



TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA
TŪMATAITI

Living trust, bare trust, distributions

Decision date | Rā o te Whakatau: 11 December 2025

Issue date | Rā Tuku: 29 May 2026

TDS 26/06

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Subjects | Kaupapa

This item summarises a private ruling that considered the proposed amendment to a living trust deed and the later distribution of the trust's assets to one of the specified beneficiaries when the last of the trustors dies.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Grandparents live and are tax resident overseas.
2. The Father is tax resident in both New Zealand and the same overseas country as the Grandparents.
3. The Father lives in New Zealand with the Mother (together referred to as the Parents) and their Children. They are also tax resident in New Zealand.
4. The Grandparents executed a trust agreement under overseas law (the Grandparents' Trust is referred to as the GPT). The Grandparents are the trustees of the GPT. The GPT deed has been amended several times in the years since it was first executed.
5. The Parents also executed a trust deed (the Parents' Trust is referred to as the PRT). The Children are the main beneficiaries of the PRT.

Proposed amendments to the GPT

6. The Applicant proposed further amendments to the GPT. Paragraphs [7] to [10] summarise most of the proposed terms of the amended GPT that are relevant to this ruling.
7. The GPT was structured so that the Grandparents (as trustors) retained full control of the trust assets during their lifetimes. While either of them was alive, they could receive all income and capital on request, revoke the trust entirely or amend its terms. During this period, the trustees had no obligations to account to beneficiaries (who lacked revocation powers).
8. On the death of the first trustor, the surviving trustor would continue to receive all income and capital and retained the power to revoke or amend the GPT.

9. It was only on the death of the surviving trustor did that the GPT would become irrevocable. At that point:
 - all trust assets were to be distributed outright to the Father, if alive; or
 - if the Father was not alive, assets were to be passed to the Mother if specified conditions were met or, if those conditions were not met, to the PRT or other contingent beneficiaries.
10. Following the death of the surviving trustor:
 - the trustees' role was strictly limited to paying approved taxes, debts and expenses, and distributing assets;
 - the trustees would hold the assets as bare trustees, with only administrative and distribution powers; and
 - the beneficiaries, not the trustees, would bear the tax liabilities relating to the trust assets.

Issues | Take

11. The main issues considered in this ruling were:
 - whether the amended GPT deed created a valid trust in New Zealand law until the death of the last surviving trustor;
 - whether the nature of the trust created on the death of the last surviving trustor was a bare trust; and
 - as a consequence of both the above conclusions, whether:
 - s YB 21 applied at the date of any distribution from the amended GPT to the Father (or, as applicable, the Mother or PRT);
 - any distribution would be from a foreign trust and whether any one or more of the following sections would apply at the date of any distribution from the amended GPT to the Father (or, as applicable, the Mother or PRT): ss HC 11, HC 14, HC 15, HC 17, HC 18, HC 19 and/or HC 20; and
 - any such distribution would be a taxable distribution under s CV 13.

Decisions | Whakatauranga

12. The Tax Counsel Office (TCO) made the following decisions:

- The amended GPT did not create a valid trust in New Zealand for the purposes of the “trust rules”, as defined in s YA 1, until the death of the last surviving trustor.
- On the death of the last surviving trustor, the amended GPT created a bare trust and, in accordance with s YB 21:
 - the trustees would receive and hold the assets of the amended GPT as bare trustees and nominees for the Father (or, as applicable, the Mother or PRT); and
 - the Father (or, as applicable, the Mother or PRT), would be treated as receiving and holding the assets and the trustees would be ignored.
- As s YB 21 would apply to any distribution from the amended GPT to the Father (or, as applicable, the Mother or PRT) following the death of the last surviving trustor, the distribution:
 - would not constitute a taxable distribution from a foreign trust under ss HC 15 and HC 18;
 - would not constitute beneficiary income under ss HC 6 and HC 17; and
 - would not be income under s CV 13.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Is there a trust under New Zealand law?

