


***TD 2012/22A1 - Addendum - Income tax: for the purposes of paragraph 97(1)(a) of the Income Tax Assessment Act 1936 is a beneficiary's share of the net income of a trust estate worked out by reference to the proportion of the income of the trust estate to which the beneficiary is presently entitled?***

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# Addendum

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## Taxation Determination

Income tax: for the purposes of paragraph 97(1)(a) of the *Income Tax Assessment Act 1936* is a beneficiary's share of the net income of a trust estate worked out by reference to the proportion of the income of the trust estate to which the beneficiary is presently entitled?

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Determination TD 2012/22 to take account of the decision in *Lewski v Commissioner of Taxation* [2017] FCAFC 145 (*Lewski*), and to make a minor clarification to Example 2.

The decision in *Lewski* confirms that, where a trustee makes an income variation resolution, the determination of a beneficiary's share of the net income of a trust estate will depend on the facts and circumstances of the case.

Examples 6 and 7 have been omitted as they do not explain the facts in sufficient detail, such that there are circumstances in which the outcomes expressed in those examples could be incorrect.

TD 2012/22 is amended as follows:

**1. Title**

Omit (ITAA 1936).

**2. Throughout**

- (a) Omit all instances of '2010-11'; substitute '2010–11'.
- (b) Omit all instances of '2011-12'; substitute '2011–12'.

**3. Paragraph 1**

Omit 'ITAA 1936'; substitute '*Income Tax Assessment Act 1936* (ITAA 1936)'.

**4. Paragraph 4**

After TR 2012/D1, insert '*Income tax: meaning of 'income of the trust estate' in Division 6 of Part III of the Income Tax Assessment Act 1936 and related provisions*'.

**5. Paragraph 13**

After '(commonly referred to as default beneficiaries)', insert '*by 30 June*'.

**6. Paragraphs 16 and 17**

Omit all instances of '1/3'; substitute 'one-third'.

**7. Paragraph 18**

Omit the second full stop at the end of the paragraph.

**8. Paragraph 23**

- (a) Omit '1/3'; substitute 'one-third'.
- (b) Omit 'one third'; substitute 'one-third'.

**9. Paragraphs 24 to 30**

Omit the paragraphs, excluding the headings 'Example 6: entitlements expressed as a percentage – ineffective further resolution' and 'Example 7: entitlements expressed as a specified amount – ineffective further resolution'.

**10. Paragraph 34**

Omit the calculations; substitute:

*Don*  $\$30,000 \div \$100,000 \times \$120,000 = \$36,000$

*Ed*  $\$30,000 \div \$100,000 \times \$120,000 = \$36,000$

*Fi*  $\$40,000 \div \$100,000 \times \$120,000 = \$48,000$

**11. Paragraph 35**

Omit the calculations; substitute:

*Don*  $\$30,000 \div \$100,000 \times \$20,000 = \$6,000$

*Ed*  $\$30,000 \div \$100,000 \times \$20,000 = \$6,000$

*Fi*  $\$40,000 \div \$100,000 \times \$20,000 = \$8,000$

**12. Paragraph 40**

Omit the calculations; substitute:

*Cane*  $\$30,000 \div \$100,000 \times \$110,000 = \$33,000$

*Alex*  $\$30,000 \div \$100,000 \times \$110,000 = \$33,000$

*Russ*  $\$40,000 \div \$100,000 \times \$110,000 = \$44,000$

**13. Paragraph 43**

Omit the calculations; substitute:

*Cane*  $\$30,000 \div \$110,000 \times \$110,000 = \$30,000$

*Alex*  $\$30,000 \div \$110,000 \times \$110,000 = \$30,000$

*Russ*  $\$50,000$  (being the balance)  $\div \$110,000 \times \$110,000 = \$50,000$

**14. Paragraph 45**

Omit '2010-2011'; substitute '2010–11'.

**15. Paragraph 48**

Omit the wordings of the paragraph; substitute:

*The trustee resolved that the income for the 30 June 2011 year be distributed to the following beneficiaries:*

- *Franked dividends*
  - *Pecan Pty Ltd 100%*
- *Other income*
  - *Pecan Pty Ltd \$20,000*
  - *Laura – balance*

**16. Paragraph 50**

Omit the calculations; substitute:

*Pecan Pty Ltd*:  $\$90,000$  ( $\$70,000$  franked distributions +  $\$20,000$  other income)  $\div$   
 $\$130,000 \times \$160,000 = \$110,769$

*Laura*:  $\$40,000 \div \$130,000 \times \$160,000 = \$49,231$

**17. Paragraph 51**

Omit the calculations; substitute:

*Pecan Pty Ltd*:  $\$20,000$  (the other income to which it was entitled)  $\div$   $\$60,000$   
( $\$130,000$  income –  $\$70,000$  franked distributions)  $\times$   $\$60,000$  ( $\$160,000$  net  
income – both  $\$70,000$  franked distributions and  $\$30,000$  franking credits)  
 $= \$20,000$

*Laura*:  $\$40,000 \div \$60,000$  (as for *Pecan Pty Ltd*)  $\times$   $\$60,000$  (as for *Pecan Pty Ltd*)  
 $= \$40,000$

**18. Paragraph 55**

Omit 'one third'; substitute 'one-third'.

