The Tax Institute

2 May 2022

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Australian Taxation Office

By email: justin.dearness@ato.gov.au

Cc: Peter Glindermann, Tax Counsel Network, Australian Taxation Office
Christopher Ryan, Tax Counsel Network, Australian Taxation Office

Dear Mr Dearness

Draft Taxation Ruling TR 2022/D1 | Income tax: section 100A reimbursement agreements

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to draft Taxation Ruling TR 2022/D1 *Income tax: section 100A reimbursement agreements* (**draft Ruling**).

In the development of this submission, we have closely consulted with our National Small and Medium Enterprises Technical Committee and National Taxation of Individuals Committee to prepare a considered response which represents the views of the broader membership of The Tax Institute.

Historically, the ATO has provided very limited guidance on the application of section 100A of the *Income Tax Assessment Act 1936* (**ITAA 1936**) to assist taxpayers. Instead, taxpayers and tax professionals have had to rely on limited case law and ATO practices that set the perceived boundaries and scope of section 100A. While the provision has been in effect for more than 40 years, most practitioners have had minimal exposure to section 100A and have not seen it applied in practice beyond the more egregious arrangements in the handful of cases that have come before the courts.

Although the community will generally benefit from comprehensive guidance on this topic, The Tax Institute is of the view that significant changes need to be made to ensure the draft Ruling is effective at explaining the operation of section 100A. In particular, we consider that the draft Ruling should acknowledge the threshold requirements to enliven the operation of section 100A. The draft Ruling primarily focuses on the 'ordinary family and commercial dealing' exception, which, of itself, is insufficient to provide the relevant clarity and is causing more confusion. The draft Ruling must be supported by general education of the community and the tax profession, and by the ATO highlighting all the requirements of section 100A.

Further, we consider that the draft Ruling should be amended to ensure there is clear and realistic guidance on the evidentiary requirements taxpayers will need to satisfy. If a reasonable approach is not taken by the ATO, there is a high likelihood that taxpayers will face onerous compliance burdens that were historically not required. In addition, we have concerns that the draft Ruling uses value judgments when determining whether an arrangement is an 'ordinary' family dealing. These value judgments inappropriately make the ATO effectively the sole arbiter of what 'ordinary' means due to the prohibitive nature of litigation, potentially excluding the diverse range of cultural and social factors present in Australian families and how they choose to interact within their family unit.

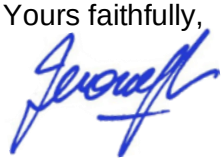
The Tax Institute also considers that there are a range of other technical and practical issues that need to be addressed in the draft Ruling. Our detailed response is contained in **Appendix A**.

We would be pleased to continue to work with the ATO on further development of the draft Ruling to ensure it provides the most useful advice and guidance for taxpayers and their advisers.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more information about The Tax Institute.

If you would like to discuss any of the above, please contact our Senior Advocate, Robyn Jacobson, on (03) 9603 2008.

Yours faithfully,



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President

APPENDIX A

We have set out below our detailed comments and observations for your consideration to ensure that the draft Ruling provides the most effective and practical advice for taxpayers and their advisers. Our comments broadly follow the structure of the draft Ruling. All legislative references are to the ITAA 1936, unless otherwise indicated.

Guardian appeal and other ongoing cases

The recent decision of *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation*[1] (**Guardian**) is significant as it is the first time the Federal Court has considered the operation of the 'ordinary family or commercial dealing' exemption in section 100A. We note that *Guardian* is currently scheduled for an appeal hearing before the Full Federal Court,[2] and special leave to the High Court could be sought regardless of the outcome of the current appeal. The outcome of the *Guardian* appeal has the potential to add valuable jurisprudence on the application of section 100A. Feedback from our members indicates that there are other cases before, or scheduled to go before, the Federal Court at first instance regarding section 100A.

We would expect the Commissioner to update all relevant guidance products to reflect any change in the law and principles that are established by emerging case law, including *Guardian* and any subsequent cases on section 100A.

General requirements for section 100A reimbursement agreements

We have concerns that the draft Ruling does not adequately work through the requirements for a reimbursement agreement for the purposes of section 100A. In its current form, the examples in the draft Ruling are framed in such a way that they appear to imply that that the prerequisites for section 100A are likely to be satisfied in all circumstances, with the ordinary family and commercial dealing exemption being the primary criterion for determining whether section 100A applies. We do not consider this conclusion to be correct as there are several other key operative or prerequisite requirements before section 100A can apply.

