


IT 348 - The meaning of present entitlement

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TAXATION RULING NO. IT 348

THE MEANING OF PRESENT ENTITLEMENT

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL

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I 1082280	PRESENT ENTITLEMENT	98 99A
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OTHER RULINGS ON TOPIC : IT 319, IT 347

PREAMBLE

This ruling stems from a review of the practice adopted in all offices in relation to cases in which a beneficiary has a vested interest in income of a trust estate that is not payable to him until some time in the future because the trust instrument requires it to be accumulated.

2. In most offices the general practice is for the beneficiary to be treated as not being presently entitled to the income. Subject to comments made at a later stage of this Ruling it is desired that this practice be now adopted in all offices.

3. In the light of the authorities, the view is held that the basic approach to a determination as to whether present entitlement exists is to ask whether, having regard to the terms of the trust instrument and relevant statute law and rules of equity, the particular beneficiary has a present or immediate right to demand payment from the trustee. It is considered that where there is an effective direction to accumulate income, so that the beneficiary's right to the enjoyment of the income is postponed to a time in the future, the beneficiary is not presently entitled to the accumulating income, because he does not have a present right to demand payment.

4. These views are based primarily on the decisions of the High Court in *Executor, Trustee and Agency Co. of S.A. Ltd. v. F.C. of T.* 48 CLR 26 and *Whiting's Case* 68 CLR 199. The decisions of Boards of Review reported as Case No. 72 12 C.T.B.R. 624 (Old Series) and Case No. 41 13 C.T.B.R. 344

(Old Series) are also relevant.

5. In cases in which income is required to be accumulated for the benefit of a beneficiary, so that his interest is vested in interest as opposed to contingent, it is considered that section 19 does not operate to confer present entitlement where, on general principles, it does not exist. Trust income in theory is accordingly assessable under section 99 or 99A assuming, of course, that section 101 does not apply, (see in this regard Case No 41, 13 C.T.B.R. 344 (Old Series) and paragraph 11 of C.I.T.C.M. 829).

6. The question of a minor beneficiary's present entitlement requires special mention. It has been suggested that the view of present entitlement expressed in this Ruling leaves section 98 with little effective operation.

7. In this regard, the views expressed by Mr. Trebilco in Case No. 41, 13 C.T.B.R. 344 at p.345 (Old Series) in the following terms are considered to provide a broad statement of the position :-

" It seems clear that section 98 applies only in respect of a beneficiary who, if he were not under legal disability, would be individually assessable under section 97 upon the share of the net income of the trust estate to which he is presently entitled."

" The best approach to the matter, therefore, is to ignore, for the moment, that the beneficiaries in this case were infants in the year of income and to consider whether, but for that fact, they would have been individually assessable under section 97 of the Act."

" This depends, of course, upon whether in terms of the trust deed, the beneficiaries are presently entitled to a share of the income of the trust estate."

8. There seems to be nothing in the decided cases opposed to the view that a minor beneficiary may be in a position where, under the terms of the trust instrument, he has a right to obtain payment of income from the trustee, although on the face of it, a right to demand payment, in the complete sense of being able to enforce the demand, may not, because of the minority, exist. The view is taken that section 97 refers to a person who can both demand and receive payment while section 98 refers to a person who can demand and who, but for his inability to give a valid receipt, could receive payment. It is considered that section 98 recognises this position and imposes the tax on the trustee for the purpose of ensuring payment of the tax.

9. The views that have been adopted mean that a settlor wishing to avoid section 99A by making the beneficiary presently entitled on general principles does not have to put money into the hands of minor beneficiaries. Where a minor beneficiary is given present entitlement but cannot give his trustee a good receipt, income may, as a result of that factor, be

accumulated. If the accumulation is not required by the trust instrument or trust law, it is considered that a present entitlement exists.

10. In determining whether present entitlement exists regard must, of course, be had to a number of factors. These are -

- (a) the proper interpretation of the relevant instrument;
- (b) any relevant statute law; and
- (c) principles adopted by the Courts, notably the principle expressed in *Saunders v. Vautier* (1841) Cr. & Ph. 240 (see paragraph 15 below) which should be applied for income tax purposes only in relation to persons over 21 years of age.

11. In elaboration of paragraph 10 above, statutory or general law may require that the terms of a trust are to be modified. For example, if a direction for accumulation in a trust instrument offends against the "Thellusson Act", e.g., section 164 of the Property Law Act (Victoria), the instrument has to be read as modified in accordance with the statutory provision.

