


IT 2358 - Income Tax : trust schemes with resident minor beneficiaries : assessing guidelines : determination of objections : settlement guidelines

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 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

TAXATION RULING NO. IT 2358

INCOME TAX : TRUST SCHEMES WITH RESIDENT MINOR
BENEFICIARIES : ASSESSING GUIDELINES : DETERMINATION
OF OBJECTIONS : SETTLEMENT GUIDELINES

F.O.I. EMBARGO: May be released

REF

H.O. REF: 86/2680-4
J 209/121

DATE OF EFFECT:

B.O. REF: ACT : 04/GTA DATE ORIG. MEMO ISSUED: 5 December 1985
PER : J36/316
HOB : H 32/1/12
PAR : A 48/5/12
ADE : M336/9/17
MEL : VJ 192/153
BRI : 5/IT/COR. 67/21
SYD : 13/NEST/4064/6-3

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1210122	INCOME TAX AVOIDANCE TRUSTS WITH RESIDENT MINOR BENEFICIARIES	DIVISION 6 FORMER SUB-SECTIONS 226(2) and (3)

PREAMBLE

This Ruling, which takes the place of previous National Office memoranda, provides assessing and settlement guidelines in respect of schemes which seek to exploit the zero rate step of the tax rates through the making of alleged trust distributions below or just above the relevant taxable threshold to resident minor beneficiaries. In these cases, the resident minor beneficiaries are never intended to receive the benefit of the purported distributions.

2. These schemes operate in a similar fashion to the non-resident beneficiaries schemes covered in Taxation Ruling No. IT 2344 but with resident minors as the purported income beneficiaries. Unlike the non-resident beneficiaries scheme, however, it was still open, up to 30 June 1983, for taxpayers to exploit the former tax-free threshold of \$1040 in respect of eligible unearned income of resident minors. After that date it was still possible to exploit the \$416 threshold in relation to the Division 6AA rates of tax. Another of these schemes sought to exploit the Division 6AA 'excepted person' exempt status of certain handicapped children.

3. Examination of these arrangements has revealed that, in many cases, there is reason to doubt that present entitlement to the trust income actually has been conferred on the resident minor beneficiaries. As with the non-resident beneficiary version, it is invariably the case that the amounts purportedly distributed to the resident minor beneficiaries are retained and used by the trustee, and neither the beneficiaries nor their

guardians are usually informed of the purported entitlement to the trust income.

RULING Assessing Guidelines

4. In determining the bona fides or otherwise of these arrangements for the purposes of assessment and determination of objections, regard should be had to the factors listed below. It should be noted that the factors are not necessarily exhaustive and that no particular factor is necessarily decisive;

- (a) the trustee's resolution purportedly conferring present entitlement on the resident minor beneficiaries;
- (b) the trustee's advice of entitlement, if any, allegedly issued to the beneficiary;
- (c) whether the income entitlements have actually been remitted to the resident minors, and, if so, whether the amounts were subsequently returned by way of gift or otherwise to either the default beneficiaries, the trustee or an associate (whether by the resident minor or by the trustee either independently or under a power of attorney);
- (d) the relationship between the resident minor beneficiaries and the settlor, trustee and the default beneficiaries;
- (e) the proportion of the trust net income allegedly distributed to resident minor beneficiaries as compared to other beneficiaries;
- (f) whether distributions made by the trust to resident minors varied as to amount after the introduction of the Income Tax (Rates) Act 1982;
- (g) the reasons given for not actually remitting the income to which the resident minor beneficiaries are allegedly entitled, in the light of any reasons given for the purported distributions;
- (h) whether there are technical deficiencies in the arrangements; for example, purported distributions to persons not within the class of beneficiaries eligible under the trust deed or the inclusion of beneficiaries not authorised by the terms of the trust deed.

5. Factors which may lead to a conclusion that the distribution to a resident minor beneficiary is genuine include:

- (a) provision of a statement signed by the trustee to the effect that the named resident minor beneficiaries exist, reside at a specified address and are aware of their entitlements to the relevant income;
- (b) provision of a statement signed by the trustee that the

resident minor beneficiaries have been paid their entitlement in the terms of the trustee's resolution or trust deed, that the amounts remitted to the resident minor beneficiaries were not merely loans, that the funds have not been and will not be returned directly or indirectly to the trustee, the other beneficiaries or associates; and

- (c) satisfactory evidence to substantiate remittances by the trustee to the relevant resident minor beneficiaries.

6. Where, after consideration of the facts of a particular case, it is not possible to be satisfied on reasonable grounds that the beneficiaries purportedly benefiting from a distribution of the trust income were ever intended to receive the benefit of that income, the following assessment action is considered appropriate :

- (a) although the correct assessment treatment is not entirely free from doubt, assessments should be raised on the basis that the entitlement to that income is governed by the default clause in the trust deed; i.e. on the beneficiaries specified in the trust deed as being presently entitled to the net income of the trust in default of a valid appointment by the trustee. If the trust deed does not include a default clause, the trustee should be assessed under section 99A;
- (b) where the relevant trust income has previously been assessed to the trustee under section 99A in accordance with earlier National Office memoranda, assessments should also be raised on the basis set out in paragraph (a) against the default beneficiaries in cases where there is a dispute or where tax remains unpaid on the section 99A assessment.

Additional Tax (Penalty)

7. Additional tax by way of penalty under the former sub-section 226(2) should be imposed and remitted in accordance with the general principles set out in Taxation Rulings No's IT 2012, IT 2028, IT 2043 and IT 2206.

Determination of Objections

8. Objections should be disallowed where, after a consideration of all relevant factors, it is still not possible to be satisfied on reasonable grounds as to the bona fides of the arrangements allegedly conferring present entitlement.

9. Objections should, of course, be allowed in cases where it is decided on the total information available that the arrangements are genuine.

Settlement Guidelines

10. The following settlement guidelines do not cover cases falling to be considered under the additional tax (penalty) provisions of the new Part VII, effective from 14 December 1984.

11. Settlement offers on behalf of the trustee and all relevant taxpayers may be accepted in respect of these schemes where they are made in the following terms :

- (a) full payment of the primary tax and associated section 207 penalty, under acceptable payment arrangements, payable under either an existing section 99A assessment against the trustee or under assessments raised or to be raised in respect of the default beneficiaries;
- (b) withdrawal of objections or appeals lodged in respect of the relevant assessments or an undertaking not to lodge objections and appeals in respect of those assessments;
- (c) withdrawal of any alternative assessments raised;
- (d) full remission of any former section 226 additional tax plus any associated section 207 penalty.

12. In respect of assessments that have already issued in these cases, the basis of settlement described above will be available for 30 days after the date of issue of this Ruling. The due date for payment of assessments which have not yet issued will be the effective cut-off date for the receipt of settlement offers. Offers made and received after the appropriate date will be considered on their respective merits.

Recovery

13. In cases where assessments under both section 99A and the default beneficiary basis have been raised, recovery action should be instituted only in respect of the assessments raised on the default beneficiary basis. Where, in terms of the trust deed, no genuine beneficiary is presently entitled to the income, recovery action should be pursued in respect of section 99A assessments issued to the trustee.

COMMISSIONER OF TAXATION
11 September 1986