

21 December 2015

Public Consultation
Inland Revenue Department
P O Box 2198
WELLINGTON 6140

By email: public.consultation@ird.govt.nz

Draft QWBA: PUB0224 GST Treatment of Bare Trusts

Introduction

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on *draft QWBA – PUB0224 GST Treatment of Bare Trusts* (the Draft QWBA).

Comments

2. The Law Society is in general agreement with the conclusions reached in the Draft QWBA, but questions the analysis in the Draft QWBA that a bare trustee is (in all cases) an agent for the purposes of section 60 of the Goods and Services Act 1985.
3. Paragraph 5 of the Draft QWBA concludes that: “an agent is a person who has authority to act for someone (called the principal) to create a legal relationship between the principal and someone else” even in circumstances where there is no express agency agreement. Paragraph 7 goes on to express the view that a bare trustee / beneficiary relationship is “predominantly” an agency arrangement.
4. The Law Society queries whether a bare trustee relationship necessarily involves an arrangement of agency or whether something more is required to create that arrangement.
5. The Draft QWBA does not address how a bare trustee is able to contractually bind its beneficiary when only the bare trustee has legal title to the relevant property. Considering examples 1 and 2, it is not clear how Greg and Rhonda would be contractually bound to the various tenants as in each case the contract would be directly between the bare trustee (holding legal title to the property) and the third party.
6. The Australian Tax Office’s ruling on a materially similar issue is considered in the Draft QWBA. (GSTR 2008/3) reaches the same conclusions but takes a different position on the issue of agency. The relevant paragraphs read:

“26. In some circumstances, having regard to the terms of the documents governing the creation of the trust, the trustee's obligations, the terms of any agreement between the parties and all other

relevant circumstances, it may be established that in a particular transaction an entity deals with the trust property in the capacity of agent for B. This may be so even though the trustee holds the legal title to the trust property on trust for B. For instance, the documents may expressly provide that the trustee is to deal with the property as agent for B. In those circumstances, if the actions of the parties are consistent with the express terms, the trustee may acquire or supply the property as agent for B.

27. This is unlikely to occur in the case of a strict bare trust, where the only obligation of the trustee is to transfer title to the trust property to B or to a third party at B's direction. In those circumstances, any transfer of title to the property is likely to be pursuant to the trustee's trust obligation rather than as agent for B. However, it may occur in circumstances where B has expressly empowered the entity that holds or is to hold the legal title to property on trust to act as B's agent in relation to the acquisition or disposal of the property.

[...]

29. A bare trust arrangement does not in itself create the relationship of agency between the trustee and beneficiary. An entity does not, merely by acting in its capacity as bare trustee, contract as agent for the beneficiary of the trust but as principal. Accordingly, transactions involving a bare trust, without more, need to be analysed in a way that does not rely on a finding of agency."

7. Paragraph 29 footnotes reference to *Ingram v. Inland Revenue Commissioners* [1997] 4 All ER 395. That case involved a bare trust over property where the trustee declared that they would comply with all directions of the beneficiary. That case considered the proposition of whether a trustee could act as agent for a beneficiary (at 427):

"...but a trustee who contracts with his beneficiary contracts as principal, even when he enters into the contract for the benefit of the trust estate and not on his own behalf. He contracts so as to make himself personally liable to sue and be sued on the contract, though he will usually have a right of indemnity out of the trust fund."

(Note: The above statement appeared in the dissenting judgment but this particular position was endorsed in a majority judgment.)

8. Much of the authority cited in the Draft QWBA accepts that a bare trustee could potentially be an agent for its beneficiary, but does not describe this as a default position:
- a. Laws of New Zealand (Agency): section 5 recognises that a trustee may also be an agent, but only if the trustee has "in addition to the powers pertaining to trusteeship ... the power to alter the legal relations of the beneficiary ... with respect to third persons, such as by the making of contracts". This statement appears to require more than just a bare trust relationship to exist in order for an arrangement of agency to exist.
 - b. Trident Holdings Ltd v Danand Investments Ltd: the decision comments that "it was clear from the trust agreement between the appellants that the principal of D Ltd could execute contracts binding upon the 'beneficiaries'". The relevant document specifically contemplated that certain documents would bind the beneficiaries. As such the Court considered that this specific intention was a sufficiently clear indication of agency.
 - c. Collins v The Queen: the Court reached its decision without having to explore whether there was a bare trust or agency.
 - d. Equity and Trusts in New Zealand: the relevant reference states that "A trust relationship can co-exist with an agency relationship. Instances of this are generally called bare trusts". While this seems to be saying that dual trustee/agents will be bare

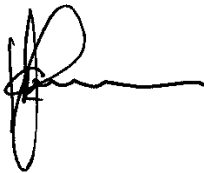
trustees, we are not confident that this can be read to imply the converse – i.e. that all bare trustees are dual trustees/agents.

9. In light of the above, the Law Society respectfully suggests that Inland Revenue give consideration to re-examining the agency issue and considering whether the approach adopted in the Australian Tax Office ruling is preferable.

Conclusion

10. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further, please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / jo.holland@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal flourish extending to the right.

Chris Moore
President