

LATEST UPDATE – April 2011

TressCox Lawyers, our trust document providers have recently undertaken another full review of their Fixed and Unfixed (Standard) Unit Trust Deeds. The review was made in light of several recent decisions on the Administrative Decisions Tribunal and the Federal Court. A brief review of decisions of the Tribunal regarding fixed trusts follows.

You can order either a fixed or standard unit trust on line or by downloading an order form from our website.

Choice of Unit Trust

Like any trust, a unit trust is not a separate legal entity but rather a relationship between the trustee and the beneficiaries called unit holders. The trust deed attaches certain rights to the units of the trust which are held by the beneficiaries. These rights can be of an income or capital nature depending of the class of unit subscribed to by the participant.

These forms of trusts are most commonly used in joint venture situations. These trusts are designed to permit taxable profits and/or capital to flow through to the individual unit holders.

We offer two forms of unit trust, a fixed unit trust and an unfixed or standard unit trust. In most circumstances it is preferable to create a standard or unfixed unit trust as it is a more flexible vehicle for commercial purposes.

However when it is intended that the trust will hold New South Wales real estate as an asset it is important to consider the provisions of the NSW Land Tax Management Act 1956.

Under that Act land tax is payable by the owner on the taxable value of the land owned at midnight on 31 December of the year immediately preceding the year for which land tax is payable. Some types of land are exempt from the tax and in certain circumstances concessional rates apply.

If the land is the subject of a special trust the tax-free threshold (currently \$387,000) does not apply when calculating the tax. A special trust is a trust where the only person who meets the definition of 'owner' under the Act is the trustee and therefore not the beneficiaries. Special trusts include

discretionary trusts and unit trusts. However an exemption does apply if the unit trust

satisfies certain criteria which classifies it as a fixed trust.

The criteria is set out in the Act. The question of whether or not certain unit trusts are fixed trusts has been the subject of two major NSW decisions. In both cases the Tribunal examined terms of the trust as opposed to the object of the trust.

Sahab Holdings Pty Ltd ATF Kanjian Family Trust V Chief Commissioner of State Revenue **18 January 2011**

In this case the fact that the unit holder had a 100% interest in the assets of the fund was held not to be conclusive as to whether that holder is the 'owner' of the land.

The Tribunal determined that the deed provided the trustee with certain discretions which meant that the unit holder was not presently entitled to the income or capital of the Trust.

Other indicators that the unit trust was not a fixed trust included:

- The power of the trustee to redeem units;
- The power of the trustee to create and issue additional units;
- The effect of certain clauses conferring on a unit holder a beneficial interest in the trust fund as opposed to an interest in any specific item of property;
- Certain provisions which made the application of income and capital subject to future and contingent liabilities.

***GTN Developments Pty Ltd v Chief
Commissioner of State Revenue 2007***

The unit trust deed reviewed in this case suffered the same fate as that in the previous case. In particular it was held that:

- Nothing in the deed entitled the unit holders to the land otherwise than where the trustee so resolved in its discretion to make a 'distribution' of the land;
- The unit holders had only a prospective entitlement to the net sale proceeds on the sale of the assets of the trust which was similar to a personal right to the due administration of the trust;
- The unit holders were not presently entitled to the income or the capital of the trust because the relevant time for such a determination for land tax purposes was 31 December rather than 30 June as stated in the deed;
- The unit holders were not individually provided with a right to require the trustee to wind up the trust (as required by 3A(3B)(a)(ii)) as the deed provided that only a special resolution was required by the trustee.
- The unit holders did not have a fixed entitlement as defined on the grounds that the entitlements of the unit holders could be affected should the trustee exercise its discretion (with the approval of 75% of the unit holders) to issue additional units on a basis other than pro rata to existing unit holders.

Summary

It appears that the Tribunals take a very narrow interpretation of what constitutes a fixed trust for the purposes of the land tax legislation. In addition all of the provisions of deeds are considered and must fit within the meanings given by section 3A(2) and sections (3A) and (3B) of the Act.

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