13. The issue was whether the amended GPT deed created a valid trust in New Zealand law until the death of the last surviving trustor.

Approach to characterising a foreign entity for New Zealand tax law purposes

14. “Trust” is not defined in the Act (other than in a limited definition in relation to superannuation schemes and unit trusts).
15. TCO considered the correct approach to characterising a foreign entity, structure or arrangement for New Zealand tax law purposes involved two steps:
 - The first step was to determine the legal rights and obligations that existed between the parties. TCO used the contractual arrangements and overseas law to determine those legal rights and obligations.

- The second step was the application of the New Zealand law contained in the Act to those legal rights and obligations.

Step one

16. In the first step, TCO identified the legal rights and obligations that the amended GPT created under overseas law. This involved examining the trust deed to determine the substantive legal relationships between the trustors, trustees and beneficiaries, without applying New Zealand tax concepts at this stage.
17. From this process, TCO considered:
 - The amended GPT was an arrangement that was a “revocable living trust” under overseas law. This was because the trustors retained full control of the trust assets during their lifetimes. While either trustor was alive, they could revoke or amend the trust at any time, require the trustees to distribute income or capital on request, and appoint or remove trustees. During this period, the trustees were required to act in accordance with the trustors’ directions and owed no enforceable obligations to beneficiaries who lacked revocation powers.
 - On the death of the surviving trustor, the “revocable living trust” became irrevocable. At that point, the trustees’ role was limited to paying approved taxes, debts and expenses and distributing the trust assets to the named beneficiary or contingent beneficiaries. From that time, beneficiaries assumed responsibility for tax liabilities attributable to the trust property, and the trustees’ powers were confined to administrative and distribution functions.

Step two

18. In completing the second step, TCO noted that an essential feature of a trust for New Zealand purposes was the existence of an obligation (fiduciary duty) on a person (the trustee) to deal with the property for the benefit of the beneficiaries or a charitable purpose. TCO considered the amended GPT lacked this essential feature as it did not demonstrate an intention to create a trust by alienating ownership of the property in the Grandparents’ lifetime.
19. TCO had the following reasons for this view:
 - Prior to their death, either trustor could revoke the trust and reclaim the property held by the trustees.
 - Prior to their death, either trustor could amend the terms of the trust.
 - The trustors, trustees and beneficiaries were the same people.

- The trustees had no accountability for providing any information to the beneficiaries without the power to revoke the trust while the trustors were alive.
 - The contingent beneficiaries had no rights of enforcement while the trustors were alive.
 - The trustors had no intention to relinquish control of their property while they were alive.
20. Once both trustors had died, TCO considered New Zealand law would recognise a trust. TCO had the following reasons for this view:
- At this point, the trust deed could no longer be revoked or changed.
 - The trustors, trustees and beneficiaries would not be the same. The trustees would hold property arising from the living trust for the Father (or, as applicable, the Mother or PRT).
 - The trustees would be required to provide certain information, on request, to the beneficiary.
 - The three certainties of a trust would be present: the Grandparents intended to create a trust; the subject matter was the assets in the living trust; and the beneficiary was the Father (or, as applicable, the Mother or PRT).

Conclusion

21. TCO concluded that the amended GPT did not create a valid trust in New Zealand for the purposes of the "trust rules" (as defined in s YA 1) until the death of the last surviving trustor.

Issue 2 | Take tuarua: Did s YB 21 apply to the eventual distribution?

22. The issue was whether the nature of the trust created on the death of the last surviving trustor was a bare trust, such that s YB 21 applied.

Bare trust

23. TCO noted the relevant provision was s YB 21(2). If the trustees were bare trustees, they would be treated as nominees and ignored for the purposes of any distribution. In such a case, the trust rules would not apply because, for tax purposes, there was no trust. Under s YB 21 the beneficiary, not the trustees, were treated as holding the property.

