

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

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## **Matter No S310/2009**

COMMISSIONER OF TAXATION

APPELLANT

AND

PHILLIP BAMFORD & ORS

RESPONDENTS

## **Matter No S311/2009**

PHILLIP BAMFORD & ANOR

APPELLANTS

AND

COMMISSIONER OF TAXATION & ANOR

RESPONDENTS

*Commissioner of Taxation v Bamford*  
*Bamford v Commissioner of Taxation*

[2010] HCA 10

30 March 2010

S310/2009 & S311/2009

## **ORDER**

*In each matter, the appeal is dismissed.*

On appeal from the Federal Court of Australia

## **Representation**

J T Gleeson SC with T P Murphy SC and K J Deards for the appellant in S310/2009 and the first respondent in S311/2009 (instructed by Australian Government Solicitor)

Submitting appearance for the first and second respondents in S310/2009



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A H Slater QC with R L Seiden and I S Young for the appellants in S311/2009 and the third respondent in S310/2009 (instructed by Robert Richards & Associates)

Submitting appearance for the second respondent in S311/2009

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Commissioner of Taxation v Bamford Bamford v Commissioner of Taxation**

Income tax – Income of trust estate – Assessable income of beneficiary – *Income Tax Assessment Act* 1936 (Cth) ("the Act"), s 97(1) provided that where beneficiary presently entitled to "a share of the income of the trust estate", assessable income of beneficiary included "that share of the net income of the trust estate" – Beneficiaries entitled to specific amounts of distributable income – One beneficiary also entitled to residue of distributable income – Disparity between net income and distributable income – Meaning of "that share of the net income" in s 97(1)(a)(i) of the Act – Whether beneficiaries to be assessed by reference to their proportion of distributable income or specific amounts.

Income tax – Income of trust estate – Trustee determined, pursuant to deed of settlement, net capital gain to be treated as distributable income – Whether net capital gain was "income of the trust estate" under s 97(1) of the Act – Relevance of trustee's determination – Whether "income of the trust estate" income according to trust law or "ordinary concepts" but excluding "statutory income".

Words and phrases – "income of the trust estate", "presently entitled", "that share of the net income of the trust estate", "trust estate", "trustee".

*Income Tax Assessment Act* 1936 (Cth), ss 6(1), 95-99A.



1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. These  
appeals are brought from the Full Court of the Federal Court (Emmett, Stone and  
Perram JJ)<sup>1</sup> and have been heard together. They concern the operation with  
respect to the income tax years of 2000 ("the taxpayers' appeal") and 2002 ("the  
Commissioner's appeal") of the provisions of Div 6 of Pt III of the *Income Tax  
Assessment Act* 1936 (Cth) ("the 1936 Act"). Division 6 is headed "Trust  
income" and comprises ss 95-102. There is no relevant difference in the text of  
Div 6 as it stood in 2000 and 2002.

2 It is appropriate at this stage to note that s 97(1) applies where "a  
beneficiary of a trust estate ... is presently entitled to a share of the income of the  
trust estate" and that, if so, the assessable income of the beneficiary includes  
"that share of the net income of the trust estate".

3 For the reasons which follow each appeal should be dismissed.

#### The facts

4 The facts are not in dispute and were fully detailed by Emmett J<sup>2</sup>. It is  
sufficient to state what follows.

5 P & D Bamford Enterprises Pty Ltd ("the Trustee") is the second  
respondent in the taxpayers' appeal and the third respondent in the  
Commissioner's appeal. By deed of settlement made 9 February 1995 it was  
trustee of the trusts of the settlement established by that deed ("the Deed").  
Mr and Mrs Bamford were among the class of "Eligible Beneficiaries" defined in  
cl 1(d). So also was Church of Scientology Inc ("the Church"). Mr and  
Mrs Bamford were directors and employees of the Trustee. They are the  
appellants in the taxpayers' appeal, and first and second respondents in the  
Commissioner's appeal.

6 The Deed provided that, as to "the income arising from the Trust Fund"  
(as defined in cl 1(n)), the Trustee was to hold it for such of the Eligible  
Beneficiaries as it selected under a provision in cl 4. This clause was of a kind  
found in what are commonly called "discretionary trusts". Clause 7(n)

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1 *Bamford v Federal Commissioner of Taxation* (2009) 176 FCR 250.

