IT 2344 - Income Tax : trust schemes with non-resident beneficiaries : assessing guidelines : determination of objections : settlement guidelines

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TAXATION RULING NO. IT 2344

INCOME TAX : TRUST SCHEMES WITH NON-RESIDENT BENEFICIARIES : ASSESSING GUIDELINES : DETERMINATION OF OBJECTIONS : SETTLEMENT GUIDELINES

F.O.I. EMBARGO: May be released

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SYD : 27/B13/AF 4064/1/1

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1209854	INCOME TAX AVOIDANCE TRUSTS WITH NON-RESIDENT BENEFICIARIES	DIVISION 6 FORMER SUB-SECTIONS 226(2) and (3)

PREAMBLE This Ruling, which takes the place of previous National Office memoranda, provides assessing and settlement guidelines in respect of schemes which seek to exploit the step-like nature of the tax rates or the exempt status of some entities through the making of alleged trust distributions to non-resident beneficiaries. In these cases, the non-residents, if they exist, are never intended to receive the benefit of the purported distributions.

2. The type of schemes covered by this Ruling operated in the 1978 and later income years but lost some of their attraction when amendments introduced by the Income Tax (Rates) Act 1982 removed the zero rate step for non-residents generally. Under the schemes, the net income of the trust is allegedly distributed to non-resident beneficiaries in order to minimise (or avoid completely) tax in the hands of both the trustee and beneficiaries. A common feature of the schemes is that the amounts purportedly applied for the benefit of the non-residents are not paid to or are not retained by them but are retained in or reimbursed to the trust or its associates and are shown in the accounts as amounts owing to the beneficiaries.

RULING Assessing Guidelines

3. In determining the bona fides or otherwise of these arrangements for the purposes of assessment and determination of objections, regard should be had to the factors listed below. It should be noted that the factors are not necessarily

exhaustive and that no particular factor is necessarily decisive -

(a) the trustee's resolution purportedly conferring present entitlement on the non-resident beneficiaries;

(b) the trustee's advice of entitlement, if any, issued to the beneficiary;

(c) whether the income entitlements have actually been remitted to the non-residents and, if so, whether the amounts were subsequently returned by way of gift or otherwise to either the default beneficiaries, the trustee or an associate (whether by the non-resident or by the trustee either independently or under a power of attorney);

(d) the relationship between the non-resident beneficiaries and the settlor, the trustee and the default beneficiaries;

(e) the proportion of the trust net income allegedly distributed to non-resident, as compared to resident, beneficiaries;

(f) whether distributions made by the trust to non-residents varied as to type or amount after the introduction of the Income Tax (Rates) Act 1982;

(g) the reasons given for not actually remitting the income to which the non-resident beneficiaries are allegedly entitled, in the light of any reasons given for the purported distributions;

(h) where appropriate, whether Reserve Bank approval for remittance of funds to non-resident beneficiaries was sought and, if so, obtained;

(i) whether there are technical deficiencies in the arrangements; for example, purported distributions to persons not within the class of beneficiaries eligible under the trust deed or the inclusion of beneficiaries not authorised by the terms of the trust deed.

4. Factors which may lead to a conclusion that the distribution to a non-resident beneficiary is genuine include :

(a) provision of a statement signed by the trustee to the effect that the named non-resident beneficiaries exist, reside at a specified address and are aware of their entitlements to the relevant income;

(b) provision of a statement signed by the trustee that the non-resident beneficiaries have been paid their entitlement in the terms of the trustee's resolution or trust deed, that the amounts remitted to the non-resident beneficiaries were not merely loans, that

the funds have not been and will not be returned directly or indirectly to the trustee, have not been and will not be used overseas by the trustee, the resident beneficiaries or associates; and

(c) satisfactory evidence to substantiate remittances by the trustee to the relevant non-resident beneficiaries.

5. Where, after consideration of the facts of a particular case, it is not possible to be satisfied on reasonable grounds that the non-resident beneficiaries purportedly benefiting from a distribution of the trust income were ever intended to receive the benefit of that income, the following assessment action is considered appropriate -

(a) although the correct assessment treatment is not free from doubt, assessments should be raised on the basis that the entitlement to that income is governed by the default clause in the trust deed, i.e. on the beneficiaries specified in the trust deed as being presently entitled to the net income of the trust in default of a valid appointment by the trustee. If the trust deed does not include a default clause, the trustee should be assessed under section 99A.

(b) where the relevant trust income has previously been assessed to the trustee under section 99A in accordance with earlier National Office directions, assessments should also be raised on the basis set out in paragraph (a) against the default beneficiaries if there is an extant dispute or tax remains unpaid on the section 99A assessment.

Additional tax (Penalty)

6. Additional tax by way of penalty under the former sub-section 226(2) should be imposed and remitted in accordance with the general principles set out in Taxation Rulings No's IT 2012, 2028, 2043 and 2206.

Determination of Objections

7. Objections should be disallowed where, after a consideration of all relevant factors, it is still not possible to be satisfied on reasonable grounds as to the bona fides of the arrangements allegedly conferring present entitlement.

8. Objections should, of course, be allowed in cases where it is decided on the total information available that the arrangements are genuine.

Settlement Guidelines

9. The following settlement guidelines do not cover cases falling to be considered under the additional tax (penalty) provisions of the new Part VII, effective from 14 December 1984.

10. Settlement offers on behalf of the trustee and all relevant taxpayers may be accepted in respect of these schemes where they are made in the following terms -

(a) full payment of the primary tax and associated section 207 penalty, under acceptable payment arrangements, payable under either an existing section 99A assessment against the trustee or under assessments raised or to be raised in respect of the default beneficiaries;

(b) withdrawal of objections or appeals lodged in respect of the relevant assessments or an undertaking not to lodge objections and appeals in respect of those assessments;

(c) withdrawal of any alternative assessments raised;

(d) full remission of any former section 226 additional tax plus any associated section 207 penalty.

11. In respect of assessments that have already issued in these cases, the basis of settlement described above will be available for 30 days after the date of issue of this Ruling. The due date for payment of assessments which have not yet issued will be the effective cut-off date for the receipt of settlement offers. Offers made and received after the appropriate date will be considered on their respective merits.

Recovery

12. In cases where assessments under both section 99A and the default beneficiary basis have been raised, recovery action should be instituted only in respect of the assessments raised on the default beneficiary basis (see Taxation Ruling No. IT 2156). Where, in terms of the trust deed, no genuine beneficiary is presently entitled to the income, recovery action should be pursued in respect of section 99A assessments issued to the trustee.

COMMISSIONER OF TAXATION
7 August 1986

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