STEP Australia
ADVISING FAMILIES ACROSS GENERATIONS

28 August 2024

Amy James-Velagic
Private Wealth
By email: AmyJames-Velagic@ato.gov.au

Karen Rooke
Tax Counsel Network
Australian Taxation Office
By email: karen.rooke@ato.gov.au

Dear Amy and Karen,

RE: Endorsement of BNR Partners Submissions on PCG 2024/D1 and TD 2024/D2 (in relation to the application of section 99B of the ITAA 1936) and Submissions on PCG2024/D1

We, the Society of Trust & Estate Practitioners Australia Pty Ltd (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.

STEP Australia endorses the submissions by BNR Partners dated 26 August 2024 concerning TD 2024/D2 and PCG 2024/D1, both of which are attached for ease of reference.

STEP Australia also makes the following further submissions in relation to PCG 2024/D1:

1. We note that all of the examples discuss 'a non-resident trustee' but confirmation of whether the Commissioner is confining the application of the provision to that scenario is not included, although it is, perhaps, implied. We submit that it may be helpful to the public to make it clear that the application is confined to non-resident trustees.

2. Paragraph 5:

The discussion of low risk arrangements and the need to evidence their 'low risk' nature risks a misunderstanding that these are exceptions to section 99B. Taxpayers need to understand that if for any reason the ATO does look into their tax affairs the ability to evidence that a benefit was received in a 'low risk scenario' is not evidence that the amount is not subject to tax and it will always be advisable to try to collect sufficient evidence to show that an exception applies. Many guidelines which discuss 'low risk' arrangements include clearer warnings to this effect such as PCG 2022/2 paragraph 6 or PCG 2023/2 paragraph 15.

3. Example 7:

   This example raises two potential issues and would benefit from clarification. It is not clear from the example whether Tom should consider the application of section 99B when he receives the loan of $100,000 or when the loan is forgiven.

4. Example 8:

   We support the submission by BNR in relation to the need for clarification about the treatment of the borrowings of $900,000. For example, does it matter if the loan was repaid from income of the trust, from accumulated corpus of the trust, or from gifts to the trustee?

5. Examples 8 to 12:

   In relation to paragraphs 43 and 44, from a practical perspective, the list of potentially acceptable documents to support the corpus exception is helpful as different documents may be more readily obtainable in different jurisdictions.

6. Examples 14 and 18:

   We submit that it would assist in understanding these examples, which refer to non-resident deceased estates that are in Italy, if it is clarified that, in each of these examples, the ATO has assumed that an executor has been appointed to administer these non-resident deceased estates because this is not always the situation in Italy. Further, we submit that the examples may be better understood if the ATO advised the basis upon which it takes the view that these executors are holding the estate property on trust in circumstances when Italy only recognises foreign trusts.

7. Example 16:

   We submit that this example may need to be changed so that it does not refer to a non-resident deceased estate in Spain. The role of the "executor" in Spain is administrative

only and it does not involve the usual personal obligations of an executor in, for example, Australia. Further, the executor requires a Power of Attorney from the beneficiaries if they are dealing with the bank or the land registries. This is because in Spain, the estate property passes to the beneficiaries upon death.

8. Paragraph 70:

The ATO should clarify that a beneficiary of a non-resident deceased estate in the situation where the deceased was a resident of Australia, the estate is distributed more than two years after the date of death and the beneficiary receives over $2 million may still come within an exception to section 99B. Equally, a beneficiary of an estate that comes within the low risk criteria may still receive amounts which are taxable under section 99B.

9. Example 21:

In respect of the use of assets the same issue arises. There is potentially an implication that a loan on commercial terms will not be taxable under section 99B whereas no matter how much interest is paid a loan is an amount that is 'applied' for the benefit of the beneficiary under the definition of that term in section 99C.

If you would like to discuss any of the above, please contact myself, Julie Van der Velde TEP, STEP Australia Board Chair, on email Julie@VdVLegal.com.au.

