


# ***TD 2022/13EC - Compendium***

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## Public advice and guidance compendium – TD 2022/13

### **1 Relying on this Compendium**

This Compendium of comments provides responses to comments received on Draft Taxation Determination TD 2019/D6 *Income tax: does Subdivision 855-A (or subsection 768-915(1)) of the Income Tax Assessment Act 1997 disregard a capital gain that a foreign-resident (or temporary-resident) beneficiary of a resident non-fixed trust makes because of subsection 115-215(3)?*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

### **Summary of issues raised and responses**

<b>Issue number</b>	<b>Issue raised</b>	<b>ATO response</b>
All legislative references in this Compendium are to the <i>Income Tax Assessment Act 1997</i> , unless otherwise indicated.		
<b>Non-residents should not be taxed on foreign-sourced, non-TAP capital gains</b>		
1	The broad legislative intent is that foreign beneficiaries should not be taxed on resident trust capital gains that are not both Australian-sourced and 'taxable Australian property' (TAP).	<p>We disagree.</p> <p>In <i>Peter Greensill Family Co Pty Ltd (Trustee) v Commissioner of Taxation</i> [2021] FCAFC 99 (<i>Greensill</i>), the Full Federal Court confirmed that where a non-resident beneficiary of a non-fixed trust is treated as having an extra capital gain under subsection 115-215(3), Subdivision 855-A does not apply to disregard that capital gain, irrespective of source or the TAP status of the asset. In the course of the decision, the Court was not persuaded by arguments that Parliament never:</p> <ul style="list-style-type: none"><li>intended a foreign beneficiary be taxed on non-Australian gains (refer <i>Greensill</i> at [77] and [78])</li><li>expressed an intention to raise capital gains from foreign residents in relation to non-TAP, as reflected by Division 855's focus solely on the character of the capital gains tax (CGT) asset and not the character of the taxpayer or type of CGT asset (refer <i>Greensill</i> at [69] and [70]).</li></ul>

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<b>Same tax consequences for foreign direct and indirect investment</b>		
2	<p>The broad legislative intent is that tax consequences for foreign beneficiaries should be the same regardless of whether the gain is made directly or through a trust.</p> <p>Paragraph 4.16 of the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 4) Bill 2006 indicates non-residents should only be subject to tax on TAP and does not distinguish between direct and indirect investments.</p>	<p>See our response to Issue 1 of this Compendium.</p> <p>The Commissioner notes that relief for foreign-resident beneficiaries in respect of particular capital gains of resident fixed trusts was first introduced in 2005 as Subdivision 768-H (later replaced by section 855-40). The Explanatory Memorandum to the New International Tax Arrangements (Managed Funds and Other Measures) Bill 2004 (the EM) discussed comparable treatment for foreign residents between direct and indirect investment, but only in the context of fixed trusts. In particular, the EM states:</p> <p style="padding-left: 20px;">1.7 Another change is to disregard a capital gain made by a foreign resident in respect of the taxpayer's interest in a fixed trust if the <i>gain relates to an asset without the necessary connection with Australia</i>. For example, this will apply where the capital gain arises from the disposal by an Australian fixed trust of a portfolio interest in an Australian public company. Again, this is appropriate because a foreign resident would not be assessed on such a gain if the asset were held directly.</p> <p style="text-align: center;">...</p> <p style="padding-left: 20px;">1.12 ... the trust in which the foreign resident has invested and all relevant trusts in the chain must meet the definition of 'fixed trust' in the <i>Income Tax Assessment Act 1997</i> (ITAA 1997). This is to ensure that there is no discretion available to the trustee to provide benefits to parties who are not beneficiaries of the trust. This is important to the integrity of the amendments.</p>
<b>Alternative view open on the words of section 855-10</b>		
3	<p>Section 855-10 is not limited to capital gains arising from assets directly owned by the foreign resident but only requires that the capital gains arise from CGT events. The Commissioner's view requires words to be read into section 855-10. That is, it requires the words 'that happens to you' to be read into the chapeau to subsection 855-10(1) after 'CGT event'.</p>	<p>We disagree. The alternative view is inconsistent with the decision of the Court in <i>Greensill</i> at [50].</p>