In the absence of the ATO acknowledging there are other requirements to be satisfied, there is a high likelihood of the provision being misunderstood. We consider that the draft Ruling does not provide the full picture of how section 100A applies in practice, which could result in confusion and the misapplication of the provision.

We also consider that the draft Ruling should also include examples of section 100A reimbursement agreements that have been recognised by case law.

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1 [2021] FCA 1619.

2 www.comcourts.gov.au/file/Federal/P/QUD36/2022/actions

Examples include:

- Distributions or payments made on paper to a loss-making entity where there is never an intention to actually distribute the economic benefit to that entity.[3]
- Distributions or payments to an arm's length supplier that has the effect of turning a non-deductible expense into a deductible expense.

Notably, no section 100A case that has come before the courts has considered the treatment of distributions made to an adult beneficiary who is a child or family member of the controllers of the discretionary trust making the distributions.

We also consider that the guidance should provide further clarity on the significant grey area concerning whether a section 100A reimbursement agreement exists where distributions are made to other family members, not just adult children. Feedback from our members indicates that there is significant confusion for taxpayers in instances where distributions are made to adult family members other than adult children, including elderly parents, nieces and nephews, aunts and uncles, cousins etc.

Any distribution, no matter how low risk it is, has the potential to lower the total tax paid. We consider that any guidance should expressly note that the mere fact that less income tax is paid is not evidence of itself that there is a reimbursement agreement. There are other relevant factors to consider when determining whether a reimbursement agreement exists.

Interaction with other anti-avoidance provisions

We note that section 100A is an integrity measure that operates independently of other anti-avoidance and integrity provisions contained in the ITAA 1936 and the *Income Tax Assessment Act 1997* (**ITAA 1997**). We note that there have been significant changes to the tax law since section 100A was introduced on 13 March 1979 and took legislative effect on 11 June 1978.[4]

This includes the introduction of the trust loss provisions in Schedule 2F to the ITAA 1936, the creation of the concepts of family group, family trust elections (**FTEs**) and interposed entity elections, and family trust distributions tax (**FTDT**). Other anti-avoidance provisions include sections 45B and 177EA of the ITAA 1936, and the trust capital gains and dividend streaming provisions.[5]

We consider that the draft Ruling should clarify the ATO's position on whether section 100A applies in addition to, or notwithstanding, the operation of other anti-avoidance and integrity provisions contained in the tax law.

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[3] We consider that this would be limited to fact scenarios similar to those noted in *Idlecroft Pty Ltd v Commissioner of Taxation* [2005] FCAFC 141 and *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* [2008] HCA 21.

[4] *Income Tax Assessment Amendment Act 1979*, Clause 18.

[5] See Subdivisions 115-C and 207-B of the ITAA 1997.

Some specific examples that have an interactional impact are noted below:

- The trust loss rules are a set of integrity provisions that provide a set of safeguards or tests to prevent the inappropriate use of trust losses. The purpose of the trust loss rules is to ensure that the tax benefit of a loss is not transferred to persons who did not bear the economic loss at the time it was incurred by the trust. In other words, the rules prevent loss trafficking. They seek to stamp out the very behaviour that section 100A would otherwise look to prevent. The concept of a family trust and FTEs were introduced as part of the trust loss provisions. If a trust has made an FTE, then it need not satisfy a number of complex tests when it seeks to recoup a prior year tax loss.
- A family group, as defined by the making of an FTE, provides certain tax concessions, such as the ability to distribute within the family group without attracting FTDT.
- The legislative provisions in Division 6 of Part III of the ITAA 1936 and Subdivisions 115-C and 207-B of the ITAA 1997 permit the streaming of capital gains and franked distributions in certain circumstances.
- Former section 160APHL(10) in repealed Subdivision 1A of former Part IIIAA of the ITAA 1936[6] contains the 45-day rule for passing on franking credits as a qualified person and the exclusion for trusts that have made a family trust election.

The draft Ruling suggests that the Commissioner views section 100A as being applied more readily than the general anti-avoidance provision contained in Part IVA of the ITAA 1936, particularly given its unlimited amendment period. This would have the effect of more easily applying a significant anti-avoidance provision to arrangements that do not fit within the Commissioner's view of 'ordinary family or commercial dealing.'

