

NEWSLETTER

August 2010



THE HEALTH WEALTH SPECIALISTS

CHARTERED ACCOUNTANT

TRUST DISTRIBUTIONS POST BAMFORD: WHAT YOU NEED TO DO BEFORE 30 JUNE 2010

Following the much anticipated High Court decision in Bamford, the Australian Taxation Office (ATO) has now issued a draft [Decision Impact Statement](#) and Practice Statement [PS LA 2010/1](#) setting out its view of the consequences of the decision and what action it will take. It would be an understatement to suggest that the ATO has attacked issues beyond those dealt with by the Court in Bamford.

The Court has confirmed what we believed was the correct position: if the trustee has the power, it can determine what is "income", which can include a capital gain; and the proportionate approach applies. The proportionate approach is the approach we use with all our clients. It means that where there is a difference between accounting and taxable income (due to say an investment allowance), the beneficiaries receive accounting income and taxable income in proportions eg. 30% accounting income and 30% taxable income.

That clarity has still left us with a mess: we just know more clearly what is the real mess. The good thing is that the ATO agrees that the existing 'rules' should apply for 2010 and there is no need to rush into changing deeds or the way distributions are made. The Decision Impact Statement states that any change in administration and application of the law will only **apply from 1 July 2010**.

The combination of the Bamford implications, the Division 7A/UPE (Debit loan accounts in private companies) ruling and Practice Statement means that it is time to step back and undertake a substantial review of the family and business structure. A review of many client's overall structure and tax management strategies is mandatory. The main reason for this is that there is one major impact in the ATO's view: streaming of classes of income is dead.

What should you do?

Action before 30 June 2010: The ATO states that as trustees and beneficiaries may have relied on rulings

regarding streaming of income for the 30 June 2010 income year, it will be business as usual for 30 June 2010.

Action after 30 June 2010:

Some issues that remain somewhat uncertain, including:

- the ability for trustees to stream different classes of income to different beneficiaries, eg capital gains to individuals and franked dividends to companies or individuals on lower rates of tax;
- can expenses be allocated against different classes of income and how are adjustments to net income to be apportioned between different streamed classes of income?;
- how can trustees account for notional tax amounts (other than tax credits) such as deemed capital gains and franking credits?;

The sleeper

The ATO has taken the view that a "share" means a numerical percentage of all of the trust's net income. This means a slice approach applies and the benefits of distributing different characters or classes of income to different beneficiaries is ineffective. As such, the Commissioner will withdraw the ruling on streaming, TR 92/13. We think this approach is wrong, and wasn't open to the Commissioner following the decision in Bamford. Even if it is accepted that "share" means proportionate rather than "portion" or "part", in our view, calculation of proportions can be achieved in a number of ways, not just as a "straight" percentage.

If streaming is dead, this has major ramifications for many of our clients.

We may end up with more trusts - a capital trust, an income trust and a trading trust - and maybe more trading companies. Let's hope not!

Submissions on the draft Decision Impact Statement are due on 28 July 2010, so it will be some time before we have further "clarity" on the way ahead.

August 2010

The contents of this article are general in nature and are not advice that applies to any particular client situation. Whilst every care has been taken in preparing the article, specific advice should be obtained before proceeding with any suggestion or recommendation made