



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

**ON APPEAL FROM THE FULL COURT OF
THE FEDERAL COURT OF AUSTRALIA**

BETWEEN:

COMMISSIONER OF TAXATION

Appellant

10

and

NATALIE CARTER

First Respondent

ALISHA CARATTI

Second Respondent

NICOLE CARATTI

Third Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

Interests of the respondents in the income of the trust estate for 2014:

1. By cl. 3.7 and 4.2 of the Trust Deed the respondents had a vested interest in the income of the trust estate subject to appointments under cl 3.1 being made during an “Accounting Period” (ending 30 June of each year): FC [98] (CAB 105). The subject matter of the gift was the income of the trust estate in any Accounting Period in which no appointment was made: *CoT v Ramsden* (2005) 58 ATR 485 at [42], [57] (JBA 38).
- 10 2. The distributable income of the trust estate for the year to 30 June 2014 was \$18,275,000. No appointment was made by the end of 30 June 2014 under cl 3.1. Therefore, on 1 July 2014 each respondent’s interest in the trust income vested in possession and they were entitled to demand payment of 1/5 of that amount: *Gartside v IRC* [1968] AC 553, 607F.

Liability of the respondents under s 97 of the 1936 at the end of the 2014 income year:

3. A “present entitlement” exists where, during the relevant income year, a beneficiary possesses *rights* (vested in interest and possession) to payment of a share of the distributable income of the trust estate, ascertained during the relevant tax year: *Harmer* 173 CLR at 271 (JBA 22); *Tindal* 72 CLR at 618 (JBA 28); *Union Fidelity* 119 CLR at 182-183 (JBA 29); s 95A(1) (JBA 3 / 10).
- 20 4. Because at the end of the 2014 income year each of the respondents had a 1/5 interest in the distributable income of the trust estate vested in interest and possession and could demand immediate payment of it, the respondents had a present entitlement to 1/5 of the distributable income and, as resident beneficiaries, were liable under s 97 to be assessed and obliged to pay tax on a 1/5 share of the net income of the trust. Upon that obligation the Commissioner issued **assessments** on 27 October 2015 (FC [65]; CAB 93). The assessments were not excessive at that time or at the time of objection (FC [69]; CAB 94).

The disclaimers did not retrospectively make the assessments excessive:

5. The **disclaimers** of 30 September 2016 released the trustee from its obligations under the trust in the respondents’ favour, including those impressed on its legal title to the income of the trust estate: *In re Gulbenkian’s Settlements (No 2)* [1970] 1 Ch 408 at 418B; *In re Wimperis* [1914] 1 Ch 502 at 510. This is consistent with the nature of the obligations of a trustee and the correlative rights of beneficiaries: *DKLR Holdings v CSD* [1980] 1 NSWLR 510 at 519; (1981) 149 CLR 431 at 474.
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6. By the disclaimers' release of the trustee from its obligations, the respondents (relevantly) effectively elected not to exercise their rights of present entitlement to the income of the trust estate for the 2014 income year. But the disclaimers did not retroactively obliterate the prior existence of those rights, just as an election not to exercise an option does not mean the option never existed: *In re Parsons* [1943] 1 Ch 12 at 15-16 (JBA 44); *In re Stratton's Disclaimer* [1958] 1 Ch 42 at 52 and 54 (JBA 56); cf., FC [109], ln 10-11 (CAB 112). Before and after the disclaimer, the answer to the question "were the beneficiaries presently entitled as at the end of 30 June 2014" was "yes". That answer had revenue consequences under s 97 which were not undone by the disclaimers.
- 10 7. The authorities concerning the retrospective effect of disclaimers on the transfer of legal title to gifts (eg *Siggers v Evans* (1855) 5 El & Bl 367 (JBA 57), *Standing v Bowring* (1885) 31 Ch D 282 at 286, 288 and 209 (JBA 58), *Matthews v Matthews* 17 CLR at 20 – 21 (JBA 23)) are not relevant because the issue posed by s 97 was not whether there was a transfer of legal title, but whether the beneficiaries were "presently entitled" in the relevant sense. The Full Court's reference to *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632 (at FC [109] CAB 11-112) was inapposite.
- 20 8. The attempt at RS[29]-[38] to avoid *Parsons* and *Stratton* rests on mischaracterisations of the subject matter of the gift to the residuary beneficiaries, the rights of the residuary beneficiaries and the effect of the disclaimers. The subject matter of the gift was the *income* of the trust estate in any year no appointment was made, not *rights* to the income of the trust estate. The Trust Deed created vested but defeasible rights to the income of the trust estate, not a mere ability to accept such rights. Those rights vested in possession and matured into a present entitlement on 1 July 2014. The disclaimers released the trustee from the respondents' rights to the income of the trust estate, but did not obliterate them. The disclaimers did not just extinguish the ability to accept those rights.
- Div 6 does not have an ambulatory and fluctuating operation:*
- 30 9. Where a revenue statute operates on general law relations to generate tax liabilities and those relations are subsequently altered, the effect of that alteration on the tax liability is a question of statutory construction: *CCSR (NSW) v Smeaton* (2017) 106 ATR 151 at [15] and [103]-[104] (JBA 33).
10. The question is not answered by saying the statute operates on general law concepts (FC[110]; CAB 112). Where the tax character of income is determined by reference to general law relations of persons, the parties' retrospective reformation of those relations will