2 (2009) 176 FCR 250 at 253-257.

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empowered the Trustee to determine whether any receipt "is or is not to be treated as being on income or capital account".

#### The 2002 year of income

7 In respect of the 2002 year of income, the subject of the Commissioner's appeal, it was common ground that the Trustee treated as income available for distribution the net capital gain of \$29,227 arising from the sale of certain real property in which the Trustee had held a half share. That capital gain was divided equally and included in the distribution made to Mr and Mrs Bamford by the Trustee. Mr and Mrs Bamford each lodged a tax return for the 2002 year in accordance with that distribution<sup>3</sup>.

8 However, the Commissioner considered that the capital gain was not included in "the income of the trust estate" of which s 97(1) speaks, with the result that there was no income of the trust estate to which s 97(1) could apply and that the Trustee itself was to be assessed under s 99A of the 1936 Act.

9 In this Court the Commissioner submits, contrary to the decision of the Full Court, that "the income of the trust estate" did not include this amount. This is said to be so because, while available for distribution in accordance with the Deed, the capital gain amount was not, in the sense of the 1936 Act, "income according to ordinary concepts".

10 On the second day of the hearing of the appeals the Commissioner made it clear that he accepts that the appeal should be dismissed if "the income of the trust estate" within the meaning of s 97(1) includes "statutory income" such as capital gains which are brought in as "assessable income".

#### The 2000 year of income

11 In respect of the 2000 year, the subject of the taxpayers' appeal, the state of affairs giving rise to the dispute is more complex. Shortly put, the issue of construction concerns the application of the phrase "that share" in s 97(1) in circumstances where the entitlement of beneficiaries is not to fixed proportions of the income of the trust estate but, as to some beneficiaries, to specific amounts and, as to another beneficiary, to the residue.

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3 (2009) 176 FCR 250 at 256-257.

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12       The Trustee determined under the Deed that the income for the year ended 30 June 2000 be distributed, as to consecutive amounts of \$643 each to a child of Mr and Mrs Bamford, the next \$12,500 to Narconon Anzo Inc, the next \$106,000 to the Church, the next \$68,000 to Mr and Mrs Bamford in equal shares, and the balance to the Church. The Trustee determined pursuant to cl 7(n) of the Deed that certain outgoings be treated as expenses and, in error, treated them as allowable deductions in computing the net income of the trust estate for the purposes of s 97(1). This was shown as \$187,530.

13       Upon making the distributions in the above sequence, there was insufficient remaining to provide the \$68,000 to Mr and Mrs Bamford, and no balance to go to the Church. There remained \$67,744, which was distributed equally between Mr and Mrs Bamford (ie each received \$33,872).

14       Rather than being merely \$187,530, the net income of the trust estate included the non-deductible outgoings of \$191,701. The Commissioner assessed Mr and Mrs Bamford by calculating the ratio which the actual distributions of \$33,872 bore to the total of \$187,530, and then applied that ratio to the excess of the net income addition of \$191,701 over the distributable income. The Commissioner included the product of that calculation (\$34,624) in the assessable income of each of the taxpayers. The taxpayers (contrary to the decision of the Full Court) contend that their share of the net income of the trust estate and thus the amounts included in their assessable incomes should have been ascertained as if the terms of the Deed, including the effect of any exercise of power of appointment over income, applied to the calculation of that "net income".

15       The difference between the parties' submissions may be illustrated as follows. Upon the taxpayers' case, if there were trust income of \$300,000 and net income of \$180,000 and a beneficiary with an annuity of \$100,000, the beneficiary's assessable income would be fixed at \$100,000. Upon the Commissioner's case, the beneficiary's assessable income would not be fixed at \$100,000 but would be the same one-third proportion (ie \$60,000).

Trust law and income tax law

16       Before turning to consider further the relevant provisions of the 1936 Act, the following points of a general nature should be made respecting the intersection between the statute and the law of trusts.

