



TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA
TŪMATAITI

Charitable trust – transfer of assets

Decision date | Rā o te Whakatau: 24 February 2025

Issue date | Rā Tuku: 26 June 2025

TDS 25/16

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Subjects | Kaupapa

Income tax: charitable trust; transfer of assets; deregistration tax; asset stripping by trustees

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007 (Act) unless otherwise stated.

Summary of facts | Whakarāpopoto o Meka

1. The Arrangement in this ruling involves a Charitable Trust that is a charity registered under the Charities Act 2005 (CA 2005) (Charities Register). It has derived exempt income under ss CW 41 and CW 42.¹
2. The trustees of the Charitable Trust (Trustees) have been incorporated as a board under the Charitable Trusts Act 1957 (CTA 1957).
3. The Trustees propose to transfer all of the Charitable Trust's property (together with any related rights and obligations) (Trust Fund) to a new trust (New Trust) prior to its "end date". The end date is expected to be the day on which the Charitable Trust is removed from the Charities Register (End Date). The Charitable Trust would subsequently be wound up and its board of trustees dissolved under the CTA 1957.
4. The New Trust would be established for charitable purposes. The New Trust would hold and apply assets in furtherance of its charitable purposes in New Zealand. The New Trust does not intend to apply to be a registered charity at the outset but may do so in the future if it is considered to be in the best interest of the New Trust for advancing its charitable purposes.

Issues | Take

5. The main issues considered in this ruling were:
 - whether the Charitable Trust will have income under s HR 12(3) if it transfers all of the Trust Fund to the New Trust before the End Date;
 - whether s HD 15 applies to the Trustees as a result of their transferring the Trust Fund to the New Trust; and

¹ Sections CW 41 and CW 42 provide tax exemptions for income derived by a charity.

- whether s BG 1 applies to negate or vary the conclusions of the above issues.

Decisions | Whakataau

6. The Tax Counsel Office (TCO) concluded the following:

- No income will arise under s HR 12(3) to the Charitable Trust if the Trust Fund is transferred to the New Trust prior to the Charitable Trust's End Date.
- Section HD 15 does not apply to the Trustees in respect of the proposed transfer of the Trust Fund to the New Trust.
- Section BG 1 does not apply to negate or vary the above conclusions.
- The conclusions in this ruling are subject to conditions that had the following effect:
 - The trustees of the New Trust must ensure all funds will be applied in furtherance of the New Trust's charitable purposes and act in accordance with the New Trust's trust deed;
 - The Charitable Trust must, at all times, comply with its rules in the Charities Register for the purposes of the exemption under s CW 41 or s CW 42; and
 - If the exemption under s CW 41 or s CW 42 does not apply, then s HD 15 must continue to not apply. That is, it cannot be reasonably concluded that a purpose of the Arrangement was to effectively deplete the Trust Fund, so the Charitable Trust is unable to meet its existing or future tax liability. In addition, the Trustees, on making reasonable enquiries, could not have anticipated at the time of the Arrangement that such a liability would need to be met.

Reasons for decisions | Pūnga o ngā whakataau

Issue 1 | Take tuatahi: Income under s HR 12

7. Section HR 12 applies to a deregistered charity that derived exempt income under s CW 41 or s CW 42 when they were a registered charity. Where s HR 12 applies, the deregistered charity is deemed to have derived an amount of income calculated under s HR 12(3).

8. Relevantly, s HR 12(2)(c) provides that this provision does not apply to a deregistered charity if it would have less than \$10,000 of income under s HR 12 on its "end date". This provision is a safe harbour from the tax rules for deregistered charities.
9. The amount of income referred to in s HR 12(2)(c) is determined under s HR 12(3). Under s HR 12(3), a deregistered charity is deemed to have derived an amount of income that is equal to the market value of the net assets held by the charity on its "end date", ignoring the assets described in s HR 12(3)(a)-(e). Notably, assets that are transferred to a tax charity for charitable purposes within 1 year of the end date are ignored (s HR 12(3)(a)). However, for the purposes of this issue, s HR 12(3)(a)-(e) do not apply.
10. "End date" means the "day of final decision" (s HR 12(7)), which is relevantly defined as the day the relevant person is removed from the register of charitable entities under the CA 2005 (s YA 1). The Charitable Trust's End Date corresponds with the meaning of "end date".
11. Given the Charitable Trust proposes to transfer its Trust Fund to the New Trust before its End Date, the Charitable Trust will have no net assets on that date. It follows that the Charitable Trust will have \$10,000 or less income (it will have nil income) on the end date.
12. Therefore, TCO concluded that the safe harbour in s HR 12(2)(c) applies to the Charitable Trust, and it will have no income under s HR 12.
13. This conclusion is subject to the conditions that the trustees of the New Trust will ensure all funds be applied in furtherance of the New Trust's charitable purposes and act in accordance with the New Trust's trust deed. Further, the Charitable Trust must, at all times, comply with its rules in the Charities Register for the purposes of the exemption under s CW 41 or s CW 42 and continue to maintain its registration as a charitable entity under the CA 2005 prior to the transfer of the Trust Fund.

