

Member Webinar

Understanding section 99B

Tuesday 27 February | 12:00pm – 1:00pm AEDT



Speaker
Jonathan Ortner



Speaker
Micaela Bernfield



Chaired by
Robyn Jacobson, CTA

27 February 2024

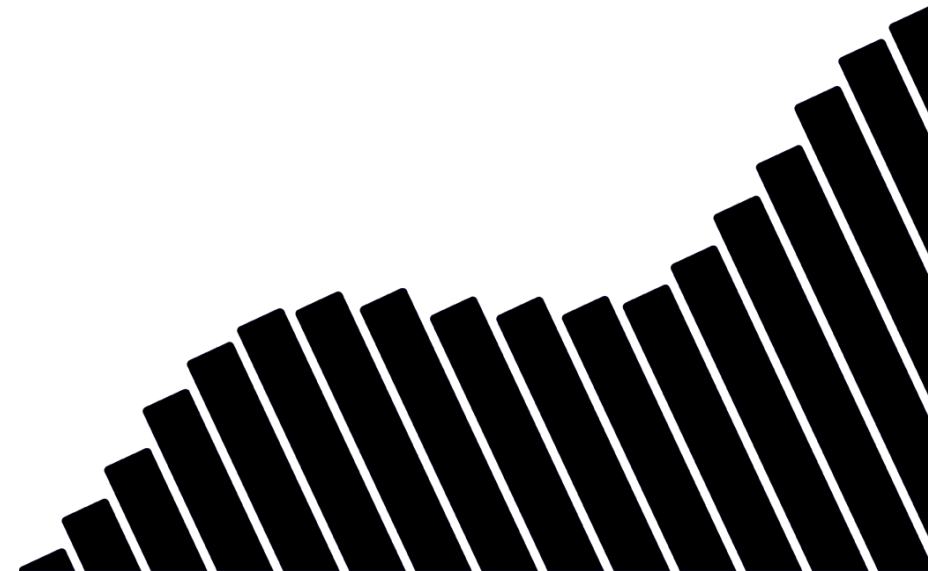
Member Webinar – Understanding section 99B

Presenters:

Jonathan Ortner, FTI Partner, Arnold Bloch Leibler

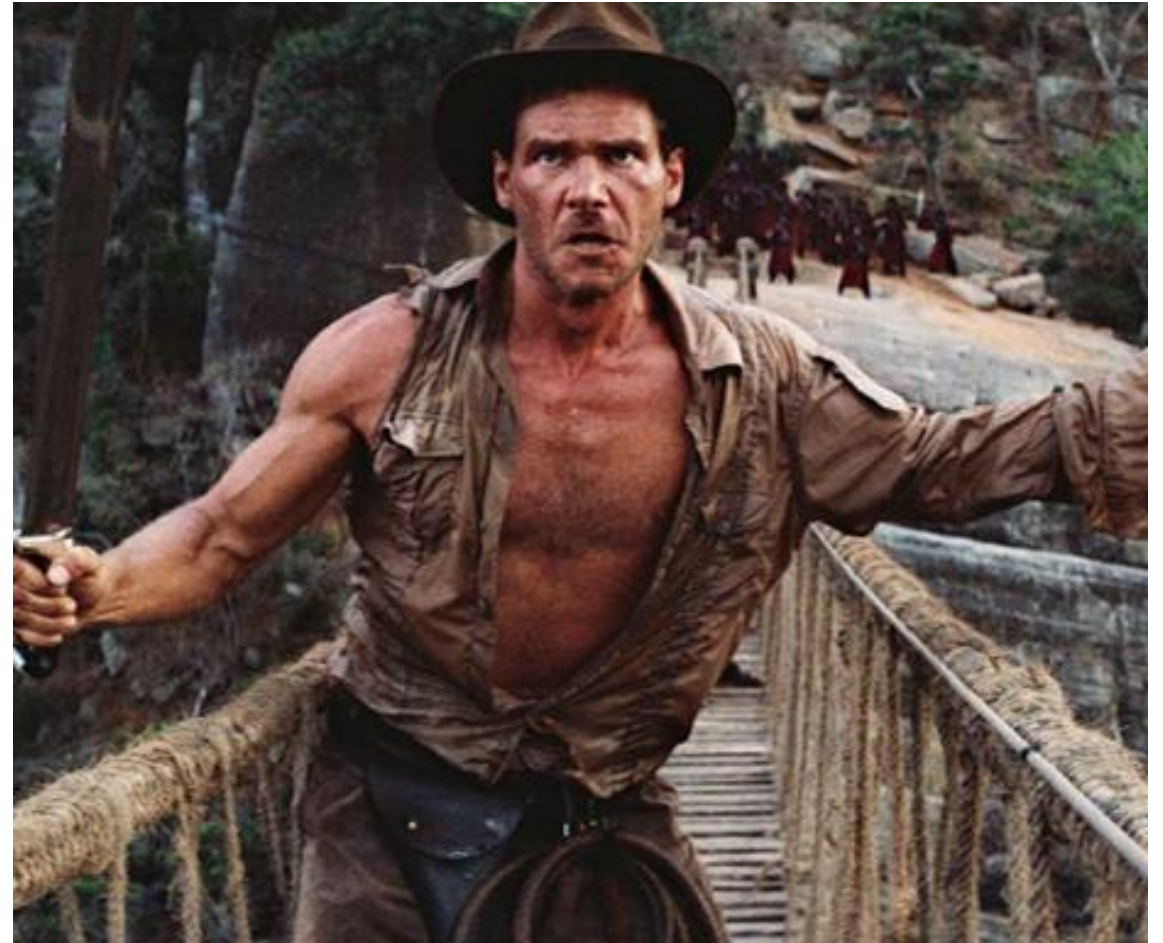
Micaela Bernfield, ATI, Senior Associate, Arnold Bloch Leibler

