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Recent Tax Guidance and Moving Forward – February 2023

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances



Overview

- High-level overview of guidance
- Some previously discussed drafts but now finalised
- PTAQ000.6.1 – Relevant contracts – medical centres
- TR 2022/3 – Personal services income and personal services businesses
- TR 2022/4 – Section 100A reimbursement agreements

PTAQ000.6.1 – Relevant contracts – medical centres



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- Are service facility agreements captured for payroll tax purposes?
- Restates recent cases/decisions
- Acknowledges dependent on a case-by-case basis
- Practically only relevant if clinic has sufficient 'employees' to have paid \$1.1million in 'wages'
- Persons under certain agreements can be deemed employees and payments under such agreements can be deemed wages with the clinic as the employer

PTAQ000.6.1 – Relevant contracts – medical centres



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- [1] “... including dental clinics, physiotherapy practices, radiology centres and similar healthcare providers who engage medical, dental and other health practitioners or their entities (‘practitioners’) to provide patients with access to the services of practitioners”
- [5] “...Where there is no common law employer–employee relationship, liability for payroll tax will arise if it is established amounts are paid under a relevant contract to a contractor (Part 2 Division 1A of the Act).”
- [8] “...In many cases, the common law employer tests can be difficult for businesses to apply to accurately assess their liability when they engage contractors. Further, it was recognised the increasing use of contractor arrangements to convert common law employees to contractor arrangements provided increased opportunities for revenue avoidance. As a result, the Act has, since 2008, included ‘contractor’ provisions (Part 2 Division 1A), which are substantially aligned with the ‘contractor’ provisions of New South Wales and Victoria.”

PTAQ000.6.1 – Relevant contracts – medical centres



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PTAQ000.6.1 – Relevant contracts – medical centres



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- [9] “... Division 1A makes payments to contractors providing services under a relevant contract liable to payroll tax unless one or more exemptions in Division 1A apply. The Division 1A exemptions are designed to exclude payments to genuine independent contractors.”
- [10] “This has the result that if the contract is a relevant contract, the principal is deemed to be an employer, the contractor is deemed to be an employee and payments made under the contract for the performance of work are deemed to be wages unless an exemption applies.”

PTAQ000.6.1 – Relevant contracts – medical centres



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- [11] “A contract between an entity that conducts a medical centre and a practitioner is a relevant contract under s.13B if all the following apply:
 - the practitioner carries on a business or practice of providing medical-related services to patients
 - in the course of conducting its business, the medical centre
 - provides members of the public with access to medical-related services
 - engages a practitioner to supply services to the medical centre by serving patients on its behalf
 - an exemption under s.13B(2) does not apply.”
- Includes circumstances where clinic engages practitioner to practice from clinic or holds out to the public that it provides patients with access to medical services of a practitioner [13]

PTAQ000.6.1 – Relevant contracts – medical centres



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- [15] “Under a relevant contract, the medical centre and each practitioner engaged by the medical centre conducts separate but related businesses (see, for example, *Commissioner of Taxation v Healius Ltd* [2020] FCAFC 173 at 32). The medical centre provides patients with access to medical services provided by practitioners. The medical centre also provides services and facilities to the practitioners and patients by attracting patients, advertising the services offered by practitioners, managing the services provided to patients including arranging appointments and billing patients either directly or by bulk billing Medicare, and maintaining patient records.”
- Annexure 1 contains matters generally dealt with in such a contract (see following slides)

PTAQ000.6.1 – Relevant contracts – medical centres



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- The medical centre and the practitioner agree that the practitioner will provide competent, professional medical services to patients.
- The agreement can be terminated by either party by giving notice as specified in the contract.
- The practitioner is engaged as an independent contractor, is solely responsible for medical advice or medical procedures, and must take out professional indemnity insurance at their own cost to cover malpractice.
- Responsibilities of each party for controlling the manner in which services are provided
- Responsibilities of each party in the determination and payment of fees by patients, including decisions as to which patients may be bulk billed to Medicare, payments by the Department of Veterans' Affairs (DVA) and other specified fees and amounts paid or payable
- How patients' fees are shared between the medical centre and the practitioner or the entity through which the practitioner's services are obtained
- How Medicare and DVA benefits are to be assigned and shared by the medical centre and the practitioner
- Provision for the practitioner to periodically invoice the medical centre; or for the medical centre to invoice the practitioner or the entity through which the practitioner's services are provide

PTAQ000.6.1 – Relevant contracts – medical centres



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- The practitioner's entitlement to take a leave of absence may be specified, including any requirement to seek approval from the medical centre or to ensure a minimum number of practitioners are available to service patients.
- The practitioner may be required to provide the medical centre with specified information and documents, and to keep and maintain records required by law.
- Ownership of, or access to records, including patient information may be specified.
- There may be restrictions on copying or removing records from the medical centre.
- The practitioner may be required to promote the interests and welfare of the medical centre.
- The practitioner may be required to commit to provide a share of duties relating to after-hours calls, home visits and nursing home visits.
- The medical centre agrees to provide the practitioner with administrative services, clerical and professional staff and facilities, plant and equipment necessary for the practitioner to provide medical services to patients.
- The practitioner must ensure that they have a Medicare provider number and local medical officer status with DVA.
- The medical centre does not provide medical services to patients, is not registered as a medical practitioner and does not have a Medicare provider number.

