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# John W Gaal

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18 March 2011

The General Manager  
Business Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [SBTR@treasury.gov.au](mailto:SBTR@treasury.gov.au)

Dear Sir/Madam,

### Improving the Taxation of Trust Income

Attached is a submission on a practical aspect of the proposed trusts changes being canvassed by the consultation paper Improving the Taxation of Trust Income. The issue is not considered in the consultation paper but, it is submitted, must be addressed.

I trust the submission is of some assistance. Please let me know if I can be of any further help.

Yours faithfully,

John Gaal

## SUBMISSION ON THE DISCUSSION PAPER IMPROVING THE TAXATION OF TRUST INCOME

This submission is on an issue which is not directly within the scope of the Questions for Consultation raised by the Discussion Paper. Nevertheless, from a practical point of view, in the context of the changes under consideration, the issue is one of considerable practical importance for practitioners and should be addressed.

### 1. Background

- 1.1 It is proposed that the amendments that flow from the consultation process will apply from and including the 2010-11 income year. As the recent decision of Stone J in the *Colonial First State Investments case* ([2011] FCA 16) has reaffirmed, to make beneficiaries presently entitled to income of the 2010-11 income year, trustees will need to make distribution resolutions by 30 June 2011 at the latest.
- 1.2 The Assistant Treasurer, in his media release of 4 March 2011 which announced the current consultation process, stated that it is envisaged that exposure draft legislation will in due course be released for public consultation and that "it is expected" that any legislation will be "introduced" into Parliament in the winter sittings of Parliament.
- 1.3 The issues that are being addressed in the consultation are significant and any resulting amending legislation will have the potential to cause difficulties for practitioners in advising clients how to act. Practitioners will need to evaluate the terms of the legislation and also the terms of each particular trust deed but until legislation is in fact passed by Parliament, this evaluation cannot be undertaken. It will be essential that any changes that are made by the amendments in fact represent a final position and do not provide merely a temporary solution. Indeed, the Assistant Treasurer in his media release envisages that any changes will apply beyond the 2010-11 income year.
- 1.4 Having regard to the Parliamentary sittings schedule there must be doubt whether the legislation will be law by 30 June 2011 or, if it is, whether it would be enacted in sufficient time to allow it to be properly evaluated for 30 June resolutions. Indeed, the introduction of the legislation into Parliament would meet the time schedule stated in the Assistant Treasurer's media release.
- 1.5 The Commissioner has adopted an administrative (non-binding) practice which (subject to the terms of the particular trust deed) allows a trustee two months after the close of an income year within which to make a distribution resolution that he, the Commissioner, will treat as being effective for the income year (see IT 328 and IT 329).

- 1.6 The Commissioner's administrative practice is, it seems, recognised in sec 96C(1)(b) ITAA 1936 and in sec 269-65 Sch 2F ITAA 1936. The practice is also recognised in the explanatory memorandum to the Tax Laws Amendment (2004 Measures No 1) Bill 2004 (see para 3.20) and in TR 2010/3 (see para 111).
- 1.7 The fact that the Commissioner's administrative practice is at variance with the law (and is not binding on him, the AAT or the Federal Court) means that practitioners do not have certainty should they rely on it.

## 2. Submission

- 2.1 Consideration should be given to incorporating into any amending legislation that results from the current consultation process, provisions that give legislative force to the Commissioner's practice. This would alleviate the 30 June pressure for practitioners which is likely to be substantially increased as a result of any proposed amendments.
- 2.2 For the 2010-11 income year, if the relevant amending legislation is not law by 30 June 2011 or does not become law within a reasonable time before 30 June, there should be a transitional provision which would permit the distribution resolution to be made within a suitable specified time after the amending Bill becomes law.
- 2.3 A change along the lines suggested could not override an express provision of a trust deed which requires that a distribution resolution be made by a particular time. In such a case it may be necessary for the trust deed to be amended. If the submission in 2.2 for the 2010-11 income year is adopted, trustees would have time to address any changes that may be required to trust deeds to enable them to rely on an extended distribution time.
- 2.4 The way other provisions operate may also need to be considered – for example, the use of the expression "distributions ... during the income year" in the definition of an entity's direct small business participation percentage in a non-fixed trust (see item 3 in the table in sec 152-70(1) ITAA 1997).

## 3. Summary

- 3.1 That an amendment be made to permit a trustee to make a distribution resolution for an income year by the end of two months after the end of the income year subject to a transitional provision which would apply for the 2010-11 income year and which would cater for the special circumstances that would apply for that income year.

John Gaal