

## OPERATIONAL STATEMENT

# Excusing estates from filing income tax returns

Issued: 24 August 2021

OS 21/03

Operational Statements set out the Commissioner of Inland Revenue's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

This Statement sets out a change in the Commissioner's approach to applying the income tax return filing exemption in s 43B of the Tax Administration Act 1994 to estates.

All legislative references in this Statement are to the Tax Administration Act 1994, unless otherwise specified.

This Statement applies from the date of issue.

## Introduction

Section 43B allows trustees of non-active trusts to be excused from the obligation to file income tax returns if the trusts meet certain requirements.

With some exceptions, the Commissioner's general approach has been that s 43B only applies to non-active trusts. It does not apply to deceased estates that similarly derive no income. This is on the basis that "estates" are something different to "trusts".

The Commissioner has now modified her position to accept that there can be occasions during the administration of an estate where the estate property is held on trust and the s 43B exemption can apply.

This Statement sets out the broad approach that the Commissioner is taking to determining whether an estate's administration has got to that point.

## The requirement to file income tax returns

1. For income derived by a deceased person until the date of death, executors and administrators must meet whatever filing and income tax obligations the deceased would have had if they had remained alive (s 43). If the deceased only had "reportable income" (types of income where tax has been withheld at source by the payer, such as employment and investment income), these obligations can be met through the pre-populated account process in subpart 3B ("auto-calc").
2. Executors and administrators must also obtain a separate IRD number for the estate and make returns for income derived in the years following death.
3. The prescribed return form to be used for income derived after death is the same income tax return as prescribed for trustees (the IR 6 return). However, this is for administrative convenience rather than because an estate is a trust.

## Being excused from filing a return under s 43B

4. Under s 43B, a "trustee of a trust" can apply to be excused from the obligation to file income tax returns if they meet the specified requirements. These requirements concern being a "complying trust" as described in s HC 10 of the Income Tax Act 2007, making a declaration to the Commissioner as to various matters (the IR 633 form has been prescribed for this - more information can be obtained [here](#)) and also not having any income or deductible expenditure for the year, ie they are "non-active".
5. The reference to "trustee of a trust" means that any exemption from filing is limited to situations where there is a "trust".
6. While "trustee" is a defined term and can include an executor or administrator, "trust" is not a defined term in tax legislation and has the meaning it has in general law. That meaning is broad. However, a trust does not automatically arise in the administration of every estate. In general law, the position is that executors hold the property in the estate "in right of the deceased" and not in trust. 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.

7. Therefore, at some point in the administration of an estate a trust can arise, and that trust may qualify under s 43B. However, this does raise the question of how to determine when administration of an estate has got to the point that property that until then was part of the estate is now held on a trust.

## When will a trust arise in the administration of a deceased estate?

8. Executors and administrators of estates have duties to collect the deceased's property and to use it to meet any expenses, debts and legacies and to distribute what is left according to the directions in a will or the law of intestacy. A trust will only arise when executors and administrators have completed their duties to the point that they stand ready to "distribute" the remaining property (in technical terms, this is referred to as "assent"). The fact the estate administration has reached this point can be evidenced in various ways, depending on the particular circumstances. For example, it might be explicit in or able to be inferred from a letter to a trust beneficiary from an executor. Or it might be clear from their actions.
9. Interpretation Statement IS 18/01 *Taxation of trusts* has further discussion (from [9.25]) on taxation in the context of deceased estates.
10. At the time of assent, the distribution may be to separate trustees specified in a will (so it will usually be straightforward to identify that a trust has arisen). However, it is common for a will to specify that the executors are also to be the trustees so there is a distribution only in the sense that the executors cease to hold the property in their capacity as executors and begin holding the property in a separate capacity as trustees.
11. A trust provided for in a will is known as a testamentary trust. Testamentary trusts are general law trusts. It follows that a testamentary trust, once it arises, is a "trust" for the purposes of s 43B.
12. Once administration of an estate by executors gets to the point that the assets in the estate are ready for distribution and are held by trustees of a testamentary trust for beneficiaries and the assets do not generate any income, s 43B may apply. The testamentary trust may be expressly provided for in the will or it may be implied.
13. A common situation is where the only significant property in the estate is a house, and a family member is granted a life interest or is otherwise allowed to live in the house until their death.
14. Where the family member is granted a life interest, and the executors have completed their administration duties to the point of being ready to distribute, the house may be

held on trust for the life tenant (and for the remainder beneficiaries - ie those who stand to inherit on the death of the life tenant). In that case, because a trust has arisen for the life tenant, from the date of distribution of the property to the trustees the trustees can apply to be excused from filing under s 43B.

15. The situation differs where the family member is granted only a licence to reside in the property. In that case another person will take the property subject to the licence under the will or intestacy. In some cases, the property subject to the licence may be distributed to a trustee to be held on trust for that other person (for example, where the other person is a minor). In that case s 43B may apply to the trust for the minor beneficiary if the licence allows the licensee to reside in the property for no consideration.

## The Commissioner's approach

16. The Commissioner considers that executors and administrators are able to apply under s 43B to be excused from filing income tax returns where they have reached the point in administration of an estate that they are ready to distribute, or have distributed, the property in the estate to be held on trust for beneficiaries.
17. Executors and administrators who apply on this basis, or do so through their tax agent, will be excused if the trust in question meets the requirements of s 43B. They do not need to obtain a new IRD number for the trust, the number obtained earlier for the estate can be used.

This Operational Statement is based on the Commissioner's view of the law at the date of issue and applies until the statement is withdrawn, amended or any law change occurs. A legislative change to s 43B that may alter some or all the matters covered in this statement is currently being considered by the Policy and Regulatory Stewardship Unit of Inland Revenue.

This Statement was signed on 24 August 2021.

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