PTAQ000.6.1 – Relevant contracts – medical centres



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- [17] “A contract is a relevant contract under s.13B(1) if it provides for the supply of services ‘in relation to the performance of work’ by one party for or on behalf of the other party unless one of the exemptions in s.13B(2) applies.”
- [18] “The requirement that a practitioner supplies services to a medical centre **is satisfied if the practitioner serves patients for or on behalf of the medical centre.**”
- [20] “...However, **each contract must be considered individually** on a case-by-case basis to determine whether it is a relevant contract. If the contract provides, either **expressly or by implication, that a practitioner is engaged to supply work-related services to the medical centre by serving patients for or on behalf of the medical centre**, the contract is a relevant contract under s.13B(1).”

PTAQ000.6.1 – Relevant contracts – medical centres



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- Example 1 is a relevant contact:
 - *ABC Pty Ltd (ABC) operates a medical centre that provides patients with access to a range of medical services performed by qualified practitioners who are engaged by ABC to service patients of ABC.⁶*
 - *Practitioners are engaged by ABC to provide their services to the medical centre by serving patients of the medical centre in accordance with the terms of individual contracts. The contracts also require ABC to provide practitioners a consultation room for patients, manage appointments, maintain patient contact information and medical records, collect fees from patients and pay practitioners a share of revenue.*
- The Optical Superstore Case and Thomas and Naaz Case referred

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- The Optical Superstore Case per [22]:
 - TOS was supplied with the services of optometrists for or in relation to the performance of work.
 - The optometrist entities ensured the attendance of optometrists at agreed locations and times, and the optometrists provided optometry services to TOS customers.
 - The arrangements also benefitted TOS by potentially leading to increased sales of frames, lenses and other optometry products.
 - The services of the optometrists were provided to TOS as well as to the patients.
 - The contracts were not tenancies because the optometrists did not have rights to exclusive occupancy, and were more consistent with a contracting arrangement.

PTAQ000.6.1 – Relevant contracts – medical centres



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- The Thomas and Naaz Case per [24]:
 - The terms of the agreement indicate the doctors agreed to (at [38]):
 - provide services on a five day per week basis, including weekend rosters
 - provide advance notice and obtain approval of vacations limited to four weeks per annum
 - promote the interests of Thomas and Naaz, including not channelling patients away from its business
 - abide by Thomas and Naaz's operating protocols and complete all necessary documentation
 - comply with a restrictive covenant for two years after the doctor departs from the medical practice owned by Thomas and Naaz.
 - The terms of the agreement secured the provision of the services provided by the doctors to the patients of Thomas and Naaz's medical centres. Where such services were a necessary part of Thomas and Naaz's business, doctors provided their services to the medical centre as well as to patients (at [39]).
 - The services provided by the doctors were provided for or in relation to the performance of work, and the services supplied were work-related (at [40]).

PTAQ000.6.1 – Relevant contracts – medical centres



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- Ruling considers circumstance of company/trust conducting business and practitioner engaged by such entity
- Exemptions are available, namely:
 - The practitioner provides services to the public generally—s.13B(2)(b)(iv).
 - The practitioner performs work for no more than 90 days in a financial year—s.13B(2)(b)(iii).
 - Services are performed by two or more persons—s.13B(2)(c)(i).
- Noted that Public Ruling PTA021 Contractors who ordinarily perform services to the public may apply:
 - Requires Commissioner declaration unless working for multiple 'Principals' for 10 days or less per month
 - Does not apply where Principals are related

PTAQ000.6.1 – Relevant contracts – medical centres



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- Noted wages can include per [47] “money received by the medical centre on behalf of practitioners, whether from patient fees or Medicare payments, even if the practitioner is beneficially entitled to that money (see Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd [2019] VSCA 197 at [67]). When the practitioner’s entitlement is recognised and the money is paid or becomes payable, it constitutes wages for payroll tax purposes.”
- Beware at [50] “Under s.51, ‘third party payments’ of money or other consideration may be taken to be wages paid or payable by an employer to an employee. This provision applies to a third-party payment under a relevant contract that would be wages if paid by an employer to an employee under the contract.”

PTAQ000.6.1 – Relevant contracts – medical centres



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- Public Ruling acknowledges proper tenancy contracts may not be a relevant contract where per [53] “a landlord (who may be a sub-lessor) by lease or licence provides a practitioner with use of a suite or space in, for example, a building from which the practitioner conducts their own independent medical practice. The tenancy contract will reference the specific space being leased or licensed and generally includes provisions for fit-out and alterations to accommodate the practitioner’s requirements and services such as building maintenance and signage for the practitioner’s operating hours”.
- Further, per [54], “A tenancy contract is not a relevant contract if the practitioner does not supply work-related services to patients for or on behalf of the landlord. In these circumstances, the practitioner must operate their own independent medical practice responsible for such matters as advertising and attracting patients, providing medical services to their own patients (i.e. not for or on behalf of anyone else), managing patient appointments and records and directly submitting claims for medical benefits to Medicare; with Medicare paying those benefits to the practitioner (or the practitioner’s entity).”

