

TRUST GUIDANCE FACT SHEET NO. 4

ATO GUIDANCE AND PRACTICE MANAGEMENT

ATO guidance on trusts and the impacts on practice management

Updated: December 2022

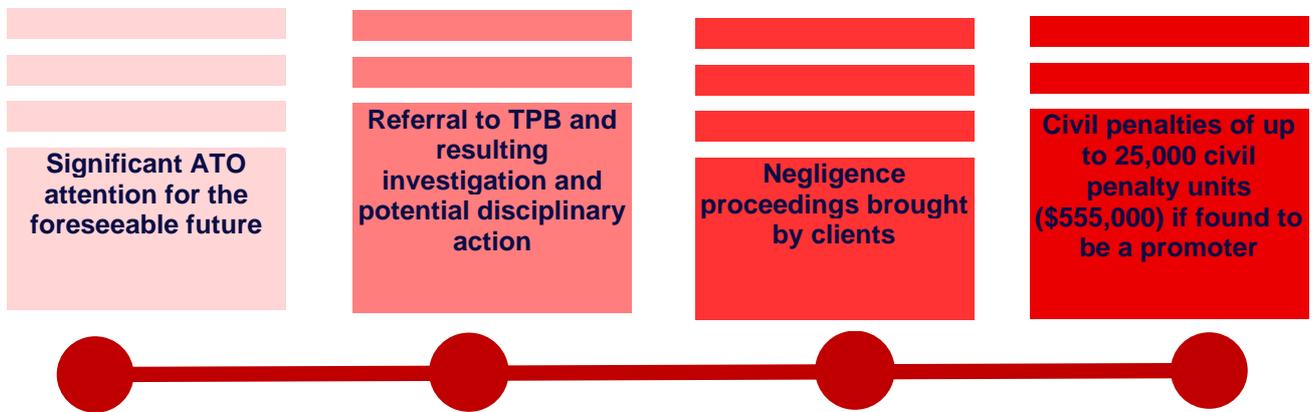
Introduction

The ATO’s most recent suite of guidance for trusts is comprised of TA 2022/1, TR 2022/4, PCG 2022/2 and TD 2022/11 (the Trust Products). In addition to the significant impact on taxpayers, there are also consequences for tax advisors. Tax advisors need to be aware of their personal risk exposure when advising on trust distributions in the context of the Trust Products.

This fact sheet provides an overview of the taxpayer alert and can be considered when contemplating trust arrangements. However, it is important to note that each situation will be different, and the fact sheet is not a substitute for independent legal advice.

What’s the risk for tax advisors?

Personal risk exposures for tax advisors include:



Tax Practitioners Board risk

Section 90-5 of the *Tax Agents Services Act 2009* (TASA) defines a ‘tax agent service’ to include ‘advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law,¹’ in circumstances where the entity can be expected to rely on that advice².

Provision of tax agent services is regulated by the Tax Practitioners Board (TPB). An [investigation](#) by the TPB can be onerous and stressful for tax agents, and the TPB have powers to suspend, cancel or terminate registration of tax agents.

Negligence proceedings brought by clients

Tax advisors can be sued by clients where they do not fully inform clients of the tax issues associated with arrangements they enter into, or of risk mitigation strategies that could be adopted.

¹ *Tax Agent Services Act 2009* (TASA), s90-5(1)(a)(ii)

² TASA, s90-5(1)(b)

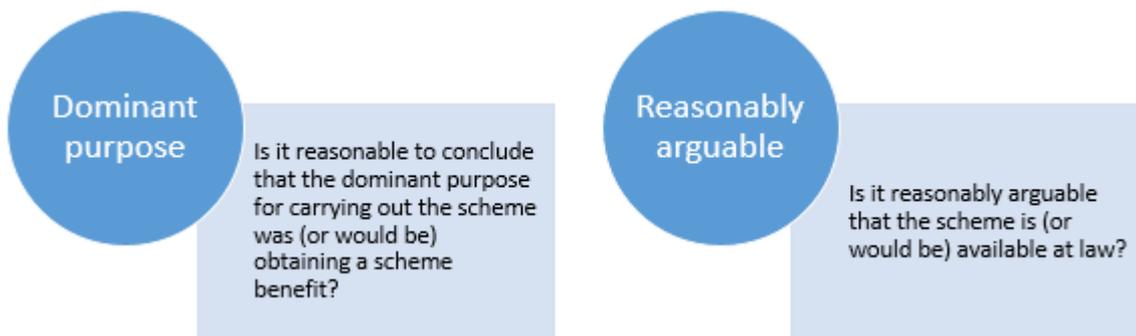
Promoter penalty risk

Promoter penalties can apply where there is a:

- promoter; and
- tax exploitation scheme (TES).

A tax advisor may be considered a promoter if they market or encourage growth of a scheme (including schemes promoted but not implemented and directly or indirectly receive a benefit in respect of marketing or encouragement) and it causes another entity to be a promoter.

The following criteria must be satisfied for a scheme to be considered a TES:



A scheme benefit is defined to include a reduced tax liability as a result of the scheme.

Whilst advice on tax planning arrangements (even those that are later found to be a TES) might be independent, objective advice, the Commissioner retains the discretion to refer the matter for prosecution.

Checklist for tax advisors to manage personal risk exposure – past years

No. Action

1. Identify clients who have made trust distributions in prior years.
2. Identify documentation or 'paper trail' for all distributions and application of trust funds – for example trustee resolutions and minutes.
3. Set up document management protocols to ensure that relevant documents are kept for the minimum retention periods.
4. Assess risk profile against the Trust Products – seek independent advice if unsure.
5. For clients assessed at being at risk advise those clients accordingly and inform them of their options to manage and mitigate risk.

Seek independent advice for:
 - second opinions;
6.
 - risk management and mitigation strategies such as voluntary disclosure or other ATO engagement; or
 - in the event of a TPB or promoter penalty investigation being commenced.

Checklist for tax advisors to manage personal risk exposure – future years

No. Action

1. Inform clients of the existence of the Trust Products.
2. Undertake conflict checks and set up confidentiality protocols to ensure that there is no conflict in acting for a Trust and its beneficiaries and that there is no sharing of confidential information. For example an adult child's information is not shared with the parents.
3. Have discussions with clients about future trust distributions, objectives sought to be achieved, documentation requirements and how they are likely to be risk profiled by the ATO.
4. In documenting arrangements, consider including either in trust distribution minutes or separate records an explanation of the trustee's rationale for distributing income as it is distributed.
5. Advise clients that the ATO could ask what they intend to use funds for and that it will be a potential problem if the funds are to be loaned or gifted to related parties and applied against an existing loan.

Seek authorisations for distributions from all parties involved. Best practice would be authorisations from:
 6.
 - the client engaging the tax advisor;
 - beneficiaries in receipt of tax income; and
 - the trustee making the distributions.
7. For arrangements regarded by the tax advisor as having risk, inform the client and consider recommending:
 - seeking a second opinion;
 - consultation with the ATO (such as by way of private ruling): or
 - implementation but lodging tax returns in accordance with the Trust Products and self-objecting to the assessment to the extent the taxpayer wants to challenge the position.

About the author

This checklist was prepared by Holding Redlich on behalf of CPA Australia and updated by CPA Australia.

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