Inland Revenue
Te Tari Taake

QUESTION WE'VE BEEN ASKED QB 16/03

GOODS AND SERVICES TAX – GST TREATMENT OF BARE TRUSTS

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Question We've Been Asked is about ss 51, 57(2), 60(1) and 60(1B).

Question

1. Is it the trustee or the beneficiary of a bare trust who makes supplies in respect of the trust property for GST purposes?

Answer

2. It is the beneficiary of a bare trust who makes supplies in respect of the trust property for GST purposes, unless the trustee and the beneficiary agree otherwise under s 60(1B). This is because it is the beneficiary that carries on any taxable activity and may be registered or liable to be registered under s 51.

Explanation

3. Any reference to "beneficiary" in this Question We've Been Asked includes "beneficiaries".

4. This Question We've Been Asked applies once it has been established that a trustee holds property on bare trust for a beneficiary. Whether a bare trust exists in any given situation must be determined on the facts of each case.

What is a bare trust?

5. A bare trust is a type of trust under which the trustee holds property on trust without any duties to perform other than to convey the trust property to the beneficiary or as the beneficiary directs. The reference to "duties" in this definition is to duties that the settlor has specified. For example, the trustee may have been appointed to hold the property as nominee, or the settlor may have required that the beneficiary be maintained until becoming entitled to call for capital and income on reaching the age of majority. Once the beneficiary reaches the age of majority, the trustee no longer has a duty to maintain the beneficiary. In both situations, the trustee is "bare" of any duties specified by the settlor. However, so long as a trustee holds property on trust, they always retain their legal duty to take reasonable care of the trust property. The trustee cannot escape this duty: *Herdegen v FCT* 88 ATC 4995 (FCA); *Waters' Law of Trusts in Canada* (4th ed, Carswell, Toronto, 2012) at 33–34.

6. Therefore, a bare trustee has not only a duty to transfer the trust property to the beneficiary (or as directed by the beneficiary), but also a legal duty to take reasonable care of the trust property in the meantime: *Herdegen*; *CGU Insurance Ltd v One Tel Ltd (in liquidation)* [2010] HCA 26; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (CA); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697.

7. What a bare trustee must do to fulfil their duty to protect trust property depends on the nature of the trust property and any threats to the trust property. However, a bare trustee must refrain from active management that does not fall

within the duty to maintain the trust property: *Bruton Holdings Pty Ltd (in liquidation) v FCT* (2011) 193 FCR 442 (FCAFC).

When can a bare trust arise?

8. A bare trust can be created by an express declaration of trust, either in writing or orally. It can also arise without a declaration of trust. One of the most common scenarios in which a bare trust arises is where a purchaser (the beneficiary) provides someone else (usually called a nominee) with the purchase money to purchase an asset. This type of bare trust may also be described as a resulting trust: *Herdegen*.

9. The question of which party makes supplies for GST purposes arises because the bare trustee is likely to have legal ownership of the trust property, but the beneficiary is absolutely entitled to the trust property. Before considering which party makes supplies for GST purposes, we must consider which party is carrying on the taxable activity. The GST Act is concerned only with supplies that are made in the course or furtherance of a taxable activity.

Can a bare trustee carry on a taxable activity?

10. A taxable activity is an activity that is carried on continuously or regularly and that involves or is intended to involve, in whole or in part, the supply of goods and services to any other person. To be a taxable activity, the activity need not be carried on for pecuniary profit: s 6(1)(a). An activity, in the context of ss 6 and 8, points to the combination of tasks undertaken or course of conduct pursued by the registered person: *CIR v Bayly* (1998) 18 NZTC 14,073 (CA).

11. In the context of a bare trust (and the question being considered), any taxable activity is likely to involve the property held by the bare trustee. The issue arises because it is generally considered that the range of activities that a bare trustee could undertake (and remain a bare trustee) would not extend to carrying on a taxable activity.

12. However, the Commissioner considers that the activities of a bare trustee could meet the definition of "taxable activity" where the bare trustee is discharging their duty to:

    - transfer property in accordance with the directions of the beneficiary, or
    - maintain the trust property.

13. An example where this may occur is where a bare trustee in a nominee situation holds commercial property that is subject to a lease. A leasing activity may be a taxable activity: *Bayly.*

14. Therefore, we must consider whether it is the trustee or the beneficiary of a bare trust who carries on the taxable activity and makes and receives supplies in respect of the trust property for GST purposes.

