

THE GST TREATMENT OF BARE TRUSTS

By Paul Stacey*

In commercial structures legal title to assets is often held in bare trust. There are various reasons for doing so. The motivation may be a desire for anonymity. An express trust bare trust can be an efficient entity for pooling income yielding assets. In all instances it is intended that the benefits of ownership will pass more-or-less seamlessly to the beneficiary, who may or may not also be the settlor.

The issue from a GST perspective is whether this goal may be attained. There are no statutory references to bare trusts in the GST Act. This raises the first issue. What is, or is not, a bare trust largely depends on the statutory context in which the term appears. There are several possibilities. If the term does not appear in the GST Act, which meaning does it take for GST purposes?

Further uncertainties are apparent. Can a bare trustee also be regarded as an agent at law? Is a bare trustee an entity for GST purposes? Can a bare trustee carry on an enterprise and hence be registered? Is the settlement of legal title in bare trust “a supply” by the settlor? If so, is there consideration for that supply such that it could be a taxable supply? Can input tax credits be claimed on third party supplies to the bare trustee? If so, which entity can claim them? Further, what is the Australian Taxation Office’s published view on these issues? There is, at least, a known answer to that question: it does not have one. Therefore, how does it administer the GST law?

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GST TREATMENT OF BARE TRUSTS

Whether a particular express trust bare trust achieves the intended result vis-à-vis GST will depend upon how it is drafted and implemented. The purpose of this article is to chart the reefs upon which that intent might run aground. Forearmed with this knowledge it is hoped practitioners will be able to help navigate their clients past this peril.

1. INTRODUCTION

Bare trusts arise in a multitude of circumstances, and are widely used in the property and financial services sectors to hold legal title to assets. But what is their treatment for GST purposes? Is that transfer of bare legal title to (and from) the bare trustee a supply? Is it “for consideration” such that it could be a taxable supply upon which GST is payable? Similarly if the bare trustee were to incur expenses in performing its duties can input tax credits be claimed on these? If so, by whom can they be claimed? Is it the bare trustee or the beneficiary?

The purpose of this article is to briefly consider the likely answers to these questions. Its method is to outline the legal nature of bare trusts, consider the relevant statutory provisions and then to analyse their GST treatment from fundamental principles. The article concludes with some comment on the administrative approach to this issue by the Australian Taxation Office (“ATO”).

This article is one outcome from a larger piece of work which examines the equity law relating to bare trusts, sham trusts and the dividing line between agency and trusteeship, as well as the United Kingdom and New Zealand VAT and GST analyses respectively. It follows that this article contains a number of references to the jurisprudence in these other common law jurisdictions. Some of the issues addressed in passing here are canvassed more fully in these other articles. Also it is noted that the approach in the UK and New Zealand to identifying “the supply” may differ to the still evolving Australian approach.

2. THE LEGAL NATURE OF BARE TRUSTS

The GST legislation like most tax legislation is “parasitic” in that it incorporates existing legal concepts, insofar as they are consistent with the scheme of GST. Therefore where there is an ambiguity, or some uncertainty, in an underlying legal concept that too is incorporated into GST law thereby adding complexity to the GST analysis. This is the case with bare trusts. It is accordingly necessary to outline that ambiguity as a prelude to the GST analysis.

Broadly, a bare trust might arise in three plain vanilla situations.¹ First, a bare trust may be an express trust under which property is explicitly settled in bare trust. This article is primarily focused on this situation. Second, a bare trust might come into existence upon completion of the specified trustee duties enumerated in a trust deed. Third, a resulting trust will be a bare trust eg where property is purchased with another’s money,² or a purported trust settlement is defective.

The orthodox view of a bare trust is that it refers to the situation where “the trustee or trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them, for example, on sale to a third party”.³ The reference to “duty” is to “active duty”: a bare trustee “never hav[ing] had *active duties* or who have ceased *those duties*”.⁴

¹ A bare trust may also arise upon the creation of a sub-trust by the beneficiary of an existing trust and in certain other specialised circumstances.

² The existence of a resulting trust is in these circumstances, however, a rebuttable presumption: see *United Corporate Services Ltd v CIR* (1997) 18 NZTC 13,151 where the presumption was rebutted due to the group relationship between the parties.

³ *Herdegen v FC of T* (1988) 84 ALR 271, 281 (per Gummow J).

⁴ *Ibid* 282 (per Gummow J) (emphasis added).

GST TREATMENT OF BARE TRUSTS

The ambiguity here lies in the term “active duties”, whose meaning has long been uncertain.⁵ It is logical to think of “active” in terms of physical activity, so that *if* a trustee has things to do it will not be a bare trustee. This suggests a bare trustee is one who has little to do, or who is largely passive. However, the reference to “active” is *not* to “active” in the sense of “doing something”. It refers to “doing something which is specified in the trust deed” eg to maintain the beneficiaries until they attain the age of majority at which point the trustee “is bare or naked of these active duties decreed by the settlor”.⁶ This expression works well in the testamentary trust context from which it is derived.⁷

However, where property is settled in bare trust without any enumeration of duties this understanding of “active duties” is less informative. A bare trustee is a trustee and possesses all the powers and duties which attach to it by virtue of its office as a trustee. Accordingly, a bare trustee will “retain his legal duties, namely to exercise reasonable care over the property, either by maintaining it or by investing it”.⁸ Thus, depending upon the nature of the trust property and circumstances a bare trustee may have a significant amount of activity, legal and physical, to perform. This is relevant to the GST issue of whether a bare trustee can carry on an enterprise for GST purposes.

Perhaps because this formulation of bare trust can be confusing a different test has recently emerged in Australia in the area of

⁵ See for example Jessel MR in *Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582 who at 584 could neither make head nor tails of the term.

⁶ D Waters, *Law of Trusts in Canada* (2nd ed, 1984) 27. This view was endorsed by Gummow J in *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 281. The view appears to have been derived from *In Re Lashmar*, *Moody v Penfold* [1891] 1 Ch 258.

⁷ The “no active duties” formulation was first fully expressed by Stirling J in *In re Cunningham and Frayling* [1891] 2 Ch 567. However, a bare trust is often equated with the rule in *Saunders v Vautier* (1841) Cr & Ph 240, although the concept predates the case and its scope is not co-terminous.

⁸ Waters, above n 6, 27.

corporate law. This emphasises the control wielded by the beneficiary over the bare trustee: “the expression [bare trustee] must be related to situations where a trustee is no more than a nominee or cypher, in a commonsense commercial view”.⁹

This formulation will be readily understood by a commercial person, but it too is not free from difficulty.

A valid trust must exist before it can be classified as a bare trust; a bare trust is a sub-species of trust rather than a separate genus. Ordinarily a trustee is duty bound to perform the terms of the trust. However, where property is settled in bare trust often the only express term is that the entity holds the property as a bare trustee. Yet, as noted, the bare trustee retains its duty to maintain the trust assets and act in the best interests of the beneficiary. The performance of this duty may involve taking account of the beneficiary’s wishes but it still involves an independent exercise of judgment: a beneficiary cannot “tell the trustee what to do” even if it has the capacity to terminate the trust by directing the trustee to transfer the trust property,¹⁰ as is the case with a bare trust.

The paradox raised by this formulation is: if a bare trustee is “a cypher” and it must be a trustee before it can be a bare trustee and a trustee must be independent then how can it be a cypher? So how is this paradox to be resolved? One possibility is to simply ignore it for GST purposes. Another is to conclude that a bare trustee who acts as a cypher, other than in terminating the bare trust upon the beneficiary’s instruction, is acting in breach of its duties. Or, if the bare trustee has always acted in this way, to conclude the trust is in truth a sham trust rather than a bare trust.¹¹

⁹ *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 398 (per Meagher JA); applied in *Australian Securities Commission v Bank Leumi Le-Isreal* [1995] 143 ALR 101, 146.

¹⁰ *In Re Brockback* (1948) Ch D 206 at 209.

¹¹ The application of the sham doctrine as expounded by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 to a trust context has

GST TREATMENT OF BARE TRUSTS

Underlying these differing possibilities is the deeper question of whether it is possible for a trustee of an *express trust* to act as both a trustee *and* an agent for the beneficiary/principal. If this is possible then the fortuitous answer is the person is a cypher where it acts as an agent and otherwise acts independently as a trustee. This has implications for the GST analysis. However, it seems to be a wholly artificial distinction as every action done by the person, in either alleged capacity, is *in relation to* the property, which is trust property. As a matter of jurisprudence the answer is a strong “no” in English law,¹² a clear “yes” in Canadian law,¹³ with an undecided “may be” in Australian and New Zealand law.

Looking at this issue from the other direction the prime distinguishing feature of agency from trusts is that an agent does not have to hold title to the principal’s property.¹⁴ However, an agent may hold legal title for its principal. Where it does this distinction evaporates. In this situation the courts may impose a constructive trust to prevent any unjust enrichment by the agent.¹⁵ If a constructive trust is imposed the net effect appears to be vis-à-vis dealings with the property that the agent is personally liable *as against* the imputed beneficiary, but that the principal remains

recently been confirmed as a matter of English law: *Shalson v Russo* [2005] 2 WLR. 1213 and *Richard John Hill (as trustee in bankruptcy of Henry Stanley Nurkowski) v Spread Trustee Company Ltd* [2005] WL636084. The *Snook* sham doctrine has been applied in Australia in numerous Federal Court cases and it is likely that it will also be held to apply in a trust context. Early indications are to that effect: see *Faucilles Pty Ltd (Trustee for John Kakrididas Family Trust No 2) v FC of T* (1989) 20 ATR 1712 and *Wily (as Trustee of the Bankrupt Estate of Fuller) v Fuller* [2000] FCA 1512.

¹² See Lord Hoffman in the House of Lords decision *Ingram v IRC* [1999] 1 All ER 297, 305.

¹³ See the Ontario Court of Appeal decision in *Trident Holdings Ltd v Danand Investments* [1988] Carswell Ont 112.

¹⁴ See for example *The Laws of Australia*, 15.13 Trusts, para 10.

