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1. Introduction

We live in a digitally connected global economy in which transactions are rarely confined to Australian parties. As families, assets and decision makers increasingly operate across multiple jurisdictions, estate administration is no longer confined to Australia. Cross border estates present tax, legal and practical challenges that advisers and executors must identify and manage effectively. It is incumbent upon the executors to navigate the complexities which unfold, such as:

- The tax residency of the estate including whether a dual residency situation for the estate exists?
- Which parties involved with the estate should be taxed?
- Are any of these parties classified as tax residents of countries other than Australia?
- What happens if the executor is or becomes a non-resident?
- In which jurisdictions will taxes be levied upon the estates and any other relevant parties?
- If multiple jurisdictions are involved, do withholding taxes or foreign tax credits need to be considered before estimates of income tax liabilities are confirmed?
- How will assets located outside of Australia be distributed to foreign beneficiaries of the estate or repatriated to Australia in a tax compliant manner?
- Are testamentary trusts established as a result of the will and what is the residency of those testamentary trusts?

This session outlines the principal international tax provisions likely to be encountered by advisers dealing with deceased estates and associated parties, including executors and beneficiaries, that are affected by international factors. Those factors may alter the taxation of estate income and capital gains. The paper is relevant to tax advisers working on estate planning before death and estate administration and focuses on residency, treaty application, trust income, capital gains, withholding obligations, foreign income tax offsets, offshore estate taxes and foreign investment considerations. The analysis is supported by practical scenarios and summary tables to help advisers identify the relevant taxation points, jurisdictions and compliance obligations

Please note that this paper assumes that, as announced by Treasury in the exposure draft legislation released on 3 September 2026, deceased estates and testamentary trusts established for ‘genuine testamentary purposes’ will be excluded from the effects of the legislation introducing the new minimum 30% tax on discretionary trusts. Similarly, this paper assumes that the measures announced in *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* excluding deceased estates and testamentary trusts established for ‘genuine testamentary purposes’ from being subject to the new minimum 30% tax on capital gains will be legislated.

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2. Upfront Planning for Taxation Points and Jurisdictions

Once you have established you have a deceased estate or testamentary trust that crosses borders, the first step is an analysis of:

- The potential individual and entity taxation points;
- The income and asset profiles of the affected parties involved with the deceased estate or testamentary trust;
- The relevant jurisdictions with which the deceased estate or testamentary trust has a nexus.

The following table provides a simplified example of the types of information that needs to be mapped and collated in a multi-jurisdictional estate plan or matter. Once this information is obtained, the executor and the advisor then can turn their mind to each of the relevant taxation points and jurisdictions. Further analysis then may be required for the elements involving greater complexity, such as the income and asset profiles of the affected parties.

Items Requiring Analysis	**Affected Parties Involved Who are Subject to Analysis**
Tax Residency / Dual Tax Residency Income Profile Asset Profile Jurisdictional Nexus	The deceased person prior to his/her death The deceased estate (and by extension, the executor/s of the deceased estate) The beneficiaries of the deceased estate Any entities controlled by the deceased person or the executor/s Any testamentary trusts created under the will, along with the beneficiaries and trustees of these testamentary trusts

This paper details some of the more contentious and controversial issues to think about in each of these areas.

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3. Tax Residency and Treaty Application

The tax residency of each of the individuals and entities involved in the multi-jurisdictional deceased estate or testamentary trust will need to be considered having regard to:

- Local tax laws
- Double Tax Agreements (DTAs)

For the purposes of this paper, we will not delve into individual or company tax residency issues but rather bring to the readers' attention some of the key points relevant to trusts and estates as this area usually entails the more complicated analysis. It also is important to note that 'Temporary Residents', be they the deceased person, the executor/s or the beneficiaries, bring an additional layer of complexity not considered in this paper, but which should not be ignored by the executor/s or advisors.

3.1 Tax Residency for Trust Estates – Australian Law

For trust estates (including deceased estates and testamentary trusts), the question of tax residency starts with a consideration of Section 95 of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*').

> ***95(2)*** *For the purposes of this Division, a trust estate shall be taken to be a resident trust estate in relation to a year of income if:*
> *(a) a trustee of the trust estate was a resident at any time during the year of income; or*
> *(b) the central management and control of the trust estate was in Australia at any time during the year of income.*
>
> ***95(3)*** *In this Division, a trust estate that is not a resident trust estate in relation to a year of income is referred to as a non-resident trust estate in relation to that year of income.*

Supplementary to this enquiry, Section 6(1) *ITAA 1936* gives the following expansive definition to the role of 'trustee':

> *In addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, a 'trustee' includes:*
> *(a) an executor or administrator, guardian, committee, receiver, or liquidator; and*
> *(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability.*

Three essential points arise from a reading of these subsections:

1. A non-resident trust estate is defined by reference to any trust estate which does not meet the criteria to qualify as a resident trust estate.

2. Classification as a resident trust estate depends upon the trust estate satisfying one of two discrete criteria: that *a* trustee (as expansively defined in the tax legislation) was an Australian tax resident at any time during the year of income, or that the central management and control of the trust was in Australia at any time during the year of income.

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3. Both the criteria contained in the legislative provision refer to the phrase ‘at any time during the year of income’. Therefore, during any particular year, even if either the Australian tax residency of the trustee or the Australian locale of the trust’s central management and control is only transient, then the trust itself will be considered a resident trust estate for tax purposes under Australian tax law for that entire year.

Analysing the tax residency status of deceased estates often will depend upon an enquiry of the tax residency status of the executor/s, which usually necessitates a review of the definition of ‘resident’ found in Section 6(1) *ITAA 1936*, along with the associated case law amassed over the decades dedicated to considering the application of this definition.

3.2 Tax Residency for Trusts Estates – Foreign Law

Attention must then turn to whether another jurisdiction treats the trust estate as resident or otherwise subject to tax. The residence of each affected party, together with the location and source of income and assets, may create a primary or secondary taxing nexus in a foreign jurisdiction. Some jurisdictions also impose separate estate, inheritance or succession taxes, as discussed in Section 7. Common examples requiring careful analysis include estates connected with the United States, the United Kingdom or New Zealand through residence, citizenship, domicile, assets or administration.

3.3 Double Tax Agreements

Double tax agreements may modify the domestic law treatment of dual residents, but the available tie breaker mechanism depends on the wording of the particular treaty and the type of taxpayer involved. Individual residence articles commonly contain sequential tie breaker tests. For trusts and other non-individual entities, some treaties use a competent authority process, while others may not provide an effective treaty residence outcome. Each relevant treaty must therefore be reviewed separately for the deceased, executors, beneficiaries and trust estate.

Particularly for trusts with a United States connection, an analysis of the Limitations of Benefits article is critical to consider whether the treaty applies.

It also should be noted that Australia does have a specific Estate Tax Treaty with the United States. Australia also has Social Security treaties with multiple countries which sometimes prove relevant in the payment of pensions in estate contexts.

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4. Taxation of Trust and Deceased Estate Income in Australia

The taxation of trusts and deceased estates in Australia requires careful analysis. Before starting the analysis, the following facts are required to be ascertained:

1. The residency of the trust or deceased estate, whether it is either a resident trust estate for Australian tax purposes or a non-resident trust estate for Australian tax purposes.

2. Whether any beneficiaries are presently entitled to a share of the income of the trust estate or whether no beneficiaries are presently entitled to as share of the income of the trust estate.

3. Whether any beneficiaries themselves are non-residents for Australian tax purposes.

4. Whether the income in question is sourced within Australian or is of a foreign source.

Table 1 outlines a summary of the principles which apply to the assessment of the net income of a trust estate, along with the corresponding legislative provisions in the *ITAA 1936* giving effect to these principles. These principles deal with the assessment of the net income of the trust estate. As covered in Section 5 of this paper, capital gains are impacted by various other provisions in the tax legislation and require a whole separate analysis to income.

Advisors also may need to look at foreign income separately under Section 99B ITAA 1936 when a non-resident beneficiary was presently entitled to that foreign income but subsequently received a distribution of it while classified as a resident beneficiary (see Section 4.4 of this paper).

