


***TR 2009/6A1 - Addendum - Income tax: entitlement to foreign income tax offsets under section 770-10 of the Income Tax Assessment Act 1997 where income is derived from investing in fiscally transparent foreign entities***

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## Addendum

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### Taxation Ruling

Income tax: entitlement to foreign income tax offsets under section 770-10 of the *Income Tax Assessment Act 1997* where income is derived from investing in fiscally transparent foreign entities

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2009/6 to remove references to Part XI of the *Income Tax Assessment Act 1936* which was repealed by the *Tax Laws Amendment (Foreign Source Income Deferral) Act (No. 1) 2010* with effect from the 2010/2011 income year.

#### TR 2009/6 is amended as follows:

##### 1. Paragraph 1

Omit from the second dot point:

- (a) 'the notional income of a foreign investment fund (FIF) or'
- (b) 'FIF or'.

##### 2. Paragraph 6

In the second dot point:

Omit 'section 485AA'; substitute 'subsections 830-10(2) or 830-15(5) of the ITAA 1997 or former section 485AA'.

##### 3. Paragraph 8

Omit the second sentence; substitute 'An interest in a foreign hybrid company also includes an interest in respect of which a taxpayer has made an election under subsection 830-15(5) of the ITAA 1997 or former section 485AA of the ITAA 1936.'

## **4. Paragraph 9**

Omit the second sentence; substitute 'An interest in a foreign hybrid limited partnership also includes an interest in respect of which a taxpayer has made an election under subsection 830-10(2) of the ITAA 1997 or former section 485AA of the ITAA 1936.'

## **5. Paragraph 14**

Omit the paragraph and associated heading.

## **6. Paragraph 15 (including headings)**

- (a) Omit 'or a FIF'; substitute 'or a (former) Foreign Investment Fund (FIF)'
- (b) Omit 'and FIF companies'.
- (c) Omit 'or a foreign company FIF'
- (d) 'or FIF'
- (e) 'or the FIF's notional income'.

## **7. Paragraphs 17 to 19**

Omit the paragraphs and associated heading.

## **8. Paragraphs 20 and 21 (including heading)**

Insert 'former' before the word 'FIF'.

## **9. Paragraphs 28 to 31**

Omit '2008-09', wherever occurring; substitute '2010-11'.

## **10. Paragraph 32**

- (a) Omit '830-10(1)(e)'; substitute '815-15(1)(d)'
- (b) Omit 'section 485AA'; substitute 'subsection 830-15(5) of the ITAA 1997 or former section 485AA'.

## **11. Paragraph 34**

Omit footnote 3.

**12. Paragraphs 34 to 38**

- (a) Omit '2008-09', wherever occurring; substitute '2010-11'.
- (b) Omit '2009-10', wherever occurring; substitute '2011-12'.

**13. Paragraphs 39 to 41**

Omit the paragraphs and associated heading.

**14. Paragraph 49**

Omit 'section 485AA'; substitute 'subsection 830-10(2) of the ITAA 1997 or former section 485AA'.

**15. Paragraph 50**

Omit '2008-09'; substitute '2010-11'.

**16. Paragraph 53**

Omit '2008-09'; substitute '2010-11'.

**17. Paragraph 54**

Omit the paragraph; substitute:

54. As per the circumstances of Example 3 above, Fozzie Pty Ltd will be entitled to a foreign income tax offset in the income year in which its assessable income includes the amount treated as a dividend paid by Hank. However, the availability of a foreign income tax offset may also be subject to the USA Convention. The Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income [1983] ATS 16.

**18. Paragraph 61**

Omit 'section 485AA'; substitute 'subsections 830-10(2) or 830-15(5) of the ITAA 1997 or former section 485AA'.

## 19. Paragraph 62

Omit the paragraph; substitute:

62. The effect of an election under subsections 830-10(2), or 830-15(5) of the ITAA 1997 or former section 485AA of the ITAA 1936, as applicable, is that the fiscally transparent foreign entity is a foreign hybrid only for the purpose of applying the Australian income tax law to that taxpayer's interest in the entity.<sup>6A</sup>

## 20. Paragraph 63

Omit 'a partnership'; substitute 'treated as a partnership'.