PTAQ000.6.1 – Relevant contracts – medical centres



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- Sham tenancy contracts may still be a relevant contract – [55]
- Contracts with an administration entity may be a relevant contract per [56] “depending on the terms and conditions of each contract. In some cases a contract may be a relevant contract under s.13B(1), but an exemption may apply under s.13B(2). The terms and conditions of each contract must be considered on a case-by-case basis having regard to ‘When is a contract a relevant contract?’ above.”

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- Note regarding Service Facility Agreements that:

[58] “A contract between a medical centre and a practitioner may state the practitioner is the principal, and/or the medical centre only provides administrative services to the practitioner. **Such clauses do not prevent the application of the relevant contract provisions if the medical centre is able to exercise operational or administrative control over the services provided to patients, or is able to exercise operational or administrative control over a practitioner to influence decisions about who practises at the centre, when they practise, and the space within the centre where that occurs.** The manner in which the parties describe or label their relationship in contract cannot change the character of the relationship established by their rights and obligations.”

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- Practically, it is noted:
 - [59] A practitioner, being an eligible health professional, must apply for a unique Medicare provider number (MPN) to provide services listed under the Medical Benefits Schedule (MBS) and, where eligible, refer patients to relevant specialists and/or consultant physicians and request certain imaging and pathology services. Further, an MPN is required to access and claim Medicare services and benefits. Only an eligible health professional, being a natural person, can be granted an MPN meaning the medical services under the MBS are provided by a practitioner to a patient.
 - [60] The MPN requirement does not alter the outcome that, under a relevant contract, where a practitioner is engaged by a medical centre to serve patients for or on behalf of the medical centre, the practitioner is still providing medical services to the medical centre and to the patients, consistent with the principles determined in the Optical Superstore Case and the Thomas and Naaz Case.
- Records must also be kept for a minimum of 5 years – [61]

PTAQ000.6.1 – Relevant contracts – medical centres



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- Takeaways – nothing changes other than the importance of proper drafting of service agreements and the fact that this is an area where the Queensland Revenue Office will look into

TR 2022/3 – Personal services income



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- Ruling outlines:
 - how to identify PSI
 - how the PSI rules apply to an individual or entity, and
 - the application of the personal services business (PSB) tests.
- Discussion today assumes we are able to identify what constitutes PSI and understand the PSB tests
- Note:
 - [5] “The PSI rules ensure that the net PSI received by a PSE is attributed to the individual who performed the personal services. They also limit the deductions available to PSEs and to individuals who provide personal services but not through a PSE”
 - [12] “**The PSI rules do not apply if** the PSE or sole trader conducts a PSB. A PSE or sole trader **conducts a PSB** if it meets at least one of 4 PSB tests or if they have received a Personal Services Business Determination (PSBD) from the Commissioner.”

TR 2022/3 – Personal services income



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- Importantly: [14] “A PSE or sole trader that conducts a **PSB** may still be subject to the anti-avoidance provisions contained in **Part IVA** of the Income Tax Assessment Act 1936 (ITAA 1936)... Part IVA of the ITAA 1936 may apply to the sole trader or PSE that conducts a PSB involving an income-splitting arrangement where the dominant purpose is to obtain a tax benefit resulting from the alienation or the splitting of the PSI of the sole trader or the individual undertaking the work for, or on behalf of, the PSE”

TR 2022/3 – Personal services income



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- Note following key changes from original TR 2021/D2:
 - No starting consideration of number of principal and non-principal practitioners
 - PSI derived attributed to person with contractual obligation and where multiple individuals working through an entity, then each component of income must be attributed
- Consideration of Ruling today in relation to application of Part IVA

TR 2022/3 – Personal services income



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TR 2022/3 – Personal services income



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- [161] “In deciding whether the PSB and test individual has engaged in income splitting in order to gain a tax benefit, the following considerations **may be relevant**:
 - whether the salary or wages paid to the test individual is commensurate with the skills exercised or services provided, and with the income received by the PSB for those services
 - whether the PSB distributes income to associates and does not distribute income to the test individual who provided the actual services, and
 - whether the salary or wages paid to associates by the sole trader or PSB is not commensurate with the skills exercised and services provided, and the income received by the sole trader or PSB is for services performed by the test individual.”
- Note footnote 111: “Part IVA and its predecessor, section 260 of the ITAA 1936, have successfully been applied in numerous cases involving scenarios where individuals whose income is a result of their personal efforts and skills have tried to lower the tax on that income through the use of an entity to split the individual's personal exertion or PSI with others or retaining profits in the lower-taxed interposed entity.”

TR 2022/3 – Personal services income



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- The Part IVA Example (Example 41):
 - Jason Banks is a computer systems analyst who provides his personal services through a family trust, The JB Trust. He also forms a company, JB Pty Ltd, to be trustee of The JB Trust. The beneficiaries of The JB Trust are Jason, his wife and 3 children. Jason's wife and 3 children are in the lowest marginal tax bracket. JB Pty Ltd (in its capacity as trustee) enters into an agreement with XYZ Pty Ltd to perform specific computing tasks, for a total contract price of \$120,000 in the income year, to provide the personal services of Jason. The work will be performed by Jason. No work will be performed by any of the other beneficiaries. Instalments of the contract price are payable on achieving agreed milestones. The contract also provides that JB Pty Ltd provide the necessary equipment and is liable for the cost to remedy any defects.