Yours sincerely

Julie Van der Velde TEP

Chair of STEP Australia

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Amy James-Velagic
Private Wealth
Australian Taxation Office

26 August, 2024

By email: Amy James-Velagic@ato.gov.au
cc: karen.rooke@ato.gov.au

Dear Amy,

Consultation on draft Practical Compliance Guideline PCG 2024/D1

Thank you for the opportunity to provide feedback on PCG 2024/D1 (about the application of section 99B of the ITAA 1936).

BNR Partners is an accounting practice that specialises in the taxation of deceased estates. We see the application of section 99B as one of increasing relevance to our clients. In that regard, guidance on the application of the section is welcomed.

We note too that in the changing tax practitioner environment, there will be a growing demand for ATO advice and guidance in areas such as this. Practitioners will often need to know how the ATO considers that the law applies in order to decide whether to refer themselves or others to the TPB.

While the PCG is a starting point in terms of section 99B, it is important for those who will now know that they have a potential section 99B problem how it might apply to them. For example, in the context of a deceased estate where there has been no prior accumulation of income or gains, will the ATO accept that section 99B does not apply if the trustee has kept accounting records in such a way that shows that distributions to resident beneficiaries were from the deceased's bank accounts, rather than the proceeds from the sale of assets. If so, this is important for practitioners to know so that they can make any changes to their accounting practices in order to avoid being sued by their clients.

We and others have previously lobbied the government, Treasury and the ATO to change the law so that deceased estates would be treated as having the same tax residence for Australian tax purposes as the deceased individual (as is the practice in the UK). This would produce results that are more consistent with the intended policy behind the CGT treatment of gains and losses resulting from the death of an individual. This is especially true where an Australian resident deceased appoints a foreign resident LPR (or where there might be a change of trustee of a deceased estate from resident to non-resident). In particular, such a law change would avoid the application of section 99B in these cases. We ask that you raise this recommendation with Treasury and government.

What this guideline is about?

Despite paragraphs 3, 6 and 7 of the draft PCG, many commentators are still suggesting that the ATO needs to clarify that section 99B does not apply to distributions from a resident trust. That is, they have focussed on paragraph 1 and the examples (which don't address this nuance).

We suggest that greater emphasis should be given to the application of the provision to distributions from resident trusts in the introduction and throughout the examples. For example,

> Section 99B was introduced into the tax legislation in 1979 to tax, on distribution to a resident beneficiary, amounts that had been accumulated tax free in a foreign trust. However, the scope of the provision is not limited to non-resident trusts. While the ATO practice is not to apply section 99B generally to the distribution of untaxed amounts by a resident trust, we may seek to do so if the trust has at some time been a foreign trust.

There is also another scenario that should be addressed, that of a non-resident trustee distributing to a resident trustee beneficiary. In all of the examples, the Australian beneficiaries are individuals. It should be made clear how section 99B applies if an amount is distributed to a resident trustee beneficiary. Presumably, if there is no trust income, the trustee will be assessed but to the extent that beneficiaries are presently entitled to trust income, they will be assessed on a share of the distribution.

It should also be made clear that section 99B does not apply if the beneficiary is a temporary resident.

Paragraph 4

It would be useful to explain how the ATO might engage with taxpayers.

For example, you could explain that if section 99B potentially applies, then beneficiaries should include details in their trust income schedule and return if they are unsure whether section 99B applies and object to the assessment if there is some reasonable prospect that it does not.

We imagine that that the trust schedule will be amended to capture these payments (noting too that the trustee will be unlikely to provide them with the data they need).

You could also explain that the application of section 99B is not a matter that you would be raising with the trustee but rather with a recipient beneficiary. So, if there is uncertainty about the application of the provision then it is the beneficiary and not the trustee who should seek a private ruling.

You might also explain that an engagement might arise as the result of compliance activity by the ATO, for example, looking at Austrac data and probate documents.

Application of section 102AAM

As you will appreciate in many cases where section 99B applies, an interest charge calculated under section 102AAM of the ITAA may also form part of the recipient beneficiary's assessable income. Tax agents and the ATO struggle with the application of that section. It may also be a reason why people are reluctant to come forward about any distribution they receive.

