

# Local Tax Club – Geelong

28 July 2023

Geelong Events Centre



# The scope of section 99B and implications for Australian beneficiaries

George Psarrakos, CTA

Mutual Trust

# The unwary Australian beneficiary:

*“ ...but this is my money from before I came to Australia ...”*

# Unfortunately, not according to ATO ID 2011/93:

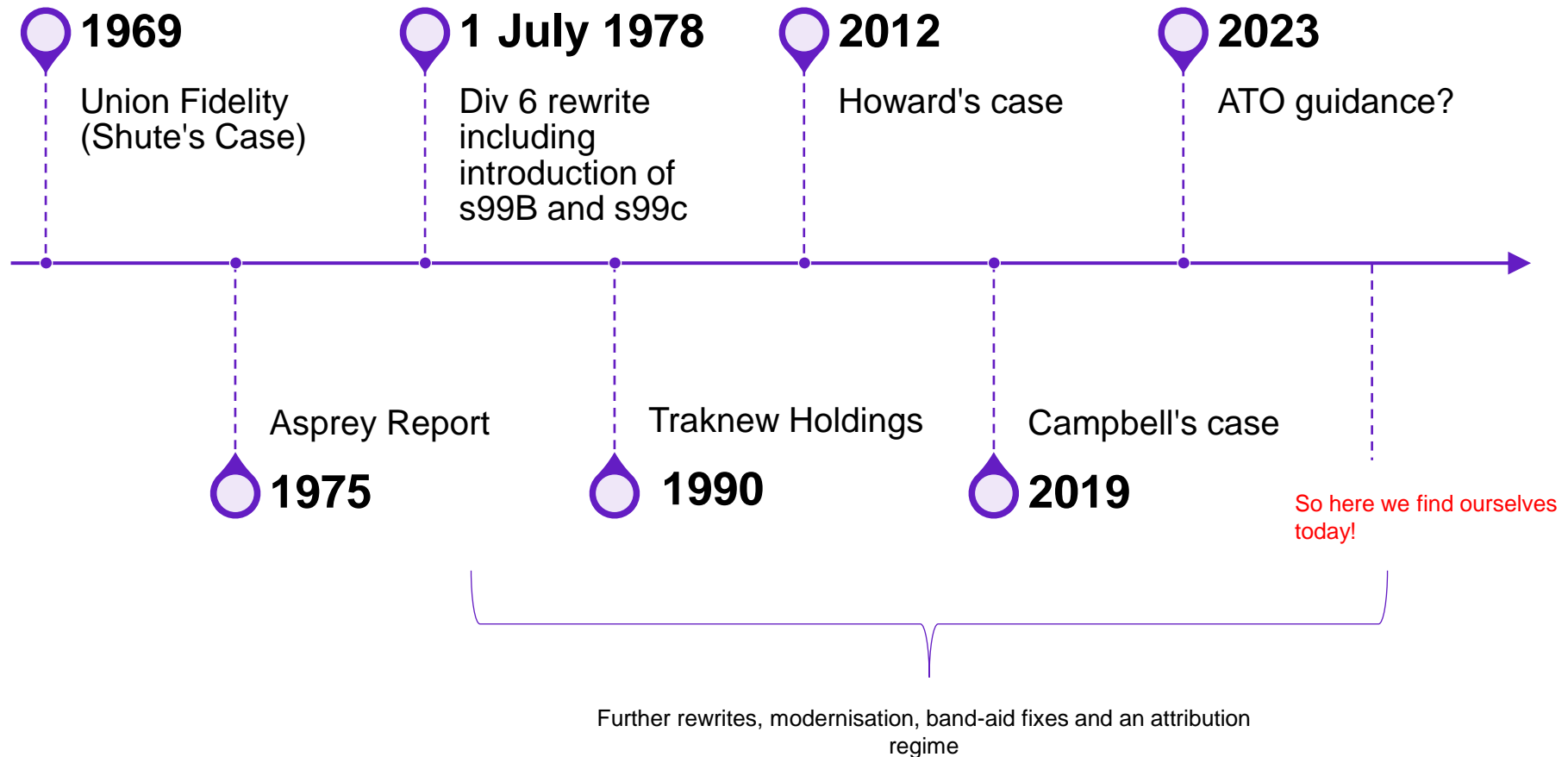
*“ ... section 99B of the ITAA 1936, and by inference from subsection 102AAM(5) of the ITAA 1936, that there **is no apportionment of the amount included in assessable income by reference to the residency status of the beneficiary as at the time the income was derived by the trust.** Rather, the only explicit condition concerning residency is that the beneficiary be a resident at some time during the year of income in which the trust property is paid to them or applied for their benefit.”*