¹⁵ The courts will “look to the nature of the transaction by the agent, the particular provisions of the agreement of the parties, and the whole of the circumstances attending the relationships between the parties”: *Walker v Corboy* (1990) 19 NSWLR 328, 397 (per Meagher JA).

personally liable *as against* third parties. Again, this is highly relevant to the GST analysis of *that* situation.

However, it cannot be presumed that just because a person holds legal title, other than under an express trust, that it is an agent. This is particularly so where the person is described as a “nominee”. A nominee might be an agent, but it might equally be a trustee or simply a person nominated pursuant to a contractual right (and neither an agent nor trustee).¹⁶ A relevant example of the latter situation is the London Tribunal decision in *Water Hall Group PLC v The Commissioners of Customs & Excise*.¹⁷

The situation for income tax law is that bare trusts are often treated as “tax transparent”, or are “looked through” with taxation consequences attaching to the beneficiary. In UK corporation and income tax law this outcome is achieved by statute through a smattering of provisions in various Acts;¹⁸ in Australia it is due to a combination of ATO practice and statutory provision.¹⁹

¹⁶ *Lord v Trippe* (1977) 51 ALJR 574, 580 (per Mason J). This can also be seen from s OD 9 of the *Income Tax Assessment Act 2004* (NZ) which provides look through treatment for “nominees”, but only *if* the nominee is a bare trustee.

¹⁷ (2002) Decision No 18007.

¹⁸ For example, s 60 *Taxation of Chargeable Gains Act 1992* (UK) provides that where an asset is “held by a person as nominee for another or as a trustee for another person absolutely entitled as against the trustee” then the property is treated “as if” it were vested in the other person. With regards to stamp duty *Finance Act 2003* (UK), Sch 1, para 3(1) states that where a bare trustee acquires a chargeable interest it is treated “as if” it were acquired by the beneficiaries.

¹⁹ It is ATO practice for imputation credits on dividends to be treated as belonging to the beneficiary where legal title to shares is held in bare trust. Taxable income is under statute taxable in the hands of the beneficiary where it is presently entitled to the income and not under a disability, or absolutely entitled to a CGT asset. While this is technically a different test the ATO’s preliminary view in relation to absolute entitlement is that this requirement will be met where the asset is held in bare trust: see *Draft Taxation Ruling TR 2004/D25*, para 33.

3. THE GST ANALYSIS

3.1 What Then Is the Situation For GST?

The GST law commences with the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (“GSTA 1999”) and “entity”; GST consequences attach to “entities”. The term entity is defined in s 184-1(1)(g) to include “a trust”. Section 184-1(2) further states that “the trustee of a trust ... is taken to be an entity ... who is the trustee ... at any given time”.

The purpose of s 184-1(2) seems to be to emphasise that the trustee of a trust *at any point in time* is the legal person acting in that capacity at that time. Accordingly, the identity of the trustee of a particular trust can vary over time as and when different legal persons perform this role. However, s 184-1(2) also deems that person to be “an entity”, namely the entity of “the trustee of a trust”. This interpretation is reinforced by s 184-1(3) which states that where a legal person acts in a number of differing capacities it “is taken to be a different entity” for each capacity in which it acts.

Thus, we end up with the situation where “a trust” and “the trustee” of that trust are both deemed to be entities for GST purposes. Therefore: to whom do GST consequences attach?

A trust is “a relationship” not a legal person, and as commented in the note to s 184-1(2) “a right or obligation cannot be conferred on an entity that is not a legal person”. Accordingly, the more sensible view is that GST consequences attach to the deemed entity of “the trustee”, rather than deemed entity of “the trust”. This was the approach taken by Hill J in *HP Mercantile Pty Ltd v FC of T*.²⁰ This interpretation also brings the Australian approach into line with that

²⁰ (2005) 143 FCR 553, 555. See also *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC 83, para 66 (per White J). Although, in this case the Court held that the trustees made the supply of the property by virtue of it being vested in them by a court order issued pursuant to s 66G of the *Conveyancing Act 1919* (NSW).

in the UK and New Zealand, whose VAT and GST respectively operate by reference to “persons”.²¹ The inclusion of “a trust” in s 184-1(1)(g) would therefore seem to be superfluous.²²

Having established that the relevant entity is, *prima facie*, “the trustee” four critical issues need to be addressed to further the GST analysis. These are:

- (1) Should or can the term “the trustee of a trust” be read down to exclude a bare trustee?
- (2) Can a bare trustee be registered for GST?
- (3) Does the settlement of legal title upon creation of a bare trust and its transfer upon conclusion of that trust involve a supply for consideration?
- (4) Who can claim input tax credits on third party taxable supplies to a bare trustee?

3.2 Scope of the Term “the Trustee of a Trust”

The term “trustee” ordinarily encompasses a “bare trustee”. Where property is purportedly settled in trust a valid trust must be found to exist *before* it can then be classified as a bare trust, and hence for the trustee to be a bare trustee. This fundamental point is

²¹ The New Zealand GST Act expressly, if somewhat circuitously, includes “the trustee of a trust” within its definition of person: *Goods and Services Tax Act 1985* (NZ), s 5(2). In the UK there is no specific reference to trustees in its VAT definition of person taken from the *Interpretation Act 1978* (UK), Sch 1. However, the inclusion within VAT of a person acting as a trustee follows from equity law.

²² It is noted that no explanation is given at 2.1, *Explanatory Memorandum* to the A New Tax System (Goods and Services Tax) Act 1999 as to why “a trust” was included as an entity. The preliminary ATO view is that “the trust” and “the trustee” are essentially a fused entity as and when one or the other is required: “the Act does not create two separate entities – the trust and trustee – but rather the relevant entity is the trust, with the trustee standing as that entity if legal personality is required” (Draft Miscellaneous Taxation Ruling MT 2005/D1, para 68).

GST TREATMENT OF BARE TRUSTS

illustrated by the cases of *Herdegen v FC of T*,²³ which concerns an express trust, and *United Corporate Services Ltd v CIR*,²⁴ which concerns a resulting trust.

In *Herdegen* the taxpayer argued that he was not subject to recoupment tax as he held the relevant shares as a bare trustee. Section 5(5) of the *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth) excluded recoupment tax “in relation to the sale of shares or of an interest in shares by a person who was a bare trustee in respect of those shares or that interest”. However, the taxpayer failed to establish the necessary certainty of identity of trustee, subject matter and beneficiary to demonstrate the existence of an express trust.²⁵ Accordingly, the shares were held personally and not in trust. In the absence of a valid trust the taxpayer failed to get to first base on the bare trustee argument. This is why Gummow J’s lengthy comments on bare trusts are, as acknowledged by him, obiter.²⁶

In *United Corporate Services* the taxpayer originally contracted to purchase a ship from a non-resident third party. However, prior to settlement it nominated a non-resident subsidiary nominee company, with the taxpayer ensuring payment of the US\$18 million purchase price. Some time later it acquired legal title from the nominee when the ship was in New Zealand territorial waters and claimed input tax under the second hand goods rules. The Taxation Review Authority (“TRA”) in *Case R1*²⁷ rejected the claim as the ship had been supplied to the taxpayer at the time of the original contract ie prior to the nomination. The nominee company merely later took legal title

²³ (1988) 84 ALR 271.

²⁴ (1997) 18 NZTC 13,151.

²⁵ *Herdegen v FC of T* (1988) 84 ALR 271, 278 and 279. The requirement for these three certainties was clearly established by Lord Langdale in *Knight v Knight* (1840) 3 Beav 148.

²⁶ *Herdegen v FC of T* (1988) 84 ALR 271, 281. A bare trust by virtue of a resulting trust, due to an invalid settlement, did not arise in this case because the purported settlor and trustee were the same person.

²⁷ (1993) 16 NZTC 6,001.

as a bare trustee. This and the subsequent transfer of legal title to the taxpayer were therefore ignored by the TRA for GST purposes.

The New Zealand High Court, however, overturned the TRA's decision. It held the ship was supplied to the nominee, hence the taxpayer could claim input tax on the later supply to it of the ship. The basis of the High Court's decision was that although the nominee purchased the ship with monies provided by the taxpayer there was no resulting trust. The group relationship between the nominee and taxpayer rebutted the presumption of a resulting trust. Accordingly, the nominee was not a bare trustee of the ship since no trust relationship was established.

Therefore, when s 184-1(2) specifically deems "the trustee of a trust" to be an entity for GST purposes it, *prima facie*, also deems "the bare trustee of a bare trust" to be an entity. This is reinforced by the absence of any reference whatsoever to bare trusts or bare trustees in the GST Act. Bare trusts and bare trustees are invariably only referred to in statutes when they are to be afforded special or exceptional treatment. This is one of the reasons why, in relative terms, there are a paucity of cases on bare trusts as compared to other aspects of equity law.

For example, under income tax the 45 day holding period rule in respect of franking credits applies to shares held by trustees *except* where the trustee is a bare trustee for a sole beneficiary.²⁸ Or under the old *Companies (New South Wales) Code 1981* (NSW) the prohibition against loans to trustees holding a greater than 10% shareholding *did not apply* where the trustee was a bare trustee.²⁹ Or, going further back, under s 48 of the *Land Transfer Act 1875* (UK) the normal transmission rule on the death of a trustee was *varied* if it

²⁸ *Income Tax Assessment Act 1936* (Cth), s 160APHH(6).

²⁹ See *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 397–398 (per Meagher JA).

GST TREATMENT OF BARE TRUSTS

was a bare trustee so that legal title to a freehold passed to his or her legal personal representative rather than heir-at-law.³⁰

Nonetheless, there is an argument that the term “the trustee of a trust” excludes a bare trustee. This argument would rest on two pillars. The first is the view of a bare trustee as a “nominee or cypher, in a commonsense commercial view”.³¹ The second are comments in several recent Federal Court cases which could be taken to support the suggestion that this term be interpreted from such a commonsense commercial view.

Under the first pillar it would be argued that “a commercial person” views a bare trustee as an agent ie someone who is there to do the beneficiary/principal’s bidding. Under GST the acts of agents are normally attributed to their principals. This is evidenced from Div 57 (resident agents acting for non-residents) and Subdiv 153-B (principals and agents as separate suppliers or acquirers) which provide special rules varying that normal outcome.

