

By email: justin.dearness@ato.gov.au
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2 May 2022

Mr Justin Dearness
Mr Christopher Ryan
The Australian Taxation Office

Dear Sir,

DRAFT TR 2022/D1, PCG 2022/D1 - SECTION 100A: REIMBURSEMENT AGREEMENTS - BDO SUBMISSION

BDO refers to the invitation by the Australian Taxation Office (ATO) to provide comments on the ATO's **Draft TR 2022/D1 - Section 100A: Reimbursement agreements and Draft PCG 2022/D1 - Section 100A: Reimbursement agreements - ATO compliance approach.**

BDO is pleased to provide comments on the Draft TR 2022/D1 (Draft TR) and Draft PCG 2022/D1 (Draft PCG). In summary, our main concerns are that the view in the Draft TR and Draft PCG on what is or is not an "ordinary family dealing should not be applied retrospectively and preferably not apply until the later of when the Full Federal Court gives its judgement in the Guardian appeal or 1 July 2022, or if this is not accepted by the ATO, at the earliest, the date of release of the Draft TR and Draft PCG on 23 February 2022.

The Draft TR and Draft PCG contain a number of issues which require clarification of the interpretation of the 'ordinary family or commercial dealings' exclusion in s100A of the ITAA 1936. BDO's detailed comments in this regard are in the attached appendix.

Should you have any questions, or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on 02 9240 9736 or lance.cunningham@bdo.com.au.

Yours sincerely

Lance Cunningham

BDO National Tax Technical Leader

BDO Submission to the Australian Taxation Office
Draft TR 2022/D1 - Section 100A: Reimbursement agreements and
Draft PCG 2022/D1 - Section 100A: Reimbursement agreements - ATO compliance
approach

BDO has considered the Draft TR 2022/D1 - Section 100A: Reimbursement agreements (Draft TR) which sets out the ATO's draft view on trust reimbursement agreements under s100A in Division 6 of the ITAA 1936 and the Draft PCG 2022/D1 - Section 100A Reimbursement agreements - ATO compliance approach which provides the ATO's proposed approach to compliance activity in relation to reimbursement agreements. We provide the following comments on the issues of concern in the Draft TR and Draft PCG.

1. Reconsider retrospective application of Draft TR and Draft PCG

The Draft TR and Draft PCG say that when they are finalised they will apply to arrangements both before and after 23 February 2022 (their date of issue). However, BDO is concerned there is no basis for retrospective application of the Draft TR and Draft PCG.

We acknowledge that under the Draft PCG, for entitlements conferred before 1 July 2022, the ATO states it will stand by its administrative position in [Trust taxation - reimbursement agreement](#) (2014 guidance) first published in July 2014, to the extent it is more favourable to the taxpayer's circumstances than draft PCG 2022/D1. It is assumed that this is based on PSLA 2011/27- Determining whether the ATO's views of the law should be applied prospectively. However, it is submitted that under PSLA 2011/27 the ATO should only apply their views in the Draft TR and Draft PCG from the date of their release 23 February 2022 or preferably 1 July 2022. This is on the basis that 2014 guidance did not give any real guidance on what is not an ordinary family dealing.

PSLA 2011/27 requires the ATO to consider various factors before applying its view retrospectively, including where the ATO facilitated or contributed to taxpayers adopting a different view as follows:

- where the ATO became aware of a position adopted by taxpayers or an industry practice but did not challenge it within a reasonable time of the ATO becoming aware of it;
- where there was taxpayers' position and/or industry practice that can be reasonably understood, or deducted from ATO statements or ATO practice; and
- the amount of time that has elapsed since the ATO's first awareness and publicly announcing it would challenge the industry or taxpayer practice.

It is submitted that, as the time between the 2014 guidance and release of the draft TR and Draft PCG is eight years, there was a taxpayers' position and/or industry practice that the ATO has not challenged in a reasonable time and the ATO contributed to taxpayers' positions and/or industry practice since 2014 by not giving any real guidance on what is not an 'ordinary family dealing'.

The only guidance on what is 'ordinary family dealings' in the 2014 guidance are some examples that are clearly ordinary family dealings and the following generic comment that does not give any real guidance on what is not an 'ordinary family dealing':

‘An agreement won’t necessarily be considered to have been entered into in the course of an ordinary family dealing merely because all of the entities involved are members of the same ‘family group’.

The examples of what are ordinary family dealings in the 2014 guidance and the above comment in the 2014 guidance do not provide any real guidance on what is not an ordinary family dealing and therefore it cannot be said that the ATO has previously provided its view on what is not an ‘ordinary family dealing’.