- Compare:
  - Foreign employment bonuses, dividends
  - Grandfather: ESS, Division 305 or Division 855
- No time limits – decades ago
- Throwback interest

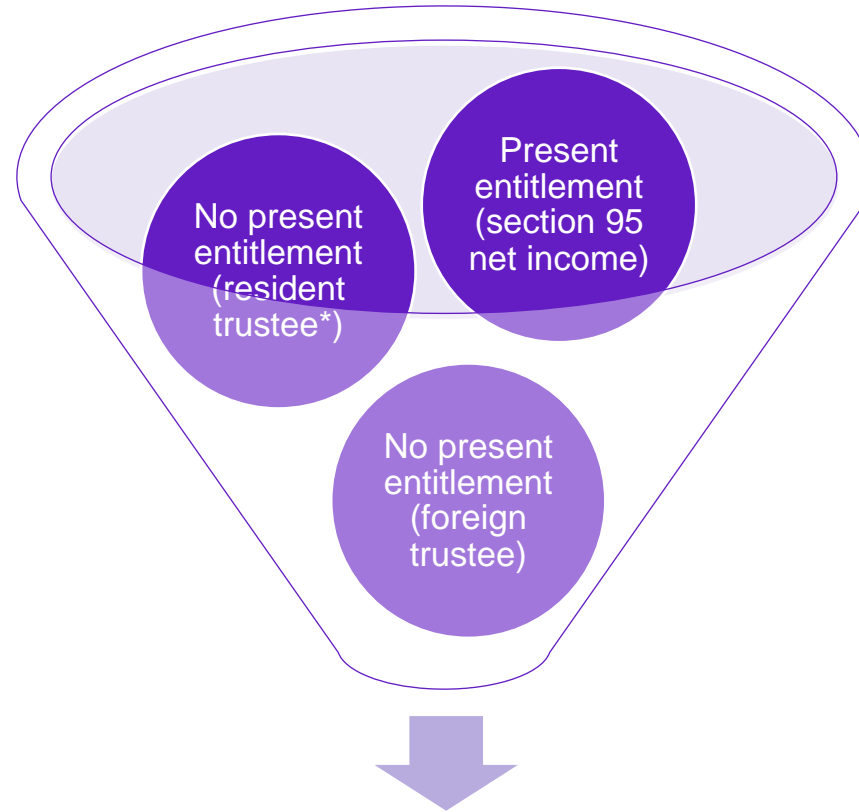
# In today's environment it can apply to common situations:

- Inheritors, expats, beneficiaries, Australian relatives:
  - Previous foreign employment earnings
  - Pre-migration wealth
  - Foreign gifts
  - Foreign inheritance
  - Foreign life insurance
  - Inter-generational wealth transfers

