

TRUST GUIDANCE FACT SHEET NO. 1

SECTION 100A REIMBURSEMENT AGREEMENTS

TR 2022/D1 and
PCG 2022/D1

Overview of how the ATO proposes to differentiate risk for trust arrangements to which section 100A may apply and recommendations for managing and mitigating any actual risk in practice

Introduction

*Draft Taxation Ruling TR 2022/D1 Income tax: section 100A reimbursement agreements ([TR 2022/D1](#)) and Draft Practical Compliance Guideline PCG 2022/D1 Section 100A reimbursement agreements - ATO compliance approach ([PCG 2022/D1](#)) set out how the ATO categorises risk and allocates compliance resources to perceived risks associated with section 100A of the *Income Tax Assessment Act 1936* (section 100A).*

The views expressed by the ATO are to apply to all trust entitlements conferred after 1 July 2022. For trust entitlements conferred before 1 July 2022, the ATO will stand by any administrative position reflected in [Trust Taxation – reimbursement agreement](#) first released in July 2014, to the extent that it is more favourable to the taxpayer's circumstances.

PCG 2022/D1 contains four risk categorisation zones – white, green, blue and red – with corresponding differentiated ATO compliance approaches and different responses required from taxpayers and advisors.

This guidance will assist CPA Australia members to understand the issues arising from the ATO guidance on section 100A reimbursement agreements and the positions taken by the Commissioner of Taxation.

This fact sheet provides an overview of each of the risk zones contained in PCG 2022/D1 and covers:

- Types of arrangements in each zone
- The ATO's compliance approach
- Options to consider
- Recommendations for action.

The information contained within this fact sheet 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.

This information is based on the draft guidance current as at 3 May 2022.

White zone

Arrangements and approach	Options and recommendations
<p>Arrangements</p> <ul style="list-style-type: none"> • Arrangements entered into prior to 1 July 2014 and not ongoing after 2014. <p>Compliance approach</p> <ul style="list-style-type: none"> • Considered low risk - direct compliance resources will not be applied to such arrangements • May be considered where the ATO is generally considering the affairs of the taxpayer or returns for the trust have not been lodged before 1 July 2017. 	<p>Historic risk</p> <ul style="list-style-type: none"> • Check tax return lodgement dates for years before 1 July 2014 • If tax returns were lodged after 1 July 2017 and taxpayer is currently subject to review by the ATO, address as you would for the green, blue or red zones if it were in a later income year • If tax returns were lodged after 1 July 2017 and taxpayer is not currently subject to review, ensure documentary records that are relevant to issues are retained for period the years that remain open to review. <p>Future risk</p> <ul style="list-style-type: none"> • Not applicable <p>For advisors</p> <ul style="list-style-type: none"> • Review records to identify taxpayers for whom tax returns for years before 1 July 2014 were lodged after 1 July 2017 • Inform those clients of their position and available options.

Green zone

Arrangements and approach	Options and recommendations
<p>Arrangements</p> <ul style="list-style-type: none"> • An individual beneficiary is made presently entitled to income of the trust estate and the funds paid to the beneficiary: <ul style="list-style-type: none"> – are mixed with their spouse’s funds (e.g., a joint bank account) or used for joint family purposes; or – benefit a person who is a dependent of the beneficiary. • Arrangements identical to a TR 2022/D1 example which concludes the arrangement is an ordinary family or commercial dealing • A beneficiary that is an individual or a private company is made presently entitled to income of the trust estate and there is a trustee retention of funds where all of the following are satisfied: <ul style="list-style-type: none"> – the funds are used for working capital of a business activity that it carries on for the acquisition, maintenance or improvement of investment assets of the trustee, and/or to lend funds to the associates on terms that satisfy a s109N loan agreement; – no ‘red zone’ elements are present; – if the beneficiary is an individual – the individual or their spouse is a trustee of the trust or controls the trustee of the trust or is employed in the management of a business the trustee conducts, or – if the beneficiary is a private company - the company is controlled by an individual who controls the trust and the company entitlement is made available to the trustee on terms that satisfy being a section 109N loan agreement. <p>Compliance approach</p> <ul style="list-style-type: none"> • Considered low risk • Direct compliance resources will not be applied to such arrangements but may be considered where the ATO is generally considering the affairs of the taxpayer. 	<p>Historic and future tax risks</p> <ul style="list-style-type: none"> • Ensure documentary records relevant to issues are retained for period the years remain open to review. • These records should contain sufficient detail to satisfy the ATO that the arrangement is green zone and may include: <ul style="list-style-type: none"> – trust distribution minutes; – trust deeds; – employment records; – bank account records; – financial statements for the trust; – section 109N loan agreements. <p>For advisors</p> <ul style="list-style-type: none"> • Review records and ensure those relevant to the issues are retained for the retention period • Notify clients of existence of guidance products and of their options/obligations to retain records • For future years: <ul style="list-style-type: none"> – Meet with clients to discuss objectives and rationale and ensure that is documented; – 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; – Best practice to protect an advisor’s position would be to attain authorities from each of the advisor’s client/s, the trustee and the beneficiaries as to how funds are to be distributed.

