

## TR 2005/D15<sup>1</sup> – Issues compendium

This table lists issues raised, and Tax Office responses, in relation to Draft Taxation Ruling TR 2005/D15 (the meaning of the words ‘the beneficiaries and terms of both trusts are the same’ in paragraphs 104-55(5)(b) and 104-60(5)(b) of the ITAA 1997)

Issue No.	Issue raised	Tax Office response
1	<p>The identity of the appointor of a trust is <u>not</u> a term of the trust. Therefore, the exception may be satisfied if the trusts have different appointors.</p> <p>The terms of a trust are determined by the trust’s settlor and the duty of the trustee is to strictly adhere to, and carry out, those terms. They do not necessarily include the identity of the appointor. For example, the identity of the appointor is not a term if the trust deed provides a mechanism for replacing the appointor.</p> <p>The view in the Draft TR that the appointors must be the same is inconsistent with the fact that changing a trust’s appointor will not trigger a resettlement of the trust.</p> <p>Anyway, a requirement that the appointors be the same is pointless because they can simply be changed after the transfer.</p>	<p>We acknowledge the strength of the view put on this issue in various submissions received. However, that view does not accord with the purpose or object underlying the exception. If it was accepted, it would mean the exception could be used to change the identity of the person who effectively controls an asset without triggering a CGT taxing point. As the exception is designed to prevent a CGT taxing point only where there is a change in the trustee (and no other change in the trust arrangements) we prefer the view that the identity of the appointor is a term of the trust for the purpose of applying the exception.</p> <p>The fact that a mere change of appointor may not trigger a resettlement is not relevant in considering whether the exception applies. Whether or not there is a resettlement is about determining the threshold question of whether there has been a disposal of the assets from one trust to a new one. Whether or not the exception applies is about determining whether that disposal constitutes a CGT event. They are two different things and while they are governed by similar criteria, they each involve different considerations.</p> <p>In respect of the comment that the appointors can simply be changed after transfer, it is noted that the general anti-avoidance provisions in Part IVA of the ITAA 1936 may be relevant where a conclusion can be reached that a scheme has been entered into for the dominant purpose of obtaining a tax benefit.</p>

<sup>1</sup> This Ruling has been finalised as Taxation Ruling TR 2006/4

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2	<p>The finalised TR should have a prospective date of effect if it maintains that the identity of an appointor is a term of the trust.</p> <p>In this regard, the Ruling constitutes a change in the Commissioner's interpretation of the law.</p> <p>[ATO ID 2003/554 (published on 11 July 2003 and withdrawn on 13 May 2005) said the appointors could be different. ATO ID 2005/175 (published on 24 June 2005 and withdrawn on 28 September 2005) said appointors need to be the same. As the TR applies before the date of its issue, it is inconsistent with ATO ID 2003/554.]</p>	<p>TR 2006/4 has both past and future application.</p> <p>The Draft TR was consistent with ATO ID 2005/175 (which was only withdrawn on publication of the Draft TR). Both said the appointors must be the same.</p> <p>However ATO ID 2003/554, which was withdrawn several months before publication of the Draft TR, said the appointors could be different.</p> <p>TR 2006/4 has both past and future application because ATO ID 2003/554 does not represent a general administrative practice by the Commissioner and therefore the Ruling does not change the Commissioner's interpretation of the law. An ATO ID is simply a summary of a decision on an interpretative issue and is merely indicative of the Commissioner's view on the interpretation of the law on that particular issue at that time.</p>
3	<p>A family trust or interposed entity election made by a trustee of a trust is <u>not</u> a term of the trust. Therefore, the exception may be satisfied if, for example, the original trust has made a family trust election but the new trust has not.</p>	<p>We acknowledge the strength of the view put on this issue in various submissions received. However, given the statutory context of the exception, we take the view that, in that context, such elections are terms of the trust.</p> <p>The trustee is bound by the election. The election relates to the trust property. The election imposes an obligation on the trustee to pay family trust distribution tax if trust property is distributed outside the family group. The fact that the election affects the way in which a trustee may deal with trust property suggests that the making of the election amounts to a term of the trust.</p> <p>Also, adopting the view that such elections are not terms of the trust does not accord with the purpose or object underlying the exception. In particular, it would mean the exception could, in effect, be used to facilitate the revocation of the election. This would be contrary to the scheme of the relevant provisions which provide that such elections can be revoked only in limited and specified circumstances.</p>