TR 2022/3 – Personal services income



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- The Part IVA Example (Example 41 continued):
 - In the income year, JB Pty Ltd pays Jason a salary of \$50,000, which is less than the contracted price for Jason's services, and claims deductions amounting to \$25,000. JB Pty Ltd distributes the balance of The JB Trust's net income, namely \$45,000, to each of the 3 children who receive \$416 (making a total of \$1,248) and the remainder to Jason's wife. No trust income is distributed to Jason as a beneficiary of The JB Trust. No tax is payable by Jason's children and Jason's wife pays tax on her trust distribution at her marginal tax rate, but the total amount of tax paid between Jason, his wife and children is less than what would have been paid if Jason had returned the entire net PSI from his personal effort and skills in his personal tax return. The splitting of any of the income that is mainly the reward for Jason's personal effort and skill to an associate that results in less overall tax being paid is a tax benefit.

TR 2022/3 – Personal services income



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- The Part IVA Example (Example 41 continued):
 - The JB Trust is a PSE because its income includes the PSI of the individual who does the work. JB Pty Ltd is able to self-assess because it meets the results test in relation to at least 75% of the PSI. The JB Trust self-assesses it is a PSB because it meets the results test in respect of the PSI of Jason. Accordingly, JB Pty Ltd determines that the PSI rules will not apply to Jason's PSI. However, in this case, the Commissioner would consider the application of Part IVA to cancel the tax benefit. Part IVA would apply if, having regard to the matters in subsection 177D(2) of the ITAA 1936, it would be concluded that there was a dominant purpose of enabling Jason to obtain a tax benefit by splitting the income. This would require a detailed consideration of all the circumstances. A likely conclusion would be that the dominant purpose of the arrangement is income splitting to which Part IVA applies.

TR 2022/3 – Personal services income



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- Part IVA guidance via PCG 2021/4
- [5] “...we will be concerned with arrangements where the compensation received by the individual is artificially low while associated entities benefit (or the individual ultimately benefits) and commercial reasons do not justify the arrangement.”
- [8] “We are aware that in some cases, professional firm income has been treated as being derived from a business structure, even though the source of that income remains, (to a significant extent) the provision of professional services by one or more individuals. In that context, we may look to apply Part IVA of the Income Tax Assessment Act 1936 (ITAA 1936)[1] where income is redirected away from the individuals, despite the existence of a business structure.”



PCG 2021/4

- [9] “This Guideline explains the ATO's risk-based approach to IPPs and how their professional firms allocate profits. The application of Part IVA requires consideration of the matters identified in subsection 177D(2). A consideration of Part IVA would go beyond the gateways, including, for example, an IPP's profit allocation arrangement. It is only after having passed the gateways in this Guideline that an IPP (or the firm more generally) can assess their risk rating under this Guideline. The Commissioner will use the 'risk assessment factors' in this Guideline to determine whether compliance resources will be allocated to structures or transactions after gateways have been satisfied.”



PCG 2021/4

- [10] “The Guideline only applies if the two gateways are passed:
 - We expect there to be a sound commercial rationale for entering into and operating the arrangement or structure - see paragraphs 39 to 46 of this Guideline.
 - There must not be certain 'high-risk features' - see paragraphs 47 to 59 of this Guideline.



PCG 2021/4

- **Commercial rationale:**

- [39] “...there must be a genuine commercial basis for the arrangement and also for the way in which profits are distributed”
- [40] “...The arrangement should reflect the commercial needs of the business. For example, the arrangement is likely to enhance, assist or improve the business' ability to produce income or make profits or the commercial benefits asserted to be achieved by the arrangement are justified.”
- [41] “...stated commercial purpose was achieved as a result of the arrangement...the mere assertion of 'asset protection' for an IPP is not sufficient if the arrangement does not actually provide asset protection
- [43] “The legal form and documentation must be consistent with the economic substance of how the professional firm operates in practice. The presence of discrepancies may indicate artifice or contrivance in the manner in which the arrangement is carried out.”



PCG 2021/4

- Indicators that arrangement lacks sound commercial rationale per [45]:
 - The arrangement seems more complex than is necessary to achieve the relevant commercial objective.
 - The arrangement includes a step, or a series of steps, that appears to serve no real purpose other than to gain a tax advantage; for example
 - transactions which interpose an entity to access a tax benefit
 - intra-group or related-party dealings that merely produce a tax result, or
 - arrangements involving a circularity of funds or no real money.
 - The tax result of the arrangement appears at odds with its commercial or economic result; for example, a tax loss is claimed for what was a profitable commercial venture or transaction.
 - The arrangement results in little or no risk in circumstances where significant risks would normally be expected; for example
 - use of non-recourse or limited recourse loans which limit the parties' risk or actual detriment in relation to debts/investments
 - arrangements where the taxpayer's risk is significantly limited because of the existence; for example, of a 'put' option.
 - The parties to the arrangement are operating on non-commercial terms or in a non-arm's length manner; for example
 - financial arrangements made on unusual terms, such as interest rates above or below market rates, insufficient security or deferment of repayment of the loan until the end of a lengthy repayment period
 - transactions which do not occur at market rates/value.
 - There is a gap between the substance of what is being achieved under the arrangement (or any part of it) and the legal form it takes; for example, arrangements where a series of transactions taken together produce no economic gain or loss, such as where the whole scheme is self-cancelling.



