

Taxation of Trusts including special trusts



J Van der Velde
TEP FCPA CTA FTIA





1

Agenda

2

- Income
- Distributions
- Capital Gains
- Residency
- Special Disability Trusts






2

Income

3

- Taxable income
 - Net Income s 95
 - Assessable income less allowable deductions
 - Artificial construct - varies from time to time
- Distributable income
 - Income of the trust estate s 97(1)
 - "income ascertained by the trustee according to appropriate accounting principles and the trust instrument"
Zeta Force (1998) Bamford (2010)



3

Income


4

Historically two competing views

- Proportionate view
- Quantum view

FCT v Bamford; Bamford v FCT High Court 2010

- s 97(1) "beneficiary ... presently entitled to a share of the income of the trust estate the assessable income of the beneficiary shall include: so much of that share of the net income..."



4


Income

5

"interim legislation" 29 June 2011

- Streaming relies on powers in trust deed
 - to separate income of the trust into classes; and
 - to allocate those classes independently

Tax law only recognises streaming of Capital Gains and Franked Dividends




5

Income

6

What may the trustee distribute?

- Trust Instrument
 - Income according to ordinary concepts
 - Income according to Australian Accounting Standards
- Under the deed
 - If process of accounting not specified Trustee must make appropriate choice



6

Income


7

Clark v Inglis NSW CA 2010

- importance of the accounts
- generally acceptable manner of accounting
- sufficient to include unrealised gains in distributable income

Fischer v Nemeske High Court 2016

- evidence intention of the trustee




7

Income

8

- Characterisation under deed
Forrest v C of T FCAFC (2010)
- A power in the deed for the trustee to classify receipts on revenue account or capital account is not a power to change rights of beneficiaries – misuse of power




8

Distributions

9

Equalisation clause

- Distributable income = Taxable income
- 'notional' amounts
 - Imputation credits
 - Market value proceeds
 - Distribution on corporate winding up
 - Balancing adjustments




9

Present Entitlement

10

No definition in Tax Legislation: trust law concept

- *FCT v Whiting* (1943) - Present right to demand, Vested in interest and possession
- *Taylor* (1970) – Right to payment if not under legal disability
- *Totledge* (1982) – Amount legally available for distribution
- *Harmer* (1991) – Determinable rather than determined
- Deemed present entitlement tax
 - s 95A ITAA 1936
 - s 101 ITAA 1936




10

Taxation of Beneficiary

11

- Sui juris resident beneficiary
- Resident not sui juris
 - minors
- Non resident
 - No tax free threshold
 - Non resident rates

\$0 to \$90,000	32.5%
\$90,001 to \$180,000	\$29,250 + 37% over \$90,000
\$180,001 and over	\$62,550 + 45% over \$180,000




11

Taxation of Beneficiary

12

- Tax exempt bodies
 - Paid in cash or body notified by 31 August
 - If not taxable to trustee (no effect on trust law entitlement)
 - Commissioner's discretion
 - Section 100AA
- Benchmark percentage issues
 - If exceed benchmark taxable to trustee (no effect on trust law entitlement)
 - Section 100AB



12

Interim Legislation

13

- All Franked Dividends taxed under Subdiv 207B ITAA 1997
- All Capital Gains taxed under Subdiv 115C ITAA 1997
- Specific Entitlement
 - financial benefit s 974-160
 - 'in accordance with the terms of the trust'
 - received
 - reasonably expected to receive



VdV Legal

13

Franked Dividends

14

- Specific entitlement by 30 June
- Sub division 207C ITAA 1997
 - allocate by class
 - allocate by particular dividend
- Directly relevant expenses



VdV Legal

14

Capital Gains

15

- Create specific entitlement
 - entitlement – to what?
 - Capital
 - Income
 - 50% capital - 50% income
- Concessions
 - Sub division 115C
 - Small business concessions Subdiv 328G and Div 152



VdV Legal

15

Capital gains

16

- Revalued assets
 - If benefit distributed on revaluation recipient is specifically entitled on realisation
 - *Clark v Inglis*
 - *Fischer v Nemeske*
- Market value substitution
 - No specific entitlement can be created
- CGs to which no beneficiary is specifically entitled



VdV Legal

16

Capital Gains

17

- Distributions in Specie
 - Power in deed
 - Establishing market value
 - Specific entitlement to any gain
 - There may be Stamp Duty!!



