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Trusts becoming vehicle of choice as super tax looms

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

The belief that discretionary trusts are being used as a tax haven is “monolithic thinking”, says a top legal specialist. Matthew Burgess, director of View Legal, told SMSF Adviser that the narrative from the government that only the wealthy use trusts to avoid paying higher tax is misinformed and egregious.

Treasury has in recent months intensified its scrutiny of discretionary trusts, believing they have grown in popularity as a tax minimisation method and suggesting they could be taxed more heavily in the future. This notion was raised In Parliament on Wednesday and Prime Minister Anthony Albanese refused to rule out touching trusts as a way to boost government revenue.

ATO figures reveal the total number of trusts used by taxpayers rose by more than 100,000 to 947,000 in the decade to the end of the 2021 financial year.

In 2019, Labor promised to come down hard on income splitting to minimise tax via discretionary trusts and proposed taxing distributions from trusts at a minimum rate of 30 per cent to raise $4.1 billion over four years and $17.2 billion over a decade.

Mr Burgess said with the $3 million super tax legislation now before parliament he is seeing more people exiting assets out of their funds into trusts.

“A trust is the only place they can sensibly relocate assets, but if they change the tax rules on trusts this will spiral further out of control,” he said.

“But the belief that a trust equals tax avoidance is not accurate although it is one that Treasury gets a lot of airtime with. The reality is that you can’t just set up a trust and all these tax savings will suddenly appear. The range of tax benefits in a trust compared to super are minimal at best.”

Mr Burgess said the concepts of trusts date back to the early 1300s and are not a modern invention of wealth retention.

“The actual drivers of a trust have never been any different either. It’s always been about flexibility, asset protection and succession planning,” he said.

“Of course, tax will be a point of discussion, but it is generally way behind the other three and that has been the case since early English law.”

Mr Burgess said in his experience, clients are using trusts now because of a growing distrust around government super policies, particularly around SMSFs.

“With an SMSF, you have to comply with all the legislation changes and that is why trusts are coming back into vogue,” he said.

“Trusts are actually worse from a tax perspective than super, but they are anti-fragile, and have stood the test of time primarily because they aren’t driven by tax incentives.”

He said since the early 2000s, the government has been looking at trusts as another revenue-raising vehicle, with legislation drafted but never enacted.

"It comes back every few years with the government saying 'even though it's a trust we'll tax it as a company', using a flat minimum rate of tax," he said.

"If they do something like that it begs the question that if trusts are supposedly evil the next item on the agenda is that companies are evil – that's the logical extension of the argument."

He added advisers are now being put in a situation where they have to guess what the next step from the government may be.