Table 1: Summary of the main assessing principles for the net income of a trust estate (ignoring consideration of beneficiaries who are minors or who are under other legal disabilities)

Deceased Estate or Testamentary Trust	**Resident Beneficiary Presently Entitled**	**Non-Resident Beneficiary Presently Entitled**	**No Beneficiary Presently Entitled**
Resident Trust	Beneficiary taxed on its share of worldwide income to which it is presently entitled under Section 97(1) *ITAA 1936*.	Trustee taxed on beneficiary's share of Australian-sourced income at either non-resident marginal tax rates, corporate tax rates, or 45% under Section 97, 98 and 98A *ITAA 1936*.	Trustee taxed on worldwide income at either marginal tax rates or 45% under Section 99 or 99A *ITAA 1936*.
Non-Resident Trust	Beneficiary taxed on its share of worldwide income to which it is presently entitled under Section 97(1) *ITAA 1936*.	Trustee taxed on beneficiary's share of Australian-sourced income at either non-resident marginal tax rates, corporate tax rates, or 45% under Section 97, 98 and 98A *ITAA 1936*.	Trustee taxed on Australian-sourced income at either non-resident marginal tax rates or 45% under Section 99 or 99A *ITAA 1936*.

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4.1 Section 97 *ITAA 1936*

Section 97(1) *ITAA 1936* is the starting point for the taxation of net income of trust estates where the beneficiaries are not under a legal disability.

In summary, in the case of deceased estates or testamentary trusts in which the beneficiaries are residents for Australian tax purposes and are presently entitled to the income of the trust estate, the beneficiaries are taxed on their share of the net income.

If the beneficiary is not a resident for Australian tax purposes, then "so much" of the share of the net income which is attributable to sources in Australia is taxable in Australia.

4.2 Sections 98 and 98A *ITAA 1936*

In the context of non-resident trust estates and non-resident beneficiaries, Sections 98 and 98A add an additional layer of mechanics onto how Section 97(1) assesses beneficiaries to income tax on their share of the net income of a trust estate.

As an overview:

- Section 98(2A) *ITAA 1936* assesses an executor or trustee on the share of net income to which a non-resident individual or corporate beneficiary for Australian tax purposes is presently entitled, excluding from this share of net income any income derived which was attributable to sources outside of Australia while the beneficiary was a non-resident.

- Section 98(3)(a) *ITAA 1936* then taxes the net income at the individual tax rates applicable to non-residents, or Section 98(3)(b) alternatively taxes the net income at the corporate tax rates if the beneficiary is a company.

- Section 98(4) *ITAA 1936* assesses an executor or trustee on the share of net income to which a non-resident trustee beneficiary for Australian tax purposes is presently entitled, excluding from this share of net income any income derived which was attributable to sources outside of Australia. This share of net income is taxed at the rate of 45%.

- Section 98A *ITAA 1936* allows the income tax paid by a trustee on behalf of a non-resident beneficiary to be recouped by the non-resident beneficiary as a credit against any income tax payable by the non-resident beneficiary should it lodge a tax return in Australia for the same income year.

In effect, Section 98 *ITAA 1936* imposes a form of 'non-final' withholding tax on trustees in circumstances when a beneficiary who is presently entitled to a share of the income of a trust estate is a non-resident at the end of the year of income.

Under this section, a trustee is assessed and liable to pay income tax in respect of:

- The non-resident beneficiary's share of the net income of the trust estate attributable to a period when the beneficiary was a resident; and
- The non-resident beneficiary's share of the net income of the trust estate, attributable to sources in Australia, attributable to a period when the beneficiary was a non-resident.

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This treatment aims to equate the tax treatment of the beneficiary with the tax treatment to which it is entitled if it were assessed in its own name on the exact same income. Special marginal rates of income tax applicable to trustees are detailed in the *Income Tax Rates Act 1986* (Cth).

Unlike Section 128D *ITAA 1936* (covered in Section 6.1.1 of this paper), Section 98A *ITAA 1936* ensures that tax paid by a trustee on a non-resident beneficiary's share of net trust income is *not* treated as a final tax (i.e., the non-resident beneficiary is expected to lodge its own tax return including its share of the net trust income, with the beneficiary then receiving a credit against its assessment for tax already paid by the trustee).

The practical reality for deceased estates is that often the executor/s, when making cash distributions of income after year-end to presently entitled beneficiaries, will reduce any amounts due to non-resident beneficiaries by the tax required to be paid by the executor under the above provisions.

4.3 Sections 99 and 99A *ITAA 1936*

Sections 99 or 99A will apply where no beneficiaries are presently entitled to the net income of a trust estate, which often is the case during the period of administration of a deceased estate or when a will has imposed conditions on a testamentary beneficiary preventing them from obtaining entitlement to income or capital of a trust estate until certain preconditions are met.

The default provision is Section 99A *ITAA 1936*, which assumes that all trust estates where no present entitlement exists are taxed under that Section at the rate of 45% (plus 2% Medicare Levy).

Section 99A(2) *ITAA 1936* contains the clause which usually excludes deceased estates or testamentary trusts from the punitive taxation of Section 99A:

> *(2) This section does not apply in relation to a trust estate in relation to a year of income, being a trust estate:*
>
> *(a) that resulted from:*
>
> *(i) a will, a codicil or an order of a court that varied or modified the provisions of a will or a codicil; or*
>
> *(ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate; …*
>
> *if the Commissioner is of the opinion that it would be unreasonable that this section should apply in relation to that trust estate in relation to that year of income.*

If the Commissioner does exercise this discretion in the favour of the executor/s or testamentary trustee/s following lodgement of the tax return for the relevant year, then Section 99 *ITAA 1936* instead will apply and the net income of the deceased estate or testamentary trust will be taxed at special marginal tax rates applicable to residents or non-residents, depending upon the tax residency status of the deceased estate or testamentary trust.

Generally, for deceased estates, if less than three years has elapsed since the death of the deceased person, the tax rates should mirror the normal marginal tax rates applicable to resident or non-resident individual taxpayers (without Medicare Levy). However, if more than three years has elapsed since the death of the deceased person, although marginal tax rates still will be applicable (without Medicare Levy applying), a resident deceased estate will lose access to the tax-free threshold when calculating its income tax liability.

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4.4 Section 99B(1) *ITAA 1936* – Taxation of Income from Foreign Trusts?

Section 99B(1) *ITAA 1936* broadly includes in a beneficiary's assessable income an amount of trust property paid to, or applied for the beneficiary's benefit, where the beneficiary is an Australian tax resident at any time during the income year. Section 99C *ITAA 1936* extends this concept to indirect or deemed benefits and may capture arrangements involving gifts, loans or access to trust assets.

As confirmed by the ATO in *ATO ID 2011/93*, Section 99B(1) *ITAA 1936* captures distributions made to an Australian tax resident beneficiary of foreign source income which accumulated in a non-resident trust during a period of time when that beneficiary was not an Australian resident for tax purposes. The tax residency status of the beneficiary need only be temporal during the income year in which the distribution of accumulated foreign source income occurs (i.e., the beneficiary need not be an Australian tax resident at the end of the income year).

4.4.1 Foreign Source Income

Where a trust estate which is a non-resident trust estate derives foreign source income and there is no beneficiary presently entitled to that income, so much of the net income as represents the foreign source income would not be assessable either to the beneficiaries or to the trustee (unless it was deemed as assessable income under the anti-avoidance provisions of Division 6AAA *ITAA 1936,*).

Importantly though, if the foreign source income is paid to, or applied for the benefit of, a beneficiary, the beneficiary would be assessable on it if he or she is a resident at any time during the year in which the payment or application occurs, provided that none of the other exclusions listed in Section 99B(2) *ITAA 1936* did not apply.

4.4.2 Section 99B(2) *ITAA 1936* - Exclusions

Section 99B(2) *ITAA 1936* limits this broadness of Section 99B(1) *ITAA 1936* by excluding amounts that genuinely represent trust corpus (unless that corpus represents prior year accumulated earnings), amounts that a hypothetical Australian resident taxpayer would not have included in assessable income, and amounts already assessed to a beneficiary, trustee or taxpayer under the trust and attribution regimes.

Corpus is determined by the objective source of the property distributed, not merely by accounting labels or trustee descriptions. Accumulated income or gains do not escape assessment simply because they have been capitalised.

4.4.3 TD 2024/9

TD 2024/9 explains the "hypothetical resident taxpayer" tests in paragraphs 99B(2)(a) and (b). The hypothetical taxpayer is assumed only to be an Australian tax resident; personal characteristics or concessions available only to particular classes of taxpayers, such as the CGT discount, are not imported. However, the factual circumstances that produced the amount remain relevant, including how an asset was acquired, its tax attributes and cost base, whether it was a pre-CGT asset or inherited property, and the event that generated the proceeds.

