


***TD 95/D10 - Income tax: can section 36A of the Income Tax Assessment Act 1936 apply if a sole trader who owns trading assets transfers the assets to another person as a trustee of a discretionary trust?***

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This document has been finalised by TD 96/1.

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.

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## Draft Taxation Determination

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**Income tax: can section 36A of the *Income Tax Assessment Act 1936* apply if a sole trader who owns trading assets transfers the assets to another person as a trustee of a discretionary trust?**

1. No.

**If the sole trader is not a discretionary beneficiary:**

2. Subsection 36A(1) does not apply because, if such a transfer occurs, the sole trader who owned the trading assets, before the change in ownership of the assets effected by the transfer, has no interest (legal, beneficial or legal and beneficial interest) in the assets after the change.

**If the sole trader is a discretionary beneficiary:**

3. Section 36A is founded on the existence of undivided fractional interests in trading assets. A discretionary beneficiary of a discretionary trust does not have, in our view, an undivided fractional interest in the assets held by the trustee of a discretionary trust (even if, at general law, the discretionary beneficiary may have a beneficial interest in trust assets in certain circumstances: see *Queensland Trustees Ltd v. Commissioner of Stamp Duties (Qld)* (1952) 88 CLR 54). Because the sole trader has no undivided fractional interest in the trading assets after the transfer of the assets to the trustee, subsection 36A(1) does not apply.

**Whether or not the sole trader is a discretionary beneficiary:**

4. Because subsection 36A(1) does not apply, subsection 36A(2) cannot apply: see paragraph 36A(2)(a).

5. Section 36 applies to such a transfer if it is not made in the ordinary course of carrying on the sole trader's business.

6. This Draft Taxation Determination withdraws and replaces Draft Taxation Determination TD 94/D68.

***Definition:***

The expression 'trading assets' is used in this Taxation Determination to mean assets of a business (being trading stock, standing or growing crops, crop-stools or trees which have been planted and tended for the purpose of sale).

***Example***

*Fred Jersey owns a grazing business in north west Queensland. Fred transfers his business to a private family company as corporate trustee of Fred's family discretionary trust, in which Fred is not a discretionary beneficiary.*

*Neither subsection 36A(1) nor 36A(2) applies to the disposal of the trading stock of the business by Fred to the corporate trustee of the discretionary trust because Fred retains no interest in the trading stock after the disposal. The transfer of the trading stock is not a disposal made in the ordinary course of Fred's business and section 36 applies.*

**Commissioner of Taxation**30/08/95

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FOI INDEX DETAIL: Reference No.

Related TRs and TDs: TD 95/D11; TD 95/D12; TD 95/D13

Subject Ref: discretionary trust; disposal; ownership; trading stock; trustee; undivided fractional interest

Legislative Ref: ITAA 36; ITAA 36A; ITAA 36A(1); ITAA 36A(2); ITAA 36A(2)(a)

Case Ref: Queensland Trustees Ltd v. Commissioner of Stamp Duties (Qld) (1952) 88 CLR 54

ATO Ref: TDUMG 94/1; TOW52; NAT 95/6458-6

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ISSN 1038 - 8982