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WEEKLY COMMENT: FRIDAY 5 AUGUST 2022

1. This week I conclude my review of the new tax return and disclosure requirements that apply to trusts from the 2022 income year onwards. As noted in last week's *Weekly Comment*:
 - (a) The *Taxation (Income Tax Rate and Other Amendments) Act 2020* inserted s 59BA (trust tax return information requirements for the 2021-22 income year onwards) and s 59BAB (allowing the Commissioner to request information from the 2014-15 income year onwards) into the *Tax Administration Act 1994* ("the TAA");
 - (b) The *Tax Administration (Financial Statements – Domestic Trusts) Order 2022* ("the Trusts OIC") made on 7 March 2022 under s 21C of the TAA, which came into force on 31 March 2022, sets out minimum requirements for the preparation of financial statements of a trust for the purposes of s 21B of the TAA; and
 - (c) Inland Revenue issued Operational Statement OS 22/02 "Reporting requirements for domestic trusts" on 6 April 2022, published in *Tax Information Bulletin* Vol. 34, No. 4, May 2022, setting out the Commissioner's approach to applying the trust information gathering powers contained in s 59BA and s 59BAB of the TAA.

Additional information requirements for trusts

2. Except for trusts excluded under s 59BA(3), from the information requirements, s 59BA(2) sets out the information to be included in a tax return by a trust, as follows:
 - (a) A statement of profit or loss and a statement of financial position (as discussed in last week's *Weekly Comment*);
 - (b) The amount, and nature, of each settlement that:
 - (i) Is not the provision to the trustee, at less than market value, of minor services incidental to the activities of the trust; and
 - (ii) Is made on the trust in the income year;
 - (c) The name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each settlor who makes a settlement on the trust in the income year or whose details have not previously been supplied to the Commissioner;
 - (d) The amount, and nature, of each distribution that:

- (i) Is not a distribution, other than of money, that is minor and incidental to the activities of the trust; and
 - (ii) Is made by the trustee in the income year;
 - (e) The name, date of birth, jurisdiction of tax residence, and tax file number or taxpayer identification number, of the beneficiary who receives a distribution referred to in paragraph (d);
 - (f) The name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each person having a power under the trust to appoint or dismiss a trustee, to add or remove a beneficiary, or to amend the trust deed;
 - (g) The other information required by the Commissioner.
3. Section 59BA(5) allows the Commissioner to vary the above requirements for a trustee or class of trustees.

Trusts excluded from the requirement to comply with s 59BA(2)

4. Section 59BA(3) provides that the information requirements in s 59BA(2) do not apply to the following trusts (however, subject to the exceptions referred to below, they may still be required to file a return, under s 59BA(1), if they derive assessable income):
- (a) A non-active trust excluded from making a return by s 43B and, in this case, a trust with non-active complying status under s 43B does not have to file a return even if assessable income is derived;
 - (b) A foreign trust, with separate disclosure requirements – these include:
 - (i) A trustee required to make a return by s 59D of the TAA (which relates to foreign trusts where one or more of the trustees of the trust are New Zealand tax residents);
 - (ii) A trustee of a foreign trust, with no trustees that are New Zealand tax residents, that derives New Zealand source income;
 - (iii) Dual status trusts (trusts that satisfy the requirements to be a complying trust from inception but have only non- resident settlors so are also a foreign trust) satisfy the s HC 11 of the *Income Tax Act 2007* definition of foreign trust, so also will not be required to comply with s 59BA(2);
 - (c) A trust incorporated as a board under the *Charitable Trusts Act 1957*;
 - (d) A charitable trust registered under the *Charities Act 2005*;
 - (e) A trust eligible to become a Maori authority under sections HF 2 and HF 11 of the *Income Tax Act 2007*;
 - (f) A trust that is a widely held superannuation fund, as defined in s YA 1 of the *Income Tax Act 2007*;
 - (g) A trust that is an employee share scheme that is an exempt ESS, as defined in s YA 1 of the *Income Tax Act 2007*;

(h) A lines trust established under the *Energy Companies Act 1992*.