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<b>Undue reliance on the presence of section 855-40 in interpreting section 855-10</b>		
4	<p>The existence of section 855-40 does not support the policy justifications for limiting relief in Division 855 to beneficiaries of fixed trusts.</p> <p>The Commissioner should reconsider his concern that the alternative section 855-10 would render section 855-40 redundant.</p>	<p>We disagree. The view that section 855-40 reinforces that section 855-10 does not have operation in the context of Subdivision 115-C has been approved by the Court in <i>Greensill</i> at [55]–[68].</p>
<b>Application of Australian tax to non-resident beneficiaries of resident non-fixed trusts in respect of non-TAP capital gains</b>		
5	<p>If the Commissioner's views in the draft Determination are maintained, it will result in the application of Australian tax to non-resident beneficiaries of resident non-fixed trusts with specific entitlement to capital gains from non-TAP assets. This would be inconsistent with the intent and actual drafting of Division 855.</p>	<p>No change made. We do not consider the application of Australian tax to non-resident beneficiaries of resident non-fixed trusts with entitlements to capital gains from non-TAP assets to be inconsistent with the policy intent and actual drafting of Division 855.</p>
<b>Tax treaty interaction</b>		
6	<p>The Commissioner should provide guidance to address the interaction of the view in the Determination with Australia's tax treaties, whether that be in the final Determination or elsewhere.</p>	<p>Noted. We will monitor the need for public guidance on the position under Australia's tax treaties elsewhere.</p> <p>The focus of the Determination is to provide advice on whether Subdivision 855-A (or subsection 768-915(1)) disregards a capital gain that a foreign-resident (or temporary-resident) beneficiary of a resident non-fixed trust has because of subsection 115-215(3). The Determination is not intended to deal with the interaction of these provisions with other parts of the tax law, including Australia's tax treaties.</p> <p>Further, given the differences between the operation of the articles of many of Australia's tax treaties (which may subsequently be renegotiated or modified), it would be impractical for the Determination to address these interactions in a meaningful way. Rather, the approach taken in the Determination is to provide the Commissioner's interpretation of the relevant Australian domestic law provisions, which can then be applied by a taxpayer to their individual circumstances (including in the context of the relevant treaty).</p>

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<b>Prospective application</b>		
7	There should be no retrospective application of the final Determination. Rather, the final Determination should allow sufficient time for the Government to consider legislative change to clarify the operation of the law.	We disagree. The Determination expresses the long-standing ATO view, previously contained in ATO Interpretative Decision ATO ID 2007/60 <i>Income Tax: Capital Gains Tax: exemption for non-resident beneficiary of trust</i> . The views in the final Determination and ATO ID 2007/60 have been confirmed by the Court in <i>Greensill</i> .
<b>Investments in non-fixed trusts is possible</b>		
8	The statement in paragraph 16 of the draft Determination that 'investing' does not occur with non-fixed trusts is incorrect.	We recognise that 'investing' might not necessarily be limited to fixed trusts. The paragraph has been deleted from the final Determination.
<b>Detailed reasoning and more examples</b>		
9	If the Commissioner maintains this view in the final Determination, detailed reasoning and several worked examples should be provided.	No change made. The reasoning and examples have been reviewed. We consider the content illustrates the principle in the draft Determination, and clearly communicates and explains the view. The position is now also explained in the judgment in <i>Greensill</i> .
<b>Private ruling applies alternative view</b>		
10	The edited version (EV) of private ruling Authorisation Number 1013121561565 seems to suggest that a capital gain made by a trustee of a trust from the disposal of shares that are not taxable Australian property could be disregarded under section 768-915 by a temporary-resident beneficiary receiving the capital gain via a trust distribution.	No change made. The EV is incorrect. EVs that are published on the Register of private binding rulings are intended to be a public historical record only. They cannot be relied on by, and afford no protection to, taxpayers other than the taxpayer to which it applies. This is clearly stated in each edited version, which directs users to Law Administration Practice Statement PS LA 2008/4 <i>Publication of edited versions of written binding advice</i> for further information on the status of edited versions of private advice and the reasons for publishing them. Published EVs are annotated in limited circumstances. Not all incorrect or misleading EVs will need to be annotated. For example, where the EV is incorrect or misleading only due to changes to the law, it will not be annotated. However, where the EV is found to be incorrect or misleading, it may be annotated if it represents a risk in regard to incorrect use.

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		Consideration of this risk includes looking at what other advice or guidance exists on the issue. The view in the Determination is consistent with the Commissioner's longstanding view as previously expressed in ATO ID 2007/60 and that of the Full Federal Court in <i>Greensill</i> .
<b>Cross-referencing error</b>		
11	Are the references to paragraphs 7 and 8 in paragraph 21 of the draft Determination correct?	The typographical errors have been corrected in the final Determination.