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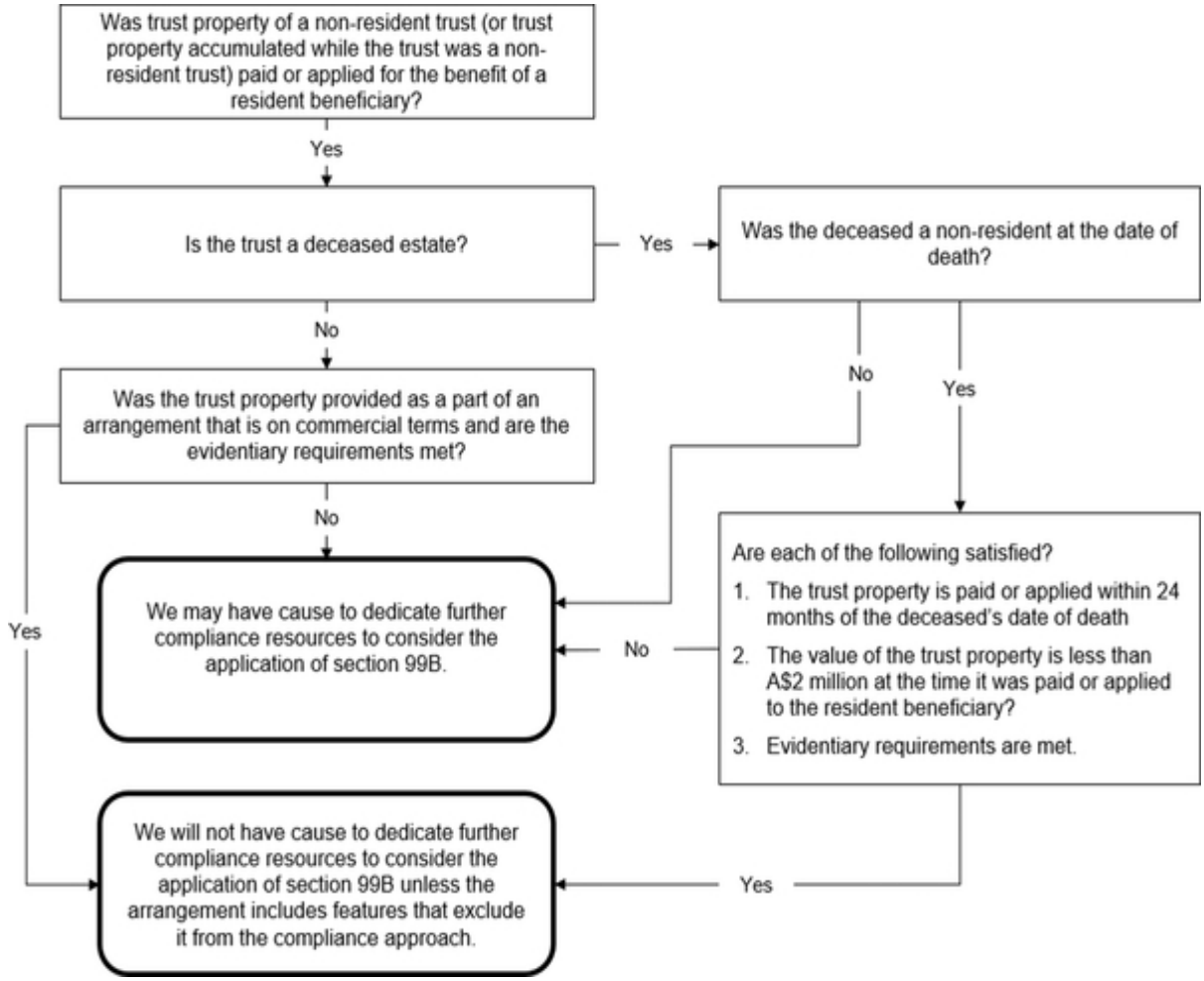
4.4.4 PCG 2024/3

PCG 2024/3 outlines the ATO's compliance approach for payments and benefits from property accumulated while a trust was non-resident trust estate for tax purposes.

In the context of deceased estates (but not testamentary trusts), PCG 2024/3 states that the ATO generally treats qualifying distributions from a non-resident deceased estate as low risk, in the absence of high-risk factors (e.g., contrived schemes) where those distributions are made within two years of death and the value of the estate's assets from which the distributions are sourced does not exceed AU$2 Million at the time at which the distributions are made. This approach is illustrated in Diagram 1.

Diagram 1: Decision tree that the ATO will follow when applying its compliance approach for low-risk arrangements falling within the ambit of Section 99B (taken from PCG 2024/3)



4.5 Impact of New Trusts Legislation from Budget 2026-2027

Some brief observations about how the exposure draft legislation released by Treasury on 3 September 2026 may affect deceased estates and testamentary trusts:

- Proposed Section 101AD *ITAA 1936* will exclude deceased estates and testamentary trusts from the minimum 30% tax on discretionary trusts provided that such entities are established and administered for genuine testamentary purposes (i.e., the assessable income of those entities must be generated from assets which were not injected from external sources post-death into the asset pool of the deceased estate or testamentary trust).

- Additionally, if the deceased estate or testamentary trust is established on or after 1 July 2028, then the exclusion from the minimum 30% tax on discretionary trusts only will apply if the eligible beneficiaries of the deceased estate or testamentary trust are either individuals or exempt entities.

While it is too early to proffer advice on how these draft provisions practically may operate, in theory, the existing provisions in *ITAA 1936* regulating the assessment of trust income to trustees or beneficiaries already covered in the above sections should prevail, at least in the case of deceased estates and testamentary trusts excepted from these new measures.

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5. Taxation of Trust and Deceased Estate Capital Gains in Australia

The fundamental rule outlined in Section 128-10 of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*') is that when a person dies, any capital gain or capital loss from a CGT event that results for a CGT asset owned by the deceased person just before dying is disregarded. Section 128-15(2) *ITAA 1997* expands this exemption to any capital gain or capital loss which legal personal representatives (i.e., executors) may realise when transferring assets from the deceased estate to beneficiaries of that deceased estate.

Everything discussed to this point in this paper regarding income should be put aside because as will be seen, capital gains are governed by a whole separate set of principles and provisions, especially when non-resident trust estates or non-resident beneficiaries are involved.

Table 2 outlines a summary of the principles which apply to the assessment of the capital gains of a trust estate, along with the corresponding legislative provisions in the *ITAA 1936* and the *ITAA 1997* giving effect to these principles. Note that the legislative provisions dealing with the entitlement to the CGT Discount come with their own intrinsic complexities and are covered separately in Section 5.6 of this paper.

Table 2: Summary of the main assessing principles for the capital gains of a trust estate

Deceased Estate or Testamentary Trust	**Resident Beneficiary Presently Entitled**	**Non-Resident Beneficiary Presently Entitled**	**No Beneficiary Presently Entitled**
Resident Trust **CGT Asset = Taxable Australian Property**	Beneficiary taxed on capital gains under Section 97(1) *ITAA 1936* and Subdivision 115-C *ITAA 1997*.	Trustee taxed on beneficiary's share of capital gains included in the net income of the trust estate at either non-resident marginal tax rates, corporate tax rates, or 45% under Section 97, 98 and 98A *ITAA 1936,* and Subdivision 115-C *ITAA 1997*.	Trustee taxed on capital gains under Section 99 or 99A *ITAA 1936*, and Subdivision 115-C *ITAA 1997*.
Resident Trust **CGT Asset = Non-Taxable Australian Property**	Beneficiary taxed on capital gains under Section 97(1) *ITAA 1936* and Subdivision 115-C *ITAA 1997*.	<u>Non-Fixed Trusts:</u> Trustee taxed on beneficiary's share of capital gains included in the net income of the trust estate at either non-resident marginal tax rates, corporate tax rates, or 45% under Section 97, 98 and 98A *ITAA 1936,* and Subdivision 115-C *ITAA 1997*.	Trustee taxed on capital gains under Section 99 or 99A *ITAA 1936*, and Subdivision 115-C *ITAA 1997*.

