Accru+

Section 100A

Fact Sheet, March 2023

This fact sheet explains key terms and rules for Section 100A, Present entitlement arising from reimbursement agreement

Current taxation rules

Section 100A is an anti-avoidance provision which applies in cases where one person receives a benefit from the trust, but another person is made presently entitled to income and assessed.

Section 100A applies in cases where:

+ Connection: There is a present entitlement/ deemed present entitlement, of a beneficiary to a share of trust income, which has arisen out of, in connection with or as a result of a reimbursement agreement[1]
+ Benefit: A beneficiary has become entitled to trust income but it has been agreed that another person will benefit from that income, and
+ Tax reduction purposes: The agreement is made with the purpose that some person will pay less/ no income tax as a result (however the tax reduction purpose does not have to be the main purpose for Section 100A to apply); and
+ Ordinary Family/Commercial dealings: The agreement was entered into outside the course of ordinary family/ commercial dealings.

Consequences of Section 100A applying:

The consequence of Section 100A applying is that the trustee, rather than the presently entitled beneficiary will be liable to tax at the top marginal rate of 47%.

Recent taxation ruling regrading Section 100A:

The recent ruling sets out the Commissioner's views on the application of Section 100A which makes the trustee liable to tax (at the top marginal rate) where a beneficiary's present entitlement arises from a reimbursement agreement.

The ruling provides for additional guidance on many aspects, including:

+ The application of the Tax reduction purpose requirement – in particular criteria to satisfy.
+ The application of the Ordinary Family/ Commercial dealings exception – including new guidance on the relevance of cultural factors

The Commissioners view in this ruling is that Ordinary Family/ Commercial dealings is a dealing explained by the family or commercial objectives it will achieve. If the objective of a dealing can be explained as the payment of less tax to maximise group wealth, rather than a family or commercial objective, it is not an ordinary family or commercial dealing.

Practical Compliance Guideline ('PCG'):

The ruling should be read in conjunction with PCG 2022/2 which sets out the ATO's compliance approach in respect of Section 100A reimbursement agreements. The Guideline uses three coloured zones to denote risk ratings. An appendix to the guideline contains examples of how to apply the risk zones. We have set out a summary table below:

[1]Note that a reimbursement agreement doesn't have to be written for Section 100A to apply

Risk level	Risk zone	Description and compliance approach
Low risk	White zone	Applies to arrangements entered into in income years that ended prior 1 July 2014 The "white zone" refers to the range of circumstances where the ATO considers that the application of Section 100A is less likely and therefore the ATO will not dedicate new compliance resources to consider the application of Section 100A to arrangements in the white zone unless it is outside the green zone and: + ATO are considering your income tax affairs for those years, or + You have entered into an arrangement before and after that date
Low risk	Green zone	Applies to five scenarios covering distributions to individual family members, certain ordinary dealings as described in the aforementioned ruling and retention of funds by the trustee ATO will not dedicate compliance resources to consider the application of Section 100A to green zone arrangements, other than to confirm that the features of the relevant scenario are present in the taxpayer's circumstances Green zone Examples include: + Distribution to Family Members + Beneficiary Entitlement paid or applied and used within two years
High risk	Red zone	Applies where the: + Beneficiaries' entitlements appear to be motivated by sheltering the trust's (taxable) net income from higher rates of tax; + Arrangement involves contrived elements directed at enabling someone other than the presently entitled beneficiary to have use and enjoyment of the economic benefits referable to the trust net income. Arrangements in the Red zone will attract the attention of the ATO and they will conduct further analysis on the facts and circumstances of your arrangement as a matter of priority. The ATO may also undertake compliance activities such as audits, reviews, or other forms of enforcement action. Red Zone Examples include: + Amounts provided to parent for expenses incurred before beneficiary turns 18 + Non-Resident beneficiary makes loan/ gift to another party + Use of losses by beneficiary who is not part of family

How to avoid Section 100A applying:
At a high level, in order to avoid Section 100A from applying, the below should be satisfied:

1. Beneficiary paid their entitlement within two years
2. Keep in green zone
3. Don't have a reimbursement agreement.