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NSW trust laws a reminder that government tax grabs are omnipresent

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

State trust laws can be just as detrimental to estate planning as the controversial Federal regulations that are set to come into play next year, Matthew Burgess, director of View Legal said.

Burgess said a prime example is the NSW foreign beneficiary rules in NSW which were implemented with a "zero-tolerance" approach from 1 January 2021. These rules state that any discretionary trust owning residential land in NSW that had not irrevocably excluded foreign beneficiaries by a valid deed of variation by midnight on 31 December 2020 is subject to the additional surcharge until the required variation is implemented.

"Over recent years, the courts have rejected multiple applications for relief from the draconian impact of the rules, on the basis that the legislation permits no waiver of the tax in any circumstances (see, for example, Khalil & Associates Pty Ltd ATF The George Khalil Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 23, Hixson Pty Limited v Chief Commissioner of State Revenue [2025] NSWSC 192 and S Hill Invest Co Pty Ltd ATF Hill Family Trust v Chief Commissioner of State Revenue [2026] NSWCATAD 41)," he said.

"This is despite the fact that the rules could arguably have been crafted to apply only to the category of 'offensive' beneficiaries that parliament claimed to be targeting (foreign residents), by catching only trusts making distributions to foreign beneficiaries in the years those distributions occurred."

Burgess said based on previous cases, it is likely that any trust with NSW land that failed to validly implement the required variation by 31 December 2020 will only be able to avoid the surcharge prospectively, unless a prior attempted variation can be validly rectified.

"Rectification ultimately has three core attributes. The first is that rectification is an equitable remedy to rectify mistakes in the expression in written instruments of prior agreements, which can be by court order or deed (see Chloe Adolphi Pty Ltd as trustee for The Chloe Adolphi Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 48)," he said.

"Secondly, the purpose of the remedy is to make the instrument conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately (see Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 366). And finally, where rectification is granted, the instrument is read as if originally executed in its rectified form. In other words, rectification has retrospective effect (see Issa v Berisha [1981] 1 NSWLR 261)."

He said the decision in Aroosa Invest Pty Ltd as trustee for Aroosa Family Discretionary Trust v Chief Commissioner of State Revenue [2026] NSWCATAD 323 is pertinent to the interplay between the NSW rules and attempts to rectify inadequate historical documentation.

Burgess said the facts of the case include claims that the trustee had not been given notice of the legislation and a subsequent deed of variation failed both to make the exclusion irrevocable and to achieve retrospective effect through rectification.

“On irrevocability, the court confirmed that the relevant deed of variation was inadequate. It used the phrase ‘the terms of the trust are not capable of amendment that would result in a foreign person being a potential beneficiary’,” he said.

“This wording was held ineffective including that the words were descriptive rather than directive and applied only to a potential beneficiary, not a beneficiary.”

He continued that in relation to the potential retrospective effect of the deed of variation, the court confirmed that the question is not whether the retrospective operation of a legal principle affects a third party, but whether it undercuts the operation of a taxing act.

“Where it undercuts provisions designed to protect revenue in the event of default by the primary taxpayer, separate attention must be given at the outset to the statute (see Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184),” he said

“The court also confirmed that generally, the subsequent alteration of rights under a discretionary trust through rectification does not affect the operation of taxing legislation at the time a liability arises (see Keddas Pty Ltd ATF Kaluarachichi Family Discretionary Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 138), even though it may bind the parties to the document and perhaps the beneficiaries (see Bailey v Federal Commissioner of Taxation [1977] HCA 11).”

Burgess said the decision noted that rectification as a concept is “susceptible to much confusion” (see Verona Hill Holdings Pty Ltd ATF Roveto Family Trust v Chief Commissioner of State Revenue [2026] NSWCATAD 69) and rectification by construction aids the construction of an instrument where there are obvious mistakes on its face (see Federal Commissioner of Taxation v Trustee for the Michael Hayes Family Trust [2019] FCAFC 226).

“A court must be satisfied that a deed of rectification did not amend the previous instrument, but instead recorded the subjective intention of the parties when they entered into it. Third parties, including revenue authorities, are not bound by the terms of a deed of rectification. Rather, revenue authorities must assess liability on the taxable facts at the time of the relevant assessment,” he noted.

“Furthermore, if a deed is rectified by court order or by deed of rectification, the rectification is considered to have retrospective effect: the document is read as if it had been executed in its rectified form (see Chloe Adolphi Pty Ltd as trustee for The Chloe Adolphi Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 48).”

However, Burgess said, the court also stated that the retrospective alteration of the parties’ rights or obligations under a rectified instrument may be resisted by third parties to whom rights have accrued (see Gilsan (International) Pty Ltd v Optus Network Pty Ltd (No 2) [2005] NSWSC 38), or where the rectification affects the obligations of parties under statute (see Rowe v Federal Commissioner of Taxation [1982] FCA 93).

“This principle applies with force to revenue collectors, who are bound to determine tax liability on the so-called “taxable facts”: the facts known to and accepted by them when undertaking the assessment process (see Bailey v Federal Commissioner of Taxation [1977] HCA 11),” he said.

“Nevertheless, a deed of rectification approved by the court may still be capable of evidencing the true intention or taxable facts (see Davis v Federal Commissioner of Taxation [2000] FCA 44). In those instances, rectification has retrospective effect for both the parties to the document and third parties.”