PCG 2021/4

- Genuine commercial basis includes the following [46]:
 - the IPP actually receives an amount of the profits or income which reflects a reward for their personal efforts or skill and reflects an appropriate return for the services they provide
 - an IPP's return in a given period is linked in whole or part to their personal performance in that period (rather than the performance of the overall firm) and whether their direct remuneration reflects that linkage
 - the income has been distributed in substance
 - the IPP ultimately benefits from the distribution of income to associated entities, which is referrable to the personal efforts or skill of the IPP
 - the remuneration is less than a true commercial comparable and would not be perceived as an arm's length payment
 - there are loan accounts relevant to the arrangement, including whose name those accounts are in and whether they are aware of the loans
 - the payment recipients have
 - control in managing the entity's cash flows and financials
 - use and enjoyment of the money or it is in fact predominantly for the IPP's use and enjoyment.



PCG 2021/4

- **No high-risk features**
- [47] “If, after considering Gateway 1, you conclude that your arrangement is commercially driven, you must then assess whether your arrangement contains any high-risk features, such as those arrangements covered by a Taxpayer Alert. We also consider the following as potentially high-risk features:
 - financing arrangements relating to non-arm's length transactions
 - exploitation of the difference between accounting standards and tax law
 - arrangements where a partner assigns a portion of a partnership interest that is materially different in principle from *Everett* and *Galland* multiple classes of shares and units held by non-equity holders.



PCG 2021/4

- After meeting above two ‘Gateways’, it’s a consideration of:
 - Proportion of profit entitlement from the whole of firm group returned in the hands of the IPP
 - Total effective tax rate for income received from the firm by the IPP and associated entities
 - Remuneration returned in the hands of the IPP as a percentage of the commercial benchmark for the services provided to the firm (if relevant)
- [77] “You can self-assess your profit allocation arrangement using:
 - risk assessment factors 1 and 2 only, or
 - all three risk assessment factors.”
- Green “Low risk”: score of 7 or fewer (for first 2 factors) or 10 or fewer (for all three factors)
- Amber “Moderate risk”: score of 8 (for first 2 factors) or 11 or 12 (for all three factors)



PCG 2021/4

Risk assessment factor	Score					
	1	2	3	4	5	6
(1) Proportion of profit entitlement from the whole of firm group returned in the hands of the IPP	>90%	>75% to ≤90%	>60% to ≤75%	≥50% to ≤60%	>25% to <50%	≤25%
(2) Total effective tax rate for income received from the firm by the IPP and associated entities ^[6]	>40%	>35% to ≤40%	≥30% to ≤35%	>25% to <30%	>20% to ≤25%	≤20%
(3) Remuneration returned in the hands of the IPP as a percentage of the commercial benchmark for the services provided to the firm	>200%	>150% to ≤200%	>100% to ≤150%	>90% to ≤100%	>70% to ≤90%	≤70%



PCG 2021/4

Risk zone	ATO treatment
Green Low Risk	<p>We will only apply compliance resources to review your allocation of profit in exceptional circumstances, such as where:</p> <ul style="list-style-type: none">• we are not satisfied your self-assessment is correct, or is adequately supported with evidence• we become concerned that higher-risk features are present in your arrangement• we become concerned, from our own data and analysis, that there is a change in your arrangement causing a shift towards the border of compliance• we become concerned that your broader arrangements present a compliance risk (for example, with Division 7A of Part III)• your arrangement relates to a broader set of circumstances being reviewed by us• changes to your arrangement may not have been appropriately treated or disclosed. <p>Where there has been no material change, then we will generally only apply compliance resources to the arrangement to:</p> <ul style="list-style-type: none">• confirm your calculations were done according to this Guideline• confirm the absence of any exclusionary factors (for example, the high-risk features under Gateway 2)• provide binding advice where you request it, if you wish to obtain certainty.
Amber Moderate Risk	<p>We are likely to conduct further analysis on the facts and circumstances of your arrangement.</p> <p>We may contact you to understand the arrangement and resolve any areas of difference.</p>
Red High Risk	<p>We will conduct further analysis on the facts and circumstances of your arrangement as a matter of priority.</p> <p>If further analysis confirms the facts and circumstances of your arrangement remain high risk, we may proceed to audit where appropriate.</p>

TR 2022/4 – Section 100A reimbursement agreements



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- Done to death over the past 12 months and will likely be done to death in lead up to 30 June 2023
- Finalisation of both TR 2022/4 and PCG 2022/3
- Changes include:
 - Removing blue zone from PCG
 - Additional green zone examples
 - Consideration of recent case law in the TR
 - E.g. comments regarding consideration of arrangement as a whole and not just whether each step independently considered ordinary
 - Paragraphs 47 to 54
 - See further slides regarding family or commercial objective commentary

