


TR 93/10A - Addendum - Income tax: whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax

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Addendum

Taxation Ruling

Income tax: whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax

This Addendum amends Taxation Ruling TR 93/10 to reflect the following:

- (a) the repeal of inoperative provisions that were rewritten into Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (PAYG withholding) for the 2000-01 and subsequent years of income;
- (b) the introduction of withholding tax on royalties;
- (c) the introduction of Part IIB of the *Taxation Administration Act 1953* (Running Balance Accounts, Application of Payments and Credits, and Related Matters); and
- (d) the repeal of Division 18 of Part III of the *Income Tax Assessment Act 1936* (Credits in respect of foreign tax) and introduction of Division 770 of the *Income Tax Assessment Act 1997* (Foreign income tax offsets).

TR 93/10 is amended as follows:

1. Paragraph 1

- (a) Omit 'section 221YS of the *Income Tax Assessment Act 1936*'; substitute 'section 18-30 in Schedule 1 to the *Tax Administration Act 1953* (TAA)'.
(b) Omit 'dividend or interest' (where occurring); substitute 'dividend, interest or royalty'.

2. Paragraph 2

Omit the paragraph; substitute;

2. The Ruling does not apply to:
 - distributions of income to resident unitholders of non-resident public unit trusts which are treated as companies under Division 6B or 6C of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - trust income which is subject to the transferor trust measures under Division 6AAA of Part III of the ITAA 1936;
 - trust income which is subject to the foreign investment fund measures under Part XI of the ITAA 1936; or
 - a resident beneficiary's entitlement to a foreign income tax offset under Division 770 of the *Income Tax Assessment Act 1997*.

3. Paragraph 3

Omit 'section 221YS'; substitute 'section 18-30 in Schedule 1 to the TAA'.

4. Paragraph 4

Omit the paragraph; substitute:

4. The credit is allocated or applied as set out in Division 3 of Part IIB of the TAA. So much of the credit that is not allocated or applied is refunded to the beneficiary under Division 3A of Part IIB of the TAA.

5. Subparagraph 6(b)

Omit 'dividend and interest'; substitute 'dividend, interest and royalty'.

6. Paragraph 8

Omit the paragraph; substitute:

8. Generally, an unfranked dividend, interest or royalty paid from Australia is subject to Australian withholding tax under Division 11A of the ITAA 1936 if it is derived by a non-resident (section 128B of the ITAA 1936). A resident is not liable to Australian withholding tax except where subsections 128B(2A) or (2C) of the ITAA 1936 apply (interest or royalty income derived by a resident in carrying on a business through a permanent establishment outside Australia). Subsections 128B(2A) and (2C) of the ITAA 1936, however, do not apply to trust income derived by a beneficiary of a non-resident trust estate.

7. Paragraph 9

Omit the paragraph; substitute:

9. Thus, a dividend, interest or royalty paid to a non-resident trustee (that is, the trustee of a non-resident trust estate) is not subject to Australian withholding tax if the beneficiary presently entitled to that dividend, interest or royalty is a resident. This is because, for the purposes of Division 11A of the ITAA 1936, subsection 128A(3) of the ITAA 1936 deems the beneficiary to have derived that dividend, interest or royalty at the time of present entitlement and ensures that this income retains the character of a dividend, interest or royalty when the trust income is distributed to the beneficiary.

8. Paragraph 10

Omit the paragraph; substitute:

10. Australian withholding tax need not be withheld from a payment of a dividend, interest or royalty if the tax is not payable on that dividend, interest or royalty (section 12-300 in Schedule 1 to the TAA). However, in practice, an entity paying an unfranked dividend, interest or royalty to a non-resident trustee is generally not aware of the present entitlement of a resident beneficiary, or beneficiaries, of the trust to that income of the trust estate and that such a payment is not subject to withholding tax. That entity remains obliged to withhold an amount from that dividend, interest or royalty (sections 12-210, 12-245 and 12-280 in Schedule 1 to the TAA).

9. Paragraph 11

Omit 'dividend or interest'; substitute 'dividend, interest or royalty'.

10. Paragraph 12

Omit the paragraph; substitute:

12. In these circumstances, the beneficiary is accepted as entitled to a credit for that amount of Australian withholding tax under section 18-30 in Schedule 1 to the TAA. The credit is to be allocated and applied as set out in Division 3 of Part IIB of the TAA.

11. Paragraph 13

Omit '1991-92 income year'; substitute '2001-02 income year'.

12. Paragraph 15

Omit 'against his income tax liability for the year'.

13. Paragraph 16

Omit the paragraph; substitute:

16. If the credit exceeds the amount that is allocated and applied under Division 3 of Part IIB of the TAA, any excess amount will be refunded to Ben Fischer.

14. Legislative References

Omit the legislative references; substitute:

- ITAA 1936 Pt III Div 11A
- ITAA 1936 128B
- ITAA 1936 128B(2A)
- ITAA 1936 128B(2C)
- ITAA 1936 128B(3)
- TAA 1953 Pt IIB Div 3
- TAA 1953 Pt IIB Div 3A
- TAA 1953 Sch 1 12-300
- TAA 1953 Sch 1 12-210
- TAA 1953 Sch 1 12-245
- TAA 1953 Sch 1 12-280
- TAA 1953 Sch 1 18-30

This addendum applies on and from its date of issue, 7 July 2010.

Commissioner of Taxation

7 July 2010

ATO references

NO: 1-200EUUF

ISSN: 1039-0731

ATOlaw topic: Income Tax – Assessable income – interest, dividend and royalty – Australian sourced
Income Tax – Tax offsets, credits and benefits – credits for Australian withholding tax