Who makes and receives supplies under a bare trust?

15. The Commissioner considers that it is the beneficiary of a bare trust who carries on the taxable activity and makes and receives supplies in respect of the trust property for GST purposes. Any taxable activity is carried on by the beneficiary, rather than a bare trustee, based on agency principles and case law.

Agency principles

16. The trustee is the legal owner of trust property. Generally, legal ownership is the basis for claiming GST inputs and returning outputs: *Case N39* (1991) 13 NZTC 3,333; *Case P84* (1992) 14 NZTC 4,561; *Pine v CIR* (1998) 18 NZTC 13,570

(CA); *Case T35* (1997) 18 NZTC 8,235. A person may, however, be both a trustee and an agent. An agent is a person who has authority to act for someone (called the principal) to create a legal relationship between the principal and someone else: *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC); *Case 14/2014* (2014) 26 NZTC ¶2-024. The acts of an agent are attributed to the principal under the common law of agency: *Lilyvale Hotel Pty Ltd v FCT* 2009 ATC ¶20-094 (FCAFC).

17. An express agency contract is not necessary for an agency relationship to exist. An agency agreement can be implied from the conduct of the parties: *Papalia v Romeo* [2011] NSWSC 696; *Marr v Parkin* [2014] NZHC 3269.

18. A bare trustee has no independent power or discretion relating to the trust property other than to take reasonable care of the trust property. Therefore, any supply involving the trust property that does not fall within that duty must be made on the instructions of the beneficiary. In such circumstances, in the absence of an express agency, there would be an implied agency: *Trident Holdings Ltd v Danand Investments Ltd* (1988) 64 OR (2d) 65 (ONCA).

19. The Commissioner considers that the relationship between a beneficiary and a bare trustee acting on the directions of the beneficiary is predominantly an agency relationship: *Trident Holdings*; *Collins v The Queen* (2002) GTC 314 (TCC); Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [16.6.1], fn 102; *Laws of New Zealand: Agency* at [5]; JD Heydon, MJ Leeming, *Jacobs' law of trusts in Australia* (7th ed, LexisNexis Butterworths, Chatswood, 2006) at [210]; Nuncio D'Angelo, *Commercial trusts* (LexisNexis Butterworths, Chatswood, 2014) at [3.34] and [3.46].

20. Section 60 applies to agency relationships. This means that:

- a supply a bare trustee makes for and on behalf of the beneficiary is treated as a supply the beneficiary makes, unless the bare trustee and the beneficiary agree in writing to treat the supply as two separate supplies (ie, a supply from the beneficiary to the bare trustee and a supply from the bare trustee to the recipient): s 60(1) and 60(1B);
- a supply made to a bare trustee for and on behalf of the beneficiary is treated as a supply made to the beneficiary: 60(2).

21. The effect of s 60 is that any taxable activity carried on by a bare trustee that involves making supplies on behalf of a beneficiary is carried on by the beneficiary rather than the trustee (unless the trustee and the beneficiary agree otherwise in writing under s 60(1B)).

22. Therefore, the beneficiary (rather than the trustee) is the person entitled or required to register for GST for that taxable activity.

Case law principles

23. However, the Commissioner accepts that the agency principles may not apply in every instance where there is a bare trust. In these circumstances, case law suggests that a supply to or from a bare trustee would be treated as a supply to or from the beneficiary: *Case R1* (1994) 16 NZTC 6,001; *CIR v Campbell Investments & Anor* (2004) 21 NZTC 18,559 (HC). While *Case R1* was overturned on appeal (after further evidence established that a bare trust did not exist: *Union Corporate Services Ltd* v *CIR* (1997) 18 NZTC 13,151 (HC)), *Case R1* makes it clear that, had a bare trust existed, it is the beneficiary of the trust who would have been the person carrying on the taxable activity and receiving the supply in question. In *Campbell Investments*, a syndicate of three taxpayers carried on the taxable activity of renting commercial properties. One member of

the syndicate held the legal title to the properties on trust for the syndicate. The trustee later transferred the legal title to the properties to the members of the syndicate. Wild J held that there was no supply as the beneficial owners already owned the properties and were entitled to have legal title transferred to them on request. He considered that the transfer of their share of the legal title to the properties from one syndicate member to the other members was "irrelevant" to the carrying on of the syndicate's taxable activity. He noted that the syndicate's taxable activity had previously been carried on without issue while one syndicate member held legal title to the properties.