# Almost 55 years ago it was a different story:

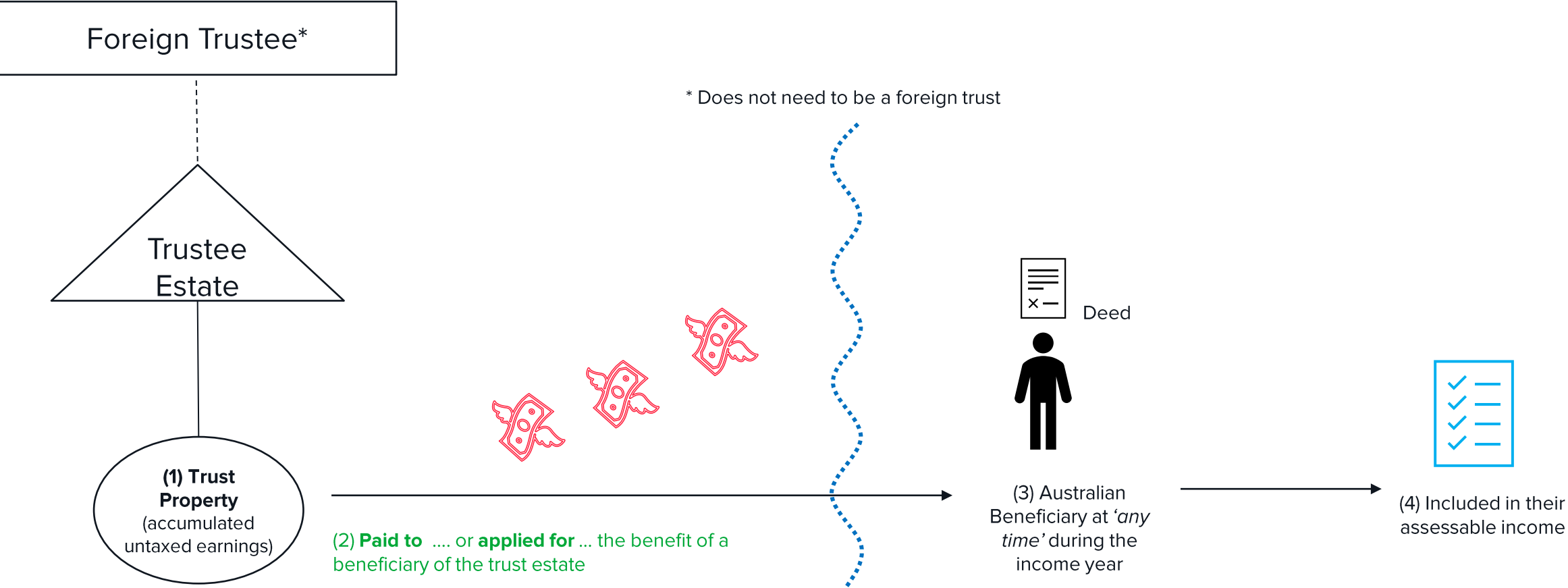


# Its place within Division 6 - everything goes into the section 99B bucket for an Australian beneficiary



s99B catches everything and  
carves out if taxed above

# Section 99B(1) works as follows:





# The gateway in section 99B(1) casts a broad net

- An amount of property of the trust estate

- Property (cf income of trust?)
  - trust, trustee, settlor residency – N/A
  - source, situs, character, etc – N/A
- Amount – quantified; no valuation rule
- Trust estate
  - Deceased estate, foreign pension fund
  - Legal owner, obligation beneficiary

