Aussiegolfa Pty Ltd (Trustee) v Federal Commissioner of Taxation -

Decision impact statement

Aussiegolfa Pty Ltd (Trustee) v. Federal Commissioner of Taxation

Court citation:	[2018] FCAFC 122
Venue:	Federal Court
Venue reference no:	VID 54 of 2018 VID 83 of 2018
Judge/AAT member names:	Besanko, Moshinsky and Steward JJ
Judgment date:	10 August 2018
Appeals on foot:	No
Decision outcome:	Partly favourable to the Commissioner

Impacted advice

The ATO is reviewing the impact of this decision on related advice and guidance products.

- Self-Managed Superannuation Funds Ruling SMSFR 2008/2 *Self Managed Superannuation Funds: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits*

Précis

At issue in this decision was the application of the in-house asset provisions and sole purpose test in the *Superannuation Industry (Supervision) Act 1993* (SISA) to a managed investment scheme (MIS) facilitating a 'simulated direct investment' in real property, including whether a distinct trust was created in respect of a particular investment by the trustee of a self-managed superannuation fund (SMSF) in the MIS.

Brief summary of facts

The matter concerned the investment by Aussiegolfa Pty Ltd (Aussiegolfa) as trustee for the Benson Family Superannuation Fund (BFSF) in units in a MIS called the DomaCom Fund (DomaCom). It was an appeal from the decision of the Federal Court dismissing a claim for declaratory relief regarding the application of the SISA to the investment. Aussiegolfa sought declarations that the investment was not an in-house asset under subsection 71(1) of the SISA and did not involve a breach of the sole purpose test in section 62 of the SISA.

In the alternative to his primary position that the asset was an in-house asset, the Commissioner made a determination under paragraph 71(4)(b) of the SISA, to 'deem' Aussiegolfa's investment to be an in-house asset. This determination was set aside by the Administrative Appeals Tribunal (AAT) on the basis that the Federal Court had found the asset was an in-house asset, and the determination could only be made if the asset was not an in-house asset. The Commissioner also filed a 'contingent' appeal in respect of this decision of the AAT.

DomaCom is a registered MIS which facilitates fractional property investment. Each property acquired by DomaCom is held in a separate class of units, known as a sub-fund.

DomaCom is governed by a constitution which sets out the governing rules for the fund and provides for the creation of sub-funds. The Product Disclosure Statement (PDS) and Supplementary Product Disclosure Statement (SPDS), provided to potential investors in DomaCom, advise that investing in a sub-fund simulates direct investment in the specified property held by the sub-fund. Consistent with this advice, the returns to unitholders of the sub-fund that holds the specified property arise solely from that property and investors in other sub-funds have no right to any return sourced from that property.

Aussiegolfa in its trustee capacity resolved to invest in a residential property in Burwood, Victoria (**Burwood Property**) by acquiring, together with two related parties, 100% of the units in a sub-fund (**Burwood Sub-Fund**). The sole member of the BFSF was Mr Benson.

The funds committed to the Burwood Sub-Fund in subscription for the units were used to buy the Burwood Property.

While the Burwood Sub-Fund held the property, it was leased twice at market rent initially to tenants unrelated to the BFSF. In April 2017, a lease over the property was entered into with Mr Benson's daughter at the same rent as those previous tenants with the lease commencing in February 2018.

Issues decided by the court

In-house assets

The Court decided that the investment of the BFSF in the Burwood Sub-Fund was an investment in a 'related trust' for the purposes of Part 8 of the SISA which was not a 'widely held unit trust' (at [1], [16], [157] and [184]). Accordingly, the investment was an in-house asset under subsection 71(1) of the SISA. If the market value ratio of the BFSF's in-house assets exceeded 5% at the end of the income year, the trustee of the BFSF would be required to take action under section 82 of the SISA to ensure that one or more of the fund's in-house assets are disposed of to at least the value of the excess amount (at [101]). The Court observed that whether the investment was in a related trust turned on whether there was a separate trust associated with the Burwood Sub-Fund and this in turn was to be assessed by the general law conception of a trust. Further, the product disclosure statements made by DomaCom constituted secondary evidence of the rights and obligations attaching to the units in the Burwood Sub-Fund.

In that context Moshinsky J (with whom Besanko J agreed) observed that when the provisions of the Constitution were considered as a whole 'they allowed for, indeed facilitated, the creation of a distinct trust associated with a particular class of units' (at [145]). Further, the relevant PDS and SPDS 'point decisively in favour of the view that a distinct trust was created with respect to the Burwood Sub-Fund units' (at [147]) – that 'one [was] left with a clear and unmistakable impression that there was an intention to create a distinct trust' (at [149]). Steward J surveyed authorities that had considered in a variety of contexts the question of when a sub-fund can constitute a distinct settlement or trust. His Honour agreed that the terms governing the Burwood Sub-Fund 'evidences an intention to create a distinct trust very much separate from any other sub-funds or trusts created by the DomaCom Constitution' (at [219]).