12. Of more general importance may be provisions corresponding to section 31 of the Trustee Act 1925 of the United Kingdom. That section applies to trusts for minors. It is not unusual for similar provisions to be found in the statute law of Australian States relating to trusts. Section 37 of the Trustee Act 1958 (Victoria) is an example. The effect of the United Kingdom provision was described by Lord Greene M.R. in the following terms in *Stanley v. I.R.C.* (1944) 1 All E.R. 230 at p.233 :-

" We are disposed to think that the effect of the section is better described, not as leaving the interest of the infant as a vested interest subject to defeasance, but as engrafting upon the vested interest originally conferred on the infant by the settlement or other disposition a qualifying trust of a special nature which confers on the infant a title to the accumulations if, and only if, he attains twenty-one or marries".

If the occasion arises, it would, of course, have to be decided in the light of the particular provisions in State laws and of any local decisions, to what extent this interpretation of the U.K. provision by the Court of Appeal applies for the purposes of Division 6.

13. While it has not been possible at this stage to make an exhaustive examination of provisions of the nature referred to in the preceding paragraph in the Trustee Acts of all the States, the research that has been made indicates that they

apply only if not negated by the trust instrument (see Case No. 69 15 C.T.B.R. 535 (Old Series)). It may be expected that, where it is necessary to do so, future inter vivos trusts for minors will, if it is desired to ensure that section 99A is inapplicable, be so expressed as to negative provisions of this kind.

14. The rule in *Saunders v. Vautier* may be broadly expressed as stating that a beneficiary of full legal capacity and entitled absolutely may put an end to the trust and direct the trustee to transfer the trust property to him. This rule is, accordingly, relevant where accumulation is directed to be made until the beneficiary reaches an age greater than 21 years, and its application is considered to confer present entitlement on a sole beneficiary who has attained his majority and has an absolute indefeasible interest, even though the trust instrument may direct further accumulation.

15. The rule in *Saunders v. Vautier* is described in these terms in *Fricks and Strauss : The Law of Trusts in Victoria* at page 449 :-

" Probably the most common instance of a restriction imposed on a vested interest is a direction to accumulate the income until the beneficiary attains an age greater than 21 years. The rule in such a case was stated by Lord Langdale, M.R., in *Saunders v. Vautier* (1941) Cr. and Ph. 240 : 'Where a legacy is directed to accumulate for a certain period or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge'. So, too, Lord Davey stated in *Wharton v. Masterman* (1895) AC 186 : 'where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit'.

" In regard to directions postponing payment of vested interests, Wood V.C., stated in *Gosling v Gosling* (1859), John 265 at p.272 : 'The principle of this Court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age - unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is

in the will or in some codicil to it a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain the age of twenty-five, but that some other person is to have that enjoyment - or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five so as to induce the Court to hold that, as to the previous rents and profits there has been an intestacy - the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full, until they attain the age of twenty-five years'."

16. The editorial note to C.I.R. v. Hamilton-Russell (1943) 1 All E.R. 474 provides further comment on the application of the rule. The note reads :-

"The decision in this case is based upon the rule that, after a fund becomes absolutely vested in a beneficiary of full age, a trust for accumulation ceases. The position was not that the trustees must continue to accumulate until requested by the beneficiary to hand the fund over to him, but that, at any time after the beneficiary attained full age, the trustees could have refused to continue the accumulations and have paid the fund into court if the beneficiary was adverse to any other method of determining the settlement"

This means that where an adult beneficiary is in a position to make a demand for payment from his trustee, but does not do so, he should be treated as presently entitled - see paragraph 11 of C.I.T.C.M. 829.

17. In Case No. 72, 12 C.T.B.R. 624 (Old Series) there was a direction to accumulate a legacy until a child attained 25 and Mr. Gibson relied on Saunders v Vautier to say that upon attaining the age of 21 the legatee would be entitled to payment of the legacy and the accumulated income thereon.

18. The principles set out in this Ruling should be applied for the purposes of future assessments and advising taxpayers in relation to whether or not section 99A is potentially applicable to the income of a trust estate. The principles are to be applied to all trusts whether created inter vivos or arising on death or otherwise. If any difficulties arise as a result of the advice contained in the Ruling, the matter should be referred to this office for consideration.

19. Advice as to the application of section 101 in relation to the 1964 amending legislation is to be found in Taxation Ruling IT 328.

COMMISSIONER OF TAXATION