



Monthly Information Newsletter – Tax & Super

April 2023

Trust distribution landscape now more settled

If you carry on your business affairs through a trust structure, there is now more clarity around the law on distributions following much uncertainty throughout the year.

Neither the taxpayer, Mr. Springer, nor the Commissioner has appealed against the Full Federal Court decision handed down in January 2023 (*Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3).

Readers will recall that the Full Court ruled against the Commissioner on the section 100A issue, but upheld his Part IVA determination for the 2013 year on the basis that the taxpayer had not demonstrated that absent the scheme (involving a distribution to a corporate beneficiary that was paid back to the trust as a franked dividend and on-paid to the non-resident Mr. Springer without any top-up tax) the trust would have done something other than making a distribution directly to Mr. Springer. The Commissioner was unsuccessful with his Part IVA appeal for the 2012 year, when events were still said to be evolving.

Mr. Springer may well have decided he's done well enough, having succeeded in challenging all but one of the income years attacked by the Commissioner.

The Commissioner may have been disappointed with the section 100A outcome, but will probably rationalise the decision on the basis that it turned very much on its own facts – at the time the 2013 resolution was made to appoint trust income there was no certainty that the corporate beneficiary would pay a franked dividend back up to the trust.

But he would have been quite pleased with the Part IVA result, which confirms that the 2013 amendments have been effective in disposing of the “do nothing” alternative postulate that was successfully relied upon by *RCl, News Corp* and *Futuris*.

The legal and practical upshot of the Part IVA decision is that taxpayers can now be taxed on notional transactions with a very high tax cost that they would not have contemplated entering into in a million years. Just goes to show that taxpayer success in the courts can be undone by the stroke of a legislative pen.

The Full Federal Court ducked the issue of the ordinary dealing exception, which it was entitled to do, given its conclusion that there was no reimbursement agreement. But that outcome is regrettable at a broader level. Absent further guidance from the Full Court, we are left with some encouraging comments from Logan J at first instance (about the lack of artificiality) which the Commissioner reads down in TR 2022/4.

Hopefully the Full Court's decision in a case known as *BBlood*, expected later this year, will shed further light on the issue. Given the decision at first instance, it seems unlikely the taxpayer will succeed on the ordinary dealing question in that case. However, the appeal decision may include some helpful guidance from the Full Court, even if the taxpayer is unsuccessful.

In the meantime, 30 June is rushing towards us, and family trusts need to be considering their position in relation to upcoming trust resolutions. Chat with us to establish your distributions for this year which may be governed, among other things, by your appetite for risk within the confines of the law.

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