		Fixed Trusts: Trustee NOT taxed on beneficiary's share of capital gains included in the net income of the trust estate, because Section 855-40(2) *ITAA 1997* excludes the capital gain from taxation. Likewise, the beneficiary is NOT taxed on its share of capital gains included in the net income of the trust estate, because Section 855-40(2) *ITAA 1997* excludes the capital gain from taxation.	
Non-Resident Trust **CGT Asset = Taxable Australian Property**	Beneficiary taxed on capital gains under Section 97(1) *ITAA 1936* and Subdivision 115-C *ITAA 1997*.	Trustee taxed on beneficiary's share of capital gains included in the net income of the trust estate at either non-resident marginal tax rates, corporate tax rates, or 45% under Section 97, 98 and 98A *ITAA 1936,* and Subdivision 115-C *ITAA 1997*.	Trustee taxed on capital gains under Section 99 or 99A *ITAA 1936*, and Subdivision 115-C *ITAA 1997*.
Non-Resident Trust **CGT Asset = Non-Taxable Australian Property**	Beneficiary NOT taxed on capital gains under Section 97(1) *ITAA 1936* and Subdivision 115-C *ITAA 1997*, because Section 855-10(1) *ITAA 1997* excludes the capital gain from the net income of the trust estate (refer to *TD 2017/23*). However, the gain may be assessed to the beneficiary under Section 99B *ITAA 1936*, on revenue account.	Neither trustee nor beneficiary is taxed on capital gains under Section 97, 98 and 98A *ITAA 1936*, and Subdivision 115-C *ITAA 1997*, because Section 855-10(1) *ITAA 1997* excludes the capital gain from the net income of the trust estate (refer to *TD 2017/23*).	Trustee NOT taxed on capital gains under Section 99 or 99A *ITAA 1936*, and Subdivision 115-C *ITAA 1997*, because Section 855-10(1) *ITAA 1997* excludes the capital gain from the net income of the trust estate (refer to *TD 2017/23*).

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5.1 Capital Gains Tax and Non-Residents – The TAP Trap

Capital gains are a type of statutory income implemented into the Australian taxation system by the *ITAA 1997*. For this reason, both the ATO and the courts have emphasised that the tax residency rules governing trusts and deceased estates which are found in Sections 95(2) and 95(3) *ITAA 1936* will be overridden should a more specific provision dealing with the interaction of capital gains tax and tax residency exist in the income tax legislation.

In *TD 2017/23*, the ATO confirms that Section 855-10(1) *ITAA 1997* will prevail regarding capital gains or capital losses.

> ***855-10(1)*** *Disregard a capital gain or capital loss from a CGT event if:*
> *(a) you are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens; and*
> *(b) the CGT event happens in relation to a CGT asset that is not taxable Australian property.*

A 'foreign trust for CGT purposes' is defined by Section 995-1(1) *ITAA 1997* in exactly the same terms as a 'non-resident trust estate' for all types of trusts except unit trusts.

Section 855-15 *ITAA 1997* lists five categories of CGT assets which constitute 'taxable Australian property' ('*TAP*'):

1. Taxable Australian Real Property ('*TARP*'), as defined in Section 855-20 *ITAA 1997*;
2. An 'indirect Australian real property interest', as defined in Section 855-25(1) *ITAA 1997*;
3. A CGT asset used at any time in carrying on a business through a permanent establishment in Australia;
4. An option or right to acquire one of the above classes of assets;
5. A CGT asset upon which a taxpayer chose, under Section 104-165(2) *ITAA 1997*, to disregard realising a capital gain or capital loss which arose when the taxpayer ceased to be resident for Australian tax purposes.

Where a deceased estate is a 'foreign trust for CGT purposes', capital gains or capital losses stemming from CGT events on CGT assets which do not meet the definition of TAP should be excluded from the assessable income of the deceased estate.

The trap though for executors of deceased estates is that even if the deceased estate is a 'foreign trust for CGT purposes', if the deceased person was a non-resident for Australian tax purposes prior to death, then CGT assets generally not perceived as TAP may, and often will, constitute TAP, subjecting those assets to capital gains tax in the hands of the executor/s or the beneficiaries, depending on how the deceased person treated those assets previously.

CGT Event I1 states that an individual makes a capital gain or loss on each CGT asset that is not TAP at the time when the individual ceases to be a resident for Australian tax purposes. Under the assumption that most taxpayers do not choose to pay the capital gains tax voluntarily on unrealised gains, then because of the choice inherently made by the deceased person under Section 104-165(3) *ITAA 1997* in the year in which he/she ceased residency to disregard CGT Event I1, each affected CGT asset is converted into TAP at that time. So, for example, if the deceased person held shares in non-land rich companies prior to becoming a non-resident for Australian tax purposes, then it is quite likely that the deceased estate would be subject to capital gains on the disposal of those shares, even if the deceased estate is a non-resident trust estate.

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A trustee also needs to remain cognisant of the principles outlined by the ATO in *TD 2022/12* and *TD 2022/13* (as confirmed in the *Greensill* case), which addresses the operation of Section 855-40 *ITAA 1997*.

> *(1) The purpose of this section is to provide comparable taxation treatment as between direct ownership, and indirect ownership through a fixed trust, by foreign residents of CGT assets that are not taxable Australian property.*
>
> *(2) A capital gain you make in respect of your interest in a fixed trust is disregarded if:*
> *(a) you are a foreign resident when you make the gain; and*
> *(b) the gain is attributable to a CGT event happening to a CGT asset of a trust (the **CGT event trust**) that is:*
> *(i) the fixed trust; or*
> *(ii) another fixed trust in which that trust has an interest (directly, or indirectly through a chain of trusts, each trust in which is a fixed trust); and*
> *(c) either:*
> *(i) the asset is not taxable Australian property for the CGT event trust at the time of the CGT event; or*
> *(ii) the asset is an interest in a fixed trust and the conditions in subsections (5), (6), (7) and (8) are satisfied.*
>
> *Note: Section 115 - 215 treats a portion of a trust's capital gain as a capital gain made by a beneficiary, and applies the CGT discount to that portion as if the gain were made directly by the beneficiary.*
>
> *(3) You are not liable to pay tax as a trustee of a fixed trust in respect of an amount to the extent that the amount gives rise to a capital gain that is disregarded for a beneficiary under subsection (2).*
>
> *(4) To avoid doubt, subsection (3) does not affect the operation of subsection 98A(1) or (3) of the Income Tax Assessment Act 1936 (about taxing beneficiaries who are foreign residents at the end of an income year).*
>
> *Conditions*
> *(5) The conditions in subsections (6), (7) and (8) must be satisfied if the relevant CGT event happens to an interest in a fixed trust (the **first trust**) and the interest is taxable Australian property at the time of the CGT event.*
>
> *(6) At least 90% (by market value) of the CGT assets of:*
> *(a) the first trust; or*
> *(b) a fixed trust in which the first trust has an interest (directly, or indirectly through a chain of trusts, each trust in which is a fixed trust);*
> *must not be taxable Australian property at the time of the relevant CGT event.*
>
> *(7) If the condition in subsection (6) is not satisfied for the first trust (but is satisfied for a trust covered by paragraph (6)(b)), the condition in subsection (8) must be satisfied for the first trust, and for each other trust in the chain of trusts between the first trust and the trust that satisfied the condition in subsection (6).*

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> *(8) The condition is that, assuming any interest in a fixed trust in that chain not to be taxable Australian property, at least 90% (by market value) of the CGT assets of the trust must not be taxable Australian property.*

In short, Section 855-40 *ITAA 1997* operates to ensure that non-resident beneficiaries of fixed trusts are not assessed on capital gains made on CGT assets of the fixed trust that are not taxable Australian property.

Non-resident beneficiaries of non-fixed trusts are not entitled to avail themselves of this concession. Consequently, in the case of trusts with discretionary elements, even if a capital gain stems from non-taxable Australian property, then a non-resident beneficiary will be assessed on that capital gain (i.e., the source of the capital gain is not relevant).

Therefore, unless the executor/s of a deceased estate confidently can prove that the deceased estate is a fixed trust, then if the executor/s are assessed on behalf of presently entitled non-resident beneficiaries under Section 98(2A) *ITAA 1936*, capital gains resulting from CGT assets which are non-taxable Australian property will be recognised as assessable income at both the deceased estate and beneficiary levels, regardless of the tax residency status of the beneficiaries.

This position was confirmed by the ATO in *ATO ID 2007/60*, where the ATO stated that Section 855-10(1) *ITAA 1997* could not apply to non-resident beneficiaries of non-fixed trusts because while Section 115-215(3) *ITAA 1997* imputes a capital gain to the beneficiary of the trust, it does not create a CGT event in the hands of the non-resident beneficiary.

5.2 TD 2017/23 and TD 2017/24

TD 2017/23 confirms that the residency assumption in Section 95(1) *ITAA 1936* does not override Section 855-10 *ITAA 1997*. Accordingly, where a trust is a foreign trust for CGT purposes and a CGT event concerns an asset that is not TAP, the trustee disregards the resulting capital gain or loss when calculating the trust's net income. The capital gain or loss therefore does not flow through to beneficiaries under Subdivision 115-C: beneficiaries are not treated as having capital gains from the event, and the trustee is not assessed under the related trustee assessment provisions.

