

## REVENUE RULING NO. SD 024

### DISCRETIONARY TRUST - VARIATION DEED (PACHET'S CASE)

#### PREAMBLE

In *Pachet Pty. Ltd. v. Commissioner of Stamp Duties (Queensland)* 85 ATC 4587 a dispute arose as to the "property" and the value thereof to be adopted for assessment purposes in respect of a Deed that evidenced an acknowledged resettlement.

#### FACTS

Briefly, the facts were that a Deed of Variation of an existing trust was executed which had the effect of removing certain beneficiaries and adjusting the interests of others. The full unencumbered value of the assets of the fund was \$769,770 and there were outstanding liabilities of \$769,760.

The head of charge in the First Schedule to the Queensland Stamp Act is "settlement, Deed of Gift or Voluntary Conveyance and it provides for an ad valorem rate of duty to be applied to the "full unencumbered value" of the "property".

The taxpayer claimed that the assessment of duty should be calculated on the net figure of \$10 and not on the full unencumbered value.

The Court was of the view that the reasoning in *Kemtron Industries Pty. Ltd. v. Commissioner of Stamp Duties (Queensland)* 84 ATC 4380 (Full Supreme Court), a case which dealt with the sale of a **beneficiary's interest** in a unit trust, was to be applied to the present matter.

In that case, the Court ruled that, in order to determine the full unencumbered value of the beneficiary's interest, the amount required to meet the trust's indemnity for debts and liabilities incurred on behalf of the trust has to be deducted before that figure can be ascertained. The decision in *Kemtron's* case (above) applied the principle that in determining a beneficiary's interest the trust property means the property to which the beneficiary is entitled in equity.

#### RULING

As far as New South Wales is concerned, the relevant provisions to be considered where a resettlement occurs are sections 65 and 66. For the purposes of section 65, the Variation Deed in *Pachet's* case (above) would be considered to have the effect of transferring, vesting or accruing property.

Although **Pachet's** case (above) was a resettlement of the trust fund, the view of the Court was that trust property must be looked at as being that which the beneficiaries have after deducting any outstanding liabilities incurred by the trustees for which they have a right of indemnity. In other words, the trust property is that property to which the beneficiaries are entitled in equity.

The decision is one which is of a persuasive nature for New South Wales purposes. However, there are reservations in accepting its application to this State.

The decision in **Kemtron's** case (above) concerned the transfer by sale of a beneficiary's interest in a unit trust which in itself is a particular class of trust.

The application of the principles in determining a beneficiary's interest to a resettlement causes concern as to what is "trust property". The Queensland cases run on the line that such property is represented by the beneficiaries' equitable interests.

However, trust property has also been defined as being the "subject matter of the trust - an interest in property which the trustee holds subject to the right of another person or for an object or purpose"> (Law of Trusts, Marks and Baxt, paragraph 101).

The principal Pachet deed appears to have been one which created primary beneficiaries and takers by default, the latter having a vested interest subject to defeasance. The trustees were also empowered to revoke, add to, or vary the trusts.

Under the mere powers granted to the trustees under the original deed they executed a deed which affected the then existing rights and entitlements of the beneficiaries and in certain instances deleted beneficiaries from any benefit under the trust.

It is difficult to see how, in the changes that were made which resulted in a resettlement of the fund, the trust property can be looked at as being that represented by the interests of the beneficiaries. New trusts have been created by the new deed and the old entitlements extinguished - not by actions of the beneficiaries but by those of the trustees.

It would therefore be not unreasonable to hold the view that the property in a resettlement, as distinct from the sale of a beneficiary's share, is that property which vests or is vested in the trustee. On this basis, there would be no difficulty in applying the relevant clauses of section 66 to such a situation, i.e. assess on unencumbered values or encumbrances, whichever is the greater.

When assessing resettlements of this nature, it is considered that for the purposes of section 66 of the **Stamp Duties Act** the property is that in the hands of the trustees and not the entitlement of the beneficiaries.

**Note:** in two Victorian Board of Review cases (1981) dealing with resettlements of discretionary trusts, secured debts were allowed. This was by reason of the then section 90 in that State's Act. A trustee's right of indemnity in respect of other debts (unsecured) was held not to be within the phrase "certain charge" in the same provision. In Victoria, section 90 has since been repealed.

A.D. CLYNE,  
Chief Commissioner of Stamp Duties.  
28 April, 1986.

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