



# TPB Information sheet

## TPB(I) 15/2012

### Code of Professional Conduct – Holding money or other property on trust

#### Disclaimer

This is a Tax Practitioners Board (Board) Information sheet (TPB(I)). It is intended to be for information only. It provides information regarding the Board's position on the application of subsection 30-10(3) of the *Tax Agent Services Act 2009* (TASA), containing one of the obligations of registered agents under the Code of Professional Conduct (Code). While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the Board's powers in the TASA.

In addition, please note that the principles, explanations and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

#### Document history

The Board released this document as a draft information sheet in the form of an Exposure draft on 11 June 2012. The Board invited comments and submissions in relation to the information in it. The closing date for submissions was 26 July 2012. The Board considered the submissions made and now publishes the following TPB(I).

Issued: **18 October 2012**



# Holding money or other property on trust

## Introduction

1. This Information sheet (TPB(I)) has been prepared by the Tax Practitioners Board (Board) to assist tax and BAS agents to understand their obligations under the Code of Professional Conduct (Code) in relation to holding money or other property on trust for clients.
2. In this TPB(I), you will find the following information:
  - background about the obligation on registered tax and BAS agents to account for money and other property held on trust
  - an explanation of what a trust is
  - an explanation of what is required of registered tax and BAS agents to account to clients for money or other property held on trust
  - consequences for failing to account for money or other property held on trust
  - some practical examples involving trust money.

## Background

3. All registered tax and BAS agents are required to comply with the Code, which is contained in section 30-10 of the TASA.
4. One of the obligations under the Code is subsection 30-10(3) of the TASA (Code item 3). It requires that 'if:
  - (a) you receive money or other property from or on behalf of a client; and
  - (b) you hold the money or other property on trust;you must account to your client for the money or other property'.
5. The Board has released an explanatory paper on the application of the Code which details the Board's view on the scope and meaning of the obligation to account to clients for money or other property held on trust.<sup>1</sup>

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<sup>1</sup> Refer to paragraphs 41 to 46 of [TPB\(EP\) 01/2010 Code of Professional Conduct](#).



## What is a trust?

6. In essence, a trust is an obligation on an entity that holds property to deal with it for the benefit of another entity that may enforce the obligation. In other words, a trust imposes a personal obligation on an entity to deal with property for the benefit of another entity or class of entities, for the advancement of certain purposes, whether they are private (including commercial) or charitable.
7. In the description above, the entity holding the property is called a 'trustee' and the entity for which the property is held is called a 'beneficiary'. The trust property would be the property held by the trustee for the benefit of the beneficiary. These three elements, the trustee, the beneficiary and trust property make up the necessary elements of a trust.
8. The trustee will have legal title to the trust property held on behalf of a beneficiary, but will be limited to acting, in relation to the trust property, for their benefit and in accordance with any agreements creating the trust. In this sense, a beneficiary also has an interest in the trust property. This interest is referred to as an equitable interest.
9. A trustee owes certain duties to the beneficiaries of the trust and has certain responsibilities in relation to the trust property. One of these is the duty to account to the beneficiaries for money or other property held on trust.

## When is property held on trust?

10. Property will be held on trust where an entity (which includes a registered individual, company or partnership) has property that they hold for, or on behalf of, another entity to be applied for a particular purpose (for example, to pay a tax liability).
11. For tax and BAS agents, a trust will generally arise where the agent receives money or other property on behalf of a client. The agent is then required to keep that money or other property separate from their own money or property.
12. A trust relationship may be created from either express or implied arrangements between the agent and the client (see example 2 on page 6 for an illustration of an implied agreement between an agent and their client). Therefore it is not necessary for there to be a written agreement between the agent and the client for a trust to arise.



### General position

13. In the absence of any agreement to the contrary, where a tax or a BAS agent receives money or other property **on behalf of** a client, whether or not the money or other property was obtained from a third party, ordinarily this money or other property will be held on trust. This will generally include:

- client tax refunds received from the Australian Taxation Office (ATO)
- any other payments received from the ATO or another entity on behalf of the client
- money received from the client to be applied to a specific purpose (for example, money intended for costs and disbursements, setting up a company for the client or, depending on the terms of the retainer, pre-paid fees).

## How can an agent account for money or other property held on trust?

14. An agent can account on a reasonable and timely basis for money or other property held on trust for a client by doing the following:

- keeping the personal or business funds of the agent separate from any trust money, most preferably through the use of a separate trust account
- keeping accurate and up-to-date records of any dealings in relation to the money or other property held on trust
- seeking prompt instructions from clients about how and where to pay money or other property received on their behalf, and then paying or providing that money or other property to the client in a timely manner
- passing tax refunds on to clients within 14 days unless there are exceptional circumstances or some agreement between the agent and their client to the contrary
- promptly answering any questions clients raise about money or other property held on trust
- allowing clients access to any records relating to money or other property held on trust
- reconciling the trust records and reporting to clients on an appropriate periodic basis, in the circumstances, to ensure that they are correct and up-to-date
- maintaining up-to-date policies and procedures of the practice in relation to the handling of client money or other client property
- applying money or other property lawfully in accordance with the directions of the client, and telling the client what has been done.

