TD 2012/D5 - Income tax: for the purposes of paragraph 97(1)(a) of the Income Tax Assessment Act 1936 (ITAA 1936) is a beneficiary's share of net income worked out by reference to the proportion of the income of the trust estate to which the beneficiary is presently entitled?

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This document has been finalised by TD 2012/22.

There is a Compendium for this document: **TD 2012/22EC** .

Draft Taxation Determination

Income tax: for the purposes of paragraph 97(1)(a) of the *Income Tax Assessment Act 1936* (ITAA 1936) is a beneficiary's share of net income worked out by reference to the proportion of the income of the trust estate to which the beneficiary is presently entitled?

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Ruling

1. Yes. To determine the share of net income of a trust estate to be included in a beneficiary's assessable income under paragraph 97(1)(a) of the ITAA 1936, the beneficiary must:

(i) calculate how much of the income of the trust estate they are (or are taken to be) presently entitled to, as percentage share of that income; and

(ii) apply that percentage to the net income of the trust.

This approach is often referred to as the 'proportionate approach' to the assessment of trust net income.

2. If in the 2010-11 or a later income year a trust has made a capital gain or received a franked distribution to which no beneficiary is specifically entitled, the proportionate approach may also be relevant to the application of Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997* (ITAA 1997).

3. The effect of the application of the proportionate approach in any particular case will depend on the facts and circumstances of that case, including the terms of the trust and, where relevant, any resolutions made by the trustee to appoint the income of the trust.

Definitions

4. In this draft Determination, unless context otherwise requires:

- **income** means the income of the trust estate as explained in Taxation Ruling TR 2012/D1. If, in the 2010-11 or later income year, a net capital gain or franked distribution is taken into account in working out a positive net income (absent the application of Division 6E of Part III of the ITAA 1936), the income of the trust estate is instead to be calculated after making the assumption set out in subsection 102UX(2) of the ITAA 1936;
- **net income** means the net income of a trust estate calculated pursuant to subsection 95(1) of the ITAA 1936 as the total assessable income of the trust estate calculated as if the trustee were a resident taxpayer less all allowable deductions (except for certain deductions identified in the provision). If, in the 2010-11 or later income year, a net capital gain or franked distribution is taken into account in working out a positive net income (absent the application of Division 6E of Part III), the net income is instead to be calculated after making the assumption set out in subsection 102UX(3) of the ITAA 1936; and
- a beneficiary's **present entitlement** to income means any income of the trust estate that the beneficiary is (or is taken or deemed by Division 6 of Part III of the ITAA 1936 to be) presently entitled to where the present entitlement has arisen by the last day of the relevant income year, but excludes any amount the beneficiary is treated as not being, or deemed to not be, presently entitled to by Division 6 by the last day of the relevant income year. If, in the 2010-11 or later income year, a net capital gain or franked distribution is taken into account in working out a positive net income (absent the application of Division 6E of Part III), the amount of a present entitlement of a beneficiary to income of the trust estate is instead to be calculated after making the assumption set out in subsection 102UX(4) of the ITAA 1936.

Examples

5. The following examples demonstrate the relevance of the trust deed and the wording of the trustee resolution to the outcome under the proportionate approach.

Example 1

6. Under the trust deed for the Riverdale Family Trust, 'income' is defined to be the same as the net income calculated for tax purposes. The deed does not contain any provision enabling the trustee to determine a different amount to be the income of the trust.

7. For the year ended 30 June 2012, the trustee calculates the net income for the year as $120,000 consisting of interest and net rental income.

8. The trustee resolved to distribute $40,000 to each of beneficiaries Ann, Ben and Cy and they were each assessed on that amount. The deed contained no provisions dealing with the situation where the trustee failed to appoint some or all of the income of the trust estate by a particular time.

9. Subsequently, the Commissioner determined on audit that the trustee had omitted $9,000 interest income in calculating the net income.

