
Client Newsletter

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Trustees Liability

The legal position of a trustee is that they are personally liable for trust transactions.

Often, the trust deed has a limitation of liability clause that is included to effectively provide a trustee (usually an independent trustee) with protection against claims by a beneficiary. The trustee, however, may not be protected when transacting with third parties if a limitation of liability clause is not included in a third party contract.

Just as often, the trustee has a right of indemnification from the trust funds under the terms of the trust deed. Again, the trustee can seek reimbursement only to the extent of the trust assets.

Where a trustee transacts with a third party (even if in good faith), and believes that his liability is limited to the trust assets (which may not be adequate), he leaves himself open to being personally sued in the Courts.

Likewise, trustees are also personally liable for any GST or income tax payable to the IRD by the trust. If the trust funds are exhausted, the trustee may not only be not reimbursed but will also end up with a liability for tax.

In the context of income tax, usually the liability is more likely to arise from accrual income than in the normal course of business. For example, a bank could be owed a debt by the trust that the trust is now unable to repay. The bank may write-off that debt and not be able to seek remedy from the independent trustee due to a limitation of liability clause in the bank documentation. However, the debt written-off may become taxable income resulting in tax to pay. The IRD can recover the tax by suing the trustees personally.

Where that trustee is a family friend, lawyer or accountant, the trustee cannot escape from the tax liability by simply resigning because they are liable for any tax that results from income arising in the year that they were trustees. In the above example, if the trustees had resigned in the year before the bank wrote-off the debt, they may not have been personally liable for tax. The resigning trustees should ensure that the IRD is advised that they are no longer a trustee.

Directors Liability

There are personal risks when a person acts as a company director. It is possible for a director to be held personally liable to the company, the shareholders or to a third party.

A person may become a deemed director if he or she exercises powers as a director or is unwittingly treated as one by being involved with that company or by sitting at the board table (e.g. a shareholder who is not a director). Sometimes a person is only a nominee director but he is still acting as a director and therefore has responsibilities and may be liable for his actions.

It is important for directors (and deemed or nominee directors) to be aware of their obligations. One such obligation is the request to maintain a Directors' Interests Register. Directors must disclose any interest they have in a transaction of the company on the Interest Register.

An interest includes situations where the director is a:

- Party to a transaction in which he or she will derive financial benefit from a transaction with the company;
- Director, officer or trustee of an entity deriving financial benefit from a company transaction; or
- Parent, child or spouse of the party deriving such financial benefit from a transaction of the company.

Regardless of whether or not the interest is disclosed, the company can void the transaction at any time up to three months after the disclosure is made to all the shareholders in the event where the company does not receive fair value for a transaction in which the director had an interest. If a disclosure of the interest is not made, the director could be liable for a fine of up to \$10,000.

However, the transaction cannot be voided where the company receives fair value.

Where a person is asked to accept a role as a director, it is advisable to require both:

- an indemnity; and
- insurance

from a company before that person accepts a directorship.

An indemnity typically provides that a director will be reimbursed by the company in respect of liability to any

person, other than the company or a related company (as defined by the Companies Act 1993), for any act or omission in his or her capacity as company director. However, an indemnity can only be provided by a company if it is permitted by the company's constitution and will not cover all the acts of the director, for example criminal acts or breach of his fiduciary duties as the law does not allow it.

In case of insurance, the company may provide this only if its constitution allows it and the required board resolutions and certificates are signed.

Employer Superannuation Contributions

Employer superannuation contribution tax (ESCT), formerly named specified superannuation contribution withholding tax (SSCWT), can be taxed in one of the following ways:

1. At a flat rate of 33 cents in the dollar;
2. An optional ESCT rate based on either:
 - the annual salary or wages plus gross employer contributions paid to the employee in the previous standard tax year (where the employee was employed for all of that year); or
 - an estimate of the total amount of salary or wages plus gross employer contributions that the employee will earn in the year ahead (where the employee was not employed for all of the previous tax year).

The ESCT rate for contributions from 1 October 2010 is as follows.

- 10.5% if wages were less than \$16,800;
- 17.5% if wages were between \$16,801 and \$57,600;
- 30% if wages were between \$57,601 and \$84,000;
- 33% if wages were over \$84,000.

3. Treat the employer contribution as salary or wages, for which the employee's agreement is needed.

ESCT must be paid to Inland Revenue along with PAYE deductions on the Employer deductions (IR345) form but is not included on the Employer monthly schedule (IR348). The amount shown as total KiwiSaver employer contributions on the IR348 is the net amount, ie the gross employer contribution less ESCT.