Commissioner's determination under subsection 71(4) of the SISA

As the Court concluded that the BFSF's investment in the Burwood Sub-Fund was an in-house asset (being an investment in a related trust not otherwise excluded from the definition), the Court likewise concluded that the Tribunal had correctly set aside the determination.

Moshinsky J (with whom Besanko J agreed) noted, however that, had the investment not been an in-house asset but for the determination, he saw no error in the AAT reasons which focused on the substance and practical effect of the investment as a basis for assessing the merits of a determination under subsection 71(4) of the SISA.

Sole purpose test

The Court held that, on the facts and circumstances before it, the leasing of the Burwood property to the member's daughter did not cause Aussiegolfa to contravene the sole purpose test (at [1], [16] and [184]).

The Court did not find sufficient evidence to infer that the leasing constituted a collateral purpose for maintaining the fund. Moshinsky J (with whom Besanko J agreed) observed that there did not appear to be any financial or other non-incidental benefit to be obtained by the daughter leasing the property rather than another lessee. Nor did there appear to be any financial or other non-incidental benefit to be obtained by the member due to the property being leased to his daughter rather than another tenant. The 'comfort or convenience' the daughter received by residing in the property was viewed at best as an incidental benefit (at [177]).

In the absence of a financial or non-incidental benefit being obtained, it was concluded that the fund would be maintained solely for core purposes and ancillary purposes set out in section 62 of the SISA.

Moshinsky J noted at [178] that this conclusion would be different if:

- there was evidence that the rent received by the fund was less than market value, or
- there was evidence that providing accommodation to the member's daughter had influenced the fund's investment policy.

ATO view of decision

Sub-fund as a separate trust

The decision provides valuable guidance on the factors that might be considered in determining whether a new trust has been created at general law.

We note that the finding that the Burwood Sub-Fund constituted a separate trust turned on the particular facts of the arrangement.

Whether classes of a trust are in fact separate trusts will depend on the particular facts and circumstances of each case having regard to factors considered by the Court, including the relevant governing and disclosure documents, the 'terms of issue' of the class and the general law concept of a trust.

While the decision provides useful guidance on the factors that may be considered in determining whether a separate trust has been created, the ATO does not expect that this case will have a significant impact on traditional multi-class managed funds. For example, a single trust with multiple classes will be entitled to make the Attribution Managed Investment Trust multi-class election under section 276-20 of the *Income Tax Assessment Act 1997*, where the requirements of that section are otherwise satisfied.

Commissioner's determination under subsection 71(4) of the SISA

The Commissioner notes that the Court's decision in relation to the determination was predicated on the finding that the Burwood Sub-Fund units were in-house assets. If the units were not in-house assets but for the determination, both Pagone J at first instance, and Moshinsky J on appeal (Besanko J agreeing), indicated they would have upheld the determination (at [181]).

The ATO will continue to consider issuing a determination under subsection 71(4) of the SISA as appropriate in circumstances where the trustee of a SMSF enters into an arrangement to acquire an asset that would otherwise be an in-house asset under section 71 of the SISA if directly held by the SMSF.

Sole purpose test

The Commissioner considers that the decision of the Court is referrable to the particular facts of the case. An important aspect of the factual arrangement was that:

- the Burwood Property had been leased to two tenants unrelated to the BFSF for two years prior to the premises being leased to the daughter of the member of the BFSF
- the daughter paid equivalent market rent to that paid by the two previous tenants, and
- there was no suggestion that the leasing of the Burwood Property to the daughter influenced the BFSF investment policy.

We do not consider that the case is authority for the proposition that a superannuation fund trustee can never contravene the sole purpose test when leasing an asset to a related party simply because market-value rent is received.

It is the purpose of making and maintaining a fund's investments that is central to identifying if there is a contravention of the sole purpose test. We note the observations of the court that a collateral purpose, and a contravention of section 62 of the SISA, could well be present if, for example, the circumstances indicated that leasing to a related party had influenced the fund's investment policy.

For example, in the Commissioner's view a superannuation fund trustee will contravene the sole purpose test if the fund acquires residential premises for the collateral purpose of leasing the premises to an associate of the fund, even where the associate pays rent at market value.

Implications for impacted advice or guidance

We will review our public advice and guidance on the sole purpose test to see if we can more clearly illustrate factors which may be important in determining whether a fund has been maintained for a collateral purpose.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	3 December 2018
Due date:	11 January 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Superannuation Industry (Supervision) Act 1993
Pt 8
62
71
71(1)
71(4)
71(4)(b)
82

Income Tax Assessment Act 1997
276–20