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**PUB0209: Income Tax – Whether a beneficiary will be treated as a settlor where there is no loan, and Income Tax – Whether a beneficiary will be treated as a settlor where there is a loan**

***Introduction***

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the draft Public Rulings PUB0209: *Income Tax – Whether a beneficiary will be treated as a settlor where there is no loan*, and *Income Tax – Whether a beneficiary will be treated as a settlor where there is a loan* (Exposure Draft). Determining whether a person is a settlor of a trust for tax purposes is important, not only for the purposes referred to in paragraph 14 of the Exposure Draft, but also for determining whether the trust is classified as a "foreign trust" or a "complying trust", and also because a settlor may be liable for income tax payable by the trustee(s), as agent of the trustee(s) (section HC 29 of the Income Tax Act 2007).

***Comments***

2. The key point made by the Exposure Draft, including through the difference between the two draft rulings, is that in order for a beneficiary to use an amount vested in or paid to that beneficiary to "provide" money or money's worth (in terms of the "transfer of value" definition) to the trust, or to "provide" financial assistance to the trust, the beneficiary must first actually have been paid that amount at law. Further, this actual payment could occur by way of set-off against an obligation of the beneficiary to pay an equivalent amount to the trustees to give effect to a loan that the beneficiary has agreed to make to the trust.
3. The different conclusion reached in relation to the two draft rulings arises solely as a result of the fact that, in the BR Pub 14/YY arrangement, the beneficiary lends an amount to the trust. The Exposure Draft states (at paragraphs 10 and 81) that it can be inferred from the agreement to lend that there is an agreement to set off two payment obligations. As a result of the set-off the two amounts (i.e. the distribution to the beneficiary and the advance of the loan principal) have, at law, been paid.
4. Because the set-off aspect is critical to the legal analysis underpinning the conclusion, the Law Society considers that reference should be made to it in the arrangement description for BR Pub 14/YY. This would make the Ruling much clearer, and more fully describe the legal arrangements, without users having to find references to the inferred set-off in the

commentary. In this regard a bullet point should be added to the arrangement description (after the one referring to the loan) stating:

- The beneficiary's obligation to pay the loan principal to the trustees is set off against the trustees' obligation to make payment of the amount vested in or paid to the beneficiary.
5. As noted in paragraphs 78 and 79 of the Exposure Draft a set-off of two payment obligations has the effect that both payments are made. We therefore submit that the references in paragraphs 9 and 75 of the Exposure Draft to "(i.e., without there being an **actual payment** of the vested amount to the beneficiary)" (emphasis added) are confusing and should be removed or amended. A set-off does effect a payment at law, and in a legal context this is an "actual payment".
6. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / [jo.holland@lawsociety.org.nz](mailto:jo.holland@lawsociety.org.nz)).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal flourish extending to the right.

Chris Moore  
**President**