

Commissioner of Taxation v Commercial Nominees of Australia Ltd

Taxes & duties — income tax — whether trustee of superannuation fund entitled to carry forward losses from previous years — whether fund in year in which deduction claimed same ‘entity’ as suffered the losses claimed — whether amendments to trust deed in intervening years amounted to ‘resettlement’ — relevance of resettlement analysis in context of taxation of superannuation funds — whether continuity of regime regulating superannuation fund can be identified

Cases Cited

[*Davidson v Chirnside* \(1908\) 7 CLR 324](#), cited

Truesdale v Commissioner of Taxation (1969) 120 CLR 353, cited

Legislation Considered

Income Tax Assessment Act 1936 (Cth), s 79E, s 80, s 272, s 278

Superannuation Industry (Supervision) Act 1993 (Cth), s 10, s 45

- 1. The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the *Federal Court Rules*.

Lee, Emmett & Gyles JJ

1

The respondent, Commercial Nominees of Australia Ltd (“the Trustee”) is the trustee of the Miden Group Superannuation Fund. The Trustee lodged an income tax return under the *Income Tax Assessment Act 1936* (“the Assessment Act”) for the year ended 30 June 1995. The return showed a taxable income of \$165,881. The return did not claim a deduction in respect of losses incurred in the years ended 30 June 1989 and 30 June 1990 by the superannuation fund then known as the Control Data Australia Employee Benefits Fund. The name of the Control Data Australia Employee Benefits Fund was changed in November 1990 to Miden Group Superannuation Fund. The expression “the Fund” will be used to refer to the fund now known as Miden Group Superannuation Fund, which was previously known as Control Data Australia Employee Benefits Fund.

2

An assessment was deemed to be issued by the present applicant, the Commissioner of Taxation (“the Commissioner”), in consequence of the lodgment of the return. The Trustee lodged an objection against the deemed assessment. There was no response to the objection within the period prescribed in section 14ZYA of the *Taxation Administration Act 1953* (“the Administration Act”) and, accordingly, by the operation of that section the objection was deemed to have been disallowed. The Trustee then applied to the Administrative Appeals Tribunal (“the Tribunal”) pursuant to section 14ZZ of the *Administration Act* for review of that deemed objection decision.

3

The Tribunal, constituted by a Deputy President, concluded that the Trustee was entitled to set off against the income disclosed in the 1995 return what remains of the losses incurred in the 1989 and 1990 years

in respect of the Fund. The Tribunal set aside the decision under review and remitted the matter to the Commissioner with the direction that a new assessment be made in accordance with the Tribunal's reasons.

4

The Commissioner has now “appealed”, under section 44 of the *Administrative Appeals Tribunal Act 1975*, from the Tribunal's decision. Pursuant to section 44(3)(b) of the *Administrative Appeals Tribunal Act*, it was directed that the “appeal” be heard by a Full Court. The jurisdiction exercised by the Court, of course, is original and not appellate jurisdiction - [TNT Skypak International \(Aust\) Pty Ltd v Federal Commissioner of Taxation](#) (1988) 82 ALR 175 per Gummow J at 178 - 182.

5

Section 44 of the *Administrative Appeals Tribunal Act* relevantly provides as follows:

- “44.
 - (1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.”

6

The existence of a question of law is not a qualifying condition to ground the “appeal” but the subject matter of the “appeal” itself - [Commissioner of Taxation v Brixius](#) (1987) 16 FCR 359 at 365.

7

The question at issue between the Trustee and the Commissioner is whether the Trustee is entitled, in calculating its taxable income as trustee of the Fund, to deduct from its assessable income for the 1995 year of income losses that were incurred in the 1989 and 1990 years of income. The Trustee contends that at all material times the Fund continued and that, accordingly, the Trustee is entitled to a deduction of those losses from its assessable income as trustee for the 1995 income year. The Commissioner contends to the contrary. The Tribunal accepted the Trustee's contentions.

