

TAX TALKS

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155 | Trust 101 - Part I

Here is a quick overview of simple mistakes that are easy to avoid but even easier to make – Trust 101 Part I.

Trust 101 – Part I

In this episode Paul Goldin of [Vectigal](#) in Melbourne gives a good overview of the most common mistakes encountered around trusts.

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Here is what we learned but please listen in as Paul Goldin explains all this much better than we ever could.

Practical Issues

In practice there are six common issues. The first question is often whether a trust or sub-trust even exists. Secondly there is the question of who the beneficiaries are. Third who the trustee is and what they are authorised to do.

And then there are the questions of family trust groups, effective distributions and who the appointor is if there is one.

Paul Goldin will cover the first three questions in this episode. And then the other three questions in Part II – Trust 101 Part II.

1 Existence of a Trust

Sometimes – and more often than you think – everybody thinks that they have a trust when in fact the trust never came into existence. Or there is a trust or sub-trust arrangement without anybody being aware of such or having drafted a trust deed.

For there to be a trust you need a trustee, trust assets, identifiable beneficiaries and rules, often documented within a trust deed.

Trustee

The trustee can be an individual or a company. If the trustee is a company, it is referred to as a corporate trustee.

Trust Assets

The trust asset can be an initial nominal consideration to give legal effect to the trust. It is common to start a trust with a \$10 contribution.

Trust Deed

The first step to getting the basics for a trust right is to READ THE DEED. Read it. Live it. Breathe it.

The trust deed exemplifies the intention of creating a trust and sets the rules that govern the relationship between trustee and beneficiaries with respect to the trust assets.

The trust deed is a legal document and so should be prepared by someone competent in that area. To be legally valid it must be properly executed according to the relevant state or territory law. All trustees need to sign and date the deed.

Court Cases

There are three significant court cases – among others – around the existence or non-existence of a trust.

Commissioner of Taxation v Commercial Nominees of Australia Limited [2001] HCA 33 is the lead case in trust law. It all points back to the deed.

In *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation [2018] FCAFC 122* the Federal Court found that there had been a sub-trust arrangement, even though there was no trust deed.

Aston (Aust) Property Pty Ltd v Commissioner of State Revenue [2012] VCAT 48 deals with advisers creating a trust, but then the settlor invoiced the settled sum back to the actual beneficiaries ('mum & dad'), putting the entire existence of the trust into question.

2 Beneficiaries

Has there been an effective appointment of beneficiaries with respect to income and capital? This sounds like a simple question but is one of the most common issues.

Standard practice is to prepare distribution minutes, but check that all distributions comply with the deed. Avoid the issues that came up in *Idlecroft Pty Ltd (atf The Simon Fleury Family Trust) & Ors v FCT [2005] FCAFC 141*.

Settlor

To comply with s102(1) ITAA 36 and to avoid the issues encountered in *Hobbs v COT (1957) 98 CLR 151*; *Truesdale v COT 70 ATC 4056* the settlor should not be a (potential) beneficiary.

Beneficiary Class

The definition of a class of beneficiaries can impact a wide range of tax issues from stamp duty and land tax all the way to payroll grouping.

A prominent case in this respect is *Smeaton Grange Holdings Pty Ltd v CSR [2016] NSWSC 1594*.

Excluded Beneficiaries

The notional settlor, trustee, appointor or guardian are often excluded as beneficiaries in the deed.

Disclaimer

A beneficiary can disclaim its status as beneficiary. In *FCT v Ramsden* [2005] FCAFC 39 and *Alderton v FCT* [2015] AATA 807 and *Lewski v FCT* [2017] FCAFC 145 the question was whether an effective disclaimer had taken place.

3 Trustee

A trustee has duties and can only act within its powers.

Trustee Duties

A trustee has a fiduciary duty. But a fiduciary has no positive legal duty to act in the interests of the beneficiary. This became clear in *Breen v Williams* (1996) 186 CLR 71.

A fiduciary duty is proscriptive forbidding a conflict of interest and duty, and any unauthorised profit from use of position, property or confidential information. This had been an issue in *Breen, Chan v Zacharia* (1984) 154 CLR 178.

Fettering of Discretion

Trustees are under a duty to exercise their powers personally, so they can't delegate. As part of this duty, trustees have a duty not to fetter their discretion, so a fiduciary cannot bind himself to the future exercise of a discretion – be it by a resolution or a contract – with a third party or beneficiary.

In *Re Stephenson's Settled Estates* (1906) 6 SR (NSW) 420 the question was whether a lease with option to purchase at a future date constituted a fettering of discretion. Another well-known court case around the fettering of discretion is *Re Vestey's Settlement* [1950] 2 All ER 891.

Trustee Power

If the deed silent around the powers of the trustee, the trustee's powers are derived from the state or territory trustee act, for example in Victoria s63 of the Trustee Act 1958 (Vic).

In Victoria s8 of the Trustee Act 1958 (Vic) requires a trustee to have regard to certain matters in exercising the power of investment. The other states' trustees act include similar directives.

In Trust 101 Part II Paul Goldin will cover the next three issues – Family Trust Groups – Distributions – Appointor.

MORE

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