IT 2049 - Income tax liability of trustee in respect of distributions to non-resident beneficiaries

TAXATION RULING NO. IT 2049

INCOME TAX LIABILITY OF TRUSTEE IN RESPECT OF DISTRIBUTIONS TO NON-RESIDENT BENEFICIARIES

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1104838	NON-RESIDENT BENEFICIARIES	97(2)
		98A
	LIABILITY OF TRUSTEE	98(3)
		98(4)

PREAMBLE The purpose of this ruling is to highlight certain features of new provisions, inserted in Division 6 by the Income Tax Assessment Amendment Act 1983, which apply to trust income of non-resident beneficiaries.

RULING 2. The Income Tax Assessment Amendment Act 1983 introduced provisions aimed at facilitating the collection of tax payable by non-resident beneficiaries on trust income. Broadly, these provisions operate to transfer to the trustee of a trust estate the primary liability for the payment of tax on trust income to which a beneficiary who is a non-resident at the end of the year of income is presently entitled. The new provisions are similar in effect to existing provisions under which a trustee is taxed on behalf of a beneficiary who is, for example, under a legal disability such as infancy. Trust income consisting of dividends and interest subject to withholding tax is not affected by the new provisions.

3. So far as is relevant, the amendment to section 97 excludes from assessment to the beneficiary under that section the trust income to which non-resident beneficiaries are, or are deemed to be, presently entitled. The amendment does not, however, affect trust income of a non-resident beneficiary -

- which is a body, association, fund or organisation, the income of which is exempt from tax by the provisions of section 23;
- which is an international organisation the income of which is exempt from tax by virtue of a regulation in force under the International Organizations (Privileges and Immunities) Act 1963;
- to whom sub-section 97A(1) or (1A) applies - that is, a beneficiary who has made, or is deemed to have made, an income equalisation deposit; or

. who is, in respect of the particular income, a beneficiary in the capacity of trustee of another trust estate.

4. Income that is excluded from the operation of section 97 by the amendment is instead taxed first to the trustee under new sub-section 98(3) or (4) and second to the beneficiary under new section 98A.

5. New sub-section 98(3) provides that, where the non-resident beneficiary is a company and satisfies the other conditions set down in the sub-section (in other words, the company is a beneficiary that would, but for the amendments, have been assessed on the trust income under section 97), the trustee is to be taxed on the trust income at the rate declared by Parliament (that is, 46 per cent - the current company rate). The trustee is so taxed in respect of the trust income from any source that is attributable to a period when the company beneficiary was a resident as well as the trust income from Australian sources that is attributable to a period when the company beneficiary was a non-resident.

6. The counterpart of sub-section 98(3) is new sub-section 98(4) which applies where the non-resident beneficiary is an individual. It operates to tax the trustee in respect of the relevant trust income at the rates applicable to non-resident individuals which, of course, depend on the level of trust income to which the beneficiary is presently entitled in a particular year of income and on whether or not the beneficiary was a resident at any time during the year. As a trustee may be taxed under sub-section 98(1) (on behalf of a non-resident beneficiary under a legal disability) or under sub-section 98(2) (on behalf of a non-resident beneficiary not under a legal disability, who is a natural person and who is deemed under sub-section 95A(2) to be presently entitled to a share of trust income), sub-section 98(4) also effectively provides that the trustee will continue to be taxed under sub-section 98(1) or (2), as the case may be, and not also taxed in respect of the same income under sub-section 98(4).

7. In terms of section 98A, a non-resident beneficiary, on whose behalf a trustee has been taxed under sub-section 98(3) or (4), is also taxed on the particular trust income. A credit is allowed in the assessment of the beneficiary for the tax paid by the trustee. Section 98A thus provides the means by which recourse can be had to the beneficiary if the tax cannot be collected from the trustee. The section also ensures, in the case of companies, that those existing provisions of the income tax law that have particular application to companies are not affected by the changes. In the case of individuals, it ensures that the beneficiary's total income is brought to account for the purpose of calculating the tax payable, and that the individual beneficiary is not disadvantaged in relation to any deduction (e.g. carried forward loss from a previous year) and/or rebate (e.g. averaging rebate) from which the beneficiary would have benefited if he or she had continued to be taxed directly under section 97, and

which is not allowable in the assessment on the trustee under sub-section 98(4). Where the tax paid by the trustee exceeds the tax assessed to the beneficiary, the difference is to be refunded to the beneficiary.

8. Transitional provisions contained in the Amendment Act (section 67) provide that the amendments apply in assessments for the year of income in which 18 May 1983 occurred and all subsequent years of income. The trustee is taxed under new sub-section 98(3) or (4) only on so much of the relevant trust income as is paid to, or applied for the benefit of, the non-resident beneficiary on or after 18 May 1983.

9. It may be claimed that a trustee will not be in a position to know whether a beneficiary is one on whose behalf the trustee may be taxed under the new provisions or to know the extent of any tax liability. However, the law as it stood prior to the amendments provided that a trustee is taxed in certain circumstances depending on the status of the beneficiary and thus it was already incumbent on a prudent trustee to ascertain whether, and to what extent, the trustee might be liable for tax on behalf of a beneficiary. In this regard, if a trustee, after making due enquires, has any difficulty in determining the status of a beneficiary or the extent of his or her liability under the new provisions, appropriate assistance should be provided on request.

10. It should be noted that the trustee is not taxed personally under the new provisions but in the capacity of trustee, and that section 254 provides authority for the trustee to retain funds sufficient to pay the tax in question and indemnity in respect thereof.

11. As with the existing trust provisions, the new provisions do, of course, apply equally to income of a unit trust and that of any other trust estate. Accordingly, a unit trustee may be taxed under sub-section 98(3) or (4) in respect of the relevant unit trust income entitlements of a non-resident unitholder.

COMMISSIONER OF TAXATION

6 July 1983