Second, in *Sterling Guardian Pty Ltd v Commissioner of Taxation*³² Stone J commented: “The clear thrust of the GST Act, both in its wording and as explained in the EM, is that of a practical business tax imposed with respect to elements of commerce”.³³ In *SAGA Holidays Ltd v Commissioner of Taxation*,³⁴ Conti J went further and stated: “A contextual consideration involved in construing the GST Act is that GST is traditionally a tax on ‘businessmen’, to be assessed and paid by businessmen, and to be administered and *interpreted in accordance with the understanding of businessmen*”.³⁵

³⁰ The “no active duties” view of a bare trustee was first expressed by Stirling J in his consideration of this section in *In re Cunningham and Frayling* (1891) 2 Ch 567.

³¹ *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 398.

³² [2005] FCA 1166.

³³ *Ibid* para 39.

³⁴ [2005] FCA 1892.

³⁵ *Ibid* para 29 (emphasis added).

Therefore, if businessmen understand a bare trustee as being basically the same thing as an agent and the GST Act is to be interpreted according to their understanding then the term “the trustee of a trust” should be read as excluding a bare trustee.

The author makes two comments on that argument. First, Meagher J’s finding in *Corumo Holdings Pty Ltd v C Itoh Ltd*³⁶ that a bare trustee was to be understood as a cypher in a commonsense commercial view was expressly restricted to the interpretation of the phrase “bare trustee” as it appeared in the *Companies (New South Wales) Code 1981* (NSW).³⁷ The term bare trustee does not appear in the GST Act, accordingly there is no specific statutory contextual reference available to give “bare trustee” that particular and still relatively unusual meaning.

Second, Conti J’s comments were made in the context of understanding what is a “supply”, which is a peculiarly GST concept. There are indications elsewhere in his judgment which suggest he considered existing legal concepts take their legal meaning in GST. In particular, while he found the term “agent” was used in a commercial sense in the documentation, the GST analysis proceeded on the term’s legal meaning.³⁸ This alternative argument would give a scope to Conti J’s comments beyond that, which the author believes, was intended by his honour.

Accordingly, the author considers the better view is that the phrase “the trustee of a trust” includes a bare trustee. However, he does recognise that the alternative argument can be made.

3.3 Can a Bare Trustee Be Registered For GST?

In order for an entity, including a bare trustee, to be registered for GST it must be “carrying on an enterprise”. The term “enterprise” is defined in s 9-20(1) and relevantly includes

³⁶ (1991) 24 NSWLR 370.

³⁷ Ibid 398.

³⁸ *SAGA Holidays Ltd v Commissioner of Taxation* [2005] FCA 1892, paras 17–18.

GST TREATMENT OF BARE TRUSTS

an activity or series of activities, done:

- (a) in the form of a business; or
- (b) in the form of an adventure or concern in the nature of trade; or
- (c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property.³⁹

In determining whether a bare trustee can carry on an enterprise it is not simply a matter of looking at the label. It is necessary to determine whether the extent of the activities done, or which might have to be done, by a *particular* bare trustee in the performance of its duties amount to carrying on an enterprise.⁴⁰

As alluded to earlier in the article a particular express trust bare trustee may have a considerable amount of legal and physical activity to perform. The extent of that activity will largely depend upon the nature and scope of the trust property.

A wide variety of assets can be settled in an express trust bare trust. The trust property might be legal title to an interest in real property, registered mortgages, trading and liquor licences, shares, debentures etc. The bare trustee's *non-active* duties, in a legal sense,

³⁹ Section 9-20(1) also includes at (d) and (e) reference to specific kinds of trusts. These are not reproduced as they are not relevant for present purposes and have no interpretative significance. For example, it could not reasonably be argued that because (e) refers to the trustee of a superannuation fund that a trustee of a trust could not carry on a business under (a).

⁴⁰ In *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC 83 White J considered that in the case of court appointed trustees for the sale of property the trustees carried on an enterprise of doing "the series of activities required to be undertaken pursuant to their appointment as trustees for sale": *ibid* para 68. That word included "retaining real estate agents, solicitors, counsel and accountants; giving instructions for the marketing of the property; liaising with Toyama and Landmark; preparing the contract of sale; arranging for the marketing and public auction of the development site; and selling the site": *ibid* para 67. Those activities had "a commercial character" and were "done in the form of a business": *ibid*.

will include the “exercise of reasonable care over the property, either by maintaining it or by investing it”.⁴¹

So take the example of a freehold or leasehold interest in real property where the bare trustee holds the legal title subject to a lesser interest eg a sub-lease or licence. The bare trustee’s duty to exercise reasonable care over the trust property will involve entering into new sub-leases and licences as and when the existing lesser interests expire or are terminated. This activity would seem to fall within the s 9-20(1)(c) definition of “enterprise”. It will also include if necessary taking legal action to recover unpaid rent,⁴² which additional activities may also bring it within another head of the definition of enterprise.

Or consider the case where the bare trustee is the registered holder of shares. Is the scope of the trust property limited to the *particular shares* in the *particular company* or is it wider? If the trust property is wider, then how much wider is it? The answer depends upon how the trust property in a particular express trust bare settlement is defined. This will involve considering the terms of the settlement. There is also an issue of law.

If a bare trust settlement is expressed as “100 000 shares in XYZ company with a value of \$500 000 to be held in bare trust” what is the scope of the trust property? Is that trust property:

- (a) “100 000 shares in XYZ company”; or
- (b) “shares with a value of \$500 000”; or
- (c) “property with a value of \$500 000”?

Remember the bare trustee has a duty to maintain *the* trust property and a duty to account to the beneficiary for the income

⁴¹ Waters, above n 6, 27.

⁴² For example in *Schalit v Joseph Nadler, Ltd* [1933] 2 KB 79 the bare trustee held the lease subject to a two year sub-lease. It was held that in the action to recover unpaid rent from the sub-lessee that the proper party was the bare trustee not the beneficiary.

GST TREATMENT OF BARE TRUSTS

earned by the bare trust. The latter is not the same as an obligation to pass the actual receipts to the beneficiary. Accordingly, a bare trustee might operate its own bank account, or it might bank income received directly into the beneficiary's bank account.

If *the* trust property is (a) then the bare trustee will have to pass on dividend income to the beneficiary. It will also have to collate and forward dividend statements to the beneficiary to allow the claiming of imputation credits etc.⁴³ The bare trustee may also vote in shareholder meetings. It will certainly have a duty to consider whether it should vote on particular resolutions. If it does vote then it will normally do so in accordance with the beneficiary's wishes, but it may vote even in the absence of any expressed wishes.⁴⁴

If the trust property is (b) then additionally the bare trustee may need to turn over the shareholding in XYZ company. The bare trustee has a duty to maintain the trust property, which is "shares with a value of \$500 000". This will also be the case in (c). The difference between the two scenarios is the nature of the replacement assets; in (b) it is restricted to shares, whereas in (c) there is no restriction, other than its duty in respect of investment under the various State and Territory Trustee Acts.⁴⁵

These two scenarios highlight the tension between the two views as to the legal nature of a bare trust discussed earlier. If a bare trust is conceived as "a cypher in a commonsense commercial view" then the bare trustee could, arguably, only sell the shares on the instruction of the beneficiary.⁴⁶ The two views might be reconciled by reading down this view as only applying to where the bare trustee

⁴³ Subdivision 207-B of the *Income Tax Assessment Act 1997* (Cth) will generally have the effect that the beneficiary gets the benefit of the imputation credits, although there is relevant administrative practice by which that would not have to be claimed via a tax return lodged by the bare trustee (PS LA 2000/2).

⁴⁴ *Kirby v Watkins* [1929] 2 Ch 444, 454.

⁴⁵ See for example *Trustee Act 1925* (NSW), ss 14A, 14B, 14C and 14D.

⁴⁶ See *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 134 ALR 101, 146 (per Sackville J).

is terminating the trust by selling the trust property and remitting the proceeds to the beneficiary. Otherwise, the bare trustee has a *non-active* duty, in a legal sense, to maintain then the trust property which might involve selling particular shares. Normally, the bare trustee would have regard to the beneficiary's wishes but it must nonetheless independently form its own opinion.⁴⁷

At this point the argument becomes arid from a GST perspective. The issue is whether the activities conducted, or which may need to be conducted, by a bare trustee in the performance of its duties amount to carrying on an enterprise. This looks to "the activities" themselves and their character, not the mental state of the bare trustee in doing them. On its face it is not relevant whether the bare trustee performs these activities on the instruction of the beneficiary or after independently exercising its own judgment.

The residual legal point in terms of identifying *the* trust property is that it must be sufficiently certain in order for there to be a valid trust settlement. With regards to shares Gummow J queried in *Herdegen* whether they would be regarded as *fungible* for this purpose,⁴⁸ and hence in defining the scope of the trust property. It has been subsequently determined as a matter of English law that shares do not need to be identified by share certificate number where they are all of the same class.⁴⁹

Refocusing on the statutory definition of s 9-20(1)(a) this includes activities conducted "in the form of a business". There is Australian case law that it is not possible to settle "a business" in an

⁴⁷ It should be recalled that this discussion is focused on an express trust bare trust settlement. If a trust settlement requires the trustee to sell the shares in certain circumstances then the trustee must perform the terms of the settlement. However, that trust would not be a bare trust since duties were enumerated in the trust deed. Further, the trust deed cannot require that the trustee do as the settlor directs as that is indicative of a sham trust. This is a pertinent issue where the settlor and the beneficiary are the same entity.

⁴⁸ *Herdegen v FC of T* (1988) 84 ALR 271, 279.

⁴⁹ *Hunter v Moss* [1994] 1 WLR 452, 460.

GST TREATMENT OF BARE TRUSTS

express trust bare trust. In *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd*,⁵⁰ a case which concerned the express settlement of a Freemantle café business in bare trust, McLure J said: "by no stretch of the imagination can it be said that a trustee carrying on a business would or could be a bare trustee".⁵¹ In particular, McLure J did not consider that the role of an employer was consistent with a settlement in bare trust.⁵² It is noted that not all types of businesses require employees.

