

TD 2022/12 - Income tax: is the source concept in Division 6 of Part III of the Income Tax Assessment Act 1936 relevant in determining whether a non-resident beneficiary of a resident trust, or trustee for that trust, is assessed on an amount of trust capital gain arising under Subdivision 115-C of the Income Tax Assessment Act 1997?

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Status: **legally binding**

Taxation Determination

Income tax: is the source concept in Division 6 of Part III of the *Income Tax Assessment Act 1936* relevant in determining whether a non-resident beneficiary of a resident trust, or trustee for that trust, is assessed on an amount of trust capital gain arising under Subdivision 115-C of the *Income Tax Assessment Act 1997*?

📌 Relying on this Determination

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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Ruling

1. No. The source concept in Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) is not relevant in determining whether an amount of trust capital gain is assessable to the non-resident beneficiary¹ or trustee.² The same view applies in relation to a non-resident beneficiary's share of taxable Australian property (TAP)³ gains of a non-resident trust and a trustee's share of a capital gain to which section 115-222 of the *Income Tax Assessment Act 1997* applies.

2. All legislative references in this Determination are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

¹ See section 115-215, and sections 95AAB and 95AAC of the ITAA 1936.

² See section 115-220, and sections 95AAC and 98 of the ITAA 1936. Also see *Peter Greensill Family Co Pty Ltd (Trustee) v Commissioner of Taxation* [2021] FCAFC 99 (*Greensill*) at [27] and [76], per Davies, Moshinsky and Colvin JJ.

³ See section 855-15 for when a CGT asset is TAP.

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3. In this Determination, the phrase ‘source concept’ refers to the limitation in Division 6 of Part III of the ITAA 1936 on the assessment of non-residents (or trustees for them) to amounts ‘attributable to sources in Australia’.⁴
4. This Determination does not deal with the application of Australia’s double-taxation agreements.

Example 1 – non-fixed trusts

5. *The OZ Trust is a resident non-fixed trust estate. The trustee of the trust holds shares in a land-rich Australian company (LandCo) and shares in an Australian company that owns no taxable Australian property (OtherCo). The trustee sells all the shares by contract executed in the United Kingdom in the 2013–14 income year and makes non-discount capital gains totalling \$70,000 and \$30,000 respectively.*
6. *Pursuant to the trust deed, the trustee resolves to treat the gains as income of the trust for that year. There is no other trust income. The trustee further resolves to make Edward, a non-resident beneficiary who is not under a legal disability, presently entitled to 100% of the trust income.*
7. *The trustee is assessed under section 98 of the ITAA 1936 on the \$100,000 of trust capital gains attributable to Edward. The source concept in subsection 98(2A) of the ITAA 1936 has no application in relation to these capital gains as section 115-220 increases the amount assessable to the trustee under section 98 of the ITAA 1936 without regard to those conditions.*
8. *Capital gains totalling \$100,000 are included in the calculation of Edward’s net capital gain for the income year.⁵ However, Edward is entitled to a refundable tax offset for the tax the trustee paid on his behalf under subsection 98A(2) of the ITAA 1936.*
9. *The same outcome would arise if the trustee did not treat the gains as income but Edward was made specifically entitled to the amounts of capital gains.*

Example 2 – fixed trusts

10. *If the trust had instead been a fixed trust, Edward may be able to access the exemption in section 855-40 to disregard capital gains in relation to the shares in OtherCo.*

Date of effect

11. Subject to paragraph 12 of this Determination, this Determination applies to arrangements entered into before and after its issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).
12. For the 2018–19 and earlier income years, the Commissioner will not devote compliance resources to identify arrangements which would give rise to adjustments solely on the basis of this Determination, but if the Commissioner is presented with the issue and asked to provide advice or otherwise becomes aware of an arrangement in the course of

⁴ See, for example, paragraphs 98A(1)(b) and 98(2)(e) of the ITAA 1936.

⁵ Sections 115-215 and 102-5.

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compliance activities, the Commissioner will apply the law consistently with the views expressed in the Determination.

Commissioner of Taxation
31 August 2022

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Appendix – Explanation

❶ *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

13. The capital gains and losses of a resident trust are determined without regard to whether they arise from TAP or whether the trust has non-resident beneficiaries. Any net capital gain is included in the trust's net income for the income year, calculated in accordance with subsection 95(1) of the ITAA 1936.

14. For each capital gain of the trust, Subdivision 115-C treats a beneficiary (whether or not the beneficiary is a non-resident) as having an extra capital gain worked out according to section 115-215. That capital gain is taken into account in calculating the beneficiary's net capital gain for the income year in accordance with the method statement in subsection 102-5(1).

15. For the 2010–11 and later income years, section 115-220 assesses the trustee under section 98 of the ITAA 1936 on the trust's capital gain attributed to the non-resident beneficiary.⁶ The attributable gain is worked out by reference to a non-resident beneficiary's share of the trust's capital gain, including where the share arises from a specific entitlement to the gain.⁷ Section 115-220 does not test whether the beneficiary's attributable gain satisfies the conditions in section 98 of the ITAA 1936.⁸ Rather, it increases the amount assessable to the trustee under section 98 without regard to those conditions.

16. In other words, the effect of section 115-220 is merely to make the amount drawn from Subdivision 115-C, without regard to source, both assessable and taxable to the trustee under section 98 of the ITAA 1936. This applies even if there is no other amount (based on the Division 6E net income) assessable to the trustee.⁹

17. Similarly, the conditions in subsection 98A(1) of the ITAA 1936 have no application to determine the beneficiary's capital gains, as this is done by section 115-215 and other provisions within Subdivision 115-C.