It would be useful if a safe-harbour could be introduced in relation to the application of the provision (for example, you will not seek to apply it if distributions received are less than $1 million).

Date of effect

It will come as a surprise to many deceased estate beneficiaries (and their legal advisors) that they might be assessable under section 99B, particularly where the deceased and their LPR are foreign residents. Perhaps in these cases you might consider applying the provision and the PCG only where the deceased died on or after the date of issue of the PCG. In many cases records relevant for Australian tax purposes will not have been kept.

Common scenarios - examples 1-7

These examples are very vanilla and might tend to mislead practitioners as to the circumstances when section 99B might need to be considered.

We suggest that it would be more useful to vary the example as shown below so that people get a better understanding of the nuances involved. The red text/deleted text highlight the particular facts that we think would be more useful.

It might also be useful if you were to indicate what expectation you have of those who receive amounts from overseas to enquire as to the source of the funds. That is, are you expecting that in non-deceased estate cases (where it is obvious), recipients should enquire as to the source of funds paid to them.

Example 1A – non-resident migrates to Australia resulting in trust change of residence

Marty migrates to Australia during the year ended 30 June 2024. After migrating to Australia, Marty begins the process of winding up his overseas interests, including a non- resident trust which holds listed shares. As Marty is the trustee of the trust, the residence of the trust also changes when he becomes a resident.

Since the establishment of the trust, all income earned from the listed shares has been accumulated and reinvested in further shareholdings. During the year ended 30 June 2024 and 2025, Marty in his capacity as the trustee of the trust, distributes the listed shares to himself.

As Marty is a resident beneficiary who has received trust property from a trust that was non- resident trust for a period, he needs to consider the application of section 99B with respect to the 2024 and 2025 income years, including whether one of the exceptions applies.

Example 2A – resident beneficiary receives a distribution

Alice is an Australian-resident taxpayer and requires funds to assist in buying a house. Her non-resident parents agree to provide financial assistance.

During the year ended 30 June 2025, Alice's parents, in their capacity as trustees of a non-resident trust, appoint an amount totalling $500,000 to Alice. The trustees advise Alice that she is a being paid the amount as beneficiary of the trust ~~and that the amount has been paid from the trust and sourced from accumulated profits~~.

As Alice has received a distribution from a non-resident trust, she needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

Example 6A – beneficiary receives amount from a deceased estate

Amanda is a resident beneficiary of a non-resident deceased estate. Amanda's grandfather was a ~~non-r~~resident and recently passed away. He appointed his son who is not a tax resident of Australia as executor of his will.

At the time of her grandfather's death, the assets included in his estate consisted of cash and listed shares. During the 2025 income year, the non-resident trustee (executor), as permitted by the will, liquidates the listed shareholdings, and makes a payment ~~in US dollars~~ to Amanda.

As Amanda has received an amount of trust property from a non-resident trust, she needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

Example 8B – beneficiary receives amount indirectly from a deceased estate

Amanda is a resident of Australia. Amanda's grandfather recently passed away. He was a non-resident. He appointed his son Basil (Amanda's father) as executor of his will and sole beneficiary. Basil is also a non-resident.

At the time of her grandfather's death, the assets included in his estate consisted of cash and listed shares. During the 2025 income year, Basil as permitted by the will, liquidates the listed shareholdings and distributes the proceeds to himself. ~~US dollars~~. Basil does not need the funds and gives them to his daughter to help pay the mortgage on her property.

As Amanda has not received an amount from a non-resident trust, she does not need to consider the application of section 99B.

Record keeping for hypothetical resident taxpayer tests

Paragraph 35

The examples in the PCG deal only with cases where the deceased's assets are sold and proceeds distributed, not where the assets are transferred in specie. Presumably where a trust asset is transferred to a beneficiary for no consideration, no relevant amount has actually been derived by the hypothetical taxpayer in order to bring any unrealised gain to tax.

Can you please confirm that section 99B will not be applied to *in specie* asset transfers unless, for example, the cost base is attributable to amounts that would have been assessable to a hypothetical taxpayer (for example, if the trustee accumulates trust income for 10 years and uses it to buy an asset, which is transferred to a beneficiary some years later).