Facilitator: Robyn Jacobson, CTA, Senior Advocate, The Tax Institute



Section 99B(1) – Receipt of trust income not previously subject to tax

Where, at any time during a year of income, **an amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary** of the trust estate **who was a resident** at any time during the year of income, **the assessable income of the beneficiary** of the year of income **shall**, subject to subsection (2), **include that amount.**



Section 99C – Determining whether property is applied for benefit of beneficiary

- (1) In determining for the purposes of section 99B whether any amount has been applied for the benefit of a beneficiary of a trust estate, regard **shall be had to all benefits that have accrued at any time** to the beneficiary (whether or not the beneficiary had rights at law or in equity in or to those benefits) as a result of the derivation of, or in relation to, that amount, irrespective of the nature or form of the benefits.
- (2) Without limiting the generality of subsection (1), an amount **shall be taken**, for the purposes of section 99B, to have been applied for the benefit of a beneficiary if:
 - (a) whether by re-investment, accumulation, capitalization or otherwise, and whether directly or indirectly, the amount has been so dealt with that it will, at a future time, and whether in the form of income or not, enure for the benefit of the beneficiary;
 - (b) the derivation of the amount has operated to increase the value to the beneficiary of any property or rights of any kind held by or for the benefit of the beneficiary;
 - (c) the beneficiary has received or become entitled to receive any benefit (including a loan or a repayment, in whole or in part, of a loan, or any other payment of any kind) provided directly or indirectly out of that amount or out of property or money that was available for the purpose by reason of the derivation of the amount;
 - (d) the beneficiary has power, by means of the exercise by the beneficiary of any power of appointment or revocation or otherwise, to obtain, whether with or without the consent of any other person, the beneficial enjoyment of the amount; or
 - (e) the beneficiary has directly or indirectly assigned to another person his or her interest in the amount or is able, in any manner whatsoever, and whether directly or indirectly, to control the application of that interest.