STATUTORY FRAMEWORK

8

Section 17(1) of the *Assessment Act*, as it applied in the years in question, provided that income tax was levied, and was to be paid, for a relevant year of income, upon the **taxable income** derived during the years of income by **any person**. Under section 6, the expression ‘taxable income’ was defined, relevantly, as meaning the amount remaining after deducting from **assessable income** all **allowable deductions**. Section 25(1) of the *Assessment Act* provided, relevantly, that the assessable income of a taxpayer was to include the gross income derived directly or indirectly from all sources whether in or out of Australia.

9

Sections 80(2) and 79E(3) of the *Assessment Act* provided for the carrying forward of losses incurred in previous years so as to be allowable as deductions in subsequent years of income. Those sections were in the following terms:

- “80
 - (2) ... so much of the losses incurred by a taxpayer in any of the seven years next preceding the year of income as has not been allowed as a deduction from his income of any of those years shall be allowable as a deduction in accordance with the following provisions:
 - (a) ... the deduction shall be made from the assessable income.
... ..”
- “79E
 - (3) ... so much of a taxpayer's loss as is incurred in any of the post 1989 years of income before a particular year of income as has not been allowed as a deduction from the taxpayer's income of any of those years is allowable as a deduction in accordance with the following provisions:
 - (a) ... the deduction is to be made from the taxpayer's assessable income of that year.
... ..”

10

Several provisions of the *Assessment Act* deal with the taxation of income of trusts. Division 6 of Part III of the *Assessment Act*, entitled “Trust Income”, is the principal provision of the *Assessment Act* relating to trusts. Section 96, which is within Division 6, provides that, except as provided in the *Assessment Act*, a trustee is not to be “*liable as trustee to pay income tax upon the income of the trust estate*”. In general, the *Assessment Act* imposes liability for tax in respect of the income of a trust estate on the beneficiary. Although liability is also imposed on a trustee in some circumstances, liability is imposed on trustees only in a representative capacity.

11

The provisions of Division 6 direct attention to “*trust estates*”. Divisions 6AAA (non-resident trusts), 6AA (minors - trust income), 6B (corporate unit trusts) and 6C (public trading trusts) of the *Assessment Act* also deal with taxation of trusts. Each of those divisions also directs attention to the trust, not as a legal person or a deemed legal person, but as a conglomerate of assets by which income is generated.

12

Part IX of the *Assessment Act* deals with the taxation of the income of superannuation funds. Under section 6 of the *Assessment Act*, 'superannuation fund' means:

- • A scheme for the payment of superannuation benefits upon retirement or death; or
- • A superannuation fund within the definition of 'superannuation fund' in section 10 of the *Superannuation Industry (Supervision) Act 1993* ('the SIS Act').

13

Section 10 of the *SIS Act* provides as follows:

“**superannuation fund** means:

- (a) a fund that:
 - (i) is an indefinitely continuing fund; and
 - (ii) is a provident, benefit, superannuation or retirement fund; or
- (b) a public sector superannuation scheme.”

14

Under section 6 of the *Assessment Act*, “*taxpayer*” is defined as a **person** deriving income or deriving profits or gains of a capital nature. Under section 272, which is within Part IX, the taxable income of an eligible entity is to be calculated as if the trustee were a taxpayer. Under section 267, “*eligible entity*” includes a fund that is an “*eligible superannuation fund*” in relation to the year of income. An eligible superannuation fund in relation to a year of income includes a fund that is a “*complying superannuation fund*”. A complying superannuation fund has the meaning given by section 45 of the *SIS Act*. Section 268 provides that:

“Where, apart from this section, there is in relation to a fund no person who is a trustee of the fund for the purposes of this Part, the person, or each of the persons, who manages the fund shall be taken, for the purposes of this Part, to be the trustee, or a trustee, as the case requires, of the fund.”

15

Under section 278(1) of the *Assessment Act*, which is to be found in Division 3 of Part IX of the *Assessment Act*, the trustee of a complying superannuation fund is liable to pay tax on the taxable income of the fund. Under section 278(2), the income of a complying superannuation fund is not subject to tax except as provided in Part IX. The effect of those provisions is that the taxable income of a complying superannuation fund is to be calculated as if the trustee of the fund were a person deriving that income. It is common ground that at all times the Fund was a complying superannuation fund within the meaning of section 45 of the *SIS Act*. Accordingly, in so far as there was taxable income of the Fund, the Trustee was liable to pay tax on that taxable income.