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		Note: the nature of the obligation imposed on a trustee as a result of making an election has been clarified (see paragraph 178 of TR 2006/4).
4	<p>Assume a family trust election <u>is</u> a term of the trust. What happens if the trustee of the original trust has made a family trust election in respect of a test individual who has since died?</p> <p>The death of the test individual means the new trust cannot make a family trust election in respect of the deceased test individual (as is required by the Draft TR in order to satisfy the exception).</p> <p>Can the exception be satisfied in these circumstances by the trustee of the new trust making an interposed entity election in respect of the test individual's family group?</p>	<p>The exception cannot be satisfied in these circumstances. See new Example 19.</p> <p>A family trust election cannot specify a deceased individual as the test individual (though a family trust election already in place is not affected by the death of the test individual). Therefore, the new trust cannot make the same family trust election as was made by the original trust and the exception cannot be satisfied.</p> <p>The new trust can make an interposed entity election. But that will not satisfy the exception. Family trust elections and interposed entity elections are different things and the exception contemplates the transfer of an asset from one trust to another to be held on the same trust arrangements <i>without any change at all</i> in the trust arrangements. (See extract from Explanatory Memorandum quoted at paragraph 27 of the Draft TR and at paragraph 98 of TR 2006/4.)</p>
5	Assume the view in the Draft TR about family trust elections is retained in the final version of the ruling. What happens if trusts have used the exception without making the elections required by the Draft TR (which is the first time the Tax Office has stated this requirement)? Linked to issue 2 (about date of effect).	<p>The Tax Office had not indicated its view on the family trust and interposed entity election issues prior to issuing the Draft TR.</p> <p>However, the fact that a Ruling is the first time the Tax Office has stated its view of the law in relation to a particular matter does not mean the Ruling should have only future application. Even if uncertainty existed previously in an industry, market or among taxation advisers and taxpayers, a Ruling that is issued to clarify this uncertainty should have both a past and future application (see paragraph 64 of Draft TR 2006/D6).</p>
6	Can the exception apply to self managed superannuation funds (SMSFs)?	<p>In theory yes, but in practical terms rarely.</p> <p>Our understanding is that the exception would generally be sought to be used, for example, where one member of a SMSF (the continuing member) wishes to separate their interests from those of the other fund members (non-continuing</p>

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		<p>members) and seeks to do this by starting their own fund and transferring their account balance from the original fund to the new fund. Immediately after the transfer all the members of the original fund are members of the new fund, but the 'non-continuing' members have only a nominal account balance. Eventually though, the continuing member would be the only member of the new fund and the non-continuing members would be the only members of the original fund.</p> <p>The exception is not satisfied in these circumstances because the member entitlements in the new fund (just after the transfer) are not the same as the member entitlements in the original fund (just before the transfer).</p> <p>Example 18 has been added to TR 2006/4.</p>
7	Can the exception apply to an asset transfer between two unit trusts if the interests of the unit holders in the new trust are different from those held by them in the original trust?	No. The exception is not satisfied. It is considered that the terms of a trust include the extent of a beneficiary's interest in the trust. So unless the beneficiaries have identical interests in each trust the exception cannot be satisfied. See paragraph 79 of the Draft TR and paragraph 159 of TR 2006/4.
8	Ensuring that the vesting dates of the two trusts are the same can be difficult if (as is generally the case) the trusts were established on different dates.	If it is not possible to reproduce the terms of the original trust (as in issue 4) then the exception cannot apply. Practitioners should take particular care in drafting the vesting date clause for the new trust.
9	The 'same' does not necessarily mean 'identical'. It depends on its context. And in that regard there is strong support for the view in the Draft TR.	Noted.
10	Does the legislative reference to 'the beneficiaries' refer only to those entities in existence at the transfer time or also to those that may come into existence in the future?	In our view the reference to 'the beneficiaries' includes a reference to a class of beneficiaries (see paragraph 49 of the Draft TR and paragraph 123 of TR 2006/4). A class of beneficiaries includes (without the need to name them specifically) those who currently satisfy the conditions for membership of the class. And the nature of the class may be such as to permit of the possibility of others joining the class in the future.