However, the test in s 9-20(1)(a) is not that an entity be carrying on a business, but that its activity or series of activities be done "in the form of" a business. This is a wider concept than "carrying on a business". In *Toyama Pty Ltd v Landmark Building Developments Pty Ltd*,⁵³ White J indicated that these words:

have the effect of extending the meaning of enterprise beyond entities carrying on a business, to encompass activities that have *the appearance or characteristics of business activities*.⁵⁴

Similarly Senior Member McCabe in *Body Corporate, Villa Edgewater Cts 23092 v FC of T*⁵⁵ thought that the extension indicated that decision-makers should:

concentrate on whether the activities of the entity are *carried on in a business-like way*, rather than on the ends of the activities.⁵⁶

It is likely that there will be many bare trustees who carry on their activities, in a physical sense, in a way which has "the appearance of a business" or "in a business-like way". Where a bare

⁵⁰ [2003] WASCA 11.

⁵¹ *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11, para 57.

⁵² *Ibid.* McLure J at this point also referred to the obligation to receive "the income of the Business and pay its expenses". However, bare trustee's typically receive income and pay expenses.

⁵³ [2006] NSWSC 83.

⁵⁴ *Ibid* para 69 (emphasis added).

⁵⁵ (2004) 55 ATR 1162.

⁵⁶ *Ibid* 1169 (emphasis added).

trustee does so it will be entitled to be registered (as trustee of the bare trust), or might be required to be registered. The latter circumstance is unlikely to arise where the bare trustee holds financial assets since the Div 188 definition of “annual turnover” excludes input taxed supplies. Accordingly, the annual turnover of such a bare trust could never exceed the registration threshold.

3.4 Does Settlement of Legal Title In Bare Trust and Its Subsequent Transfer Involve a Supply For Consideration?

It may *not* be possible to settle a business in bare trust or for a bare trustee to carry on a business. But, *it is* possible for a settlor carrying on a business to settle particular business assets in bare trust. Will that settlement and later transfer to the beneficiary upon termination of the bare trust be a supply for GST purposes? If so, is the initial supply “for consideration” such that it could be a taxable supply?

3.5 Equity Concepts In Taxation Law

The answer to these questions is not as easy as it first seems. As a first step it involves transmigrating concepts from one world view (equity law) to another (GST). Equity law is all about relationships and remedies. It is not so much concerned with interests in property but with doing the right thing. In contrast GST, like most taxes, is at a fundamental level concerned with the transfer of property.⁵⁷ It is focused on *the passing of ownership of a thing* from the supplier to the recipient where consideration is provided.⁵⁸ Hence the debate as to whether “a right” needs to be proprietary in nature before it can be

⁵⁷ This statement is not intended to qualify the broad subject matter of “supply”, which includes services.

⁵⁸ There are only a few technical exceptions to the requirement for consideration eg GST-free supplies, input taxed supplies of precious metals, supplies between associates under Div 72.

GST TREATMENT OF BARE TRUSTS

supplied, or whether a personal right is sufficient.⁵⁹ That debate is fundamentally about the threshold level at which ownership exists for GST purposes.⁶⁰

From an equity law perspective the trustee takes full legal title to the trust property. It can deal with the trust property as it thinks fit. This includes selling the trust property, whether in accordance with the trust deed or not. However, *if* the trustee contravenes the trust deed, or otherwise breaches its duties, it will be liable for that breach. The beneficiary has a remedy against the trustee since it has done a wrong to the beneficiary. Further, the beneficiary will normally have a right to trace and recover any wrongly sold trust property. Hence the age old equity law debate as to whether a beneficiary's rights are *in personem* (a chose in action against the trustee) or *in rem* (founded in the trust property). However, where the trustee wrongly sells the trust property to a purchaser who provides consideration and has no knowledge of the trust the beneficiary cannot reclaim the property.⁶¹

The application of taxation law to equity law concepts has been done before, hence so too has this transmigration process. The approach taken is to reduce the totality of the relationship between the trustee and the beneficiary vis-à-vis one another and the trust property, in property based terminology, to “the legal interest” and “the equitable interest”. Accordingly, the trustee takes “legal ownership” of the trust property and the beneficiary “equitable or

⁵⁹ See R Cordara and P Gallagher, “Supply of Rights and Rights To a Supply” [2001] (4) *International VAT Monitor* 161; C James and P Stacey, “The Limits of Supply” (2002) 2 *Australian GST Journal* 41; and GST Ruling GSTR 2003/8, paras 57–61.

⁶⁰ Another example of that debate is the GST treatment of hire purchase and whether a supply is made upon the transfer of possession or legal title at the end of the hire purchase contract. The ATO treats a supply as being made on the transfer of possession: GSTR Ruling 2000/29, paras 190 to 217. The author has long been of the view that although this treatment is now standard practice it is not technically correct: see for example P Stacey, “Hire Purchase Agreements” [2000] (15) *GST Today*, para 15.3.

⁶¹ *Re J Leslie Engineers Co Ltd* [1976] 2 All ER 85.

beneficial ownership". While this description is apt to mislead, it generally does not cause harm.⁶² In the case of GST the risk is that a transfer of a "legal interest" or an "equitable interest" might be taken to be "a supply" in the same way as the transfer of a "leasehold interest" even though the "interests" are not comparable.

One example of the use of this terminology in a bare trust context is the High Court's decision in the stamp duty case of *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*.⁶³ The High Court stated that prior to the creation of a trust there is "an entire and unqualified legal interest and not two separate interests; one legal and the other equitable".⁶⁴

The issue before the High Court was whether the Commissioner had correctly stamped the transfer of land and the declaration of trust. The Commissioner assessed the transfer of the property to ad valorem duty of \$50.16 and the declaration of trust to duty of \$6 in the mistaken belief that the transfer had occurred before the declaration. If he had known the correct position he would have assessed the declaration to ad valorem duty and the transfer to fixed duty. The Commissioner sought a further payment of duty from the bare trustee, DKLR Holding Co (No 2) Pty Ltd.

The High Court held that the "entire and unqualified legal interest" in the property was held by the trustee immediately before the declaration of trust. Accordingly, by majority decision, the bare trustee was found to be liable to ad valorem duty. However, that particular outcome was a function of the *Stamp Duties Act 1920*

⁶² See M Robertson, "Beneficiaries' Rights Re-Examined: A Sterile Debate Takes On Practical Significance" (1995) 12 *Australian Tax Forum* 484, 487–488.

⁶³ (1982) 149 CLR 431.

⁶⁴ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 463 (per Aicken J), for which he cited the following English authority: *In re Douglas* (1885) 28 Ch D 327, 331; *In re Sealous*; *Thomson v Selous* [1901] 1 Ch 921, 922; and *In re Cook* [1948] Ch 212, 214–215.

GST TREATMENT OF BARE TRUSTS

(NSW) being drafted upon this “fiction or footing”.⁶⁵ Normally, the settlor would hold the entire and unqualified interest in the property as it is the settlor’s intention which is critical to the formation of a trust, rather than the trustee’s.⁶⁶

Therefore, from a GST perspective the question becomes is the settlor’s creation of a legal interest in trust property (by transfer of legal title) a supply? Or must there be a transfer of an entire and unqualified legal interest in property for it to be supplied? To answer these questions it is necessary to return to the sufficiency debate. For ease of reference the phrase “an entire and unqualified legal interest in property” is referred to as “full ownership of the property”.

3.5 Does the Supply of Property Require the Transfer of Full Ownership of Property?

The author submits, as a proposition, that full ownership of property must pass for that property to be supplied for GST purposes. He submits that this is inherent within the nature of GST as a transaction and consumption tax and in the nature of supply. The proposition is only argued in skeleton as a full analysis is beyond the scope of the article. The ATO’s view is not known, although there are conflicting indicators.⁶⁷

The term “supply” is, in practical terms, largely undefined in the GST Act. The definition of “a supply” in s 9-10(1) is “any form of

⁶⁵ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 457 (per Gibbs CJ). Per s 55 *Stamp Duties Act 1920* (NSW) a declaration of trust over identifiable property is chargeable at a concessional rate. However, to qualify for the concession the property must already “be vested in the apparent purchaser”: s 55(1)(a)(i). Accordingly, for stamp duty purposes the declaration of trust is made *after* the transfer of the property to the trustee.

⁶⁶ This is evident from the courts imposing a fiduciary obligation on a person (the trustee) in certain circumstances regardless of his or her’s intent eg a constructive trust.

⁶⁷ Cf the ATO’s view of the ECJ decision in *Auto Lease Holland* [2003] ECR I-1317 in GSTR 2005/1, para 34 and its “substance and reality approach” argued in *SAGA Holidays Ltd v FC of T* [2005] FCA 1892.

supply whatsoever”. Subsection 9-10(2) then provides a list of examples which illustrate the meaning of supply. These include a supply of goods, a supply of services, the provision of advice or information, a grant of real property, an entry into an obligation etc. none of which are further defined. But stating that the term “supply” includes “a supply of goods” doesn’t greatly advance one’s understanding of “supply”.

The reason the term “supply” is used in the GST Act is because this is the term which is invariably used in VAT and GST regimes elsewhere in the world. The absence of a more explanatory statutory definition of “supply” indicates an intention that the term should be understood in Australia having regard to how the term is understood in other VAT/GST jurisdictions. Accordingly, Underwood J in *Shaw v Director of Housing (Tas)*⁶⁸ looked to how the word “supply” was understood in New Zealand and the United Kingdom.⁶⁹ Similarly Conti J in *SAGA Holidays* looked to a variety of English VAT decisions for guidance on how to identify “the supply” in the circumstances before his honour.⁷⁰

The approach taken in European VAT is that there must be a transfer of full ownership for there to be a supply of the property. Supply is defined in the EEC Directive 77/388/EEC (“the Sixth Directive”) by reference to either a “supply of goods” or a “supply of services”; with “a supply of services” being defined as the supply of anything which is not a supply of goods. Therefore in understanding what is a supply primacy is afforded to a supply of goods. Article

⁶⁸ (2001) 46 ATR 242.

