


***TD 95/D13 - Income tax: can subsection 36A(2) of the Income Tax Assessment Act 1936 apply if partners of a partnership who own trading assets transfer the assets to a trustee of a unit trust in which one former partner holds at least 25% of the units?***

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This document has been finalised by TD 96/4.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

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## Draft Taxation Determination

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**Income tax: can subsection 36A(2) of the *Income Tax Assessment Act 1936* apply if partners of a partnership who own trading assets transfer the assets to a trustee of a unit trust in which one former partner holds at least 25% of the units?**

1. Yes, if the unit trust is one in which each unit holder has a proprietary interest in the underlying assets the subject of the trust deed: see *Charles v. FC of T* (1954) 90 CLR 598.
2. Subsection 36A(2) applies if each unit holder has a proprietary interest in the underlying assets because:
  - (a) a change has occurred in the ownership of, or in the interests of each partner in, the trading assets;
  - (b) the partners owned the trading assets before the change; and
  - (c) the former partner who now holds at least 25% of the units in the unit trust has an interest (being an undivided fractional interest) in the trading assets after the change.
3. We accept in a unit trust in which each unit holder has a proprietary interest in the underlying assets that a unit holder has at least a beneficial interest in the assets held by the trustee of the unit trust. This form of unit trust is the most common form.
4. However, unit trusts can have various hybrid forms and some confer on unit holders no proprietary interest in the underlying assets but only a right to receive a sum or sums of money calculated by reference to the value of the underlying assets. Unless the unit trust is one in which each unit holder has a proprietary interest in the underlying assets, section 36A will not apply.

***Definition:***

The expression 'trading assets' used in this Taxation Determination means 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***

*Red and Blue Aussie operate a grazing business in partnership in central Western Australia. They decide to transfer the business and all its trading stock to the corporate trustee of a unit trust, Aussie Colours Unit Trust. Blue Aussie holds 250 units, being 25% of the total 1000 units, in the Aussie Colours Unit Trust. Red Aussie holds 250 units in the unit trust and a new investor, Rusty*

*Aussie, holds the remaining 500 units. Under the trust deed, each unit holder has a proprietary interest in the underlying assets subject to the unit trust.*

*Subsection 36A(1) applies because Blue Aussie (and for that matter, Red Aussie) is one of the persons who owned the trading stock of the business before the change in ownership and has an interest in the trading stock after the change. The interest held by Blue Aussie after the change is the undivided fractional interest he or she holds as a unit holder in a unit trust in each of the assets held by the trustee of the unit trust.*

*There is nothing to suggest that subsection 36A(8), or any other subsection of section 36A, would operate to make ineffective an agreement made between the parties under paragraph 36A(2)(d).*

**Commissioner of Taxation**30/08/95

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Legislative Ref: ITAA 36A; ITAA 36A(1); ITAA 36A(2); ITAA 36A(2)(d); ITAA 36A(8)

Case Ref: Charles v. FC of T (1954) 90 CLR 598

ATO Ref: TDUMG 94/1; TOW55; NAT 95/6458-6

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