



TD 2016/D4 - Income tax: does the residency assumption in subsection 95(1) of the Income Tax Assessment Act 1936 (ITAA 1936) apply for the purpose of section 855-10 of the Income Tax Assessment Act 1997 (ITAA 1997), which disregards certain capital gains of a trust which is a foreign trust for CGT purposes ?

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This document has been finalised by TD 2017/23.

 There is a Compendium for this document: **TD 2017/23EC** .



Draft Taxation Determination

Income tax: does the residency assumption in subsection 95(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) apply for the purpose of section 855-10 of the *Income Tax Assessment Act 1997* (ITAA 1997), which disregards certain capital gains of a trust which is a foreign trust for CGT purposes¹?

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Ruling

1. No. Accordingly, where a CGT event happens to a CGT asset of such a trust and that asset is not 'taxable Australian property':²

- the trustee disregards any capital gain (or capital loss) from that event in calculating the net income of the trust under subsection 95(1) of the ITAA 1936, and
- Subdivision 115-C of the ITAA 1997 does not treat the trust's beneficiaries as having capital gains (or make the trustee assessable) in respect of the event.

2. However, if an amount attributable to such a gain is paid or applied for the benefit of a resident beneficiary of the trust, the amount may be included in the beneficiary's assessable income under section 99B of the ITAA 1936. The way in which section 99B applies is dealt with in draft Taxation Determination TD 2016/D5 *Income tax: where an amount included in a beneficiary's assessable income under subsection 99B(1) of the Income Tax Assessment Act 1936 (ITAA 1936) had its origins in a capital gain from non-*

¹ A foreign trust for CGT purposes is defined in subsection 995-1(1) of the ITAA 1997 as a trust that is not a resident trust for CGT purposes. A resident trust for CGT purposes is defined in subsection 995-1(1).

² 'Taxable Australian property' is defined in section 855-15 of the ITAA 1997.

taxable Australian property of a foreign trust, can the beneficiary offset capital losses or a carry-forward net capital loss ('capital loss offset') or access the CGT discount in relation to the amount?

Example

3. *The Kiwi Trust is a discretionary trust established in New Zealand. The trust is a foreign trust for CGT purposes as the trustee company is incorporated in New Zealand and the trust is centrally managed and controlled there. The trustee can appoint income and capital of the trust to a range of beneficiaries, some of whom are resident in Australia.*
4. *The trustee invests in shares in Australian companies that are not 'taxable Australian property'. In the 2016 income year, the trustee sells some of those shares.*
5. *As the trust is a foreign trust for CGT purposes and the shares are not 'taxable Australian property', no capital gains in respect of the sale will be reflected in the net income of the trust under subsection 95(1) of the ITAA 1936. Accordingly, Subdivision 115-C of the ITAA 1997 will not treat the trust's beneficiaries (or the trustee) as having capital gains in respect of the sale.*
6. *During the 2017 income year, the trustee distributes an amount attributable to the gain to a beneficiary resident in Australia. Section 99B of the ITAA 1936 may then apply to include the amount in the beneficiary's assessable income.*

Date of effect

7. 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 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

30 November 2016

Appendix 1 – Explanation

❶ *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.*

The residency assumption and section 855-10

8. Subsection 95(1) of the ITAA 1936 requires the trustee of a trust estate to calculate the net income of the trust as if the trustee were a resident taxpayer (the residency assumption). Residents are required to include capital gains and capital losses from all sources in the calculation of their net capital gain for a year of income.

9. Section 855-10 of the ITAA 1997 provides that the trustee of a trust that is a foreign trust for CGT purposes disregards a capital gain or a capital loss if the relevant CGT event happens in relation to a CGT asset that is not 'taxable Australian property' (or, for CGT events happening **before** 12 December 2006, that does not have a 'sufficient connection with Australia').

10. An issue arises as to how section 855-10 of the ITAA 1997 interacts with the residency assumption in the definition of net income and in subsection 95(1) of the ITAA 1936.