5. Inland Revenue notes that:

- (a) Trustees that are required to file returns but qualify, under any of the paragraphs in s 59BA(3), to be excluded from providing the information required by s 59BA(2) will need to notify the Commissioner that they are excluded on the return filed each year;
- (b) Trustees that meet the exclusion under s 59BA(3)(a) (complying non-active trust) will not need to file a return so will not be required to notify the Commissioner that they are excluded under s 59BA(3)(a).

Estates

6. Inland Revenue has made the following comments regarding the obligations of estates to comply with s 59BA of the TAA:

(a) IS 18/01 *Taxation of Trusts – Income Tax* (at [9.25]) clarifies that estates are not trusts:

- (i) The mere fact that a person has died, and an executor has been appointed to manage their estate, does not give rise to a trust relationship - trustees and executors have different capacities (*Re Hayes* [1971] 1 WLR 758 (Ch));
- (ii) However, it will often be the case that a trust will be created by will (referred to as a testamentary trust), which can occur expressly by way of a statement in a will that specific property of the deceased will be held on trust for a named beneficiary, or where property is left for a minor beneficiary that needs to be held until the beneficiary is of age;

(b) OS 21/03 *Excusing estates from filing income tax returns* sets out the Commissioner's approach to determining when a trust will arise in the administration of a deceased estate:

"A trust can, and often does, arise before an estate is fully administered but administration of the estate needs to have reached the stage of the property being held by someone with the special duties of a trustee.";

(c) See also IS 19/04 *Income Tax – Distributions from Foreign Trusts* for further discussion on when a trust will arise in the administration of a deceased estate;

(d) After the date that a trust arises in the administration of an estate, a trustee will be required to comply with s 59BA(2) if they have an obligation to file a return under s 59BA(1), however, if the trust has complying non-active status under s 43B, it will not be required to file a return.

Persons responsible for performance

7. Inland Revenue notes that:

- (a) The obligation to comply with subsections 59BA(1) and (2) lies with a trustee of a trust. If there is more than one trustee, then the obligation to comply lies with each trustee individually but only one return is to be filed.

(b) If there are trustees who are not New Zealand residents, then any New Zealand resident trustees are responsible for the performance of the obligations imposed by s 59BA.

8. Section 59BA(4) provides that if the trustee of a trust is a non-resident, a settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed on the trustee by this section.

Details of settlements and settlors

9. New Form IR6S is the prescribed form for providing details of settlors and settlements as required by s 59BA(3)(b) and (c) of the TAA.

10. Boxes 4 to 13 set out the details required in respect of settlements. For each settlement made in the income year, the trustee will be required to disclose:

(a) The amount of the settlement; and

(b) The nature of the settlement.

11. Section HC 4(1B) provides that the value of property settled on a trust is the market value of an item of property at the time of the settlement, and all such market values are aggregated to determine the total amount settled on the trust, excluding:

(a) Resettlements from another trust that would be beneficiary income if distributed to a beneficiary;

(b) Settlements for which the settlor is allowed a tax deduction; and

(c) Settlements that would otherwise be income of the settlor.

12. If there is a transfer of value where there is no property settled on the trust, for example, the provision of services at less than market value, or the provision of an interest-free loan, the settlement still has to be disclosed, but the amount of the settlement is nil.

13. For each settlor, the nature and amount of settlements are to be disclosed as follows (but multiple settlements of the same nature by the same settlor in the income year can be aggregated):

(a) Box 4: If the settlor has made no settlements, this box is ticked;

(b) Box 5: Cash settlements;

(c) Box 6: Shares/Ownership interests;

(d) Box 7: Financial arrangements;

(e) Box 8: Services: The provision of minor services incidental to the activities of the trust does not need to be disclosed as a settlement, under s 59BA(2)(b)(i), however, note that:

(i) The services must be both minor services and incidental to the operation of the trust, for example, services that are incidental to the operation of a trust include attending trust meetings and reviewing trust documents;

