



Estate and Taxation Planning Council New Zealand Inc

September 2004

Executive Report

Your Executive next meets on Wednesday 13th October and will be starting work on speakers and topics for 2005. As always your input would be greatly appreciated, so if you have any ideas please share them with us. Another area that your Executive will be focusing on next year will be membership. After having rationalised the membership database this year, we are now left with a true active membership of just over 80 members. So, if you have colleagues who you think would be an asset to the Council, and who would benefit from membership, please download an application form from the website and encourage them to apply.

The new website is now up and running (please note the address is www.etpc.co.nz) so I encourage you to have a look. I would like to make mention of Jeff Matthews in this regard, who has worked hard on getting the new site up and running and ensuring that past Newsletters were added to the "Library" page for general interest and reference.

The breakfast seminars continue to be well received and well attended. In an effort to ensure that this year's Christmas function doesn't clash with other Christmas events, we've brought it forward to November 17th. Please put this date in your diaries now, and help us to make it a successful occasion. Brian Gaynor will be our guest speaker, so I'm sure it will be an entertaining evening.

Gary Morgan
President

Last Seminar – Trading Trusts – The Good, The Bad & The Ugly

The recent breakfast seminar held on Wednesday 18 August had a positive turnout despite the bitterly cold weather. Barrister John Hart presented members of the Council with a seminar on the topic of trading trusts.

After highlighting the typical trading trust structure - where a corporate trustee in a limited liability company operates the trust pursuant to the trust deed and trades on behalf of the beneficiaries of trust, the beneficiaries generally being the beneficial owners of the business - John discussed the advantages and disadvantages of trading trusts

Advantages

- Flexibility of profit distribution
- Flexibility and succession planning
- Ability to distribute to other trusts
- Confidentiality
- Ease of changing beneficial ownership

Objects of the Council:

To promote a better inter-relationship between professionals involved in Estate and Taxation planning

Disadvantages

- less flexible for multi-party ownership
- consider partnership of trusts
- consider umbrella trusts with sub-trusts within

Other points raised in his address:

- Trustee liability issues
- Trustee's right of indemnity out of trust assets
- Can the right of indemnity be excluded by contract?
- Interaction of trust law and company law
- Style/content of trading trust deeds;
- Use of a trading trust in tandem with a conventional discretionary trust.
- Tax advantages of a trading trusts – which has attracted the attention of the IRD

Recent case law re tax avoidance

Recent case law involving trading trusts used as potential tax avoidance schemes were discussed in *Case V20 (2002) 20 NZTC 10,233* which was followed by a final decision in *Case W33* this year

The judge in *Case W33* discussed whether there was a "purpose and effect" relating to tax avoidance. He found that there was no purpose of tax avoidance but an effect of tax avoidance. When reading these cases one expects to be confused as the judgment is not particularly good.

John's feeling was that the cases left a huge chasm between legislation and case law from which a set of principles cannot be drawn. The issue revolved around whether or not the situation in point was a taxable arrangement (defined in section OB 1) being "an arrangement that directly or indirectly has tax avoidance ... as one of its purposes or effects if the purpose or effect is not merely incidental."

There have been a number of cases with similar facts however different conclusions have been reached and accordingly the position relating to this area of tax avoidance is unclear.

John's practical recommendations when advising clients with trading trusts:

There must be a commercial justification required to restructure the current company/trust into a trading trust otherwise it may look suspicious.

The key issue is to obtain an arm's length dealing especially with respect to salaries. All documentation must be in order including proper employment contracts, changing bank accounts into the names of the new structure – do not attempt to cut corners.

Trading trusts are not going to be suitable for everyone and should be regarded with long term planning in mind. Try to get your client's to plan ahead for the future, the structure may not be appropriate now while they have a young family but may have many advantages in the years to come.

Ensure market salaries are realistic. The IRD were targeting market salary in trading trusts which were well below the market rate. It is possible that the IRD may target ordinary companies, as well as those in trading trusts to ascertain what a market salary is.

If you would like a copy of John's slideshow presentation please e-mail Gary Fitzpatrick gfitzpatrick@nzgt.co.nz and he will e-mail you a copy.

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New Members

Lindsay Pope is an Investment Fiduciary with Strategic Asset Management where he consults to trustees and clients on managing fiduciary practices and investment processes. He has close to 30 years trustee industry experience including national roles in a trustee company leading specialist business teams to service high net worth trust clients and clients with complex trusteeship issues to manage.

Lindsay is committed to taking positive "results Oriented" actions to help clients achieve their business goals, and has an extensive network of trustee industry contacts to call on.

Christmas Function

Our next function is our Christmas function with guest speaker Brian Gaynor. The format will be drinks and finger foods both before and after the guest speaker.

Date	Wednesday 17 November
Time	5.15pm for a 6.00pm start, 7.30pm finish
Venue	Auckland Club, 34 Shortland Street, Auckland

Brian is one of New Zealand's most experienced and well known investment analysts. His distinguished career includes roles as a Partner and Head of Research at stockbrokers Jarden & Co, a member of the New Zealand Stock Exchange, Chairman of the New Zealand Society of Investment Analysts and Chairman of the Asian Securities Analysts Council.

More recently Brian has worked as an independent investment analyst and business media columnist. He is a Director of The New Zealand Investment Trust plc (listed on the NZ and UK stock exchanges) and was a Board member of the Guardians of New Zealand Superannuation. Brian recently joined Milford Asset Management as an executive director and a shareholder.

Council Web Page

Just another reminder, that the Council webpage is now up and running. We have managed to convert a number of old printed newsletters into the new format, and they have been added to the Library section. If any members have some old or missing newsletters, we would be pleased to receive copies.

As well as details of the Executive, we have an updated list of current members, their firm and their phone numbers. If you change firms, or phone numbers please let us know. We chose not to include the e-mail addresses of members on the webpage, but again please let us know if your address changes, mail any changes to: gfitzpatrick@nzqt.co.nz

We intend to ensure that the latest Newsletter and details of the next council activity are posted on the website page as soon as available. So please bookmark the council webpage at: www.etpc.co.nz

STEP

Some of our member's maybe interested in the up-coming Mini Conference for the Society of Trust and Estate Practitioners, to be held at the Northern Club, 19 Princess Street, Auckland on Tuesday 28th September 2004. The cost is \$185 for Estate and Tax Council members. For more details contact Alison Gilbert at Brookfields on (09) 979-2253, or e-mail: gilbert@brookfields.co.nz

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