18. Division 6E of Part III of the ITAA 1936 prevents double taxation by ensuring capital gain amounts are disregarded in determining the trust income and net income that may be assessed through the ordinary operation of Division 6 of Part III of the ITAA 1936.¹⁰

19. Prior to the 2010–11 income year, trust capital gains were assessed having regard to the combined operation of Subdivision 115-C and Division 6 of Part III of the ITAA 1936, including the 'source concept'. This was the result of section 115-215 as it was before the amendments, that considered whether a beneficiary had assessable income under subsection 98A(1) of the ITAA 1936 (which had regard to source) and, if so, including additional gains in the beneficiary's net capital gain calculation.

20. The position for the 2010–11 and later years in respect of the relevance of the source concept is consistent with that which applies in respect of capital gains of non-residents from direct investments. While paragraph 6-10(5)(a) requires non-residents

⁶ See subsection 115-220(2). In some cases, the trustee is assessed on double the amount of the trust capital gain attributed to the beneficiary.

⁷ See sections 115-227 and 115-228 for how to determine a beneficiary's share of a trust capital gain and any specific entitlement. The insertion of section 95AAB of the ITAA 1936 means that beneficiaries may still receive a credit for related tax paid by the trustee (for example, subsection 98A(2) of the ITAA 1936).

⁸ Including paragraph 98(2A)(d) of the ITAA 1936.

⁹ Subsection 115-220(3).

¹⁰ *Greensill* at [25–28], [74] and [76].

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to include only Australian-sourced statutory income in their assessable income, paragraph 6-10(5)(b) also includes other statutory income where a provision assesses this on some basis other than it having an Australian source. Part A of Chapter 4 in the Explanatory Memorandum to the Income Tax Assessment Bill 1996 and the Income Tax (Consequential Amendments) Bill 1996 provides that:

[m]ost ordinary and statutory income from foreign sources is not assessable to foreign residents. However, there are limited cases where an amount is assessed on a specifically expressed basis (eg. the capital gains and losses provisions bring to account gains and losses on the disposal of a 'taxable Australian asset' rather than on Australian-sourced capital gains and losses).

21. While rules outside of Subdivision 115-C allow some non-resident beneficiaries of resident trusts to disregard some trust capital gains, this is based on the concept of TAP rather than the source concept in Division 6 of Part III of the ITAA 1936. For example, section 855-40 disregards a capital gain made by a foreign-resident beneficiary of a fixed trust that is attributable to a CGT event happening to an asset (or interest in an asset) which is not TAP, and provides an equivalent treatment to the trustee.¹¹

22. It is noted that the source concept is relevant to the application of section 99D of the ITAA 1936, which in some cases can provide a non-resident beneficiary with a refund of tax paid by the trustee under sections 99 or 99A of the ITAA 1936 on income from non-Australian sources. Section 99D of the ITAA 1936 could potentially apply to a distribution of trust income¹² attributable to a foreign source.¹³ Importantly, any entitlement under subsection 99D(1) of the ITAA 1936 is subject to the discretion of the Commissioner under subsection 99D(2) of the ITAA 1936 to refuse a refund where there was a purpose of enabling the beneficiary to obtain the refund of tax. The Commissioner would carefully consider the requirements of subsection 99D(1) and the operation of subsection 99D(2) of the ITAA 1936 in a case where a non-resident beneficiary seeks a refund under section 99D of the ITAA 1936 in respect of a distribution which the beneficiary asserts is attributable to a capital gain.

¹¹ Subsection 855-40(3).

¹² See subsection 99D(1), including paragraph 99D(1)(c), of the ITAA 1936.

¹³ See subsection 99D(1), including subparagraph 99D(1)(e)(i), of the ITAA 1936.

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References

Previous draft:

TD 2019/D7

Related Rulings/Determinations:

TD 2022/13; TR 2006/10

Legislative references:

- ITAA 1936 Pt III Div 6
- ITAA 1936 Pt III Div 6E
- ITAA 1936 95(1)
- ITAA 1936 95AAB
- ITAA 1936 95AAC
- ITAA 1936 98
- ITAA 1936 98(2)(e)
- ITAA 1936 98A(1)
- ITAA 1936 98A(1)(b)
- ITAA 1936 98A(2)
- ITAA 1936 98(2A)
- ITAA 1936 98(2A)(d)
- ITAA 1936 99
- ITAA 1936 99A
- ITAA 1936 99D
- ITAA 1936 99D(1)
- ITAA 1936 99D(1)(c)
- ITAA 1936 99D(1)(e)(i)
- ITAA 1936 99D(2)
- ITAA 1997 6-10(5)(a)

- ITAA 1997 6-10(5)(b)
- ITAA 1997 102-5
- ITAA 1997 102-5(1)
- ITAA 1997 Subdiv 115-C
- ITAA 1997 115-215
- ITAA 1997 115-220
- ITAA 1997 115-220(2)
- ITAA 1997 115-220(3)
- ITAA 1997 115-222
- ITAA 1997 115-227
- ITAA 1997 115-228
- ITAA 1997 855-15
- ITAA 1997 855-40
- ITAA 1997 855-40(3)

Cases relied on:

Peter Greensill Family Co Pty Ltd
(Trustee) v Commissioner of Taxation
[2021] FCAFC 99; 285 FCR 410

Other references:

- Explanatory Memorandum to the
Income Tax Assessment Bill 1996
and Income Tax (Consequential
Amendments) Bill 1996

ATO references

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