The Tax Institute is concerned by this approach as it effectively circumvents a review by the General Anti-Avoidance Rules (**GAAR**) Panel,[7] an important independent review step in the existing processes for Part IVA. Accordingly, we consider that matters involving the potential application of section 100A should be required to be referred to the GAAR Panel, with information about the referral process being included in PS LA 2005/24: *Application of General Anti-Avoidance Rules* (or similar guidance). This will ensure consistent procedural treatment for anti-avoidance provisions concerned with the determination of a tax purpose.

Use of value judgments and confusing terms

We consider that the draft Ruling utilises a range of terms that may be considered confusing or could create uncertainty. Examples include the use of the terms 'financially advanced', 'ordinary familial or commercial objects' and 'separate trust'. These terms are ambiguous and are not supported by further explanation or details to clearly identify the ATO's intent when using them. Given these terms are not commonly used in practice nor defined in the tax law, we consider that their use makes it difficult for taxpayers and tax professionals to understand and apply the draft Ruling.

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6 See paragraph 207-145(1)(a) of the ITAA 1997.

7 See Law Administration Practice Statement PS LA 2005/24*: Application of General Anti-Avoidance Rules* regarding the role of the GAAR Panel in certain anti-avoidance provisions.

We note that these terms require the making of value judgments. They depend on a range of factors including culture, race, socio-economic factors and other personal circumstances. It should not be up to the ATO to determine how a family ordinarily deals with each other. This approach also introduces the significant risk of inconsistent outcomes of audits and objections as the decision maker will be asked to apply their values or understanding of these phrases to taxpayers' circumstances.

We consider that any terms that may be ambiguous or require the use of a value judgment be removed from the draft Ruling. We consider that these terms should be replaced with simple and easy to understand language that is consistent with the language used in the taxation legislation. Alternatively, we consider that any terms should be expanded upon and defined so the public is better able to understand the ATO's rationale and approach, especially if the terms have underlying assumptions that will be used by ATO decision makers.

Trustee's reasons for actions and distributions

The draft Ruling frequently references the need for trustees to keep extensive documentary evidence and records detailing the rationale for various decisions they make regarding the net income of the trust, and distributions made to beneficiaries. We consider that this blanket approach creates significant practical and legal difficulties for trustees. We note that, generally, trustees are not required to keep or provide detailed reasons for all decisions they make concerning the net income of the trust, or the reasons for distributions. We consider that requiring trustees to justify all their decisions in writing and keep a historical record is an excessive and unreasonable burden.

Further, this requirement may have an unintended consequence of making trustees legally liable to explain their reasoning and defend their decisions against claims by beneficiaries for non-tax related reasons. We therefore consider that the ATO acknowledges the burden imposed on trustees by this requirement and either removes it or clarifies how this evidentiary requirement accords with general trust law principles. If considered crucial and consistent with general trust law principles, we consider that the evidentiary requirements should be easy to comply with, without placing an onerous burden on trustees.

Onus of proof

We consider that further guidance is needed to determine the amount of evidence required by taxpayers to satisfy the onus of proof demonstrating that costs were paid by family members on behalf of other family members. Typically, individuals do not list or keep detailed records of gifts and expenses paid to or on behalf of each other. Accordingly, the resulting evidence is often verbal and may not be detailed or complete given its nature, resulting in evidentiary difficulties for the taxpayer. Alternatively, families that do prudently record these types of transactions may be unfairly deemed by the ATO to be engaging in behaviour considered 'suspicious', contrived or otherwise contrary to normal practice.

The draft Ruling does not provide taxpayers with sufficient guidance regarding the evidentiary standards they are required to maintain to be able to readily demonstrate their family dealings. We consider that the draft Ruling should include clear guidance regarding the type and extent of documentation or substantiation that is needed by taxpayers to sufficiently explain their personal arrangements. We also consider that any requirements or assumptions regarding evidence should be clearly published and applied by all ATO officers. The current approach introduces an inherent risk of inconsistent treatment across reviews, audits and objections.

Other evidentiary requirements

The draft Ruling requires that all distributions to adult children must be supported by detailed reasons. We consider this to be an inconsistent outcome compared with distributions made to non-working spouses. We consider that, in the context of a family unit, there should be no practical difference for the legitimate reasons a trustee may want to distribute amounts to adult children or spouses, ensuring close family members are able to effectively support themselves. Despite the similarity, we note that documentation for non-working spouses is not needed, and this is consistent with our position. We consider that this different treatment is an example of the inequitable outcomes arising from the use of unstated value judgments assumed throughout the draft Ruling.