However, if an amount attributable to the disregarded capital gain is later paid or applied for the benefit of an Australian tax resident beneficiary, Section 99B(1) *ITAA 1936* may include that amount in the beneficiary's assessable income (refer to Section 4.5 of this paper for further discussion about this legislative provision).

To this point, *TD 2017/24* confirms that where an Australian tax resident beneficiary receives an amount from a foreign trust that is attributable to a capital gain on non-taxable Australian property, and the amount is assessable under Section 99B(1) *ITAA 1936*, it is not treated as a capital gain for Australian tax purposes. The beneficiary therefore must declare the assessable amount as ordinary statutory income and cannot reduce it by current year or carried forward capital losses, or claim the CGT discount, even though the amount originated from a capital gain realised by the foreign trust and may have been treated as income or corpus under the trust deed.

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5.3 Changing Residency: CGT Event I2

Whereas CGT Event I1 occurs when an individual stops being a resident for Australian tax purposes, pursuant to Section 104-170 *ITAA 1997*, CGT Event I2 occurs when a trust stops being a resident for Australian tax purposes. Crucially, unlike with CGT Event I1, there is no provision within the legislation to allow the trustee/s to choose to disregard any capital gain made by the trust upon the cessation of its Australian tax residency.

It can be seen then how easy it is for a change in tax residency status of the executor/s of a deceased estate to unexpectedly cause a capital gains tax liability for the deceased estate on all its non-taxable Australian property CGT assets. This may include where an executor's tax residency status changes, or an Australian resident executor is appointed or resigns. Further, the timing of the CGT event means that the CGT liability quite likely will be imposed upon the deceased estate prior to its realisation of the CGT assets which are caught by this CGT Event I2.

5.4 CGT Event K3

One exception to the fundamental rule in Section 128-10 *ITAA 1997* that is easily overlooked by executors is CGT Event K3, contained within Section 104-215 *ITAA 1997*.

> *(1)* ***CGT event K3*** *happens if you die and a CGT asset you owned just before dying passes to a beneficiary in your estate who (when the asset passes):*
> *(a) is an exempt entity; or*
> *(b) is the trustee of a complying superannuation entity; or*
> *(c) is a foreign resident.*
>
> *(2) If the asset passes to a beneficiary who is a foreign resident,* ***CGT event K3*** *happens only if:*
> *(a) you were an Australian resident just before dying; and*
> *(b) the asset (in the hands of the beneficiary) is not taxable Australian property.*
>
> *(3) The time of the event is just before you die.*
>
> *(4) A* ***capital gain*** *is made if the market value of the asset on the day you died is more than the asset's cost base. A* ***capital loss*** *is made if that market value is less than the asset's reduced cost base.*
> *Note: The trustee of the estate must include in the date of death return any net capital gain for the income year when you died.*
>
> *Exception*
> *(5) A capital gain or capital loss is disregarded if you acquired the asset before 20 September 1985.*
> *Note: There is also an exception for certain philanthropic testamentary gifts: see section 118 - 60.*

CGT Event K3 covers post-CGT assets of a deceased person which pass to a tax-advantaged entity as a beneficiary of the deceased person's estate. Guidance on the circumstances in which an asset passes to a beneficiary is found in Section 118-20 *ITAA 1997*. Furthermore, *TD 2004/3* expresses the ATO's view that an asset also passes to a beneficiary when the beneficiary becomes absolutely entitled to the asset as against the executor/s of the deceased estate, regardless of whether the CGT asset is later transferred to the beneficiary.

For the purposes of CGT Event K3, tax-advantaged entities are: exempt entities listed under Section 11-5 *ITAA 1997* (e.g., charities, educational institutions, community service societies, public authorities); trustees of complying superannuation entities; or non-residents for Australian tax purposes. Philanthropic testamentary gifts caught by Section 118-60 *ITAA 1997* are excluded from the net of CGT Event K3.

In respect of non-residents for Australian tax purposes, CGT Event K3 only arises when the deceased person was a resident for Australian tax purposes just before dying, and the CGT asset in the hands of the beneficiary is not TAP. The confinement of CGT Event K3 to these circumstances in respect of non-residents for Australian tax purposes is crucial because otherwise, CGT Event K3 would conflict directly with the functional application of Section 855-10 *ITAA 1997*, rendering that provision moot and resulting in CGT Event K3 taxing a class of entity which is not tax-advantaged.

If a capital gain or capital loss is realised by the deceased person under CGT Event K3, then the market value of the relevant CGT asset, as of the date of death, which passes to the beneficiary becomes the cost base of that CGT asset in the hands of the beneficiary (see for example, ATO Private Ruling #1051195136436).

The timing of when CGT Event K3 occurs is just before the death of the deceased person, meaning that CGT Event K3 is assessable to the deceased person in its final tax return rather than assessable to the deceased estate or the beneficiary in question.

Practically, this timing creates two issues for deceased estates:

1. Often, CGT assets do not pass to beneficiaries until many years after the death of the deceased person. In these cases, if CGT Event K3 arises, then the executor/s may have to lodge an amended final tax return for the deceased person, especially if the tax residency status of a beneficiary changes between the date of death and when the CGT asset passes to that beneficiary. That may be difficult if the relevant limitation period has elapsed.

2. The burden of taxation caused by CGT Event K3 is imposed upon the deceased estate (and consequently, all beneficiaries under the will) when the benefit of ownership of the CGT asset really is transferred to only one of the beneficiaries under the will.

Strategies to help parties overcome the unfavourable effects of CGT Event K3 include:

1. Drafting wills to utilise a testamentary trust (which will be a resident trust estate) for testamentary distributions instead of directly nominating a non-resident beneficiary.

2. Drafting wills such that cash assets or assets which are TAP are the only ones which are distributed to beneficiaries who are likely to be non-residents for Australian tax purposes.

3. Drafting wills to include clauses which allow executor/s to make decisions regarding the appropriation of individual assets to satisfy beneficiaries' entitlements under the will, or clauses which allow for the reimbursement of CGT Event K3 liabilities back to the deceased estate by the beneficiaries which have triggered such liabilities to arise.

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5.5 Main Residence Exemption

Changes made to the law in 2019 significantly limited the ability of non-residents for Australian tax purposes to access the main residence exemption when declaring capital gains on their Australian tax returns. Relevantly, these changes also were extended to executors who deal with property (which is not TAP) on behalf of deceased persons who were non-residents at the date of death, or beneficiaries who inherited property from deceased persons who were non-residents at the date of death.

The basic rule extending a full main residence exemption to executors or beneficiaries of deceased estates is contained within Section 118-195 *ITAA 1997*. In some circumstances where a full main residence exemption is unavailable, a partial main residence exemption may be available to executors or beneficiaries of deceased estates under Section 118-200 *ITAA 1997*. Section 118-205 *ITAA 1997* then ensures that the partial main residence exemption calculation is adjusted to encompass all periods of main residence if the property in question itself was inherited by the deceased person.

5.5.1 Main Residence Exemption if the Deceased Person was a Non-Resident

If the deceased person was a non-resident for Australian tax purposes at the date of death, and that residency status had not changed for more than six years prior to the date of death, then no main residence exemption whatsoever is available to the executor/s or beneficiaries of the deceased estate. Section 118-200(2)(aa) *ITAA 1997* operates to ensure that not even a partial main residence exemption is available to the executor/s or beneficiaries of the deceased estate in these circumstances.

Additionally, in these circumstances, the cost base rules in Section 128-15(4) *ITAA 1997* stipulate that the executor/s or beneficiaries of the deceased estate are stuck with the cost base of the asset as it was in the hands of the deceased person on the date of death, instead of the market value of the asset on the date of death (which normally becomes the cost base for dwellings which pass through deceased estates and which were not used for the purpose of producing assessable income at the time of death).

