IT 319 - Presently entitled: The effect of the decision in Taylor v FC of T [(1969) 123 CLR 206] upon the interpretation of the phrase presently entitled in section 98.

This Ruling incorrectly references the High Court case of *Taylor v FC of T* [(1969) 123 CLR 206]. It should instead refer to *Taylor v Commissioner of Taxation (Cth)* [1970] HCA 10.

TAXATION RULING NO. IT 319

PRESENTLY ENTITLED : The effect of the decision in Taylor v FC of T [(1969) 123 CLR 206] upon the interpretation of the phrase "presently entitled" in section 98.

F.O.I. EMBARGO: May be released

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RULING It has been decided to accept the decision of Kitto J. in the case of Taylor v FCT In that case the question was whether the beneficiary, a minor, was presently entitled to income arising under a trust for accumulation, which directed the trust income to be accumulated and paid to the beneficiary when he reached 21 years of age or to pass to his personal representatives as par of his estate in the event of his earlier death.

2. The Commissioner had relied primarily on the decision in F.CT. v Whiting (1943) 2 A.I.T.R. 421, where the test of present or immediate right to demand payment of trust income was laid down. His Honour, however, said that the Court in Whiting's Case merely decided that a beneficiary is not presently entitled to any income of a trust estate unless the administration had reached such a point that an amount of income was identifiable as being the subject of a present interest in possession vested in the beneficiary by the trust instrument. The Court was not referring to the beneficiary's legal capacity to give a discharge for the payment.

3. His Honour said that "presently entitled" refers to an interest in possession in an amount of income that is legally ready for distribution so that the beneficiary would have a right to demand payment of it if he were not under a disability. In the instant case, immediately upon the making of the settlement the beneficiary became absolutely entitled to the income arising during his minority, though his personal enjoyment of it was postponed. Accordingly he was presently entitled to the income accumulated in the subject year.

4. The decision should be applied only in cases where the facts are substantially the same. Its acceptance involves two propositions:-

(1) the ratio in Whiting's Case is that present entitlement depends upon the legal availability for distribution of trust income in which the beneficiary has a vested interest in possession;

(2) the beneficiary under a trust for accumulation is presently entitled to trust income if he has an absolute vested interest in possession to that income, notwithstanding that because of a disability (e.g., minority) he cannot obtain payment of it.

5. It is thought that acceptance of the first proposition will make little difference to present assessing practices so far as the income of a deceased estate is concerned - see C.I.T.C.M. No. 768.

6. In the case of inter vivos trusts, while it is of course possible that income may not be legally available for distribution by the trustee, such a situation is unusual in practice. Clearly this is not the position where a trustee invests trust income pursuant to a power of investment, for although the income is no longer physically available for distribution, there would have been no legal bar to distribution by the trustee. This is the situation which existed under the Taylor Settlements.

7. In Case No. 41, 13 C.T.B.R. 344, where the beneficiaries held absolute vested interests, the trustees were permitted to withhold and accumulate income and apply it towards repayment of a debt on the trust property. The decision that the beneficiaries were not presently entitled appears to have been based on the existence and exercise of the power to accumulate. It is probable that this decision could not now be supported, as the payments by the trustee seem to be merely an investment of trust funds. This is the view that was adopted by the Board in Case No. K76, 10 T.B.R.D 399.

8. Acceptance of the second proposition will probably have little practical affect. Most inter vivos trusts confer contingent interests and it was relatively uncommon, at least prior to the 1964 legislation, to encounter trust deeds which conferred upon beneficiaries an absolute vested interest in possession. Since that legislation was introduced, the trend has been to confer present entitlement on beneficiaries where there were arrangements that might have caused the discretion under s.99A to be withheld had the beneficiaries held only contingent interest. It is quite consistent with the objectives of the 1964 legislation that trustees should avoid liability under s.99A by exercising whatever powers they may have to make beneficiaries presently entitled to income. For this reason it is thought this modification of the view expressed in Taxation Ruling IT 348 that where there is an effective direction to accumulate income the beneficiary is not presently entitled to the accumulating income, will not offer any additional scope for avoiding the application of s.99A.