Issue 2 | Take tuarua: Liability under s HD 15

14. This issue considered whether s HD 15 applies to the Trustees as a consequence of the Charitable Trust transferring its Trust Fund to the New Trust.
15. Section HD 15 applies when a company enters into an arrangement that has the effect of the company not being able to meet an existing or future income tax liability (Tax Obligations). For s HD 15 to apply, it must be reasonably possible to conclude that a purpose of the arrangement is to have the effect of the company not being able to meet the Tax Obligations, and if a director had made reasonable inquiries, they could

have anticipated at the time of the arrangement that the income tax liability would, or would likely, be required to be met.

16. Where s HD 15 applies, all persons who are directors of the company at the time of the arrangement are treated as agents of the company for the Tax Obligation and may be held jointly and severally liable for it.
17. A "company" means a body corporate or other entity that has a separate legal existence from its members, whether incorporated or created in New Zealand or elsewhere (s YA 1). For the purposes of s HD 15, a company includes a company that is acting in the capacity of trustee (s HD 15(9)).
18. A board incorporated under the CTA 1957 is treated as having the legal capacity of a body corporate and can do and suffer such acts and things for which a separate legal existence is required.² Therefore, the Charitable Trust's board of trustees, being incorporated under the CTA 1957, satisfies the definition of company for the purposes of s HD 15.
19. For an entity that is treated as a company under the Act, "director" means a person who acts in the same or similar way as a director would if the entity were a company incorporated in New Zealand under the Companies Act 1993 (s HD 15(9)(b)).
20. Under the Charitable Trust's trust deed, the Trustees have the power to act or omit to act for the benefit of the Trust Fund and the furtherance of the Charitable Trust's charitable purposes in New Zealand. The Trustees also have the power, authority and discretion in the management, administration, and performance of the Charitable Trust. As such, TCO considered the Trustees act in the same or similar way as a director would and were considered "directors" for the purposes of s HD 15.
21. The Tax Obligations contemplated by s HD 15 is an existing or future income tax liability. As the Charitable Trust is a registered charity and a "tax charity" as defined in s CW 41(5), the Charitable Trust's income up to now has been exempt under ss CW 41 and CW 42. As such, there is no existing income tax liability. Similarly, there will be no future income tax liability while the Charitable Trust remains a registered charity.
22. In addition, given the disposal of the Trust Fund to the New Trust prior to the Charitable Trust's End Date will not give rise to any income for the Charitable Trust under s HR 12(3) (as TCO concluded in Issue 1), it follows that the Arrangement will not give rise to a future income tax liability.
23. Therefore, TCO concluded that s HD 15 would not apply to the Trustees as a consequence of the Arrangement, so long as the Charitable Trust continues to be

² Section 13 of the CTA 1957.

exempt under s CW 41 or s CW 42 and remains a registered charity prior to the transfer of the Trust Fund.

24. This conclusion is subject to the condition that should the Charitable Trust be found to not qualify for the exemption, s HD 15 must continue to not apply. That is, it cannot be reasonably concluded that a purpose of the Arrangement was to effectively deplete the Trust Fund, so the Charitable Trust is unable to meet its existing or future tax liability. In addition, the Trustees, upon making reasonable enquiries, could not have anticipated at the time of the Arrangement that the liability would, or would likely, be required to be met.

Issue 3 | Take tuatoru: Section BG 1

25. Section BG 1(1) provides that a “tax avoidance arrangement” is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.
26. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.
27. The Tax Counsel Office’s approach in making this decision is consistent with Interpretation Statement: IS 23/01 Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007 (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:
- Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement’s tax effects.
 - Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
 - Identifying and understanding Parliament’s purpose for the specific provisions that are used or circumvented by the arrangement.
 - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts. Artificiality and contrivance are significant factors.

- Considering the implications of the preceding steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
 - If the arrangement has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.
28. Taking into account all of the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) TCO concluded as follows.

