TD 2022/12EC - Compendium

This cover sheet is provided for information only. It does not form part of *TD 2022/12EC - Compendium*

Public advice and guidance compendium – TD 2022/12

Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Taxation Determination TD 2019/D7 *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?*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.		
Inconsistent with policy		
1	The position taken by the Commissioner in the draft Determination is not consistent with policy. There is nothing to suggest in the Explanatory Memorandum to the Tax Laws Amendment (2011 Measures No.5) Bill 2011 (2011 EM) that the policy intent of the amendments in the Bill (2011 streaming amendments) was to broaden the scope of Australia's taxing rights in respect of capital gains by extending the taxation of non-residents to foreign-sourced capital gains.	We disagree. The removal of the source concept is a consequence of the taxation of capital gains being effectively taken out of Division 6 via Division 6E of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), which was an intended outcome of the 2011 streaming amendments (see, for example, paragraphs 2.21 and 2.26 of the 2011 EM). The Full Federal Court has confirmed that the 2011 streaming amendments cannot be construed to support a policy outcome whereby foreign-sourced capital gains are not subject to tax in the hands of foreign-resident beneficiaries (see *Peter Greensill Family Co Pty Ltd (Trustee) v Commissioner of Taxation* [2021] FCAFC 99 (*Greensill*) at [27], [76] and [77]).

Issue number	Issue raised	ATO response
Source limitation in paragraph 6-10(5)(a)		
2	The core provisions in Division 6 provide an independent and overriding confirmation of source taxation in relation to resident trust capital gains attributed to foreign beneficiaries. The draft Determination asserts that Subdivision 115-C requires foreign beneficiaries to take into account capital gains derived by a trust in calculating its net capital gains without reference to whether the trust's capital gain has an Australian source. Section 855-40 is not a comprehensive basis within the meaning of section 6-10 because it does not relate to non-fixed trusts. Further, Draft Taxation Determination TD 2019/D6 *Income tax: does Subdivision 855-A (or subsection 768-915(1)) of the Income Tax Assessment Act 1997 disregard a capital gain that a foreign-resident (or temporary-resident) beneficiary of a resident non-fixed trust makes because of subsection 115-215(3)?* expresses the view that section 855-10 is not available to foreign beneficiaries. Therefore, Subdivision 115-C should be subject to paragraph 6-10(5)(a). This is confirmed by the extrinsic materials, whose policy setting has not changed since the inception of capital gains tax (CGT), and there is nothing in the public record indicating a departure from it. In particular, subsection 6-10(5) provides that a foreign resident's assessable income includes their statutory income from all Australian sources and other statutory income that a provision includes in their assessable income on some basis other than having an Australian source. The use of the word 'basis' in paragraph 6-10(5)(b) requires that there be some explicit articulation of the basis applicable to foreign residents. Subdivision 115-C does not contain any rule that differentiates on a jurisdictional or residency basis. The absence of these rules means Subdivision 115-C gains	We disagree. The source limitation in paragraph 6-10(5)(a) is not relevant to resident capital gains attributed to foreign beneficiaries. Paragraph 6-10(5)(b) applies instead. CGT has always been levied on a taxation basis other than source. At the inception of CGT in 1986, it was clear that foreign residents were to be taxed on capital gains via reference to 'taxable Australian assets' rather than source. While the concept of taxable Australian assets has since been replaced by the concept of 'taxable Australian property' (TAP), that policy setting (that is, a basis of taxation other than source for capital gains) has not changed and neither has the public record. The enactment of section 6-10 explicitly recognised that capital gains was an example of income under paragraph 6-10(5)(b) (see the Explanatory Memorandum to the Income Tax Assessment Bill 1996 and the Income Tax (Consequential Amendments) Bill 1996 at page 44). While we agree that Subdivision 115-C does not contain a rule that differentiates on a territorial or residency basis for the purpose of determining liability, Subdivision 115-C does not determine an amount of assessable income, nor does it include an amount in assessable income. Rather, it determines an amount of capital gain that a beneficiary is taken to have for the purposes of Division 102. This capital gain is then taken into account in working out the beneficiary's own 'net capital gain'. It is the net capital gain, not the capital gain, that is the relevant 'assessable income' referred to in subsection 6-10(5), and Subdivision 115-C has not changed this (see *Greensill* at [24]). Further, a capital gain a beneficiary is taken to have under subsection 115-215(3) is not the same capital gain (nor part of the same capital gain) as the trust estate's capital gain (see *Peter Greensill Family Co Pty Ltd (trustee) v Commissioner of Taxation (No 2)* [2020] FCA 597 at [8], per Thawley J). A subsection 115-215(3) amount does not have the attributes of the trust capital gain; it does not have any characteristics except those given to it by subsections 115-215(3) and (4).