10. The net income and consequently the trust income was therefore $129,000. But as the trustee had distributed only $120,000, there is $9,000 of trust income to which no beneficiary was presently entitled.

11. The corresponding share of net income ($9,000) is therefore assessed to the trustee.

Example 2

12. Assume the same facts as for Example 1, except that the trust deed provides that in the event of the trustee failing to appoint income by a particular time it is taken to be appointed to certain beneficiaries, (commonly referred to as default beneficiaries). In this case, the $9,000 would be assessed proportionately to those beneficiaries.

Example 3

13. Assume the same facts as for Example 1, except that the trustee resolved to distribute $40,000 to each of Ann, Ben and Cy and the balance to David.

14. On the basis of this resolution, the additional $9,000 net income would be assessed to David.

Example 4

15. Assume the same facts as for Example 1, except that the trustee resolved to distribute 1/3 of the trust income to each of Ann, Ben and Cy.

16. On the basis of this resolution, each beneficiary is presently entitled to 1/3 of the trust's income (being the same as the net income determined on audit). Each beneficiary is assessed on $43,000 and no amount of the trust's net income is assessed to the trustee.

Example 5

17. Under the trust deed for the Farmer Trust, 'income' is defined to be the same as the net income calculated for tax purposes unless the trustee determines it to be a different amount.

18. In accordance with the deed, the trustee determined the income of the trust to be $120,000.

19. The trustee resolved to distribute $40,000 to each of beneficiaries Ed, Fred and Greg.

20. The trustee lodged an income tax return disclosing net income of $120,000. Subsequently, the Commissioner determined on audit that the trustee had omitted $9,000 interest income in calculating the net income.

21. On the basis of the trustee's determination that the income of the trust was $120,000 and the resolution, each beneficiary is presently entitled to 1/3 of the trust's income. Each beneficiary is therefore assessed on $43,000 being one third of the net income of the trust and no amount of the trust's net income is assessed to the trustee or any default beneficiary.

Example 6

22. The trust deed of the Surrey Trust equates the income of the trust with its section 95 (of the ITAA 1936) net income unless the trustee determines it to be a different amount. The trustee did not make any other determination of income.

23. On 30 June 2011, the trustee resolved to distribute the income of the trust equally between two individual beneficiaries, Daisy and Rose. The trustee further resolved that should the Commissioner later include any amount in the assessable income of the trust, that amount is deemed to be distributed on 30 June to Bouquet Pty Ltd.

24. The trust income tax return lodged by the trustee for the year ended 30 June 2011 shows the net income as $100,000 consisting of business income. The Commissioner later determined that the income from the business carried on by the trustee was understated by $20,000. This meant that net income of the trust and the income of the trust was (and had always been) $120,000. All that had changed was the trustee's understanding of what those amounts were.

25. Under the proportionate approach Daisy and Rose are each assessable on $60,000 as a consequence of the trustee resolution in their favour. As that resolution effectively dealt with all of the income of the trust, there was nothing in respect of which the further resolution in favour of Bouquet Pty Ltd could operate.

Example 7

26. Assume the same facts as for Example 6, except that the trustee resolved to distribute $50,000 to each of Daisy and Rose and that there were no beneficiaries entitled to income in default of an appointment by the trustee.

27. The further resolution in favour of Bouquet Pty Ltd is ineffective to make Bouquet Pty Ltd presently entitled to income of the trust as at 30 June 2011. At best Bouquet Pty Ltd had, at 30 June 2011, an entitlement that was contingent on a future event happening (the Commissioner increasing the section 95 net income).

28. As there was $20,000 income to which no beneficiary was presently entitled on 30 June 2011, the corresponding share of net income ($20,000) is assessed to the trustee.

Example 8

29. The trustee of the Efficient Family Trust resolved to distribute the income of the trust for the year ended 30 June 2010 as follows:

(i) The first $30,000 to Don;

(ii) The next $30,000 to Ed; and

(iii) The balance (if any) to Fi.