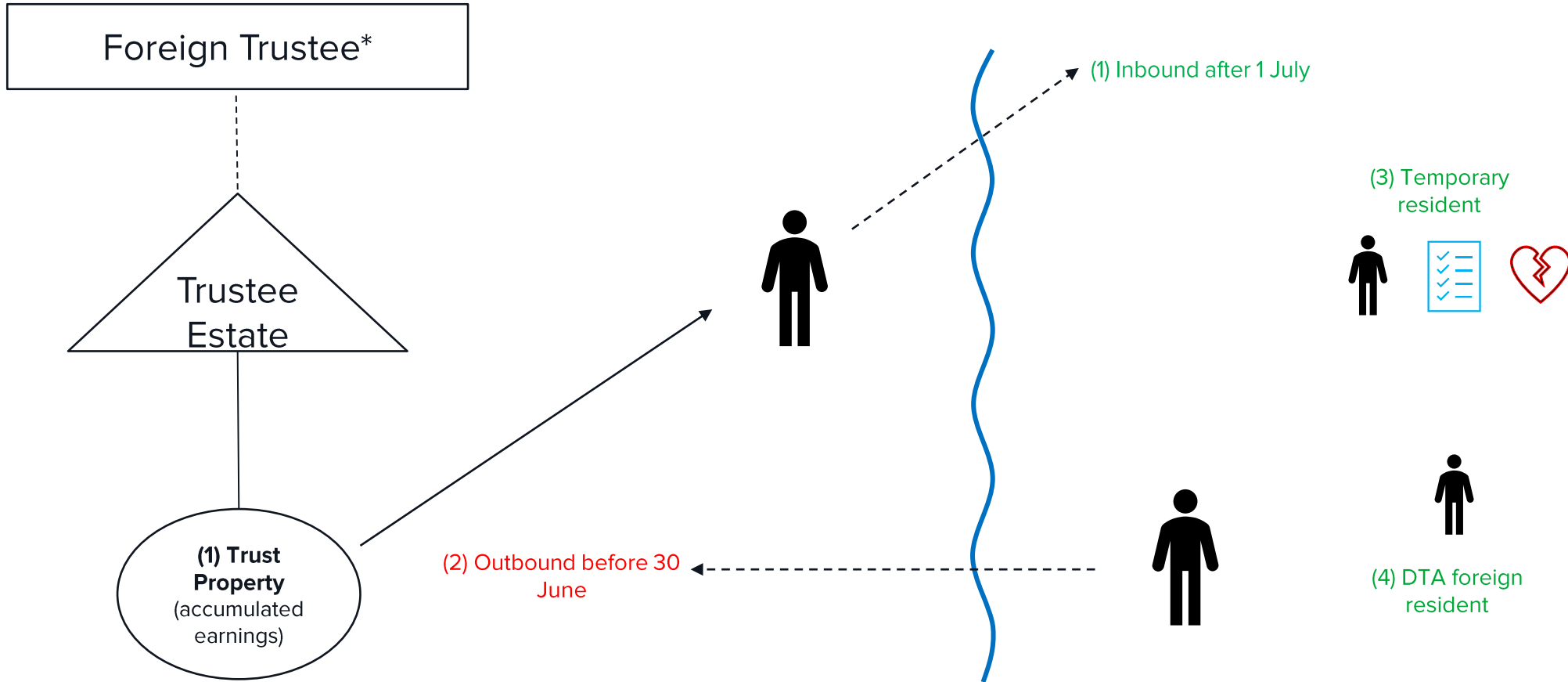
- Paid to or applied for the benefit of a beneficiary of the trust estate

- Paid to – direct?
- Applied for – indirect?
- The benefit of - betterment?
- A beneficiary of the trust estate
  - Beneficiary – due administration
  - Read deed – access, english
  - Capacity of recipient
- Section 99C