17       First, both sides in argument on the present appeals accepted that whichever of the competing constructions of Div 6 were accepted examples

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could readily be given of apparent unfairness in the resulting administration of the legislation; it is more than 20 years since Hill J observed that "the scheme of Div 6 calls out for legislative clarification, especially since the insertion into [the 1936 Act] of provisions taxing capital gains as assessable income"<sup>4</sup>. Secondly, as Stone and Perram JJ emphasised<sup>5</sup> in the Full Court, the distinction between income and capital in trust law was a product of the administration of successive equitable estates with the balancing in particular of the concern of those with life interests in the receipt of income and those with remainder interests in the conservation and augmentation of capital. Thirdly, the "rules" which were developed in Chancery regarding apportionment between capital and income of receipts and outgoings and losses largely took the form of presumptions which would yield to provision made in the trust instrument<sup>6</sup>. Fourthly, against this background it was to be expected that the treatment of receipts and outgoings by a trustee would not necessarily correspond with that in a taxing statute such as the 1936 Act. Fifthly, the degree to which a revenue statute adopts or qualifies or supplants the general understanding of terms with a particular application in property law will be a matter of statutory construction, but bearing in mind the caution expressed by Lord Wilberforce in *Gartside v Inland Revenue Commissioners*<sup>7</sup> that the transfer from one context to another may breed confusion.

18           Finally, there is the difficulty that while the general provisions in s 17 and s 19 of the 1936 Act<sup>8</sup> speak of income derived by a "person" and a trustee will answer that description, the trust itself, in the absence of special provision in the legislation, will not be a separate entity with the distinct character of a taxpayer.

19           Writing of the provisions of the 1936 Act dealing with trusts and companies as they stood in 1958 Professor Ford said that looking at "a trust in the

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4   *Davis v Federal Commissioner of Taxation* (1989) 86 ALR 195 at 230.

5   (2009) 176 FCR 250 at 265.

6   *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at 485 [1952].

7   [1968] AC 553 at 617.

8   Now rendered into "plain English" by the "Core provisions" in Pt 1-3 of the *Income Tax Assessment Act 1997* (Cth).

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abstract" there appeared to be two methods by which it could be dealt with in the scheme of income taxation<sup>9</sup>. He continued<sup>10</sup>:

"First, the trust could be treated as a separate entity and the income of the trust as a whole could be assessed as one unit. Under this approach no regard would be had to the income which beneficiaries under the trust derive from other sources. The rate of tax would be that appropriate to the total taxable income of the trust and the trustees would be assessed in respect of that income. If a trust were treated as a tax entity in this way its position would, in a broad sense, be like that of a company. In fact, not only is tax assessed and paid on the taxable income of a company but in addition, dividends paid by the company to its shareholders are, in general, taxed as part of the income of each shareholder. The suggested analogy between a trust treated as a tax entity and a company is a broad one, and is not intended to imply that similar double taxation should operate when trust income is distributed to beneficiaries."

20        However, Professor Ford went on to write that wherever possible the 1936 Act adopted in Div 6 of Pt III what he described as the second approach for a scheme of income taxation. This was as follows:

"[T]he trust could be treated as a mere conduit through which the beneficiaries under the trust receive income. Under this approach the income received by each beneficiary would be aggregated with his income from other sources and tax would be assessed against the beneficiary on that aggregated income at the rate appropriate thereto."

21        This second approach was implemented by Div 6.

#### The provisions of Div 6

22        The primary provision remains s 96. This states:

"Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon *the income of the trust estate*." (emphasis added)

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9     Ford, "Income and Estate Taxation Affecting Trusts", (1958) 1 *Melbourne University Law Review* 419 at 420.

10    Ford, "Income and Estate Taxation Affecting Trusts", (1958) 1 *Melbourne University Law Review* 419 at 420.

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23 Section 96 had its immediate predecessor in s 31 of the *Income Tax Assessment Act* 1922 (Cth), which in turn had been preceded by s 26 of the *Income Tax Assessment Act* 1915 (Cth)<sup>11</sup>. The Court was taken to the text of this and earlier federal and Victorian legislation<sup>12</sup> respecting the taxation of trust income, but it provides no immediate assistance in the construction of Div 6 for the purposes of the present appeals.

24 The structure of Div 6 as first enacted was as follows. Special provision was made in s 98 for assessment of and payment by the trustee where a beneficiary was presently entitled to "a share of the income of a trust estate" but under a legal disability. Further, where no beneficiary was presently entitled the trustee was to be assessed and liable to pay (s 99); s 99 is now subject to s 99A. Finally, in the case of revocable trusts whereby the person creating the trust had the power to acquire a beneficial interest in the income derived during the year of income the Commissioner was empowered to assess the trustee (s 102).