## 21. Paragraph 77

Omit 'section 485AA'; substitute 'subsections 830-10(2) or 830-15(5) of the ITAA 1997 or former section 485AA'.

## 22. Paragraph 78

Omit the last sentence (including footnote).

## 23. Paragraphs 87 to 95

Omit paragraphs and associated heading; substitute:

*Taxpayer receives a distribution which is non-assessable non-exempt income under section 23AK of the ITAA 1936*

87. A distribution to a taxpayer whose interest in a foreign entity was assessed in accordance with the former FIF provisions will still be NANE income under section 23AK of the ITAA 1936 to the extent that the distribution gives rise to a post FIF abolition debit.

## 24. Paragraph 97 (heading)

Omit 'or a FIF'.

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<sup>6A</sup> The FIF rules were repealed with effect from the 2010-2011 income years (see *Tax Laws Amendment (Foreign Source Income Deferral) Act (No. 1) 2010*). However, taxpayers can still rely on an election for foreign hybrid treatment in respect of a former FIF interest under former section 485AA of the ITAA 1936 and can make an election under subsections 830-10(2) or 830-15(5) of the ITAA 1997, subsequent to the repeal of section 485AA. (See Sch 1, items 76, 78 and 96 to the *Tax Laws Amendment (Foreign Source Income Deferral) Act (No 1) 2010*. Also refer to paragraphs 1.34 to 1.36 of the Explanatory Memorandum accompanying the Tax Laws Amendment (Foreign Source Income Deferral) Bill (No 1) 2010).

**25. Paragraph 99**

Omit the paragraph.

**26. Paragraph 100**

- (a) Omit 'or a FIF'
- (b) Omit 'or FIF'.

**27. Paragraph 101**

- (a) Omit 'or FIF'
- (b) Omit the second dot point and substitute:
  - the conditions in subsections 770-135(3) and 770-135(5) are satisfied.

**28. Paragraph 102**

Omit the paragraph; substitute:

102. Subsection 770-135(2) states:

An amount is included in an entity's assessable income as described in this subsection if the entity is a company and the amount is included under:

- (a) section 456 (a **section 456 case**) of the 1936 Act in relation to a \*CFC and a statutory accounting period; or
- (b) section 457 (a **section 457 case**) of that Act in relation to a CFC.

**29. Paragraph 103**

- (a) Omit 'or FIF'
- (b) Omit ', 457 or 529' and substitute 'or 457'.

**30. Paragraph 104**

- (a) Omit 'or foreign company FIF' wherever occurring.
- (b) Omit 'or the foreign company FIF'.

**31. Footnote 20**

Omit 'and in relation to a FIF under section 581 of the ITAA 1936'.

## 32. Paragraph 105

Omit the paragraph; substitute:

105. As noted at paragraph 86 of this Ruling, the net income of a foreign hybrid (for the purposes of Division 5 of Part III of the ITAA 1936) may include an amount under sections 456 or 457 of the ITAA 1936 in respect of an interest the foreign hybrid has in a CFC. However, as subsection 770-135(2) is only satisfied where the attributable taxpayer is a company, a foreign hybrid (which is treated as a partnership) will not be taken to have paid foreign income tax which has been paid by a CFC in which it holds an interest. Accordingly, a resident taxpayer that has an interest in such a foreign hybrid is not entitled to claim a foreign income tax offset for foreign income tax, income tax or withholding tax paid by a CFC in respect of an amount included in the CFC's notional assessable income.

## 33. Paragraphs 106 to 112

Omit the paragraphs

## 34. Paragraph 113 (heading)

Omit 'or a FIF'.

## 35. Paragraph 117

- (a) Omit 'Division 19'; substitute 'former Division 19'
- (b) Omit 'apply'; substitute 'applied'.

## 36. Footnote 22

Omit the footnote; substitute:

<sup>22</sup> The same result is effected under section 23AK of the ITAA 1936 for a taxpayer who holds an interest in a foreign hybrid that included an amount in its assessable income under former section 529 of the ITAA 1936 prior to the repeal of the FIF provisions: see former subsection 605(8) of the ITAA 1936.

