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Ruling Compendium – TR 2010/6

This is a compendium of responses to the issues raised by external parties to draft TR 2009/D4 – Income tax, Pay As You Go Withholding and fringe benefits tax: tax consequences on the issue, holding and redemption of bonus units as part of an employee benefits trust arrangement

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	The following suggestions relate to the structure of TR 2009/D4: 1.1 The situation described in TD 2009/D5 is similar to TR 2009/D4 and, therefore, should be included as a third variant or at least referred to in the Part IVA section of the Taxation Ruling. 1.2 A paragraph should be included in the summary section highlighting the differences between the two variants of the arrangement. This would include highlighting the differences noted at issue 2 of this compendium.	Paragraph 87 of the final Ruling refers to the Part IVA analysis in Taxation Determination TD 2010/10. The beginning of paragraph 7 of the final Ruling now recognises that the different elements in the paragraph are not dependant on the cancellation of an employee's ordinary units.
2.	The following differences were identified in respect of the two variants: (i) In paragraph 5, the bonus units can only be cancelled when the corresponding ordinary units are cancelled (subparagraph 5(i)); whereas there appears to be no such restriction for the fringe benefit variant.	As noted at issue 1.2 of this compendium, paragraph 7 of the final Ruling identifies that what happens with the bonus units is not dependant on the cancellation of an employee's ordinary units. How, and when, value in the employer contribution capital account is transferred to an employee's bonus units, and, then the bonus units are redeemed, depends on the particular arrangements between the employer and the trustee of the trust.

Issue No.	Issue raised	ATO Response/Action taken
2. cont	(ii) In paragraph 5, the bonus units do not give the holder any rights or interests in the assets or income of the trust and the cancellation entitlement is typically a cash amount that is based upon either the amount paid to acquire the ordinary units or a proportionate share of the value of the trust assets allocated to the employee's ordinary units (subparagraphs 5(m)&5(n)); whereas in the fringe benefit variant the bonus units give the holder rights to and interests in the assets of the trust and the cancellation entitlements are based on those rights and interests in the trust (subparagraphs 7(d)&7(e)). (iii) In both the variants, the arrangement is seen as a way of rewarding the employee for work done for the employer (after satisfying certain performance hurdles) but, in paragraph 5, it is through 'the issue, redemption and cancellation of the bonus units' (subparagraph 5(j)); whereas in paragraph 7, it is only through 'the issue of the bonus units' (subparagraph 7(b)). In other words, in paragraph 7, the reward is provided when the bonus units are issued but, in paragraph 5, the reward is not provided until the redemption of the bonus units.	It is clarified in paragraphs 7(d) and 7(e) of the final Ruling that the bonus units do not give the holders rights to, and interests in, the assets of the trust. Rather, a bonus unit gives its holder rights to a value held in the employer contribution capital account or in the holder's bonus unit account. It is also noted that, in paragraph 5 of the final Ruling, both an employee's ordinary units and bonus units are cancelled at the same time, and that the employee's outstanding loan balance will usually equal, and be offset against the cancellation entitlement for the bonus units. Those assumptions do not apply to the arrangement in paragraph 7.

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Issue No.	Issue raised	ATO Response/Action taken
2. cont	(iv) In paragraph 5, the cancellation entitlement for the bonus units will usually equal the employee's outstanding loan balance, and will be offset against and, therefore, extinguish the loan from the trustee to the employee (subparagraph 5(p)) (although example 1 in the draft ruling indicates the loan balance could be offset against either the ordinary or bonus units balance); whereas there is no description in the draft ruling of how the employee's loan balance is dealt with in paragraph 7.	
3.	Paragraphs 16 and 17 of TR 2009/D4 should state clearly that where the arrangement results in a taxable fringe benefit, the Commissioner will not apply Part IVA to any perceived tax benefit.	Paragraph 16 of the final Ruling now recognises that Part IVA will not apply to include in the assessable income of a taxpayer, the non-assessable, non-exempt income under section 23L of the <i>Income Tax Assessment Act 1936</i> that is referred to in paragraph 21 of the final Ruling.
4.	Concerns raised in respect of the application of Fringe benefits tax (FBT) to the arrangement. The following issues were raised: (i) How FBT can apply to the proceeds of a contribution to an employee share trust when FBT does not apply to the contribution to the trust?	The application of FBT is considered in the final Ruling at paragraphs 18 to 24 and 87 to 106. In particular: (i) At the time of the contribution to the employee benefit trust (paragraph 5(b) of the final Ruling), there is no 'fringe benefit' provided in respect of the employment of a particular employee (<i>FC of T v. Indooroopilly Childrens Services P/L</i> [2007] FCAFC 16). However, the final Ruling explains how FBT may apply once bonus units issue to a particular employee as a reward for work done for the employer.
4. cont	(ii) How is there an arrangement with an employer where a trustee exercises its fiduciary duty or uses its discretion? Either a trustee had independent discretion or he does not?	(ii) The arrangement as described in the final Ruling states that there is a tacit or express understanding between the trustee and the employer and employee that the employee will be rewarded by the trustee for work done.

Issue No.	Issue raised	ATO Response/Action taken
	(i) How the surrender of a right in the trust is wages or salary for services rendered – CGT events are involved? It seems that several previous private rulings have (correctly) accepted or would imply that a payment of capital from a trust by a trustee, acting as trustee, and not as agent of an employer, are capital payments arising from rights under the trust and are not benefits provided 'in respect of employment'. We refer you to the following ATO decisions or private rulings (PR) where this approach (or an approach which implies the same result) seems to have been taken: • ATO ID 2003/316 (last 4 paragraphs) • PR 86360 (paragraph 9 explanation paragraph 8) • PR 85494 (paragraph 9 explanation paragraph 8) • PR 85242 (paragraph 4 explanation paragraph 4) • PR 83658 (explanation Issue 3 'shares').	(i) The final Ruling concludes that the provision of bonus units and the transfer of value to an employee's bonus unit account amount to the provision of fringe benefits. ATO ID 2003/316, and private rulings 86360, 85494, 85242 and 83658 do not deal with that conclusion. They deal with the consequences of the surrender of rights or the exercise of options to obtain shares. The final Ruling does not say that FBT applies to the surrender of the bonus units.
4. cont	(ii) We also note that in CITCM 476, at page 1, the ATO acknowledged that a non-vested amount credited to an employee superannuation account could not be considered a benefit and, on the same reasoning, we cannot see how employer contributions to an employee share trust (which are exempt from FBT) can become a benefit merely by being credited to a non-vested member account.'	(ii) The trust referred to in the final Ruling is not an employee share trust because its activities do not include ensuring that employee share scheme interests are provided to employees. Under either paragraphs 5 or 7 of the final Ruling, an employee does not acquire any interest in the assets of the trust.