

ESTATE AND TAXATION PLANNING COUNCIL OF NEW ZEALAND INC

Denham Martin

8 July 2020 Seminar

“TOPICAL TAX / TRUST ISSUES”



DENHAM MARTIN TAX LAW

GENERAL REFLECTIONS

- COVID HAS CONFIRMED IMPORTANCE LIFETIME WEALTH CREATION TO INDIVIDUAL (FAMILY) SECURITY;
- COVID HAS EXPOSED FINANCIAL VULNERABILITY OF THOUSANDS HARD-WORKING TAXPAYING KIWI BUSINESSES;
- GOVERNMENT/BANKS WILL PICK WINNERS/LOSERS (HACKETT BUNGY), FAIR-WEATHER AND UNRELIABLE FRIENDS;
- IN COVID WORLD OPTIMUM BUSINESS INVESTMENTS ONES PROVIDE “NECESSITIES OF LIFE” (HOUSING/FOOD PRODUCTION/ENERGY/MEDICAL EQUIPMENT SUPPLIES/POSSIBLY KIWISAVER?);
- IMPORTANCE LONG-ESTABLISHED WILL/TRUST ARRANGEMENTS FOR DEBT-FREE HOME/INVESTMENTS UNDERPINNING WEALTH RETENTION AND SUCCESSION PLANS

NEW OR INCREASE EXISTING TAXES

- NEW/INCREASE TAXES
 - GOVERNMENT POOR UNDERSTANDING HOW NZ SMES (97%) OPERATE
 - POLITICALLY CAUTIOUS APPROACH NEW/INCREASE TAXES 2020 ELECTION
 - NEW/INCREASE TAXES INEVITABLE (PWC FAVOURS CGT!!) “ELEPHANT IN ROOM”
 - IR’S REFORMS TAXATION LAND EXTENDING TAX-BASE INCREMENTALLY (E.G. TIGHTENING EXCLUSIONS BY AGGREGATING ASSOCIATED “GROUP” ENTITY ACTIVITIES)
 - IR’S PROPOSALS FOR TAX DEDUCTIONS LAND HOLDINGS COSTS
 - IR’S FORENSIC TOOLS IDENTIFYING “TAXABLE” TRANSACTIONS/RISK REVIEWS/TAXPAYERS ENCOURAGED TO SETTLE (COVID CLIMATE UNIQUE IF HAVE OUTSTANDING TAX)

TAXING WEALTH AND WEALTHY

- LOTS OF FOCUS ON TAXING WEALTH/WEALTHY (ONLY ONES CAN PAY EXTRA TAX)
- ESTATES/TRUSTS/SUCCESSION PLANS/SETTLEMENTS ALL THESE LEGAL THINGS INHERENTLY ABOUT PRIVATE/CONFIDENTIAL FAMILY ARRANGEMENTS INVOLVING WEALTH TRANSFERS/TAX-PAID ACCUMULATIONS
- BEING WEALTHY (BADGE OF HONOUR/BADGE OF SHAME) IN 2020? NO INTEREST IN HOW WEALTH CREATED
- “WEALTHY” MAY BE THE HARDWORKING/RISKTAKING/“ESSENTIAL INDUSTRY”
- “DUST OFF” 2019 TAX WORKING GROUP REPORT (8 MEMBERS OF COMMITTEE FAVOURED “THE INTRODUCTION OF A BROAD APPROACH TO THE TAXATION OF CAPITAL GAINS” [8]. “THE INCONSISTENT TAXATION OF CAPITAL GAINS THEREFORE HAS THE EFFECT OF REDUCING THE PROPORTION OF TAX PAID BY THE WEALTHIEST MEMBERS OF SOCIETY” [19]

