



PS LA 2002/11 - Fixed vs non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the Income Tax Assessment Act 1936 including requests to exercise the Commissioner's discretion under subsection 272-5(3)

 This cover sheet is provided for information only. It does not form part of *PS LA 2002/11 - Fixed vs non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the Income Tax Assessment Act 1936 including requests to exercise the Commissioner's discretion under subsection 272-5(3)*

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT: Fixed vs. non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the *Income Tax Assessment Act 1936* including requests to exercise the Commissioner's discretion under subsection 272-5(3)

PURPOSE: To advise that all requests for advice involving the consideration of whether fixed entitlements exist under section 272-5 or whether a trust is a fixed trust must be escalated to the relevant business line's Trust Community of Practice member for consideration

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STATEMENT

1. Business lines will assume responsibility for administering the rules contained in Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936) - the Trust Loss measures - including the consideration of whether a beneficiary has a fixed entitlement to a share of the income and/or capital of a trust under subsection 272-5(1) and the exercise of the discretion under subsection 272-5(3). Business lines will also assume responsibility for administering the application of this fixed entitlement concept where it is used or relied on in other provisions or contexts. Responsibility for these issues previously rested with the Losses & Capital Gains Tax Centre of Expertise.

2. It is essential that all references to the fixed entitlement concept in the Trust Loss measures are interpreted and applied consistently by the Commissioner in all of the various legislative contexts in which it is used. Requests for advice received in respect of persons having fixed entitlements to income and/or capital of a trust under subsection 272-5(1) and/or exercise of the discretion under subsection 272-5(3) must therefore be escalated to the business line's Trust Community of Practice member for consideration. (A hyperlink to contacts is contained in the other references section at the conclusion of this practice statement.) This includes all requests for advice received as to whether a trust is a 'fixed trust' or a 'non-fixed trust' where reference is made to the definitions in the Trust Loss measures (sections 272-65 and 272-70 respectively). Attachment A lists legislative references where the terms 'fixed entitlements' and 'fixed trust' need to be considered.

EXPLANATION

3. The Trust Loss measures were introduced to restrict the recoupment of prior year and current year losses and debt deductions of trusts in order to prevent the transfer of the tax benefit of those losses or deductions. Different tests apply in determining whether a trust can recoup its prior and current year losses and debt deductions depending on whether the trust is a fixed trust or a non-fixed trust.
4. In order to determine whether a trust is a fixed trust, it must be established that persons have fixed entitlements to all of the income and capital of the trust (section 272-65). Subsection 272-5(1) provides that for a person to have a fixed entitlement to the income or capital of a trust, the person must have a vested and indefeasible interest in a share of the respective income or capital of the trust. If a person does not have vested and indefeasible interests in the income and/or capital of the trust, the Commissioner may exercise a discretion under subsection 272-5(3) that a person does have a fixed entitlement.
5. Consideration of whether a beneficiary has a fixed entitlement to income and/or capital of a trust and the exercise of the discretion was originally designed only for purposes of the operation of the Trust Loss measures. However, since the introduction of the Trust Loss measures, the requirement of persons to have fixed entitlements to income and/or capital has also been incorporated in other tax legislation. Attachment A lists legislative references where the terms 'fixed entitlements' and 'fixed trust' as defined in the Trust Loss measures need to be considered.
6. It is essential that section 272-5 is consistently interpreted and applied by the Commissioner in the various legislative contexts and that the discretion be exercised only in the special kinds of circumstances with which it was intended to deal. All requests for advice received where consideration has to be given to interpretation and application of section 272-5 (whether for the purpose of the Trust Loss measures or for the purpose of any other provisions in the ITAA 1936 or the *Income Tax Assessment Act 1997* that rely on that provision) are to be escalated to the relevant business line's Trust Community of Practice member for consideration.

