

PS LA 2001/12 - Lodgment of Ultimate Beneficiary Statements

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ATO Practice Statement

Law Administration

PS LA 2001/12

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: Lodgment of Ultimate Beneficiary Statements

PURPOSE: To clarify the circumstances under which a trustee of a closely held trust is required to lodge an ultimate beneficiary statement ('UB statement') and the circumstances in which the UB statement period will be extended.

BACKGROUND

1. Division 6D of the *Income Tax Assessment Act 1936* (ITAA 1936) requires the trustees of closely held trusts with a trustee beneficiary to provide the Commissioner with a UB statement within a specified period ('the UB statement period'). Under paragraph 102UH(b) of that Division, the Commissioner has the discretion to extend the UB statement period.
2. UB statements enable the Commissioner to determine whether there are ultimate beneficiaries of income and other present entitlements arising from the trust and distributed through a trustee beneficiary. For a UB statement to be correct it must identify the ultimate beneficiaries and disclose the amount of trust income distributed to each ultimate beneficiary. These disclosure obligations apply to all trustees of closely held trusts that have trustee beneficiaries presently entitled to a share of net income. It includes the trustees of head trusts and trustees of sub-trusts in their capacity as a trustee of a head trust.
3. A resident beneficiary cannot be an ultimate beneficiary for the purposes of the legislation unless they have a tax file number ('TFN'). If a trustee is required to lodge a UB statement, for that statement to be correct, it must disclose the name and TFN for all Australian resident ultimate beneficiaries and the name and address for all non-resident ultimate beneficiaries.
4. Where the trustee is unable to provide the Commissioner with a correct UB statement within the UB statement period, the legislation imposes ultimate beneficiary non-disclosure tax ('UBNT') on the trustee at the highest marginal tax rate plus Medicare levy. For the 1998-1999 year, trustees of closely held trusts who distributed to a trustee beneficiary were required to lodge a UB statement when they lodged their income tax return for the trust.
5. In his Media Release 2000/107 of 27 November 2000, the Commissioner stated that he had extended the UB statement period subject to certain conditions. This Law Administration Practice Statement explains the conditions under which the

Commissioner's extension of the UB statement period ('the general extension') will apply.

6. The refined administrative arrangements are intended to assist trustees and tax practitioners to meet their obligations under the New Tax System and to more closely target compliance activity.
7. The operation of the UB legislation will continue to be monitored and will be reviewed within two years.

STATEMENT

8. For the 1999-2000 income tax year, lodgment of a UB statement is required where:
 - (a) the trustee did not lodge a UB statement for the 1998-1999 year;
 - (b) the trustee has a UBNT liability for the 1999-2000 year; or
 - (c) the Commissioner requests a UB statement.
9. For the 2000-2001 and subsequent income tax years, trustees are to indicate on the trust return if they are notionally required to lodge a UB statement under the income tax legislation. However, lodgment of a UB statement is only required where:
 - (a) the trustee has a UBNT liability for the year under consideration; or
 - (b) the Commissioner requests a UB statement.

Trustee did not lodge a UB statement for the 1998-1999 year

10. If a trustee was not required to lodge a UB statement in the 1998-1999 year, that trustee is required to lodge a UB statement in the 1999-2000 income tax year. The trustee may not have been required to lodge a UB statement in 1998-1999 where:
 - the trust was newly created in 1999-2000; or
 - a distribution was made to a trustee beneficiary for the first time since the UB legislation was introduced.
11. Trustees required to lodge a UB statement in the 1998-1999 year that have failed to do so must lodge the UB statement for that year.

Trustee has an ultimate beneficiary non-disclosure tax liability

12. For the majority of trustees, the relationship between the trustee, the trustee beneficiaries (sub-trusts) and the ultimate beneficiaries is such that the trustee can readily ascertain if there are ultimate beneficiaries presently entitled to the income of the trust and consequently whether there is a UBNT liability and a requirement to lodge a UB statement.
13. A UBNT liability arises if a trustee of a closely held trust that has trustee beneficiaries presently entitled to a share of net income is unable to disclose the

ultimate beneficiaries of that share of the net income. These circumstances could arise because there are no ultimate beneficiaries or the trustee cannot identify the ultimate beneficiaries.

14. If the trustee has a UBNT liability, the trustee must lodge a UB statement and pay the UBNT within 21 days of the due date for lodgment of the trust income tax return (or such later day as the Commissioner in special circumstances allows).

