Monthly Information Newsletter – Tax & Super

July 2022

Last minute trust distributions and record keeping

In late June, the ATO released their '100A guidelines' provided in respect of the 2021/22 income year ('Managing section 100A for the 2021–22 income year').

In summary, the guidelines would appear to be a reiteration of previously published draft material (the 23 February Guidelines) with no or little direction with respect to the practical issues and determinations that taxpayers and their advisors will need to make with regards to the 2021/22 income year.

It is noted that the ATO is focused on practitioners implementing and maintaining substantive records to support the arrangements entered for 2021/22 or undertaken in respect of the matters in question. Keep good records that explain the transactions that have happened. Having a clear understanding as to why entitlements have been dealt with in the way they have will help support your position. It will also assist in timely resolution in the event that the ATO reviews your arrangement.

While each arrangement depends on its facts, the following will be important:

- the trust deed (including amendments), trustee resolutions, and contact details of the trustee
- for an inter-party loan, copies of the loan agreements and records of the purpose for making the loan
- evidence to demonstrate that a beneficiary has received or enjoyed the benefit of their entitlement.

It is acknowledged that intra-family arrangements are typically conducted with a greater level of informality than commercial dealings that are conducted by unrelated parties. Nonetheless, to the extent possible, contemporaneous records should be maintained that demonstrate the objectives an arrangement was intended to achieve and how it helped to achieve them.

Going forward regarding future years, the ATO could not be clearer in its draft guidance about how it sees section 100A of the ITAA (1936) operating. Where a beneficiary receives and enjoys their present entitlement to trust income, section 100A will have no role to play. However, where another person receives a payment or a benefit in relation to that present entitlement, and there was a purpose that someone pays less tax, there may be a reimbursement agreement and section 100A can apply. The beneficiary is then taken never to have been entitled to the distribution and the trustee is assessed under section 99A at the top marginal tax rate.

There is an exclusion for 'ordinary family dealings' which the ATO has sought to read down in its draft guidance. The ATO's interpretation is currently at odds with that of the Federal Court. The result of that ongoing litigation will be crucial.

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