More generally, the requirement for trustees to keep detailed reasoning raises further issues that we consider requires further explanation in the draft Ruling. These include the following:

- It can be relatively simple for a trustee to prove the existence of an arrangement, for example, through distribution statements and resolutions that can be provided to substantiate a trustee's decisions. However, it is significantly more difficult for a trustee to produce evidence that a particular arrangement or agreement does not exist, as the absence of an agreement generally coincides with a lack of evidence. We consider that the ATO should provide additional guidance in the draft Ruling regarding what evidence or statements will be accepted when a taxpayer is required to prove that an agreement does not exist.
- The draft Ruling states that the ATO will apply their July 2014 guidance where it is more favourable to a taxpayer's circumstances. However, we note there are practical difficulties for trustees to demonstrate that their arrangement was beneficially treated under the 2014 guidance. We consider that the ATO further explain what evidence and details a trustee is required to produce to demonstrate this.
- The draft Ruling is unclear on how long trustees are required to keep records for. Although the ATO generally requires that tax records be kept for five years, section 100A has an unlimited amendment period. We therefore recommend that the ATO provides further clarity on this issue in the draft Ruling.
- The draft Ruling does not contemplate situations where the decision-maker, controller, or the beneficiary passes away during the existence of the trust. This can have significant impacts on the ability of the trustee to obtain and provide evidence of potential arrangements. We recommend that the ATO provides further guidance for trustees who are impacted by this fact scenario.

- Trustees may find it difficult to substantiate historical arrangements given the lack of previous ATO guidance on section 100A, and the ambiguities in the evidentiary requirements already noted in this submission. We consider that the ATO should allow lesser evidentiary burdens for historical arrangements, particularly where the arrangement dates back to beyond the five-year record-keeping period.
- Trustees may seek to document reasons for transactions that may have an ancillary impact of reducing tax. However, despite reasonable efforts, it is uncertain whether this type of evidence would provide the level of substantiation described in the draft Ruling and whether this would satisfy the tax reduction purpose condition in section 100A. We consider that the draft Ruling should provide further clarity on this point.
- Paragraphs 60 and 61 of the draft Ruling highlight the Commissioner's view that the connection between a beneficiary's present entitlement and the reimbursement agreement can be wider than a direct causal connection. Noting that the taxpayer bears the burden of proof, the draft Ruling does not give any practical guidance on the Commissioner's view of the extent of the scope of section 100A. We consider that further practical guidance is required on the meaning of the term 'direct causal connection', as well as guidance regarding the evidence the taxpayer needs to provide to practically demonstrate to, and satisfy, the Commissioner during the course of an audit or objection.

Purpose of advisers

Paragraph 19 of the draft Ruling states that 'where a party acts in accordance with advice provided by an adviser, the purpose of that adviser can be imputed to the party.' We consider that the ATO should more fully explain the basis of this statement. We consider that the draft Ruling should include a supported rationale detailing the instances when the knowledge of the tax adviser can be imputed to the taxpayer.

We have concerns that the draft Ruling does not draw sufficiently on the concept of imputed knowledge from case law in the context of section 100A. Taxpayers and their advisers would benefit from understanding how the body of law on imputed knowledge is relevant to section 100A when trying to apply the ATO's view. We consider that the draft Ruling should contain practical examples and guidance on the instances when the Commissioner will consider an adviser to be a party to the agreement, resulting in their subjective intention being imputed to others in the arrangement, noting there are some limitations in this regard. Some insights may be gained from the analysis of the imputing the purpose of the adviser in *Commissioner of Taxation v Consolidated Press Holdings Ltd* [2001] HCA 32, at [95].

Interpretation of agreement

Paragraphs 55 to 58 of the draft Ruling highlight the Commissioner's view that an agreement for the purposes of subsection 100A(13) takes it 'widest meaning'. The draft Ruling further states that an 'agreement' does not require:[8]

> … an exact understanding of the parties to the nature and extent of the agreement and benefits to be provided and can, depending on the facts, be a plan comprising a series of steps undertaken individually by those parties over a period of time; …

Broadly, based on case law, a meeting of the minds of two or more parties is an essential requirement for the making of an agreement.[9] We consider that this principle necessitates a bilateral understanding being formed between two parties, and cannot be entirely undertaken by one party. It also requires certainty. So it may be that there does not need to be an exact understanding of the parties to the nature and extent of the agreement, but it needs to have sufficient definition to identify the rights and obligations of each of the parties. We recommend that the draft Ruling be amended to explicitly state this.