General interest charge ('GIC')

15. If UBNT is payable by the trustee, the general interest charge ('GIC') will accrue from 60 days after the original due date. However, the Commissioner may remit the GIC if he is satisfied that the trustee did not know or could not reasonably be expected to know that there was no ultimate beneficiary, and it is reasonable in all the circumstances to do so.

Commissioner requests lodgment of a UB statement

16. The Commissioner may require lodgment of a UB statement even though the criteria for extending the UB statement period are met. Where the Commissioner requests that a trustee lodge a UB statement, the Commissioner will provide a minimum of 28 days and such further time as is reasonable in the circumstances, for the trustee to comply.
17. In recognition of the substantial work load that may be imposed on the trustee in preparing a UB statement, any requests for the preparation and lodgment of a UB statement will be authorised by an Executive Level 2 officer. Where the liability for UBNT could potentially fall on more than one trustee (ie, because the head trust has trustee beneficiaries (sub-trusts) that are also head trusts in their own right) the decision as to which trustee(s) should be requested to lodge a UB statement will be made having regard to all the circumstances of the case including the size and complexity of the UB statement.
18. For example, the Commissioner may require lodgment of a UB statement where, during an audit or other enquiries, it is revealed that the present entitlement income may not have gone to ultimate beneficiaries. In such a situation, if there is more than one trustee beneficiary (there may be more than one sub-trust) the Commissioner will generally first request the trustee of the lower level sub-trust to lodge the UB statement and pay any UBNT. This means that the burden of preparing the UB statement falls on the lower level trustee liable to make and lodge a UB statement. This is reflected in the examples at paragraphs 28 and 29.
19. In situations where the Commissioner has requested a trustee to lodge a UB statement and the trustee cannot obtain a TFN from a beneficiary but can identify the beneficiary, representations by the trustee will be considered on merit having regard to all the circumstances. The underlying intention of the legislation is not simply to impose UBNT in circumstances where beneficiaries who are identified do not have a TFN. The requirement to quote a TFN is to allow the Commissioner to establish the identity of the ultimate beneficiary and to enable tracing of the distribution.

Extension of statement period in other circumstances

Trustee is not in a position to readily identify all ultimate beneficiaries (service trusts and large discretionary trusts)

20. In instances where the head trust has sub-trusts that are also head trusts in their own right, the trustee of the first level head trust, may not, in practice, be in a position to readily identify all ultimate beneficiaries. This arrangement typically exists where a number of professionals operate a service trust, but may also occur in other large discretionary trusts. In such instances (and where paragraphs 23, 24, and 25 of this Law Administration Practice Statement are not applicable) it is accepted that the head trust may not be in a position to identify all ultimate beneficiaries. Where this occurs, the trustee of the head trust will not be required to prepare and lodge a UB statement unless requested by the Commissioner. As stated above, it is acknowledged that sub-trusts could also be head trusts in their own right. It is expected that the trustees of the sub-trusts will have knowledge of the ultimate beneficiaries and will consider if there are ultimate beneficiaries presently entitled to the income of the trust and consequently whether there is a UBNT liability and an obligation to lodge a UB statement.

Trustee cannot obtain a TFN from a beneficiary but can identify the beneficiary (minors and tax exempt charities)

21. In situations where the ultimate beneficiary is a minor receiving income below the tax threshold or is a tax exempt charity and has not requested notification of their TFN from the ATO, a trustee will not have a UBNT liability merely because the minor or charity does not have a TFN. The general extension will apply in these circumstances and the trustee will not be required to prepare and lodge a UB statement unless the Commissioner requests it.
22. If the trustee is required to lodge a UB statement, the Commissioner will continue his administrative practice of providing the trustee with an extension of time to enable minors and charities to obtain a TFN.

Extension does not apply where no ultimate beneficiary or where tax avoidance scheme

23. The Commissioner's announcement extending the UB statement period does not relieve trustees of their obligation to prepare and lodge a UB statement and to pay UBNT where the trustee knows, could reasonably be expected to know, or reasonably believes or suspects, that there is no ultimate beneficiary to some or all of the present entitlement income.
24. The test in respect of *know, could reasonably be expected to know, or reasonably believes or suspects* depends on the facts of the case taking into account the relationships between the trustee, the trustee beneficiaries, ultimate beneficiaries and tax agent(s). Where, for example, the trustee enters into an arrangement to reduce tax with a third party and is told that the third party has a means of dealing with the trust income in a tax effective way that the trustee does not need to know about, a reasonable trustee in those circumstances might suspect that there are not ultimate beneficiaries. The trustee cannot, in these circumstances, avoid lodging a

UB statement by being indifferent to what happens to the trust income where a reasonable trustee would be on notice to make enquiries.