Conclusion

24. Therefore, the Commissioner considers that the beneficiary (rather than the trustee) remains the person entitled or required to register for GST. In most cases, this will be because the agency provisions of the Act apply to put the position beyond doubt. In situations where agency principles do not apply, case law supports the position that the beneficiary carries on the taxable activity and makes and receives any supplies.

Does s 57(2) apply to a bare trust?

25. Section 57(2) contains special rules that apply when unincorporated bodies such as trusts are registered for GST purposes. Section 57(2) deems any supplies made or received in the course of carrying on the body's taxable activity to be made or received by the body (and not the members of the body). The section also confirms that the members of the body are not liable to register for GST. The Commissioner considers that s 57(2) does not apply to the trustees of a bare trust because it will be the beneficiary under a bare trust who carries on any taxable activity and is therefore the person entitled or required to register for GST (unless the trustee and the beneficiary agree otherwise in writing under s 60(1B)).

26. However, there may be more than one beneficiary under a bare trust (like the syndicate members in *Campbell Investments*). Given that the Commissioner considers it is the beneficiaries under a bare trust who make supplies and therefore conduct any taxable activity, that group of beneficiaries may be an unincorporated body for the purposes of s 57(2). Whether the beneficiaries are an unincorporated body must be determined on the facts of each case by considering whether there is sufficient comity, agreement (formal or otherwise), or actions indicating a joint endeavour for the beneficiaries to be an unincorporated body: *Newman & Ors v CIR, Holdsworth & Ors v CIR, Hair & Ors v CIR* (2000) 19 NZTC 15,666 (HC); *Case P70* (1992) 14 NZTC 4,469; *Case T40* (1997) 18 NZTC 8,267; *Case U19* (1999) 19 NZTC 9,186.

What about a bare trustee's transfer of trust property to the beneficiary?

27. A bare trustee's transfer of trust property to the beneficiary is not a supply, as the beneficiary already owns the property beneficially and is entitled to have legal title transferred to them on request: *Campbell Investments*.

What if the bare trustee is registered for GST instead of the beneficiary?

28. If you think you may have taken a tax position in past tax years that is different from the Commissioner's position in this Question We've Been Asked, discuss the matter with your tax advisor, or Inland Revenue, and consider making a voluntary disclosure.

Examples

29. The following examples are included to assist in explaining the application of the law.

Example 1 – Bare trustee enters into lease agreements on behalf of beneficiaries

30. Starlight Nominees Ltd is the legal owner of three commercial rental properties as bare trustee on behalf of two business partners, Greg and Rhonda. Greg and Rhonda take care of the day-to-day activities of the rental business and instruct Starlight to enter into all leases and other contracts as required. There is no written agreement between Starlight and Greg and Rhonda under s 60(1B). In this case, Starlight is both bare trustee and agent for Greg and Rhonda. The supply of the properties for rent is treated as a supply made by Greg and Rhonda: s 60(1), *Case R1* and *Campbell Investments*.

Example 2 – Bare trustee transfers trust property to third party

31. Greg and Rhonda decide to sell one of the properties and instruct Starlight to enter into an agreement for sale and purchase of real estate with the purchaser and to transfer the property to the purchaser on settlement. In this case also, Starlight is both trustee and agent for Greg and Rhonda. The supply of the property to the purchaser is treated as a supply made by Greg and Rhonda: s 60(1), *Case R1* and *Campbell Investments*.

Example 3 – Bare trustee transfers properties to beneficiaries

32. Greg and Rhonda now decide to hold the legal title to the remaining properties in their own names. They instruct Starlight to transfer the legal title in the properties to them. The transfer of the legal title to Greg and Rhonda is not a supply to them for GST purposes, because Greg and Rhonda already own the properties beneficially.

References

Subject references
GST, bare trust, agency

Legislative references
Goods and Services Tax Act 1985 – ss 2(1), 6(1), 8, 51, 57(2), 60(1), (1B) and (2)

Case references

Bruton Holdings Pty Ltd (in liquidation) v FCT (2011) 193 FCR 442 (FCAFC)
Case 14/2014 (2014) 26 NZTC ¶2-024
Case N39 (1991) 13 NZTC 3,333
Case P70 (1992) 14 NZTC 4,469
Case P84 (1992) 14 NZTC 4,561
Case R1 (1994) 16 NZTC 6,001
Case T35 (1997) 18 NZTC 8,235
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Other references

Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009)
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