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Page status: **not legally binding**

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Public advice and guidance compendium – TR 2018/7

This is a compendium of responses to the issues raised by external parties to draft TR 2017/D5 *Income tax: employee remuneration trusts*.

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	Proposal for a safe harbour A safe harbour should be provided or consideration given to the use of the Commissioner's Remedial Power to overcome the double taxation that results in Example 11 of TR 2017/D5.	The Commissioner has considered the nature of trust distributions and when they are in respect of employment in Taxation Determination TD 2017/26 <i>Income tax: employee share schemes – when a dividend equivalent payment is assessable to an employee as remuneration</i> . Paragraph 21 of that Determination sets out the circumstances in which the Commissioner will accept that a dividend equivalent payment paid under an employee share scheme is not for, or in respect of, services provided as an employee, and therefore is not assessable as remuneration. The Commissioner will adopt a compliance approach consistent with that outlined in paragraph 21 of TD 2017/26 to dividend equivalent payments made under an ERT arrangement (see footnote 75 of the final Ruling).
2	Assessability of distributions from ERT¹ The final Ruling should make it clear that an employee is not assessable on an amount contributed on their behalf or held on their behalf until the relevant vesting conditions are satisfied and the employee becomes	An employee may be assessable on amounts contributed on their behalf to an ERT if the employee is taken to have derived that amount at the time it is paid to the ERT. This will include amounts that are applied or dealt with on the employee's behalf or as they have directed. Similarly, an employee may be assessable under section 6-5 of the <i>Income Tax Assessment</i>

¹ All terms used in this Compendium have the same meaning as those in TR 2018/7.

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	entitled to receive the relevant amounts. Example 11 of TR 2017/D5 provides some guidance in relation to this but otherwise the Ruling only implies this.	<i>Act 1997</i> (ITAA 1997) on benefits received out of the ERT if the employee is taken to have derived them (either by receiving them directly or amounts that are applied or dealt with on their behalf or as they have directed). Whether the amounts were subject to 'vesting conditions' is irrelevant if otherwise they are taken to have been derived by the employee. Whether an amount is included in the assessable income of an employee, under section 6-5 of the ITAA 1997 will also depend on whether those amounts are already included in the employee's assessable income under the trust assessing provisions.
3	Contribution provided in respect of a particular employee Paragraph 106 of TR 2017/D5 relies on the fact that there is use of the definite article in subsection 109ZB(3) of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936). However, the subsection does not use the definite article and uses only the indefinite article, namely, 'a' and 'an'. Specifically, subsection 109ZB(3) states [emphasis added]: 'payment made to a shareholder in their capacity as an employee or an associate of an employee...' Accordingly, the explanation in paragraph 106 of TR 2017/D5 is a bit confusing to understand.	The explanation in paragraphs 36 and 37 of the final Ruling has been updated to clarify the ATO view on the operation of subsection 109ZB(3) of the ITAA 1936.
4	Amounts that have been previously assessed under section 99A of the ITAA 1936 The Ruling should make it clear that dividend equivalent payments are assessable to an employee under section 6-5 of the ITAA 1997, if the payment is	Paragraph 58 of the final Ruling clarifies the ATO view that it is irrelevant whether an amount is paid from an amount previously assessed to the trustee in determining if the amount is income in the hands of an employee beneficiary. The character of a payment in the hands of a taxpayer (an

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	connected to the employee's employment, despite the trustee having previously been assessed on the dividend under section 99A of the ITAA 1936 to which the dividend equivalent payment relates.	employee, in the case of an ERT) is not informed or determined by whether the amount has been taxed to the payer in an earlier income year (the trustee, in the case of an ERT) under section 99A of the ITAA 1936. Such amounts may represent dividend equivalent payments or another form of payment. The Ruling is intended to apply to all distributions from an ERT and is not restricted to payments that are dividend equivalent payments. Therefore, if a payment (even if it is not described as a dividend equivalent payment) meets the requirements of section 6-5 of the ITAA 1997 (in that it is made to an employee as remuneration), it is assessable to the employee under section 6-5 regardless of whether it was assessed to a trustee under section 99A of the ITAA 1936 in an earlier income year.
5	Application of section 99B of the ITAA 1936 As by definition, a dividend equivalent payment is the after-tax amount of a dividend that the Trustee has previously been assessed on under section 99A of the ITAA 1936, sub-section 99B(2)(c)(ii) applies to reduce the amount assessable under subsection 99B(1) to zero.	As outlined at footnote 72 of the final Ruling while subsection 99B(1) of the ITAA 1936 provides that certain property of a trust estate paid to, or applied for the benefit of, a resident beneficiary, is assessable to the beneficiary, it does not apply unless the trust is or was a non-resident trust estate. Accordingly, neither it, nor the exception to it in subparagraph 99B(2)(c)(ii) of the ITAA 1936 (concerning amounts previously assessed to the trustee), generally applies to the arrangements described in this Ruling.