

11 September 2020

Mr Andrew Orme
Deputy Chief Tax Counsel Public Advice and Guidance
Australian Taxation Office
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MELBOURNE VIC 3001

By email: Andrew.orme@ato.gov.au

Dear Mr Orme

Amendments to Section 102AG

We the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

Amendments to section 102AG in Treasury Laws Amendment (2019 Measures No 3) Bill 2019 that are intended to prevent 'inappropriate' property injections into testamentary trusts have now come into effect. The amendments apply in relation to assets acquired by or transferred to the trustee of a testamentary trust estate on or after 1 July 2019, so will be relevant for upcoming returns for the 2019/20 income year.

There are a number of issues which would benefit from public advice prior to the time when relevant returns will be required to be lodged.

One issue that our members are concerned about is whether the repayment of existing trust borrowings after 1 July 2019 might be viewed as a relevant addition to the trust property. Informal discussions with the ATO prior to the passage of the legislation suggested that existing borrowed funds would likely be viewed as property of the trust as at 1 July 2019, even though there is a matching liability to repay the loan. That being the case, there would be no consequences from the repayment of that amount.

However, in terms of new borrowings, the answer will likely depend on what is done with the borrowings. For example, if it can be shown that the money was used to repair an existing asset then there may be no problems so far as the amendment is concerned. But if

the funds were used to build a house, the answer might be different. Or it may be that if records are kept in such a way to show that funds have been injected to meet holding costs and have not been used to produce income there would be no issues arising from the amendments.

The amendment is also expected to affect current succession planning practices. For example, it will no longer be effective for section 102AG purposes to establish a testamentary trust for a beneficiary on the death of one person (say a parent or grandparent) with assets from the estate of that person's spouse passing to that testamentary trust on death. The ATO should disseminate this sort of information to ensure that people have the best opportunity to make changes to their estate/succession plans.

Where people in the situation above do not change their existing wills (or who may not be able to), it will be important for advice to be published about what approaches the ATO will accept in terms of income and expense allocation to determine the amount that qualifies for excepted trust income treatment and that which does not. The EM adopts a very simplified approach that may not be appropriate in all cases.

We would be happy to canvas our members to identify further issues if there was some prospect that relevant advice or guidance could be developed in respect of them.

If you would like to discuss any of the above, please contact Peter Bobbin TEP, STEP Australia Board Chair, on email pbobbin@colemangreig.com.au, or Lyn Freshwater TEP, on email lfreshwater@bnrpartners.com.au .

Yours sincerely



Peter Bobbin

Chair of STEP Australia