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PRACTITIONER ARTICLES

[111] Recovering overpaid tax following Bendel - don't forget s 100A

by Nicole Sammel, Principal, Nicole Sammel Tax Lawyers

The decision in *Bendel* [2025] FCAFC 15, reported at 2025 WTB 7 [106], indicates that the ATO has incorrectly been treating unpaid trust income entitlements ("**UPEs**") as "loans" for Division 7A purposes.

But does this mean, assuming the High Court does not overturn the decision, that family groups previously assessed to tax under Division 7A on a UPE will now be able to recover that tax (as was suggested in a recent newspaper article)?

Certainly, after *Bendel*, family groups will be able to show that the ATO was wrong to have applied Division 7A to a UPE. However, to recover all the tax paid under the assessment, they will likely also need to show that **s 100A of the ITAA 1936 did not apply** to the UPE.

Section 100A can apply to an amount of trust income where **a beneficiary of a trust has been made presently entitled to income of the trust and a second entity has obtained a benefit**.

This situation occurs, in the ATO's view, when a UPE is owed by a trustee to a corporate beneficiary (see paras 18 and 81 of Taxation Ruling TR 2022/4). Presumably this is on the basis that the corporate beneficiary has been made presently entitled to trust income and the trustee (a second entity) has obtained a benefit by retaining the income in the trust.

Since, following *Bendel*, the ATO can no longer apply Division 7A to tax non-commercial UPEs owed to corporate beneficiaries, the ATO may now instead attempt to tax such UPEs under s 100A. In PCG 2022/2 (at paras 28 - 29 and 134 -142), the ATO states that, where a trustee uses a UPE (unpaid for more than 2 years) for working capital purposes, the ATO will regard the UPE as "low risk" for s 100A purposes if the UPE is on commercial terms. This suggests that, **in the case of a UPE that is NOT on commercial terms, the ATO may attempt to apply s 100A to the UPE**. And if the ATO wants to apply s 100A, there are no time restrictions on it doing so - the ATO can amend an assessment at any time to give effect to s 100A (see s 170(10) of the ITAA 1936).

Of course, a family group may be able to successfully show that s 100A does **not** apply to a UPE. Section 100A can only apply to a UPE if the benefit obtained by the trustee arose under an agreement that satisfied 4 requirements. Accordingly, it may be possible to show, having regard to the specific circumstances of the UPE in question, that one or more of those 4 requirements was not satisfied. (The 4 requirements are that the agreement: (a) came into existence at or before the time the beneficiary's present entitlement arose; (b) had a tax avoidance purpose; (c) was not entered into in the ordinary course of a family or commercial dealing; and (d) was the 'source' of, or was made in connection with, the beneficiary's present entitlement to income.)

If s 100A *does* apply to a UPE, can the family group nevertheless recover **some** of the tax it previously paid on the UPE under the Division 7A assessment? Presumably yes, in cases where the amount of tax payable on the UPE under s 100A is less than the tax that was paid on the UPE under the Division 7A assessment. The tax payable by the family group under s 100A may differ from the tax payable under the Division 7A assessment because, if s 100A applies to an amount of trust income, the corporate beneficiary will be treated as if it had never been presently entitled to the income (and so should get a refund of any tax previously paid under s 97 - see para 121 of TR 2022/4) while the