Conversely, if the deceased person was a non-resident for Australian tax purposes at the date of death, but that residency status had changed within the six years prior to the date of death, then a full main residence exemption still may be available to the executor/s or beneficiaries of the deceased estate, pending satisfaction of the additional conditions prescribed in Section 118-195(1) *ITAA 1997*:

Item	***One of these items is satisfied***	***And also one of these items***
1	*the deceased acquired the ownership interest on or after 20 September 1985 and the dwelling was the deceased's main residence just before the deceased's death and was not then being used for the purpose of producing assessable income*	*your ownership interest ends within 2 years of the deceased's death, or within a longer period allowed by the Commissioner*
2	*the deceased acquired the ownership interest before 20 September 1985*	*the dwelling was, from the deceased's death until your ownership interest ends, the main residence of one or more of:* *(a) the spouse of the deceased immediately before the death (except a spouse who was living permanently separately and apart from the deceased); or*

Item	*One of these items is satisfied*	*And also one of these items*
		(b) an individual who had a right to occupy the dwelling under the deceased's will; or *(c) if the CGT event was brought about by the individual to whom the ownership interest passed as a beneficiary--that individual*

5.5.2 Main Residence Exemption if the Beneficiary is a Non-Resident

If the deceased person was a resident for Australian tax purposes at the date of death, and the beneficiary of the deceased estate is a non-resident for Australian tax purposes at the time of the CGT event impacting the inherited property, and that residency status had not changed for more than six years prior to the CGT event, then as per Section 118-195(1A)(b) *ITAA 1997*, no main residence exemption is available to the beneficiary for the period of ownership during which the beneficiary treated the property as its main residence. In these circumstances, a full main residence exemption still may be available to the non-resident beneficiary (who is an 'excluded foreign resident') if the inherited property is sold within two years of the deceased person's death, or if the inherited property acted as the main residence for the deceased person's spouse (or an individual with a right to occupy under the will) since the date of death up until the date of sale.

5.5.3 Summary

See below Table 3 for a summary of the taxation outcomes from the application of the main residence exemption discussed in the above sections.

In theory, because of Section 128-15(2) *ITAA 1997*, there should be no difference in outcomes regardless of whether the main residence is sold by a deceased estate first and converted into cash, compared with if the main residence itself is transferred directly to a beneficiary under the will (noting potential FIRB applications discussed further in Section 7 of this paper).

However, dealings with main residences are rarely ever straightforward. The facts of each scenario need to be analysed on their own merits before any conclusion can be drawn about whether a full or partial main residence exemption will apply, either at the deceased estate level or at the beneficiary level. For this reason, executor/s should dedicate adequate attention to if flexibility is allowed under the will to decide whether the interests of the beneficiaries under the will are best served by realising the main residence within the deceased estate or by transferring the main residence in-specie to the beneficiary entitled to it.

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Table 3: Summary of the main residence exemption consequences for international parties depending upon the residency status of the deceased and the beneficiary under the will

	Deceased Person was a Non-Resident at Date of Death	**Deceased Person was a Resident at Date of Death**
Beneficiary under the will is a non-resident at the time of the CGT Event on the inherited property and has been a non-resident for longer than six years prior to this time	If the deceased person was a non-resident for longer than six years immediately prior to death, then no main residence exemption is available (and no market value uplift on cost base). If the deceased person was a non-resident for less than six years immediately prior to death, then a main residence exemption is available if the dwelling was sold within two years of death, or if it was used as a main residence since death by the deceased person's spouse or by a person with a right to occupy the dwelling under the will.	A main residence exemption is available if the dwelling was sold within two years of death, or if it was used as a main residence since death by the deceased person's spouse or by a person with a right to occupy the dwelling under the will.
Beneficiary under the will is a non-resident at the time of the CGT Event on the inherited property and has not been a non-resident for longer than six years prior to this time	If the deceased person was a non-resident for longer than six years immediately prior to death, then no main residence exemption is available (and no market value uplift on cost base). If the deceased person was a non-resident for less than six years immediately prior to death, then a main residence exemption is available if the dwelling was sold within two years of death, or if it was used as a main residence since death by the beneficiary, by the deceased person's spouse or by a person with a right to occupy the dwelling under the will.	A main residence exemption is available if the dwelling was sold within two years of death, or if it was used as a main residence since death by the beneficiary, by the deceased person's spouse or by a person with a right to occupy the dwelling under the will.
Beneficiary under the will is a resident at the time of the CGT Event on the inherited property	Same as immediately above.	Same as immediately above.

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5.6 CGT Discount

When applying the capital gains tax legislation to the taxation of deceased estates, it is paramount that the specific rules about trusts with net capital gains, contained within Subdivision 115-C *ITAA 1997*, are applied in precedence to the taxation of net income rules found within Division 6 *ITAA 1936* (discussed earlier in the paper). With the way that Division 6E *ITAA 1936* functions, net capital gains effectively are removed from the net income of a trust estate as calculated under Division 6 *ITAA 1936* and are replaced by net capital gains as calculated under Subdivision 115-C *ITAA 1997*, with those rules dictating how net capital gains are attributed to trustees and/or beneficiaries.

Consequently, when the rules in Subdivision 115-C *ITAA 1997* are applied to deceased estates and their entitlement to the general CGT discount, some outcomes which seem anomalous may eventuate.

5.6.1 An Individual Beneficiary is Presently Entitled to the Net Income of the Deceased Estate

Section 98(3)(a) *ITAA 1936*, Section 115-120 *ITAA 1997* and Section 115-220 *ITAA 1997* operate collectively to preserve the entitlement to the CGT Discount available to the executor/s on the net income on which the executor/s are assessed on behalf of the beneficiary, as if the beneficiary was an individual calculating its own entitlement to the CGT Discount.

Therefore, the CGT Discount claimed by the executor/s at the deceased estate level is adjusted pursuant to the discount percentage calculation rules applicable to foreign residents.

At the individual beneficiary level, Section 115-110 *ITAA 1997* operates to ensure that non-resident beneficiaries are subject to the same discount percentage calculations rules which are applicable to non-residents for Australian tax purposes who realise capital gains directly in their own name (i.e., that the entitlement to the general 50% CGT discount is reduced to a lower percentage to account for periods of non-residency between 8 May 2012 and when the CGT event occurred).

5.6.2 A Trust or Company Beneficiary is Presently Entitled to the Net Income of the Deceased Estate

Sections 98(3)(b) and 98(4) *ITAA 1936*, and Section 115-220 *ITAA 1997* operate collectively to deny the entitlement to the CGT Discount available to the executor/s on the net income on which the executor/s are assessed on behalf of those trust or company beneficiaries.

In these instances, if a beneficiary of a deceased estate or a testamentary trust is a trust or company, and the trust or company is a non-resident for Australian tax purposes, then those beneficiaries are prevented from accessing any entitlement to the CGT discount whatsoever.

5.6.3 No Beneficiary is Presently Entitled to the Net Income of the Deceased Estate

Sections 99(4) and 99(5) *ITAA 1936*, and Section 115-222(2) *ITAA 1997* operate collectively to preserve the entitlement to the CGT Discount available to the executor/s when:

- There are no beneficiaries which are presently entitled to the net income of the deceased estate; and

- The Commissioner has exercised the discretion under Section 99A(2) *ITAA 1936* to apply Section 99(1*) ITAA 1936* to the deceased estate and thus the executor/s are the ones who are assessed on the net income at the individual tax rates applicable to resident or non-resident individuals (depending on if the deceased estate is a resident or non-resident trust estate).

In these circumstances, because the taxpayer is the executor/s of the deceased estate, Section 115-100(ab) *ITAA 1997* stipulates that the applicable CGT discount percentage is 50%. This 50% CGT discount percentage is unaltered regardless of if the deceased estate is a non-resident trust estate or if any of the beneficiaries of the deceased estate (who are not presently entitled to any share of the net income of the deceased estate) are non-residents for Australian tax purposes. This interpretation of the law has been applied by the ATO in several private rulings (see, for example, ATO Private Ruling #1052485990534 and ATO Private Ruling #1052476116760).

Conversely, Section 115-222(4*) ITAA 1997* denies the entitlement to the CGT Discount to executor/s in the event that the Commissioner's discretion is not exercised and thus the deceased estate is assessed on the net income of the deceased estate at 45% under Section 99A *ITAA 1936*.

Planning Point: It may be more beneficial from a capital gains tax perspective for a deceased estate to sell CGT assets while administration is ongoing and no beneficiaries under the will are yet presently entitled to a share of the net income of the deceased estate. In this case, the 50% CGT discount percentage may still apply regardless of tax residency status and may not be subject to the reduction which would occur once beneficiaries become presently entitled.

5.6.4 Summary

See below Table 4 for a summary of the CGT Discount outcomes when the net income of a trust estate is assessed to trustees under either Sections 98, 98A, 99 or 99A *ITAA 1936*.

