


# ***TD 96/1 - Income tax: can section 36A of the Income Tax Assessment Act 1936 apply if a sole trader who owns trading assets transfers the assets to another person as a trustee of a discretionary trust?***

 This cover sheet is provided for information only. It does not form part of *TD 96/1 - Income tax: can section 36A of the Income Tax Assessment Act 1936 apply if a sole trader who owns trading assets transfers the assets to another person as a trustee of a discretionary trust?*

 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in [TR 2006/10](#) provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

 This document has changed over time. This is a consolidated version of the ruling which was published on *29 November 2006*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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## Taxation Determination

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### **Income tax: can section 36A of the *Income Tax Assessment Act 1936* apply if a sole trader who owns trading assets transfers the assets to another person as a trustee of a discretionary trust?**

1. No.

#### **If the sole trader is not a discretionary beneficiary**

2. Subsection 36A(1) does not apply if such a transfer occurs. The sole trader who owned the trading assets before the change in ownership of the assets effected by the transfer has no interest (legal, beneficial or legal and beneficial interest) in the assets after the change.

#### **If the sole trader is a discretionary beneficiary**

3. Section 36A is founded on the existence of undivided fractional interests in trading assets. A discretionary beneficiary of a discretionary trust does not have, in our view, an undivided fractional interest in the assets held by the trustee of a discretionary trust (even if, at general law, the discretionary beneficiary may have a beneficial interest in trust assets in certain circumstances: see *Queensland Trustees Ltd v. Commissioner of Stamp Duties (Qld)* (1952) 88 CLR 54). Subsection 36A(1) does not apply because the sole trader has no undivided fractional interest in the trading assets after the transfer of the assets to the trustee.

#### **Whether or not the sole trader is a discretionary beneficiary**

4. Because subsection 36A(1) does not apply, subsection 36A(2) cannot apply: see paragraph 36A(2)(a).
5. Section 36 applies to such a transfer if it is not made in the ordinary course of carrying on the sole trader's business.

#### **Definition**

6. The expression 'trading assets' is used in this Taxation Determination to mean assets of a business (being trading stock, standing or growing crops, crop stools or trees which have been planted and tended for the purpose of sale).

***Example***

*Fred Jersey owns a grazing business in north west Queensland. Fred transfers his business to a private family company as corporate trustee of Fred's family discretionary trust, in which Fred is not a discretionary beneficiary.*

*Neither subsection 36A(1) nor 36A(2) applies to the disposal of the trading stock of the business by Fred to the corporate trustee of the discretionary trust because Fred retains no interest in the trading stock after the disposal. The transfer of the trading stock is not a disposal made in the ordinary course of Fred's business and section 36 applies.*

**Commissioner of Taxation**

17 January 1996

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Related Determinations: TD 96/2; TD 96/3; TD 96/4

Subject Ref: discretionary trusts; trading assets disposal; trading assets ownership; trading stock; trustees; undivided fractional interest

Legislative Ref: ITAA 36; ITAA 36A; ITAA 36A(1); ITAA 36A(2); ITAA 36A(2)(a)

Case Ref: Queensland Trustees Ltd v. Commissioner of Stamp Duties (Qld) (1952) 88 CLR 54

ATO Ref: NAT 95/6458-6; TDUMG 94/1

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