


TR 93/D5 - Income tax: whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax

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This document has been finalised by TR 93/10.

Draft Taxation Ruling

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

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CITCM 858

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What this Ruling is about

1. This Ruling considers whether a resident beneficiary of a non-resident trust estate is allowed a credit for Australian withholding tax under section 221YS of the *Income Tax Assessment Act 1936* where:

- the resident beneficiary receives a distribution of income that includes a dividend or interest from an Australian source; and
- Australian withholding tax had been deducted from the dividend or interest when it was paid to the non-resident trust estate.

The Ruling also sets out the procedures a resident beneficiary should follow to claim a credit for the Australian withholding tax.

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; or
- trust income which is subject to the transferor trust measures under Division 6AAA of Part III; or
- a resident beneficiary's foreign tax credit entitlement under Division 18 of Part III.

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Ruling

3. A resident beneficiary in the situation described in paragraph 1 can claim and be allowed a credit for an amount of Australian withholding tax under section 221YS if the tax:

- has been borne by the beneficiary; and
- is included in the beneficiary's assessable income in addition to the trust distribution received (i.e. the amount of distribution received is 'grossed up' by the amount of withholding tax).

4. The credit is allowed against any income tax assessed to the resident beneficiary. If the credit exceeds the tax payable by the beneficiary, the excess amount is refunded to the beneficiary.

5. For these purposes, the amount of Australian withholding tax borne by the resident beneficiary is equal to the difference between the amount of the trust distribution received and the amount of the trust distribution that would otherwise have been received if the withholding tax had not been deducted.

6. A resident beneficiary seeking a credit for the Australian withholding tax should attach a written request to the return of income that includes the trust distribution received. The written request should include a statement from the non-resident trustee showing the following details:

- (a) the total amount of income distributed to the resident beneficiary during the year of income;
- (b) the amount of Australian source dividend and interest income included in the trust distribution;
- (c) the amount of Australian withholding tax borne by the resident beneficiary; and
- (d) the name and address of each person who deducted the Australian withholding tax as referred to in item (c) above.

The credit is to be claimed by way of that written request and should not be shown anywhere on the return form itself.

Date of effect

7. This Ruling has both a past and future application (see Taxation Ruling TR 92/20). However, it does not have a past application for a taxpayer who has agreed to a settlement of a dispute to the extent that

the Ruling is less favourable than the settlement terms. To the extent that the Ruling is more favourable, it does not have a past application for the taxation years the subject of the settlement.

Explanations

Liability to Australian withholding tax

8. Generally, an unfranked dividend or interest paid from Australia is subject to Australian withholding tax under Division 11A if it is derived by a non-resident (section 128B). While Australian withholding tax may apply to interest income derived by a resident in carrying on a business through a permanent establishment outside Australia (subsection 128B(2A)), it does not apply to income derived by a resident as a beneficiary of a non-resident trust estate.

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

Deduction of withholding tax

10. Australian withholding tax need not be deducted from a payment of a dividend or interest if the tax is not payable on that dividend or interest (paragraph 221YL(3)(a)). However, in practice, a person paying an unfranked dividend or interest to a non-resident trustee is generally not aware that such a payment is not subject to withholding tax because of the present entitlement of a resident beneficiary, or beneficiaries, of the trust to that income of the trust estate. That person remains obliged to deduct withholding tax from that dividend (subsection 221YL(1)) or interest (subsection 221YL(2A)) unless an exemption from deducting withholding tax is granted by the Commissioner of Taxation under section 221YM.

Credit for withholding tax deducted

11. A resident beneficiary who receives a trust distribution from a non-resident trust estate that includes a dividend or interest from an Australian source is assessed on that income under the general trust provisions in Division 6. If Australian withholding tax had been

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deducted in the circumstances mentioned in paragraph 9 (i.e. where no liability to that withholding tax in fact exists), the resident beneficiary's assessable income should include the amount of withholding tax borne by the beneficiary.

12. In these circumstances, the beneficiary is accepted as entitled to a credit for that amount of Australian withholding tax under section 221YS. The credit is to be applied against any income tax assessed to the beneficiary (section 221YT).

Examples

Example 1

13. Facts:

- Anzet International Trust (AIT) is a non-resident trust whose investments include debt securities issued by Australian companies.
- The interest received by AIT from these Australian companies is the net amount after 10% interest withholding tax has been deducted.
- Ben Fischer is a resident beneficiary in AIT who, for the 1991-92 income year, received a cash distribution of \$6200 consisting of Australian interest (\$2700) and other income (\$3500).

14. If the Australian companies had not deducted withholding tax from the interest paid to AIT, Ben Fischer would have received a cash distribution of \$6500 instead of the \$6200. Thus, the amount of Australian withholding tax borne by Ben Fischer on the Australian interest is \$300.

15. Ben Fischer's assessable income includes the withholding tax of \$300 in addition to the trust distribution of \$6200 received (i.e. a total of \$6500). He is then allowed a credit for the withholding tax of \$300 against his income tax liability for the year.

16. If the credit exceeds Ben Fischer's tax liability, any excess amount (or the full \$300 where he has no tax liability) will be refunded to him.

Example 2

17. Facts:

- A non-resident trust, NR Property Trust, invests \$100,000 at 12% per annum with an Australian bank.
- NR Property Trust has 20,000 issued units.
- A resident unitholder, Resi Dent, holds 1,000 units or 5% of the total issued units.
- The Australian bank paid net interest of \$10,800 to NR Property Trust. That is, interest of \$12,000 less 10% withholding tax, \$1,200.
- Resi Dent receives a distribution from NR Property Trust being her share of the net Australian interest, that is, \$540 or 5% of \$10,800.
- The amount of withholding tax borne by Resi Dent is 5% of the withholding tax deducted (\$1,200), that is, \$60.

18. Resi Dent's assessable income includes the amount of the distribution received from NR Property Trust (\$540) plus the amount of withholding tax borne by her (\$60), that is, a total of \$600. She is then entitled to a credit of \$60 in respect of the withholding tax.

Commissioner of Taxation

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- ITAA 128A(3); ITAA 128B;
- ITAA 221YL; ITAA 221YM;
- ITAA 221YS; ITAA 221YT