

# Tax Update

# 2010

## Commissioner of Taxation v Bamford [2010] HCA 10

On Tuesday 30 March five justices of the High Court handed down a unanimous decision in *Commissioner of Taxation v Bamford*. The decision should give comfort to taxpayers and their advisers

### Key decisions

The two key issues in the case were in relation to interpretation of tax legislation (Division 6 of the Income Tax Assessment Act 1936) which deals with the taxation of trust beneficiaries.

The Court found that the language of the tax legislation must mean that a "proportionate" approach was intended to apply to the taxation of beneficiaries. This means that a beneficiary who is allocated a proportionate amount of income of the trust estate (as determined under the trust deed) is taxable on the same proportion of the net income of the trust estate (as determined for tax purposes).

It was also found that "income of the trust estate" was a separate concept from "income according to ordinary concepts". Accordingly it was open to a trustee to re-classify receipts so that the "income of the trust estate" includes amounts which are not ordinary income, such as taxable capital gains (provided that the trust deed permits this).



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## Implications of Decisions

The judgement is consistent with previous judgements of the Full Federal Court on these issues, both in this case and in previous cases such as Zeta Force. As noted in our previous update on this case (June 09, regarding the Full Federal Court decision), this decision is also consistent with common practice in the industry; any other decision might have had serious implications for many distributions made since the introduction of the CGT regime.

The Commissioner's purported reason for appealing this matter all the way to the High Court was that there was a lack of clarity in the operation of the law. Whilst it is not apparent that the law itself was unclear, the difficulties that arise from the application of the law will continue. In other words, it will remain crucial to carefully examine trust deeds in regard to powers of distribution and to ensure trustee resolutions are in accordance with the deeds.

In our view, the High Court decision in this matter does not open up the possibility that such schemes will now be permissible. Such schemes may fall foul of general anti-avoidance provisions and possibly fail for other reasons. It has been rumoured (though not confirmed) that the Commissioner may again push for an "entity" taxation regime where trusts would be directly taxed like companies. We suggest that a better approach would be to conduct a long overdue re-write of Division 6 to address the uncertainty and the potential abuses directly.

## Avoidance Issues

A possible underlying motive for the Commissioner pursuing this matter so vehemently is that it is thought that the current interpretation of the law (now settled as correct) would allow tax avoidance in certain situations by intentionally manipulating receipts so that distributions and tax liabilities are mismatched.

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