TRUST GUIDANCE FACT SHEET NO. 3

SECTION 100A TAXPAYER ALERT

TA 2022/1

Overview of TA 2022/1 and its impact for trust distributions to adult beneficiaries

CPA AUSTRALIA

Introduction

Taxpayer Alert TA 2022/1 Parents benefitting from the trust entitlements of their children over 18 years of age (TA 2022/1) can apply to arrangements where trust income is appointed between members of a family group but in substance it is the parents who exercise control over and enjoy the economic benefit of the income.

These can include arrangements where:

- there is an understanding that trust income appointed to children will be paid to their parents or otherwise dealt with at their parents' discretion
- trust income appointed to children is recorded as applied (with or without their knowledge) to repay amounts owed by them to their parents, being amounts owed in respect of expenses that benefit the children but are properly understood as parental expenses.

The arrangements the ATO is concerned about are those which they perceive as being more properly explained by the tax outcomes obtained, including the accessing of tax-free thresholds and lower marginal tax rates of family members, rather than ordinary familial considerations.

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.

This information is based on the draft guidance current as at 3 May 2022.

Features attracting ATO attention

Features likely to attract ATO attention include where:

- the trustees of a discretionary trust, or the directors of a corporate trustee, are either one or two individuals who are the parents in a particular family
- income derived by the trust is used during the year of derivation to meet the expenses of the parents
  - these may be recorded as beneficiary loans made from the trustee to the parents throughout the year
- resolutions of the trustee for the year show one or more of the children presently entitled to a share of the income of the trust
- the entitlements are substantial but do not generally result in the children's taxable income exceeding top marginal tax rate threshold ($180,000)
- amounts are not paid to the children
  - rather, at the actual or purported direction of the children, the entitlements are satisfied by the amounts being either paid to their parents or applied against any beneficiary loans owed by the parents
- the parties contend that the entitlements are paid or applied in this manner because:
  - the children are required to repay their parents for expenses incurred in relation to their upbringing or while they were minors (e.g., school fees);

  - the children are required to pay their parents amounts to meet their share of family costs in excess of amounts it would reasonably be expected an adult child would meet for their personal living expenses (e.g., reasonable rate for their board); or
  - there is an agreement that the parents will manage the pooled family entitlements from the trust for the benefit of the family members.
- there is no expectation or understanding that the children's income they derive from sources other than the trust distributions will be used to either repay their parents for expenses incurred when they were a minor or pay more than their reasonable share of the household expenditures or be placed in a pool to be managed by the parents for the benefit of the family members.

For such arrangements the ATO may consider treating them as shams, applying section 100A of the *Income Tax Assessment Act 1936* (section 100A), the general anti-avoidance provisions or assessing the parents as presently entitled where the means by which the trustee permits the use of funds allows it.

Actions recommended for tax advisors

Tax advisors that know of clients that have made such distributions should speak to those clients to confirm what documentation there is and what the rationale was to risk assess those arrangements and discuss options around risk mitigation such as voluntary disclosure.

Going forward, tax advisors should ensure that where distributions are made to children the rationale is understood by the tax advisor and documented and that clients are aware of the risk of the ATO reviewing and adjusting the arrangements if they do not think they are valid.

Tax advisors should also consider implementing protocols to require authorisations from both trustees and trust beneficiaries for distributions made.

From a practice management perspective, tax advisors should ensure that proper conflict checks have been made where acting for family groups and that, where necessary, appropriate measures are taken to ensure that the confidentiality information of each family member is kept confidential unless authorised to share the information.

About the author

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