15. The list of things in paragraph 14 is not exhaustive. This means that an agent can take additional steps to ensure they account to their clients for money or other property held on trust. It will be a matter for the agent to consider what steps are appropriate given the nature and size of their practice.



16. The Accounting Professional and Ethical Standards Board have released APES 310 *Dealing with Client Money* (APES 310). This is a standard that applies to members of relevant professional bodies that have adopted it. While it is **not** binding on all tax and BAS agents, it provides useful guidance on what steps an agent can take to ensure that they account to their clients for money or other property held on trust. This standard provides that members, among other things:

- shall be accountable for all client monies and keep client monies separate from all other monies of the member
- shall implement appropriate internal controls and procedures in respect of the operation of a trust account and client bank account and shall take all reasonable steps to ensure that those internal controls achieve the following objectives:
  - client monies are dealt with in accordance with the clients instructions and APES 310
  - a trust account is properly safeguarded and accounted for
  - a client bank account is properly safeguarded against unauthorised access or use
- shall, where the member is acting as a trustee, comply with the member's legal and fiduciary duties as trustee when dealing with client monies and shall apply APES 310 to the extent practicable.

## Failure to account for money or other property held on trust

17. If an agent does not account to their clients for money or other property held on trust, the Board may find that the agent has breached the Code and may impose sanctions under the TASA for that breach.

18. The Board may find that an agent has breached the Code even if the client has not specifically requested that the agent account to it for money or other property held on trust. This may include, for example, where the Board has clear evidence that an agent has not kept trust money separate from the agent's own money, has misapplied trust money or has failed to pass on tax refunds to a client in a timely way (14 days).

19. Importantly, any conduct concerning inappropriate or inadequate arrangements in relation to the handling of money or other property received from clients may, in addition to breaching Code item 3 referred to in paragraph 4, also constitute a breach of the following obligations of the Code:

- the requirement to act honestly and with integrity<sup>2</sup>
- the requirement to ensure that a tax agent service a registered agent provides, or that is provided on the agent's behalf, is provided competently.<sup>3</sup>

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<sup>2</sup> See subsection 30-10(1) of the TASA.

<sup>3</sup> See subsection 30-10(7) of the TASA.



20. If an agent breaches the Code, the Board may impose one or more of the following sanctions:

- a written caution
- an order requiring the agent to do something specified in the order
- suspension of the agent's registration
- termination of the agent's registration.

## Practical examples involving trust money

21. The following examples are where money is held on trust and where the obligation under Code item 3 of the TASA will apply.

### **Example 1 – refunds and no client agreement**

An agent receives a refund for a client from the ATO and there is no letter of engagement, retainer or other contract between the agent and the client about how the refund should be handled.

In this case, the agent has received the refund on behalf of the client and has an obligation to keep this money separate from the agent's own money under subsection 30-10(3) of the TASA. The Board would consider that this refund is held on trust for the client.

### **Example 2 – refunds and implied agreements**

Same as example 1 except, the past dealings between the agent and the client point to a practice under which the agent generally deducts their professional fees from the refund money and then forwards the balance of the refund to the client.

The agent still holds the money received on trust and must account to the client for the basis on which professional fees were deducted in accordance with the (implied) agreement with the client and for the remaining balance of the refund. The money is held on trust as the money is held on behalf of the client and is required to be kept separate from the agent's own money. This includes the portion of the money that is to go to the agent, which is also held on trust until the agent has satisfied any preconditions which have been agreed with the client.

The agent is at risk, in the absence of written agreement, if the client denies any agreement that the agent may deduct fees from the refund. If the Board finds that there was in fact no agreement, the agent may be regarded as having misappropriated client funds.

### **Example 3 – money given to agent for a specific purpose**

A client gives a cheque payable to their agent for the purpose of making a payment to the ATO for tax payable relating to a previous year's income tax return.

The agent will hold this money on trust as this money is held on behalf of the client and the client has directed the agent to apply this money to a particular purpose (paying the ATO) on the client's behalf.



#### **Example 4 – mixing client funds with the agent’s personal/business funds**

An agent receives a tax refund cheque on behalf of a client and the agent deposits this cheque into their own personal/business account and not a separate trust account.

As in example 1, the money received by the agent is received on trust and therefore the obligation in subsection 30-10(3) of the TASA applies. By placing the money into their own personal/business account, the agent has breached the Code as the money is not being kept separate from the agent’s own money.

The agent would also breach the Code if the agent deposited the money into a third party’s account, without the authorisation of the client.

The agent’s conduct would be considered even more egregious if the agent deposited the refund into an overdrawn account. By depositing the refund into the overdrawn account, the agent is in effect using that money to repay their loan from the bank. This is because the amount in the overdrawn account is being reduced by the amount of the refund. In this case, the agent will be regarded as having misappropriated the funds for their own benefit.

#### **Example 5 – unauthorised payment to a third party**

An agent subcontracts their trust arrangements to a company that specialises in administering these. No mention of this arrangement is made in the agent’s agreement with the client. The agent pays or authorises payment of the client’s refund to the company. Without express authority from the client the agent will have committed a breach of trust that could result in a breach of subsection 30-10(3) of the TASA.

In addition, the agent may be liable in separate legal proceedings by the client for making good any resulting loss suffered by the client (for example, if the receiving company goes into liquidation).