Issue number	Issue raised	ATO response
	cannot be included in a beneficiary's assessable income on some basis other than having an Australian source per paragraph 6-10(5)(b). Further, section 855-40 is not a comprehensive basis within the meaning of section 6-10, because it does not relate to non-fixed trusts and section 855-10 is not available under the view expressed in TD 2019/D6.	
Source relevant under paragraph 115-220(1)(b)		
3	The Commissioner's view that the concept of source is irrelevant in determining whether a trustee of a resident trust is assessed on an amount of trust capital gain attributed to a non-resident beneficiary is inconsistent with paragraph 115-220(1)(b). This is because, under paragraph 115-220(1)(b), section 115-220 only applies if, on the assumption that there is a share of the income of the trust to which a beneficiary of the trust is presently entitled, the trustee would be liable to be assessed (and pay tax) under section 98 of the ITAA 1936. Under section 98 of the ITAA 1936, where the beneficiary is a non-resident, a trustee is only liable to be assessed and liable to pay tax to the extent that the net income of the trust is attributable to Australian sources.	As per our response to Issue 1 of this Compendium, see *Greensill* at [27], [76] and [77]. The Commissioner's view is that the purpose of paragraph 115-220(1)(b) is to limit the operation of section 115-220 such that the section would only apply to trustees in respect of beneficiaries who have characteristics (for example, non-resident or under a legal disability) that would otherwise attract the operation of section 98 of the ITAA 1936. This view is supported by paragraph 2.98 of the 2011 EM. Present entitlement is 'assumed' for this purpose, noting that Subdivision 115-C applies to all trust capital gains included in a net capital gain taken into account in working out the trust estate's net income (subsection 115-210(1)), including in cases where no one is 'presently entitled', but may, for example, be 'specifically entitled'. 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. As stated in paragraph 14 of the final Determination, section 115-220 does not test whether the beneficiary's attributable gain satisfies the conditions in section 98 of the ITAA 1936; rather, it increases the amount assessable to the trustee under section 98 of the ITAA 1936 without regard to those conditions. This operation is made clear by subsection 115-220(3).
Division 6E of the ITAA 1936		
4	One of the arguments provided in the draft Determination as supporting the Commissioner's view regarding the relevance of the source concept is that the liabilities of a beneficiary and trustee now arise, following the 2011 streaming amendments, via sections 115-215 and 115-220 respectively, rather than	We disagree. The Full Federal Court in *Greensill* (see at [27], [76] and [77]) confirmed the views in the Determination. As stated at paragraph 17 of the final Determination, Division 6E of Part III of the ITAA 1936 prevents double taxation by ensuring capital gain amounts are

Issue number	Issue raised	ATO response
	under Division 6 of Part III of the ITAA 1936. This is achieved, in part, by the introduction of Division 6E of Part III of ITAA 1936. However, Division 6E of Part III of ITAA 1936 was not introduced to deal with source but to ensure that the streaming of capital gains and franked dividends were dealt with appropriately for income tax purposes.	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. The overall effect of the 2011 streaming amendments (which includes the introduction of Division 6E of Part III of the ITAA 1936) is that the taxation of capital gains is effectively taken out of Division 6 of Part III of the ITAA 1936, with the consequence that the source concept is no longer relevant.
Anomalous outcomes – comparable revenue and distributed accumulated gains outcomes		
5	The effect of the draft Determination can give rise to anomalies and outcomes which are unsuitable from a policy perspective, being: • capital gains taxed in circumstances where a corresponding revenue amount would not, and • distributed capital gains taxed where accumulated capital gains paid out later would not.	A difference between the tax treatment of a revenue gain and capital gain does not, of itself, suggest that the outcome is an anomaly or is unsuitable from a policy perspective. Generally, revenue and capital gains are subject to different provisions which reflect the respective policy intentions for the type of income being considered. Similarly, a difference between the tax treatment of a capital gain that is distributed in the income year in which it arises and a capital gain that is accumulated and distributed in a later income year does not of itself suggest that the outcome is an anomaly or is unsuitable from a policy perspective.
Section 99D of the ITAA 1936 – source is relevant		
6	Section 99D of the ITAA 1936 provides non-resident beneficiaries a refund of Australian tax paid by the trustee on accumulated trust amounts later paid to them, but only to the extent those trust amounts were foreign-sourced. The fact that section 99D of the ITAA 1936 provides such relief to non-residents for foreign-sourced income, which can include accumulated foreign-sourced non-TAP capital gains, is support for the notion that source is relevant to the taxation of trust capital gains.	As stated in our response to Issue 5 of this Compendium, a difference between the tax treatment of a capital gain that is distributed in the income year in which it arises and a capital gain that is accumulated and distributed in a later income year, does not of itself suggest that the outcome is unsuitable from a policy perspective. We have addressed the operation of section 99D of the ITAA 1936 at paragraph 21 of the final Determination.