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		It has been clarified that a reference to a class of beneficiaries means it is not necessary to identify specific beneficiaries in existence at the transfer time (see paragraph 130 of TR 2006/4 and response to issue 12 below).
11	<p>The Draft TR (paragraph 70) says if the trustees are the same and the beneficiaries and terms are the same, then there would only be one trust.</p> <p>But are there any cases where the powers conferred on the trustee by the terms of the trust would be such that, unless the trustees were identical, the terms of the trust could not be said to be the same?</p> <p>Also, the trustees were the same in the AAT case quoted in paragraph 50 of the Draft TR as authority for the fact that the beneficiaries need to be exactly the same. The case proceeded on the basis that the exception would have been satisfied had the beneficiaries been precisely the same.</p>	The reference to there being only one trust in these circumstances has been removed.
12	The exemption should be available even if deceased beneficiaries are named in the new trust (though there is no problem if they are not). There may be thousands of potential beneficiaries of a discretionary trust (eg. any person who is a shareholder of a company in which the beneficiary owns shares). It would be almost impossible to determine how many of these have died and then exclude them from the new trust.	<p>The beneficiaries of the original trust do not include a person who has ceased to be a beneficiary of the trust for any reason, including because they were the object of a discretionary trust but have since died.</p> <p>The reference to deceased beneficiaries is only to beneficiaries who are specifically named in the deed. This has been made clearer, see paragraphs 127 to 129 of TR 2006/4.</p> <p>On the other hand, a reference to a class avoids the need to specifically name or identify particular members of the class in the trust deed. Therefore, the beneficiaries of both trusts will be the same provided the new trust refers to the same class or classes of beneficiaries as were referred to in the original trust (with the proviso that any members of the class who had effectively renounced</p>

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		<p>their rights under the original trust would need to be excluded from the beneficiary class described in the new trust). See paragraphs 130 to 131 of TR 2006/4.</p> <p>That is, there is no requirement that, in order for the exception to apply, members of the class of beneficiaries referred to in the original trust deed must be specifically named or identified in drawing up the deed for the new trust. Therefore there is no need to identify deceased beneficiaries in respect of a class. In fact, moving from a class list to a specific list may change the beneficiaries from a floating to a fixed class which would mean the exception was <i>not</i> satisfied.</p>
13	<p>The precise effect of renunciation is uncertain. It may be that the renouncing beneficiary does not cease to be a beneficiary of the original trust (see TD 2001/26).</p> <p>It would be better to be able to ignore completely any beneficiaries who have renounced their interests in the original trust. Otherwise they would have to be made beneficiaries of the new trust and then renounce again.</p>	<p>The beneficiaries of the original trust do not include a person who has ceased to be a beneficiary of the trust for any reason, including because they have renounced their rights under the trust.</p> <p>The Ruling is only looking at a situation where renunciation by a beneficiary is effective to extinguish the beneficiary's rights and interests under the trust. It does not comment on when a renunciation will be considered effective and does not suggest that all purported renunciations are effective.</p> <p>If a beneficiary's renunciation in respect of the original trust is effective, then they are no longer a beneficiary of the original trust and, in order for the exception to apply, they should not be named as a beneficiary of the new trust (and should be specifically excluded from any relevant class). On the other hand, if a beneficiary's renunciation in respect of the original trust was <u>not</u> effective then, in order for the exception to apply, it will be necessary to name them as a beneficiary of the new trust.</p>
14	<p>The view that beneficiaries who hold their interests in different capacities are different beneficiaries (para 58 of the Draft TR) is inconsistent with the view that the exemption applies if the 'direct' beneficiaries of the</p>	<p>This has been clarified (see paragraph 137 of TR 2006/4). The 'direct beneficiaries' discussion is subject to the 'different capacities' discussion. That is, in each capacity that an entity holds an interest in a trust, they will be considered a different beneficiary. Therefore, the exception is not satisfied if an</p>

