


# ***LCG 2015/D13 - Attribution Managed Investment Trusts: withholding in respect of 'fund payments'***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *16 December 2015*



## Attribution Managed Investment Trusts: withholding in respect of ‘fund payments’

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### **Relying on this draft Guideline**

This draft Law Companion Guideline describes how the ATO proposes to apply the law in Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015 when it comes into effect. If you rely on this draft Guideline in good faith before it is finalised, and the law is enacted as introduced, you will not have to pay any underpaid tax, penalties or interest in respect of matters it covers if it does not correctly state how a relevant provision applies to you.

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### **What this draft Guideline is about**

1. This draft Guideline explains changes that have been made to the managed investment trust withholding (MIT withholding) rules contained in Subdivision 840-M of the *Income Tax Assessment Act 1997* (ITAA 1997) and Division 12 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)<sup>1</sup> for Attribution Managed Investment Trusts (AMITs<sup>2</sup>) applying to fund payments to accompany the introduction of an attribution regime for certain MITs. Draft Law Companion Guideline LCG 2015/D12 *Attribution Managed Investment Trusts: dividend, interest and royalty withholding* explains the modifications that have been made to the withholding rules for dividends, interest and royalties insofar as they apply to MITs.

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<sup>1</sup> All legislative references in this draft Guideline are to Schedule 1 to the TAA as proposed to be amended by the Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015, unless context otherwise dictates.

<sup>2</sup> An AMIT is a managed investment trust that has elected in to the attribution regime for the taxation of MITs contained in Division 276 of the ITAA 1997.

### **Date of effect**

2. It is proposed that this draft Guideline will be finalised as a public ruling, effective for those who rely on it in good faith from when the Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015 (the Bill) comes into effect. If the Bill is enacted as introduced, this will be for assessments for income years starting on or after:

- 1 July 2016, or
- if the trustee has made an irrevocable choice to apply the new tax system for its 2015-16 income year which starts on or after 1 July 2015 – 1 July 2015.

### **Managed investment trust withholding**

3. A liability to withholding tax in relation to ‘fund payments’<sup>3</sup> flowing to a non-resident arises under Subdivision 840-M of the ITAA 1997. A corresponding obligation to withhold is imposed on the payer under Subdivision 12-H (which may be a MIT, or an Australian custodian or other entity).

### **Withholding MITs**

4. The MIT withholding rules apply to ‘withholding MITs’.<sup>4</sup> A ‘withholding MIT’ is, broadly, a MIT<sup>5</sup> or AMIT which carries out in Australia a substantial proportion of its investment management activities in relation to certain Australian assets, including assets situated in Australia and securities listed on an approved Australian stock exchange.<sup>6</sup>

5. Withholding MITs that are *not* AMITs will continue to apply Subdivision 840-M of the ITAA 1997 and Subdivision 12-H in respect to their withholding tax obligations in relation to ‘fund payments’ as defined in section 12-405. Withholding MITs that *are* AMITs will apply Subdivision 840-M of the ITAA 1997 and Subdivision 12-H as modified by Subdivision 12-A. For example, the definition of ‘fund payment’ relevant for AMITs that are withholding MITs is now found in section 12A-110.

### **Subdivision 840-M of the ITAA 1997**

6. One of the issues that faced MITs making payments to foreign investors was that the MIT may not have known whether those payments fell within the withholding rules. Where the foreign recipient of the fund payment (or amount attributable to the fund payment) was a beneficiary in the capacity of trustee of another trust with no presently entitled beneficiaries, or where the ultimate beneficial recipient of the fund payment was a resident, the payment would fall outside the withholding rules. In such a situation, there would generally<sup>7</sup> be no liability on the recipient to MIT withholding tax. Instead, different taxation provisions may have applied in respect of those payments to the MIT itself and its members at higher rates of taxation. However the MIT might have had no way of knowing whether the facts were such that the withholding rules or the different taxation provisions applied.

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<sup>3</sup> Sections 12-405 and 12A-110.

<sup>4</sup> References to a MIT in Subdivisions 840-M of the ITAA 1997 and 12-H have been changed to a withholding MIT.

<sup>5</sup> The definition of a MIT has been moved from Schedule 1 to the TAA 1953 (the main section being 12-400) to Subdivision 275-A of the ITAA 1997 (section 275-10 being equivalent to 12-400). Accordingly, sections 12-400 to 12-404 have been repealed. A withholding MIT must be a MIT under paragraphs 275-10(1)(a) or (2)(b) of the ITAA 1997. The former covers MITs under the ordinary rules, the latter covers a trust that, apart from temporary circumstances outside the control of the trustee, would be a MIT under the ordinary rules.

<sup>6</sup> Section 12-383.

<sup>7</sup> Special rules apply to certain foreign pension funds.

7. In order to improve certainty for withholding MITs that are AMITs and their investors, Subdivision 840-M of the ITAA 1997 now operates so that fund payments<sup>8</sup> to foreign resident recipients will be dealt with via the withholding tax regime<sup>9</sup> but will also be taxable to a resident in the event the fund payment flows back onshore.

8. Under these rules, the liability to MIT withholding tax falls on the foreign resident who receives a fund payment (from a MIT) or an amount attributable to a fund payment (from a custodian), or is presently entitled to trust income which is attributable to a fund payment (from an interposed trust, whether resident or non-resident). If there is no liability to MIT withholding tax (such as where the payment is made to an Australian permanent establishment of a non-resident), there is no obligation on the MIT, custodian or other interposed trust to withhold from the payment.