THE FACTUAL BACKGROUND

16

The Fund was established under a trust deed dated 11 March 1988 (“the Original Trust Deed”). Under the Original Trust Deed, Control Data Australia Pty Ltd (“Control Data”) was identified as “the Principal Employer” and, as such, “the first Trustees”.

17

In December 1989, the name Control Data was changed to Miden Pacific Pty Ltd (“Miden Pacific”). Amendments, not presently material, were made to the Original Trust Deed prior to November 1993.

18

The Original Trust Deed as so amended consisted of the following:

“WHEREAS:

- A. The Principal Employer has decided to establish an indefinitely continuing superannuation fund (hereinafter called the ‘Fund’) for the purpose of providing superannuation benefits for those of its Employees and of the Employees of its Associated Employers who, being eligible for membership, become Members of the Fund and for the Dependents thereof.
- B. The Principal Employer will act as the first Trustees of the Fund.

NOW THIS DEED WITNESSES THAT the Fund, which shall be deemed to have come into operation on 1 July 1987 (hereinafter called the ‘Commencement Date’) and which shall be known as the **MIDEN GROUP SUPERANNUATION FUND**, shall vest in and shall be controlled and administered by the Trustees upon the trusts of this Deed (which includes the Parts annexed hereto) and shall be indefinitely continuing.”

Annexed to the Original Trust Deed were three parts entitled as follows:

- • Part 1 - General Provisions
- • Part 2 - Contributions and Benefits of Category “A” Members
- • Part 3 - Contributions and Benefits of Category “B” Members

19

The distinction between Category “A” Members and Category “B” Members is not presently relevant.

The Old Regime

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Under the terms of the Original Trust Deed, benefits, as specified in the Original Trust Deed, were to be paid to employees of the Principal Employer and Associated Employers upon the events there specified. The benefits were defined, being calculated chiefly by reference to final salary and years of service. The term “*Associated Employer*” was defined in the Original Trust Deed as meaning:

“any person which has been admitted to participation in the Fund as an Associated Employer as provided in the deed ... ”

The arrangements for the admission of Associated Employers were covered by clause 1.14 as follows:

“The Trustees and the Principal Employer may enter into an agreement in a manner and form acceptable to the Trustees and the Principal Employer with any person which the Principal Employer deems it is desirable and convenient to include in the Fund as an Associated Employer. Subject to any conditions imposed under such agreement or the Deed, such Employees of an Associated Employer as become eligible as provided in such an agreement or the Deed shall be eligible to participate in the Fund.”

21

There was no limitation on the categories of persons with whom the Principal Employer could enter into an agreement under clause 1.14. Therefore, at least in theory, any employer in the world could become an Associated Employer, if that employer was prepared to do so and the Principal Employer was prepared to enter into an agreement with that person in a manner and form acceptable to the then trustees.

22

The Principal Employer had, amongst others, the following powers and functions:

- (a) subject to qualifications on the power expressed in the relevant clauses the Principal Employer could appoint and remove the trustee of the Fund (Clauses 1.3.1, 1.3.2);
- (b) the Principal Employer made the rules and procedures in relation to the calculation and rounding off of contributions (Clause 1.6.3(i));
- (c) the Principal Employer determined the amount that the participating employers were required to contribute to indemnify the Trustee in the event of a shortfall in assets (Clause 1.8.1(b));
- (d) the Principal Employer was empowered to direct the Trustee to invest the assets of the fund, or any portion thereof, in any particular manner or form as determined by the Principal Employer (Clause 1.12.4);
- (e) in the event of the dissolution or termination of the Fund, the Principal Employer could direct that surplus funds were distributed to participating employers in such shares as determined by the Principal Employer (Clause 1.17.1);
- (f) if at any time there were actuarially-determined surplus amounts, the Principal Employer could direct the Trustee to pay such amounts to such participating employers as were nominated by the Principal Employer (Clause 1.17.2(b));
- (g) the Principal Employer determined the classification of Members into categories (Clause 1.18.5(a));