Benefits to a person other than the beneficiary

Paragraph 67 of the Draft Ruling states:

> For example, it could be satisfied in a case where the person intended to benefit holds equity, share units or similar interests in the presently entitled beneficiary.

With the current context provided, we consider that this phrase will result in uncertainty and cause confusion for taxpayers. We note that this statement will likely hold true in most situations given the standard drafting of the beneficiary clauses prevalent in most discretionary trust deeds. Further, these circumstances are usually required to ensure that a family group exists. Although we note that an indirect benefit may be relevant in some circumstances, we consider that clarification is required here to ensure that this paragraph is not misunderstood by taxpayers.

Ordinary vs common

Paragraph 79 of the draft Ruling states that 'a dealing is not ordinary just because it is commonplace.' We consider that this may cause confusion as the community is likely to understand that a common transaction is a reasonable synonym for an 'ordinary' transaction.

We consider that the draft Ruling should be amended to explain the practical difference between the terms 'common' and 'ordinary' and make it clear why the Commissioner may not consider transactions that are 'common' in practice to also be considered as 'ordinary' for the purposes of section 100A. Greater specificity in the use of the terms that are supported with clear examples should assist in reducing instances of confusion or misunderstanding.

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8 Paragraph 57 of the Draft Ruling.

9 *Dickinson v Dodds* (1876) LR 2 Ch D 463, at 473.

We also consider that when describing what 'ordinary' means for the purposes of section 100A, the draft Ruling should incorporate the comments of Logan J in *Guardian* who notes that the use of the adjective 'ordinary' means the purpose must not be tax driven.[10] Reflecting Logan J's comment that ordinary is not tax driven in the Ruling would ensure that it accurately reflects the Federal Court's interpretation of section 100A as a general statement, in the case that the ATO finalises the draft Ruling while the appeal is on foot.

Read in context, the adjective 'ordinary' in 'ordinary family or commercial dealing' has particular work to do. It is used in contradistinction to 'extraordinary' and refers to a dealing that contains no element of artificiality. The Explanatory Memorandum to the *Income Tax Assessment Amendment Bill (No. 5) 1978*[11] notes that section 100A was introduced to overcome certain tax avoidance arrangements designed to enable trading profits and other income derived by trusts to escape tax. Further authority supporting the proposition that 'ordinary' means the arrangement was not tax driven is found in case law concerning former section 260 of the ITAA 1936.[12] We understand that this is descriptive of activities akin to 'trust-stripping' arrangements.

'Presence of tax driven features'

We consider that the factors listed in paragraph 95 of the draft Ruling require further clarification or amendment. In their current form, some of the factors do not provide useful guidance, or they make inappropriate value judgments about appropriate investments and skills of trustees as financial advisers.

In particular, we consider that the dot point which states 'income entitlements have not been remitted to the beneficiary, and the reasons given are false having regard to the reasons given for the purported distribution,' requires further clarification regarding what will be considered to be a relevant falsehood that would raise concerns in the transactions. The dot point also assumes that reasons were given for the distribution. We refer to our submission above in relation to onerous expectations of trustees and absence of general legal requirements for trustees to document reasons for their discretionary decisions. Further clarity in this instance will assist taxpayers to understand what the underlying concern is.

The final two dot points seem to state facts, without providing guidance, regarding the features of the factors that would raise concerns. As suggested above, we consider that further clarity is needed to help taxpayers understand the ATO's concerns.

We consider that any fact patterns, biases, judgments or other assumptions that could be adopted by the Commissioner in these factors should be stated upfront to avoid confusion, and to ensure that taxpayers and tax professionals understand the ATO's position. We also consider that the factors should clarify why they raise concerns for the ATO, or the context within which they may be examined further by the ATO.

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[10] *Guardian*, paragraph 144.

[11] Enacted as the *Income Tax Assessment Amendment Act 1979*, Act No. 12 of 1979.

[12] See *Rowdell Pty Ltd v FCT* (1963) 111 CLR 106 per Kitto J at [196].

Example 5

Example 5 of the draft Ruling refers to funds being set aside on a 'separate trust'. We note that the term 'separate trust' is not defined or expanded upon and is likely to cause confusion for taxpayers. For example, a taxpayer may interpret a 'separate trust' to be akin to, or refer to, any of the following:

- a sub-trust arrangement as discussed in PS LA 2010/4: *Division 7A: trust entitlements* (**PS LA 2010/4**) akin to Option 1 or Option 2 in PS LA 2010/4 (an interest-only 7-year or 10-year investment arrangement);
- a sub-trust arrangement akin to Option 3 in PS LA 2010/4;
- a sub-trust as discussed in TD 2022/D1: *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*;
- a modification of a sub-trust, as described above, that applies only to individual beneficiaries;
- an implied bare trust; or
- a new concept that is not akin to existing concepts in tax law.