30. 'Income' is defined under the trust deed to include all receipts other than capital gains. Although the trustee has a power to characterise other receipts as income the trustee did not exercise that power in the 2010 year. The income of the trust for the year was $100,000 comprised of interest and net rental income.

31. The trustee also made a (non-discount) capital gain of $20,000. The net income of the trust for the income year was therefore $120,000.

32. Each of the beneficiaries are assessed on the same percentage share of the net income of the trust as their entitlement to the income of the trust bears to the total trust income as follows:

Don $30,000/$100,000 x $120,000 = $36,000

Ed $30,000/$100,000 x $120,000 = $36,000

Fi $40,000/$100,000 x $120,000 = $48,000

33. To the extent that the amount assessed to each of the beneficiaries is attributable to the $20,000 (non-discount) capital gain made by the trustee, they will each be taken to have made an extra capital gain and allowed a corresponding deduction so as to avoid double tax.[1] *In the Commissioner's view, the extra gain they are taken to make (and corresponding deduction allowed) is:*

Don $30,000/$100,000 x $20,000 = $6,000

Ed $30,000/$100,000 x $20,000 = $6,000

Fi $40,000/$100,000 x $20,000 = $8,000

Note: The outcome would be practically the same had the relevant income year ended 30 June 2011 or later. As no beneficiary is specifically entitled to any part of the capital gain, each beneficiary would still be taken to have made an extra capital gain in the amount described above. Rather than being allowed a corresponding deduction, the amount upon which they would be assessed under section 97 of the ITAA 1936 would instead be adjusted to take out the capital gain (so that in addition to being taken to have made an extra capital gain Don and Ed would each only be assessed on $30,000 of the net income of the trust estate and Fi on $40,000).

Example 9

34. The trustee of the Bus Family Trust resolved to distribute the income of the trust for the year ended 30 June 2011 as follows:

(i) The first $30,000 to Cane;

(ii) The next $30,000 to Alex; and

(iii) The balance (if any) to Russ.

35. 'Income' is not defined under the trust deed so takes its ordinary trust law meaning. As originally determined by the trustee, the income of the trust for the year was $100,000 (after expenses) being income from carrying on a transport business.

36. The net income of the trust as determined by the trustee was also $100,000 and was assessed as follows:

(i) Cane – $30,000;

(ii) Alex – $30,000; and

(iii) Russ – $40,000.

[1] See Subdivision 115-C of the ITAA 1997 as it applied prior to the amendments made to it by *Tax Laws Amendment (2011 Measures No. 5) Act 2011*.

37. The trustee later realised that the net income of the trust had been incorrectly calculated because a total of $10,000 spent on entertainment and political contributions (being expenditure which is not deductible for tax purposes) had been expensed. The income of the trust was however correctly determined because although non-deductible, the expenditure was properly chargeable against income for trust law purposes in working out the income of the trust available for distribution.

38. As the income of the trust is $100,000 whereas the trust's net income is $110,000, the proportionate approach will have the effect that part of the adjusted net income will be included in the assessable income of each of the beneficiaries as follows:

Cane $30,000/$100,000 x $110,000 = $33,000

Alex $30,000/$100,000 x $110,000 = $33,000

Russ $40,000/$100,000 x $110,000 = $44,000

Example 10

39. Assume the same facts as for Example 9 except that, in this example, the income of the trust is defined to equal its section 95 net income.

40. Both the income and net income of the trust are, and always were, $110,000.

41. In this case, the amended net income of the trust would be assessed to each of the beneficiaries as follows:

Cane $30,000/$110,000 x $110,000 = $30,000

Alex $30,000/$110,000 x $110,000 = $30,000

Russ $50,000 (being the balance)/$110,000 x $110,000 = $50,000

Example 11

42. The trust deed for the Walnut Trust defines income to mean 'the amount worked out under section 95 of the tax law' unless otherwise determined by the trustee. The deed allows the trustee to maintain separate categories of income in the trust accounts and to appoint income of a particular type to designated beneficiaries.