9. In determining whether a beneficiary has an absolute vested interest in possession to income arising under a trust for accumulation, it is important to consider not only the terms of the trust instrument but also any relevant statutory provisions. Such a provision is contained in s.27(1) of the Trustee Act 1958 (Vic), which provides that where a trustee holds property for inter alia a vested interest for a person, then during that person's infancy the trustee may apply such part of the income thereof as he thinks fit on behalf of the infant and shall accumulate the balance on trust for that infant on his attaining twenty-one or marrying as an accretion to the capital, to pass with that capital, notwithstanding that the infant had a vested interest in the income. If s. 37 applies, then notwithstanding that the beneficiary may in the literal terms of the trust instrument be entitled to the income, he would not in fact have a legal right to get it, except so far s it is actually applied in his favour, and depending of course upon the terms of the trust instrument any income that is accumulated he may never get.

10. Section 37(1) of the Trustee Act, although expressed in mandatory terms, only applies where there is no "contrary intention" shown in the trust instrument (s.2(3) of that Act) - In re Turner's Settled Trusts, (1937) Ch. 15 In re Lesser (1954) VLR 435. The question whether the trust instrument shows a contrary intention is often not a simple one. It usually arises in relation to the question whether a direction to accumulate income for an infant excludes the power otherwise given by s.37(1) to apply income for the infant's benefit. It has been held that an express direction to accumulate does so, In re Turner (supra), In re Linton, (1944) VLR 119, but that a mere implied direction (more accurately an accumulation required to give effect to rules as to gifts of corpus carrying intermediate income) does not, In re Watts, (1949) VLR 64.

11. It should be noted that in 70 ATC, Case B24; 15 CTBR (NS) Case 86 where the trust deed expressly negatived the statutory power (in s.43 of the N.S.W. Trustee Act) to accumulate surplus intermediate income, No. 1 Board of Review agreed that the beneficiary was presently entitled to the trust income. But where statutory powers operate to require the accumulation of income not applied for the maintenance or benefit etc., of the beneficiary, it should be maintained that the beneficiary is not presently entitled to the unapplied trust income.

12. One question which will arise is whether an express gift of income is inconsistent with the statutory power (obligation) to accumulate surplus income not in fact applied for the infant's benefit. The mere fact that there is a vested gift of income seems hardly to show an intention to exclude a statutory power which in its own terms applies to vested interests : c.f. the opening words of s.37(1), and the words of s.37(2)(a)(i), of the (Vic) Trustee Act, which assume the application of the power to accumulate surplus income in cases where the infant does have a vested interest in income. What is needed, to exclude the power or obligation to accumulate surplus income, is an expression of a contrary intention beyond that to be inferred from the mere

fact that the gift of income is vested.

13. In the Taylor case, the terms of the trust instrument were sufficient to exclude s.37 of the Trustee Act. The deed provided specifically that accumulated income was not to form an accretion to the trust fund, but was to be held (a) for future application for the benefit of the infant, as if it were income of the current year, (b) for the infant absolutely at twenty-one years of age, and (c) if the infant died under twenty-one, for his legal personal representatives as part of his estate. The effect of those provisions was that eventually all income had to go to the infant and s.37 of the Trustee Act does not operate to interfere with that position. Accordingly it will be necessary to distinguish between those cases where the power given to the trustee is to accumulate income for the benefit of the beneficiary and those cases in which the beneficiary's right to accumulated income is contingent only.

14. While acceptance of the Second proposition will mean that income which is accumulated for beneficiaries under 16 years of age who have an absolute vested interest in possession under a trust for accumulation will not be subject to assessment under s.99A, the provisions of s.94 will apply in the appropriate circumstances. A further effect of accepting that such beneficiaries are presently entitled to the trust income is that assessments will be raised under s.100, and also, where the settlor is the parent of the beneficiary, under s.102(1)(b).

COMMISSIONER OF TAXATION