### **Foreign entities that are trustees**

9. Where a fund payment (or a payment attributable to a fund payment) is made to a foreign resident by an AMIT, custodian or interposed trust, there will be a liability to MIT withholding tax.<sup>10</sup> As a result of subsection 840-805(4D) of the ITAA 1997, this is whether or not the foreign entity receiving the payment from the AMIT is receiving it in the capacity of trustee of a trust. For AMITs, subsection 840-805(4D) effectively extends the treatment provided to recipients who are foreign pension funds in section 840-805(4A) to other foreign trustees.

10. A beneficiary of a trust subject to subsection 840-805(4D) of the ITAA 1997 may be liable to MIT withholding if they are presently entitled to a share of the income or capital of the trust that is reasonably attributable to the fund payment. In working out the amount of their liability, subsection 840-805(4E) of the ITAA 1997 allows the beneficiary to disregard the part on which the trustee has paid tax because of subsection 840-805(4D).<sup>11</sup>

### **Example 1**

11. *The Dakin Trust is an AMIT that is also a withholding MIT. It makes an actual payment that is a fund payment for an income year to foreign member X who receives the payment in its capacity as a trustee of a trust.*

12. *As a result of subsection 840-805(4D) of the ITAA 1997, foreign member X is liable to MIT withholding tax in respect of the payment received.*

13. *The Dakin AMIT has an obligation to withhold from the payment under Subdivision 12-H.*

### **NANE treatment**

14. Under subsection 840-815(1) of the ITAA 1997, an amount that is subject to withholding tax is non-assessable non-exempt income (NANE income) of a person. This ensures that withholding tax is a final tax for most foreign investors into MITs. However, under subsection 840-815(2), if an Australian resident directly or indirectly receives an amount on which MIT withholding tax is payable because of section 840-805(4D) of the ITAA 1997, the amount will not be NANE income of the resident. This ensures that Australian residents will continue to be subject to tax in respect of such income at appropriate marginal rates.

<sup>8</sup> Special rules apply in relation to permanent establishments and carried interest payments.

<sup>9</sup> Section 840-805(4D) and (4E).

<sup>10</sup> No liability to withholding tax arises in respect of an amount received by the foreign entity through an Australian permanent establishment or to the extent the fund payment part is related to a payment in respect of carried interests.

<sup>11</sup> See also the Explanatory Memorandum to the Bill at paragraphs 5.65 and 5.66.

### **Example 2**

15. Assume the same facts as Example 1, except that the amount which is subject to MIT withholding tax is on-paid by foreign member X to Cooling Co, an Australian resident company. The amount is not NANE income of Cooling Co.

16. Cooling Co will include the amount in its assessable income. Cooling Co may be entitled to a credit in respect of any withholding tax borne by it.<sup>12</sup>

### **Subdivision 12A-B – AMITs**

17. Subdivision 12A-B modifies the operation of the Subdivision 12-H withholding rules for AMITs that are withholding MITs. These modifications ensure that the withholding rules dovetail appropriately with the attribution taxation regime for AMITs.

18. Under the attribution regime for AMITs<sup>13</sup>, amounts of ‘determined trust components’ are worked out by the AMIT and attributed to its members on a fair and reasonable basis.<sup>14</sup> Determined trust components may include components of the AMIT’s assessable income (net of relevant deductions<sup>15</sup>), exempt income, NANE income and tax offsets.

19. The amounts so attributed to members are called ‘determined member components’. They are reflected in a relevant AMMA statement, but need not be actually paid to those members. Relevantly, amongst other things, determined member components may include amounts of the AMIT’s dividends, interest and royalties.<sup>16</sup>

20. In particular, the modified withholding rules are intended to accommodate scenarios where the amount of determined trust components attributed to members for an income year exceeds the actual payments made to members by the AMIT. The rules are broadly intended to operate such that the withholding liability/obligation that can arise in respect of a foreign resident member is based on the member’s share of the AMITs total determined member components of a character relating to assessable income, less excluded components.

21. A key point is that different rules apply to ‘actual payments’ (including present entitlements and other constructive payments covered by section 11-5), and ‘deemed payments’ which arise under section 12A-205 when the AMIT issues AMMA statements<sup>17</sup> to its members. Whereas Subdivision 12-H imposes obligations on payers to withhold in relation to actual payments (as is always the case for MITs that are not AMITs), that Subdivision has no work to do in relation to deemed payments made by an AMIT. Instead, the making of deemed payments give rise to an obligation to pay an amount to the Commissioner under Subdivision 12A-C.

### **Fund payments**

22. Section 12A-110 defines what is meant by a fund payment for AMITs and how fund payments are calculated.

<sup>12</sup> Taxation Ruling TR 93/10 *Income tax: whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax* explains when an amount of withholding tax may be borne by a resident investor.

<sup>13</sup> Division 276 of the ITAA 1997.

<sup>14</sup> See Draft Law Companion Guideline LCG 2015/D7 *Attribution Managed Investment Trusts: attribution on a ‘fair and reasonable’ basis* for more information about this requirement.