The Arrangement

29. The Arrangement for s BG 1 purposes includes the following steps and transactions:
- The establishment of the New Trust on terms set out in the New Trust's trust deed executed by its initial trustees.
 - The trustees of the New Trust will be incorporated as a board under the CTA 1957.
 - The New Trust will not apply for registration as a charitable entity under the CA 2005 at the outset.
 - The transfer of the Trust Fund from the Charitable Trust to the New Trust with the necessary approvals and consents required for such transfer.
 - Following the transfer of the Trust Fund, the Charitable Trust will be wound up (there being no remaining property or assets held on the terms of the trust) and the board of trustees of the Charitable Trust dissolved under the CTA 1957.
30. According to the Applicants, the commercial or private purposes of the Arrangement are:
- To transfer the Trust Fund to the New Trust which would be bound under the terms of the trust deed of the New Trust to hold and apply the assets exclusively in furtherance of the charitable purpose of the New Trust in accordance with New Zealand law.
 - To mitigate the significant time and resources in meeting the Charitable Trust's obligations under the CA 2005.

- To assist the Trustees being able to perform their roles and duties effectively in determining how best to govern and operate the Trust Fund in furtherance of the Charitable Trust's charitable purposes, taking into account the context and objectives of the trust, including implementing the Charitable Trust's investment policy and decisions.

31. The Arrangement will give rise to the following tax effects:

- No income will arise under s HR 12(3) as a consequence of the deregistration of the Charitable Trust from the Charities Register to the extent that the Trust Fund is transferred to the New Trust prior to the Charitable Trust's End Date.
- Section HD 15 does not apply to the Trustees in respect of the proposed transfer of the Trust Fund to the New Trust and the subsequent winding up and dissolution of the board of trustees of the Charitable Trust.

32. TCO considered the second tax effect did not give rise to s BG 1 concerns because s HD 15 cannot apply where the Charitable Trust will only derive tax exempt income. Further, the Charitable Trust will have no income under s HR 12 on its End Date. Consequently, no income tax liability will arise for the Charitable Trust on or after deregistration, and accordingly, the proposed Arrangement would not have any effect of causing the Charitable Trust to avoid the payment of a tax liability.

33. The remainder of the s BG 1 analysis focused on the first tax effect – i.e. no income will arise under s HR 12(3) as a result of the Arrangement.

Parliamentary contemplation

34. TCO considered the purpose of s HR 12 as follows:

- To ensure that only bona fide charities should be eligible for tax concessions under ss CW 41 and CW 42.
- A charity will not be a bona fide one where it takes its charitable assets out of the charitable sector. This could be done by retaining the charitable assets after deregistration or by disposing of the assets after deregistration to a recipient that is not regulated under the CA 2005.
- Deregistered charities in those circumstances should have to account for the tax concessions they previously enjoyed.

- The commentary on the amendments made to s HR 12(3)(a) in 2024³ made it clear that Parliament's purpose is to incentivise charitable assets to remain in the charitable sector subject to regulatory oversight under the CA 2005. If a charity is subject to this regulatory oversight, the funds and their accumulated tax benefits will be used for charitable purposes that benefit New Zealanders. This suggests that Parliament was not as concerned about transfers of charitable assets by a charity (in accordance with their rules) while it is still registered and subject to regulatory oversight under the CA 2005 given the regulatory safeguard.

Commercial and economic reality

35. TCO then considered the factors for determining the commercial and economic reality of the Arrangement and concluded that the Arrangement makes use of the relevant provisions in a manner that is consistent with Parliament's purpose for those provisions. In particular:

- There is a good commercial reason for restricting the Arrangement to an asset transfer before the Charitable Trust's End Date. The Trustees will deal with the Trust Fund and act to further the Charitable Trust's charitable purposes in accordance with the terms of the trust. The Trustees will be acting consistently with its statutory duty by transferring the Trust Fund to the New Trust with a compatible charitable purpose in a way that mitigates the depletion of the Trust Fund as much as possible.
- The non-application of s HR 12 is a tax advantage that Parliament contemplates can be used by an existing charity to transfer all of its assets to a new charity before its end date.
- The transferor of assets, being a charity, to a new charity before the end date is still subject to the CA 2005.

Conclusion

36. Accordingly, TCO consider that the way in which the Charitable Trust intends to transfer the Trust Fund to the New Trust will be done in a way that is contemplated by Parliament. The Arrangement is commercially explicable, is not artificial or contrived in

³ Commentary on the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill (May 2023).

a way that is inconsistent with Parliamentary contemplation, and there is no mismatch between the form of the Arrangement and its commercial and economic reality.

37. Therefore, TCO concluded that the Arrangement does not have a tax avoidance purpose or effect, and s BG 1 does not apply to the Arrangement.