TR 2022/4 – Section 100A reimbursement agreements



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- [101] 'Family' in 'ordinary family or commercial dealing' takes its ordinary meaning. It refers to a relationship of natural persons based on birth or affinity, and may often involve co-residence. Family is not limited to any particular type of family relationship that is more common at a point in time than others.
- [102] For a dealing to be able to achieve commercial objectives, the parties would be expected to advance their respective interests. Transactions which would be normal or regular if seen in trade or commerce demonstrate that a dealing is founded in commercial objectives. A dealing can achieve commercial objectives, even in the absence of market value or where the parties do not deal at arm's length.

TR 2022/4 – Section 100A reimbursement agreements



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- Factors that may point to an absence of an ordinary family or commercial dealing includes per [105]:
 - elements of contrivance or artificiality are factors which point against an agreement being entered into in the course of ordinary family or commercial dealing
 - while complexity can be a necessary feature of transactions to achieve family or commercial objectives, an arrangement that is overly complex or lacking justification to achieve those objectives is a factor that will point against the agreement as having been entered into in the course of ordinary family or commercial dealing, and
 - the presence of other features which show that the arrangement is clearly tax-driven may also indicate that an arrangement is more properly explained by other objectives instead of family or commercial objectives.

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- Factors that may point to an absence of an ordinary family or commercial dealing includes per [106]:
 - the manner in which an arrangement is carried out has contrived or artificial features
 - family or commercial objectives could have been achieved more directly; for example, could the arrangement instead have simply or directly provided the benefit to the person who actually benefited, such as by making that person presently entitled to trust income
 - the complexity of the arrangement and the presence of additional steps that achieve no commercial purpose, and
 - the conduct of the arrangement is inconsistent with the legal and economic consequences of the beneficiary's entitlement (such as an asset or funds representing the entitlement are purportedly lent to others without any intention of being repaid).
- TR also acknowledges consideration of *overly* complex arrangements – [108]

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- Cultural factors may be relevant – [109]

Example 2 - cultural practice of gifting

110. Azra is a member of an extended family whose members' cultural values include grandparents gifting money or goods to younger members of the family during the festive season. This cultural practice is relevant in considering whether transactions that involve Azra gifting money to her grandchildren out of funds from a trust distribution she has received have been entered into in the course of ordinary family or commercial dealing.

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Example 3 - cultural practice to support older relatives

111. Jack lives by the practices that have been common for centuries in the culture that he draws his heritage from. One of those practices is that children will meet the needs for shelter and living of their parents and other older relatives when they are no longer participating in the workforce. This is founded in notions of respect for elders and is practiced irrespective of what means those relatives would have to fund their own needs from available resources. This cultural practice is relevant in considering whether Jack's direction to the trustee of a trust to apply his entitlements to meet mortgage repayments for his aunt, who has retired from her employment working in a factory, is in the course of ordinary family or commercial dealing.

112. Cultural factors refer to the distinct and observable ideas, customs or practices of people or certain groups within a society. The existence of a cultural factor which is not widely understood in the broader community can be demonstrated by evidence. As the core test is applied to the whole of the agreement, rather than the individual steps, whether the presence of a cultural factor determines if a dealing is entered into in the course of ordinary family or commercial dealing will depend on the facts of the case.

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Example 4 - cultural practice of not accepting entitlement

113. Max and the trustee of a trust he controls agree to distribute certain income of the trust to Asher, a non-resident who for religious reasons will not accept the entitlement. While Asher's beliefs are a cultural factor that explains why the entitlement will not be called for, in these circumstances they do not, without more, explain the objectives for making the resolution to distribute in the first place.

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Example 8 - gift from parents to a child

143. Assume the same facts as Example 7 of this Ruling. In one year, Alex (being Lisa's eldest daughter and Jessie's stepchild) purchases a property. Lisa and Jessie pay for the deposit for the purchase of the home as a gift to Alex, from funds attributable to their distribution from the Rosegum Family Trust. While on these facts, the creation of an entitlement and gifting from that entitlement may raise questions about whether the entitlement arose under or in connection with an agreement between the parties, the making of gifts between family members for ordinary family objectives, such as parents contributing to the purchase of a house, would usually be ordinary family or commercial dealing.

144. The following additional or alternative facts may change the conclusion made in paragraph 143 of this Ruling and make it less likely that an agreement has been entered into in the course of ordinary family or commercial dealing. Were that the case, it would be of greater relevance to examine whether one or more persons have a purpose of reducing income tax when entering the agreement (so as to cause the tax reduction purpose requirement to be met) and examine further whether the connection requirement is met:

- If the arrangements were to involve parents gifting money received from a trust to their children repeatedly and one or more of the following factors are present
 - the parents have a lower marginal tax rate
 - the parents have lesser financial means than the adult child, or
 - the adult child is also capable of benefitting under that trust in their own right; for example, the parents may be subject to lower tax rates because they are retired and in pension phase or have significant losses to reduce tax payable on trust distributions.
 - Arrangements where the situation is reversed, so that Alex (who has limited financial resources apart from a distribution made to her and has a lower marginal tax rate) gifts money to her parents Lisa and Jessie who are subject to higher rates of tax, and there is no financial or cultural circumstance that would explain the gift.
- Arrangements where Alex, who has a lower marginal tax rate, agrees to apply her trust entitlements to reimburse her parents for costs incurred by them on her maintenance, education and financial support while Alex was a minor.