<sup>15</sup> See Draft Law Companion Guideline LCG 2015/D8 *Attribution Managed Investment Trusts: the rules for working out trust components - allocation of deductions* for more information about the deduction allocation rules.

<sup>16</sup> Draft Law Companion Guideline LCG 2015/D6 *Attribution Managed Investment Trusts: character flow through for AMITs* provides a general explanation of how amounts so attributed are treated in the hands of the member.

<sup>17</sup> An AMIT member annual statement.

23. The overall operation of the section is broadly consistent with the operation of subsection 12-405(1).

24. For an AMIT, its total fund payments should as near as practicable, equal:<sup>18</sup>

- the sum of the determined member components of a character relating to assessable income (assuming that any capital gains from taxable Australian property which have been or would be discounted by the AMIT trustee are double the actual amount)<sup>19</sup>

*less*

- components of the following characters (excluded components):
- capital gains (discount and non-discount) relating to assets that are not taxable Australian property
- dividends, interest or royalties, subject to or exempted from a requirement to withhold under Subdivision 12-F
- foreign source ordinary or statutory income, and
- a character specified in a legislative instrument made under subsection 12A-110(4)

*plus*

- the total of each capital loss of the AMIT from a CGT event that happens in relation to CGT assets that are not taxable Australian property.

### ***Deemed payments – withholding MITs that are AMITs***

25. Under the attribution rules, AMITs can attribute the trust's determined trust components of a character relating to assessable income to members without having to make the member entitled to income of the trust. Therefore, in order to ensure that the withholding tax liability of foreign members of an AMIT (or custodian/other interposed entity) is not inappropriately deferred where no actual payment occurs, the concept of a 'deemed payment' has been introduced for withholding MITs that are AMITs.<sup>20</sup>

26. At the time the AMIT gives a member (referred to as the 'first recipient') an AMMA statement, the trustee of the AMIT is taken for the purposes of Subdivision 840-M of the ITAA 1997 and Part 2-5<sup>21</sup> to have made a payment (a 'deemed payment') to the member. The amount of this deemed payment is the member's share of the total determined trust components of a character relating to assessable income *less* any pre-AMMA actual AMIT dividend, interest and royalty payments or fund payments.<sup>22</sup>

27. 'Pre-AMMA actual payment' is defined in section 12A-210(2) to be an actual payment that is made before the issue of the AMMA statement and is related to the same member components.

### ***Example 3***

28. *Amy is a foreign resident member of the Docklands AMIT which is a withholding MIT. There are 100 members of the Docklands AMIT who each hold the same number of*

<sup>18</sup> Subsection 12A-110(3)

<sup>19</sup> As a consequence of step 2 in the method statement in subsection 12A-110(5).

<sup>20</sup> Section 12A-205.

<sup>21</sup> The Pay As You Go Withholding rules.

<sup>22</sup> Subsection 12A-205(2).

units of the same class carrying equal entitlements to income and capital. The AMITs total determined member components of a character relating to assessable income are:

<i>TAP capital gains (non-discount)</i>	<i>\$10,000</i>
<i>Non-TAP Capital gains (non-discount)</i>	<i>\$20,000</i>
<i>Interest</i>	<i>\$10,000</i>
<i>Other Australian sourced income</i>	<i>\$10,000</i>
<i>Total</i>	<i>\$50,000</i>

29. There are no pre-AMMA actual payments made for the income year. The amount of the deemed payment taken to have been made to Amy when she receives an AMMA statement is (consistent with what is advised in that statement) \$500 ( $\$50,000 / 100$ ). The amount of any fund payment this gives rise to is worked out under subsection 12A-110(5) (see Example 5).

#### Example 4

30. Assume the same facts as Example 3, but in this case, the AMIT made a fund payment of \$20,000 prior to the issue of the AMMA. Because the \$20,000 payment relates to the same member components taken into account in determining the deemed payment, it is a pre-AMMA actual payment. Amy's 'deemed payment' is \$300 ( $(\$50,000 - \$20,000) / 100$ ).

#### Actual and deemed payments

31. Both actual and deemed payments made by an AMIT are fund payments – the amount of which is worked out according to the formula in subsection 12A-110(5).

32. In determining the amount of a fund payment that arises from an actual or deemed payment, the AMIT trustee must take into account the expected amount of the determined member components of assessable income (excluding components of specified characters<sup>23</sup>), the total of each capital loss in relation to non-taxable Australian property, the discount component of discounted capital gains, as well as any earlier (or later) fund payments made (or expected to be made) in relation to the income year.

#### Example 5

33. Assume the same facts as Example 3. Assume further that the Docklands AMIT intends to make no actual payments in respect of that year.

34. Applying the formula in subsection 12A-110, starting with the deemed payment of \$500, it is reduced by the \$200 that is attributable to non-TAP capital gains, and by the \$100 attributable to interest (**Step 1**). In this example, no further adjustments arise under the remaining steps.

35. The \$500 deemed payment made to Amy by the Docklands AMIT is therefore a \$200 fund payment, attributable to the TAP capital gain and other Australian income she was attributed by the Docklands AMIT.

<sup>23</sup> The excluded components are discount and non-discount capital gains from non-taxable Australian property, dividends, interest and royalties that are subject to, or exempted from, a requirement to withhold under Subdivision 12-F and foreign source income: subsection 12A-110(3).