Section 99B(2) – Receipt of trust income not previously subject to tax

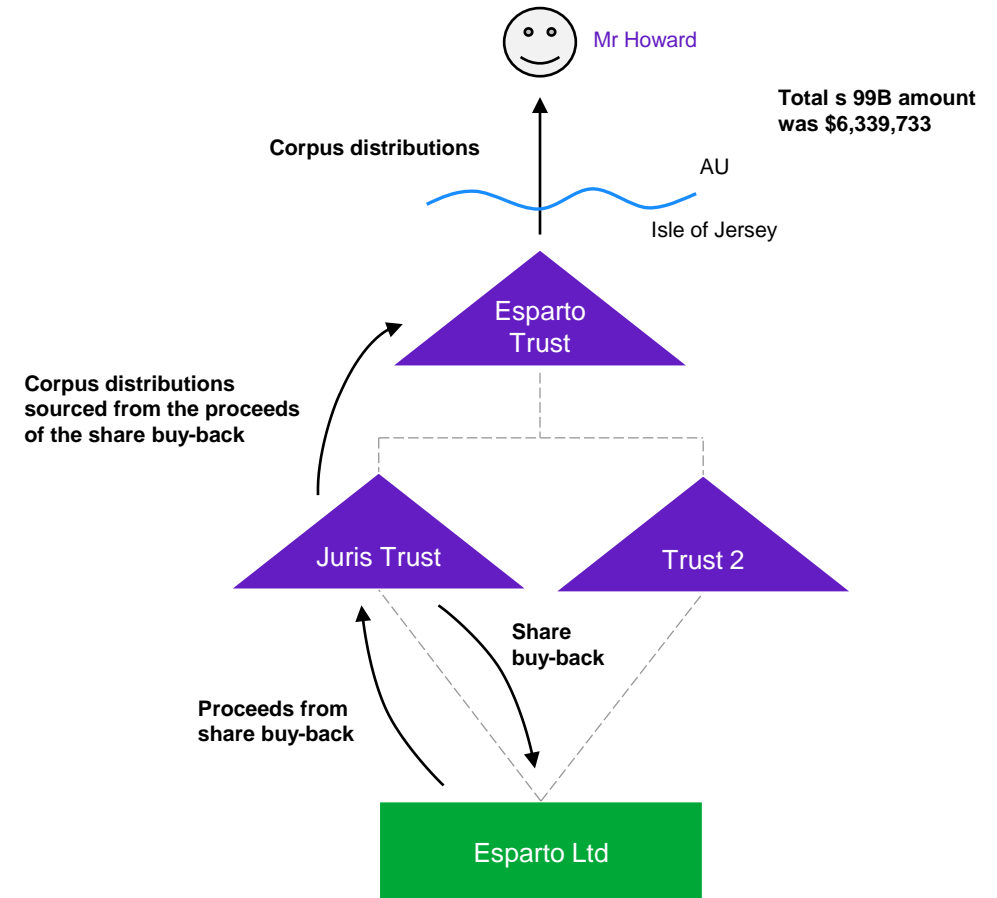
The amount that, but for this subsection, would be included in the assessable income of a beneficiary of a trust estate under subsection (1) by reason that an amount, being property of the trust estate, was paid to, or applied for the benefit of, the beneficiary **shall be reduced** by so much (if any) of the amount, as represents:

- (a) corpus of the trust estate (except to the extent to which it is attributable to amounts derived by the trust estate that, if they had been derived by a taxpayer being a resident, would have been included in the assessable income of that taxpayer of a year of income);
- (b) an amount that, if it had been derived by a taxpayer being a resident, would not have been included in the assessable income of that taxpayer of a year of income;
- (ba) an amount that is non-assessable non-exempt income of the beneficiary because of s 802-17 of the [1997 Act];
- (c) an amount:
 - (i) that is or has been included in the assessable income of the beneficiary in pursuance of s 97; or
 - (ii) in respect of which the trustee of the trust estate is or has been assessed and liable to pay tax in pursuance of ss 98, 99 or 99A; or
 - (iii) that is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4);
- (d) an amount that is or has been included in the assessable income of any taxpayer (other than a company) under s 102AAZD; or
- (e) if the beneficiary is a company--an amount that is or has been included in the assessable income of the beneficiary under s 102AAZD.