⁶⁹ Ibid paras 13–14. Although, as commented later in the article there is a different judicial approach in these two jurisdictions to identifying “supply”.

⁷⁰ These were primarily *Customs and Excise Commissioners v Pippa-Dee Parties Ltd* [1981] STC 495, *Customs and Excise Commissioners v Diners Club Ltd* [1987] 2 ALL ER 385 and *Commissioner of Customs & Excise v Plantiflor Ltd* [2002] 1 WLR 2287.

GST TREATMENT OF BARE TRUSTS

5(1) of the Sixth Directive defines “a supply of goods” to mean “the transfer of the right to dispose of tangible property *as owner*”.⁷¹

The reference to “owner” is understood as referring to “full ownership”. Accordingly, the enactment of the definition in the *Value Added Tax Act 1994* (UK) is, broadly, “any transfer of *the whole property* in goods”.⁷² Hence, when the European Court of Justice (“ECJ”) came to consider article 5(1) in *Shipping and Forward Enterprise Safe*⁷³ it concluded that the definition was not restricted by the niceties of particular member states’ legal procedures but “covers any transfer of tangible property by one party ... empowers the other party actually to dispose of it *as if* he were the owner.”⁷⁴ Accordingly, the ECJ in *Auto Lease Holland*⁷⁵ found that the supply of the petrol, which was sold on credit, was to the individual rather than the finance company since the individual could “decide in what way the fuel must be used or to what end”.⁷⁶ It did so as this is an indicator of full ownership.

Returning to a bare trust context the bare trustee holds legal title to the property, but is *not* entitled to retain the benefits of ownership. It must account to the beneficiary for *all* profits earned from either possession of the trust property, eg rent or dividends, or upon its alienation to a third party, either absolutely or partially, eg sale proceeds.⁷⁷ Accordingly, the trustee does not have “full ownership” of the trust property. Hence the settlor does not make a supply to the trustee when it settles property in bare trust. This is the case even

⁷¹ Emphasis added.

⁷² Schedule 4 of *Value Added Tax Act 1994* (UK), s 5(1) (emphasis added).

⁷³ [1990] ECR I-285.

⁷⁴ Cited in *Auto Lease Holland* [2003] ECR I-1317, para 32 (emphasis added).

⁷⁵ [2003] ECR I-1317.

⁷⁶ *Ibid* para 34.

⁷⁷ As a matter of equity law a trustee is *prima facie* not entitled to benefit from acting as a trustee. However, that situation can be varied by trust deed so as to permit trustee fees. Where this happens the trustee can retain trust property where, and to the extent, that a lien arises in respect of unpaid trustee fees.

though the trustee can, almost anomalously, pass full ownership of the trust property to a third party and thus supply it.

A further point is that a bare trust can arise by operation of law eg a resulting trust. It is therefore arguable that just as the extinguishment of a judgment debt occurs by operation of law (upon payment by the judgment debtor) and is not a supply,⁷⁸ then nor too is the creation of a bare trust. However, the argument is not strong since the parties voluntarily put themselves into the situation under which the resulting trust arises eg the purchase of legal title with another's money.

The overseas case with greatest proximity to this situation is the New Zealand High Court decision in *CIR v Campbell Investments*.⁷⁹ However, care is required when interpreting the decision.

3.6 The Decision In *Campbell Investments*

CIR v Campbell Investments concerned “a tax avoidance arrangement”.⁸⁰ This circumstance would have informed the court's decision; the lower New Zealand courts being generally pragmatic in their interpretation and application of GST. Accordingly, there is a lack of clarity on certain aspects when the decision is analysed technically.

The circumstances of the case were as follows. Mr Montgomery held the legal title to rented commercial real property for Campbell Investments, an unincorporated association comprising himself, his wife and the trustees of the family trust (“Syndicate”). The Syndicate was registered for GST.⁸¹ Mr Montgomery transferred legal title to the property to the Syndicate members for nominal consideration, namely a peppercorn, in October 1997. In May and June 1998 Mr

⁷⁸ *Shaw v Director of Housing (Tas)* (2001) 46 ATR 242, 246.

⁷⁹ (2004) 21 NZTC 18,559.

⁸⁰ *Ibid* para 50.

⁸¹ Under s 57(2) of the *Goods and Services Tax Act 1985* (NZ) an unincorporated body is effectively deemed to be a separate person.

GST TREATMENT OF BARE TRUSTS

and Mrs Montgomery transferred legal title to the family trust for \$615 000 and \$410 000 respectively. The trustees paid for the transfer by executing a mortgage over the properties. The trust was retrospectively registered for GST from October 1997 and claimed input tax on the \$1 025 000. The Syndicate, however, did not account for any output tax. It took the view that the transfer of legal title to its members terminated its taxable activity, and that as this was for nominal value there was no output tax.

The likely correct technical analysis is that Mr Montgomery purchased the properties as agent for the three Syndicate members.⁸² Under s 60(2) of the *Goods and Services Tax Act 1985* (NZ) a taxable supply to an agent is deemed to be to its principal. Accordingly any subsequent transfer of legal title to the principal is disregarded for GST purposes due to the earlier deeming. However, Wild J's decision does not refer to s 60. Also Wild J refers to Mr Montgomery, at one point, "in his agent/trustee capacity". Presumably that trustee capacity was one of a constructive trustee, although this is not clear.

Wild J held that there was no supply in October 1997 for GST purposes.⁸³ Rather, "all that happened ... was a transfer of legal title to the beneficial owners ... That was irrelevant to the Syndicate's taxable activity, which was not in any way dependent on the Syndicate members holding legal title to the properties".⁸⁴ Further, the transfer at a "peppercorn (ie a negligible amount) was appropriate as they already owned the properties and were thus 'entitled' to them ie to call for their legal title".⁸⁵

As to the subsequent transfer of legal title to the family trust Wild J indicated that he needed to consider whether it was a supply

⁸² At para 7 Wild J refers to Mr Montgomery executing an acknowledgment that he held the first of the properties "as agent for the Syndicate".

⁸³ *CIR v Campbell Investments* (2004) 21 NZTC 18,559, para 28.

⁸⁴ *Ibid* para 29.

⁸⁵ *Ibid* para 30.

for GST purposes.⁸⁶ However, he did not do so. He assumed it was a supply and focused his discussion on *when* the supply occurred, namely when the transaction was settled, which was determined to be when the mortgage was executed.⁸⁷

3.7 Is There Consideration?

However, if the settlor were to make a supply to the trustee upon the settlement of property in bare trust would it be for consideration? Similarly, if the transfer of legal title upon termination of the trust to the beneficiary were a supply would it too be for consideration? Supplies which are not for consideration are generally outside-the-scope of GST with a few technical exceptions.

There has been significant discussion as to the nature of “consideration” and the relevant connection between “consideration” and “supply” for GST purposes.⁸⁸ The real issue here is *not* whether there needs to be a connection, or nexus, between the two, but *the strength* of the required connection for a taxable and financial supply.⁸⁹ Is it sufficient that “there is consideration for the supply you make”,⁹⁰ or is a more purposive connection required? That is, is the reason you make the supply for the purpose of receiving the consideration.⁹¹ The following brief comments are not intended to add to that wider debate, although that debate is directly on point.

A settlement of property in express trust involves a gifting of the property. However, it is a gifting to the beneficiary not the trustee.

⁸⁶ Ibid para 33.

⁸⁷ Ibid paras 35–39.

⁸⁸ Relevant material includes: GSTR Rulings GSTR 2000/11 and GSTR 2001/4; the AAT decision in *Body Corporate, Villa Edgewater Cts 23092 v FC of T* (2004) 55 ATR 1162; *Stirling Guardian Pty Ltd v FC of T* [2006] FCAFC 12, para 18 and the High Court stamp duty decision in *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* [2005] HCA 3.

⁸⁹ Expressed in another way the issue is what purpose does the word “for” serve as it appears in s 9-5(a) of the GST Act and reg 40-5.09(1)(b) of the GST Regulations.

⁹⁰ GSTR Ruling GSTR 2000/11, para 77.

⁹¹ The author considers the ATO’s view to be the better view.

GST TREATMENT OF BARE TRUSTS

The trustee holds the property subject to the terms of the trust deed, in accordance with which it must act and its trustee duties more generally.

Consideration is defined in the GST Act at s 9-15(1)(a) to include “any act or forbearance, in connection with a supply of anything”. The acceptance of legal title to the trust property subject to the trustee’s duties would on the face of it involve the provision of consideration by the trustee under this definition.

There is, however, strong authority to the contrary in a stamp duty context. Gibbs CJ in *DKLR Holding Co* considered that the transfer of land was not consideration for the creation of a trust.⁹² In doing so he cited with approval the following passage from Walsh J in the Supreme Court of NSW decision in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*⁹³ in respect of the position of the trustee:

An acceptance of a trust and an agreement to hold the trust property upon the terms of the trust and to administer it accordingly, do not constitute the giving of consideration by the trustees for the property so accepted. If it were so, every trust would have to be regarded as created for full consideration.⁹⁴

Although these comments were made in a stamp duty context they are still likely to be highly persuasive. They indicate a deeply rooted legal conviction that a trustee does not provide consideration by assuming its obligations. That conviction is likely to sway a court. The question in a GST context is: how much?

There is another possible argument where the bare trust is a resulting trust eg a person buys property with another’s money. It

⁹² *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 442 on the authority of Dixon J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602, 616.

⁹³ [1960] SR (NSW) 539.

⁹⁴ *Ibid* 548, approved by Gibbs CJ in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 442.

could be argued that there is no consideration since the court imposes these fiduciary obligations. This would be akin to the situation which applies to a “supply”.⁹⁵ Extrapolating outwards the courts might be tempted to find for reasons of consistency that the bare trustee does not provide consideration in an express trust bare trust settlement. However, s 9-15(2A) would seem to forestall this argument. It states that it does not matter whether, relevantly, “the act of forbearance was in compliance with an order of a court”. There was not a similar limitation on the meaning of supply in the GST Act.