- (h) in the event the employee was a member of another fund, the Principal Employer determined any special terms, conditions and restrictions in relation to contributions payable and benefits provided to that Member (Clause 1.20);
- (i) the Principal Employer determined the amount of the contributions to be made by each participating employer (Clause 1.22.1(b));
- (j) the Principal Employer was empowered to give notice to the Trustee on behalf of any Associated Employer to the effect that its contributions to the Fund were entirely terminated (Clause 1.24.5);
- (k) the Principal Employer was empowered to add, delete or replace any provisions of the trust deed (Clause 1.41.1). There was no express provision regulating that power of amendment so as to protect the interests of any Associated Employer.

23

The Original Trust Deed contained a power of amendment. Under clause 1.41.1, the Principal Employer was empowered to:

“amend, add to, delete or replace all or any of the provisions of the Deed (including this clause) as the Principal Employer sees fit ... provided that no amendment, addition, deletion or replacement ... shall take effect in respect of a Member or Beneficiary without that person's consent ... unless -

- (a) the Actuary (whose decision shall be final) determines that such amendment, addition, deletion or replacement will not substantially prejudice the Accrued Benefit Value of such Member or Beneficiary and will not increase the Member's liability to contribute to the Fund.

... ..”

The New Regime

24

On 1 November 1993, an amending deed (“the Amending Deed”) was executed with effect from 1 July 1992. The Amending Deed was entered into pursuant to the power set out in clause 1.41.1 of the Original Trust Deed. By the time of the execution of the Amending Deed, Miden Pacific had retired in favour of six individuals. The Amending Deed provided for Miden Pacific to remove those trustees and appoint the Trustee and for the adoption of a completely new set of rules relating to contributions and benefits. The effect of the Amending Deed was to delete Parts 1, 2 and 3 annexed to the Original Trust Deed that contained the operative provisions of the Original Trust Deed, and to substitute completely new operative provisions.

25

One of the changes effected by the Amending Deed was a change in the nature of benefits to which members were entitled. Instead of a defined benefit, the benefit will depend upon the amounts contributed and accumulated earnings from contributions. One of the reasons for the change was said to be the complexity associated with the administration of a defined benefit fund and the associated problems caused by the introduction by the Federal Government of the superannuation guarantee charge with effect from 1 July 1992.

26

A professional management company was appointed as administrator and an administration fee structure was included to accommodate the shift from an employer sponsored fund to a fund promoted by an administrator.

27

Significantly, a provision was introduced allowing employers to join as participating employers, so as to enable employees of such a participating employer to become members without reference to Miden Pacific. In that connection, new classes of membership were created. In particular, "C" class membership was created for employees of new participating employers who had no relationship with Miden Pacific. By 4 November 1993, receivers had been appointed to Miden Pacific and administrators appointed to its subsidiaries.

28

The Category "A" and Category "B" members, the former employees of Miden Pacific and its subsidiaries, could no longer have contributions received in respect of them. Further, Category "C" members, unlike the Category "A" and Category "B" members, pay a fee in return for investment advice.

29

The amendments also permitted promotion of membership to the public. The benefits of an existing structure could be offered to new participating employers as sponsors who could then ensure membership for their sponsored employees. The Tribunal found that such an arrangement offered financial advantages to an employer and members superior to those which the employer could obtain for itself and its employees by the establishment of a new fund. An added advantage hoped for was to be the availability of past losses of the Fund for the 1989 and 1990 income years, assuming that the Trustee is successful in these proceedings.

THE QUESTIONS

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The notice of "appeal" filed by the Commissioner stated that the "appeal" was on six questions of law. Of those questions only one was relied upon on the hearing of the "appeal". It read as follows:

“Whether, on the facts as found by the Tribunal, the Tribunal should have held that the trusts which were created by the execution on 11 March 1988 of the deed establishing the Control Data Australia Employees Benefits Fund (later known as the Miden Group Superannuation Fund), were extinguished, and new trusts created, by the Deed of Amendment executed on 1 November 1993.”

