

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Question: SBT 44-45

Topic: Trusts – websites (ATO)

Hansard Page: 110

Senator CAMERON asked:

Senator CAMERON: So you are going to review trusts to bring them into the modern era. I just picked a website on trusts at random and I got a company called Tax Effective Accountants, based in Sydney. They say they are professionals. There would be many, many of these around the country, I would suppose. They say:

'Safeguard your money and property with bullet-proof asset protection strategies and trust structures.'
What is a bullet-proof trust structure?

Mr Quigley: I have no idea what that could—

Senator CAMERON: You have no idea? But this is a company selling its services to taxpayers and saying it is providing 'bullet-proof asset protection strategies and trust structures'.

Mr Quigley: I would need to understand more of the context before I would be able to answer that.

Senator CAMERON: I can simply guide you to their website: www.taxeffective.com.au. If you look at that you can maybe come back to me and advise me what is a bullet-proof asset protection strategy and trust strategy.

Mr Quigley: Yes, I will take that on notice.

Senator CAMERON: You can understand why I am concerned about it. When you start talking about bulletproofing, it means no-one can get access to any money.

Mr Quigley: Again, I would do not speculate on what they might mean by that.

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Mr Quigley:

I understand that there are strategies that can be in place to provide some forms of asset protection that are legitimate. Whether these are legitimate or not, I am not making a comment.

Senator CAMERON: Can you provide me on notice some overview—not in highly technical detail but in lay terms—as to what these legitimate trust arrangements can be that can protect you from legitimate law suits and unfavourable legal judgements. I would be really interested to know what you believe is appropriate. The website goes on to say—and this is completely at random, and I am sure there is more out there:

- Find out how special trusts can save beneficiaries from excessive and unnecessary taxes, family objections, legal claims and fees.

So under the tax laws and the trust laws you can be protected from legal claims, fees. and family objections. What is an unnecessary tax? Do you know?

Mr Quigley: I have no idea what that would mean.

Senator CAMERON: Could you maybe come back to me on what that means as well. It also says:

- Protect your business from devastating negligence and professional liability threats.

Can you arrange your assets in a way that you are protected from devastating personal negligence and professional liability threats? Is that something that you can do?

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Mr Quigley: Without knowing more detail, I am not in a position to say.

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Senator CAMERON: I might take it up with the Attorney-General's office. I will do that. But this is the doozy, and it is squarely in your patch. It says:

Learn the secrets to trust structures that help investors reduce their taxes and protect their portfolios.

Are there secrets in trust structures? What is the issue here?

Mr Quigley: Senator Bushby mentioned spin, and maybe that is a bit of spin on the services that can be offered. Again, I just cannot speculate on those things.

Senator CAMERON: Will you have a look at this website?

Mr Quigley: Yes. You have given us the link, so we will have a look at it and we will provide whatever information we can to you about the issues—not about that particular company and what they are doing, but about the issues that are relevant to taxation.

Senator CAMERON: Could you also then have a look at a few of the other publicly-listed tax areas and see whether this is a pattern? I think there are issues here for the Attorney-General. I think there are issues for you. I think there are issues for maybe the ACCC. There are issues right across the spectrum of government given the basis of some of these claims. I would be interested for you to have a look at that. Some of these trust funds you have heard me mention are what I have described as super trusts. That is these trusts for billionaires, who are putting a lot of their assets away from immediate taxation. Some of the issues that have been reported in the press as a result of some problems with these trusts are that there is a lack of robust compliance in some of the trusts. Is that an area for you guys?

Mr Quigley: Certainly we look at any non-compliance with the taxation requirements of trusts, including resolutions about the way distributions are made to beneficiaries

Answer:

44. Asset protection

Asset protection is not directly a taxation matter, but a general civil law matter. As such, it is not a matter the ATO can provide expert advice on.

Sometimes restructuring is undertaken ostensibly under a guise of asset protection, but may be found by the ATO to be for the underlying purpose of obtaining a taxation benefit and can be caught by anti-avoidance provisions in the *Income Tax Assessment Act 1936 (the Act)*. By way of example, if taxpayers restructured their business assets into a trust to purportedly to achieve asset protection, but in substance liberated profits in a way that avoided tax, that might be found to give rise to taxable income.