### Example 6

36. The Collins Street AMIT is a withholding MIT. It has 20 members, each holding units in the trust belonging to the same class and carrying equal rights to income and capital.

37. The AMITs total determined trust components of a character relating to assessable income for the income year is:

TAP capital gains (non-discount)	\$30,000
Non-TAP capital gains (non-discount)	\$20,000
Interest	\$10,000
Other Australian sourced income	\$10,000
Total	\$70,000

38. At the time the AMMA statements are issued to the members of the AMIT, the trust has not made any pre-AMMA actual payments for the income year.

39. The amount of the total deemed payment relating to determined member components of an assessable income character is \$70,000.

40. Applying the method statement in subsection 12A-110(5):

**Step 1** – reduce the deemed payment by so much as is attributable to excluded components

$$\begin{aligned} & \$70,000 - \$30,000 \text{ (non-TAP capital gains \$20,000, interest \$10,000)} \\ & = \$40,000 \end{aligned}$$

**Step 2** – Work out what is reasonable to expect the total assessment income less excluded components plus non-TAP capital losses to be (subsection 12A-110(3))

$$= \$40,000$$

**Step 3** – determine the fund payment

Having regard to the object of the section and that no pre-AMMA actual payments had been made, the fund payment is \$40,000.

41. For the purposes of Subdivision 12A-C and Subdivision 840-M of the ITAA 1997, treat the Collins Street AMIT as having made a fund payment equal to \$2,000 per member (\$40,000 / 20).

### Example 7

42. The Star AMIT is a withholding MIT that has made no pre-AMMA actual payments by the time it issues the AMMA statements for the income year. The total of all determined member components of the Star AMITs members is \$1M which is all of the character of discounted TAP capital gains. The AMIT has 100 members each with equal unit holdings. Shiny P Co is a foreign resident member of AMIT.

43. Applying the formula in section 12A-110, the total amount of the deemed payments made to members that are fund payments is \$2M (\$1M doubled under Step 2 of the method statement).

44. Shiny P Co will be treated as having been paid a deemed payment that is a fund payment of \$20,000 by the Star AMIT in accordance with section 12A-205 (\$2M / 100).

***A fund payment may be more than the cash ‘payment’***

45. The new definition of fund payment makes it clear that the amount of the payment that is treated as a ‘fund payment’ can exceed the amount of any relevant actual payment to the member.

***Example 8***

46. *The Level 16 AMIT is a withholding MIT with 1,000 members each holding interests belonging to the same class carrying equal entitlements to income and capital. The trustee makes four cash distributions of an assessable income character to members in relation to the 2016-17 income year as follows:*

- an interim cash distribution of \$10,000 on 31 October 2016
- an interim cash distribution of \$10,000 on 31 January 2017
- an interim cash distribution of \$10,000 on 30 April 2017, and
- a final cash distribution of \$10,000 on 31 August 2017.

47. *On 30 September 2017, the Level 16 AMIT gave AMMA statements for the 2016-17 income year to its members. The total determined member components of a character relating to assessable income for the income year for all members is \$48,000.*

48. *There are no excluded components.*

49. *The trustee of the Level 16 AMIT had at all times expected that the total determined member components of a character relating to assessable income less excluded components for the income year would be \$48,000. The trustee also expected to make the four equal quarterly distributions.*

50. *Applying the method statement in subsection 12A-110, the Level 16 AMIT will have made a fund payment to each member in respect of each cash distribution worked out as follows:*

- *in respect of the actual payment of \$10,000 on 31 October 2016, the trustee worked out a fund payment amount of \$12,000*
- *in respect of the actual payment of \$10,000 on 31 January 2017, the trustee worked out a fund payment amount of \$12,000*
- *in respect of the actual payment of \$10,000 on 30 April 2017, the trustee worked out a fund payment amount of \$12,000, and*
- *in respect of the actual payment of \$10,000 on 31 August 2017, the trustee worked out a fund payment amount of \$12,000.*

51. *Due to these prior actual payments and the earlier fund payments they gave rise to, the issue of AMMA statements gave rise to a deemed payment of nil.<sup>24</sup>*

***Post-AMMA actual payments are not fund payments***

52. A payment that is attributable to the same member component that gave rise to a deemed payment on issue of an AMMA statement and is made at or after the time the AMMA statement issues is called a ‘post-AMMA actual payment’ (see subsection 12A-210(1)). A post-AMMA actual payment is not treated as a fund payment under subsection 12A-110(8). As such, no withholding obligation arises in relation to a post-AMMA actual payment. This ensures there can be no effective double taxation of amounts which are attributable to the relevant determined trust components of a character relating to assessable income.

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<sup>24</sup> See in particular subparagraph 12A-205(2)(b)(iv) in working out the amount of this deemed payment.

#### **Example 9**

53. Assume the same facts as Example 4. After the Docklands AMIT issues AMMA statements for the income year, the trustee makes a distribution of \$10,000 to its members representing a distribution of Docklands AMIT's income with respect to that year. Each member receives \$100 (\$10,000 / 100). This payment is a post-AMMA actual payment. As such, it is by definition not a fund payment and does not give rise to withholding obligations.<sup>25</sup>

#### **Example 10**

54. Assume the same facts as in Example 7.

55. The trustee of Star AMIT will be required to pay an amount to the Commissioner in accordance with section 12A-215 in respect of the \$20,000 fund payment to Shiny P Co equal to the amount that the trustee would have been required to withhold under Subdivision 12-H if the \$20,000 deemed payment that is a fund payment (that is, the amount increased as a result of the method statement in subsection 12A-110(5)) had instead been an actual payment.