31

In essence the Commissioner's case was that the objects of the Fund and the obligations undertaken in administration of the Fund, were so altered by the amendments made to the Original Trust Deed on 1 November 1993 that those objects and obligations related to a new entity (whether described as a “Trust” or “Fund”) which commenced on that day. Accordingly, it was submitted, any prior losses able to be carried forward and utilised by the previous “entity” under sections 79E and 80 of the *Assessment Act* were not losses which the new “entity” may deduct from its assessable income pursuant to those provisions.

32

It is the Commissioner's submission that the liability to pay income tax of a taxpayer that is a trustee of a trust entity is governed by the rights and obligations that attach to the trust and that in the instant case the Tribunal, on the facts it had found, was bound to conclude that the Fund had no interest in the losses sought to be deducted under section 79E or section 80 of the *Assessment Act*.

33

The question of law on the “appeal” was whether the Tribunal had erred in failing to reach the only conclusion available to it on facts it had found.

THE CONTENTIONS

34

The Commissioner accepted that sections 79E and 80 applied to the assessment of superannuation entities pursuant to Part IX of the Act at the relevant time and raised no issue in argument as to the identity of any particular person as the taxpayer for those purposes. However, the Commissioner contended that the effect of the Amending Deed, objectively ascertained, was not the effectuation of the continuing purpose of providing superannuation benefits for the employees of Miden Pacific and its subsidiaries. Rather, it was said, its object was to facilitate the marketing of Category C membership and the securing of a competitive marketing advantage by virtue of the availability as deductions of the prior losses in question.

35

The Commissioner's case was based on the proposition that the Amending Deed constituted “*a new charter of future rights and obligations*” - see [Davidson v Chirnside \(1908\) 7 CLR 324](#) at 340-341. It was contended that, in so far as the changes to the Original Trust Deed reflected a move from the purpose of

providing superannuation benefits for the employees of Miden Pacific to the purpose of attracting and administering Category “C” members, there was a resettlement that created new trusts.

36

The thrust of the Commissioner’s contention was that new beneficial interests were created by the introduction of Category “C” members. Because of the change from a defined benefits scheme to an accumulation scheme, the rights of beneficiaries were significantly changed and the rights and obligations under the Original Trust Deed no longer applied. Indeed, any further reference to the Original Trust Deed was redundant because the Amending Deed deleted the whole of the operative provisions of the Original Trust Deed.

37

The Commissioner contended that, while each of the changes might not, in itself, in other circumstances, constitute a resettlement, the changes taken as a part of the whole of the relevant circumstances, lead to the conclusion that there was a resettlement. The change in trustees, the appointment of an administrator and the substitution of very different rules were said not to be conventional or normal responses to changing commercial and regulatory conditions.

38

Rather, they were said to result from a desire to create a structure that would take advantage of the losses in the 1989 and 1990 years of income. Simultaneously with the creation of such new beneficial interests, the concept of the Principal Employer was eliminated. The consequence was that there was insufficient identity between the trust that incurred the losses in the 1989 and 1990 years, on the one hand, and the trust that derived the income in the 1995 year, on the other hand.

39

The Trustee did not accept that the question was whether the amendment constituted a settlement or a resettlement. The Trustee contended that resettlement was not a matter having any relevance to the computation of the taxable income of superannuation funds. Authorities as to resettlement relied on by the Commissioner, concerning the chargeability of instruments to stamp duty, were said to have no application in the present context.

40

Strictly speaking, each time further property is settled on the terms of an existing trust, a new trust is created, albeit on the same terms as the trust constituted by an existing trust instrument - *Truesdale v Commissioner of Taxation* (1969) 120 CLR 353 at 363. However, it could not be contended, said the Trustee, that every time a new employer agreed to make contributions to a fund, a new trust was established for the purposes of the *Assessment Act*. That would be totally inconsistent with the statutory context of a superannuation fund as being an indefinitely continuing fund.