24. TCO reached the following conclusion:

- A bare trustee was a person who held property on trust for the absolute benefit and at the absolute disposal of other persons and had no beneficial interest in the property.
- A bare trustee did not have any duties to perform in regard to the property, except to convey or transfer it to a person entitled to hold it when required to do so. While case law has established that a bare trustee would also have a legal duty to take reasonable care of the trust property until transfer, a bare trustee was to refrain from management that did not fall within the duty to maintain the trust.
- For a bare trust relationship to exist, the three certainties of a trust must be satisfied.

Classification of the trust at distribution

25. On the classification of the trust at distribution, TCO considered as follows:

- Trusts are classified at the time a distribution occurred. In this arrangement, the relevant distribution would be the transfer of assets following the deaths of the Grandparents.
- On the facts, GPT would be classified as a foreign trust at the time of such distribution under s HC 9. However, this classification would not determine the tax outcome **if** the trustees were found to be acting as bare trustees and s YB 21 applied.

Whether the trustees were bare trustees

26. TCO considered the amended GPT deed contained several features supporting the conclusion that the trustees acted as bare trustees once the trust came into existence for New Zealand tax purposes:

- After the death of the surviving trustor, responsibility for all tax liabilities, claims and expenses rested with the beneficiary, who could direct or approve payment from the trust assets. This feature ensured that the trustees did not have substantive obligations that delayed or qualified the beneficiary's entitlement.
- The trust deed also required that all assets be distributed outright to the primary beneficiary (or specified contingent beneficiaries). It expressly stated that the trustees held the assets as bare trustees for that purpose. The power to amend the trust ceased on death, and the trustees' powers were tightly limited to paying

approved liabilities and distributing the assets. These features were consistent with a bare trustee's obligation to preserve and transfer property.

27. Accordingly, TCO concluded the trustees' role was essentially mechanical and facilitative. The trustees did not hold or manage the assets under a broader fiduciary mandate and were properly characterised as bare trustees.

Conclusion

28. TCO concluded that, because the trustees were bare trustees, s YB 21(2) applied. The trustee was ignored for tax purposes, and the beneficiary was treated as holding the assets directly from the point when the trust arose. As a result, there was no distribution from a trust for tax purposes.

Issue 3 | Take tuatoru: Is any inheritance a taxable distribution or beneficiary income?

29. As a consequence of the conclusions on the first two issues (above), the questions related to the third issue are:
- whether any distribution would be from a foreign trust and whether any one or more of the following sections would apply at the date of any distribution from the amended GPT to the Father (or, as applicable, the Mother or PRT): ss HC 11, HC 14, HC 15, HC 17, HC 18, HC 19 and/or HC 20; and
 - whether any such distribution would be income under s CV 13.
30. TCO considered the effect of s YB 21 applying to a bare trust was that the section operated to treat the trustee as having made no distribution for tax purposes. In practical terms, this meant that inheritors did not derive beneficiary income or taxable distributions, although they were treated as deriving any income that the property produced.
31. Applying the previous analysis to the amended GPT, TCO concluded that the Father (or, as applicable, the Mother or PRT) were treated as holding the trust assets for New Zealand tax purposes at the time the Grandparents died and the trust arose under New Zealand law. As a result, there was no distribution from a trust for tax purposes.

Conclusion

32. TCO concluded that, as the amended GPT is a bare trust for the Father (or, as applicable, the Mother or PRT) following the death of the last surviving trustor out of the Grandparents and applying s YB 21, the distribution:
- did not constitute a taxable distribution from a foreign trust under ss HC 15 and HC 18;
 - did not constitute beneficiary income under ss HC 6 and HC 17; and
 - was not income under s CV 13.
33. TCO made it clear that it was not ruling on the ongoing treatment of the PRT for New Zealand tax purposes or the ongoing treatment of assets that the PRT held or distributed.