

TR 2015/4EC - Compendium

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Ruling Compendium – Taxation Ruling TR 2015/4

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2015/D2 *Income tax: CGT small business concessions: unpaid present entitlements and the maximum net asset value test*

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	Definition of UPE in paragraph 3 The reference to capital distribution should be specifically drawn out by a footnote reference to <i>Bell v. Federal Commissioner of Taxation</i> [2013] FCAFC 32, which is an example of a UPE arising from a one-off distribution of capital (as opposed to an annual trustee resolution to determine the distribution of income and capital of the trust).	Footnote added to paragraph 3 as suggested.
2	Explanation of how a UPE becomes an absolute entitlement to trust assets It is implicit in the draft Ruling that a trustee resolution to distribute income of the trust to a beneficiary, while sufficient to create an unpaid present entitlement, does not create an absolute entitlement to one or more trust assets. The reasoning behind this should be expressly stated and an example provided of a situation where a UPE is or becomes an absolute entitlement to one or more trust assets. The flip side of this should also be explored: the draft Ruling should confirm whether every instance of absolute entitlement is also a UPE for these purposes.	Given that TR 2004/D25 deals more comprehensively with the issue of when a beneficiary is absolutely entitled to a trust asset as against the trustee, it is not thought appropriate to address the issue in detail in the present Ruling. The ATO is currently reviewing TR 2004/D25 in light of court decisions since its publication and awaits further guidance in the pending Federal Court matter of <i>Oswal</i> . We will take this comment into account in updating that Ruling.

Issue No.	Issue raised	ATO Response/Action taken
3	TR 2004/D25 TR 2004/D25 does not contain a relevant example of when a UPE is or becomes an absolute entitlement to one or more trust assets. TR 2004/D25 needs to be updated and issued as final in light of court decisions since 2004. Industry has a number of concerns with certain views taken in TR 2004/D25. The examples/discussion also needs to be expanded to cover common situations governed by ATO practice where the ATO may apply the law as though the beneficiaries are absolutely entitled.	The ATO has been in ongoing consultation with practitioners regarding issues around absolute entitlement via the former National Tax Liaison Group Trust Sub-group and the Consultation Hub. As noted above, the ATO is currently reviewing TR 2004/D25 and will take these comments into account in updating that Ruling.
4	Whether UPE relates to assets of trust Paragraph 62 suggests that not every UPE will relate to the assets of the trust. It should be amended to state that a UPE, as defined in the draft Ruling, will always relate to the assets of the trust. The final ruling should also state that where a loan merely replaces an existing UPE that relates to trust assets (that is, the funds represented by the loan are used for the same purposes as the UPE) then the loan will relate to the assets of the trust. In particular, where a trust deed stipulates that a UPE 'automatically' converts to a loan, the Ruling should state that this loan will relate to the assets of the trust. If the ATO takes a contrary view, an example should be provided. The Ruling should then confirm whether double counting would arise in such a situation.	Modification made to wording of paragraph 62 as suggested. However, we do not agree that where a UPE is replaced by a loan, that loan will automatically relate to trust assets. Regardless of whether the loan arises by agreement between the trustee and beneficiary or by operation of the deed, the relationship between the loan and the assets of the trust will depend on what use the borrowed funds are put to in each case. That is, the test for whether that loan relates to trust assets will be the same as for any other loan obligation owed by the trustee on behalf of the trust. For example, if the UPE is converted into a loan and the trustee then neither keeps those loan funds as an asset of the trust nor uses them to acquire other trust assets, but rather facilitates or allows those funds to otherwise leave the trust, <i>Bell v. Federal Commissioner of Taxation</i> [2013] FCAFC 32 suggests (at paragraph 39) that the trustee's liability to repay the loan may not relate to any asset of the trust. In such a case, whilst the loan will not be taken into account as a relevant liability, the funds corresponding to the loan will have left the trust so will not be counted as trust assets. That is, the trust will have neither an asset nor a liability to count in respect of the loan.

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4 cont		In the connected beneficiary's hands, the loan will be a CGT asset. A loan is a 'debt' within the meaning of paragraph 152-20(2)(a) (being a legal obligation to pay a sum of money to another) so it will not be disregarded. In this example, the value of the loan is therefore counted only once in the trust's net asset value, as part of the assets of the connected beneficiary.
5	Order of ruling It is more common in practice for a beneficiary to have an entitlement to funds rather than an asset. This more common situation should be dealt with first in the Ruling.	Ruling and explanation reordered as suggested.
6	Order of examples Examples should reflect the order in which issues are addressed in paragraphs 5, 6 and 7 of the draft Ruling.	Ruling reordered so that examples now reflect the same order.
7	Terminology Practitioners are accustomed to the terminology used in TR 2010/3 and PS LA 2010/4. Concepts used in the Ruling should relate back to that earlier guidance where possible.	Additions made to ruling to relate concepts of 'sub-trust' and 'loan' to TR 2010/3 and PS LA 2010/4.