# *IT 328W - Notice of Withdrawal - Trusts : Interpretation of section 101 in relation to sections 99 and 99A under 1964 amending legislation.*

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# Notice of Withdrawal

## Taxation Ruling

Income tax: trusts: interpretation of section 101 in relation to sections 99 and 99A under 1964 amending legislation

Taxation Ruling IT 328 is withdrawn with effect from 1 September 2011.

1. Taxation Ruling IT 328 (issued on 20 May 1966) deals with the circumstances in which a beneficiary will be 'presently entitled to the income of the trust estate' for the purposes of Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936). It makes particular reference to the circumstances in which a beneficiary will be deemed to be presently entitled to income of a trust estate for the purposes of section 97 of the ITAA 1936 by virtue of section 101 of the ITAA 1936.

2. Section 97 says a beneficiary who is presently entitled to a share of the income of the trust estate will be assessed on that share of the trust's net income calculated under section 95 of the ITAA 1936. Section 101 says that where a trustee has a discretion to pay or apply income of a trust estate to or for the benefit of specified beneficiaries, a beneficiary in whose favour the trustee exercises his discretion shall be deemed to be presently entitled to the amount paid to him or applied for his benefit.

3. The starting point for 'present entitlement' must now be the principle outlined by the High Court in *Harmer v. Federal Commissioner of Taxation* (1991) 173 CLR 264 at 271 (*Harmer*), namely that a beneficiary is 'presently entitled' to a share of the income of a trust estate if, but only if:

(a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and

(b) the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment.

4. See also Federal *Commissioner of Taxation v. Totledge Pty Ltd* (1982) 40 ALR 385 where the Full Federal Court held that the requirement of present entitlement to a share of the income of a trust estate refers to a present vested right to demand and receive payment of the income available for distribution.

5. The issue of whether a beneficiary is presently entitled to the income of a trust estate is to be determined by application of these principles to the facts of the particular case. The facts to be taken into account include the terms of the trust as evidenced by its constituent document, the terms of any trustee resolution and any other actions by the trustee relevant to creating the entitlement of a beneficiary to income of the trust estate.

6. IT 328 also says that, while a strict application of section 101 may require that income be paid or applied before the end of the income year, the Commissioner will accept that a payment or application of income made within two months of the close of the income year is effective for the purposes of section 101 (provided the other requirements of the section are complied with and the assessments raised under section 97 or 98 are accepted).

7. However, the legislative requirement is that the test of present entitlement for the purposes of Division 6 must be satisfied by the end of the income year. See, for example, *Trustees of Estate Mortgage Fighting Fund v. Federal Commissioner of Taxation* 102 FCR at 32 where Hill J said that present entitlement to the income of a trust estate 'must arise, if at all, at the latest by the end of the year of income'. More recently in *Colonial First State Investments Ltd v. Federal Commissioner of Taxation* [2011] FCA 16 Stone J held that the test of present entitlement prescribed in *Harmer* will be satisfied if an entitlement arises 'within the relevant tax year'.

8. The legislative requirement for present entitlement to arise by year end means that, absent the practice set out in IT 328, a beneficiary who has only been made presently entitled to trust income after year end will not be assessed on a share of the net income of the trust estate under section 97.

9. As the relevant principles for determining present entitlement have been articulated in court decisions made since IT 328 first issued, and as the administrative practice discussed in paragraph 6 is contrary to that articulation of the legislative requirement, IT 328 is accordingly withdrawn.

**Commissioner of Taxation**
24 August 2011

ATO references
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