Table 4: Summary of the CGT Discount outcomes in trustee assessment circumstances

	CGT Discount Outcome
A non-resident individual beneficiary is presently entitled to the net income of the trust estate and is assessed under Section 98(3)(a)	A CGT Discount is available to the trustee and beneficiaries in these circumstances. The beneficiaries' discount percentage is calculated in accordance with Section 115-110 *ITAA 1997*.
A non-resident trust or company beneficiary is presently entitled to the net income of the trust estate and is assessed under Section 98(3)(b) or 98(4)	No CGT Discount is available to the trustee or beneficiaries in these circumstances.
No beneficiary is presently entitled to the net income of a non-resident trust estate and Commissioner discretion is exercised to assess the net income under Section 99	The 50% CGT Discount remains available to the trustee under a Section 99 assessment.
No beneficiary is presently entitled to the net income of a non-resident trust estate and Commissioner discretion is not exercised to assess the net income under Section 99	No CGT Discount is available to the trustee under a Section 99A assessment.

5.6.5 Impact of New CGT Legislation from Budget 2026-2027

Some brief observations about how this legislation may affect deceased estates and testamentary trusts:

- *Treasury Laws Amendment (Tax Reform No. 1) Act 2026* legislated the concepts of Deferred Residential Capital Gains and Deferred Non-Residential Capital Gains, which refer to capital gains ascertainable prior to and up to 1 July 2027 and to which the existing laws regarding the CGT Discount still apply.

- *Treasury Laws Amendment (Tax Reform No. 1) Act 2026* legislated the concepts of Residential Capital Gains and Non-Residential Capital Gains, which refer to capital gains attributable to periods from 1 July 2027 and to which the existing laws regarding the CGT Discount will not apply, except for CGT assets which meet the definition of 'new residential dwelling' and except in other limited circumstances.

- *Treasury Laws Amendment (Tax Reform No. 1) Act 2026* legislated the introduction of Section 119 into the *ITAA 1997*, which imposes the 30% minimum tax on capital gains on Residential Capital Gains and Non-Residential Capital Gains.

- *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* plans to introduce provisions into Section 119 *ITAA 1997*, which exclude deceased estates and testamentary trusts from the imposition of the 30% minimum tax on capital gains on Residential Capital Gains and Non-Residential Capital Gains.

- *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* does not propose to incorporate deceased estates and testamentary trusts into the limited categories of CGT assets which qualify to retain entitlement to the CGT Discount beyond 1 July 2027. So, while these entities will not be subject to the 30% minimum tax on capital gains realised after 1 July 2027, they will be forced to revert to cost base indexation (if eligible) on these capital gains.

5.7 Testamentary Trusts

Except for CGT Event K3, many of the concepts discussed in this section about the taxation of capital gains in deceased estates equally will be applicable to the trustees of testamentary trusts. *PS LA 2003/12* confirms the Commissioner's long-standing administrative practice of treating the trustee of a testamentary trust in the same way as an executor of a deceased estate for the purposes of Division 128 *ITAA 1997*.

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6. Other International Tax Considerations for Trusts and Deceased Estates

6.1 Withholding Tax Obligations

6.1.1 Dividends, Interest and Royalties Paid to Non-Residents

Division 11A of the *ITAA 1936* outlines the withholding tax rules enshrined in Australian legislation which are applicable to unfranked dividends, interest and royalties paid to non-residents. These rules and withholding rates may be superseded though in some respects by the operation of an applicable DTA.

The liability to withholding tax on dividends, interest and royalties is created within Section 128B *ITAA 1936*. Throughout this section, the liability is not activated until the dividends, interest or royalties are 'paid' to the non-resident. The rates of withholding tax stipulated in Sections 40-42 of *Taxation Administration Regulations 2017* (Cth). Subject to any applicable exemption or treaty reduction, the rates are 30% for unfranked dividends, 10% for interest and 30% for royalties.

Relevantly for deceased estates and testamentary trusts, Section 128A(3) *ITAA 1936* states that a withholding tax liability will arise at the time when a non-resident beneficiary of a trust estate becomes presently entitled to unfranked dividends, interest or royalties included in the income of the trust estate.

IT 2680 subsequently clarifies that present entitlement to a share of the income of a trust estate can be conferred on a beneficiary even though no distribution of income is made to a beneficiary. So even if a trust estate has no net income or has incurred a tax loss during an income year, any non-resident beneficiary presently entitled to a share of income which includes unfranked dividends, interest or royalties is still liable to withholding tax on those income types under Section 128A(3) *ITAA 1936*. Consequently, it is entirely possible that non-resident beneficiaries may be liable to withholding tax on income which they have not yet received and may not receive until well into the future.

There are three important exceptions to this general rule which function to relieve taxpayers from the risk of double taxation:

1. No withholding tax liability arises where no beneficiary is presently entitled to a share of the income of a trust estate, in which case the trustee is assessed on the net income under either Section 99 or Section 99A *ITAA 1936*.

2. Crucially, Section 128B(3)(d) *ITAA 1936* excludes income previously assessed under Section 99 or Section 99A *ITAA 1936* from being subject to withholding tax if it subsequently is paid or distributed to non-resident beneficiaries.

3. Per Section 128D *ITAA* 1936, income subject to withholding tax is non-assessable non-exempt income of a person, which is why non-resident withholding tax is referred to as a 'final tax'. A person is broad enough to encompass both a trustee and a beneficiary of a trust estate. Therefore, income subject to withholding tax is not then taxed again if it is included in the net income of a trust estate which is taxed in the hands of a beneficiary under Section 97 *ITAA 1936* or a trustee on behalf of a beneficiary under Section 98 *ITAA 1936*.

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6.1.2 Capital Gains Withholding

The Foreign Resident Capital Gains Withholding regime requires purchasers of certain capital gains tax (CGT) assets to withhold a portion of the proceeds paid to non-resident vendors.

The foreign resident CGT withholding regime is contained within Subdivision 14-D of Schedule 1 of the *Taxation Administration Act 1953* (Cth).

Subject to limited exclusions, it imposes a withholding tax obligation on purchasers of certain CGT assets, unless the vendor can demonstrate to the purchaser that the vendor is not a foreign resident for Australian tax purposes. To displace this presumption of non-residency, the vendor must obtain a clearance certificate from the Commissioner and provide it to the purchaser prior to settlement. Where a deceased estate is the vendor, the clearance certificate will need to be obtained in the name of the executor/s as the legal owner/s of the property.

The regime covers CGT assets consisting of:

- Taxable Australian Real Property (TARP);
- An indirect Australian real property interest;
- An option or right to acquire such property or interest.

From 1 January 2025, the withholding rate increased from 12.5% to 15%, and the withholding regime was extended to cover sales of eligible property of any value (i.e., the $750,000 property value threshold before withholding applies was abolished).

Deceased estates need to be cognisant of these rules if the intention is to realise property or interests captured under this withholding regime as part of the administration of the estate. Timing is paramount because the executor/s of an estate need to allow ample time to obtain a clearance certificate from the ATO prior to the planned settlement of any relevant transaction.

If the deceased estate is a non-resident trust estate, obtaining a clearance certificate from the ATO will not be possible. In these circumstances, the executor/s either can accept the 15% withholding rate at settlement or prior to settlement, apply to the ATO for a variation notice, if the executor/s can demonstrate to the ATO that the 15% withholding rate is excessive (e.g., because of the availability of capital losses). In either case, the amount withheld at settlement may be claimed by the executor/s as a credit against income tax assessed on the relevant estate tax return lodged.

However, where CGT assets are transferred to beneficiaries under a will, because CGT is disregarded in these circumstances under Division 128 *ITAA 1997*, the Commissioner's longstanding practice has been to vary the amount of withholding tax payable on these transactions to nil via legislative instrument. This variation currently can be found in Clause 7 of *LI 2026/38*.

6.1.3 Double Tax Agreements and Withholding Taxes

DTAs affect withholding tax obligations of Australian and overseas entities. This impact is realised through articles found in most DTAs addressing the limits on taxation of interest, dividends, or royalties by 'contracting states' (i.e., the jurisdictions which are party to the relevant DTA) having regard to residency and limitation of benefits articles in those treaties.

If the deceased estate is a tax resident of Australia, then it will have withholding tax obligations (subject to legislative exceptions) if it pays income in the nature of interest, dividends, or royalties to a non-resident of Australia. Australian law establishes a baseline set of withholding tax rules when the above types of income are paid to non-residents. While the provisions of DTAs will supersede the operation of these baseline laws, these provisions generally only prescribe the maximum withholding tax rate which may be levied on the income when paid. The provisions generally do not operate to prescribe a jurisdiction from levying a withholding tax on specific types of income when that income is paid by an entity, which is a tax resident of that jurisdiction, to another entity which is a tax resident of another jurisdiction.

6.2 Foreign Income Tax Offsets

Entitlements to foreign income tax offsets are principally governed by Division 770 of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*').

