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ATO targeting your family trust – decision time ahead of 30 June

The ATO has breathed new life into an anti-avoidance law targeting trusts. Anyone with a trust could inadvertently breach it, with significant possible tax consequences and more.

Old law, new life

At Nexia, we believe in tackling issues head-on. We strive to see your reality for how it is, even if that might mean having an uncomfortable conversation. Because anything less is not helpful to you.

Over the last year, we have been keeping you informed on the Australian Taxation Office's (ATO) renewed focus on a particular anti-avoidance law applying to trusts.

Section 100A in the tax law targeted certain promoted tax schemes in the 1970s used by a relatively small number of wealthy people. However, trusts are now widely used, and we cannot emphasis enough that anyone could inadvertently breach section 100A, including possibly in ways that you might regard as ordinary practice.

What is targeted

In broad terms, you appoint your trust's net income each year to one or more beneficiaries. A beneficiary discloses their appointed income in their tax return for the year and is assessed for income tax and Medicare levy. Although there are a number of components to section 100A, here is the general scenario section 100A targets:

> *You appoint trust income on paper to a beneficiary on a lower tax rate, but someone else gets the benefit of the underlying funds, and there is a purpose, however miniscule, of saving tax.*

Many circumstances may well tick all three criteria above. However, there is then a general exclusion from section 100A, being arrangements "entered into in the course of ordinary family or commercial dealing". This phrase is not defined, and so is open to interpretation.

ATO's views

Section 100A targets certain activity through trusts which, as we set out above, today are a widely used vehicle. But the ATO has now cast doubt on the legitimacy of some practices which for many years were considered uncontroversial within families and viewed as falling into that "ordinary dealing" exception. This includes appointing trust income to your adult children – usually incurring a lower tax impost – and reinvesting the funds in the trust for the benefit of your family.

The ATO's stated position leaves more people exposed to section 100A applying to their family trust arrangements, the potential consequence of which is tax imposed at 47%, with penalties and interest possibly as well. This is where the conversation really gets going.

ATO review program

The ATO has commenced a review program, and will be tapping taxpayers on the shoulder to review their family trust arrangements. Accordingly, it is recommended that you give attention to this development.

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Two-part approach

Addressing the risk of section 100A applying to your family trust arrangements can be divided into two strands:

1. Your trust-income appointment decisions for this coming 30 June 2023
2. The accumulated past appointments of trust income to beneficiaries

The second strand can be addressed at a later time, but the first one is the more immediate issue.

Ahead of this coming 30 June...

We can provide our considered view on the risk of the ATO regarding your proposed trust-income appointment decisions for the year ending 30 June 2023 as breaching section 100A, and make any recommendations. We can in due course then address the second strand above.

We recommend that you talk to your trusted Nexia advisor, as ignoring this new development may invite high risk of inadvertently breaching section 100A, with a significant consequent tax and penalty impost.

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