INTERESTING TAX IMPLICATIONS COVID

- PHYSICAL PRESENCE AND TIMING RULE CONCESSIONS
 - 183-DAY/325-DAY/92-DAY/PLEASURE CRAFT 325-DAY RULES/TRANSITIONAL RESIDENT RULES /PEs /FOR TAXPAYERS IN AND THOSE CANNOT LEAVE NZ
 - IR STATEMENTS CONCESSIONAL: FREEZE DAY TESTS IF TAXPAYER CANNOT GO HOME BUT EXPECTATION WILL LEAVE NZ “AFTER REASONABLE NUMBER OF DAYS NO LONGER PRACTICALLY RESTRICTED” (OPEN TO INTERPRETATION)
- STATUTORY FILING DEADLINES
 - IR USING NEW COVID POWERS IN ss 6H AND 6I TAA TO EXTEND (AMEND) DUE DATES, DEADLINES, TIME PERIODS FOR RETURNS/ELECTIONS, ETC
 - REGULATORY PERIOD APPLIES (IMPLICIT NOT EXTENDED, NO CONCESSION)
 - IR SOME DISCRETION TO ALTER STATUTORY TIMING RULE (GST EXPORT GOODS), TAX DISPUTE DOCUMENTS (“EXCEPTIONAL CIRCUMSTANCES”), 2-MONTH TAX CHALLENGE PERIOD??
 - LEGISLATIVE CHANGES UOMI, PENALTIES ETC

SECTIONS 6H AND 6I TAA

- 6I COVID-19 RESPONSE: COMMISSIONERS VARIATIONS

Power to vary

- (1) The Commissioner may vary the application of a provision in an Inland Revenue Act by—
 - (a) extending a due date, deadline, time period, or timeframe by, within, or in relation to which—
 - (i) a person must comply with a requirement set out in the provision:
 - (ii) a person must make an election under the provision:
 - (iii) a person's entitlements, rights, or obligations are affected:
 - (b) modifying a procedural or administrative requirement that a person must meet under the provision, *for example*, modifying the nature or form of information or action required under the provision.

QB 19/15/QB 19/16 AND RELATED IR STATEMENTS

- SERIES OF IR *QUESTIONS WE'VE BEEN ASKED* ADDRESSING THE RENTING OUT OF TRUST PROPERTY FOR SHORT-STAY ACCOMMODATION IN TERMS OF WHO SHOULD DECLARE INCOME/CLAIM DEDUCTIONS (APPORTIONMENT ISSUES)
- IR STATEMENTS CONFIRM THAT *INTER ALIA*:
 - WHO RENTS OUT PROPERTY LEGALLY (BENEFICIARY/TRUSTEE) DICTATES WHO DERIVES INCOME
 - WHO LEGALLY INCURS COSTS DETERMINES DEDUCTIONS (APPORTIONMENTS, MIXED USED ETC)
 - WHERE BENEFICIARY PAYS TRUSTEE'S INCURRED PROPERTY-RELATED COSTS, RENTAL INCOME TO TRUSTEE/TRUSTEE CLAIMS DEDUCTION COSTS
 - IF TRUST "COMPLYING" AND PROPERTY COSTS MODEST (NON-ACTIVE TRUST DECLARATION (IR 633), NO TAX RETURN REQUIREMENT: S 43 B(3) TAA
 - RENT-FREE USE OF PROPERTY OF COMPLYING TRUST: EXEMPT DISTRIBUTION (SS CW 53 AND HC 20)
 - IR NOT USE GC5 ITA UNLESS EVIDENCE RENTAL INCOME SHIFTING

BENEFICIARY CURRENT ACCOUNT BALANCE DEEMED SETTLOR STATUS

- INCOME ALLOCATED TO BENEFICIARY BUT REMAINING UNPAID WITHOUT INTEREST;
- BENEFICIARY TREATED AS TRUST “SETTLOR” UNLESS:
 - TRUSTEE PAYS INTEREST ON AMOUNT OWED TO BENEFICIARY AT OR ABOVE PRESCRIBED RATE (AS FOR FBT); OR
 - AMOUNT OWNING AT END OF THE RELEVANT INCOME YEAR IS NOT MORE THAN \$25,000;
- CONSEQUENCES OF BENEFICIARY/SETTLOR STATUS