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	two trusts are the same (paragraphs 54 to 56).	entity is a direct beneficiary of both trusts, but is acting in a different capacity in respect of each trust.
15	Delete the last sentence of paragraph 55 in the Draft TR (about 'distribution' rather than 'transfer'). It adds nothing and may only confuse.	Sentence has been deleted (see paragraph 133 of TR 2006/4).
16	Statutory terms should not be taken into account as they are not really 'terms' of the trust.	The terms of a trust include the trustee's powers and duties and these may be conferred upon the trustee by the trust instrument, by statute and by the court. <sup>2</sup>
17	<p>Two trusts may be subject to different statutory rules due to the application dates of various legislative amendments.</p> <p>Also, different statutory rules may apply to trust property situated in different states. For example, if the original trust has land situated in Victoria and the new trust does not, then the Victorian laws dealing with land ownership would apply to the original trust but not the new trust. A common sense approach is needed.</p>	<p>If it is not possible to reproduce the terms of the original trust as a result of legislative changes to the rules under which a trust of they type operates, then the exception cannot apply (paragraph 145 of TR 2006/4).</p> <p>The statutory rules that must be the same are those in the nature of State trust legislation that governs the operation of trusts within its jurisdiction. There is no requirement that other statutory rules must be the same, such as those governing property or transactions that apply more generally and regardless of whether the person undertaking the transaction is a trustee.</p>
18	Use of a non-exhaustive definition of 'terms' is not helpful. It suggests there are provisions of a trust deed, other than those mentioned, which could also be 'terms'.	The TR says the terms of a trust <i>include</i> those set out in the trust deed and those implied by statute and the general law (paragraph 148 of TR 2006/4). This is not an exhaustive list of the places where you may find the terms of a trust. For example, the terms of a trust may in some cases be conferred by a court.
19	There is some potential for misunderstanding by taxpayers as to whether the wording of each term must be identical in order for the terms to be the same.	The wording of the trust deeds do not have to be identical but they must have the same meaning and effect. In determining whether the terms of two trust deeds have the same meaning and effect, the language used in each deed must be construed strictly according to its proper legal meaning.

<sup>2</sup> Meagher RP and Gummow WMC, *Jacobs' Law of Trusts in Australia*, Sixth edition, Butterworths, Sydney, 1997 at 554.

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	<p>For example, are the terms of two trusts the same if one says '<i>the trustee may borrow moneys from any bank or other lending institution on terms that it thinks fit</i>' and the other says '<i>the trustee may borrow moneys from any bank or credit union or other lending institution on terms it thinks fit</i>'?</p>	<p>The scenario raised is now included in TR 2006/4 as Example 13. It is considered that the terms are the same.</p>
20	<p>Taking into account paragraph 34 of the Draft TR, it is difficult to see how the original trust and the new trust could be the same unless they are precisely identical, including every right, power, indemnity, decision-making process, commissions, fees, way in which notices must be given etc.</p> <p>There is potential for confusion as to whether small anomalies between the original trust and the new trust mean the terms of the trusts are not the same. If the trust deeds must be identical reflections of each other then the TR should say so.</p>	<p>Any difference in meaning, no matter how small, means the exception will not be satisfied. See paragraph 6 of TR 2006/4.</p>