

INTERNATIONAL TAXATION OF TRUST INCOME: PRINCIPLES, PLANNING AND DESIGN

ISBN: 9781108492256 PRICE: GBP95 PUBLISHER: Cambridge University Press

BY DR MARK BRABAZON TEP

REVIEWED BY EMMA CHAMBERLAIN

This is not a book for everyday client use (although the UK tax summaries are very accurate and commendably up to date); nevertheless, it is one that all practitioners, academics and policymakers interested in trusts should read. It presents an illuminating and thought-provoking review of the principles behind the taxation of trusts, with particular reference to Australia, New Zealand, the UK and the US.

In his analysis, Dr Brabazon identifies unintended non-taxation and double taxation scenarios and considers principles of tax design that might deal with cross-border problems, e.g. where the trustees are in one country, the assets in another and the beneficiaries located in various countries.

International Taxation of Trust Income makes a strong case for the development of a set of coherent global principles when taxing trusts and trust distributions, and contrasts the recent moves to tax companies in cross-border situations. The author points out the peculiar features of

trusts that can make them challenging in an international tax context, i.e. their flexibility and the difficulty, particularly in civil-law countries, in conceptualising an entity without separate legal personality. The emphasis is on what Dr Brabazon terms 'donative trusts' for holding personal and family wealth, rather than trusts used for collective investments such as pension funds.

The book has three goals: identify the principles by which countries tax trust income and distributions internationally; identify unintended non-taxation and double taxation associated with trusts; and propose some principles of tax design to respond to problems of double and non-taxation.

The introduction begins by tackling key questions:

- Who should be regarded for tax purposes as deriving the income of the trust: the grantor, the beneficiaries or the trustees?
- Should the trust itself be regarded as the proper taxpayer; that is, is it fiscally opaque or purely transparent?

- To what extent should the trust be regarded as a proper taxpayer and to what extent should distributions from the trust be regarded as income analogous to corporate dividends?

These are questions that no doubt frequently exercise Her Majesty's Revenue and Customs (HMRC), particularly in relation to the taxation of non-resident trusts, but a common global approach would be preferable and the author sets out some useful principles to consider.

Hence, the first part contains an interesting comparison of the national income tax laws in Australia, the UK and the US, particularly in relation to foreign grantor trusts in the US and the settlement provisions in the UK. Obvious problems arise where the country in which the trust and/or beneficiary resides attributes the income to a non-resident grantor and the grantor's country attributes the same income to the trust or beneficiary, resulting in an absence of any taxation. Equally, double taxation can arise when countries disagree about attribution or taxation is deferred until distributions are made to beneficiaries. The author illustrates the diversity of international and domestic approaches with a useful table summarising grantor attribution between Australia, the US and the UK, in relation to income and gains.

He highlights the major differences between the four countries in their enthusiasm to claim a trust as fiscally resident and, therefore, taxable on a worldwide basis on all its income. Australia is relatively expansive; the US is more restrictive in designating a trust as a US taxable person; and the UK is more easily manipulated. In contrast, New Zealand taxes trusts by reference to the current residence of the grantor rather than the residence of the trustees per se. The capacity for dual trust residence or, alternatively, trust 'fiscal

homelessness' is neatly illustrated. The appendix contains very useful factual material on the way in which the four countries tax beneficiaries and trusts.

The second part is more theoretical and considers the international tax order, including treaties, the OECD Base Erosion and Profit Shifting project and their applicability to trusts in contrast to companies.

In its conclusions, the book identifies a strong case for countries to act cooperatively, not only to protect their own tax base but also to prevent or neutralise trust-based tax arbitrage. The book recommends a range of strategies for consideration in the design of national tax laws and tax treaties. It does not tackle areas that might be particularly relevant to trusts, such as inheritance tax, and it does not consider entities that may display some characteristics similar to trusts, such as foundations and usufructs. However, it is expressly conceived as 'foundational'.

Its strong theoretical analysis will hopefully encourage practitioners, academics and policymakers to think through proposed trust taxation changes more rigorously and coherently, and encourage further academic research.

If you are a practitioner at all interested in policy, I strongly recommend you read this book. You will learn a lot more about how these four countries tax beneficiaries and trusts and you will also be stimulated by the analysis and ideas presented. If you are at HMRC considering the taxation of trusts (a consultation that has been going for more than a year), then it will be even more useful to you.

EMMA CHAMBERLAIN TEP IS A BARRISTER
AT PUMP COURT TAX CHAMBERS