Issue number	Issue raised	ATO response
Inconsistency in statement in paragraph 19 of the draft Determination		
7	It is unclear how the statement in paragraph 19 of the draft Determination (that the 'position for the 2011 and later years, is consistent with that which applies in respect of capital gains of non-residents from direct investments') reconciles with: • the view taken in TD 2019/D6 that section 855-10 is not available to foreign beneficiaries of resident trusts, and • paragraph 12 of the draft Determination.	The statement in paragraph 19 of the draft Determination that '[t]he position for the 2011 and later years is consistent with that which applies in respect of capital gains of non-residents from direct investments' should be read in the context of the previous paragraph, which discusses the relevance of the concept of source to trust capital gains post the 2011 streaming amendments. That is, similar to non-residents with capital gains from direct investments which are not assessed on the basis of source (see paragraph 6-10(5)(b)), the source concept is also not relevant to trust capital gains post the 2011 streaming amendments. There is also no inconsistency between the statement in paragraph 19 of the draft Determination and that in paragraph 12 of TD 2019/D7 (being '[t]he capital gains and losses of a resident trust are determined without regard to whether they arise from TAP'). The former statement refers to the treatment of capital gains for *non-residents* whereas the latter refers to the treatment of capital gains and losses for a *resident trust.*
8	The policy intent of the additional inclusion of trust capital gains in a beneficiary's assessable income, as discussed in the Explanatory Memorandum to the New Business Tax System (Integrity and Other Measures) Bill 1999 and the New Business Tax System (Former Subsidiary Tax Imposition) Bill 1999 (EM), is to allow the beneficiary to apply their capital losses to the trust capital gain before applying any relevant CGT discount, and is not intended to affect how a non-resident is taxed in respect of trust capital gains.	We agree that Subdivision 115-C was introduced in 1999 to allow the beneficiary to apply their capital losses to their trust capital gains before applying any relevant CGT discount (paragraphs 11.18 and 11.19 of the EM). Prior to the 2011 streaming amendments, trust capital gains were brought to tax in the hands of a beneficiary by the combined operation of Subdivision 115-C and Division 6 of Part III of the ITAA 1936. As noted in our response to Issue 4 of this Compendium, the removal of the source concept was a consequence of the taxation of capital gains being effectively taken out of Division 6 of Part III of the ITAA 1936, which was an intended outcome of the 2011 streaming amendments (see, for example, paragraphs 2.21 and 2.26 of the 2011 EM and *Greensill* at [77]).
Tax treaty interaction		
9	The Commissioner should provide guidance addressing the interaction of the view in the draft Determination with Australia's tax treaties, whether that be in the final Determination or elsewhere.	Noted. We will monitor the need for public guidance on the position under Australia's tax treaties elsewhere. Given the differences between the operation of the articles of many of Australia's treaties (which may subsequently be renegotiated or modified), it would be impractical for the final Determination to address such interactions

Issue number	Issue raised	ATO response
		in a meaningful way. The approach taken in the final Determination is to provide the Commissioner's interpretation of the relevant Australian domestic law provisions, which can then be applied by a taxpayer to their individual circumstances (including in the context of the relevant treaty).
Prospective application		
10	While we agree with and support the administrative principles set out in paragraph 11 of the draft Determination, given the continuing uncertainty surrounding these issues, these principles should extend to beyond the 2018–19 income year, until such time as greater certainty is provided through law change.	The draft Determination proposed (at paragraphs 10 and 11) that, when finalised, it would apply to transactions occurring after 30 June 2019 and that the Commissioner would generally not disturb contrary approaches taken in relation to non-TAP assets for the 2018–19 and earlier income years. This approach is no longer open to the Commissioner since the view of the law stated in the final Determinations to this draft Determination and TD 2019/D6 has been confirmed by the courts (*Greensill*). The date of effect provisions at paragraphs 10 and 11 of the final Determination have been changed as a result. The final Determination states that we will not devote compliance resources to identify arrangements for the 2018–19 and earlier income years 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 compliance activities, the Commissioner will apply the law consistently with the views expressed in this Determination.
Compliance approach – section 99D of the ITAA 1936 refund certainty		
11	If the Commissioner retains the views in this draft Determination and TD 2019/D6 but acknowledges that this is not consistent with the intended policy, the Commissioner should adopt an administrative practice to allow non-resident taxpayers to have certainty in accessing tax refunds pursuant to section 99D of the ITAA 1936.	We do not agree that the views taken in this Determination and TD 2019/D6 are inconsistent with the intended policy and have maintained these views in the final Determinations.
Insufficient analysis and examples		
12	The draft Determination does not provide sufficiently detailed analysis as to the steps taken to reach the views expressed in the Determination and does not outline any alternative views.	We consider that Examples 1 and 2 in the final Determination clearly communicate and explain the view, and that the final Determination, which can be read in conjunction with the analysis of the law by the Full Federal

Issue number	Issue raised	ATO response
	If the Commissioner maintains this view in the final Determination, detailed reasoning and several worked examples should be provided.	Court in *Greensill*, provides comprehensive coverage and is a balanced message for a wide range of users.