

Trustees' Fiduciary Duties

Are you compromising your fiduciary duty as a Trustee?

One of the challenging tasks of the Trustee of a discretionary trust is dealing with the Trust's assets and income in a fair and equitable manner to all beneficiaries, and at the same time maximising the economic benefit of the Trust's assets and distributions.

The Trustee's responsibilities and obligations regarding the trust, including the trustee's general duty of "good faith" owed to the beneficiary, are often referred to as the Trustee's fiduciary duty. Although the Trustee has the control (legal title) of the Trust's assets, he/she must deal with those assets according to the purpose of the Trust and in a manner that is fair and equitable to all beneficiaries.

If the Trustee breaches his/her fiduciary duty, the consequence can be costly. For example, in the case involving the Murdoch family, Rupert Murdoch, as one of the Trustees of the Murdoch family trusts, was compelled to pay a sum of \$85 million to settle a dispute with his mother, Elizabeth Murdoch. The dispute originated from the mother's realisation that she had been disadvantaged as a beneficiary over the years due to the investment strategies adopted by Mr. Murdoch in his capacity as a Trustee. This sudden realisation resulted in an expensive pay out which could have been avoided if Mr. Murdoch had upheld his fiduciary duty as a Trustee.

Elizabeth Murdoch also received the compensation tax free, according to a recent Federal Court case.

Wise Decisions or Costly Liabilities

Whilst beneficiaries of a discretionary Trust are mainly family members, their rights cannot be taken for granted. When considering investment strategies or distributions of the Trust income, the Trustee must have regard to the rights of all beneficiaries including those who are minors, as one day they may have a sudden "realisation" that could cost you millions.

Are you certain the decisions you make today, as a Trustee, will not become costly liabilities tomorrow?

Reference: Re Murdoch v Commissioner of Taxation

Have you considered buying a boat?

If the answer is "yes", then the reasons why you want to buy the boat may be very important. If the boat will be used to hire out for private charters, you should consider the way in which you conduct your boat activities.

Are you carrying on business?

If your boat activities amount to carrying on of a business you may be entitled to a tax deduction for the expenses incurred in hiring the boat for private charters. You may also be entitled to a GST credit for the cost of acquiring the boat.

There are a number of factors that need to be considered in determining whether your boat activities amount to carrying on a business. If some or all of these factors are not present in the manner in which the boat activities are conducted, you risk having your tax deductions and GST credit disallowed.

For example, two recent Tribunal cases relating to boats acquired for business purposes were disallowed by the AAT on the basis that the boat activities were not carried on in a business like manner. The nature and extent of the activities conducted by the taxpayers were not sufficient for the taxpayers to be considered to be carrying on a business.

These cases illustrate the fact that there are a number of important factors that need to be evidenced before boat activities can be determined to be carrying on business.

Reference: Re Hattrick AATA 301; Drysdale AATA 393

ATO focus on main residence

Under normal circumstances a person who purchases a home with the intention of living in it may be eligible for the main residence exemption provided:

1. They move into the home "by the time it was practicable" to do so after acquiring it; and

2. They have proved that they had occupied the home as their main residence.

However, the outcomes of two recent Tribunal cases have suggested that the above principles need to be clearly established before the main residence exemption can be applied.

Delay in moving into home

As it usually takes time to move into a home, the law recognises that certain delays in moving into the home may be acceptable. For example, where there is a delay in moving in because of illness or other reasonable causes. However, are delays in moving in until it is convenient for the taxpayer to do so an acceptable situation?

This question was considered in a recent Tribunal case and the answer was “no”. Here the taxpayer purchased a property with the intention of moving in immediately after settlement. However, due to a request from the previous owners, the property was rented back to them by the purchaser for a period of 6 months. At the end of the 6 months the taxpayer rented the property to another tenant. Consequently, the taxpayer did not move into the home until it became convenient for him to do so.

The taxpayer’s delay in not moving into the home at “the time it was first practicable” caused him to lose the benefit of the main residence exemption for the period prior to him moving in.

Establishing your main residence

There are many things that a person can do to establish that they have moved into the main residence. This may include moving your belongings into the home, changing the address on the electoral roll, changing the address to which your mail is delivered and ensuring services such as telephone, electricity and gas have been connected. In the second case, the taxpayers had to pay capital gains tax on their family home because they failed to establish that their house was their main residence. Among other things they only moved in the bare essentials such as bedroom furniture, a TV and some furniture. They did not move in the fridge, washing machine or the microwave and they did not use the kitchen cooking facilities. Furthermore, they could not establish that they had changed the address on their driver’s licence, car registration, electoral roll or bank accounts.

Tax Office Audits

The Tax Office has indicated that one of their main focus on CGT reviews will be the main residence exemption. Taxpayers selling their main residence, where they have had some periods of absence or where they have conducted a business or other income producing activity at the home should ensure they obtain professional tax advice in relation to the disposal.

Reference: Re Chapman AATA 421; Erdelyi and Erdelyi AATA 1388

Should you require assistance additional information, **contact your PKF tax adviser** or:

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