

## Senate Standing Committee on Economics

### ANSWERS TO QUESTIONS ON NOTICE

#### Treasury Portfolio

#### Budget Estimates

31 May – 2 June 2011

**Question No:** BET 96

**Topic:** ATO – Trust Streaming Draft Legislation

**Hansard Page:** Written

#### Senator Bushby asked:

I refer to the Assistant Treasurer's announcement on 16 December 2010 to conduct a public consultation as the first step towards updating the trust income tax provisions in Division 6 of Part III of the Income Tax Assessment Act 1936. On 4 March 2011, a discussion paper was released to better align the concept of "income of the trust estate" with "net income of the trust estate"; and to enable the streaming of capital gains and franked distributions. Substantial feedback however pointed out the complexities involved, and the Government then sensibly decided to defer the better alignment concept until the proposed broader rewrite of Division 6.

The Government is now proceeding with draft legislation to enable the streaming of capital gains and franked distributions.

The ATO stated on 28 April 2011 "Therefore in framing a resolution, a trustee may need to also consider its tax effect should the law not be enacted as proposed." This is an uncertain outcome.

When faced with uncertainty after the 2010 High Court decision in Bamford's case, the ATO in its Practice Statement Law Administration, PS LA 2010/1, effectively permitted an amnesty for 30 June 2010 streaming.

*Why cannot the same amnesty be extended for 30 June 2011, rather than making taxpayers wait for complex legislation to hopefully be passed between now and 30 June?* The chances of getting rushed legislation correct from the outset is highly unlikely and will only add to the confusion of small business owners and their advisers.

#### Answer:

The Government's legislation to enable the streaming of capital gains and franked distributions has now been enacted (refer *Tax Laws Amendment (2011 Measures No. 5) Act 2011*). It provides trustees and their beneficiaries with certainty in respect of the tax effectiveness of the streaming of trust capital gains and franked distributions for the 2010-11 and later income years.

The ATO's Practice Statement PS LA 2010/1 referred to by Senator Bushby does not provide an amnesty from the operation of the law. Where the ATO is required to review the taxation treatment of a trust, it will apply the law. Where the ATO identifies deliberate attempts to exploit the law, it will intervene. However, as advised in that Practice Statement, the ATO

will not select cases for review for the 2009-10 and earlier income years just on the basis of uncertainties in the law following the *Commissioner of Taxation v Phillip Bamford & Ors Phillip Bamford & Anor v Commissioner of Taxation [2010] HCA 10* decision.

The ATO recognises the practical difficulties now faced by taxpayers as a result of the timing of the legislation dealing with streaming of capital gains and franked distributions. As a result, the ATO will adopt an approach for the 2010-11 income year in respect of such streaming that is comparable to the approach taken in PS LA 2010/1 in respect of trust taxation more generally.

That is, ATO staff will not select cases for audit for the sole purpose of determining whether the purported streaming of capital gains or franked distributions by a trustee in respect of the 2010-11 income year is tax effective. However, consistent with the approach taken in PS LA 2010/1, where the ATO needs to review the taxation of a trust for other reasons, the ATO will apply the law as the ATO understands it to operate.

As a result of representations from practitioners, and again in recognition of the practical difficulties now faced by taxpayers, the Commissioner has also agreed to extend the period within which the requirements for specific entitlement to franked distributions must be satisfied for the 2010-11 income year. Further details of this arrangement can be found on the ATO's website (at [www.ato.gov.au/content/00274021.htm](http://www.ato.gov.au/content/00274021.htm)) which will continue to be updated with information about the new trust measures.