#### **Withholding in respect of fund payments**

56. Where the fund payment made by an AMIT that is a withholding MIT is a pre-AMMA actual payment made 'to an entity covered by section 12-410<sup>26</sup>, the AMIT trustee will withhold from the payment in accordance with the rules in Subdivision 12-H (see particularly section 12-385).

57. Where a deemed payment that arises upon the issue of an AMMA statement is a fund payment made by the AMIT to an entity covered by section 12-410, section 12-385 does not impose an obligation to withhold. This is because of subsection 12A-105(1). However, pursuant to section 12A-215, the AMIT trustee will be required to pay an amount to the Commissioner which is equal to the amount that the trustee would have been required to withhold under section 12-385 if the deemed payment had been an actual payment.

58. For the purposes of Division 16 (payer's obligations and rights) where a trustee is required to pay an amount to the Commissioner under section 12A-105, the trustee is treated as being required to withhold the amount under Division 12. Further, where payment is made to the Commissioner, the trustee is treated as having withheld the amount. This result is achieved by section 16-7.

#### **Example 11**

59. The PGI AMIT is a withholding MIT. On issue of an AMMA statement, the AMIT is deemed to have made a payment that is a fund payment of \$5,000 to Offshore Co. Offshore Co's address for payment is in an EOI country. Offshore Co has a liability to MIT withholding tax at the rate of 15%.

<sup>25</sup> The payment will however need to be taken into account in working out the annual cost base adjustment needed under section 104-107B of the ITAA 1997. See Draft Law Companion Guideline LCG 2015/D11 *Attribution Managed Investment Trusts: annual cost base adjustments for units in an AMIT and associated transitional rules* for a discussion of the MIT cost base adjustment rules.

<sup>26</sup> An entity is covered by section 12-410 if the entity, according to a record that the payer possesses or is kept on the payer's behalf, has an address outside Australia. An entity is also covered by the section if the payer is authorised to make a payment to a place outside of Australia. However the concept does not include non-residents carrying on a business in Australia through a permanent establishment.

60. *Section 12-385 does not impose an obligation on the trustee of the PGI AMIT to withhold from the deemed payment under section 12-385. However, the trustee must pay an amount of \$750 ( $\$5,000 \times 15\%$ ) to the Commissioner under section 12A-215. This is the amount the trustee would have been required to withhold from the payment if it was an actual payment.*

61. *The payment must be made in accordance with the rules in Division 16.*

#### **Notice requirements**

62. Although section 12A-105 specifies that no withholding is required under Subdivision 12-H in respect of deemed payments which are fund payments, this does not affect the operation of the requirement to give notices imposed on AMITs under section 12-395 (see subsection 12A-105(4)). An AMIT needs to fulfil the notice requirements in relation to both actual and deemed payments if they are made to a recipient entity not covered by section 12-410.

#### **Example 12**

63. *The Compass AMIT is a withholding MIT. It makes a deemed payment that is a fund payment of \$20,000 to Smart Co, an Australian resident entity not covered by section 12-410. An amount would have been required to have been withheld by the trustee of the Compass AMIT from the payment if the amount had been paid to an entity covered by section 12-410. Accordingly the trustee must comply with the notice requirements in section 12-395 in relation to the deemed payment. This means that the trustee must give to Smart Co a statement identifying, among other things, the part of the deemed payment from which withholding would have been required.*

#### **Subdivision 12A-B – custodians**

64. A number of modifications to Subdivision 12-H made by Subdivision 12A-B apply to ‘custodians’ that have received payments from an AMIT.

65. Subsection 12-390(9) clarifies that an entity is a custodian if it is carrying on a business that consists predominantly of providing custodial or depository interests pursuant to an Australian financial services licence (an AFSL). An entity is also a custodian if it is acting on behalf of an entity carrying on such a business pursuant to such a licence.

#### **Example 13**

66. *Nominee Co is an Australian entity wholly owned by Custodian X. Custodian X acts pursuant to an AFSL licence. Nominee Co holds investments in Big AMIT that is a withholding MIT on behalf of Custodian X. Nominee Co will be treated as a custodian for the purpose of the MIT withholding rules.*

#### **Custodians in receipt of pre-AMMA actual payments**

67. Where a custodian receives a fund payment that is a pre-AMMA payment from a withholding MIT that is an AMIT, and the payment is covered by the notice or information under section 12-395, the usual Subdivision 12-H withholding rules will apply to the custodian.

68. This means that if the custodian makes a later payment of an amount that is attributable to the fund payment, the custodian is required under section 12-390 to withhold if the payment by the custodian is to an entity covered by section 12-410.

### ***Custodians and deemed payments***

69. Subsections 12A-205(4) and (5) contain specific rules that apply to a custodian in receipt of a deemed payment from an AMIT that arises upon issue of an AMMA statement to the custodian.

70. If another entity is entitled to an amount attributable to the custodian's deemed payment from an AMIT, or would be so entitled if the AMIT had actually paid that amount to the custodian, the custodian is then deemed to have made a subsequent payment (referred to in the legislation as a 'subsequent deemed payment') to that entity.

