Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 2012

30 May 2012

QUESTION: **BET 9**

Topic: **Trusts – misuse (ATO)**

Hansard Page: **92**

Senator CAMERON asked:

Senator CAMERON: In general terms are you aware of trusts being used by taxpayers for tax minimisation, tax evasion or tax avoidance, alienation of income, including personal and company income, or for putting assets out of the reach of creditors in cases of insolvency, administration or bankruptcy?
Mr D'Ascenzo: There is a lot of different situations there and I can certainly agree to some of them. As I said, trusts can be used to minimise the total tax position through distributions to lower-threshold beneficiaries, and we certainly investigate areas where we think trusts have been inappropriately used to gain some of the advantages that you referred to. Whether it covers all of those areas, I am not sure.
Mr Quigley: The current law—
Senator CAMERON: Mr Quigley, just before you commence, if you are not coming in with a direct answer on this—Mr D'Ascenzo, can you take that on notice to see whether you can provide me with some information in relation to those areas that the judiciary has seen as a problem?
Mr D'Ascenzo: We will try to do that.
Senator CAMERON: Mr Quigley.
Mr Quigley: I was going to point out that there is no doubt that the current law produces some inappropriate outcomes and does present opportunities to manipulate tax outcomes. We are currently investigating several cases where taxpayers and their advisers are taking an aggressive approach to division 6, which is the main trust provision. What they are trying to do is to separate the tax outcome from the business outcome. The government has announced a review of the taxation of trusts to address that and a whole lot of other issues.
Senator CAMERON: I understand that. So you do concede there are issues consistently with what judges are saying about misuse of trusts. Do you have any idea what the extent of the use of trusts is for these purposes?
Mr Quigley: If you are talking about figures, I would suspect not, but we will certainly see what we can come up with.

Answer:

Recent Court cases have highlighted the need for reform of the trust tax laws to reduce the complexity and uncertainty around their application, and to reduce the opportunities for manipulation. It is the Commissioner's view that many of the issues identified cannot be overcome administratively or by further litigation. This uncertainty and complexity is making it difficult for the Commissioner to administer, and for practitioners to apply, the law.

In *Commissioner of Taxation v. Bamford* [2010] HCA 10; 2010ATC 20-170; 75 ATR, the Court recognised that 'both sides in argument on the present appeals accepted that whichever of the competing constructions of Div 6 were accepted examples could readily be given of apparent unfairness in the resulting administration of the legislation'. In this context, the Court noted that it was more than 20 years since Hill J observed that 'the scheme of Div 6 calls out for legislative clarification, especially since the insertion into the *Income Tax Assessment Act 1936* (ITAA 1936) of provisions taxing capital gains as assessable income'.

The Government has announced that it will consult on options to modernise the trust tax laws. The Government released a consultation paper on 21 November 2011.

The consultation paper explored options for reform that "will ensure that businesses and individuals can continue to use trusts, with confidence that the tax outcomes applying to their circumstances are fair and consistent, whilst ensuring the community that the use of trusts does not provide inappropriate opportunities to manipulate tax outcomes."

This followed the Government enacting interim law changes with effect from the 2010-11 income year that enabled the streaming of capital gains and franked distributions to beneficiaries for tax purposes and introduced targeted anti-avoidance rules.

It is intended that the review will deal with matters not dealt with by the interim legislative amendments, including:

- the interaction between the distributable income and taxable income of a trust
- the method by which the taxable income of a trust is allocated to either the beneficiaries or trustee of the trust
- whether the amounts received by a beneficiary retain their character and source (and when 'streaming' of those amounts is effective for tax purposes), and
- the scope of Division 6 and other taxing provisions applying to trusts.