

TAX

OCTOBER 2008

EMIGRATING TO AUSTRALIA?

Potential tax implications for your New Zealand trust

Monique Mackie
SENIOR SOLICITOR

Media reports abound of the increasing number of New Zealanders emigrating to Australia. But for settlors, trustees or beneficiaries of a New Zealand trust, the impacts such a move could have on that trust are often overlooked.

When do Australian tax implications arise?

If a New Zealand trust becomes “resident” in Australia, income and assets in that trust will be exposed to Australian tax law. A New Zealand trust will be resident in Australia if a trustee of that trust is resident in Australia or if “central management and control” of the trust is exercised in Australia.

Australian tax implications may also arise for a New Zealand settlor or beneficiary who becomes resident in Australia for tax purposes.

An individual (including an individual trustee) is resident in Australia if their usual place of abode is in Australia or if they spend more than half a year in Australia and intend to reside there.

Why does it matter?

The tax treatment afforded to trusts in New Zealand is more favourable than that which applies to trusts that are tax resident in Australia.

New Zealand does not levy a capital gains tax upon the sale of assets. Moreover, income accumulated in a trust by a trustee is subject to a maximum tax rate of 33%.

By contrast, income accumulated by the trustees in an Australian resident trust is subject to tax of 45%. Trust assets (no matter where they are located) may also be exposed to capital gains tax.

There can also be significant Australian tax implications for a New Zealand settlor or beneficiary who becomes Australian tax resident.

When will Australian tax be triggered?

Trustee becomes resident in Australia

Australian tax imposed on worldwide income

When a trustee becomes an Australian tax resident, the trust is deemed to also become Australian tax resident. Australian tax residents are taxed on their worldwide income. Therefore, all of the income and assets held in the trust will generally be exposed to Australian tax, including capital gains tax.

It is worth pointing out that only one trustee needs to move to Australia to

trigger this tax consequence. The trustee cannot simply move back to New Zealand and become a New Zealand resident before selling any trust assets in order to avoid capital gains tax. If a trust ceases to be an Australian resident, it is taxed on all unrealised gains during the period of residency.

Income accumulated in the trust exposed to a high rate of personal tax

Income in a discretionary trust which is accumulated by a trustee is taxed in Australia at the maximum personal tax rate, currently 45%. This rate is significantly higher than the maximum tax rate which is imposed on income retained in a New Zealand trust (33%).

Settlor becomes resident in Australia

Before a New Zealand resident settlor moves to Australia they should give consideration to any trusts which they may have settled.

The Australian tax implications depend upon whether the trust is considered a “transferor” trust or a “revocable” trust for Australian tax purposes.

If the settlor is also a transferor/controller of the trust, the settlor would be taxed in Australia on the attributable income of the trust. In the case of a “revocable” trust (where the settlor has the power to obtain the income or property of the trust or the trust is for the benefit of a minor child of the settlor) then the trustee is taxed as if the settlor was taxable on the income.

Beneficiary becomes resident in Australia

The Australian tax implications triggered when a beneficiary moves to Australia depend upon whether the beneficiary is a “temporary” resident under Australian tax

law, the residency status of the trust of which they are a beneficiary and whether the beneficiary is “presently entitled” to receive income from that trust.

If the beneficiary is a “temporary” resident under Australian tax law, then they will not be subject to Australian tax in their capacity as beneficiary of a New Zealand trust.

If the trust is resident in Australia then the beneficiary is assessed on their share of the trust’s worldwide income. If the trust is non-resident, then the beneficiary will only be assessed on their share of the trust’s worldwide income to which they are “presently entitled”.

Critically, assets in the trust will generally become subject to capital gains tax when a New Zealand beneficiary becomes resident in Australia (and is not a “temporary” resident). If these assets are sold, capital gains tax may be payable in addition to any personal tax payable on the income generated by the sale.

How can you avoid Australian tax implications?

Trustees

One option available to a trustee is to give control over the trust to somebody else, perhaps a parent, relative or friend. However, whoever the trustee chooses must be given outright control over the trust. If the trustee is able to maintain their power over the trust’s affairs by telling the nominated person what to do, Australian tax residency rules will apply.

Alternatively, a trustee could resign their position. If a person is a trustee of several trusts, they would need to resign as trustee from all of these trusts in order to prevent these trusts from becoming subject to Australian trust tax rules.

A further option available to a trustee would be to wind up a New Zealand trust so that Australia's tax regime would not apply to it. However, this may be an unpalatable option for those who have engaged in a gifting programme over a number of years or where New Zealand tax implications would be triggered upon a wind up.

Finally, a New Zealand resident company could be appointed trustee (either a specialist trustee company or a company newly incorporated for this purpose). Care would need to be taken in terms of where the directors of the company are resident, and where central management and control of the company is exercised, to ensure the trustee company is not considered tax resident in Australia.

Settlors

Settlors who migrate to Australia pose particular challenges in terms of ensuring that any trusts they have settled do not become liable to pay tax in Australia. Every case must be analysed in terms of its specific circumstances.

Beneficiaries

In order to avoid being subject to Australian tax on trust income to which they are "presently entitled", beneficiaries moving to Australia should consider applying to become a "temporary" resident of Australia. The beneficiary will be taxed on all income relating to their employment in Australia. However, in all other respects they will be taxed as if they are non-resident in Australia. This means that trust income to which they are entitled is not taxed in Australia unless that income has an Australian source. This is an open-ended exemption with no time limit.

What should you do?

Talk to us before you leave New Zealand for Australia and we can provide you with preliminary advice. The Australian rules are complex and specialist Australian tax advice may be needed.

To receive your updates faster, please subscribe to our electronic newsletter service on:

info@bellgully.com

To view all our publications or update your details please visit our website: *www.bellgully.com*

For further information, please contact your usual Bell Gully adviser or:

David Simcock

64 9 916 8945

david.simcock@bellgully.com

Willy Sussman

64 9 916 8952

willy.sussman@bellgully.com

John Bassett

64 9 916 8946

john.bassett@bellgully.com

Monique Mackie

64 9 916 8817

monique.mackie@bellgully.com

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.

All rights reserved © Bell Gully 2007