


# ***IT 347 - Trust estates : present entitlement***

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TAXATION RULING NO. IT 347

TRUST ESTATES : PRESENT ENTITLEMENT

F.O.I. EMBARGO: May be released

REF

H.O. REF: 70/9809 F111

DATE OF EFFECT:

B.O. REF: V.O. : VJ 172/1 P3

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F.O.I. INDEX DETAIL

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OTHER RULINGS ON TOPIC : IT 319, IT 348

PREAMBLE

Consideration has been given to the effect of the decision in Commr of I.R (NZ) v Ward (1970) NZLR 1 on the phrase "presently entitled".

RULING

2. It has been accepted that the Ward decision, which followed the earlier English decision in Re Vestey's Settlement (1950) 2 All E.R. 891, is authority for the proposition that in some cases a resolution or determination of a trustee to apply, divide, set aside, etc. trust income for or amongst beneficiaries may have the effect, of itself, of vesting trust income in a beneficiary and thus making him presently entitled to that income for the purposes of sections 97 or 98. It consequently appears to remove the necessity for taxpayers and tax planners, in attempting to avoid operation of section 99A by having beneficiaries regarded as presently entitled to trust income, to look to section 101. Whereas previously, in deciding whether beneficiaries ought to be regarded as presently entitled to trust income, the question was whether there had been an application of income for the beneficiaries' benefit within the meaning of section 101, the primary question now, in the light of these two decisions, is whether a resolution or determination of the trustee to set aside, apply, etc. trust income for beneficiaries, purportedly in pursuance of the trust deed, has been of itself effective in causing those beneficiaries to be presently entitled.

3. The decisions should, however, be regarded and applied with some caution. The view is taken that both decisions rest on the finding or premise that the trustees' resolutions were a genuine exercise of their powers and were final and irrevocable. (See, for instance, McCarthy J. in Ward's Case). If this view is correct the principle the cases enunciated would not be applicable where a trustee's resolution or determination did not conform to those requirements. Regarded in this light, the decisions do not have as widespread an application as at first

glance they may appear to have. It is considered they should only be applied to trust cases where the Commissioner is satisfied that the trustee's resolution or determination is a genuine, final and irrevocable exercise of his power under the deed.

4. Deciding whether these conditions are met may not be easy in some cases. Where the deed incorporates provisions which made the trustee's resolution irrevocable and binding on him, the conditions will usually be met. Trusts including a provision or provisions directing that the trustee hold income allocated to beneficiaries on separate trusts for those beneficiaries absolutely would be acceptable.

5. Where the trust instrument gives the trustee a discretion to pay or apply the income to or for the benefit of the beneficiaries as they think fit but contains no provisions having the effect of making their act irrevocable and binding on them, problems may arise if the action taken by the trustees as a consequence of the exercise of their discretion leaves doubt as to whether there is an application of income for the benefit of the beneficiaries for the purposes of section 101. At this stage it is not practicable to issue a general direction which would encompass all the varying sets of circumstances that could be met in this field. If the decision in Ward's case is to be accepted it would follow that present entitlement could result in some cases of this nature. In practice, present entitlement may be conceded where the Commissioner is satisfied, in the particular circumstances of the case, that the trustee, in formally passing the resolution or making the determination in question, has acted genuinely and irrevocably in the exercise of his powers to distribute income of the trust and has intended to vest the income in the beneficiary concerned. In deciding this question, what the trustee has actually done with the trust moneys concerned is considered relevant though not decisive. Other circumstances to be taken into account, but which may or may not have a bearing on the question depending on the facts of each individual case, are the wording of the resolution or determination and whether the beneficiary has been advised of the resolution, etc.

6. If the action of the trustee falls within the requirements previously accepted in connection with the application of trust income for the purposes of section 101 there is, of course, no problem as the beneficiary will be deemed to be presently entitled.

COMMISSIONER OF TAXATION