## 37. Footnote 23

Omit the footnote; substitute:

<sup>23</sup> For an interest in a FIF, see subparagraph 23AK(1)(a)(i), paragraph 23AK(9)(b), former paragraphs 603(1)(c), and 605(1)(d) and former section 606 of the ITAA 1936.

**38. Paragraph 121**

Omit the paragraph; substitute:

121. The same outcome arises for an interest held in a former FIF via an interposed foreign hybrid in respect of any income to which section 23AK of the ITAA 1936 applies.

**39. Paragraph 122**

(a) Omit 'contained in Schedules to the Agreements Act.'

(b) In the second sentence omit 'Agreements Act' first occurring; substitute '*International Tax Agreements Act 1953* (the Agreements Act)'.

**40. Footnote 24**

(a) Omit 'section 485AA'; substitute 'former section 485AA'.

(b) Omit 'in the FIF'.

**41. Paragraph 125**

Omit '2008'; substitute '2010'.

**42. Detailed contents list**

Omit:

<i>Attributable FIF income from the foreign entity – no offset allowed</i>	14
Foreign income tax imposed on amounts included in the notional income of a CFC or a FIF in which a foreign hybrid has an interest	15
<i>CFCs and FIF companies – no offset allowed</i>	15
<i>FIF trusts – offset allowed because hybrid is taken to have paid the foreign income tax</i>	17
<i>CFCs and FIFs - distributions to a foreign hybrid</i>	20
<i>Example 4 distribution by limited liability company that is not a foreign hybrid (because no section 485AA of the ITAA 1936 election was made)</i>	39
<i>Taxpayer's assessable income includes attributed FIF income under section 529 of the ITAA 1936</i>	87
Foreign income tax imposed on amounts included in the notional income of a CFC or a FIF in which the foreign hybrid has an interest	97
<i>Tax imposed on distributions made by a CFC or a FIF to a foreign hybrid</i>	113



**Insert:**

Foreign income tax imposed on amounts included in the notional income of a CFC or a (former) Foreign Investment Fund (FIF) in which a foreign hybrid has an interest	15
<i>CFCs - no offset allowed</i>	15
<i>CFCs and former FIFs - distributions to a foreign hybrid</i>	20
<i>Taxpayer receives a distribution which is non-assessable non-exempt income under section 23AK of the ITAA 1936</i>	87
Foreign income tax imposed on amounts included in the notional income of a CFC in which the foreign hybrid has an interest	97
<i>Tax imposed on distributions made by a CFC to a foreign hybrid</i>	113

**43. Legislative references****(a) Omit:**

- ITAA 1936 6AB(3A)
- ITAA 1936 23AK(1)(d)
- ITAA 1936 160AFCD
- ITAA 1936 160AFCJ
- ITAA 1936 485
- ITAA 1936 485A
- ITAA 1936 529
- ITAA 1936 530
- ITAA 1936 573
- ITAA 1936 581
- ITAA 1936 605(8)
- ITAA 1936 Div 2
- ITAA 1936 Div 3
- ITAA 1936 Div 4
- ITAA 1936 Div 5
- ITAA 1936 Div 6
- ITAA 1936 Div 7
- ITAA 1936 Div 8
- ITAA 1936 Div 9
- ITAA 1936 Div 10
- ITAA 1936 Div 11
- ITAA 1936 Div 11A
- ITAA 1936 Div 12
- ITAA 1936 Div 13
- ITAA 1936 Div 14
- ITAA 1936 135(6)
- International Tax Agreements Act 1953 Sch 2

**(b) Insert:**

- ITAA 1936 23AK(1)(a)(i)
- ITAA 1936 135(6)
- Tax Laws Amendment (Foreign Source Income Deferral) Act (No. 1) 2010

**44. Other references**

- (a) Omit '2008 Version'; substitute '2010 Version'.
- (b) Insert:
  - USA Convention [1983] ATS 16
  - USA Convention [1983] ATS 16, Article 11
  - USA Convention [1983] ATS 16, Article 22(2)
  - The Explanatory Memorandum to the Tax Laws Amendment (Foreign Source Income Deferral) Bill (No. 1) 2010

This Addendum applies on and from 27 March 2013.

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**Commissioner of Taxation**27 March 2013

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ATO references

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