25 A central provision was s 97. It is upon the construction of this provision, as it stood in the 2000 and 2002 income tax years after amendments to Div 6 over the years, that these appeals turn. As enacted s 97 stated:

"(1) Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate.

(2) The exempt income of any such beneficiary shall include his individual interest in the exempt income of the trust estate, except to the extent to which that exempt income is taken into account in calculating the net income of the trust estate."

26 Section 97(1) in its current form substitutes for "income of a trust estate" the phrase "income of the trust estate". The two phrases appear throughout Div 6 (in both its original form and its current form) but are not defined. The expression "net income" when used in Div 6 in relation to a trust estate is defined in s 95(1). The relationship, in the construction of s 97(1), between the terms

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11 Inserted by *Income Tax Assessment Act* 1918 (Cth), s 21.

12 Including s 12(1)(d) of the *Income Tax Act* 1896 (Vic). This rendered the trustee liable, as a taxpayer, in respect of income earned, derived or received by the trustee where no other person was "presently entitled" to it and the trustee was "in actual receipt" of it.

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"the income of the trust estate" and "the net income of the trust estate" gives rise to difficulties some of which require resolution in these appeals.

27 The term "trust estate" appears throughout Div 6 and is attached to the term "trustee", but not defined. Nor is the term "beneficiary". However, the term "trustee" is defined in s 6(1) in terms that take the reader immediately beyond a realm limited to the trusts of a settlement or testamentary trust.

28 The definition of "trustee" in s 6(1) is as follows:

"**trustee** in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:

- (a) an executor or administrator, guardian, committee, receiver, or liquidator; and
- (b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability".

In considering this definition it is important to note that it is said in s 6(1) to apply "unless the contrary intention appears". Thus, it is not to be assumed that every person or entity which answers the statutory definition will be a trustee for the purposes of Div 6 of Pt III. The opening words of the definition speak of a trustee in the ordinary sense of a person who holds property on trust while pars (a) and (b) include persons in whom trust property is not vested. For example, a liquidator, although identified in par (a), is not a trustee of a trust estate in any ordinary sense<sup>13</sup>.

29 Nevertheless, the reach of Div 6 beyond settlements and testamentary trusts is illustrated by three decisions of this Court. The official receiver of the estate of a bankrupt was taxed under Div 6 in *Official Receiver v Federal Commissioner of Taxation (Fox's Case)*<sup>14</sup>. In *Harmer v Federal Commissioner*

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13 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592; [2005] HCA 20.

14 (1956) 96 CLR 370 at 383-384; [1956] HCA 63.

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of *Taxation*<sup>15</sup> Div 6 applied to moneys paid into the Supreme Court of Western Australia where no claimant had any vested interest in them; it was sufficient to attract Div 6 that the effect of the relevant West Australian legislation and Rules of Court was that the moneys were held upon trust for statutory purposes.

30 On the other hand, in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*<sup>16</sup> the majority in this Court held that the Registrar was a trustee "pure and simple"<sup>17</sup> of awards of compensation required by Victorian legislation to be paid into a fund under control of the Registrar. The trusts were for the benefit of those entitled to the compensation moneys, as individual beneficiaries, notwithstanding that the trusts arose under the legislation, rather than as a result of the acts of individuals<sup>18</sup>. The result was that interest then earned was income of trust estates to which Div 6 applied.

31 Division 6 is now drawn to distinguish between a trust estate which is "a resident trust estate" and "a non-resident trust estate" in relation to the relevant year of income (s 95(2), (3)). Nothing turns on that distinction for these appeals, which, it is accepted, concern resident trust estates. Section 97 is now expressed to be subject to the "closely held trust" provisions of Div 6D (ss 102UA-102UV). The purpose of Div 6D is to provide the Commissioner with information respecting the "ultimate beneficiaries" of certain net income and tax-preferred amounts (s 102UA(1)). A "tax-preferred amount" includes "income of the trust that is not included in its assessable income in working out its net income" (s 102UI).

32 If a "net capital gain", as defined in s 995-1(1) of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"), is made it will be taken into account in computing the net income of the trust estate within the meaning of s 95(1) of the 1936 Act as part of the assessable income, which is defined by reference to Div 6 of the 1997 Act<sup>19</sup>. Special rules found in Subdiv 115-C of the 1997 Act

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<sup>15</sup> (1991) 173 CLR 264; [1991] HCA 51.