VdV Legal

17

Residency

18

- Residence of Trustee
 - Non resident trust distributions to residents
 - s 99B
 - All distributions taxed as income unless can evidence:
 1. Corpus (unless would be taxable in Australia)
 2. Not assessable in Australia
 3. Beneficiary or trustee has already been taxed in Australia
- Campbell and Commissioner of Taxation* [2019] AATA 2043



VdV Legal

18

Residency

19

- Tax Determination 2017/23
 - Capital gain on non TARP asset disregarded
- Tax Determination 2017/24
 - Amounts under s 99B are deemed to be income
 - No CGT discount
 - No ability to offset capital loss



VdV Legal

19

Reform

20

"the proposal met with broad approval in principle, that some of the principles were sufficiently fundamental in principle, and some of the considerations so complex and finely balanced in practice that in principle it was proposed that the sensible and prudent practice would be to submit the proposal for more detailed consideration, laying stress on the essential continuity of the new proposal with existing principles, the principle of the principal arguments which the proposal proposes and propounds for their approval. In principle."

Lynne J and Jay A, *Yes Prime Minister: The Ministerial Broadcast* BBC Television 1986.



VdV Legal

20

Special Disability Trusts

21

- Defined - *Social Security Act* and *Veterans' Entitlement Act*
- Administered under the *Social Security (Administration) Act 1999*
- Principal Beneficiary must be diagnosed disabled s 1209M of the *Social Security Act 1991*
- Entitlement to disability support pension indicative
- Settle by will or inter vivos



VdV Legal

21

Special Disability Trusts

22

- Concessions
 - Total income test exemption
 - Asset test exemption \$679,750 (Indexed annually)
 - Home is an exempt asset
 - Does not affect entitlement to disability support
 - Unexpended income accumulated at beneficiary tax rate
 - CGT exemption for assets transferred in
 - Residence of beneficiary recognised as main residence
 - CGT concession
 - Stamp duty concession
 - Land tax concession



VdV Legal

22

Special Disability Trusts

23

- Trustee must be Australian resident
 - Corporate – must have at least two directors; or
 - Individual – must have at least two trustees; or
 - Professional Trustee
- Primary Purpose
 - Reasonable care and accommodation
 - Medical expenses (Inc. private health insurance)
 - Maintenance of residence
 - Discretionary amount limited to \$12,250 (indexed annually)



VdV Legal

23

Special Disability Trusts

24

- Contributions
 - Must be unconditional
 - Not from Primary Beneficiary
 - ✖ unless from a bequest or death benefit payment
 - Register of Donors
- Interests of the Primary Beneficiary must take precedence over any interest/ expectancy of residuary beneficiary




VdV Legal

24

Special Disability Trusts 25

- Restrictions
 - Primary Purpose; or
 - Ancillary Purpose
 - ✦ necessary or desirable to achieve the Primary Purpose
 - May not
 - ✦ Lease property from
 - ✦ Borrow from
 - ✦ Lend to
 - ✦ Pay for professional services of
 - ✦ Enter into uncommercial transaction with

a related party



VdV Legal

25

Special Disability Trusts 26

- Related Party
 - Primary Beneficiary
 - Trustee(s) (unless professional trustee)
 - Appointor
 - Immediate Family Member
 - Parent or sibling of any of the above
 - Descendant of any of the above
 - Spouse of any of the above
 - Entity of which any of the above is director, trustee, shareholder, appointor



VdV Legal


26

Special Disability Trusts 27

- No benefits to any other person
 - ✦ May be incidental benefits to partner of Primary Beneficiary

Vesting

- After death of Primary Beneficiary
 - Ceases to be Special Disability Trust
- Any remaining assets
 - persons named in deed in stated shares/ trustee discretion
 - Donors if register kept



VdV Legal

27

Special Disability Trusts 28

- Benefits
 - Social Security
 - ✦ Income test concessions
 - ✦ Asset test concessions
 - Oversight
 - Taxation
 - ✦ CGT
 - ✦ Income Tax
 - ✦ Land Tax
 - ✦ Stamp Duty




VdV Legal

28

Special Disability Trusts 29

- When would you use one?
 - Relevant Primary Beneficiary
 - Primary residence
 - Family members /professional trust
 - Not just a protective trust




VdV Legal

29

Questions 30

Julie Van der Velde
 VdV Legal
 37 Angas Street
 Adelaide SA 5000
 Tel 7009 4855
 Julie@vdvlegal.com.au



VdV Legal

30