

CLIENT ALERT

JULY 2020

AMEND DISCRETIONARY TRUST DEED TO EXCLUDE FOREIGN PERSONS AS BENEFICIARIES BY 31 DECEMBER 2020

The State Revenue Legislation Further Amendment Act 2020 (NSW) assented on 24 June 2020, clarifies that a trustee of a discretionary trust is a foreign person if the terms of the trust do not prevent a foreign person being beneficiary. To avoid the imposition of land tax surcharge each year, all discretionary trusts holding residential land in NSW should have amended their trust deeds to exclude foreign beneficiaries already.

The deed of a trust which does not hold residential land in NSW but is a beneficiary of a discretionary trust which holds residential land in NSW, should be similarly amended to exclude foreign beneficiaries by 31 December 2020.

1. What is the problem?

By inserting s104JA special provisions for discretionary trusts in NSW Duties Act 1997, the trustee of a discretionary trust is considered a foreign trustee unless the trust prevents a foreign person from being a beneficiary of the trust.

Contemplate the following scenario:

- The residential landholding discretionary trust (Trust 1) amends its trust deed to exclude foreign beneficiaries, as defined in Duties Act 1997 (NSW).
- This trust distributes to another discretionary trust (Trust 2), which did not amend its trust deed to exclude foreign beneficiaries, and is considered as a foreign trust under s104JA Duties Act 1997.

This would mean the distribution from Trust 1 to Trust 2 is ineffective under the deed, and would instead be distributed to either the default beneficiary, or if there is none, taxed to the trustee of Trust 1 at the top marginal rate as there is no beneficiary presently entitled to the trust income.

2. What is the solution?

Where a trust holds residential land in NSW, you should review its beneficiaries which are discretionary trusts, and consider if the deed of such discretionary trusts require an amendment to exclude foreign beneficiaries.

3. When do I need to do this by?

Any amendment on the trust deed to exclude foreign beneficiaries must be made by mid-night 31 December 2020.

For the landholding trust, the trustee of a discretionary trust is exempt from land tax if it amends the trust deed before 31 December 2020 to prevent a foreign person as a beneficiary and the trustee should not be liable for surcharge land tax for 2017 to 2020 land tax years. If the trustee has made the surcharge payments and amended the trust deed before 31 December 2020, then the trustee is entitled to a refund of that land tax surcharge.

Please contact your local Hall Chadwick advisor if you require a review of your group to determine if amendment of trust deeds would be required due to this new legislation.

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