<sup>16</sup> (1993) 178 CLR 145; [1993] HCA 1.

<sup>17</sup> (1993) 178 CLR 145 at 171.

<sup>18</sup> (1993) 178 CLR 145 at 170.

<sup>19</sup> See s 6(1) of the 1936 Act (definition of "assessable income") and ss 6-10 and 102-5 of the 1997 Act.

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then may allow beneficiaries to reduce their liability by their available capital losses and unapplied net capital losses.

33           So far as is presently relevant s 97(1) reads:

"Subject to Division 6D, where a beneficiary of a trust estate who is not under any legal disability is presently entitled to *a share of the income of the trust estate*:

(a)     the assessable income of the beneficiary shall include:

(i)     so much of *that share of the net income of the trust estate* as is attributable to a period when the beneficiary was a resident; and

(ii)    ...

(b)     ..." (emphasis added)

34           The phrase "the net income of the trust estate" is to be read with the definition in s 95(1):

"**net income**, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 16C or Schedule 2G and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the *Income Tax Assessment Act* 1997 in respect of such of the tax losses of previous years as are required to be met out of corpus."

35           On the other hand, and as already remarked, the expression "the income of the trust estate" which appears both in s 97 and in the basic provision of s 96 is not defined. This poses the first construction issue, that in the Commissioner's appeal.

"The net income of the trust estate" and "the income of the trust estate"

36           The very juxtaposition within s 97(1) of the defined expression "net income of the trust estate" and the undefined expression "the income of the trust estate" suggests that the latter has a content found in the general law of trusts, upon which Div 6 then operates.

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37 The opening words of s 97(1) speak of "a beneficiary of a trust estate" who is "presently entitled to a share of the income of the trust estate". The language of present entitlement is that of the general law of trusts, but adapted to the operation of the 1936 Act upon distinct years of income. The effect of the authorities dealing with the phrase "presently entitled" was considered in *Harmer v Federal Commissioner of Taxation*<sup>20</sup>, where it was accepted that a beneficiary would be so entitled if, and only if,

"(a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and (b) the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment."

The elaboration of those propositions that may be called for in the application of s 98 (being the elaboration to which Kitto J adverted in *Taylor v Federal Commissioner of Taxation*<sup>21</sup>) need not be examined in this matter.

38 The identification in s 97(1) of "a trust estate" of which there is "a beneficiary" also bespeaks the general law of trusts. It is true that s 97(1) must be read with s 96. This is addressed to "a trustee", and the effect of the decisions to which reference has been made is that there may be a trustee of a trust created by the operation of a legislative regime not by settlement *inter vivos* or testamentary disposition. Nevertheless, there must be a "trust estate".

39 Further, the phrase "presently entitled to a share of the income" directs attention to the processes in trust administration by which the share is identified and entitlement established. The relevant operation of those principles, supported by a review of the authorities, was described as follows by Bowen CJ, Deane and Fitzgerald JJ in *Federal Commissioner of Taxation v Totledge Pty Ltd*<sup>22</sup>. Their Honours said:

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20 (1991) 173 CLR 264 at 271.

21 (1970) 119 CLR 444 at 451-452; [1970] HCA 10.

22 (1982) 40 ALR 385 at 393.

11.

"A beneficiary under a trust who is entitled to income will ordinarily only be entitled to receive actual payment of the appropriate share of surplus or distributable income: the trustee will be entitled and obliged to meet revenue outgoings from income before distributing to a life tenant or other beneficiary entitled to income. Indeed, circumstances may well exist in which a trustee is entitled and obliged to devote the whole of gross income in paying revenue expenses with the consequence that the beneficiary entitled to income may have no entitlement to receive any payment at all. This does not, however, mean that a life tenant or other beneficiary entitled to income in a trust estate has no beneficial interest in the gross income as it is derived. He is entitled to receive an account of it from the trustee and to be paid his share of what remains of it after payment of, or provision for, the trustee's proper costs, expenses and outgoings."