not necessarily affect the tax character of that income: *Rowe v FCT* (1982) 60 FLR 475 at 478-479 (partnership income); *Davis v FCT* (2000) 44 ATR 140 at [55] (trust income); *Smeaton* at [9] and [148]-[149].

11. Cases involving relation-back (eg ratification and conditional escrow) or where the true relations of the parties are subsequently ascertained (eg., rectification / rescission *ab inito*); or statutory annulment / revocation of a legal status (eg., bankruptcy) are distinguishable (cf., RS [46]-[55]); so too where the revenue statues specifically provide for matters after the end of an income year to affect assessable income for the year and for amended assessments to effect that (RS [67]-[80]). They reflect no general principle for which the respondent contends (cf., RS[46]).
12. Div 6 of the 1936 Act distributes liability to include the net income of the trust estate in assessable income of trustee and beneficiaries by three criteria: (1) a present entitlement of the beneficiaries to the income of the trust estate; (2) legal disability of the beneficiaries; (3) residence of the beneficiaries or source of trust income (ss 97, 98, 99, 99A). On its proper construction, Div 6 applies those criteria to the state of affairs as they exist during and at end of the income year to generate tax obligations at the close of the year upon which the Commissioner subsequently makes assessments generating debts due and payable: *CoT v H* (2010) 188 FCR 440 at [39]-[40], [43]; JBA 35; s 5-5, 1997 Act.
13. Ascertaining whether such assessments are subsequently rendered excessive by an alteration of the rights as between trustees and beneficiaries is not a question of whether s 97 operates “once and for all” (cf., FC [110]; CAB 112), but whether the distribution of the obligations to pay tax on net income of the trust estate by Div 6 at the end of an income year and the assessments issued to give effect to those obligations are subject to revision and reformulation for an indefinite period because of a subsequent reformation of the rights as between beneficiaries and trustees by disclaimer.
14. Nothing in Div 6 suggests an intention that it should have such an ambulatory and fluctuating operation (cf., *Smeaton* at [22]); or that the liabilities it creates should be “retrospectively expunge[d]” in that way (cf., *Smeaton* at [146]). To give it such an operation would give rise to unexpected and belated tax liabilities for (other) beneficiaries or trustees or possibly settlors (eg., in the case of a resulting trust to the settlor) and difficulties in administration (including by reason of time limitations on amendments).

Michael O’Meara SC 

David Hume 

Dated: 8 November 2021