11. If the assumption in subsection 95(1) of the ITAA 1936 were applied for the purposes of section 855-10 of the ITAA 1997, the provisions would be in conflict. Section 855-10 would have no operation at all in relation to foreign trusts, despite its express reference to them. This cannot have been the intention of the legislature. It is a general (though rebuttable) rule of statutory interpretation that, where there is a conflict between general and specific provisions, the specific provision prevails.³

12. Subsection 95(1) of the ITAA 1936 is a general provision dealing with the calculation of the net income of a trust estate. In contrast, section 855-10 of the ITAA 1997 contains more specific rules in relation to capital gains made by a trustee of a trust that is a foreign trust for CGT purposes. In this context, it is considered that the reference to the trustee of a foreign trust in section 855-10 of the ITAA 1997 prevails over the assumption in subsection 95(1) of the ITAA 1936.

13. Therefore, the trustee of a trust that is a foreign trust for CGT purposes disregards a capital gain from a CGT event happening to an asset that is not 'taxable Australian property'. Accordingly, such a gain is not reflected in the net income of the trust for the purposes of subsection 95(1) of the ITAA 1936.

Consequences

14. A consequence of this interpretation is that section 115-215 of the ITAA 1997 will not apply to treat beneficiaries of the trust as having capital gains in respect of CGT events occurring in the circumstances described above. Equally, the trustee will not be assessable on increased income under sections 115-220 or 115-222 of the ITAA 1997.

³ For example, *Perpetual Executors and Trustees Association of Australia Ltd v. Federal Commissioner of Taxation* (1948) 77 CLR 1; [1948] 2 ALR 448; (1948) 2 ALJ 382; [1948] HCA 24.

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15. However, although the capital gains are not included in the net income in the year they are made, section 99B of the ITAA 1936 may apply to assess a beneficiary if amounts attributable to the gains are paid or applied for the benefit of the beneficiary.⁴

⁴ See draft Taxation Determination TD 2016/D5.

Appendix 2 – Alternative views

❶ *This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.*

16. An alternative view put to the Commissioner is that section 855-10 of the ITAA 1997 does not operate in relation to the calculation of the net income of a foreign trust (that is, the residency assumption in subsection 95(1) of the ITAA 1936 means that gains and losses from all assets are taken into account in working out the net income of such a trust).

17. On this view, it is argued that section 855-10 of the ITAA 1997 only applies to disregard the amount of a capital gain or capital loss from non-taxable Australian property that is reflected in the amount of net income that otherwise falls to be assessed to a trustee of a foreign trust under section 115-222 of the ITAA 1997.

18. The Commissioner does not consider that there is any statutory basis for this interpretation. The disregarding of a capital gain or loss logically occurs prior to the calculation of a net capital gain.

19. Further, this approach could mean that foreign beneficiaries of a non-fixed trust would be assessable in Australia on their share of gains from non-taxable Australian property.

20. This approach would also require the trustees of foreign trusts to maintain records for their worldwide assets so as to determine capital gains and losses from those assets for Australian tax purposes. This is an unnecessary administrative burden.

Appendix 3 – Your comments

21. Please forward your comments to the contact officer by the due date.

22. A compendium of comments is 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:

- provide responses to persons providing comments, and
- be published on the ATO 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: 3 March 2017

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2016/D5

Legislative references:

- ITAA 1936
- ITAA 1936 95(1)
- ITAA 1936 99B
- ITAA 1997
- ITAA 1997 Subdiv 115-C
- ITAA 1997 115-215
- ITAA 1997 115-220

- ITAA 1997 115-222
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 995-1(1)

Cases relied on:

- Perpetual Executors and Trustees Association of Australia Ltd v. Federal Commissioner of Taxation (1948) 77 CLR 1; [1948] 2 ALR 448; (1948) 2 ALJ 382; [1948] HCA 24

ATO references

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