Therefore, while the situation is not clear, the author inclines to the view that the trustee does provide consideration. Comments in the ATO’s ruling on guarantees and indemnities suggest that it is also likely to take this view.⁹⁶

If it were to be held that the trustee provides consideration then regard must also be had to the Div 72 associate rules. In a commercial context the settlor, the trustee, and the beneficiary will often be associates. These rules apply to otherwise taxable supplies made for nil or inadequate consideration. They deem the value of the supply to be made for its GST-exclusive market value.

It is arguable that where the settlor is also the beneficiary of the bare trust the market value of any transfer of legal title to and from the bare trustee is nominal or negligible. This is because the settlor retains the full economic benefit of owning the trust asset eg the bare trustee must pass all income to the settlor/beneficiary. Reliance can be placed on the above quoted comments in *Campbell Investments* concerning the “peppercorn” in support of this contention.

⁹⁵ See *Shaw v Director of Housing (Tas)* [2001] TASC 21, para 19.

⁹⁶ In GSTR Ruling GSTR 2006/1 the ATO treats at para 58 the creditor’s entering into a loan agreement with the debtor under the primary obligation as consideration provided for the guarantor under the secondary obligation. While the analogy is not exact it is indicative.

GST TREATMENT OF BARE TRUSTS

The position upon transfer of bare legal title to the beneficiary upon termination of the trust should mirror that of the initial transfer of title from the settlor.

3.8 Who Can Claim Input Tax Credits on Third Party Supplies To a Bare Trustee?

It is perfectly conceivable that a bare trustee may incur expenses. A bare trustee, for example, as mentioned earlier, retains its duty to maintain and safeguard the trust property. It may therefore incur legal fees in protecting the trust property. Who can claim input tax credits on these taxable supplies?

Under s 11-20 of the GSTA 1999 “you” can claim input tax credits on any “creditable acquisition” that “you” make. Creditable acquisition is defined in s 11-5 as follows:

You make a creditable acquisition if:

- a) you acquire anything solely or partly for a creditable purpose; and
- b) the supply of the thing to you is a taxable supply; and
- c) you provide, or are liable to provide, consideration for the supply; and
- d) you are registered, or required to be registered.

The word “you” is defined in s 195-1 of the GSTA 1999 to refer to an “entity”. As argued earlier “a bare trustee of a bare trust” will be an entity. So too will be the beneficiary and the settlor of the bare trust, although neither will be deemed to be separate entities in that capacity.⁹⁷ Accordingly, in a trust context there are potentially 3 entities “to whom” the supply might be made. Therefore, how does one determine to which entity the supply is made?

⁹⁷ The author does not consider that s 184-1(3) would apply to deem the settlor and beneficiary to be separate entities in that capacity.

The starting point must be contract. In the case of a third party supply to a bare trust the contracting party is the bare trustee. It is the bare trustee who is required to perform the contract and provide monetary consideration. And it is the bare trustee who is liable for failure to perform the contract. Certainly, the bare trustee will be able to recoup any money expended from the beneficiary via its indemnity. But, neither the settlor nor the beneficiary is a party to the contract. Therefore on the face of it the third party supply is “to” the deemed entity of the trustee of the trustee. This presumes that under Australian law, like English law, that where there is an express settlement the trustee cannot act as both a trustee and an agent in its dealings in relation to the trust property.⁹⁸

The question is whether the enquiry starts and ends there. Certainly, the English approach to identifying “the supply” goes beyond the four corners of the contract. This is indicated in the much quoted passage by Laws LJ in *Customs & Excise Commissioners v Reed Personnel Services Ltd*⁹⁹ that the supply be “ascertained from the whole facts of the case. It may be a consequence, but is not a function, of the contracts entered into by the relevant parties”.¹⁰⁰ Conti J in *SAGA Holidays* seems to have, in effect, adopted that approach in Australia.¹⁰¹

⁹⁸ If that is not the case then the GST enquiry ends here. The supply by the third party will be to the beneficiary/principal. Input tax credits will be claimable, or not, depending upon the beneficiary/principal’s GST status. This situation should apply where a constructive trust is imposed on an agent holding legal title for its principal, or perhaps where the bare trust is a resulting trust.

⁹⁹ [1995] STC 588.

¹⁰⁰ Ibid 595. This passage and approach has been applied by a number of subsequent VAT cases most notably by Lord Slynn of Hadley in *Eastbourne Town Radio Cars Association v Customs & Excise Commissioners* [2001] UKHL 19, para 14.

¹⁰¹ In *SAGA Holidays* he referred to Gibson J’s approach in *Customs and Excise Commissioners v Pippa-Dee Parties Ltd* [1981] STC 495 as supporting the ATO’s “substance and reality” approach to identifying “the supply” at para 30. He seems to have endorsed that approach at para 108. In a later High Court decision Gibson J’s approach was considered to be the same as that of *Reed Personnel Services*, save that it was expressed in different words: Lindsay J in *Debenhams Retail Plc v*

GST TREATMENT OF BARE TRUSTS

Further as indicated by Lord Millet in *Customs & Excise Commissioners v Redrow Group Plc*:¹⁰² “The fact is that the nature of the services and the identity of the person to whom they are supplied cannot be determined independently of each other, for each defines the other”.¹⁰³ Does this mean that just as the identity of the supply can be determined by looking beyond the contract then so too can be determined the identity of the recipient?

3.9 English Decisions on Bare Trustee Input Tax Entitlement

In answering this question it is instructive to look at how the UK has dealt with this issue in a bare trustee context. There are four relevant VAT Tribunal decisions: *Bird Semple & Crawford Herron*,¹⁰⁴ *Associated Concrete Repairs Ltd*,¹⁰⁵ *Water Hall Group Plc v Commissioners of Customs & Excise*¹⁰⁶ and *Lester Aldridge (a firm)*.¹⁰⁷

In *Associated Concrete Repairs* the director of the taxpayer company failed to establish the existence of a valid trust. Accordingly, he acquired the freehold personally and since he was unregistered for VAT that was the end of the matter: no input tax could be claimed.

The underlying circumstance in *Bird Semple* and *Lester Aldridge* was the same: a law firm leased office space via an intermediate nominee company. The commercial reason is that if a law firm enters into a lease directly it will have to enter a new lease each time the firm is reconstituted by the admission or retirement of a partner. If

Commissioners of Customs and Excise [2004] EWHC 1540 (Ch) paras 52, 97 and 98.

¹⁰² [1999] 1 WLR 408.

¹⁰³ *Customs & Excise Commissioners v Redrow Group Plc* [1999] 1 WLR 408, 419.

¹⁰⁴ (1986) Decision No 2171.

¹⁰⁵ (1999) Decision No 15963.

¹⁰⁶ (2002) Decision No 18007.

¹⁰⁷ (2004) Decision No 18864.

not, the outgoing partner will remain liable under the lease and the incoming partner will not assume his or her share of the liability. A nominee company is therefore used for reasons of administrative convenience.¹⁰⁸ Moreover, as the Commissioners acknowledged in *Lester Aldridge* the use of a nominee company in these circumstances is normal practice.¹⁰⁹

In *Bird Semple* the law firm was an expanding one and had leased office space greater than its immediate needs. It sublet the surplus and terminated the sub-leases as and when it required the office space. It used an intermediary, Lambert Smith & Partners, to negotiate the sub-leases which were granted by the nominee company. Lambert Smith & Partners invoiced the law firm for its services, which paid the invoices and claimed input tax.

The Edinburgh VAT Tribunal held that “*the reality of the matter* was the [law firm] in order to simplify administration of the lease and sub-leases used [nominee company] in a literally nominal way. No supply was made to [nominee company] ... *the supply was made ... to the [law firm], on their instruction, and at their expense*”.¹¹⁰

The circumstance in *Water Hall Group* concerned a claim for input tax on professional fees related to the placement of shares to existing shareholders. A proportion of shares were held by UK resident nominee companies on behalf of non-EU resident owners. The taxpayer claimed input tax on the proportion of costs related to these nominees on the basis that the placement of shares to them was a zero-rated, rather than exempt supply.

¹⁰⁸ There is a further reason for English partnerships. Under s 34(2) of the *Law of Property Act 1925* (Eng) a legal estate in land can only be conveyed in undivided shares to up to four persons. Therefore where a partnership numbers more than four partners, as was the case with *Lester Aldridge* which had 20 partners, it has a choice of selecting four partners to enter the lease or using a nominee company. *Bird Semple & Crawford Herron* was a Glaswegian law firm.

¹⁰⁹ *Lester Aldridge (a firm)* (2004) Decision No 18,864, para 29.

¹¹⁰ *Ibid* (emphasis added).

GST TREATMENT OF BARE TRUSTS

The London VAT Tribunal held that “in the case of nominees, the VAT legislation does not permit “looking through” to the underlying beneficial owner. This may be a lacuna in the legislation which needs correction but, as it stands, there is no provision which permits it”.¹¹¹ However, it also said:

a person may act in two capacities, for example as a trustee and as a nominee. What supplies are made to a person who is acting as a bare trustee? For VAT purposes, what is supplied is supplied to the underlying beneficial owner. Schedule 8 shows that it is necessary to identify to whom a supply is made.¹¹²

Accordingly, the VAT Tribunal did not consider that in the circumstances before it that the nominee companies were bare trustees. Regard therefore needs to be had to the agreed statement of facts as to the capacity of the nominee companies. This is outlined as follows:

- a) the Nominee holds legal title to the shares (on behalf of the beneficial owner)
- b) the Nominee’s name is listed on the Appellant’s register of members
- c) the name recorded on the share certificate (or CREST record) is that of the Nominee
- d) the Nominee is appointed by the beneficial owner of the shares and *must act at all times in accordance with the instructions* of the beneficial owner when dealing with the shares
- e) the beneficial owner of the shares *will make the decisions* as to how the Nominee should respond to any company documents delivered to the Nominee, for example in the case of a general meeting the Nominee *must take instructions* from the beneficial owner on how to vote; a Nominee shares for several different

¹¹¹ *Water Hall Group Plc v Commissioner of Customs & Excise* (2002) Decision No 18007, para 58.