RELEVANCE OF “RESETTLEMENT” ANALYSIS

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The Amending Deed did not, of itself, create new beneficial interests. It merely created the potential for such interests in the event that Category “C” membership was taken up. A comparison of the rights and prospective entitlements of members under the old and new arrangements indicates that they are essentially the same. Under the old rules, a member had:

- • the right to require the Trustee and the Principal Employer to administer the Fund in accordance with the rules;
- • the right to require that the provisions of the Original Trust Deed not be amended except in accordance with the amendment provisions contained in the Deed;
- • an entitlement, subject to the matters referred to made below, to whatever benefits the rules provided on the death, retirement, resignation, retrenchment, disability or illness at the time such event occurred to the member;
- • no entitlement to any specific property.

42

Entitlement to a benefit did not relate to the benefits set out in the rules at the time of joining, or at any time other than the time of the occurrence of an entitling event. Until that time, the member's entitlement could be changed in accordance with amendments properly made to the rules in accordance with the power to make amendments. Under the old rules, the entitlement was hedged about with a number of provisions under which the benefits that a member might appear to have had could be reduced.

43

The only entitlement “*protected*” under the amending provisions of the Original Deed was the member's “*accrued benefit value*”. That depended upon an actuary's opinion under which the accrued benefit value could be limited to the member's equitable share of the value of the assets as at the date of amendment. Such an amount would be more or less equivalent to the amount to which the member would have been entitled under an accumulation fund.

44

Under the regime established by the Amending Deed, the members' rights included:

- • the right to require the proper administration of the Fund by the Trustee;
- • the right to require that the rules not be amended except strictly in accordance with the rules relating to amendment;
- • an entitlement to a benefit specified in the rules, as amended, at the time of the occurrence of the relevant event, namely the time of retrenchment, resignation, disability or illness. The entitlement of the member under the new rules was more certain and less subject to discretionary disqualification

than under the old rules. Specifically, the existing Category “A” and Category “B” members retained their *accrued benefit value* irrespective of any rights acquired by new members;

- • no entitlement to any specific property.

45

Thus, the general rights of members under the new regime are not essentially different from those under the old regime. The Fund, after the changes, continued to be a fund administered for the benefit of employees or former employees of Miden Pacific and subsidiaries. There was no change in the entitlement of the Trustee to admit employers unrelated to Miden Pacific. There was no evidence before the Tribunal that any employer that was not associated with Miden Pacific had sought admission under the old regime.

46

In the course of its reasons, the Tribunal said:

“The fact that companies outside the [Miden] Group would not have made a commercial decision to become a party to the scheme prior to the Deed of Amendment is not material in my view.”

The Commissioner contended that that was a finding of fact that companies outside the “Miden Group” would not have made such a decision. Even if this be correct (which we doubt), the Original Trust Deed, as indicated above, permitted companies unrelated to Miden Pacific to become participating employers.

47

Whether or not the changes wrought by the Amending Deed mean that the Amending Deed effected a resettlement for stamp duty purposes is not to the point. The question is whether the Trustee was entitled, under sections 79E(3) and 80(2) to treat the losses for the 1989 and 1990 income years as deductions from the assessable income of the Fund in the 1995 year of income.

CONTINUITY OF THE FUND

48

In their application to a trust established as part of a superannuation scheme, sections 79E and 80 cannot be construed literally. The “*taxpayer*” referred to in the sections, when applied to a trust, must be taken to refer to the trustee for the time being of the trust. Thus, in so far as section 272 has the effect that taxable income of a superannuation fund is to be calculated **as if** the trustee were a taxpayer, there must be an underlying assumption that the reference is to the person that from time to time acts in the capacity as trustee of the superannuation fund. In a sense, there is a notional person treated as continuing to exist, being the trustee for the time being. Accordingly, the fact that the identity of a trustee, whether individual or corporate, changes from year of income to year of income, would not exclude the availability as a deduction of losses under section 79E or section 80.