40 Reliance was placed by the Commissioner upon a passage in *Federal Commissioner of Taxation v Australia and New Zealand Savings Bank Ltd*<sup>23</sup>. There was, however, in that case no submission to the effect that the trust deed could operate to treat as capital receipts what otherwise might have been included as income of the trust estate. This is apparent from the argument in the Full Court of the Federal Court in that case<sup>24</sup>, and the argument there, as in this Court, was, as the Trustee submitted in this appeal, upon other issues.

41 Finally, the Commissioner only partially invoked the operation of the 1936 Act to give content to the expression "income of the trust estate", and would exclude "statutory income", which is not income according to ordinary concepts. The lack of consistency which this involves tells against the submission.

42 The result is that the Commissioner's appeal should be dismissed. There remains the second construction issue. The resolution of that issue is sequential to that of the first issue.

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23 (1998) 194 CLR 328 at 337 [15]; [1998] HCA 53.

24 *Australia and New Zealand Savings Bank Ltd v Commissioner of Taxation (No 2)* (1997) 75 FCR 25 at 32.

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"That share"

43 The second question of construction is presented by the presence in par (a)(i) of s 97(1) of the phrase "that share", which links the preceding identification of present entitlement to "a share" of the income of the trust estate to the defined expression "the net income of the trust estate". On its face the section may appear to postulate the same share of two subject matters which do not correspond.

44 Emmett J referred to the submissions by Mr and Mrs Bamford that where the entitlement of a beneficiary is to a specified amount, as in the present case, and not to a proportionate part, the word "share" means that amount and that this is because "share" reflects the particular method for determination of entitlement to trust income<sup>25</sup>. His Honour continued<sup>26</sup>:

"Mr and Mrs Bamford say that, where there is a disparity between the net income of the trust estate and the distributable income, entitlement to which is governed by the trust instrument, the amount in respect of which each beneficiary is assessable must be calculated as if the terms of the trust instrument and any relevant appointment operated upon the amount of the net income of the trust estate as if it were the distributable income. They say that such a result accords with the concept that the liability to tax upon income should follow from the distribution of income according to the terms of the trust."

These submissions were correctly rejected.

45 The resolution of the second issue of construction is to be found in the analysis by Sundberg J in *Zeta Force Pty Ltd v Commissioner of Taxation*<sup>27</sup>. His Honour dealt with the first issue of construction to the same effect as that just explained, saying:

"The words 'income of the trust estate' in the opening part of s 97(1) refer to distributable income, that is to say income ascertained by the trustee according to appropriate accounting principles and the trust

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25 (2009) 176 FCR 250 at 259.

26 (2009) 176 FCR 250 at 259.

27 (1998) 84 FCR 70 at 74-75.

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instrument. That the words have this meaning is confirmed by the use elsewhere in Div 6 of the contrasting expression 'net income of the trust estate'. The beneficiary's 'share' is his share of the distributable income."

Sundberg J then continued:

"Having identified the share of the distributable income to which the beneficiary is presently entitled, s 97(1) requires one to ascertain 'that share of the net income of the trust estate'. That share is included in the beneficiary's assessable income. The expression 'net income of the trust estate' in par (a)(i) has the meaning given it by s 95(1) – taxable income as opposed to distributable income. The words 'that share' in par (a)(i) refer back to the word 'share' in the expression 'a share of the income of the trust estate', and indicate that the same share is to be applied to an income amount calculated according to a different formula (taxable income as opposed to distributable income). Since the income amount may differ according to which formula is applied, the natural meaning to give to 'share' where it appears for the second time is 'proportion' rather than 'part' or 'portion'. When Parliament wanted to convey the latter meaning, as it did in ss 99 and 99A, it used the word 'part'.

The contrast between the expressions 'share of the income of the trust estate' and 'that share of the net income of the trust estate' shows that the draftsman has sought to relate the concept of present entitlement to distributable income, and not to taxable income, which is, after all, an artificial tax amount. Once the share of the distributable income to which the beneficiary is presently entitled is worked out, the notion of present entitlement has served its purpose, and the beneficiary is to be taxed on that share (or proportion) of the taxable income of the trust estate."

46        That analysis should be accepted. It follows that the taxpayers' appeal should be dismissed.

#### Orders

47        Each appeal should be dismissed. No costs orders were made in the Federal Court, there being an agreement between the parties respecting costs<sup>28</sup>, and no costs orders should be made in this Court.