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Manager
Small Business Entities and Industry Concessions Unit
Treasury
Langton Cres
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Online: testamentarytrusts@treasury.gov.au

Dear Sir/Madam

Tax integrity – Improving the taxation of testamentary trusts

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

We acknowledge the need for measures to enhance the integrity of testamentary trust taxation as proposed in the *Treasury Laws Amendment (Measures 3 for Consultation) Bill 2019: testamentary trusts* exposure draft. We observe that the revenue impact is not quantified in the Budget Measures 2018-19, nor the number of affected trustees and trusts. As such, the extent of the issues being addressed is unclear. Therefore, care must be taken to ensure that the right balance is maintained between efficient testamentary trust administration and the integrity of the tax system.

The following comments are intended to assist in clarifying the proposed amendments and accompanying Explanatory Memorandum (EM) as well as to highlight the potential administrative burden on trustees arising from the changes.

1. The effect of section 102AA(4) on the proposed amendments, as identified in paragraph 1.12 of the EM, requires the Commissioner to determine that certain property represents property from which excepted trust income is derived. The requirements referred to in paragraphs 1.15 and 16 also require the Commissioner's opinion. In the absence of clear guidance, this creates uncertainty and raises concerns that the Commissioner may form inconsistent opinions when administering these provisions. We believe there is benefit in further clarifying what this may encompass – either through legislation or in the form of a ruling by the Commissioner – given the potential complexity of testamentary trust arrangements (e.g. borrowing against trust property or assumption of liabilities).
2. The issue is compounded when a testamentary trust is reliant on the Commissioner's opinion as to whether amounts are accumulations of income or capital from property connected to the deceased estate. Further, the allocation of deductions/expenses against excepted and non-excepted income may be a challenge. A *de minimis* exception should be considered to minimise the compliance burden on trustees. This may include limits on both the percentage and value of the injected property.

3. The treatment of income is unclear where the property of the trust is derived from more than one estate. For example, a husband and wife die several years apart and the trustee wishes to transfer property into the same testamentary trust for ease of compliance and administration. The proposed amendments should ensure that this type of situation is appropriately covered in the requirements.
4. There are also situations where, for compliance and administrative savings reasons, it may be preferable for property and income that is excepted by virtue of the other paragraphs in section 102AG to be held in a testamentary trust. An allowance should be made to treat income as excepted trust income where that income would be excepted trust income under other paragraphs (e.g. paragraph 102AG(2)(d)) and the beneficiaries are the same.
5. The examples contained in the EM are simplistic. Trustees may take over loans, borrow money, extend funds to beneficiaries against the trust's property and change investment strategies. For some trustees with more complex investment strategies, the ability to keep records that maintain the connection to the deceased estate property may become increasingly difficult, especially where they may be uncertain of the Commissioner's opinion on certain property. The proposed amendments should be tested against more complex examples to ensure that they can be interpreted with reasonable certainty and the administrative burden on trustees is not excessive.

We thank Ian Raspin FCPA, Lyn Freshwater and Mark Morris FCPA of BNR Partners for their assistance with this submission and endorse the comments made in their submission to you.

If you have any queries contact Elinor Kasapidis, Tax Policy Adviser at CPA Australia on elinor.kasapidis@cpaaustralia.com.au or 03 9606 9666.

Yours sincerely

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