

Let's chat

Family trust elections and QLD stamp duty business restructure exemption –
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With:

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Information provided is general in nature; precise application depends on specific circumstances

Issues to consider

- Background
- Fixed trusts, non-fixed trusts and family trusts
- Why make a family trust election
- Trust loss tests
- Family trust distribution tax
- Making elections
- Family and the 'family group'

- Bonus: QLD stamp duty small business restructure exemption

Background – family trust elections

- Applied from 1995 tax year
- Required to access certain exemptions (45 day holding rule and carry forward company losses)
- Easier to access other exemptions (trust losses and bad debt)
- Restricts who a trust can distribute to
- Family trust distribution tax payable to distributions outside a family group
- Family group and include related trusts and companies
- Take away: Care and thought must be made before deciding to make a family trust election

Fixed, non-fixed and family trusts

- Unit trust \neq fixed trust
- Using the words 'family trust' \neq family trust
- Fixed trust = a trust where persons have fixed entitlements to all of the income and capital of the trust
- Non-fixed trust = a trust that is not a fixed trust
- Family trust = a trust that has made a family trust election
- Different type of trust requires different rules to access trust losses from prior years

Fixed trusts

- Note recent ATO PCG 2016/16 outlining factors which the Commissioner will exercise a discretion to treat an interest as being a fixed entitlement
- Lists out powers that can cause a trust **not to be a fixed trust**:
 - Power to amend
 - Power to reclassify existing unit rights
 - Power to classify income or capital amounts
 - Discretionary beneficiary powers
 - Power to issue or redeem units
 - Power to enforce forfeiture or cancellation of partly paid units
- Some saving rules available to ensure not all trust deeds allowing the issue or redeeming of units to invalidate the deed (for example, where such issue or redeeming must be done at market value)

Trust loss tests

<i>Type of trust</i>	<i>Tests required to be satisfied to access trust losses</i>
Fixed trust	50% stake test Income injection test
Non-fixed trust	Pattern of distributions test 50% stake test Control test Income injection test
Family trusts	Income injection test

Trust loss tests

- 50% stake test:
 - Requires same individuals to hold more than 50% of the stake in the income and capital of the trust (easy to prove with a fixed trust)
 - Other trusts holding units having made a family trust elections will be treated as individuals as holding a fixed stake
 - Non-fixed trusts holding units without a family trust election must satisfy all of the non-fixed trust tests
- Pattern of distribution test:
 - Trust passes test if the trust distributed to a greater than 50% share of all test year distributions of income and capital to the same individuals
 - Requires analysing historical year distributions and ensuring they remain largely with the same group of individuals
 - Note issues when distributions made to an entity with discretionary entitlements or whose shareholder/unitholder is a discretionary entity (i.e. a bucket company with a discretionary trust shareholder).
 - Note broad concept of distribution including distributions by way of loan and allowing a beneficiary to use trust property or releasing a debt

Trust loss tests

- Control test:
 - A group must not, during the income year, begin to control the trust directly or indirectly (i.e. there cannot be a change of control in the trust)
 - A group is a person; or a person and one or more associates; or two or more associates of a person
 - Considers if the group has the power (including the power of appointment or revocation of income or capital) to dictate distributions, impact who can benefit or control the trust, or if it is expected that the trustee would act in a particular manner
 - Impact of change of trustees or appointors?
 - Associate is per section 318 1936 Tax Act

Trust loss tests

- Income injection test:
 - Test is failed if trustee derives income
 - An outsider provides a benefit to the trustee or an associate
 - Trustee provides a benefit to the outsider or associate
 - There is a scheme that could be concluded
 - Benefit is broadly defined
 - If the trust is not a family trust, then an outsider is a person other than the trustee or a person with a fixed entitlement to a share of the income or capital of the trust
 - If the trust is a family trust, then an outside is a person other than:
 - The trustee of the trust
 - A person with a fixed entitlement
 - Test individual and family members of the family trust election
 - Related entities to the family group

Family trust distribution tax

- Top marginal rate
- Triggered if trust confers a present entitlement or **distributes** income or capital to someone outside the family group
- Tax is due and payable:
 - If distribution made prior to election made –21 days after date of election
 - Otherwise – 21 days after making the distribution
- Individual trustee liable
- Company trustee liable along with each person who was a director of the company at the time of distribution (all jointly and severally)

Making elections

- Government form
- Need to satisfy family control test (being a family group controlling the trust)
- Can be retrospective
- Revokable within 4 years of the effect of the family trust election
- Variable provided distributions are not made outside the family group
- Only one variation allowable
- Interposed entity elections are also revokable and variable

Family and family group

- Pick an individual
- Spouse
- Parent and grandparent of the test individual and spouse
- Lineal descendants of individual and spouse
- Siblings of test individual and spouse
- Lineal descendants of siblings of test individual and spouse

- Spouse includes same sex couples
- Children includes adopted, step children and ex-nuptial children

Family and family group

- Particular rules in relation to former family members
- Trust with a family trust election is a member of the test individual's family group
- Trust with same test individuals
- Companies, partnerships or trusts having made an interposed entity election
- Companies, partnerships or trusts in which family group members have **fixed entitlements** directly or indirectly to all of the income and capital
- Deductible gift recipients
- Certain entities whole income is exempt under certain sections

QLD stamp duty business restructure exemption

- Guidance currently, not legislated
- Only available for restructure into a company
- Business valued under \$10 million
- Company must be dormant (i.e. had no assets or liabilities, been party to an agreement or a beneficiary or trustee of a trust and has not issued or sold any shares or rights relating to shares)
- Beneficiary is defined to mean a 'default beneficiary'

QLD stamp duty business restructure exemption

- Transferor must be shareholder of the company
- If sole trader, then individual is the sole shareholder
- If partnership, then partners are the shareholders in the same proportions
- If a discretionary trust, then default beneficiaries are shareholders in the same proportions
 - Note does not consider unit trusts as part of the restructure
 - Note that it is not common for discretionary trusts to be default beneficiaries, hence a restructured company with an individual shareholder
- Does not appear to have any 3-year wind-back mechanism as with other stamp duty exemptions – so possible to transfer shares after obtaining duty exemption?

QLD stamp duty business restructure exemption

- Combined with section 122-A/122-B
- Small business capital gains tax concessions
- Going concern
- Useful still for trading trusts?
- Stamp duty concession if restructured company has shareholders that are not in the same proportion as the transferor – stamp duty only on the difference in ownership rather than 100% to transfer the business into a company structure

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