# And taxes the Australian beneficiary

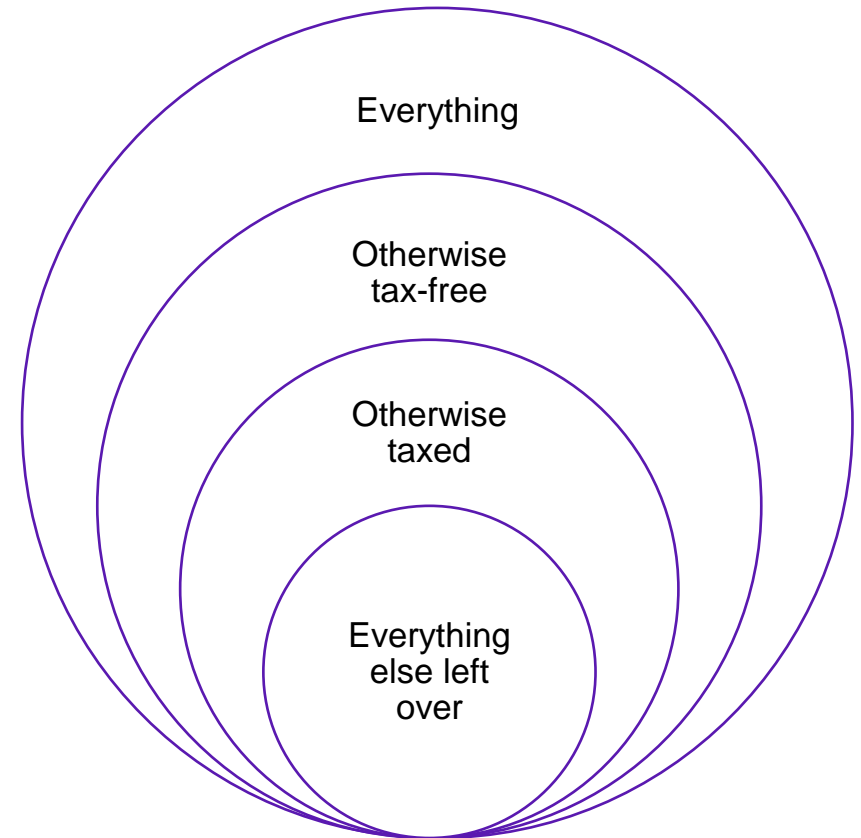
- The beneficiary was a resident *at any time* in the income year
  - Resident
  - At anytime
  - Income year
  - SAP
  - AUD (no FC election)
  - AUSTRAC
- Included in their assessable income
  - Taxed to beneficiary (not trustee)
  - Include in tax return – 4 years
  - Taxed at marginal rates (not penalty)
    - BRE
    - Minors
  - Gross amount
  - Planning considerations

# Timing could be everything



# However, section 99B(2) restricts this overreach

- Amount of property – ‘gross’, capital proceeds
- Reduced by:
  - - corpus (but not reinvested assessable income)
  - - otherwise not ‘assessable income’
  - - CFI flow-through
  - - Section 97 (included in AY)
  - - Section 98(4), 99, 99A (assessed and liable)
  - - Attributed income under TT
- = The s99B ‘amount’ in assessable income



# What you need to know for the reductions

## Corpus

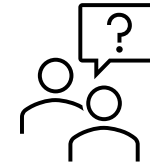
- What is corpus
  - What is it
    - Not reinvested earnings
    - Hypothetical resident shareholder
  - Who can get it
  - How do I account for it
  - How do I prove it

## Otherwise not assessable

- Not otherwise assessable
  - Hypothetical resident shareholder
  - Share buy-back, liquidators dividend
  - Examples: CDF, pre-CGT, excess of accounting over tax income\*

# Hypothetical resident taxpayer

- Fictional taxpayer
  - No attributes of trustee or beneficiary
  - No discount or losses
  - Class of income 'ordinarily' assessable
    - Expenses, losses, notional expenses?
  - Practically, net cash amount



Taxpayer attributes

(e.g. ✗ no discount)

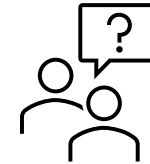


Asset / income attributes

(e.g. ✓ pre-CGT)

# Fictional taxpayer, but ...

- Asset attributes – amount?
  - How do you quantify non-assessable amount
  - Cost base
  - Pre-CGT
  - MVSIR – under ITAA?
  - Prior and current year losses (net gain in 102-5) everyone
- Non-TAP gains (TD 2017/24 & TD2017/23)
  - Section 95 net income and section 855-10
  - Section 99B, no discount or cap losses



Taxpayer attributes

(e.g. ✗ no discount)



Asset / income attributes

(e.g. ✓ pre-CGT)

