

# ***IT 329 - Discretionary trusts : section 101 - resolutions of trustee***

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TAXATION RULING NO. IT 329

DISCRETIONARY TRUSTS : SECTION 101 - RESOLUTIONS OF TRUSTEE

F.O.I. EMBARGO: May be released

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OTHER RULINGS ON TOPIC IT 328

PREAMBLE

Consideration has been given to the extent to which a resolution by a trustee is of itself sufficient evidence of payment to, or application for the benefit of, a beneficiary within the meaning of section 101.

FACTS

2. In Taxation Ruling IT 328 a broad range of matters relating to the interpretation of section 101 was discussed. The validity of various methods to which trustees might resort to confer present entitlement on a beneficiary for the purposes of section 101 was canvassed in the light of decisions in *Pilkington v I.R.C.* (1962) All E.R. 622 and *Montgomerie v I.R.C.* (NZ) (1965) 9 A.I.T.R. 577.

3. In paragraph 19 of Taxation Ruling IT 328 it was stated that, to explain this office's view of what is needed to ensure present entitlement in cases where the trustee purports to apply income without distributing or extending it, the enquirer should be told that the trustee has to take some formal action which, having regard to the terms of the particular trust instrument, has the legal effect of giving the beneficiary an immediate and irrevocable vested interest in the income - i.e. the beneficiary has to be put in a position where he would be able to demand an immediate payment if not for the fact that he was an infant.

4. The New Zealand Court of Appeal in *I.R.C. (NZ) v. Ward* (1969) 1 A.T.R. 287 had occasion to consider another case involving the question whether a resolution by a trustee was an application of trust income for the benefit of the beneficiaries. In deciding that it was, the court followed the reasoning in an earlier English decision *Re Vestey's Settlement* (1950) 2 All E.R. 891.

5. In *Re Vestey's Settlement* there was an express discretionary trust to pay or apply the income of the trust "for the support or benefit" of a class of beneficiaries including certain infant beneficiaries. The trustees resolved that certain income which the trustees shall decide to be available

for immediate distribution shall belong to the infant beneficiaries. Although the income was allocated in favour of the beneficiaries, the trustees were of the opinion that none of the income in question was required for the maintenance of the beneficiaries and they resolved that the income be accumulated in accordance with section 31 of the Trustee Act 1925 (U.K.). These sums were then invested by the trustees. The Court of Appeal held that the allocation was an application of the income for the infants' benefit and that the sum so allocated became the absolute property of the infant beneficiaries.

6. The trustee in the Ward Case stood possessed of the assets of the trust and any accumulations of income thereon for such of the children of the trustee as should attain the age of 21 years as tenants in common with provision for substitution of the issue of any deceased child. The trustee was empowered in her absolute discretion to utilize the whole or part of the capital and income of the trust for the beneficiaries during his or her minority. The income year of the trust ended 31 March 1963. Two days before the end of the year the trustee executed a declaration to the effect that the income of the trust for the year totalling /4139 was to be disposed of in part (/3540) "to be held for the credit of the four beneficiaries in equal shares". The declaration was carried into effect in the books of the trust, the entries being made after the end of the financial year. No part of the income credited to the four children was paid to them until some years later.

7. It was held that the declaration by the trustee followed by the crediting of the income to the children in the books of the trust amounted to an application of the income for the benefit of the children within the relevant provision of the New Zealand tax law.

8. North P., with whom McCarthy J. agreed, concluded that the declaration by the trustee in the exercise of her discretion had the effect of immediately vesting a specific portion of the income in the relevant year in her four children and that, in result, there was a change in title from a contingent interest to an absolute interest in the sums allotted to them. Once the trustee made her declaration the sums allotted to her children, although not immediately paid out to them, became their absolute property and would form part of their individual estates in the event of their death under the age of 21 years.

RULING

9. The decisions are seen as confirming what was said in paragraph 19 of IT 328 see paragraph 3 supra. A declaration, resolution or other act of a trustee in an effective exercise of his discretion will amount to an application of income of a trust estate for the benefit of a beneficiary where :-

- (a) a specific ascertainable portion of the income of the year in question is thereby immediately and absolutely vested in the beneficiary so that even though it might not be immediately paid to the beneficiary it becomes his absolute property and would form part of his estate in the event of his

death;

- (b) the declaration, resolution, etc, is final and irrevocable.

10. To the extent that a resolution conforms to these requirements it will be accepted that it evidences an application of trust income for the benefit of a beneficiary within the meaning of section 101.

11. Consistently with the directions given in paragraphs 31 and 32 of IT 328 it is accepted that a declaration, resolution, etc. which fulfils the above requirements made within two months after the close of the year of income will be effective for the purposes of section 101, i.e. it will be accepted as an application of the trust income in the year preceding the two months period.

COMMISSIONER OF TAXATION