

IT 2556 - Income tax: foreign tax credit system - denial of underlying tax credit to corporate unit trusts and public trading trusts.



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TAXATION RULING NO. IT 2556

INCOME TAX: FOREIGN TAX CREDIT SYSTEM - DENIAL OF
UNDERLYING TAX CREDIT TO CORPORATE UNIT TRUSTS AND
PUBLIC TRADING TRUSTS.

F.O.I. EMBARGO: May be released

REF

N.O. REF: L89/4206-4

DATE OF EFFECT: Immediate

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011536	FOREIGN TAX CREDIT SYSTEM UNDERLYING TAX CREDIT CORPORATE UNIT TRUSTS AND PUBLIC TRADING TRUSTS	DIVS 6B and 6C 160AE(1) 160AF 160AFB 160AFC

OTHER RULINGS ON TOPIC : IT 2445, IT 2555

PREAMBLE

The primary purpose of this ruling is to clarify that trusts which are treated as companies for certain purposes of the Income Tax Assessment Act (the Assessment Act) pursuant to Divisions 6B and 6C of Part III of that Act are precluded under the existing law from entitlement to foreign underlying tax credit in respect of dividend income derived from a foreign company.

2. Where certain requirements are met, section 160AFC of the Assessment Act deems an Australian company which receives a dividend from a related foreign company (according to the tests set out in section 160AFB) to have paid, and to have been personally liable for, the foreign underlying tax paid by the company which pays the dividend on the profits out of which it is paid. The effect of this deeming provision is to enable the Australian company to claim a foreign tax credit in respect of that underlying tax, pursuant to subsection 160AF(1), against the Australian tax payable by the company on the dividend income, as well as a credit for foreign tax directly attributable to the dividend.

3. Subsection 160AE(1) of the Assessment Act defines an "Australian company" for these purposes as meaning a company that is a resident of Australia and specifies that references to a "company" do not include a company in the capacity of a trustee.

4. Under Divisions 6B and 6C certain public unit trusts, called "corporate unit trusts" and "public trading trusts" respectively, are in general treated as though they were companies for purposes of the Assessment Act. In particular,

subsections 102L(10) and 102T(11) provide, inter alia, that a reference to a company in certain listed sections of the Assessment Act includes a reference to a corporate unit trust (or trustee thereof), or a public trading trust (or trustee thereof). The listed sections, however, do not include section 160AF or 160AFC.

5. Subsections 102L(6) and 102T(7) contain similar deeming provisions in relation to references to "person" or a company in certain specified provisions of the Assessment Act. It is relevant that section 160AF, but not section 160AFC, is included in the specified provisions.

RULING

6. The terms of Divisions 6B and 6C and the relevant foreign tax credit provisions of the Assessment Act do not provide for corporate unit trusts or public trading trusts to be treated as companies for foreign underlying tax credit purposes. Accordingly, they are not entitled to claim that credit with respect to dividends derived from a company that is not a resident of Australia.

7. The definition of "company" in subsection 160AE(1) applies for the purposes of the foreign tax credit provisions of Division 18 of Part 111 of the Assessment Act (including sections 160AF and 160AFC) and the specific exclusion of corporate trustees from that definition extends to a trustee of a corporate unit trust or a public trading trust. The primary test in subsection 160AFC(1) for eligibility for foreign underlying tax credit, i.e., receipt by an Australian company of a dividend from a foreign related company, could not therefore be satisfied by a trustee of such a trust.

8. In addition, although such trusts are generally treated pursuant to Divisions 6B and 6C as if they are companies for other purposes of the Assessment Act, no relevant link is provided to permit claims for underlying tax credit. In that respect, it is essentially section 160AFC which extends the foreign tax credit provisions of section 160AF to foreign underlying tax. But section 160AFC is not included in the provisions of the Assessment Act listed in the subsections of Divisions 6B and 6C which effectively require corporate unit trusts and public trading trusts to be treated as companies for the purposes of those provisions, viz., subsections 102L(6), 102L(10), 102T(7), and 102T(11).

9. Both subsections 102L(6) and 102T(7) provide that a reference in section 160AF to a company shall be read as including a reference to a corporate unit trust (or trustee thereof). However, the only reference to "company" in that section is in subsection 160AF(4) in relation to additional tax formerly payable by a private company on undistributed profits under Division 7 of Part 111 of the Assessment Act, which is now largely of historical relevance only. In any event, as indicated earlier, section 160AF only operates to provide underlying tax credit with respect to companies which meet the tests set out in section 160AFC.

10. The aforementioned summary of the relevant provisions is sufficient by itself to confirm denial under the existing law of underlying tax credit for a corporate unit trust or public unit trust. Nevertheless, it is observed that even if such a trust were to be treated as a company for those purposes, it could be expected to also fail another legislative test that is a pre-requisite to the allowance of underlying tax credit, by reason of the shares in the foreign company or companies from which dividends are derived being held by the trustee of the trust in that capacity.

This result would arise because subsection 160AFC(1) also requires that for an Australian company to be deemed to have paid, and to have been personally liable for, the foreign underlying tax in respect of dividends received from a foreign company, that company must be related to the Australian company. However, one of the conditions contained in section 160AFB for determining whether companies are related for those purposes effectively necessitates that the Australian company be the beneficial owner of the shares in the foreign company or companies.

COMMISSIONER OF TAXATION
17 August 1989