In the context of a resident deceased estate (and TAP assets of a non-resident deceased estate), beneficiaries will inherit the deceased's cost base. It would be inappropriate that a beneficiary be taxed on an unrealised capital gain under 99B at the time of distribution of an estate asset and also later when they sell assets owned by the deceased.

Examples

Again, less clearcut examples would be more helpful for practitioners.

Example 8

Some have found this example confusing. It might be useful to explain expressly why the $900,000 is not taxed. That is, we understand that you are saying that only the $100,000 represents a capital gain that would be taxable to a hypothetical resident. But where have the funds come from to pay the $900,000 borrowing. If that was from untaxed income, then presumably that amount would also be taxable.

Example 8A

Could you please add an example that varies Example 8 by showing what the ATO's approach would be if the trustee distributed only $100,000?

Example 9A

Could you please add an example to show what the ATO's approach would be if the shares were transferred to Steve five years after they were acquired by the trustee at which point they had increased in value (noting how the exception to the corpus exception would apply, or not, to an unrealised capital gain).

Example 9B

Could you please add an example to show what the ATO's approach would be if the shares were sold by the trustee for a profit and some of the funds used to acquire new shares that were then transferred to Steve (noting how the exception to the corpus exception would apply, or not, to an unrealised capital gain inherent in the new shares at the time of transfer)

Example 10A

This variation of example 10 is based on private ruling 1052252807039. It is imperative that the ATO highlights the need to account for funds separately in some cases. Otherwise practitioners will be exposing themselves to litigation risk.

> *The ATO receives information from a probate application ~~from AUSTRAC~~ that Lisa, a resident of Australia, is entitled to receive funds totalling $300,000 from a non-resident deceased estate. The deceased had been a resident of Australia but his estate was non-resident because his executor was his daughter who resided in New Zealand. ~~an overseas source~~. Upon commencing our review of Lisa's affairs, Lisa informs us that the amount is a payment sourced from trust corpus. ~~of a non-resident deceased estate and that she has received the amount as a beneficiary under the will. The trustee (executor) of the deceased estate is an independent third party.~~*
>
> *The Australian legal advisors acting for the executor had placed estate funds into their trust account from a number of sources including a death benefit, share sale proceeds and the deceased's bank deposits. The funds were intermingled and used to pay funeral expenses, general liabilities and pecuniary legacies to Lisa and a number of charities. ~~advises us that she is a distant relative of the deceased and cannot obtain all the core documents listed in paragraph 43 of this Guideline from the independent trustee (executor). Lisa provides us with evidence of the communications with the independent trustee (executor) as well as a letter from the executor confirming the amount of the bequest, and a copy of the deceased estate's financial accounts confirming that the amount has not been paid from income or gains made on the realisation of assets.~~*
>
> *In this example, Lisa cannot provide ~~is taken to have provided~~ sufficient evidence that the amount she receives is from trust corpus and that the corpus exception applies. However, we will accept Lisa's payment represented a proportion of the total funds received by the solicitors. Therefore if only 10% of*

the total funds were attributable to capital gains (before CGT discount) from shares, then only 10% of her legacy will be assessable under section 99B.

If the funds had been accounted for separately in the trust account, so that it was clear that the share sale proceeds were used to pay liabilities and the bank deposits used to pay legacies, there would be sufficient information to avoid the application of section 99B

Examples 11 and 12

Perhaps you could add a sentence to each example to make it clear what this means. For example:

- the ATO would expect John to include the entire distribution in his assessable income.
- the ATO amends Karen's income tax assessment to include the $800,000 distribution

Compliance approach – deceased estates

Paragraph 65

Perhaps you could explain what this means. That is, if we review a matter and determine that a payment was assessable under section 99B, then you may be subject to tax, penalties and interest charges.

Paragraph 70

We suggest that you add '/administrator' inside the brackets.

In the last line of para 1, 'are' should be 'is'

For consistency with subsection 102AAM(1B) which excludes deceased estates from the application of the section 102AAM interest charge for the first three years, perhaps this should be three years from the date of death.

