determination, Example 2 also now outlines the amount which would be assessed under subsection 99B(1). Some minor editorial changes to the language of the example have also been made to more accurately reflect language used by practitioners dealing with deceased estates. In the final Determination, new footnote 3 clarifies that Division 128 of the ITAA 1997 references to a legal personal representative include an executor pursuant to subsection 995-1(1) of the ITAA 1997.
16	Example 3 – CGT discount not available to hypothetical taxpayer In the final Determination, the words ‘capital proceeds’ should be inserted after ‘distribution’ in Example 3.	In the final Determination, paragraph 14 clarifies that the hypothetical resident taxpayer tests in that example is considering the distribution of proceeds.
17	Example 5– settled sums and gifted assets In the final Determination, Example 5 should specify that the gift was also from a non-resident, otherwise the transferor trust rules would apply. The example provides that for the purposes of the hypothetical resident taxpayer tests, the cost base of the land and residential property are relevant and will be the market value of those assets on the date of their acquisition. Another view is that the gifted residential property forms corpus of the trust not represented by accumulated earning and therefore is excluded by paragraph 99B(2)(a).	In the final Determination, we have updated Example 6 to specify that residential property was gifted by a non-resident to avoid confusion. We have also further refined the reasoning in the example to explain how the proceeds of sale of settled and gifted assets are treated under paragraphs 99B(2)(a) and (b). Similar amendments have been made in other examples.

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18	Example 6 – capital asset acquired using interest income In Example 6 of the draft Determination, a capital loss was realised and the cost base represents a non-assessable amount so there is no need to consider paragraph 99B(2)(a) and trace corpus.	Example 6 illustrates our view that in order to determine, for the purpose of the hypothetical resident taxpayer tests, whether the relevant amount distributed to the beneficiary is attributable to, or represents hypothetically taxable amounts, it is necessary to look behind the most recent transaction giving rise to the amount. Even if the trust property paid or applied was not corpus, the hypothetical resident taxpayer tests in paragraph 99B(2)(b) still requires tracing to determine what the amount represents.
19	Further examples requested A number of requests for new, bespoke examples detailed at Issues 20 to 24 of this Compendium, to be included in the final Determination were received.	We had to make a decision about which of these examples would be most useful and cover the most typical. It is beyond the scope of this Determination to provide extensive advice on specific bespoke scenarios. Instead, the Determination provides the principles which can be applied on an individual case-by-case basis.
20	Example involving an in specie distribution of trust property It would be useful to include an example that involves an in specie distribution of trust property rather than a disposal and distribution of proceeds and sets out how section 99B applies in that scenario. In the context of paragraphs 99B(2)(a) and (b), is ‘derived’ broad enough to encompass a notional capital gain based on deemed capital proceeds?	We have attempted to outline the principles to apply when looking at paragraphs 99B(2)(a) and (b) so that taxpayers and advisers will be able to apply those principles to their own facts. As per the response to Issue 19 of this Compendium, we had to make a decision about which examples would be most useful and cover the most typical cases. That generally involves Australian beneficiaries receiving cash rather than the transfer of trust assets. The final Determination provides the principles to apply in working out whether the amount or property received from the trust ‘represents’ or is ‘attributable to’ an amount which would or would not be assessable if derived by a resident taxpayer.
21	Example dealing with Division 149 of the ITAA 1997 The final Determination should include a new example dealing with Division 149 of the ITAA 1997 to illustrate the point at paragraph 42 of the draft Determination that ongoing ownership is not taken into account in applying the hypothetical resident taxpayer tests.	In the final Determination, we have illustrated the point made in paragraph 42 of the draft Determination through new Example 7.

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22	Example dealing with foreign testamentary trust It would be helpful for the final Determination to comment on whether the payment of a deceased Australian resident's foreign pension fund account to a foreign testamentary trust forms part of the 'non-assessable' corpus of the trust and is reduced under paragraph 99B(2)(a) when paid to Australian beneficiaries.	This example has not been included in the final Determination. In this scenario, it would be important to consider subsection 99B(1) and (2) (including the application of the hypothetical resident taxpayer tests) at each trust distribution together with our views on corpus.
23	Example dealing with disposal of main residence It would be helpful to include an example where a non-resident executor of a deceased estate disposes of the deceased's Australian main residence more than 2 years after acquiring the asset and distributes the proceeds to an Australian beneficiary.	The principles in Example 2 of the Determination demonstrate the operation of the provisions in this type of scenario. The final Determination now clarifies that it is the circumstances which give rise to the amount which are relevant and provide the characteristics of the amount considered by the hypothetical resident taxpayer test. As Example 2 highlights, regard will be had to the cost base determined by subsection 128-15(4) of the ITAA 1997. However, as the property is taxable Australian property, paragraph 99B(2)(c) would also need to be considered.
24	Example of interaction with paragraph 99B(2)(c) A further example is suggested to highlight the interaction of the corpus exception in paragraph 99B(2)(a) with the exception in paragraph 99B(2)(c) for previously taxed amounts.	The scope of this Determination is focused on the hypothetical resident taxpayer tests in paragraphs 99B(2)(a) and (b), although new Example 7 notes, for completeness, the application of paragraph 99B(2)(c) alongside paragraph 99B(2)(a).
25	102AAM In the final Determination, broader reference should be made to an assessable amount arising under section 99B requiring a section 102AAM calculation.	This is outside the scope of this Determination. We consider that footnote 8 of the final Determination is sufficient for the purposes of the Determination. In our experience, most advisers are aware of the need to take into account section 102AAM. Existing web guidance outlines the need to consider the interest charge and provides guidance on calculating the amount.
26	Historical context of section 99B Guidance on the historical context and purpose of section 99B including its application to modern contexts.	This is outside the scope of this Determination. The purpose of this Determination is to provide guidance on the interpretation of the hypothetical resident taxpayer tests in paragraphs 99B(2)(a) and (b) and does not extend to broader section 99B issues.

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27	Use of word 'exclude' In the final Determination, use of the word 'exclude' in paragraphs 1 and paragraph 19 of the draft Determination should be reconsidered, as it is potentially misleading to say that paragraphs 99B(2)(a) and (b) exclude amounts from subsection 99B(1).	In the final Determination, we have made clarifications throughout to avoid any confusion and explain that subsection 99B(2) reduces the amount taxed under subsection 99B(1).
28	Call for comprehensive ruling The ATO should consider a comprehensive, consolidated ruling on section 99B to provide a single authoritative source of guidance on section 99B.	This comment raises issues that fall outside the scope of this Determination.
29	Additional issues We have received requests for the scope of the Determination to be extended to provide guidance on a range of additional issues including: • quantifying benefits under section 99B for non-cash scenarios • addressing the potential for multiple beneficiaries to be assessed on the same amount under section 99B • the interaction between foreign exchange rules and section 99B • the interaction between section 99B and international treaties • the application of section 99B where the trust is a hybrid trust • examples dealing with temporary residents • the interaction between section 99B and foreign income tax offsets.	These issues all fall outside the scope of this Determination.

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