43. During the 2010-2011 income year, the trustee received fully franked dividends of $70,000 and interest income of $50,000. The trustee calculated the trust's section 95 net income for the year as $150,000 (being $70,000 franked dividends plus 30,000 franking credits plus $50,000 interest income).

44. By 30 June 2011 the trustee determined that the income of the trust estate was its net income as defined in section 95 of the ITAA 1936 (without stating what the dollar figure of that amount was), less any franking credits.

45. Dividends and interest were recorded as separate categories of income in the trust accounts.

46. The trustee resolved that the income for the 30 June 2011 year be distributed to the following beneficiaries:

Franked dividends	
Pecan Pty Ltd	100%
Other income	
Pecan Pty Ltd	$20,000
Laura	balance

47. The Commissioner later determined that the interest income was understated by $10,000. This meant that the section 95 net income of the trust was $160,000 rather than $150,000 as the trustee had calculated. The trust's distributable income as at 30 June 2011 was therefore $130,000 (that is, $160,000 less $30,000). In accordance with the trustee's resolution, Laura (being the balance beneficiary) was entitled to an additional $10,000 interest income

48. Disregarding the modifications to Division 6 of the ITAA 1936 effected by Division 6E, each of the beneficiaries would be assessed under section 97 of the ITAA 1936 on a share of the amended net income of the trust estate as follows:

Pecan Pty Ltd – $90,000 ($70,000 franked distributions plus $20,000 other income)/$130,000 x $160,000 = $110,769

Laura – $40,000 / $130,000 x $160,000 = $49,231

49. However, because the net income includes a franked distribution, operation of section 97 of the ITAA 1936 is modified by Division 6E of the ITAA 1936. Broadly, this Division requires that the franked distribution and franking credit be disregarded in calculating the section 97 assessable amounts, with the following result:

Pecan Pty Ltd – $20,000 (the other income to which it was entitled)/$60,000 ($130,000 income less $70,000 franked distributions) x $60,000 ($160,000 net income less both $70,000 franked distributions and $30,000 franking credits) = $20,000

Laura – $40,000/$60,000 (as for Pecan Pty Ltd) x $60,000 (as for Pecan Pty Ltd) = $40,000

50. As Pecan Pty Ltd is entitled to all of the $70,000 franked distribution received by the trustee, Subdivision 207-B of the ITAA 1997 will additionally operate to include in its assessable income for 2010-11:

- *its 100% share of the distribution ($70,000), and*
- *its 100% share of the franking credit on the franked distribution ($30,000).*

Date of effect

51. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

52. Also, for any year that the amendments made by Schedule 2 to the *Tax Laws Amendment (2011 Measures No. 5) Act 2011* do not apply to assessments in relation to a trust (including a managed investment trust):

- paragraph 2 and the corresponding explanation at paragraphs 57 to 67 do not apply in relation to that trust;
- example 11 does not apply in relation to that trust, and
- none of the assumptions set out in section 102UX of the ITAA 1936 as referred to in the definitions of paragraph 4 are to be made in relation to that trust.

Commissioner of Taxation
13 June 2012

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Explanation

53. Where a beneficiary is presently entitled to a share of the income of a trust estate, paragraph 97(1)(a) of the ITAA 1936 requires the beneficiary to include in their assessable income that share of the trust's net income. In *Commissioner of Taxation v. Bamford,*[2] the High Court endorsed the proposition that beneficiaries can only be presently entitled to whatever is generally regarded as the distributable income of the trust (that is, the amount which can be distributed to beneficiaries or accumulated by the trustee). Further, the Court held that the reference to '*that share*' meant the distributable income to which the beneficiary was presently entitled as a proportion of the total distributable income.

54. Under the proportionate approach, the amount to be included in a beneficiary's assessable income under paragraph 97(1)(a) of the ITAA 1936 is the product of a two step mathematical calculation.