Paragraph 71

It would be worthwhile spelling out that the approach does not apply in the case of a resident deceased and non-resident LPR and include an example to highlight this.

We are often told by the ATO that it can't cover every scenario by way of an example. We don't expect you to. But this is quite common and many people will not understand that section 99B potentially applies if a resident individual appoints their non-resident child as their sole LPR. As tax practitioners, it saves us a lot of time if we can point people to something that the ATO has published on a topic.

Examples 13 to 19

The structure of the opening two sentences in each example is awkward. That is, they state that someone is a beneficiary of a deceased estate and subsequently that someone passes away. As you can't be a beneficiary of a particular estate until the relevant person has died, readers are left to make the connection between the two sentences.].

Could you say: Simon is a resident beneficiary of his father's estate. Simon's father passed away on ______ and was a non-resident at that time.

Example 13

Can you expand the example please to show the approach if the trustee later transfers artwork valued at $1.1m to Simon

Example 14, 16 and 18

These examples involve civil jurisdiction countries where succession rules may differ markedly from those that apply in Australia and can include forced heirship. You should satisfy yourselves that the death of a person in these countries will result in a relationship that we might consider a trust. If it would assist, we could identify a STEP member who practices in those jurisdictions who might be able to offer advice.

Example 15

Paragraph 84 is a stretch and reflects a section 100A mindset on the part of the ATO.

There is no evidence that Harry's mother who died in 2022 drafted her Will in such a way as to create entitlements that would take advantage of the compliance approach published by the ATO more than two years after her death.

Surely, George and Sophia as beneficiaries are entitled to do what they want with the gifts they received from their grandmother.

Example 16

What should Jason do?

Example 17

This example is unrealistic. How can it be said on the one hand that the brother passed away on 1 August 2023 and then on the other that the beneficiary has no proof? If the ATO knows the date of death (somehow) then surely the beneficiary doesn't need to give you evidence.

A better example might be a case where the death certificate says the brother died between particular dates (8 and 23 April 2022) and the payment to Mary was made on 9 April 2024.

The example also confuses the issues of the compliance approach and the application of 99B. A better layout might be as follows:

> *Mary is a resident beneficiary of the estate of her non-resident brother. His death certificate shows that he passed away between 1 April 2022 and 23 April 2022. On 15 April 2024, the non-resident trustee (executor) as permitted by the will, makes a payment in US dollars (equal to A$500,000) to Mary.*
>
> *This arrangement does not meet the criteria to be considered low risk under the compliance approach as it is not clear that the payment was made within two years of her brother's death (because it is not clear when that occurred).*
>
> *Further, as Mary cannot provide information about whether the payment was sourced from assets owned by her brother at the date of his death, we may dedicate compliance resources to consider section 99B.*

Example 19

This example highlights the problem with offering a 'precipice' concession. That is, to the extent that the recipient is $1 over $2m they cannot apply the compliance approach. Another way to confer relief might be to say that you will not apply compliance resources to the first $2 million payments received in the first two years.

Compliance approach – commercial terms

After paragraph 107 it might be useful to explain that the concession only applies to the transactions described and doesn't mean that section 99B would not be applied to a subsequent distribution by the trustee of an amount paid under a commercial agreement.

Throughout these examples there are references to loans by a trust or property owned by a trust. A trust is not a legal entity and can only act through the trustee so these would be better expressed as follows:

> The trustee allows Chris to occupy a house that is trust property.
>
> …we identify that the loan is subsequently forgiven by the non-resident trustee

Other matters

Although not directly related to the PCG, we assume that the individual tax return instructions will be amended to explain that section 99B amounts should also be shown at the foreign income label. The current wording suggests only current year income may have to be included.

In the recent webinar someone made the comment that the ATO didn't think it was necessary to include a chain of trusts example in the PCG or TD because the court had dealt with the issue in Howard. We suggest that many people would not be familiar with the decision and that it would be helpful to include an example.

There was also some discussion of the decision tree at the webinar and its possible utility as a stand-alone document. If it were to be used in that way, we suggest that it should be made clear in the decision tree that a non-resident trust includes one that has at some point been non-resident, otherwise it might mislead.