- (ii) A service that is not incidental to the operation of a trust, for example, the day-to-day management of a business carried on through a trust, must be disclosed;
- (f) Box 9: Land – as for the disclosures in Form IR6, land and buildings must be separately disclosed:
 - (i) This may be done by using the apportionment used in the most recent rating valuation in the *Rating Valuations Act 1998*;
 - (ii) The most recent rating valuation can also be used as a proxy for the market value at the time of the settlement;
- (g) Box 10: Buildings – a separate disclosure is required under the same principles as for land above;
- (h) Box 11: Other- Inland Revenue notes that examples of “other” settlements include settlements of asset types not specifically listed, and the provision of low/no interest loans from a settlor to the trust;
- (i) Box 12: Description of ‘other’ – a description of items in Box 11 is required in Box 12;
- (j) Box 13: This box has to be ticked if there has been a settlement by the settlor but it has been valued at zero – Inland Revenue notes that:
 - (i) This can include services provided at less than market value and low interest or interest-free loans;
 - (ii) An amount owed to a beneficiary that exceeds \$25,000 at the end of the income year on which no interest is paid at the prescribed rate or market rate makes the beneficiary a settlor of the trust under s HC 27(2)(bb) and s HC 27(6) of the *Income Tax Act 2007*;
 - (iii) However, if the trust owes the less than \$25,000 or more than \$25,000 and pays interest at the prescribed rate or market rate, the beneficiary is not a settlor and there is no information to disclose;
 - (iv) Under s HC 14(2B) of the *Income Tax Act 2007*, interest paid to a beneficiary that does not exceed the greater of the prescribed rate or market rate is not a distribution, but an interest expense of the trust.

14. Settlor details are required in the opening section and in Boxes 1 to 3.

15. For every settlor of the trust, who makes a settlement on the trust during the income year, from the 2021-22 income year onwards, the trustee will be required to disclose:

- (a) The name of the settlor;
- (b) The date of birth, for a natural person, or the commencement date (for example, date of incorporation a company or initial settlement date of a trust) of the settlor;
- (c) The jurisdiction of tax residence of the settlor;
- (d) Tax File Number or Taxpayer Identification Number of the settlor:

- (i) The Tax File Number (TFN) is the identification number that the Commissioner allocates to a person (the “IRD Number”);
- (ii) The Taxpayer Identification Number (TIN), for a person in a jurisdiction other than New Zealand, is the functional equivalent of the person’s tax file number in that jurisdiction.

16. Inland Revenue notes that:

- (a) A trustee is required to disclose the information for each settlor whose details have not been previously provided to the Commissioner, which will include settlors prior to the 2021-22 income year and settlors in an income year where the trustee is not required to file the further information with a return under s 59BA(2);
- (b) This means that any settlors in an income year for which the trustee does not file a s 59BA return (including years prior to 2021-22) will need to be included in the next return that the trustee files;
- (c) It is accepted that some trusts may have been in existence for many years, the trustees may have changed over time or sufficient records have not been retained to determine all the settlors (or “deemed” settlors) of the trust, nevertheless, where a settlement has occurred prior to 2020-21, including “deemed” settlements, the details of the settlor must still be disclosed if they have not previously been provided to the Commissioner;
- (d) In recognition of the practicalities of making the disclosure of these historical settlors, Inland Revenue only expects trustees to disclose details based on the records held of those settlors, for example, if they hold the name of a settlor but none of the other required details and that information cannot be reasonably obtained, then disclosure of the name will be sufficient;
- (e) For any settlement in the 2021-22 year or later years, the trustee will be expected to make a full disclosure of the amount and nature of settlements and the full details of those settlors (name, date of birth, jurisdiction of tax residence and TFN/TIN).

