


TD 94/D19 - Income tax: if the trustee of a unit trust is 'the owner' of a 'unit of industrial property' (UIP) under Division 10B of Part III of the Income Tax Assessment Act 1936, is a unit holder in that trust entitled to a deduction under Division 10B in respect of that UIP?

 This cover sheet is provided for information only. It does not form part of *TD 94/D19 - Income tax: if the trustee of a unit trust is 'the owner' of a 'unit of industrial property' (UIP) under Division 10B of Part III of the Income Tax Assessment Act 1936, is a unit holder in that trust entitled to a deduction under Division 10B in respect of that UIP?*

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Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: if the trustee of a unit trust is 'the owner' of a 'unit of industrial property' (UIP) under Division 10B of Part III of the *Income Tax Assessment Act 1936*, is a unit holder in that trust entitled to a deduction under Division 10B in respect of that UIP?

1. No. Only the trustee is entitled to a deduction respect of that UIP.
2. Division 10B allows a deduction to 'the owner' of a 'unit of industrial property' (as defined in subsection 124K(1)) who satisfies the conditions set out in section 124L.
3. A 'unit of industrial property' is the bundle of rights possessed by a person as the grantee or proprietor of a patent, the owner of a copyright or registered design, or a licensee under such a patent, copyright or design. These rights include any equitable rights in respect of such a patent, copyright or design or in respect of a licence under such a patent, copyright or design. Similar rights possessed by a person under a foreign law also fall within the definition of a 'unit of industrial property'.
4. The term 'the owner' in relation to a UIP is the person who possesses the rights in respect of that UIP. This definition is relevant, among other things, for the purposes of section 124L.
5. Section 124L limits a deduction under Division 10B to the owner of a UIP who became the owner because he or she was the inventor of the patented invention, the author of the registered design, or the first owner of the copyright to which the UIP relates and incurred capital expenditure, before the UIP came into existence, directly on devising the invention or producing the design or the work in which copyright subsists (paragraph 124L(1)(a)).
6. Division 10B also applies to owners who become the owner of a UIP by incurring capital expenditure to purchase the UIP (paragraph 124L(1)(b)). Division 10B will also apply if the UIP is acquired without payment of valuable consideration or is obtained through transmission by operation of law (paragraph 124L(1)(c) & (d)). In cases where the owner of the UIP became the owner by being granted a patent or obtaining the registration of a design as the assignee of the inventor or author, and incurred capital expenditure in obtaining the assignment, that person is deemed to have incurred that expenditure on the purchase of a UIP.
7. The trustee of a unit trust will be the owner of a UIP if it possesses the rights because it is the proprietor or grantee of a patent, the owner of a copyright or registered design in accordance with the relevant legislation (for example, the *Copyright Act 1968*) or a licensee under such a patent, copyright or design. If the requirements of section 124L are satisfied the trustee will be entitled to deductions under Division 10B.

8. Unit holders in the unit trust may have a beneficial interest in the property of the trust (see *Charles v FC of T* [1953-54] 90 CLR 598 at 609). Such a beneficial interest, however, does not make unit holders the owner of a UIP. It is the trustee who possesses the rights (including equitable rights) that arise from being the proprietor or grantee of the patent, the owner of a copyright or design or the licensee under such a patent copyright or design.

9. The reference to 'equitable rights' in the definition of a 'unit of industrial property' in subsection 124K(1) makes it clear that the UIP is comprised of both the legal rights and equitable rights possessed by a person as the grantee or proprietor of a patent, owner of a copyright or registered design, or a licensee under such a patent, copyright or design. We consider that the use of the term 'equitable rights' in the definition of 'unit of industrial property' in subsection 124K(1) does not expand the operation of Division 10B to apply to rights possessed by a person other than as the legal owner of a patent, copyright or registered design under the provisions of the relevant legislation or the licensee under such a patent, copyright or registered design.

Example 1:

*A unit trust was set up to finance the production of a film. The trustee, in accordance with the provisions of the Copyright Act 1968, is the first owner of the copyright in the film. The trustee incurred costs directly in producing the film in which copyright now subsists. The trustee is the owner of the UIP and will be eligible for deductions under Division 10B. Expenditure by unit holders to acquire units in the unit trust will **not** qualify for a deduction under Division 10B.*

Example 2:

The trustee of a unit trust is, in accordance with the provisions of the Copyright Act 1968, the owner of copyright in a film. John Smith subscribes in the unit trust and pays \$1,000 for 100 units in the unit trust. John's purchase of the units does not make him the owner of a UIP. John is not entitled to any deduction under Division 10B for the expenditure incurred. The trustee is the owner of the UIP because the trustee possesses the rights as the owner of the copyright in the film.

Commissioner of Taxation

24/2/94

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