



8 March 2022

Christopher Ryan
National Director
Tax Avoidance Taskforce – Trusts | Private Wealth
Australian Taxation Office

By email: christopher.ryan@ato.gov.au

**Re: Draft Practical Compliance Guideline ('PCG') 2022/D1 (the 'Guideline')
Section 100A reimbursements – ATO compliance approach**

Dear Christopher,

The National Tax & Accountants' Association ('NTAA') appreciates the opportunity to comment on the ATO's draft compliance approach, as set out in the Guideline.

The NTAA has long been at the coalface of interaction with the tax agent community including, for instance, through its involvement in the professional development of tax agents and advisers, along with the provision of technical support through its National Hotline Service. Our reach as a professional association extends to over 10,000 member firms, which represents a considerable proportion of registered tax agents.

The purpose of this particular submission is to express the NTAA's concerns regarding the proposed date of effect of the Guideline. The NTAA intends to comment separately with respect to the content of the Guideline itself.

NTAA concerns regarding the proposed date of effect of the Guideline

Paragraph 47 of the Guideline states that, when finalised, it is proposed to apply to present entitlements to trust income conferred before and after the date of issue of the document, subject to a limited exception for certain trust entitlements conferred before 1 July 2022. In this regard, the ATO has indicated that it will devote compliance resources to examine certain trust distributions conferred from **1 July 2014** (and earlier for certain white zone arrangements) based on an interpretation of S.100A of the ITAA 1936 ('S.100A') that was first made public by the ATO on **23 February 2022**.

The NTAA has serious concerns about the retrospectivity of the ATO's compliance approach, for the following key reasons:

- (a) **Retrospectivity creates uncertainty** – This includes the uncertainty of not knowing if (or when) the ATO may decide to review a particular prior year trust distribution, as well as the uncertainty surrounding the practical implications should an adverse tax adjustment under S.100A arise. For instance, if a trustee is required to fund an unexpected tax liability arising under S.99A of the ITAA 1936, the source of that payment and its effect on the trust beneficiaries may lead to complex disputes, particularly if the adjustment relates to a trust distribution from many years ago.
- (b) **Solvency issues for trusts** – It is also important to note that retrospectively applying these new guidelines may create challenging solvency issues for trusts. Such a situation may arise where large S.100A assessments are raised by the ATO against a trustee and these tax liabilities, coupled with unpaid present entitlements of beneficiaries (and other trust liabilities), may result in a trust operating insolvently. This is clearly not a desirable situation for trustees who are affected by large assessments being raised under S.100A for prior income years.

National Tax & Accountants' Association Ltd

29-33 Palmerston Crescent
South Melbourne Vic 3205
ABN: 76 057 551 854

Ph: 1800 808 105
E: ntaainfo@ntaa.com.au
W: ntaa.com.au

- (c) **Retrospectivity creates complexity** – The NTAA also believes that, applying the Guideline retrospectively fails to adequately take into account the sheer complexity of this area of the law. Of significant note is the inherent uncertainty involved in determining when an arrangement is considered to be an ‘ordinary family or commercial dealing’.

The recent decision in *Guardian AIT Pty Ltd ATF Australian Investment Trust v FCT* [2021] FCA 1619 (on appeal) highlights the interpretative issues surrounding the determination of when an arrangement will be an ‘ordinary family or commercial dealing’. With the ATO appealing the Federal Court’s decision, it would appear that there is more to play out in this area of the law.

- (d) **Limited S.100A guidelines over the years** – For decades now, trustees and tax practitioners have been faced with the unenviable task of determining how S.100A applied to trust distributions in any number of different scenarios, in an environment of very limited jurisprudence and/or ATO guidance to assist in determining where the boundaries may lie.

Trustees and their advisers have looked to the ATO’s factsheet on S.100A, *Trust taxation – reimbursement agreement* (QC 41167) (the ‘factsheet’) to assist in understanding S.100A. However, whilst the factsheet provided some limited examples of certain arrangements that qualified as an ‘ordinary family or commercial dealing’ (which we understand the ATO will “stand by”), it did **not** warn taxpayers of the types of arrangements the ATO believed did *not* qualify for the exclusion.

Many accountants and trustees feel let down by the fact that the Guideline is proposed to apply retrospectively, to cover the same period as that covered by the factsheet. This retrospectivity has blindsided trustees and tax professionals, and understandably so, given that, in the seven years following the release of the factsheet, the ATO did not find cause to update the factsheet at any time, in order to highlight any areas of concern. The NTAA believes that any areas of concern could easily have been identified by the ATO, given the extensive disclosure requirements imposed on trustees and beneficiaries throughout this period.

For the reasons noted above, the NTAA is concerned that the Guideline’s proposed retrospective compliance approach will put undue pressure on tax practitioners, who have been (and continue to be) burdened by the challenges COVID has placed on them and their clients for over two years now. Furthermore, the ATO’s proposed compliance approach has significant potential to strain the relationship between the tax profession and the ATO; a relationship described by Sylvia Gallagher, ATO acting Assistant Commissioner, as “tumultuous”.

We are also concerned that Taxpayer Alert TA 2022/1 highlights the prospect of the ‘promoter penalties’ being applied. To that end, reference is made to registered tax practitioners being referred to the Tax Practitioners Board for contraventions of S.100A. These broad and concerning statements are made without any discussion as to the specific types of arrangements that may attract attention in this regard. We believe that such significant penalties should be accompanied by reference to the types of behaviours that are likely to attract further action under the promoter penalties and referral to the Tax Practitioners Board.

The way forward

In light of the above, the NTAA would strongly encourage the ATO to revise the date of effect for the Guideline, so that it basically only applies to present entitlements conferred by trustees on a prospective basis from the date of issue. Furthermore, if any compliance action is undertaken prior to this date, the NTAA strongly recommends that the ATO gives due regard to the fact that very little guidance was available during this time with respect to S.100A.

Yours faithfully



Geoff Boxer
Chief Executive Officer
NTAA