71. For the purposes of Subdivision 840-M of the ITAA 1997 and Subdivision 12A-B, the amount of the subsequent deemed payment the custodian is deemed to have paid the other entity is equal to so much of the custodian's deemed payment from the AMIT as that entity is (or would be) so entitled to. The subsequent deemed payment is treated as attributable to the deemed payment from the AMIT to the custodian. In the case of a deemed payment to the custodian that was a fund payment, the subsequent deemed payment is treated as an amount attributable to that fund payment.

72. These provisions impose a withholding tax liability at the level of a non-resident client of a custodian on whose behalf the custodian is investing in the AMIT.

### ***Example 14***

73. *Australian Custodian holds units in the Canberra AMIT, a withholding MIT, on behalf of clients in EOI and non-EOI countries. Australian Custodian holds units in the AMIT for the following clients in the following proportions:*

- *Global Custodian A in an EOI country (50%)*
- *Global Custodian B in a non-EOI country account (40%), and*
- *Entity X in an EOI country (10%).*

74. *The clients are entitled to receive from Australian Custodian any actual payment received in those proportions.*

75. *The Canberra AMIT issues an AMMA statement to Australian Custodian. The AMIT notifies Australian Custodian under section 12-395 that it has made a deemed payment that is a fund payment of \$20,000 at the same time.*

76. *No pre-AMMA or post-AMMA actual payments are received by Australian Custodian.*

77. *Applying subsection 12A-205, Australian Custodian is deemed to have received a fund payment of \$20,000 from the trustee of the Canberra AMIT at the time the AMMA statement issued.*

78. *For the purposes of Subdivision 840-M of the ITAA 1997 and Subdivision 12A-B, Australian custodian is deemed to have made a subsequent payment of an amount that is attributable to a fund payment to:*

- *Global Custodian A of \$10,000*
- *Global Custodian B of \$8,000*
- *Entity X of \$2,000.*

79. Subsection 12A-205(7) caters for chains of custodians allowing for recognition of more than one 'subsequent deemed payment'.

### **Payments to the Commissioner**

80. Where a deemed payment that is a fund payment is made to a custodian, the custodian is not subject to withholding obligations under Subdivision 12-H in relation to any subsequent deemed payment attributable to that amount.<sup>27</sup> Instead, pursuant to section 12A-220, the custodian will be required to pay an amount to the Commissioner which is equal to the amount (if any) that the custodian would have been required to withhold under section 12-390 if the subsequent deemed payment had been an actual fund payment by the custodian and the assumptions in subsection 12A-220(3) were applied.

81. In these circumstances, for the purposes of Division 16, the custodian is treated as being required to withhold (and to have withheld) under Division 12, the amount (if any) it is in fact required to pay to the Commissioner pursuant to section 12A-220.<sup>28</sup>

### **Custodian indemnity**

82. An obligation to pay an amount to the Commissioner under section 12A-220 may arise in respect of a deemed payment made by a custodian to a recipient where nil or insufficient actual payments are made to cover the liability.

83. Subsections 12A-220(4) and (5) are relevant to this scenario and allow the custodian to recover from the recipient, as a debt, the amount the custodian has paid to the Commissioner in accordance with section 12A-220 and to set off the amount owed against debts due by the custodian to the recipient.

### **Example 15**

84. *Following on from Example 12, Australian Custodian is deemed to have made a subsequent payment of an amount that is attributable to a fund payment to:*

- *Global Custodian A of \$10,000*
- *Global Custodian B of \$8,000*
- *Entity X of \$2,000.*

85. *Because the payments are deemed payments in accordance with section 12A-205, Australian Custodian is not required to withhold from the payments. However, under section 12A-220, Australian Custodian must pay to the Commissioner the following amounts:*

- *\$1,500 ( $\$10,000 \times 15\%$ ) in respect of Global Custodian A*
- *\$2,400 ( $\$8,000 \times 30\%$ ) in respect of Global Custodian B*
- *\$300 ( $\$2,000 \times 15\%$ ) in respect of Entity X.*

86. *These are the amounts Australian Custodian would have been required to pay if the deemed payments were actual payments.*

87. *Because Australian Custodian has received no actual payment from the Canberra AMIT, it is entitled to recover the amounts paid to the Commissioner from Global Custodian A, Global Custodian B and Entity X.*

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<sup>27</sup> Section 12A-105.

<sup>28</sup> Section 16-7.

### ***Custodians in receipt of post-AMMA actual payments***

88. A custodian is not required to withhold an amount from a post-AMMA actual payment in respect of a deemed payment made to the custodian.<sup>29</sup>

### ***Notice requirements***

89. Although section 12A-105 specifies that no withholding is required under Subdivision 12-H in respect of deemed payments which are fund payments, this does not affect the operation of the requirement to give notices imposed on custodians under section 12-395.<sup>30</sup> A custodian needs to fulfil the notice requirements in relation to both actual and deemed payments attributable to fund payments if they are made to a recipient entity not covered by section 12-410.

90. A post-AMMA actual payment cannot be a fund payment. Therefore, an amount that a custodian pays which is attributable to a post-AMMA actual payment is not attributable to a fund payment for the purposes of section 12-390. Accordingly, a custodian is not required to give notice of a post-AMMA actual payment under section 12-395.

