



# ***TR 93/10 - 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 changed over time. This is a consolidated version of the ruling which was published on *7 July 2010*



## Taxation Ruling

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

#### other Rulings on this topic

#### CITCM 858

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*This Ruling, 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 Ruling is a public ruling and how it is binding on the Commissioner.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

## 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 18-30 in Schedule 1 to the *Tax Administration Act 1953* (TAA) where:

- the resident beneficiary receives a distribution of income that includes a dividend, interest or royalty from an Australian source; and
- Australian withholding tax had been deducted from the dividend, interest or royalty 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 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- trust income which is subject to the transferor trust measures under Division 6AAA of Part III of the ITAA 1936;

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- trust income which is subject to the foreign investment fund measures under Part XI of the ITAA 1936; or
- a resident beneficiary's entitlement to a foreign income tax offset under Division 770 of the *Income Tax Assessment Act 1997*.

## 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 18-30 in Schedule 1 to the TAA 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 allocated or applied as set out in Division 3 of Part IIB of the TAA. So much of the credit that is not allocated or applied is refunded to the beneficiary under Division 3A of Part IIB of the TAA.

5. For the purposes of this Ruling, 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, interest and royalty 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.

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## **Date of effect**

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7. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling 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 Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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## **Explanations**

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### **Liability to Australian withholding tax**

8. Generally, an unfranked dividend, interest or royalty paid from Australia is subject to Australian withholding tax under Division 11A of the ITAA 1936 if it is derived by a non-resident (section 128B of the ITAA 1936). A resident is not liable to Australian withholding tax except where subsections 128B(2A) or (2C) of the ITAA 1936 apply (interest or royalty income derived by a resident in carrying on a business through a permanent establishment outside Australia). Subsections 128B(2A) and (2C) of the ITAA 1936, however, do not apply to trust income derived by a beneficiary of a non-resident trust estate.

9. Thus, a dividend, interest or royalty paid to a non-resident trustee (that is, the trustee of a non-resident trust estate) is not subject to Australian withholding tax if the beneficiary presently entitled to that dividend, interest or royalty is a resident. This is because, for the purposes of Division 11A of the ITAA 1936, subsection 128A(3) of the ITAA 1936 deems the beneficiary to have derived that dividend, interest or royalty at the time of present entitlement and ensures that this income retains the character of a dividend, interest or royalty when the trust income is distributed to the beneficiary.

### **Deduction of withholding tax**

10. Australian withholding tax need not be withheld from a payment of a dividend, interest or royalty if the tax is not payable on that dividend, interest or royalty (section 12-300 in Schedule 1 to the TAA). However, in practice, an entity paying an unfranked dividend, interest or royalty to a non-resident trustee is generally not aware of the present entitlement of a resident beneficiary, or beneficiaries, of the trust to that income of the trust estate and that such a payment is not subject to withholding tax. That entity remains obliged to withhold an amount from that dividend, interest or royalty (sections 12-210, 12-245 and 12-280 in Schedule 1 to the TAA).

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## **Credit for withholding tax deducted**

11. A resident beneficiary who receives, or is entitled to receive, a trust distribution from a non-resident trust estate that includes a dividend, interest or royalty from an Australian source is assessed on that income under the general trust provisions in Division 6. If Australian withholding tax had been deducted in the circumstances mentioned in paragraph 10 (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 18-30 in Schedule 1 to the TAA. The credit is to be allocated and applied as set out in Division 3 of Part IIB of the TAA.

## **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 2001-02 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.

16. If the credit exceeds the amount that is allocated and applied under Division 3 of Part IIB of the TAA, any excess amount will be refunded to Ben Fischer.

**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 allowed a credit of \$60 in respect of the withholding tax.

**Commissioner of Taxation**

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*legislative references*

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- ITAA 1936 128B
- ITAA 1936 128B(2A)
- ITAA 1936 128B(2C)
- ITAA 1936 128B(3)
- TAA 1953 Pt IIB Div 3
- TAA 1953 Pt IIB Div 3A
- TAA 1953 Sch 1 12-300
- TAA 1953 Sch 1 12-210
- TAA 1953 Sch 1 12-245
- TAA 1953 Sch 1 12-280
- TAA 1953 Sch 1 18-30

*subject references*

- non-resident trust estates
- trust distributions
- withholding tax
- withholding tax credit