55. The first step of that calculation involves determining the amount of income to which a beneficiary is presently entitled and converting that amount into a percentage share of the distributable income. The second step involves applying that percentage to the net income of the trust.

56. How the proportionate approach applies in any particular case needs to be carefully considered in making original and amended assessments. The effect in any case will depend upon all the facts and circumstances of the case including in particular how the income of the trust estate is calculated and the terms of any trustee resolution to appoint income.

2010 – 11 and later income years

57. For the 2010-11 and later income years, capital gains and franked distributions included in the net income of a trust are brought to tax in accordance with Subdivisions 115-C and 207-B of the ITAA 1997 respectively.[3]

58. As a result of modifications under Division 6E of Part III of the ITAA 1936 (Division 6E), the balance of the net income (that is the net income excluding amounts attributable to capital gains and franked distributions) of the trust is still assessed under Division 6 effectively in the manner described in paragraphs 53-55.

59. Division 6E adjusts the rules in Division 6 to ensure that capital gains and franked distributions are not taxed twice (that is, once as a result of the operation of Subdivisions 115-C or 207-B of the ITAA 1997 and again by reason of Division 6). In broad terms the effect of Division 6E is to carve out net capital gains and franked distributions from the operation of Division 6 by excluding net capital gains and franked distributions from the trust's net income, and any amount relating to these things is excluded from the income of the trust estate.

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[2] [2010] HCA 10.

[3] Note that franked distributions included in the net income of a trust are assessed directly under Subdivision 207-B as amended. Capital gains reflected in the net income of a trust are taken into account in determining a beneficiary's own net capital gain under section 102-5 of the ITAA 1997.

Subdivision 115-C of the ITAA 1997

60. Capital gains of a trust are allocated to beneficiaries and/or the trustee in accordance with the rules in Subdivision 115-C of the ITAA 1997. These rules differentiate between entities with a specific entitlement to all or part of a capital gain and other entities.

61. Both a beneficiary and a trustee may have a specific entitlement to an amount of capital gain. Trustees will only be treated as having such an entitlement if they choose to be assessed on the capital gain under section 115-230 of the ITAA 1997.

62. If no entity (beneficiary or trustee) is specifically entitled to a trust capital gain, a beneficiary will be taken to have a share of the capital gain equal to that gain multiplied by their 'adjusted Division 6 percentage' of the income of the trust estate in the relevant income year.[4] A beneficiary's 'adjusted Division 6 percentage' is simply the proportionate share of the income of the trust estate to which they are presently entitled (called their 'Division 6 percentage'), calculated on the assumption that any capital gain or franked distribution to which any beneficiary or the trustee is specifically entitled were disregarded in working out the income of the trust estate.[5]

63. Therefore, where no entity is specifically entitled to any capital gain or franked distribution of the trust, each beneficiary will generally be taken to have extra capital gains equal to their proportionate share of each trust capital gain (grossed-up for any CGT discount or small business 50% reduction applied by the trustee).[6]

64. Where there is no income of the trust estate, or income of the trust estate to which no beneficiary is presently entitled, the trustee may also have an adjusted Division 6 percentage share of a capital gain.

Subdivision 207-B of the ITAA 1997

65. Franked distributions of a trust are allocated to beneficiaries and the trustee in accordance with the rules in Subdivision 207-B of the ITAA 1997. These rules differentiate between entities with a specific entitlement to all or part of a franked distribution and other entities. Trustees cannot be specifically entitled to a franked distribution.

