Trading Trusts Explained

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Trading Trust

Definition:

• A trust over goodwill and business assets by which a trustee conducts a business in accordance with and under the authority of the terms of the trust instrument
Trading Trust

- Trading Trusts
- Advantages/Disadvantages
- Existence
- Right of indemnity
- Asset protection?
Trading Trust

• Exposure of directors

• Dispute

• Winding up

• Liquidator’s remuneration

• Recommendations
Trading Trust

• Not an entity but a relationship

• Trustee, property, beneficiary

• Public unit trust / private trading trust

• Use of trusts for business – 1970+

• Prime motivation – tax avoidance
Advantages

- Statutory regulation
- Tax
- Flexibility
- Control without ownership – Rockefeller
- Asset protection
Disadvantages

• Administration costs

• Dispute

• Insolvency

• Asset protection

• Ford: commercial monstrosity
Tax advantages – an example

• Trust – more advantageous?
• Independent advice
• Numerous variables

• Assumptions:
  • One discretionary trust / one shareholder
  • Dividends fully franked
  • Partner – no alternative income – also beneficiary to trust
  • A taxed at highest rate – 45%
  • Company/trust taxable income = $100,000
  • FY17/18
Tax paid – company structure

- Company pays tax on the $100,000: 0.3 x $100,000 = $30,000
- Company distributes the remaining $70,000 to the single shareholder (A).
- **A will receive:** Dividend – Tax + Franking Credit
- **Franking Credit** = [Dividend Amount / (1-0.3)] – Dividend Amount
- **Franking Credit** = $70,000/0.7 - $70,000 = $30,000
- **A receives** = $70,000 (0.45 x $70,000) +$30,000 = $68,500
- **Tax paid by A** = $70,000 - $68,500 = $1,500
- Total Tax paid
  - Company = $30,000
  - A = $1,500
  - Total = $31,500
Tax paid – trust structure

• Trust not taxed on $100,000

• Beneficiaries taxed.

• The trust distributes $100,000 to A’s partner and $0 to A

• Tax paid by A’s partner = $19,822 + (0.37 \times (100,000 - 87,000)) = $24,632

• Total tax paid = $24,632

• “Saving” = $31,500 - $24,632 = $6,868
Existence of trust

- Trust deed
- Trustee minutes
- Accounts
- Bank statements
- ABN
- Trust tax returns
- Court directions
Right of indemnity

• Trustee personally liable
• *Vacuum Oil* – (1945) HC
• Indemnity against trust assets
• Statute
• Deed
• Indemnity from beneficiaries
• *Broomhead* – (1985) Vic
Asset protection

• Indemnity against trust property
• Indemnity from beneficiaries
• Excluded by deed?
• Not discretionary trust
Exposure of Directors

• Insolvent trading

• Corporations Act s.588G

• Corporations Act s.197

• Director of trustee company

• Where right of indemnity not available
Dispute

• Replace trustee

• Trustee Act s.48

• Benson – (2015) Tas

• Family dispute

• Independent trustee appointed
Dispute

• Oppression proceedings

• Corporations Act s.233

• Oppression proceedings available for units in trust?

• Affairs of the company

• Corporations Act ss. 9 & 53

• Includes transactions as trustee
Dispute

• *Viglioroni* – (2009) Vic

• *Noosa Ventures* – (2010_ Vic

• Victorian Law Reform Commission

• Recommends amendment of Trustee Act
Dispute

• Mediation options
• A buys out B
• B buys out A
• Sell business
• Wind up
• Continue, with adjustments
• Costs - Voltaire
Winding up

• Wind up trustee company
• Liquidator receiver of trust
• Wind up trust
• Exercise right of indemnity
• Creditor access limited
Liquidator’s Remuneration

• Assessment

• Factors s.473(10)

• Proportionality

• *Sakr Nominees (2017) NSW*
Liquidator’s Remuneration

• Trust assets available?

• *Re Enhill* – (1983) Vic

• *Suco Gold* (1983) SA

• *Re Amerind* (2017, 2018) Vic

• Employee priority?
Recommendations

- One trustee & one trust
- Separate books of account
- Trustee minutes
- No trustee business in own right
- Declaration of trust of land
Recommendations

• Director liability awareness

• Trustee personally liable for debts

• Indemnity in trust deed

• Power of sale in deed

• Shareholders’ & unitholders’ agreement