As ever, BNR Partners would welcome the opportunity to discuss issues raised in this submission. Nuances are often lost when reliance is placed solely on written comments and the approach you decide to take in respect of a particular issue may generate further issues that do not benefit from consultation. A free-flowing exchange of ideas will generally result in a better product.

Yours sincerely

Ian Raspin TEP, FCPA, FCA, CTA
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Karen Rooke
Tax Counsel Network
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26 August, 2024

By email: karen.rooke@ato.gov.au
cc: Amy James-Velagic@ato.gov.au

Dear Karen,

Consultation on draft Taxation Determination TD 2024/D2

Thank you for the opportunity to provide feedback on draft Taxation Determination TD 2024/D2 (about the application of section 99B of the ITAA 1936).

BNR Partners is an accounting practice that specialises in the taxation of deceased estates. We see the application of section 99B as one of increasing relevance to us and those solicitors we advise. In that regard, guidance on the application of the section is welcomed.

We note too that in the changing tax practitioner environment, there will be a growing demand for ATO advice and guidance in areas such as this. People will often need to know how the ATO considers that the law applies in order to decide whether to refer themselves or others to the TPB.

We and others have previously lobbied the government, Treasury and the ATO to change the law so that deceased estates would be treated as having the same tax residence for Australian tax purposes as the deceased individual (as is the case in the United Kingdom). This would produce results that are more consistent with the intended policy behind the CGT treatment of gains and losses resulting from the death of an individual. This is especially true where an Australian resident deceased appoints a foreign resident LPR (or where there might be a change of trustee of a deceased estate from resident to non-resident). In particular, such a law change would avoid the application of section 99B in these cases. We ask that you raise this recommendation with Treasury and government.

Ruling

The draft PCG (paragraph 7) makes it clear that the ATO will apply section 99B to certain resident trusts. We recommend that this be made clear in the TD too especially as the TD constitutes ‘advice’ rather than ‘guidance’.

Examples 1, 2 and 3 deal with cases where the trustee has sold trust assets and distributed the proceeds of sale. It would be useful if you could explain in the ruling section how section 99B might apply if the trust asset itself is transferred to a beneficiary.

People might infer from the current examples that the ATO view is that section 99B does not apply to in specie distributions. It's not until paragraph 51 that there is a reference to an asset being distributed. This should be spelt out clearly in the Ruling section.

Could you please explain (including by way of a deceased example) what meaning the ATO gives the term 'derived' in paragraphs 99B(2)(a) and (b) in the context of an unrealised capital gain? In the context of the distribution of an asset, are you suggesting that 'derived' is broad enough to encompass a notional capital gain based on deemed capital proceeds.

We have struggled a little with the separate points being made in paragraphs 4 and 5. We have discussed our understanding of what is being said under Example 1.

Example 1

We understand this to be saying that the hypothetical taxpayer can disregard an amount attributable to a capital gain from a pre-CGT asset as that exemption applies to any type of taxpayer that is a resident. Conversely payments that may be attributable to the CGT discount component of a capital gain are assessable under section 99B to a resident beneficiary because you can't assume that the hypothetical taxpayer is an entity entitled to apply the discount.

In our area of practice, we think that the effect of the hypothetical taxpayer test is that it cannot be assumed that they are a trustee of a deceased estate. This is important in the context of applying the main residence exemption in section 118-195 of the ITAA 1997.

For example, a foreign LPR acquires a resident deceased's dwelling in Australia and sells it outside of the two-year period provided for in the legislation. The sale proceeds are distributed to a resident beneficiary. As nothing about the status of the hypothetical taxpayer (apart from its residence) is to be assumed, it cannot be assumed that they are the trustee of a deceased estate. This means that the distribution of an amount attributable to a gain for the period after the taxpayer's death will be subject to section 99B on distribution. [Presumably, any market value step-up under item 3 of the table in subsection 128-15(3) of the ITAA 1997 goes to your other point about the circumstances that gave rise to the capital gain. That is, the entire capital gain from the dwelling is not subject to tax under section 99B.]