¹¹² *Ibid* para 56 (emphasis added).

owners may be required to act differently in relation to each beneficial owner's shares.¹¹³

On these facts the nominee does not appear to have any capacity to bind the beneficial owners. Accordingly, it would not be an agent and input tax could not be claimed on this basis. Nor was the nominee a trustee, including bare trustee, since it had no independent duty to maintain the trust assets. It at all times was required to act in accordance with the beneficial owners instructions.

Returning to *Lester Aldridge* the law firm claimed input tax on rent paid to the lessor. The law firm was invoiced directly by the landlord and in its name. The Commissioners argued that the supply was to the nominee company, since the lease agreement was with the nominee company, and thus the law firm could not claim input tax. The Tribunal applied Lord Millet's approach in *Redrow* and concluded there was a supply to the law firm.¹¹⁴ Laws LJ's approach in *Reed Personnel Services* was seen as supportive of the taxpayer's appeal, although the terms of the documentation made clear the true nature of the transaction.¹¹⁵

The Tribunal did not consider that it was making a decision to the general effect that

if a supply is made to a bare trustee or nominee then for VAT purposes it must be regarded as made to the beneficiary of that trusteeship or nominee ship. Our decision is based on the particular arrangements entered into by the Appellant and the other parties. It may be that in circumstances where the bare trusteeship or nominee ship is a known and integral part of other arrangements viewed as a whole then those arrangements will be capable of a similar analysis.¹¹⁶

¹¹³ Ibid para 9 (emphasis added).

¹¹⁴ *Lester Aldridge (a firm)* (2004) Decision No 18,864, paras 39 and 46.

¹¹⁵ Ibid para 40.

¹¹⁶ Ibid para 41.

GST TREATMENT OF BARE TRUSTS

The “particular arrangements” which led the Tribunal to this conclusion was the existence of a collateral agreement to the lease, namely a guarantee provided by the law firm. Clause 7 of the guarantee was found to go beyond simply guaranteeing performance but imposed an obligation on the law firm to take on the lease in the event of default by the nominee company.¹¹⁷ The Commissioners error was said to be in focusing too narrowly on the lease terms between the landlord and the nominee company and not taking account of the guarantee arrangements which were an essential component of the transaction.¹¹⁸

3.10 Conclusion on the VAT Tribunal Decisions

The English approach to identifying “to whom” a supply is made would seem to permit looking beyond the 4 corners of “a” contract, but not beyond contract *per se*. That is, it will take account of *other relevant contracts* to the transaction and of which the parties are aware. That is plain from the VAT Tribunal decision in *Lester Aldridge*. It is also implicit in *Bird Semple* since there was clearly an agreement between the law firm and Lambert Smith & Partners. It is noted that in *Water Hall* the VAT Tribunal said that in the case of a bare trust the supply was to the beneficiary. However, absent any contractual relationship no weight should be placed on the comment.

The critical point is that there must be some contractual relationship. This can be seen from the Court of Appeal’s decision in *WHA Ltd, Viscount Reinsurance Company Ltd v HM Commissioners of Customs & Excise*¹¹⁹ where it was held that “a unilateral or if” contract was sufficient to sustain a claim for input tax.¹²⁰ But, there must be some contractual relationship

¹¹⁷ Ibid para 32.

¹¹⁸ Ibid para 37.

¹¹⁹ [2004] EWCA Civ 559.

¹²⁰ Ibid para 59.

3.11 The Australian Situation

In the *Bird Semple* or *Lester Aldridge* situation where the beneficiary guarantees the supply it is likely the same outcome will apply in Australia. A guarantee will be required in many such leasing arrangements due to the value of the transaction. However, there will still be many other acquisitions by a bare trustee which are made without a guarantee. To whom will the supply be made then?

Attention turns to the bare trustee's indemnity with the beneficiary. Is this sufficient to support the view that the supply is "to" the beneficiary? The indemnity arises out of the nature of the trust relationship: "The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal".¹²¹ Even, so it is nonetheless usual for the bare trustee to obtain a written indemnity. Indeed, the taking of a written indemnity has been found to support the characterisation of an entity as a bare trustee.¹²²

This could be argued. However, in the author's view it reinforces the view that the supply will ordinarily be to the bare trustee. The indemnity is between the bare trustee and its beneficiary and serves to ensure that the bare trustee does not bear the burden. The third party supplier is not a party to the indemnity. The Tribunal in *Lester Aldridge* emphasised that the Landlord would not have granted the lease if it could not look to the law firm to fulfill the tenant's obligations as a matter of commercial reality. It knew that the nominee was a company of no substance.¹²³ This formed a part of "the whole facts of the case". However, the author thinks it unlikely as a matter of commercial reality that a third party would make a

¹²¹ *Hardoon v Belilos* [1901] AC 119, 123.

¹²² *Opalfield Pty Ltd v Commissioner of Land Tax (NSW)* (1993) 26 ATR 578, 585.

¹²³ *Lester Aldridge (a firm)* (2004) Decision No 18,864, para 33.

GST TREATMENT OF BARE TRUSTS

supply to a bare trustee on the basis that it could ultimately obtain payment via the indemnity.

It is noted that the Div 111 reimbursement provisions of the GST Act will not apply. These serve to enable an entity to claim input tax credits on certain expenses it reimburses. However, a creditable acquisition by a trustee, and hence bare trustee, is not one of the specified circumstances. This is subject to the view that a bare trustee is not an agent, which is a specified circumstance. While as a matter of law the situation is unclear the author thinks it likely that the Australian courts will follow the English, rather than Canadian, approach if and when the issue arises. Division 111 could, however, be easily amended to include a bare trustee so as to enable a beneficiary to claim the input tax credits.

The factual situation could be altered by putting in place a direct agreement between the third party supplier and the beneficiary. Will that make a difference to the Australian analysis?

This brings one directly to the vexed question of the application of the *Redrow* principle in Australia. The ATO has interpreted that principle in a series of GSTR Rulings and Draft GSTR Rulings in such a way as to denude the principle from widespread application in Australia.¹²⁴ The author does not agree with the ATO's interpretation. However, a full debate of the issue is beyond the scope of this paper. The author will restrict his comments to one point, namely: why is the question vexed?

There is a credible view that the ATO ultimately interpreted *Redrow* in the manner it has so as to give effect to s 38-190(3). Section 38-190(3) is an anti-avoidance provision. It was inserted into GSTA 99 to prevent the outcome of *Wilson & Horton Ltd v CIR*¹²⁵ from occurring in Australia. In *Wilson & Horton* the New Zealand Court of Appeal held that supplies of advertising services to a non-

¹²⁴ See GST Ruling GSTR 2005/6 and draft GST Rulings GSTR 2005/D8 and 2005/D9.

¹²⁵ (1995) 17 NZTC 12,325.

resident were zero-rated (GST-free) even though resident suppliers of the goods advertised benefited from the advertisements.

However, and this is the critical point for present purposes, the New Zealand approach to identifying “the supply”, and hence the identity of the supplier and the recipient, *is markedly different* to that in the UK.

The New Zealand approach *is a narrow contract focused approach*. This is evident from the comments by the various judges in *Wilson & Horton*. Sir Ivor Richardson stated that the provisions in New Zealand’s GST Act relating to supply, supplier and recipient were “directed to the contractual arrangements between the supplier and the recipient of the supply”.¹²⁶ Penlington J similarly said “the broad scheme of the Act is contractually orientated”.¹²⁷ The Court of Appeal continued this narrow contract focused approach in its later decision in *Suzuki New Zealand Ltd v CIR*.¹²⁸ (2001) 20 NZTC 17,096. As already fully canvassed the approach in the UK is wider.

Therefore s 38-190(3) was drafted on the basis of a contract constrained approach to interpreting supply. The circumstance addressed in s 38-190(3) is one of a cross-border tripartite arrangement. To give effect to s 38-190(3) it is necessarily to apply that contract constrained approach. To be consistent that approach is applied to tripartite arrangements which arise in other contexts even where there is no anti-avoidance aspect. The circumstances of *Lester Aldridge* are one such case, where the Commissioners of Customs & Excise acknowledged that there was “no tax planning or similar intent”.¹²⁹

As a matter of logic the general approach to determining the identity of the supply, and of the supplier and recipient, should not be determined by a narrow anti-avoidance provision. Hence, the ATO in

¹²⁶ Ibid para 12.

¹²⁷ Ibid para 55.

¹²⁸ (2001) 20 NZTC 17,096.

¹²⁹ *Lester Aldridge (a firm)* (2004) Decision No 18,864, para 43.

GST TREATMENT OF BARE TRUSTS

SAGA Holidays argued for a “substance and reality” approach to identifying “the supply”, based on the English approach:¹³⁰ an approach which lends support for the view that the supply would be “to” the beneficiary.

The ATO is therefore effectively in the vexatious situation of arguing that a different interpretative approach applies to identifying “supply” in different circumstances. Yet, supply is a fundamental concept of GST. It would be better if there was a single interpretative approach. The situation is also vexatious for taxpayers. It would be better for all if s 38-190(3) were amended. However, on past performance this is unlikely.

4. THE AUSTRALIAN TAXATION OFFICE’S ADMINISTRATIVE APPROACH

This article has sought to map the issues which need to be considered in order to determine the correct GST treatment of bare trusts. That analysis is difficult. There is much to consider and as yet few certainties. Even so, the GST has to be administered by both taxpayers and the ATO alike.

In commercial situations the beneficiary will often account for third party transactions with the bare trustee. The beneficiary will also usually be taxed on any income and capital gains arising in the bare trust.¹³¹ As mentioned at the outset of the article this is due to a combination of statutory provision and ATO practice. Taxpayers might therefore expect that the ATO will apply a like approach for GST purposes.

¹³⁰ *SAGA Holidays Ltd v Commissioner of Taxation* [2005] FCA 1892, para 30. The ATO also applied Laws J’s approach in *Reed Personnel Services* in GSTD Determination GSTD 2006/1. As a result it concluded that the treatment of offshore warranty chargebacks in Australia is different to that determined by the New Zealand Court of Appeal in *Suzuki*.