Blue zone

Arrangements and approach	Options and recommendations
<p>Arrangements</p> <ul style="list-style-type: none"> • All arrangements not captured by the other categories • May include one or more of the following features: <ul style="list-style-type: none"> – Beneficiary makes a gift of their trust entitlement or an associated amount receivable from the trust (for example, conversion of UPE to a loan); – The beneficiary disclaims their entitlement or releases the trustee from its obligation to pay their trust entitlement or an associated amount receivable from the trust – The income of the trust estate is less than the net income as a result of the trustee exercising a power, or the deed being amended, to affect the quantum of income of the trust estate – A beneficiary’s trust entitlement is satisfied by payments that are sourced from that beneficiary, or has been made subject to a loan agreement, and the repayments of that loan are sourced from payments or loans from that beneficiary¹ – The arrangement involves one or more features that may be explicable by a tax avoidance purpose. <p>Compliance approach</p> <ul style="list-style-type: none"> • Considered medium risk • May attract ATO review but less likely to attract attention than red zone arrangements. 	<p>Historic tax risks</p> <ul style="list-style-type: none"> • Ensure documentary records that are relevant to issues are retained for period the years remain open to review – these include the same as for the green zone arrangements, but could also include: <ul style="list-style-type: none"> – agreements to effect a gift – disclaimers or releases – records of dividends being declared – unit trust registers – records of distributions from other trusts – tax advice obtained. • Depending on the degree of certainty desired by the taxpayer, options for advisors include: <ul style="list-style-type: none"> – Provide advice – Seek further advice including legal opinion – Wait and watch. However, if the ATO commences compliance action and determines section 100A applies, penalty tax of up to 90 per cent could be imposed – Voluntary disclosure of relevant facts. This includes how the arrangement has been assessed against the PCG and the possibility of section 100A applying. This can reduce penalty exposure by up to 80 per cent without requiring taxpayer to admit their position is wrong, provided the voluntary disclosure is complete – Approach the ATO. The ATO can be contacted at ReimbursementAgreement@ato.gov.au to discuss how arrangements can be modified to reduce risk exposure. If this option is used, we recommend it be undertaken as part of a voluntary disclosure to access tax penalty concessions.

¹ For example, setting off dividends against amounts payable, issuing units and setting off against amounts payable or where the trustee is made entitled to income of another trust that is comprised of franked distributions paid by the beneficiary

Arrangements and approach	Options and recommendations
	<p>Future year tax risks</p> <ul style="list-style-type: none"> • Ensure documentary records that are relevant to section 100A issues are retained for the period the years remain open to review • Consider trust distribution minutes (or other written record) including rationale for why the trustee is distributing income as it is • If a taxpayer disagrees with the views expressed by the ATO and wants to challenge the position, consider a private ruling or lodging in accordance with the ATO position and then self-objecting. <p>For advisors</p> <ul style="list-style-type: none"> • Review records and ensure those relevant to the issues are retained for the retention period • Notify clients of existence of ATO guidance products and their options • For future years: <ul style="list-style-type: none"> – Meet with clients to discuss objectives and rationale and ensure that is documented – 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/or applied against an existing loan – Best practice to protect an advisor's position would be to attain authorities from each of the advisor's client/s, the trustee and the beneficiaries as to how funds are to be distributed.

Red zone

Arrangements and approach	Options and recommendations
<p>Arrangements</p> <ul style="list-style-type: none"> • Where entitlements appear to be motivated by the aim to shelter the trust's taxable income from higher rates of tax • Arrangements that involved contrived elements aimed to allow somebody other than the beneficiary to use the entitlements • Examples include arrangements where the: <ul style="list-style-type: none"> – presently entitled beneficiary lends or gifts some or all of their entitlement to another party; – trust income is returned to the trust by the beneficiary in the form of assessable income; – presently entitled beneficiary is issued units by the trustee (or related trust) and the amount owed for the units is set off against the beneficiaries entitlement; – share of net income included in a beneficiaries assessable income is significantly more than the beneficiaries entitlement – presently entitled beneficiary has losses; – arrangements subject to a Taxpayer Alert (e.g., TA 2022/1 Parents benefitting from the trust entitlements of their children over 18 years of age). <p>Compliance approach</p> <ul style="list-style-type: none"> • Considered high risk • Will attract ATO scrutiny. 	<p>Historic risk</p> <ul style="list-style-type: none"> • Ensure documentary records that are relevant to issues are retained for period the years remain open to review – these are broadly the same as for the green zone and blue zone arrangements • Depending on the degree of certainty desired by the taxpayer, options for advisors include: <ul style="list-style-type: none"> – Provide advice – Seek further advice including legal opinion – Wait and watch. However, if the ATO commences compliance action and determines section 100A applies, penalty tax of up to 90 per cent could be imposed – Voluntary disclosure of relevant facts. This includes how the arrangement has been assessed against the PCG and the possibility of section 100A applying. This can reduce penalty exposure by up to 80 per cent without requiring taxpayer to admit their position is wrong, provided the voluntary disclosure is complete. <p>Future risk</p> <ul style="list-style-type: none"> • Ensure documentary records that are relevant to issues are retained for period the years remain open to review • Consider trust distribution minutes (or other written record) including rationale for why the trustee is distributing income as it is: • If a taxpayer disagrees with the views expressed by the ATO and wants to challenge the position, consider a private ruling or lodging in accordance with the ATO position and then self-objecting.

Arrangements and approach	Options and recommendations
	<p>For advisors</p> <ul style="list-style-type: none"> • Review records and ensure those relevant to the issues are retained for the retention period • Notify clients of existence of ATO guidance products and their options • For future years: <ul style="list-style-type: none"> – Meet with clients to discuss objectives and rationale and ensure that is documented; – 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; – Best practice to protect an advisor’s position would be to attain authorities from each of the advisor’s client/s, the trustee and the beneficiaries as to how funds are to be distributed.

About the author

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

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