

ELECNET (AUST) PTY LTD (AS TRUSTEE FOR THE ELECTRICAL INDUSTRY SEVERANCE SCHEME) v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA (M104/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 178

Date of judgment: 14 December 2015

Date special leave granted: 28 July 2016

In December 2012, the appellant (“Elecnet”) requested a private ruling from the respondent (“the Commissioner”), asking him to confirm that the Electrical Industry Severance Scheme (“the EISS”) is a Unit Trust, for the purposes of Division 6C of the *Income Tax Assessment Act 1936* (Cth) (“the ITAA”).

Elecnet was the trustee of the EISS which was established in February 1988 “*in order to provide portability and security of termination and redundancy benefits to workers in the electrical contracting industry*”. Employers within the relevant industry became members of EISS. The employer members were required to make weekly contributions to EISS in respect of their workers, pursuant to industrial agreements or awards. EISS credited these contributions to an account in the name of each of the relevant workers. When a worker’s employment was terminated, EISS was generally required to make a severance or redundancy payment to the worker.

The Commissioner ruled that the EISS was not a public trading trust for the purposes of Division 6C of the ITAA because any beneficial interests of the workers were not unitised, that is, they were not discrete parcels of rights over the income or capital of the Fund. Elecnet filed an objection to the private ruling. That objection was disallowed in full. Elecnet appealed to the Federal Court.

The primary judge (Davies J) allowed the appeal on two grounds. First, her Honour concluded that the concept of a unit trust is that of a trust in which the beneficial interest in property or income of the trust is widely held, whether or not the interest is described as a “unit”, and whether or not the trust is described as a “unit trust”. In reaching this conclusion, the primary judge relied on the inclusive definition of “unit” in s 102M of the ITAA. Secondly, her Honour concluded that under the EISS Deed each worker had a discrete proprietary interest in the contributions paid in respect of that worker into the trust fund and standing to their worker’s account, even though the worker did not have a present right to any immediate payment. This was sufficient to give rise to a beneficial interest in the property of the trust estate within the meaning of “unit” in s 102M.

The Commissioner appealed to Full Court (Jessup, Pagone & Edelman JJ). The Full Court held that it was neither necessary nor appropriate to attempt a conclusive definition of a “unit trust” for the purposes of Division 6C. It was sufficient to say that whether a trust was a “unit trust” within the undefined meaning of that term in Division 6C required the text of that Division (including its definitions) to be construed in light of a functional and descriptive understanding of the nature of a unit trust.

With respect to the EISS, the Court found there were three factors which, in combination, had the effect that, whatever interest a worker might have in the property of the trust, the trust did not fit the functional description of a “unit trust”. First, any contingent entitlement that a worker might have to a payment upon a severance event was subject to cl 8.1, which provided that cl 8 only applied to a worker who was an Active Worker. An “Active Worker” was defined as having *“the meaning determined by the Trustee for the purposes of this Deed”*. Clause 17 provided that subject to express contrary provision, *“every discretion vested in the Trustee shall be absolute and uncontrolled and every power vested in it shall be exercisable in its absolute discretion”*. Thus Elecnet, as Trustee, had the power to determine a criterion which would entitle a Worker to a contingent distribution.

Secondly, the Trustee had a discretion to vary the amount standing to the credit of a worker’s account. Clause 7.1(e) gave the Trustee power to debit *“such other amount(s) (if any) which the Trustee determines is appropriate or equitable to debit to the worker’s account of the worker”*. Thirdly, cl 8.3 broadly provided for the amount of a severance payment to be made. The amount was calculated as either (i) an amount *“up to and including the amount standing to the credit of the relevant worker’s account”*, or (ii) an amount *“up to and including the prescribed amount”* plus an amount *“up to and including the balance of the relevant worker’s account”*.

The Court considered that these three discretions, when considered together, had the effect that any interest that a worker has under the EISS Deed was not capable of being described functionally as a unitised interest under a unit trust. The terms of the EISS Deed therefore departed so far from the functional concept of a unit trust, as reflected in the context and background to Division 6C, that the trust could be described as a “unit trust” within Division 6C.

The grounds of appeal include:

- The Full Court erred in adopting as the criterion of liability to tax under Division 6C a “functional and descriptive notion of a unit trust” and should have construed the *Income Tax Assessment Acts 1936 and 1997 (Cth)* as ascribing to the term “unit trust” a single, identifiable meaning.
- Full Court erred in reasoning that the interests of beneficiaries in a unit trust must be “unitised” and should have held that a trust estate under the terms of which the interests of beneficiaries are fixed by reference to identified or identifiable criteria and may be measured in numerical or proportionate terms is a “unit trust” for the purposes of Division 6C.

The Commissioner has filed a Notice of Contention that contends the Full Court ought to have held, contrary to the finding of the primary judge, that the terms of the EISS did not confer on the workers *“a beneficial interest, however described, in any of the income or property of the trust estate”* within the meaning of the definition of “unit” in s 102M of the ITAA.