TR 95/29W - Income tax: Division 16 - applicability of averaging provisions to beneficiaries of trust estates carrying on a business of primary production

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Notice of Withdrawal

Taxation Ruling

Income tax: Division 16 – applicability of averaging provisions to beneficiaries of trust estates carrying on a business of primary production

Taxation Ruling TR 95/29 is withdrawn with effect from today.

1. Taxation Ruling TR 95/29 discusses the availability of income averaging to a beneficiary of a trust estate, the trustee of which carries on a business of primary production. In this context TR 95/29 advances the view that a beneficiary may be presently entitled to income of a trust estate for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) notwithstanding that the trust may have incurred a loss in the relevant year and the beneficiary may not be entitled to an income distribution.

2. It is now settled law that the phrase 'presently entitled to the income of the trust estate' in Division 6 of Part III of the ITAA 1936 directs attention to the income of the trust that is legally available for distribution, that is, what remains of the income after provision for the trustee's proper costs, expenses and outgoings: *FC of T v. Bamford Ors; Bamford Anor v. FC of T* [2010] HCA 10; 2010 ATC 20-170; (2010) 84 ALJR 266 referring to *Federal Commissioner of Taxation v. Totledge Pty Ltd* (1982) 40 ALR 385 at 393.

3. It follows that a beneficiary cannot be presently entitled to a share of income of a trust estate within the meaning of section 97 of the ITAA 1936 if there is no income legally available for distribution: *Cajkusic v. FC of T* [2006] FCAFC 164.

4. TR 95/29 continues to apply to arrangements begun to be carried out on or before the date of this withdrawal notice but does not apply to arrangements begun to be carried out after the date of this withdrawal notice. In this regard, the relevant arrangement is the determination of the income available for distribution to beneficiaries in each year of income. Accordingly, the Ruling will apply in respect of the 2009-10 and earlier income years.

Commissioner of Taxation
30 June 2010

ATO references
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