The exceptions in subsection 99B(2)

- *Howard v FCT* [2012] FCAFC 149 – illustrates the tracing exercise which may be required under the corpus exception to s 99B(2)(a).
- *Campbell v Commissioner of Taxation* [2019] AATA 2043 – illustrates the challenges taxpayers face in s 99B cases because of the burden of proof.
- Tax Determination TD 2017/24

Diagram of Howard's Case



Purpose and legislative background

- *Union Fidelity* held net income was only income from Australian sources
- S 99B enacted to “overcome” the decision of *Union Fidelity*
 - Amendments also made to the definition of ‘net income’, ‘resident trust estate’, and trustees brought to tax on income to which no beneficiary was presently entitled
- *Traknew Holding Pty Ltd v FCT*
 - highlights the judicial concern of s 99B applying to Australian resident trust estates given the clear policy intention for s 99B to apply to the accumulation of foreign sourced income by foreign resident trust estates

“[Section 99B] will normally apply where **accumulated foreign-source income of a non-resident trust estate** (or of a resident trust estate that previously was not able to be taxed in Australia in light of the *Union Fidelity* decision) **is distributed to a resident beneficiary.**”

Decided cases

- *Howard v FCT* [2012] FCAFC 149 – illustrates the tracing exercise which may be required under the corpus exception to s 99B(2)(a).
- *Campbell v Commissioner of Taxation* [2019] AATA 2043 – illustrates the challenges taxpayers face in s 99B cases because of the burden of proof.
- *Traknew Holding Pty Ltd v FCT*.

Current ATO guidance

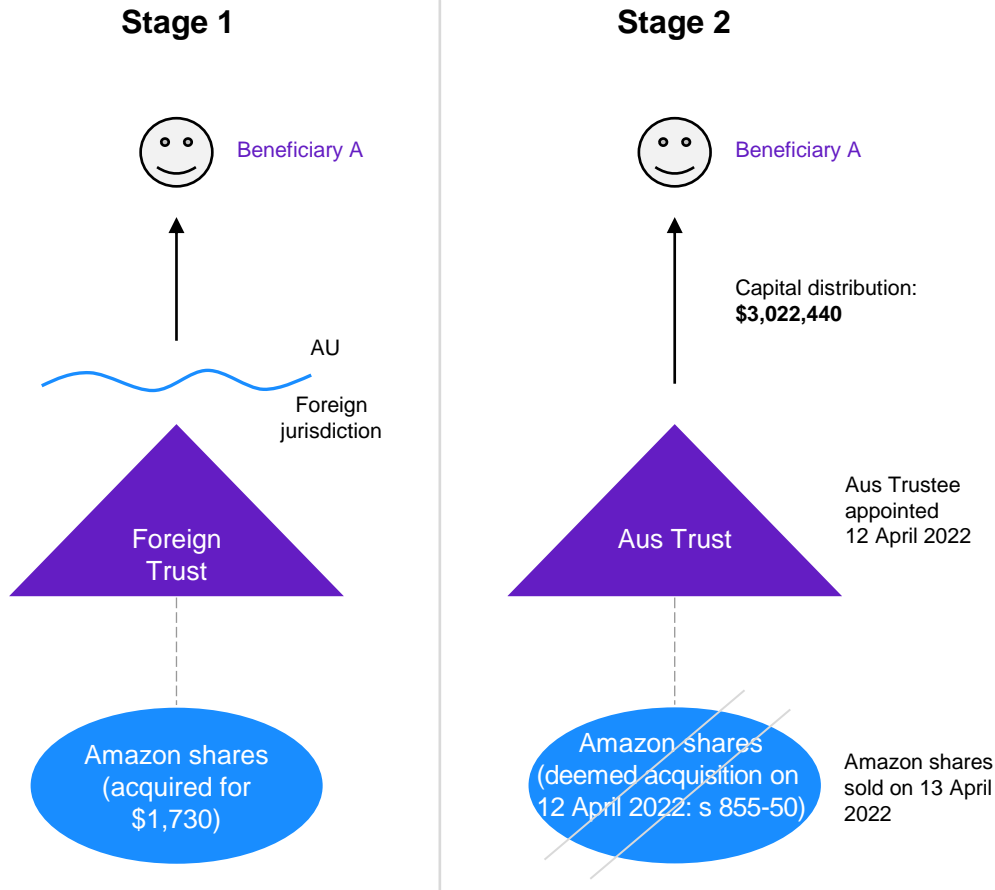
1. **ATO ID 2004/691** Assessability of lump sum payment received by resident beneficiary of a non-resident trust from foreign life assurance policy held by the trust
2. **ATO ID 2011/93** Application of section 99B of the Income Tax Assessment Act 1936 when accumulated foreign source income is paid to an Australian resident beneficiary who was a non-resident when the trustee derived the income
3. **ATO ID 2010/211** Is an amount taken to be 'included in the assessable income of any taxpayer' under section 102AAZD of the ITAA 1936 even though the taxpayer has not included the amount in their income tax return?
4. **ATO ID 2004/66** Assessability of payment of accumulated foreign-source income of a non resident trust to a resident taxpayer
5. **TD 2017/23** Income tax: does the residency assumption in subsection 95(1) of the Income Tax Assessment Act 1936 (ITAA 1936) apply for the purpose of section 855-10 of the Income Tax Assessment Act 1997 (ITAA 1997), which disregards certain capital gains of a trust which is a foreign trust for CGT purposes?
6. **TD 2017/24** Income tax: where an amount included in a beneficiary's assessable income under subsection 99B(1) of the Income Tax Assessment Act 1936 (ITAA 1936) had its origins in a capital gain from non-taxable Australian property of a foreign trust, can the beneficiary offset capital losses or a carry-forward net capital loss ('capital loss offset') or access the CGT discount in relation to the amount?
7. **TA 2021/2:** Disguising undeclared foreign income as gifts or loans from related overseas entities