Amendment history

| Date of amendment | Part | Comment |
|--------------------------|-----------------|--|
| 28 June 2012 | Throughout | Updated to reflect the changed responsibilities for the administration of Trust loss measures. |
| 21 May 2012 | Contact details | Updated. |
| 6 August 2008 | Contact details | Updated. |

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| Subject references | deemed fixed entitlement; fixed entitlement; fixed trust; non-fixed trust; trust losses; vested and indefeasible interest |
| Legislative references | ITAA 1936 Sch 2F ITAA 1936 Sch 2F 272-5 ITAA 1936 Sch 2F 272-65 ITAA 1936 Sch 2F 272-70 ITAA 1936 Div 3 ITAA 1936 Div 6D ITAA 1936 Part IIIAA Div 1A ITAA 1997 Subdiv 104-E ITAA 1997 Subdiv 115-A ITAA 1997 Div 116 ITAA 1997 Subdiv 118-G ITAA 1997 Subdiv 124-M ITAA 1997 Subdiv 165-B ITAA 1997 Subdiv 165-F ITAA 1997 Subdiv 170-D ITAA 1997 Div 247 ITAA 1997 Div 703 ITAA 1997 Subdiv 707-A ITAA 1997 Subdiv 707-C ITAA 1997 Subdiv 713-A ITAA 1997 Subdiv 719-B ITAA 1997 Subdiv 725-A ITAA 1997 Subdiv 727-A ITAA 1997 Subdiv 727-E ITAA 1997 Subdiv 855-A ANTS (GST) Reg 1999 Subdiv 48-A TAA 1953 Subdiv 45-I |
| Related public rulings | |
| Related practice statements | |
| Case references | |
| Other references | Trust Community of Practice members |
| File references | 2002/006208 |
| Date issued | 9 May 2002 |
| Date of effect | 19 September 2001 |
| Other Business Lines consulted | |

ATTACHMENT A

NB The provisions listed in this Attachment are relevant to legislation enacted at the time of issue of this Law Administration Practice Statement; should further legislation be enacted that also refers to Schedule 2F re fixed entitlements/exercise of the discretion etc, then this Law Administration Practice Statement will also apply to that legislation.

Income Tax Assessment Act 1997

| DIVISION/ SUBDIVISION | SECTION | TOPIC |
|--------------------------|--------------------|---|
| 104-E | 104-70 104-72 | Capital gains tax event E4 and trusts |
| | | |
| 115-A | 115-50 | Discount capital gains |
| | | |
| Division 116 | 116-30 116-35 | Capital proceeds – market value substitution rule |
| | | |
| 118-G | 118-510 | Capital gains tax and venture capital |
| | | |
| 124-M | 124-781 124-810 | Capital gains tax and scrip-for-scrip rollover |
| | | |
| 165-B | 165-45 | Working out a company's taxable income |
| | | |
| 165-F | All sections | Company tax loss - Ownership of a company by non-fixed trusts |
| | | |
| 170-D | 170-265 | Company as a member of a linked group |
| | | |
| Division 247 | 247-15 | Capital protected borrowings |
| | | |
| Division 703 | 703-40 | Consolidation: treating entities held through non-fixed trusts as wholly-owned subsidiaries |
| | | |
| 707-A | 707-130 | Consolidation: modified pattern of distributions test |
| | | |
| 707-C | 707-325 | Consolidation: modified market value of an entity becoming a member of a consolidated group |
| | | |

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|-------|--|---|
| 713-A | 713-50 | Consolidation: determining destination of distribution by non-fixed trust |
| | | |
| 719-B | 719-35 | Consolidation: treating entities held through non-fixed trusts as wholly owned subsidiaries |
| | | |
| 725-A | 725-65 | Direct value shifting: cause of the value shift |
| | | |
| 727-A | 727-110 | Indirect value shifting: common ownership nexus test |
| | | |
| 727-E | 727-360 727-365 727-400 727-410 | Indirect value shifting: control, common ownership and ultimate stake tests |
| | | |
| 855-A | 855-40 | Capital gains or losses of foreign residents |

Income Tax Assessment Act 1936

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|---------------------------------------|-------------------|-------------------------------|
| Division 3 | 82KZME | Certain advance expenditure |
| | | |
| Division 6D | 102UC | Trustee beneficiary reporting |
| | | |
| Former Part IIIAA, Divisions 1 and 1A | 160APA 160APHD | Franking of dividends |
| | | |
| Schedule 2F | | Trust loss provisions |

A New Tax System (Goods and Services Tax) Regulations 1999

| | | |
|------|-----------------------|------------------------|
| 48-A | 48-10.01 48-10.03A | Approval of GST groups |
|------|-----------------------|------------------------|

Taxation Administration Act 1953

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|------|--------|---|
| 45-I | 45-287 | Trust income included in instalment income of a beneficiary |
|------|--------|---|