Broadly, a taxpayer is entitled to an offset where foreign income tax has been paid on an amount included in Australian assessable income for the relevant year. As per *ATO ID 2010/175* though, if only part of the foreign-taxed amount is assessable in Australia, only the corresponding proportion of the foreign tax paid counts towards the foreign income tax offset. This position was confirmed by the Full Federal Court in the *Burton* case (which addressed the proportionate reduction of foreign income tax offsets when the foreign income tax was paid on capital gains income eligible for the 50% discount).

Of interest too is the interaction of Section 99B(1) *ITAA 1936* with the foreign income tax offset provisions. The question may arise whether a beneficiary can claim a foreign income tax offset on income assessed to that beneficiary under Section 99B(1) *ITAA 1936* when foreign tax already has been paid on that same income by a non-resident trustee. In reliance upon the constructive payment rule outlined in Section 770-130(2) *ITAA 1997* (which treats foreign income tax as paid by the taxpayer in some circumstances when it was paid by another entity), the ATO's answer to this question appears to be yes (see for example, ATO Private Ruling #1052528131128 and ATO Private Ruling #1052410430990).

Because of withholding tax obligations, application of DTAs to interest, dividend or royalty income received by deceased estates often will result in the deceased estates having an entitlement to claim foreign income tax offsets against Australian income tax.

As a simplistic example, consider a deceased estate (a resident trust estate for Australian tax purposes) with the following income sources during a financial year and no deductions:

- AU$150,000 from interest received on a loan which was owed to the deceased person by a private company solely based in the United Kingdom.
    - On this AU$150,000 of interest income, 10% withholding tax was deducted at source by the UK company under the Australia-UK DTA, such that the deceased estate only received AU$135,000 of cash into its bank account.
- AU$100,000 of unfranked dividends received on shares which the deceased person owned in a private company solely based in Australia.

If the financial year in question is 2026-2027 and falls within the first three years from when the deceased person died, then the estimated Australian income tax calculation for the deceased estate would be as follows:

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Basic income tax payable	= $51,370 + 0.45 x ($250,000 - $190,000) = $78,370
Basic income tax payable on Australian-sourced income	= $4,020 + 0.30 x ($100,000 - $45,000) = $20,520
Basic income tax payable on foreign-sourced income	= $78,370 - $20,520 = $57,850 = The cap on any foreign income tax offset (FITO) claim

Because the FITO limit calculated exceeds the AU$15,000 of withholding tax withheld under the DTA, then the full amount of withholding tax is claimable by the deceased estate in its tax return.

Net income tax payable	= $51,370 + 0.45 x ($250,000 - $190,000) - $15,000 = $63,370

6.3 Conduit Foreign Income

While foreign income tax offsets usually are most beneficial to Australian tax residents, conduit foreign income is a concept which bears most relevance to entities which are not Australian tax residents, and which receive unfranked dividends.

Provisions concerning Conduit Foreign Income (CFI) are located within Division 802 *ITAA 1997*. The overarching purpose of the provisions is to ensure that foreign investors who structure foreign investments through Australian entities are not disadvantaged when compared with the tax position which would arise if the investments were held directly by the foreign investor.

The methodology for the calculation of CFI is detailed in Section 802-30 *ITAA 1997*. Very simplistically, CFI is the foreign income of an entity on which no Australian company tax is payable.

Examples of the sort of income included in CFI are:

- Non-assessable foreign non-portfolio dividends (see Subdivision 768-A *ITAA 1997*)
- Non-assessable capital gains on interests in active foreign companies (see Subdivision 768-G *ITAA 1997*)
- Foreign branch income (see Section 23AH *ITAA 1936*).

Under Section 802-15 *ITAA 1997*, the portion of an unfranked distribution made by an Australian corporate tax entity which is declared on the distribution statement to be CFI is:

1. Non-assessable non-exempt income of a foreign resident recipient; and
2. Not subject to withholding tax upon its payment.

Similarly, Section 802-17 *ITAA 1997* extends this treatment to foreign resident beneficiaries of trust estates when CFI is included in the share of the net income which is distributed. Further, the trustee of the trust is not assessed and liable to tax on the CFI portion of the distributed income.

Consequently, if a deceased estate is a non-resident trust estate, then any unfranked dividend which it receives that is declared to be CFI is non-assessable non-exempt income in the hands of the deceased estate.

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When the income of the non-resident deceased estate is taxed in the hands of the executor of the estate, the portion of that income declared to be CFI is excluded from the calculation of the Australian income tax liability. Likewise, Section 802-17 *ITAA 1997* confirms that if the income also is taxed in the hands of non-resident beneficiaries which are presently entitled to the income of the non-resident deceased estate, then the portion of that income declared to be CFI also will be excluded from the calculation of the Australian income tax liability of those non-resident beneficiaries.

Furthermore, because the portion of the income declared to be CFI is not subject to withholding tax upon its payment, a deceased estate which is the recipient of such income should enjoy the benefit of an increased amount of cash available to it for distribution to beneficiaries.

Executors of non-resident deceased estates should pay close attention to whether any unfranked dividend income received is classified as CFI to ensure that beneficiaries are not unduly disadvantaged by the fact that excessive income tax might be paid on income of the trust estate which is non-assessable non-exempt income.

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7. Offshore Assets, Estate Taxes & FIRB Considerations

After assessing the Australian tax implications of the relevant deceased estate or the testamentary trust, the executor/s and advisors must then turn their minds to any potential international aspects.

7.1 International Estate Taxes

Firstly, if it has foreign income or foreign assets, the estate may have an income tax obligation in the relevant foreign jurisdiction. In addition to income tax, many jurisdictions impose an additional estate tax. The estate tax can be imposed on both residents and non-residents for assets and income sources in their jurisdictions and the rates are quite high as shown in the below table demonstrating estate tax rates in some key countries:

Country	Estate Tax Rate
UK	40%
USA	40%
Germany	7 – 30%
Japan	10-55%
France	5-45%

Source: countrytaxcalc.com

Estate, inheritance and succession tax outcomes depend on matters including residence, domicile, citizenship, asset location, beneficiary relationship, available thresholds, exemptions and treaty relief. Current rates and conditions should be confirmed using official sources or advice from a suitably qualified practitioner in the relevant jurisdiction.

Additionally, many foreign jurisdictions require probate to be obtained to release assets and often similar withholding rules to the Australian rules exist if income or assets are transferred to non-residents. The key action is to obtain advice from a suitably qualified practitioner in those jurisdictions.

Unites States estate tax is a significant issue which cannot be overlooked if there is any connection to the US. While US citizens have an exemption of up to US$15 Million of assets before estate taxes are levied, non-US citizens only have an exemption of US$60,000 and then it becomes necessary to consider the Australian/US estate tax treaty.

7.2 Foreign Investment Review Board

The foreign investment rules should be considered before an Australian deceased estate transfers Australian land or another regulated asset to a beneficiary who is a foreign person.

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The treatment depends on the way the asset passes, the nature and value of the interest, the beneficiary's status and any available exemption. Executors should confirm whether prior approval, notification or registration is required before making an in-specie distribution, particularly where residential, commercial or agricultural land is involved.

A testamentary trust may itself be a foreign person where a foreign person holds a substantial interest, or foreign persons hold an aggregate substantial interest, under the applicable rules. For a discretionary trust, the terms of the will and the breadth of the beneficiary class can be especially important. Before Australian assets are transferred to or acquired by the trust, advisers should review the trust terms, trustee powers and beneficiary interests so that any FIRB approval, reporting, conditions and fees are identified before completion.

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8. Conclusion

In summary, when dealing with deceased estates or testamentary trusts with international elements (be it assets, beneficiaries, executors, or the deceased party), consider each of the following issues carefully:

1. For executors and their advisors:
    a. Residency is key.
    b. Rules are complex if there are foreign assets, foreign income sources or non-resident beneficiaries involved.

2. Ascertain which provision of income taxation and capital gains taxation applies to your specific scenario. For non-residents, there are numerous exclusions for foreign-source income and non-TAP, but these exclusions are tricky. The rules impacting the main residence exemption and the relevant CGT discount percentage also are not straightforward in respect of non-residents and non-resident trust estates.

3. Even with these exclusions, the threat of triggering Section 99B is ever present in the background when present entitlement is conferred upon or distributions of trust property are made to beneficiaries who are residents for Australian tax purposes.

4. CGT Event K3 is a nasty sleeper issue that is easily overlooked by executors when one or more of the beneficiaries of the deceased estate are tax-advantaged entities, including non-residents for tax purposes in some circumstances.

5. Be mindful of foreign estate taxes, withholding taxes or other rules and regulations dealing with the transferral of assets offshore.

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