Section 102AAM – Payment of interest by taxpayer on distributions from certain non-resident trust estates

- The amount under s 99B is treated, unless the taxpayer can prove otherwise, as an amount paid out of income and profits.
- The period for which the interest is calculated commences in the first year of income after when the beneficiary became a resident, when the non-resident trust estate is deemed to have derived the income or profits, or 1 July 1990, whichever is later.
- The interest is intended to be a sanction to compensate the Australian revenue for the deferral of tax on any accumulated income.
- The calculation of the amount to which the base interest rate is applied varies depending on whether it is a listed country or non-listed country trust estate.
- The interest amount applied under s 102AAM is an ‘assessment’ to which taxpayers may object to, however, is not an amount the Commissioner has discretion to remit.

Example 1

Interactions between s 855-50 and 99B



Facts

- Foreign Trust holds shares in Amazon purchased in 1997 for 1.73 per share (cost base = \$1,730).
- On 12 April 2022, shares have a value of \$3,022,440.
- On 12 April 2022, the foreign trustee is replaced with an Australian incorporated company to act as trustee (Aus trustee) and the Foreign Trust becomes an Australian resident trust (now known as Aus Trust).
- Pursuant to s 855-50, the Aus Trustee is taken to have acquired the Amazon shares on the date Aus Trust became a resident and for its market value on that date (12 April 2022 for \$3,022,440).
- On 13 April 2022, Aus Trust disposes of its Amazon shares for \$3,022,440 (no assessable capital gain for Australian tax purposes).
- Before 30 June 2023, Aus Trust distributes the entire capital proceeds, which has formed part of the corpus, of \$3,022,440.

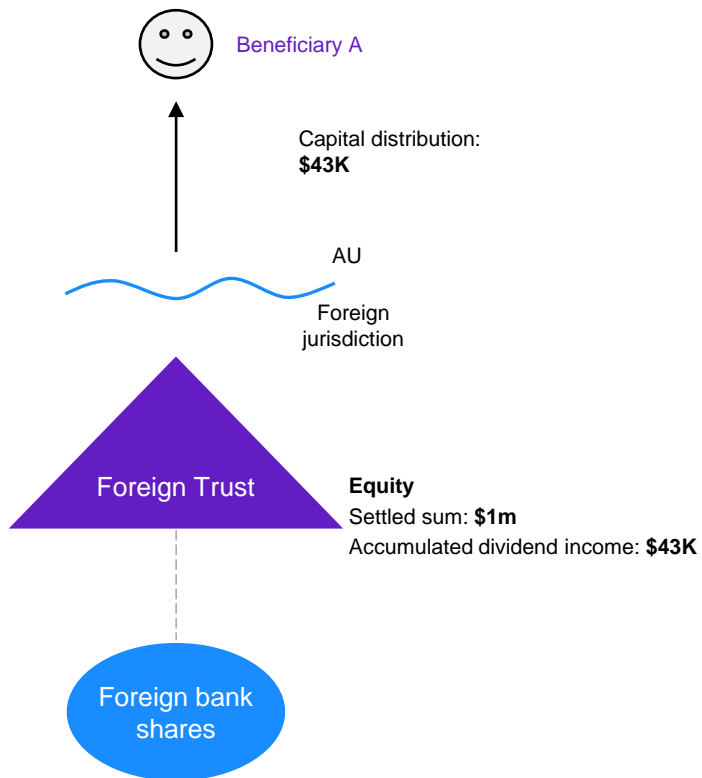
Issues

How does s 99B(2) interact with Division 855?