The examples in the 2014 guidance are summarised as below:

- Example 1 - is straight forward and does not elaborate on whether the agreement constitutes ordinary family dealings;
- Example 2 - does not consider the arrangement to be a reimbursement agreement as it is clearly ordinary commercial dealings;
- Example 3 - merely states without explanation that the arrangement is an ordinary family dealing and more generally states that it is not a reimbursement agreement as s100A doesn’t apply to income entitlements of minor beneficiaries;
- Example 4 - also merely states that in the absence of other factors, the ATO would not seek to apply section 100A to this arrangement;
- Example 5 - considered a typical ‘washing machine’ arrangement which the ATO considers is a reimbursement arrangement that falls within s100A but it does not deal with the exception for ‘ordinary family dealings’.

All the examples in the ATO’s 2014 guidance that deal with family dealings (examples 2 to 4), result in arrangements that do not fall within s100A. The 2014 guidance does not provide examples when an arrangement would constitute a reimbursement agreement on the basis that it is not an ‘ordinary family dealing’.

BDO is concerned that, in these examples the ATO is relying on its comments in the 2014 guidance (relating to agreements that ***‘won’t necessarily be considered to have been entered into in the course of an ordinary family dealing’***) as the basis for their view. We consider it is inappropriate for the ATO to hold and apply this view as a basis for retrospective application of Draft TR and Draft PCG. Particularly when amended assessments in relation to s100A are subject to an unlimited amendment period.

2. We submit that when the Draft TR and Draft PCG are finalised, the ATO should confirm it will only apply the new view from 1 July 2022 or at the earliest the date of release of the Draft TR and Draft PCG. Clarification of the Assistant Treasurer’s media release

If the ATO is not going to change the retrospective approach discussed in 1. above, we are concerned that the comments made in the Assistant Treasurer, Michael Sukkar’s Media Release of 7 March 2022 could be misinterpreted and should be clarified by the ATO before the finalisation of the Draft TR and Draft PCG.

The Assistant Treasurer’s Media Release states:

‘The Government welcomes the ATO clarifying yesterday that its draft guidance on ‘section 100A (Draft TR 2022/D1 and draft PCG 2022/D1) will not apply on a retrospective basis.

This draft guidance replaces the ATO’s 2014 guidance, ...

Confirmation that taxpayers can continue to rely on the 2014 guidance for matters that arose while that guidance was in place will be welcomed by small businesses who in good faith followed this guidance.’

We consider that the comments in the Media Release seem to contradict the Draft TR and Draft PCG. As discussed in 1. above, the only comments that was provided in the ATO’s 2014 ‘guidance’ in relation to ‘ordinary family dealings’ was a generic comment that does not give any real guidance and some obvious examples of where section 100A does not apply and from our reading of the draft ruling and draft PCG section 100A would also not apply to these examples under the ATO’s revised view in the Draft ruling and Draft PCG. We request the ATO clarify what it means by the comments made in the Assistant Treasurer’s Media Release.

3. Pending Full Federal Court decision in Guardian case

We note that the recent Federal Court decision *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation (Guardian case)*, which is currently on appeal by the Commissioner to the Full Federal Court, found in favour of the taxpayer. The Federal Court concluded the arrangements did not constitute a ‘reimbursement agreement’ for the purposes of s100A of the ITAA 1936 as the arrangements were part of ordinary family or commercial dealings. In his judgement, Justice Logan specifically addressed each element involved in the application of section 100A, including the exclusion for arrangements in the course of ordinary family or commercial dealings. The judgement hinged on whether there was an agreement before the distribution was made. The Commissioner argued that there was an interlinked series of arrangements that constituted a reimbursement agreement under s 100A. However, Justice Logan found there was no agreement before the distribution was made.

We accept that in the *Guardian case*, the comments around what constitutes ordinary family dealings were orbiter dicta but the comments provided some degree of guidance on the application of s 100A.

Therefore, we would request that before finalising the Draft TR and Draft PCG, the ATO should at least consider waiting for the Full Federal Court to provide their judgement in the *Guardian case* as the Full Federal Court may provide further comments on the meaning of “ordinary family dealing that will assist the ATO in forming its final view.

4. Further clarifying examples of ordinary family dealings

Following many years of unclear judicial interpretation of the ‘ordinary family or commercial dealings’ exclusion in s100A, it was hoped the ATO would provide much needed clarity of its meaning with the release of Draft TR and Draft PCG. However, the ATO has not provided an interpretation that is any clearer, but it has provided a number of examples that at least indicate the types of arrangements that ATO considers to both be, or not be, ordinary family or commercial



dealings to which section 100A could apply. However, there may be many taxpayers and advisers who dispute the ATOs fine line between the two.

We request that before the Draft TR and Draft PCG are finalised, the ATO would provide further clearer examples and provide an explanation to clarify situations where the meaning is unclear.

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