The draft Ruling does not provide any guidance regarding the evidence required to demonstrate the existence and terms of a 'separate trust'. It is unclear whether the trustee of the sub-trust is required to prepare separate financial statements and a separate tax return and whether a separate Tax File Number (**TFN**) is required to be obtained by the sub-trust. A lack of guidance on this point will cause significant uncertainty for taxpayers and likely result in future disputes regarding appropriate evidence. Accordingly, we consider that the draft Ruling should be updated to provide further guidance on what constitutes a 'separate trust', a clear overview of the required evidence, and any associated risks the Commissioner will accept or consider when determining this outcome.

We also consider that the evidentiary requirements should not be excessively onerous for taxpayers. For example, if taxpayers are required to keep separate trust accounts, obtain a separate TFN and lodge 'separate trust' income tax returns, taxpayers will practically not utilise 'separate trusts' given the associated compliance costs.

Further, we consider that Example 5 should be updated to reflect the outcome when the funds representing a new unpaid present entitlement (**UPE**) of one beneficiary are used to repay an existing UPE owing to another beneficiary. In the most basic scenario, we consider that this would generally result in the pre-existing UPE being discharged, with the new UPE remaining outstanding. Although this transaction may be undertaken for a tax reduction purpose in more egregious circumstances, it is often undertaken for commercial and practical reasons. We consider that the ATO should provide guidance on the evidence required to demonstrate the validity of such transactions, as well as the specific types of situations that the ATO considers unacceptable.

Paragraph 132 – Loans to unit trust

Paragraph 132 of Example 7 of the draft Ruling states that a different example would arise in circumstances if:

> … based on the circumstances it is open to infer there was an understanding between the trustee and unitholder's that the interest or principal was not genuinely intended to be repaid.

We note that this point, in effect, covers commercial equity re-investment transactions, that are frequently entered into in the market. We consider that no high risk behaviour or tax avoidance occurs in instances where equity re-investments are undertaken at market value as that is a valid commercial decision for trustees to undertake. Accordingly, we consider that this paragraph be amended to reflect that re-investments that occur at market value will not raise concerns.

Example 8 – Share buy-back arrangement

The Tax Institute is concerned that Example 8 of the draft Ruling, in relation to share buy-back arrangements, does not provide sufficient explanation of the causal nexus between the creation of the beneficiary's present entitlement and the reimbursement agreement.

Example 8 appears to indicate that a distribution of capital that is not income of the trust estate is capable of being within the purview of section 100A. The Tax Institute does not agree with this interpretation and is of the view that section 100A applies only to trust income. We note that what constitutes trust income will be determined on a case by case analysis, depending on the definition of trust income in the trust deed and any powers exercised by the trustee pursuant to the deed.[13]

We consider that Example 8 should be clarified to highlight that the primary concern is the fact pattern contained in paragraph 139, being that the trustee has varied the trust deed to achieve the desired outcome. At the time the present entitlement is created, the buy-back proceeds do not form part of the trust income, so it is unclear how the present entitlement of $10,000 'arose from' a reimbursement agreement.

If the draft Ruling contained explicit statements:

- that the primary concern is the variation of the deed to recharacterise the trust income;
- that section 100A does not apply to a distribution of trust capital that is not income of the trust estate; and
- to explain the required nexus between the present entitlement and the reimbursement agreement,

it would allow taxpayers to better understand the cause of the ATO's concerns.

We also recommend including guidance in the form of a new example concerning the potential application of section 100A if the case where the trust deed was not modified, and the trust deed defines trust income as that being trust law income under ordinary concepts. In these instances, The Tax Institute is of the view that section 100A does not apply as the amount was a genuine capital distribution and does not form part of the trust income.

For completeness, we also note in Example 8, the company uses 100% of its assets to buy back 100% of its issued shares. A company cannot exist without shareholders and is unable to buy back 100% of its shares in the absence of a liquidation.

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[13] See TR 2012/D1 *meaning of 'income of the trust estate' in Division 6 of Part III of the Income Tax Assessment Act 1936 and related provisions*.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.