### ***Interaction with Subdivision 276-C of the ITAA 1997***

91. Section 276-115 of the ITAA 1997 contains a flow through rule which applies to custodians for the purposes of determining the taxation treatment of member components under Subdivision 276-C. It applies where a custodian is a member of the AMIT with determined member components of a particular character, and the custodian is interposed between an AMIT and a subsequent recipient (for example, a foreign resident client of the custodian) that starts to have an entitlement to an amount that is reasonably attributable to the determined components or would start to have such an entitlement if the determined trust components were an actual payment of an amount.

92. The purpose of the flow through rule is to ensure that no taxation liability arises at the level of the custodian in a situation where the AMIT attributed amounts to the custodian but the custodian has no trust law income to which the foreign resident can be made entitled. To achieve this result, section 276-115 effectively put the non-resident in the shoes of the custodian for Division 276 of the ITAA 1997 purposes.

93. Section 276-95 of the ITAA 1997 then ensures that this deeming does not result in the non-resident also having a tax liability by reason of subsection 276-80(2) of the ITAA 1997 in addition to a liability for withholding tax.

### ***Example 16***

94. *Melbourne Custodian holds units in the Happy Hour AMIT on behalf of Friday Co, an Australian resident company not acting in the capacity of trustee of a trust. Friday Co is entitled to all the income paid by Happy Hour AMIT to Melbourne Custodian.*

95. *The trustee of the Happy Hour AMIT gives Melbourne Custodian an AMMA statement for the income year which shows determined trust components of:*

<i>TAP capital gains</i>	<i>\$500</i>
<i>Non-TAP capital gains (non-discount)</i>	<i>\$200</i>
<i>Interest</i>	<i>\$300</i>
<i>Total</i>	<i>\$1,000</i>

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<sup>29</sup> Subsection 12A-105(2).

<sup>30</sup> See subsection 12A-105(4).

96. *No pre-AMMA or post-AMMA actual payments are made. The Happy Hour AMIT also notifies Melbourne Custodian under section 12-395 that \$500 of the deemed payment is a fund payment.*

97. *Because Friday Co would have been entitled to all of the payment if the determined member components were actual payments, Friday Co will be treated as the member of the Happy Hour AMIT.*

98. *Friday Co will be taxed in respect of the determined member components under section 276-80 of the ITAA 1997.*

#### **Subdivision 12A-B – other intermediary entities**

##### ***Other entities in receipt of pre-AMMA actual payments***

99. Where an entity receives a fund payment that is a pre-AMMA payment from a withholding MIT that is an AMIT covered by the notice or information requirement in section 12-395, the existing Subdivision 12-H withholding rules will apply to the entity.

100. If a foreign resident is entitled to receive (or be credited with or have otherwise dealt with on their behalf) an amount that is attributable to the fund payment received by that entity, then the entity will be required to withhold from the amount in accordance with subsection 12-390(4).

101. If a resident is entitled to receive an amount attributable to that fund payment, the entity will be required to comply with the notice requirements in section 12-395.

##### ***Other entities in receipt of deemed payments***

102. Unlike AMITs and custodians, other interposed entities are not able to make deemed payment or subsequent deemed payments to recipients in accordance with section 12A-205. This is an intentional design feature of the law because without an actual payment of an amount by the entity to a recipient, there would, in many cases, be no accurate way to determine who would otherwise be the recipient of such a payment.

103. Where other interposed entities receive a deemed payment which is a fund payment, the entity will rely on the existing provisions in Subdivision 840-M of the ITAA 1997 and Subdivision 12-H to determine their withholding obligation in respect of such amounts.

104. If the entity is able to make a foreign beneficiary presently entitled to an amount of income or capital which is reasonably attributable to a fund payment, the beneficiary will generally be liable to MIT withholding tax and the entity will be required to withhold from the payment in accordance with subsection 12-390(4). To the extent that MIT withholding tax is payable the amount will be NANE income of the entity.

105. However, if a deemed payment is made to such an entity and no beneficiary is capable of being made presently entitled to all of it, Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) will apply in respect of all or part of such amounts as is relevant.

#### ***Example 17***

106. *The Late Night Trust is a discretionary trust subject to Division 6 of Part III to the ITAA 1936. The trustee of the Late Night Trust holds units in the Accumulation AMIT, which is a withholding MIT, on behalf of 5 foreign resident objects. The trust deed defines the income of the trust as ordinary income.*



107. *Accumulation AMIT makes a deemed payment which is a fund payment to the Late Night Trust of \$1,000. It makes no pre-AMMA actual payment or post-AMMA actual payments to the Late Night Trust. The Late Night Trust has no other income.*

108. *The AMIT also issues the trustee an AMMA statement with determined trust components of an assessable income character of \$1,000.*

109. *As there is no income to which a beneficiary can be made presently entitled, the trustee is assessable in respect of the \$1,000 under Division 6 of Part III of the ITAA 1936.*

#### **TFN withholding for withholding AMITs**

110. It is not intended that payments made to foreign resident investors in respect of actual or deemed payments which are fund payments (or payments attributable to fund payments) or dividend, interest or royalties will be subject to the TFN withholding payments in Subdivision 12-E. Accordingly, paragraph 202EE(1)(c) of the ITAA 1936 has been introduced to ensure that where a payment is made to a foreign investor from which an amount has been withheld under Subdivisions 12-F or 12-H, or in respect of which an amount has been paid under Subdivision 12A-C, the foreign resident will be taken to have quoted a TFN in relation to their investment.