Beneficiary disclosures

17. A “distribution” is defined in s HC 14 of the *Income Tax Act 2007* as being a transfer of value by a trustee to a person because the person is a beneficiary of the trust. A distribution is made when what is transferred vests absolutely in interest of the person or is paid to the person. However:
- (a) Any beneficiary income allocated to the income year in the period after the income year as allowed by s HC 6 (1)(b) of the *Income Tax Act 2007* is not a distribution in the income year, it is a distribution in the following year;
 - (b) The distribution and the beneficiary income allocation will be recorded in different sections of the IR6B, and only those distributions in the income year will be returned in that income year’s return.
18. For every beneficiary of the trust who receives a distribution from the trust during the income year, from the 2021-22 income year onwards, the trustee will be required to disclose, in form IR6B:

- (a) The amount, and nature, of the distribution;
 - (b) The name of the beneficiary;
 - (c) The date of birth, for a natural person, or the commencement date (for example, date of incorporation a company or initial settlement date of a trust) of the beneficiary;
 - (d) The tax jurisdiction of the beneficiary;
 - (e) The TFN (tax file number) or TIN (tax identification number) of the beneficiary.
19. Inland Revenue notes that if a distribution is made to more than one beneficiary jointly, then the distribution should be apportioned between the beneficiaries who receive it and the trustee needs to disclose the separate distributions.
20. In respect of non-cash distributions, Inland Revenue notes that:
- (a) The amount of any non-cash distribution will be determined with reference to the tax value, historical cost or market value of the asset, the valuation methodology being determined by the trustees in accordance with the minimum standards for the financial statements required by the Trusts OIC;
 - (b) In relation to non-cash distributions, such as the provision of services, interest free loans, or the use of assets by beneficiaries at no cost, a transfer of value, and therefore a distribution, has occurred, however, if there has been no reduction in the net assets of the trust, the trustees can choose to value the distribution as nil;
 - (c) Distributions, other than of money, that are minor and incidental to the activities of the trust do not need to be disclosed.
21. Allocations of beneficiary income that the minor beneficiary rule applies to are treated as trustee income, under s HC 35 of the *Income Tax Act 2007*, unless one of the exceptions apply.
22. Inland Revenue states that for the purposes of recording the movements in beneficiary accounts of minors in the IR6B the following approach should be taken:
- (a) Allocations of beneficiary income to which the minor beneficiary rule does not apply should be recorded as “Beneficiary Income”;
 - (b) Allocations of beneficiary income to which the minor beneficiary rule does apply should be recorded as “Distributions”.

Persons with powers of appointment

23. New Form IR6P contains details to be completed in respect of trust power of appointment.
24. Section 59BA(2)(e) requires the trustee, for every person who has a power under the trust to appoint or dismiss a trustee, add or remove a beneficiary or amend the trust deed (referred to as an “appointer”), to disclose:
- (a) The name of appointer;
 - (b) The date of birth, for a natural person, or the commencement date (for example, date of incorporation a company or initial settlement date of a trust) of the appointer;

- (c) The tax jurisdiction of appointer;
- (d) The TFN or TIN of appointer.

25. Inland Revenue notes that if the trustee has previously disclosed the required details of an appointer, and that person retains the same power, the trustee does not need to disclose the details again. If the appointer's details change in an income year, such as the tax jurisdiction of the appointer, the updated details will need to be disclosed.

Other information required

26. The Commissioner can require a trustee to provide any other information required by the Commissioner.

Information relating to income years before the 2021-22 income year

27. Section 59BAB of the TAA permits the Commissioner to require a trust to provide information that:

- (a) Relates to the trust and a period beginning after the end of the 2013-14 income year and ending before the beginning of the 2021-22 income year; and
- (b) Would be required to be provided under s 59BA if the period began after the end of the 2020-21 income year; and
- (c) Is in the knowledge, possession, or control of the trustee.

28. The Commissioner may issue a notice requiring the trustee of each trust having the characteristics specified in the notice to provide, in the prescribed form and by the specified date, information:

- (a) That is described in s 59BAB(1) and is specified in the notice; and
- (b) Is for each period that is specified in the notice and begins after the end of the 2013-14 income year and ends before the beginning of the 2021-22 income year.

29. If the trustee of a trust is a non-resident, a settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed on the trustee by this section.



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