


***TD 95/D11 - Income tax: can section 36A of the Income Tax Assessment Act 1936 apply if a sole trader who owns trading assets declares himself or herself to be a trustee of a discretionary trust over the assets?***

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This document has been finalised by TD 96/2.

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: can section 36A of the *Income Tax Assessment Act 1936* apply if a sole trader who owns trading assets declares himself or herself to be a trustee of a discretionary trust over the assets?**

1. No.

2. Section 36A is founded on the existence of undivided fractional interests in trading assets and a change in those interests. The section does not apply to all changes in interests in trading assets. *FC of T v. Westraders Pty Ltd* 80 ATC 4357, per Mason J at 4367 and 4368; (1980) 11 ATR 24 at 36 and 37 and *Glenfield Estates Pty Ltd v. FC of T* 88 ATC 4548, per Lockhart J, with whom Wilcox and French JJ agreed, at 4561; (1988) 19 ATR 1426, at 1441 broadly support the view that section 36A comprehensively applies to changes in undivided fractional interests in trading assets.

3. If a sole trader declares himself or herself to be such a trustee, there is no change in any undivided fractional interests in the trading assets. The sole trader who legally (and beneficially) owned the trading assets, before the declaration, has a legal interest in the assets after the change - he or she retains legal title to the assets (albeit as a trustee) but has divested himself or herself of a beneficial interest in the assets. Because there is no change in any undivided fractional interests in the trading assets and the sole trader has no undivided fractional interest in the trading assets after the after the declaration of trust, subsection 36A(1) does not apply.

4. Section 36 also does not apply to the declaration of trust because the sole trader did not transfer the entirety of his or her ownership of the assets. Section 36 is concerned with the disposal of the whole or part of the assets of a business. When section 36 speaks of disposing of the assets of a business, *Rose v. FC of T* (1951) 84 CLR 118; 9 ATD 334 makes it clear that section 36 is speaking of a transfer of the proprietor's entirety of ownership of the assets. Because the sole trader's entire ownership in the assets is not disposed of on the declaration of trust by the sole trader (the sole trader retaining a legal interest in the assets), the same kind of difficulty that arose in the *Rose* case is present and section 36 cannot apply.

### ***Definitions:***

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).

The expression 'undivided fractional interest' is used in this Taxation Determination in the same sense that it is used in the *Rose* case. A transfer of an undivided fractional interest in assets is the vesting in another or others of an undivided share or shares in the assets.

### ***Example***

*Maybell Fresian owns a grazing business in Gippsland, Victoria. Maybell declares that she holds her business and all of its assets as trustee of her family discretionary trust.*

*Neither section 36A nor section 36 applies to the declaration of trust.*

### **Commissioner of Taxation**

30/08/95

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FOI INDEX DETAIL: Reference No.

Related TRs and TDs: TD 95/D10; TD 95/D12; TD 95/D13

Subject Ref: declaration of trust; discretionary trust; disposal; ownership; trading stock; trustee; undivided fractional interests

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

Case Ref: Glenfield Estates Pty Ltd v. FC of T 88 ATC 4548; (1988) 19 ATR 1426; Rose v. FC of T (1951) 84 CLR 118; 9 ATD 334; FC of T v. Westraders Pty Ltd 80 ATC 4357; (1980) 11 ATR 24.

ATO Ref: TDUMG 94/1; TOW53; NAT 95/6458-6

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