**19. Paragraph 56**

- (a) After the first sentence, insert 'However, Examples 6 and 7 will not apply from 31 May 2023. Further,'.
- (b) At the end of the paragraph, insert 'See Appendix 2 of this Determination which sets out the Commissioner's compliance approach on 'variation of income' resolutions'.

**20. Paragraph 58**

Omit 'two step'; substitute two-step'.

**21. Paragraph 60**

Omit 'examples'; substitute 'Examples'.

**22. Paragraph 64**

Omit the paragraph.

**23. Paragraph 65**

- (a) Omit 'Examples 1 and 7'; substitute 'Example 1'.
- (b) After the paragraph, insert new paragraphs 65A to 65F, including heading:

***Income variation resolutions***

65A. Broadly, income variation resolutions arise where, in formulating resolutions to distribute income, the trustee has made further resolutions which are intended to deal with the situation where there is a change to the income of the trust at a later time.

65B. While trustees have sought to use these resolutions to specify which beneficiaries are presently entitled to trust income where there is an adjustment made by the Commissioner, often these resolutions are not effective in achieving what the trustees sought.

65C. The validity and effect of these resolutions (including their effect on other income resolutions and, consequently, any outcomes under the proportionate approach) will depend on the facts and circumstances of each case – in particular, the specific terms of the trust and the wording of the resolutions. This includes:

- how the income of the trust is defined
- whether the variation of income resolution is authorised by the trust deed
- whether the variation resolution could be severed if found to be invalid
- the existence of default beneficiaries, and other relevant terms of the trust deed
- the wording of the income variation resolution

- any other resolutions made by the trustee for that income year.

65D. For income tax purposes, the relevant question to be determined is whether the resolutions were effective in conferring present entitlement on any beneficiaries by the end of the income year.

65E. In *Lewski v Commissioner of Taxation* [2017] FCAFC 145 (*Lewski*), the Court determined the validity and effect of variation of income resolutions. It held that the effect of the resolutions was that the distribution of income to the beneficiary was contingent on the occurrence of an event, being the Commissioner's disallowance of a deduction or inclusion of an amount in the assessable income of the trust estate. Consequently, the beneficiary was not presently entitled to any income.

65F. However, the Commissioner considers that the existence of a variation of income resolution will not necessarily result in ineffective conferral of present entitlement on all named beneficiaries. Rather, the outcome in any case will depend on the precise terms of the trust deed and resolutions. In some cases, there will be a range of possible interpretations of the relevant trust deed and resolutions and therefore genuine doubt about where the liability to tax rests. In those circumstances, the Commissioner will consider issuing alternative assessments.

#### **24. Paragraph 68**

At the end of the paragraph, insert 'this'.

#### **25. Paragraph 79**

- (a) After the paragraph, insert new paragraphs 80 to 82, including heading and preamble.

##### ***Appendix 2 – Compliance approach***

***This Appendix sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow the advice in this appendix in good faith and consistently with the Ruling section, the Commissioner will administer the law in accordance with this approach.***

80. Examples 6 and 7 of this Determination will not apply from 31 May 2023.

81. For income variation resolutions which were made before 31 May 2023, the Commissioner will not devote compliance resources to identifying and examining the resolutions where all of the net income of the trust estate has been brought to tax either by inclusion in the assessable income of a beneficiary or by assessment to the trustee, and there is no evidence of tax avoidance, evasion or fraud.

82. Where it is necessary to conclude on the tax liabilities flowing from an income variation resolution and there are a range of possible interpretations as to the validity and effect of the resolution which have a substantial possibility of being correct (including the potential application of Examples 6 and 7 of this Determination), the Commissioner will consider raising alternative assessments.

- (b) For new paragraphs 80 to 82, insert the page status 'Status: **not legally binding**'.

This Addendum applies from 31 May 2023.

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**Commissioner of Taxation**  
31 May 2023

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ATO references

NO:	1-OH6R73I
ISSN:	2205-6211
BSL:	PW

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