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- [32] Arrangements are not in the green zone if they have one or more of the following features:
- the arrangement is a red-zone arrangement (see paragraphs 34 to 48 of this Guideline)
- the beneficiary makes a gift of the funds received either in satisfaction of their trust entitlement or an associated amount paid by the trustee (for example, if the unpaid present entitlement (UPE) was converted into a loan) except where the gift meets the requirement of Green zone: scenario 1
- the beneficiary disclaims their entitlement or forgives or releases the trustee from its obligation to pay their trust entitlement or an associated amount receivable from the trust (for example, if the UPE was converted into a loan)
- the beneficiary's entitlement is less than the beneficiary's share of net income, franked dividends of the trust and trust capital gains as a result of the trustee exercising a power, or the deed being amended or varied, to affect the quantum of income of the trust estate
- a beneficiary's trust entitlement is satisfied by payments that are sourced from that beneficiary, or a beneficiary's trust entitlement has been made subject to a loan agreement and the repayments of that loan are sourced from payments or loans from that beneficiary; examples include where a trustee
 - satisfies a corporate beneficiary's UPE or makes a loan repayment to that corporate beneficiary by way of set-off against a dividend paid by that corporate beneficiary
 - issues units in the trust to the beneficiary and the amount owed for the units is set-off against the amount payable by the trust to the beneficiary, or
 - satisfies a beneficiary's entitlement or satisfies a loan repayment to that corporate beneficiary by way of set-off against that trustee's entitlement to income of another trust that includes franked distributions paid by that corporate beneficiary



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- [32] Arrangements are not in the green zone if they have one or more of the following features...:
- the beneficiary is a loss company or loss trust^[14] that uses its trust entitlement to fund a distribution to its members and that distribution compromises the ability of the beneficiary to repay its existing or future liabilities
- the beneficiary is a private company that uses its trust entitlement to fund a distribution that is made directly or indirectly to a non-resident
- the beneficiary is a private company or trust that uses its trust entitlement to fund a distribution that is made directly or indirectly to the trustee that made the beneficiary presently entitled to income
- the trustee has not notified the beneficiary of their entitlement to trust income by the earlier of the trustee's due date and actual date of lodgment
- where the beneficiary that is presently entitled to trust income in a year is required to lodge a tax return for that year, either the
 - beneficiary has not lodged, or
 - the beneficiary has understated or omitted in that tax return their share of the trust net income, trust capital gains or franked dividends received from the trust
- the beneficiary uses the trust entitlement to pay excessive consideration where the parties are not dealing at arm's length.



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- Green Zone (Low Risk) – as before:
 - 20. An individual beneficiary is made presently entitled to income of the trust estate, none of the exclusions listed in paragraph 32 of this Guideline are present and the funds are paid to the beneficiary (including to a jointly-held account) and used to:
 - benefit the beneficiary, the beneficiary's spouse or dependants; for example, to meet household expenditure
 - make personal contributions to a superannuation fund, or
 - make a donation to a deductible gift recipient.



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- Green Zone (Low Risk) – slightly elaborated (per [23]):
 - 22. A beneficiary is made presently entitled to income of the trust estate and both of the following are satisfied:
 - the beneficiary receives their entitlement within 2 years of becoming presently entitled and the beneficiary uses the entitlement
 - none of the exclusions set out in paragraph 32 of this Guideline are present.
 - For the purposes of this scenario:
 - A beneficiary receives their entitlement to the extent that their entitlement is either paid to them or applied on their behalf.
 - A beneficiary uses the entitlement where that entitlement is kept or used to purchase goods or services, to meet liabilities or expenses, or invested for the beneficiary, their spouse or dependants. A beneficiary that is a trustee or company also uses their entitlement by making a distribution to their beneficiaries or members respectively.
 - A beneficiary does not use the entitlement where the use involves
 - a trustee retention of funds (as covered by Green zone: scenarios 3A or 3B) beyond 2 years of the date when the beneficiary was made presently entitled, or
 - an investment or other transaction with another related party where the consideration or amount paid by the beneficiary exceeds market value or the terms are not commercial.



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- Green Zone (Low Risk) – retention of funds by the trustee - more detail which is relevant as follows [25]:
 - Trustee retention of funds refers to the beneficiary allowing the trustee to retain funds that the beneficiary would otherwise receive in satisfaction of their entitlement by
 - not yet calling for that entitlement to be satisfied and leaving it unpaid, or
 - lending the funds representing their entitlement back to the trustee.
 - There is no trustee retention of funds if and to the extent that
 - the retention of funds ends within 2 years of the date when the beneficiary was made presently entitled, or
 - the beneficiary's entitlement is satisfied and subsequently made available to the trustee by way of dividend or distribution.