111. Where the payment is a post-AMMA actual payment in respect of a deemed payment from which an amount is payable under Subdivision 12A-C, the foreign resident will also be taken to have quoted their TFN in accordance with paragraph 202EE(1)(c)(ii) of the ITAA 1936.

112. However, these rules only apply in respect of foreign resident investors. Where instead a resident investor has failed to quote a TFN in relation to an investment to which Subdivision 12-E applies, the existing rules will continue to apply.

#### **AMITs that are not withholding MIT**

113. An AMIT that is not a withholding MIT in accordance with section 12-383 will not be eligible for the reduced MIT withholding tax rates on 'fund payments' made to foreign members. The AMIT and its members will determine their taxation liability in accordance with the rules in Subdivision 276-C of the ITAA 1997. These rules include section 276-105 of the ITAA 1997 which is intended to produce results that are broadly equivalent to those in sections 98(3) and (4) of the ITAA 1936. This means that where the AMIT has a foreign resident member to whom determined member components are attributed, the AMIT trustee will be assessed on the amount of the determined member components to the extent that the components are attributable to a period where the member was a foreign resident or to the extent that the component was attributable to Australian sources. The rates at which the trustee will be assessed depend on whether the member is an individual, company or trust. The member will also be taxable in respect of the determined trust components in accordance with section 276-80 of the ITAA 1997 and will be entitled to a tax offset to the extent that tax has been paid by the trustee in accordance with section 276-110 of the ITAA 1997.

114. Section 276-105 of the ITAA 1997 does not apply to an AMIT that is a withholding MIT.

## **Your comments**

115. You are invited to comment on this draft Law Companion Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

**Due date:** 29 January 2016  
**Contact officer:** Louise Andolfatto  
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**References**

ATOlaw topic(s)	Income tax ~~ Trusts ~~ Other
Legislative references	<p> TAA 1953  TAA 1953 Sch 1  TAA 1953 Sch 1 Pt 2-5  TAA 1953 Sch 1 Div 12  TAA 1953 Sch 1 Subdiv 12-A  TAA 1953 Sch 1 Subdiv 12-E  TAA 1953 Sch 1 Subdiv 12-F  TAA 1953 Sch 1 Subdiv 12-H  TAA 1953 Sch 1 12-383  TAA 1953 Sch 1 12-385  TAA 1953 Sch 1 12-390  TAA 1953 Sch 1 12-390(4)  TAA 1953 Sch 1 12-390(9)  TAA 1953 Sch 1 12-395  TAA 1953 Sch 1 12-400  TAA 1953 Sch 1 12-401  TAA 1953 Sch 1 12-402  TAA 1953 Sch 1 12-403  TAA 1953 Sch 1 12-404  TAA 1953 Sch 1 12-405  TAA 1953 Sch 1 12-405(1)  TAA 1953 Sch 1 12-410  TAA 1953 Sch 1 Subdiv 12A-B  TAA 1953 Sch 1 12A-105  TAA 1953 Sch 1 12A-105(1)  TAA 1953 Sch 1 12A-105(2)  TAA 1953 Sch 1 12A-105(4)  TAA 1953 Sch 1 12A-110  TAA 1953 Sch 1 12A-110(3)  TAA 1953 Sch 1 12A-110(4)  TAA 1953 Sch 1 12A-110(5)  TAA 1953 Sch 1 12A-110(8)  TAA 1953 Sch 1 Subdiv 12A-C  TAA 1953 Sch 1 12A-205  TAA 1953 Sch 1 12A-205(2)  TAA 1953 Sch 1 12A-205(2)(b)(iv)  TAA 1953 Sch 1 12A-205(4)  TAA 1953 Sch 1 12A-205(5)  TAA 1953 Sch 1 12A-205(7)  TAA 1953 Sch 1 12A-210(1)  TAA 1953 Sch 1 12A-210(2)  TAA 1953 Sch 1 12A-215  TAA 1953 Sch 1 12A-220  TAA 1953 Sch 1 12A-220(3)  TAA 1953 Sch 1 12A-220(4) </p>

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Other references	<p><a href="#">Explanatory Memorandum to the Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015</a></p> <p>Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015</p> <p>Taxation Ruling TR 93/10 <i>Income tax: whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax</i></p> <p>Draft Law Companion Guideline LCG 2015/D6 <i>Attribution Managed Investment Trusts: character flow through for AMITs</i></p> <p>Draft Law Companion Guideline LCG 2015/D7 <i>Attribution Managed Investment Trusts: attribution on a 'fair and reasonable' basis</i></p> <p>Draft Law Companion Guideline LCG 2015/D8 <i>Attribution Managed Investment Trusts: the rules for working out trust components - allocation of deductions</i></p> <p>Draft Law Companion Guideline LCG 2015/D11 <i>Attribution Managed Investment Trusts: annual cost base adjustments for units in an AMIT and associated transitional rules</i></p> <p>Draft Law Companion Guideline LCG 2015/D12 <i>Attribution Managed Investment Trusts: dividend, interest and royalty withholding</i></p>