66. If there is some part of a franked distribution to which no beneficiary is specifically entitled, a beneficiary or the trustee will be taken to have a share of the franked distribution equal to that franked distribution multiplied by their 'adjusted Division 6 percentage' of the income of the trust estate in the relevant income year.[7]

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[4] paragraph 115-227(b) of the ITAA 1997.
[5] Division 6 percentage and adjusted Division 6 percentage are defined in subsection 95(1) of the ITAA 1936.
[6] See subsection 115-215(3) of the ITAA 1997. The extra capital gain taken to have been made by the beneficiary will be different to this if losses and concessions applied against the gain at the trustee level resulted in only a part of that gain, or no part of that gain, being included in the trust's net capital gain (paragraph 115-225(1)(a) of the ITAA 1997) or if the net income of the trust is less than the trust's net capital gains and assessable franked distributions, for example, because of deductions (subsection 115-225(2) of the ITAA 1997).
[7] subsection 207-55(4) of the ITAA 1997.

67. Similarly to capital gains, this means that where no entity is specifically entitled to any capital gain or franked distribution of the trust, each beneficiary will generally be assessable on their proportionate share of the net franked distributions of the trust and attached franking credits, and the trustee will generally be similarly assessed where there is no income of the trust estate or income of the trust estate to which no beneficiary is presently entitled.[8]

Exclusions from the 2010-11 and later year modifications

68. The changes described in paragraphs 57 – 59 do not apply for the 2010-11 and 2011-12 income years in respect of a managed investment trust (MIT) (or an entity treated in the same way as a MIT for the purposes of Division 275 of the ITAA 1997) if the trustee has not chosen to apply them. Nor do they apply in respect of a trust that is an early balancer for the 2010-11 income year unless the trustee chose that they apply.[9]

69. To the extent that the changes do not apply in respect of a trust, the rules in Subdivisions 115-C and 207-B of the ITAA 1997 do not apply in the manner described above. Instead, those Subdivisions operate in respect of those trusts in the form in which they existed prior to the modifications made by the *Tax Laws Amendment (2011 Measures No. 5) Act 2011.*

[8] See paragraph 207-35(4)(b) and subsection 207-35(6) of the ITAA 1997. The franked dividends assessed to the beneficiary will be different to this if it is reduced by directly related deductions (subsection 207-37(1) of the ITAA 1997) or if the net income of the trust is less than the trust's net capital gains and assessable franked distributions, for example, because of deductions (subsection 207-37(2) of the ITAA 1997).

[9] see item 51 of *Tax Laws Amendment (2011 Measures No. 5) Act 2011.*

Appendix 2 – Your comments

70. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

71. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

(i) provide responses to persons providing comments; and

(ii) publish on the Australian Taxation Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**13 July 2012**
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2012/D1

Subject references:

- adjusted Division 6 percentage
- amendment of assessments
- Division 6 percentage
- present entitlement
- net income of a trust
- trusts
- trust beneficiaries
- trust income

Legislative references:

- ITAA 1936 Pt III Div 6
- ITAA 1936 Pt III Div 6E
- ITAA 1936 95
- ITAA 1936 95(1)
- ITAA 1936 97(1)(a)
- ITAA 1936 102UX(2)
- ITAA 1936 102UX(3)
- ITAA 1936 102UX(4)
- ITAA 1997 102-5
- ITAA 1997 Subdiv 115-C
- ITAA 1997 115-215(3)
- ITAA 1997 115-225(1)(a)
- ITAA 1997 115-225(2)
- ITAA 1997 115-227(b)
- ITAA 1997 115-230
- ITAA 1997 Subdiv 207-B
- ITAA 1997 207-35(4)(b)
- ITAA 1997 207-35(6)
- ITAA 1997 207-37(1)
- ITAA 1997 207-37(2)
- ITAA 1997 207-55(4)
- ITAA 1997 Div 275
- Tax Laws Amendment (2011 Measures No. 5) Act 2011 Sch 2 Item 51

Case references:

- Commissioner of Taxation v. Bamford; Bamford v. Commissioner of Taxation [2010] HCA 10; (2010) 240 CLR 481; 2010 ATC 20-170; (2010) 75 ATR 1

ATO references

NO:	1-3TQ8BX7
ISSN:	1038-8982
ATOlaw topic:	Income Tax ~~ Assessable income ~~ trust income - beneficiaries