49

While the propositions just articulated were accepted by the Commissioner, the Commissioner's contentions do not adequately deal with the consequences of those propositions. Thus, the fact that lack of continuity in the identity of the trustee from income year to income year would not prevent losses in an earlier year being available as deductions from assessable income of a later year, means that criteria must be established for determining when there is sufficient identity of the trusts involved to warrant such deductions being allowable. The Commissioner was not able to refer to any express statutory requirement of continuity, or to any relevant statement of applicable criteria in the legislation.

50

The approach of the *Assessment Act* in relation to trusts is to direct attention to the trust property. "*Fund*" when used in Part IX must mean a "*stock or sum of money, especially if set apart for a particular purpose*" (New Shorter Oxford Dictionary) or a "*stock of money or pecuniary resources*" (Macquarie Dictionary). The use of the term "*trust estate*", which is not defined in the *Assessment Act*, is analogous to the use of the expression 'fund' as that expression is defined and used in Part IX.

51

Neither refers to a legal person. Both terms must be taken to refer to the conglomeration of property in respect of which trust obligations and corresponding rights exist from time to time. Putting it another way, a trust estate or a superannuation fund will be that property the ownership of which is divided between trustee and beneficiary. The trustee will always be ascertainable. However, the class of beneficiaries, while identifiable, will not necessarily be closed and all beneficiaries may, of course, not be ascertainable.

52

The trust obligations of the trustee and the corresponding rights of the beneficiaries may vary from time to time, in accordance with law. Similarly, the property that is the subject of such obligations and rights will not be static. Parts of the property might be distributed so as to cease to be subject to trust obligations. Further property may accrue as income or by further settlement so as to become subject to obligations where previously that additional property was not.

53

However, at any given time it will be possible to identify the property that is the subject of the trust obligations and in respect of which the rights of beneficiaries exist. It is the income which accrues from that property, less outgoings from that property, that go to make up the **taxable income** of the trust estate or fund. Thus, the *Assessment Act* requires a calculation of taxable income in respect of the trust property, to which it sometimes refers as the **trust estate** and at other times as the **fund** (in Part IX).

54

The *Assessment Act* then imposes a liability either on the beneficiaries or, in some cases, on the trustee in a representative capacity. 'Superannuation fund', as that term is defined in the *SIS Act* and the *Assessment Act*, contemplates a continuing regime regulating the manner in which a fund may be added to and the

manner in which payments may be made from it. So long as one can identify a continuity of that regime, that will be sufficient.

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Thus, in order to determine whether losses of particular trust property are allowable as a deduction from income accruing to that trust property in a subsequent income year, it will be necessary to establish some degree of continuity of the trust property or corpus that earns the income from the income year of loss to the year of income. It will also be necessary to establish continuity of the regime of trust obligations affecting the property in the sense that, while amendment of those obligations might occur, any amendment must be in accordance with the terms of the original trust.

56

So long as any amendment of the trust obligations relating to such trust property is made in accordance with any power conferred by the instrument creating the obligations, and continuity of the property that is the subject of trust obligation is established, there will be identity of the “*taxpayer*” for the purposes of section 278 and sections 79E(3) and 80(2), notwithstanding any amendment of the trust obligation and any change in the property itself.

57

In the present case, there has been continuity of the regime regulating the Fund. The amendment that took place in 1993 was in accordance with the provisions of the Original Trust Deed. Further, it is a straightforward matter to trace the continuity of the property that has been the subject of that regime since the 1989 and 1990 income years. Accordingly, there has been sufficient continuity of the Fund from the 1989 and 1990 income years to the 1995 income year. The change of name in 1990 and the change of rules from time to time did not interfere with the continuity of the fund that was established in 1988. It is relevant to note that the Act expressly recognises the legislative regime governing superannuation, and takes that as it finds it. If any concept of continuity is implicit in the relevant provisions of the Act, it more naturally relates to continuity under the separate provisions. If that be the test, it is satisfied here. It follows that there is available, in calculating the taxable income of the Fund for the 1995 income year, the losses incurred in the 1989 and 1990 income years.

58

The conclusion of the Tribunal was therefore correct. Accordingly, the appeal should be dismissed with costs.