How might s 102AAM operate when the Australian trust sells the Amazon shares?

Example 2

Tracing and the corpus exclusion



Facts

- Trust is a foreign resident trust (**Foreign Trust**). The trust is settled with \$1m and accounts record:

Assets

Cash: \$1,000,000

Liability

Equity

Settled sum: \$1,000,000

- Foreign Trust acquires foreign shares and those shares pay an annual dividend of \$43K. The trustee accumulates the income. The accounts record:

Assets

Cash: \$43,000

Shares: \$1,000,000

Liability

Equity

Settled sum: \$1,000,000

Accumulated income \$43,000

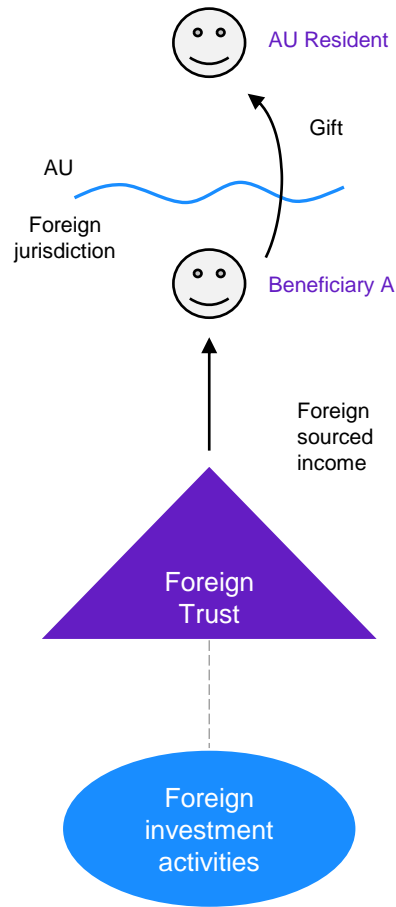
- Foreign Trust has an Australian resident individual beneficiary (**Beneficiary A**).
- Foreign Trust resolves to make a capital distribution of \$43K to Beneficiary A and appropriated the amount out of the 'settled sum' reserve.
- Assume Foreign Trust has never made any other distribution of capital or income.

Issues

Does the corpus exclusion in s 99B(2)(a) apply to the distribution of \$43K?

Example 3(A)

Non-resident trust distribution to non-resident individual. Non-resident individual gifts to resident individual.



Facts

- Trust is a foreign resident trust (**Foreign Trust**).
- Foreign Trust derives solely foreign sourced income.
- Beneficiary A of Foreign Trust is a non-resident individual.
- Beneficiary A makes a gift to an Australian resident individual (**AU Resident**) (who is also a beneficiary of the Foreign Trust).

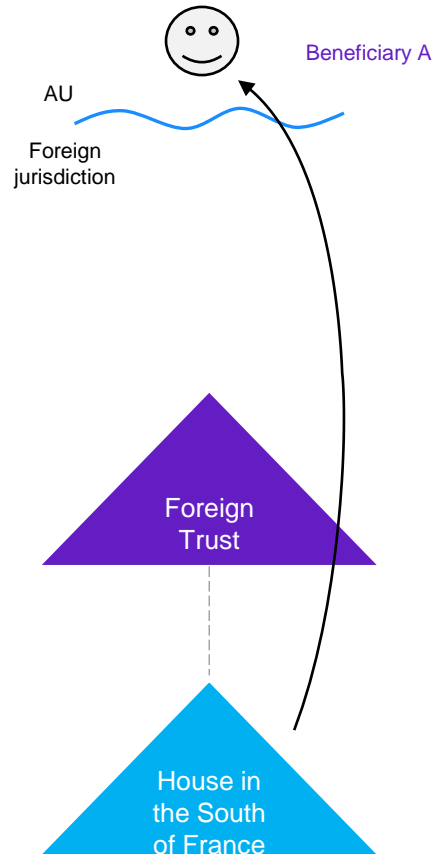
Issues

Does s 99B(1) (read with s 99C) apply to the distribution?