# Real world examples:

- Transferor trust are very broad
  - Probably apply first- exclusions foreign TT, death of transferor, migrant, listed non-EDCI
- Foreign deceased estate
  - Assets on death = MV corpus (IHT)
  - Income during administration (no interest charge)
- Foreign superfund
  - Division 305 v 99B v 302
- Foreign life insurance policies
  - Not ordinary, 10+ years not statutory, no CGT = 99B(2)(b)



# Section 99C expands the web of “applied for the benefit of a beneficiary of the trust estate”

- General rule – accrues: ignore time, nature and form (not discretionary object)
- Specific examples: Listed in EM
  - Loans and payments
    - Arm’s length loans, source of finance, c.f. Div 7A and 47A
    - Repayments to beneficiary (including pre-residency); forgiveness
    - Payments = arm’s length?
    - Gifts = direct or indirect
  - Private use of trust asset
  - Assignment

# To make matters worse - throwback interest!

- Listed (non-EDCI) or unlisted (not full tax)
- Lack of records
- Amount = tax shortfall
- Timing:
  - Start of year income derived by trustee
  - End of year amount included in assessable income (decades)
- Rate
- Deductibility
- Exclusions

# Some better news on foreign income tax offsets

- Generally available (assume taxed overseas)
- Mismatches
  - Opaque
  - Grantor
  - IHT
  - Australian withholding tax

# Interaction with other provisions

- In-specie distributions
  - CGT event
  - Discountable
  - Section 118-20 anti-overlap
- Section 102
- Section 100A:
  - Inverse
  - Anti-avoidance = 'tax reduction purpose'

# Conclusion

- 45 years ago = different time
- Integrity measure
- Throwback interest = What does it imply?
- No anti-avoidance purpose necessary = self executing
- Family or commercial purpose irrelevant – arm's length arrangement?
- Out of place in a modern globalised world
- Be alert ... be alarmed ... and be prepared.

# Upcoming Events

## **Local Tax Club**

25 August 2023 – Geelong Events Centre

Topic: Tax Agent Obligations & Issues Confirmed

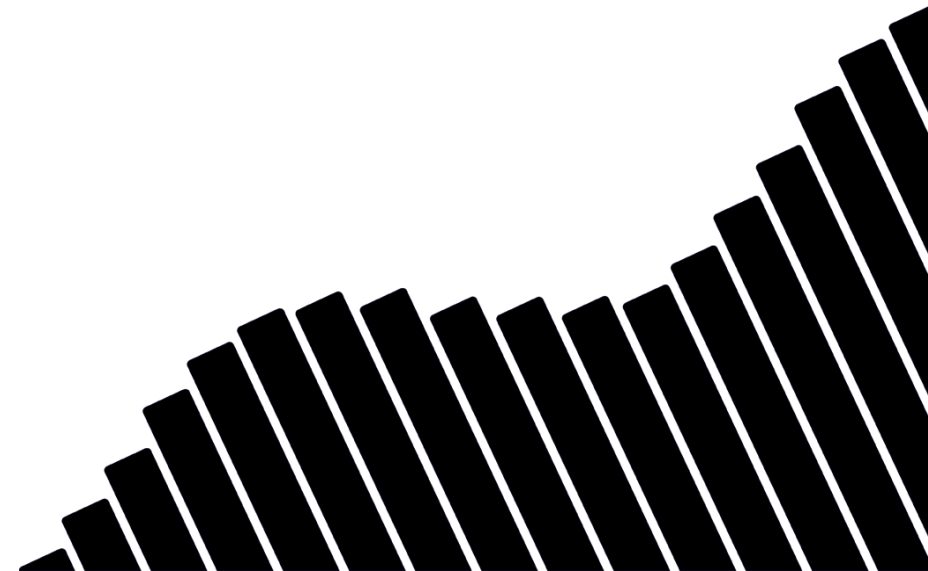
Speaker: Arthur Athanasiou, CTA, Thompson Geer Lawyers

## **The Tax Summit**

5-7 September-Melbourne Convention and Exhibition Centre

# Thank you

Please complete your evaluation form



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