¹³¹ See C James “Nominees and Bare Trustees: Can the GST Treatment Be Compatible with the Commercial Imperatives?” (2003) 3 *Australian GST Journal* 81 for a discussion on these issues.

At the time of writing the ATO has *not* expressed a view as to the correct GST treatment of transactions related to bare trusts. There are *no* GST Rulings, GST Determinations, GST Bulletins or ATO Interpretative Decisions which address these issues. One therefore has to delve deeper into the recesses of taxation lore to ascertain how GST *is* being applied to bare trusts in practice. There are conflicting indicators.

4.1 The Register of Private Binding Rulings

The Register of Private Binding Rulings contains a list of sanitised private rulings. Entries are made on the Register “for purposes of integrity and transparency”.¹³² A search of the Register revealed four private binding rulings which address *certain limited aspects* of the GST treatment of bare trusts. These are GST Private Rulings authorisation numbers 46079, 46083, 13524 and 31828. The first two private rulings concern the use of a bare trustee in the property sector, the latter two relate to a bare trustee in the financial services sector. The two groups are discussed separately.

4.2 Bare Trusts In the Property Sector

The ATO states in GST Private Rulings authorisation numbers 46079 and 46083:

It is not uncommon for real property to be held by a bare trustee for a beneficiary in circumstances where all dealings in the property are at the direction of the beneficiary and any associated activities, such as development of the real property are carried out by the beneficiary.

In recognition of this, we consider that in certain circumstances GST may be accounted for *as if* a supply of the trust property made by the trustee at the direction of the beneficiary is a supply made by the trustee *as agent* for the beneficiary.

This *administrative approach* will apply to only those bare trusts which are created by express declaration or under a resulting trust

¹³² ATO Practice Statement Law Administration PS LA 2001/8, para 4.

GST TREATMENT OF BARE TRUSTS

flowing from the provision by the beneficiary to the trustee of the purchase money for property then brought by the trustee. Additionally, this measure requires that the trustee has no remaining duties to perform other than to transfer the trust property to the beneficiary or at the beneficiary's direction to a third party.¹³³

It is particularly noteworthy that the ATO states that this is an “administrative approach”. That approach is to treat the supply of the bare legal title upon termination of the bare trust *as if* it was a supply of the property by the beneficiary (under agency principles). Accordingly, if the beneficiary is GST registered the supply will either be taxable or input taxed in its hands.

However, that deemed approach is limited to the bare trust's concluding transaction and particular types of bare trust. It only applies to an express trust bare trust or a resulting trust bare trust. However, if legal title is acquired in a group situation, as will often be the case, the presumption of a resulting trust, and hence bare trust, will likely be rebutted: see *United Corporate Services Ltd v CIR*.¹³⁴ Further, the stated approach will not apply where the property is not settled in bare trust, eg the trust was originally a discretionary trust.

4.3 Bare Trusts In the Financial Sector

The ATO states in GST Private Rulings authorisation numbers 13524 and 31828, which concern “Investor Directed Portfolio Service”, that:

A bare trust may therefore be described as a trust created by declaration where the trustee possesses only the legal duties necessary to guard property and is then bare of any other active duties.

Where it is found that the members of the Fund are absolutely entitled to their portfolio of investments, the trust expressly declared over those assets will not be viewed as an entity that is carrying on

¹³³ Emphasis added.

¹³⁴ (1997) 18 NZTC 13,151.

an enterprise. This is because each trust is necessarily viewed as a passive investment vehicle, where the activities of the taxpayer are limited to the legal duties owed to the member in order to guard their property. In the opinion of the Commissioner, such activities will not meet the test of activities done in the form of a business so as to constitute an enterprise for the purposes of the GST Act.

Accordingly, the ATO's administrative approach of deeming the termination supply (ie transfer of legal title) to be made by the beneficiary under agency principles does not extend to bare trusts in the financial sector. Rather, the ATO considers that supply will fall outside the GST net since the bare trustee is not carrying on an enterprise. The approach to this supply would, presumably, not result in any loss of input tax credit recovery as compared to the situation where the bare trustee is GST registered. This is due to the nature of the asset, the supply of which would be an input taxed financial supply.

4.4 Extent To Which Taxpayers Can Rely on These Views

The views expressed in private rulings on the Register are not "precedential" views.¹³⁵ Therefore, ATO auditors are not bound to follow this administrative practice. Further, there is no estoppel preventing the ATO from applying taxation law in a manner contrary to previous practice.¹³⁶ Similarly, the English law view that a statutory authority must act in a fair way, as a substantive matter, will generally not apply in a taxation context.¹³⁷ Taxpayers therefore cannot rely on these views.

¹³⁵ ATO Practice Statement Law Administration PS LA 2001/8, para 4.

¹³⁶ See *Bellinz v FC of T* (1998) FCR 154, 164; *AGC (Investments) Ltd v FC of T* (1991) FCR 65, paras 71–76; and *FC of T v Wade* (1951) 84 CLR 105, 117. Also more generally see Gummow J's lengthy comments as to why estoppel does not apply to administrative law in *Minister for Immigration and Ethnic Affairs v Kutovic* (1990) 21 FCR 193.

¹³⁷ See *Bellinz v FC of T* (1998) FCR 154, 167. See also *Minister for Immigration and Ethnic Affairs v Kutovic* (1990) 21 FCR 193, paras 53–56 (per Gummow J).

GST TREATMENT OF BARE TRUSTS

It is timely, at this juncture, to recall the circumstances in *David Jones Finance and Investments Pty Ltd v FC of T*.¹³⁸ At the time of the case the ATO had a 30 year ATO practice of permitting beneficiaries to claim the dividend rebate on dividends paid on shares held in nominee companies.¹³⁹ The ATO had continued to apply this policy even after the High Court in *FC of T v Patcorp Investments Ltd*¹⁴⁰ effectively held it to be contrary to the law.¹⁴¹ The taxpayer claimed the dividend rebate in reliance on this policy. The ATO denied the claim, despite its policy, as it perceived wrong doing by the taxpayers.¹⁴²

If no reliance can be placed on these views *per se*, the logical next step is to apply for a private ruling. Where a private ruling is issued to, and relied upon by, the applicant it will be protected to the extent provided by s 37 of the *Taxation Administration Act 1953* (Cth). Underpaid indirect tax will cease to be payable and the ATO will not seek to apply the uniform penalty regime or general interest charge.¹⁴³ As a practical matter both the beneficiary and bare trustee should separately apply for a private ruling since only the applicant can rely on the private ruling issued to it.

¹³⁸ (1991) 28 FCR 484.

¹³⁹ *David Jones Finance and Investments Pty Ltd v FC of T* (1991) 21 ATR 1506, 1508.

¹⁴⁰ (1976) 140 CLR 247.

¹⁴¹ This was because s 46(2) of the *Income Tax Assessment Act 1936* (Cth) (“ITAA36”) referred to “shareholder”, which the High Court regarded as the entity on the company register: see *Patcorp Investments Ltd v FC of T* (1976) 6 ATR 420, 431. The ITAA36 has been subsequently amended to permit an absolutely entitled beneficiary to claim the dividend rebate: s 45Z, ITAA36.

¹⁴² The Federal Court held that it had the jurisdiction where the issue of an assessment is an abuse of power, although it was not established whether that had occurred. The dispute between the taxpayer and the ATO was settled out of court. Going forwards while the Court may have the jurisdiction the circumstances in which it will be exercised are likely to be remote: see for example *Lehane J in Daihatsu Australia Pty Ltd v DFC of T* [2000] FCA 1658, paras 51–54.

¹⁴³ See PS LA 2003/3, para 8, table.

However, any private ruling issued is unlikely to be on the terms indicated in these four sanitised private rulings. Anecdotal evidence suggests that those views no longer reflect ATO administrative practice. However, this cannot be formally confirmed with the ATO. The ATO will not comment on its administrative practice where it does not have a published view on that practice. And as noted the ATO does not have a published view on the GST treatment of bare trusts.

4.5 Anecdotal Evidence

Anecdotal evidence suggests that ATO auditors do not proceed from a presumption of “look through” treatment for bare trusts, as indicated in Private Rulings 46079 and 46083 for the property sector. The approach appears to be one of disregarding the legal label, eg bare trust, and of analysing each transaction in the capacity it is undertaken to the extent to which they can determine. This would potentially involve treating a third party transaction with a bare trustee as been made by that entity in another capacity. There appears to be willingness towards identifying an agency relationship if possible.

The practical implication for settlors is to draft express trust bare trust settlements in a manner which helps the ATO reach that conclusion. At its most overt this might include in express provision that the entity deals with the property as agent. That may be unacceptable for other commercial reasons, although it seems to have occurred. A more fruitful approach might be to exploit the ambiguity inherent in the word “nominee” — see earlier discussion. Other imprecise language can also be used to bolster the suggestion of agency. A private ruling application could then be applied for to provide some certainty of treatment.

This approach may provide a practical way of dealing with the very real and difficult issue of determining the correct GST treatment of bare trusts. However, there are several reasons to be concerned about the continuance of this situation. The first has to do with the

GST TREATMENT OF BARE TRUSTS

lack of transparency and hence loss of equity in the GST system. Those entities who are savvy enough, or sufficiently well advised, will be able to secure a GST advantage over those entities who are not. This results in unfairness and diminishes the system.

There is also a concern as to the extent to which the situation will continue to be legally sustainable. This ATO approach largely depends on a view that holding property in a bare trust is not in itself a barrier to a conclusion that a particular transaction in respect of the property is undertaken as agent. That position is sustainable as long as the Australian legal position remains unclear. As noted earlier in the article this is the situation in Canada. However, it is not the position as a matter of English law. The author tends to think that ultimately the Australian position will follow the English law and that this may well be determined in a non-tax context. As to where and when that is another of the many uncertainties bedeviling the GST treatment of bare trusts.

The one firm certainty is that it would be better if the GST Act were amended to make clear the treatment of GST transactions with bare trusts. At the moment determining the correct GST treatment for these transactions as either a matter of law, or lore, is like tip toeing through a mine field. One false step and ...