25. Trustees that make distributions as part of a tax avoidance scheme or arrangement are also not entitled to extension of the UB statement period. This includes arrangements that use multiple trust structures in an attempt to avoid or indefinitely defer tax.

EXAMPLES

Example - trustee is expected to know all ultimate beneficiaries

26. Trustee of the ABC Unit Trust distributes to the trustee of the XYZ Trust who distributes to M, N, O and P as ultimate beneficiaries. All entities and beneficiaries are associated and the same accounting firm handles their tax matters. The trustee of ABC Unit Trust is expected to know all ultimate beneficiaries as per paragraph 12.

Example - trustees are expected to know all ultimate beneficiaries

27. Trustee of the Paul Property Trust distributes to the trustee of the Julie Property Trust. The trustee of the Julie Property Trust distributes to the trustee of the Daniel Development Trust. The trustee of the Daniel Development Trust distributes to Jack and Kelly (two natural persons). The accountants for the Paul Property Trust and the Julie Property Trust are the same firm. The accountants for the Daniel Development Trust are a separate firm, however the trustees for the three trusts are three companies, each with associated directors. In this case, the trustee of both the Paul Property Trust and the Julie Property Trust are expected to know all ultimate beneficiaries as per paragraph 12.

Example - head trust not required to identify all ultimate beneficiaries unless requested to lodge a UB statement

28. The trustee of the Big Service Trust distributes to the trustees of the Pink, Purple, Blue, Green and Indigo discretionary trusts. The trustees of these five discretionary trusts distribute through a series of sub-trusts to 500 ultimate beneficiaries. The tax matters of the various trusts and beneficiaries are handled by a number of unrelated accounting firms and the entities and individuals are predominantly unassociated other than through the relationship created by the service trust. In this example, the trustee of the Big Service Trust is unlikely to know the identity of the ultimate beneficiaries without substantial enquiry. There is no requirement for that head trustee to actively make enquiries to positively identify all the ultimate beneficiaries unless and until called upon to lodge a UB statement. However, as pointed out in paragraph 23, a trustee who knows or reasonably suspects that there is no ultimate beneficiary of some or all of the present entitlement income is required to lodge a UB statement. A trustee with such knowledge or suspicion cannot later claim they were entitled to an extension of the UB statement period just because the trust was a large service trust or other large discretionary trust. Further, the trustees of the sub-trusts in their capacity as trustees of head trusts are expected to consider if there are ultimate beneficiaries presently entitled to the income of the trust and consequently whether they have a UBNT liability and an obligation to lodge a UB statement.

Example - when the Commissioner might request lodgment of a UB statement

29. Assume in the example in paragraph 28 that, during the course of an audit, the case officer suspects that the income of the Big Service Trust distributed to the Purple Trust and to which there was a present entitlement from that trust, did not flow to an ultimate beneficiary. In this case, the officer could require the trustee of the Purple Trust (as a relevant interposed head trustee) to lodge a UB statement and, if necessary, pay UBNT. The trustees of the other interposed trusts (Pink, Blue, Green and Indigo) would not be called upon to lodge UB statements unless there was a reason to suspect that the interposed trusts did not have ultimate beneficiaries. In this example, it is not appropriate to call for a UB statement from the trustee of the Big Service Trust. It is sufficient for the purposes of applying the legislation to obtain the information from the trustee of the Purple Trust who is directly involved in a distribution of income in the manner at which the legislation is directed. In this way, the legislation is used to target the lower level trust liable under the law and not to impose an unnecessary burden on other trustees. Similarly, if another trust further down the distribution chain was a lower level trust liable under the law, the request to lodge a UB statement would first be directed to that trustee. A failure or refusal to lodge a UB statement when properly called upon to do so, immediately results in a recoverable UBNT liability together with GIC and action would then be initiated to recover this liability from the relevant trustee. Where the trustee knew a UBNT liability existed, the circumstances may render the trustee personally liable for the tax.

Amendment History

Date of amendment	Part	Comment
2 April 2012	Contact details	Updated contact details

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ITAA 1936 102UH(b)

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