- DISTRIBUTIONS FROM FOREIGN TRUSTS
 - ADDRESSES INCOME TAX IMPLICATIONS OF DISTRIBUTIONS FROM FOREIGN TRUSTS(INCLUDING BY INHERITANCE);
 - DISTRIBUTION MUST HAVE SOURCE IN “TRUST” OF A TYPE THAT THE TRUSTS ACT/ITA RECOGNISES (EXCLUDING BARE TRUSTS);
 - DISTRIBUTION WILL BE EITHER BENEFICIARY INCOME OR TAXABLE DISTRIBUTION;
 - DISTRIBUTIONS FROM CIVIL LAW COUNTRY “ENTITIES” ARE LIKELY NOT TO BE FROM “TRUST” BUT THERE MAY STILL BE TAXABLE INCOME ELEMENTS ASSOCIATED WITH THE BENEFIT;
 - HOW DISTRIBUTION DESCRIBED (e.g. GIFT) NOT DISPOSITIVE AND ORDERING RULE WILL APPLY;

WINDING UP TRUSTS

- LOTS OF TRUSTS BEING WOUND UP AND FOR MANY MAKES PERFECT SENSE
 - FEAR OF DISCLOSURE REQUIREMENTS
 - REQUIREMENT FOR INDEPENDENT TRUSTEES
 - REDUCING ADMINISTRATIVE COSTS
 - SINGLE HOME TRUST
 - UNCERTAINTY PRA RULES

WINDING UP TRUSTS

- PLAYING WEALTH CREATION/PROTECTION LONG GAME MAKES NO SENSE
 - PARLIAMENT HAS RATIFIED 125 YEAR TRUSTS
 - INCREASING USE INTERNATIONALLY
 - DESIGN TRUSTS ON THE ASSUMPTION WILL BE CONTESTED (E.G. INDEPENDENT TRUSTEES/SECTION 21 AGREEMENTS)
 - REMAINS MOST FLEXIBLE LEGAL MECHANISM TRANSFERRING CAPITAL / INCOME TO FAMILY MEMBERS / CHARITIES

WINDING UP TRUSTS

- **MAIN TRUST LAW ISSUES**
 - IDENTIFYING AND APPLYING CORRECTLY RIGHT TRUST TERMINATION MECHANISM
 - CONFIRMING NO RESTRICTIONS ON SETTLOR BENEFITS ETC
 - ENSURING RIGHT TRUST OBJECTS GET BENEFITS
 - ANY UNCERTAINTY OBTAIN COURT DIRECTION / BENEFICIARY CONSENT

WINDING UP TRUSTS

- **MAIN TAX LAW ISSUES**

- IDENTIFY TAX PROFILE PROPERTY BEING DISTRIBUTED (RESETTLED) MANY TRUSTS FEW ISSUES FOR TRUSTEES IF PRIVATE/EXEMPTED PROPERTY
- REVENUE ACCOUNT ASSETS, DEPRECIABLE ASSETS, DEBTS, POTENTIAL TAX LIABILITY TRUSTEE ON DISTRIBUTION (TAX DISPOSAL MARKET VALUE)
- RECEIVING BENEFICIARY BIGGEST TAX ISSUE NON-EXCLUDED/REVENUE ACCOUNT LAND
- TRUSTEE MUST HOLD BACK MONEY FROM DISTRIBUTION IF TAX UNCERTAINTY
- TAX POSITION FOREIGN BENEFICIARIES CAPITAL DISTRIBUTIONS (E.G. AUSTRALIAN/US TAX RESIDENTS)

INTERESTING CASES

- *THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS TRUST BOARD V CIR*
 - TRUE LEGAL NATURE OF “GIFT” FOR SS LD1 & LD2
 - HELD PAYMENTS WERE GIFTS, REJECTED MORE SUBSTANTIVE APPROACH
- *JANE GOSS-CUSTARD V LESLEY TEMPLEMAN*
 - VALIDITY OF LAST WILL FOR LORD TEMPLEMAN, FAMOUS ENGLISH TAX JUDGE
 - DETAILED DISCUSSION ENGLISH RULES ON DETERMINING “TESTAMENTARY” CAPACITY



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