Whether or not we have understood correctly, this would be a useful example to add to the TD to show how the principles apply and the provisions interact.

If our understanding is correct, this is an important issue. Without a law change along the lines of that discussed above, legal practitioners will be exposed to the risk of litigation for failing to draw the issue to the attention of clients when drafting a Will.

Example 2

We suggest that in this example, you change the facts so that the deceased was a resident who appointed their non-resident child as executor of their estate. In our experience, this is a more common scenario than the one you have raised, or at least one where people fail to appreciate that section 99B potentially has application. It would also be useful to add that the central management and control of the trust was not in Australia at any time.

We assume that the deceased died relatively recently in which case the reference to the 1991 acquisition date for the shares is misleading in the context of the current facts. Item 3A in the

table in subsection 128-15(4) of the ITAA 1997 operates with respect to CGT events (deaths) that happened after the day on which T*axation Laws Amendment (2006 Measures No4) Act* received Royal Assent. So, if a non-resident died after that time, their LPR would obtain a market value acquisition cost. [If you take up our suggestion to make the deceased a resident, then the 1991 acquisition date is relevant.]

Paragraph 11

Suggest saying devolved to their legal personal representative (as per legislation). It is not clear to us how the provisions might apply in civil jurisdictions where there is no representative who administers the estate. Though it is a legal question, we understand that in some counties the assets pass directly to beneficiaries.

Suggest deleting the word 'executor'. This is already covered by the reference to legal personal representative.

Paragraph 12

Again, we suggest that you say that the shares were acquired by the LPR (rather than the deceased estate) and replace 'trustee' with 'LPR' to avoid any confusion as to whether trustee was meant to mean something different from LPR (that is, the LPR acting in their capacity as trustee).

Further example

We suggest adding another example to highlight the interaction of the corpus exception and the exception in paragraph 99B(2)(c) for prior taxed amounts. The facts that we often have to deal with and which we would like clarified are as follows.

Resident deceased, non-resident LPR. Sells a property in Australia. Tax is paid on the discounted capital gain in the current year under section 97 or 99. The LPR then distributes the discount component to the beneficiary. Does an exemption apply? Does it make any difference if the beneficiaries were assessed because they were made specifically entitled to the whole of the financial benefit attributable to the gain before discount?

At a more granular level (and this may go to the source of the distribution), assume that there is only one estate asset. It is sold for $150,000. The gain before discount is $100,000 and the LPR paid tax of $25,000 on the post-discount gain.

There is $110,000 left to distribute after payment of tax and other expenses that could not be included in cost base. Can the LPR take the approach that the amount being distributed represents the cost base of the asset ($50,000- not subject to 99B), the taxed capital gain ($50,000 – not subject to 99B) and the discount component ($10,000- which may be taxable under 99B depending on your view).

Source of the distribution

As the PCG acknowledges, this is going to be very problematic for beneficiaries particularly where there have been many injections and outgoings of trust capital from different sources over the life of a trust and all funds have been intermingled (particularly as many non-resident trustees would not have been aware of the possibility of Australian tax issues).

The ATO should indicate some approaches that it might accept to assist trustees and beneficiaries deal with this problem.

For example, does the ATO accept that section 99B would not apply in the following circumstances. A foreign trust has a contributed capital account of $1m, it received a dividend of $200,000 which was credited to a different account. The trustee made a capital distribution of $200,000 to a resident beneficiary by debiting the contributed capital account.

Or does the ATO regard all of the $200,000 as assessable under s99B on the basis that distributions firstly represent assessable amounts before any others? Alternatively, would the ATO regard $33,333 as assessable on the basis that it is attributable as to one-sixth of assessable sources and as to five-sixths non-assessable sources (a pro-rata approach)?

As ever, BNR Partners would welcome the opportunity to discuss issues raised in this submission. Nuances are often lost when reliance is placed solely on written comments and the approach you decide to take in respect of a particular issue may generate further issues that do not benefit from consultation. A free-flowing exchange of ideas will generally result in a better product.

Yours sincerely

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