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- Green Zone (Low Risk) – retention of funds by the trustee - more detail which is relevant as follows [25]...:
 - The trustee working capital condition means that the trustee (in its capacity as trustee and as permitted by the trust instruments) only uses or holds the funds that represent the beneficiary's entitlement in one or more of the following ways
 - in the working capital of a business that it actively carries on
 - for the acquisition, maintenance or improvement of investment assets of the trust, or servicing of debt used to acquire, maintain or improve those assets
 - to lend the funds to another entity within the family group on commercial terms where the borrowing entity uses the funds in a way that satisfies subparagraphs 25(c)(i) or (ii) of this Guideline.
 - The trustee working capital condition is not satisfied if an arrangement provides a benefit (other than by way of a loan covered by paragraph 25(c) of this Guideline) to a person or persons other than the beneficiary. For example, a trust investment asset is made available for use by someone other than the beneficiary, their spouse or their dependants, for less than market value consideration.



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- Green Zone (Low Risk) – retention of funds by the trustee - more detail which is relevant as follows [25]...:
 - A loan is on commercial terms if
 - the rate of interest is at least equivalent to the benchmark interest rate for the purposes of Division 7A (whether or not Division 7A applies to the arrangement)
 - the term of the loan does not exceed 7 years, and
 - the loan requires repayment on terms no more favourable (to the borrower) than the minimum yearly repayment formula in subsection 109E(6) (whether or not the provision applies to the arrangement).
 - A beneficiary or entity is a member of the same family group as the trust where
 - the trust has made a family trust election (FTE)[8], the beneficiary or entity is an eligible member of the specified individual's family group, as defined in section 272-90 of Division 272 of Schedule 2F
 - no FTE has been made, the beneficiary or entity is a company or trustee that is controlled by either an individual who also controls the trust or that individual's spouse.



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- Green Zone (Low Risk) – retention of funds by the trustee - more detail which is relevant as follows [25]...:
 - Despite paragraph 25(f) of this Guideline, where a beneficiary is a trustee of a trust that is taken to have capital gains under section 115-215 of the Income Tax Assessment Act 1997 (ITAA 1997) as a result of its trust entitlement, and that beneficiary has capital losses or carried forward capital losses, then that beneficiary will only satisfy the requirement in paragraph 28(c) of this Guideline if the beneficiary either
 - made an FTE that commenced before it made the capital loss and carried forward capital loss, and the beneficiary is also an eligible member of the specified individual's family group in respect of the FTE made for the distributing trust, or
 - has been continuously controlled by either an individual who also controls the distributing trust or that individual's spouse since just before the beneficiary made the capital loss and carried forward capital loss.
 - An individual controls the trust where either the trustee will act in accordance with the wishes of the individual or the individual can appoint and remove the trustee.



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- Green Zone (Low Risk) – retention of funds by the trustee [26]:

26. A beneficiary, being an individual, is made presently entitled to income of the trust estate and all of the following apply:

- (a) there is a 'trustee retention of funds'
- (b) the trustee working capital condition is satisfied
- (c) none of the exclusions set out in paragraph 32 of this Guideline are present
- (d) either
 - (i) the individual or their spouse (or both) is a trustee of the trust or controls the trustee of the trust, or
 - (ii) the individual is employed in the management of a business that the trustee conducts.



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- Green Zone (Low Risk) – retention of funds by the trustee [28]:

28. A beneficiary, being a trustee or company, is made presently entitled to income of the trust estate and all of the following apply:

- (a) there is a trustee retention of funds
- (b) the beneficiary is not an exempt entity
- (c) the beneficiary is a member of the same family group as the trustee of the trust estate who has made the FTE
- (d) the trustee working capital condition is satisfied
- (e) none of the exclusions set out in paragraph 32 of this Guideline are present, and
- (f) the terms on which the entitlement is made available for a trustee retention of funds is by way of loan on commercial terms.



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- Green Zone (Low Risk) – arrangements relevantly identical to an example in Appendix 2 of TR 2022/4 and examples 4 to 13 in the Appendix of PCG 2022/2



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- Appropriate evidence should be kept including but not limited to per [50]:
 - the trust deed (including amendments), trustee resolutions and contact details of the trustee and former trustees
 - notes, contemporaneous documents and records of discussions or meetings explaining the transactions that have happened or calculations that have been made
 - details of how the beneficiary was notified of their present entitlement to trust income
 - details of how the present entitlement to trust income was satisfied and, where practical, used by the beneficiary
 - details of how the trustee utilised the underlying funds; for example, to satisfy the trustee retention of funds or the trustee working capital condition referred to in paragraph 25 of this Guideline
 - copies of loan agreements and records showing how the loan repayments were satisfied from time to time.



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- [51] “We acknowledge that family arrangements are typically conducted with a greater level of informality than dealings between unrelated parties. Nonetheless, to the extent possible, the trustee or their registered tax agent should maintain contemporaneous records that are ordinarily created which demonstrate the objectives an arrangement was intended to achieve and how it would achieve them. For example, this could be in the form of a file note of a meeting between the trustee and registered tax agent.”

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