(Consideration might also need to be given to the application of s 99B(2) depending on the exact factual scenarios.)

Example 4

Non-resident trust provides resident beneficiary with use of trust asset



Facts

- Trust is a foreign resident trust (**Foreign Trust**).
- Foreign Trust owns a house in the South of France.
- Beneficiary A of Foreign Trust is a resident individual.
- Beneficiary A regularly travels to the South of France and stays in the house.

Issues

Does s 99B(1) (read with s 99C) apply to the distribution?

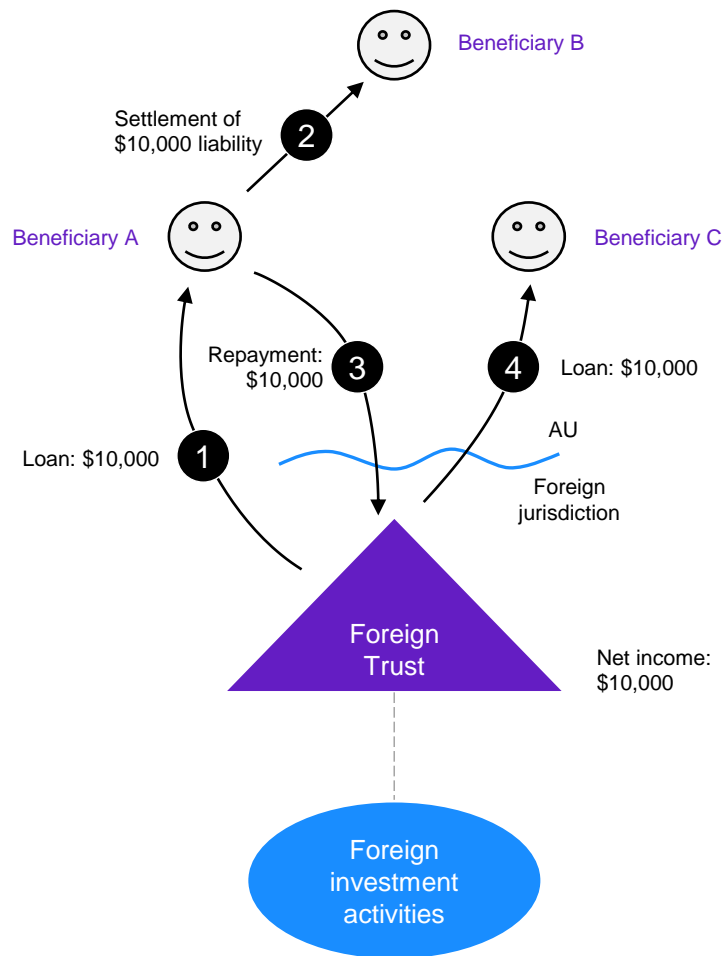
Can s 99B(2)(a) apply?

Compare to Division 7A

Does it make a difference if Beneficiary A pays rent?

Example 5

Non-resident trust loans and successive applications



Facts

- Trust is a foreign resident trust (**Foreign Trust**).
- Foreign Trust derives solely foreign sourced income.
- Foreign Trust has Australian resident beneficiaries, being, Beneficiary A, B C.
- The net income of Foreign Trust in the previous income year was \$10,000 and was accumulated.

Transactions

1. Foreign Trust lends \$10,000 to Beneficiary A (representing the net income derived in the previous year).
2. Beneficiary A applies the \$10,000 to settle a debt owing to Beneficiary B and pays the amount to Beneficiary B.
3. Beneficiary A then repays the \$10,000 loan from Foreign Trust.
4. Foreign Trust then lends that \$10,000 to Beneficiary C.

Issues

Does s 99B apply to the advance of funds to the beneficiaries? If so, which beneficiaries are caught?

Thank you

Please complete your evaluation form

Upcoming Events

Women In tax Congress
Wednesday 28 February

Financial Services Taxation Conference
Thursday 14 – Friday 15 March

WA Tax Forum
Thursday 7 – Friday 8 March



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