Trust strategy / tax planning

Trusts are used for a variety of reasons, such as holding wealth, carrying on business or investment activities, or a combination of both. Trusts are also used for family succession planning (including testamentary trusts) or to care for vulnerable people (such as Special Disability Trusts).

Trusts are also used for tax planning purposes in ways that are clearly allowed under the law. Broadly, this is due to their flexibility (at least for discretionary trusts), their general flow-through nature, and the ability for certain types of income to retain its character in the hands of beneficiaries.

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Compared to other structures (such as individuals, companies and partnerships), trusts have various advantages and disadvantages. For example, the flow-through nature described above generally provides the same tax outcome compared with an individual earning income directly, but can provide a better tax outcome compared with shareholders in a company in some cases. On the other hand, the trustee tax rate is typically the top marginal tax rate plus the Medicare Levy (other than for deceased estates), which is higher than the progressive rates for individuals or the 30 per cent corporate tax rate.

The Government is consulting on options to modernise the taxation of trust income. As stated in its consultation paper of November 2011, the Government considers that, where used appropriately, trusts are a legitimate structure through which Australians should be able to conduct their personal and business affairs. The discussion paper sets out a number of principles that elaborate on the Government's policy framework.

45. 'Unnecessary tax'

The ATO does not know what the author of the website meant by 'unnecessary tax' and it is likely that advice of that nature is highly particularised to the circumstances of each client.

In the context of such a website an 'unnecessary tax' might mean a tax which you can legitimately reduce or prevent from arising if you put in place tax planning strategies. A general example might be a trust distributing capital gains to individuals, rather than a company, to take advantage of the capital gains tax discount for individuals. Another example is where state government stamp duty liability is averted by holding assets in a family trust, rather than making transfers of direct ownership among individuals in the family group.

'Secrets' in trust structures

In the context of providing professional advice, a firm might consider its knowledge of the complex subject of trust law and administration as superior and possibly market themselves as knowing the 'secrets'. The so-called secrets may relate to:

- legitimate tax planning - strategies that minimise tax by successfully navigating the law
- aggressive tax planning - pushing the boundaries of the law based on what might be reasonably arguable positions, despite being contrary to ATO views
- tax evasion - disregard for the law or entering into schemes that are designed to appear legitimate whilst hiding the reality.

The majority of users of trusts utilise longstanding strategies such as income streaming, because they confer economic advantages. In this context, income streaming broadly means that beneficiaries that receive a particular type of income from a trust (such as a capital gain) would be assessed as if they derived that type of income directly, rather than on a 'blend' of all of the types of income earned or received by the trust.

In 2011, the parliament enacted interim changes to the trust taxation provisions that confirmed that the 'streaming' of capital gains and franked distributions to particular beneficiaries that receive the related financial benefits would be effective for tax purposes.

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Because of complexity in the tax law and differing appetites for risk-taking, there is a subset of taxpayers who may choose to adopt reasonably arguable positions that do not accord with the ATO's understanding of the law. The ATO generally refers to this as aggressive tax planning. The ATO has identified trust cases limited to tax avoidance and therefore civil sanctions (see ATO response to Senator Cameron's question of 30 May 2012, BET 10 for descriptions of such schemes). The ATO has also identified cases involving blatant tax evasion.

The ATO has established a Trust Taskforce that is directed against egregious forms of tax abuse involving trust structuring. This work is operating under the framework of Project Wickenby and involves collaboration with the Australian Federal Police and other law enforcement agencies. Early results include charges brought against two men for serious criminal offences, restraint of more than \$56 million of assets and ongoing compliance action involving pursuit of domestic and offshore participants in elaborate evasion schemes. The Trust Taskforce has enabled the Australian Federal Police to conduct the first 'proceeds of crime' litigation to restrain assets on behalf of the Commonwealth Criminal Assets Confiscation Taskforce since legislation came into effect in January 2012.

Taxpayers who engage in avoidance or evasion make themselves vulnerable not only to rectification of their tax liabilities, but also to substantial levels of interest and penalties. They may also be at risk of imprisonment. Tax advisers who encourage the proliferation of dishonest tax schemes can be liable for promoter penalties. These are significant deterrents to those who may contemplate doing the wrong thing.