REDEMPTION OF UNITS IN A UNIT TRUST: CAPITAL GAINS TAX IMPLICATIONS

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Does redemption of a unit in a unit trust affect the status of the remaining units for the purpose of Part IIIA of the Income Tax Assessment Act 1936? The author endeavours to answer this question by analysing the nature of a unitholder's interest in a unit trust and by examining the treatment of "units" under the Act. He proposes that an application of the traditional principles of property law does not necessarily lead to the conclusion that a variation in unit entitlement creates a different asset, and that the structural content of Part IIIA suggests that each unitholder's interest is discrete.

I. INTRODUCTION

The initial observation to be made about this topic is that it presupposes that unit trusts are entities with precise legal characteristics and, similarly, that units are a homogeneous category. Despite the fact that this is patently not so, it is the premise adopted by the drafter of the Income Tax Assessment Act 1936 (Cth) ("the Tax Act").

There is no satisfactory definition of "unit trust" in the Tax Act. Other definitions such as "public unit trust" exist,[1] but all such definitions assume a certainty of interpretation of the concept of a unit trust, and also, of a unit therein. Yet unlike corporations, which are creatures of statute and are therefore constituted with defined features, unit trusts are regulated only by the constraints imposed by their creators in individual cases, and by the conceptual constraints imposed by equitable doctrines concerning trusts generally and the relevant legislation in each State.[2] The reality is that there are many different permutations of the concept of a unit trust.

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1. S102G.
2. In WA, the Trustees Act 1962 (WA).

II. THE POLICY

The second reading speech of the former Treasurer, Mr Keating, on the presentation of the Bill containing the nascent Part IIIA on 22 May 1986 stated:

> The Bill also provides for the capital gains tax treatment of trusts to parallel their income tax treatment. This will mean, for example, that where a beneficiary in a private trust or a unit holder in a public unit trust is presently entitled to a capital gain made by the trust, it will be taxed in the beneficiary's or unitholder's hands. Where this is not the case, it will be taxed in the trustee's hands. Capital gains tax will also apply to units held in unit trusts, where the units were acquired after 19 September 1985.

Two points of policy can be extracted from this statement. First, that units in trusts are to receive separate treatment as assets unlike other interests under trusts. Secondly, the treatment of such units is to be limited to units which were acquired after 19 September 1985.

The first point has manifestly been implemented in the legislation. Whether the Treasurer's second point is upheld by the legislation is moot, as this article discusses. However, unless one takes the cynical attitude that the Treasurer was being deliberately deceptive, it is plain that it was not intended that interests in unit trusts obtained before 20 September 1985 should be affected by any occurrence subsequently other than a disposal by the unit holder.

III. HISTORY

Unit trusts had their origins in the 19th century at a time when corporate law was finding its feet. The concept suffered a serious set-back when they were held by an English Court to be unincorporated associations under the Companies Act of 1862 (UK).[3] Despite the fact that the case seems to have been wrongly decided[4] there was a hiatus until the 1930s when unit trusts had a renaissance.[5]

Unit trusts were originally designed as vehicles for public investment. The typical format of a public unit trust was a declaration of trust by a trustee in favour of a manager who was the original holder of units in the trust. As members of the public agreed to invest they were assigned units by the manager who also usually agreed to repurchase units from outgoing unit

3. *Sykes v Beadon* (1879) 11 Ch D 170.
4. *Smith v Anderson* (1880) 15 Ch D 247.
5. P H Pettit *Equity and the Law of Trusts* 5th edn (London: Butterworths, 1984) 13.

holders if there was no market. The manager was generally charged with responsibility for managing the enterprise of the trust and received a fee from the trustee for doing so. This basic structure remains typical of public unit trusts today.[6]

Recently, unit trusts have become a favoured vehicle for non public or closely controlled enterprises. It is not uncommon for such unit trusts to have only a small number of unitholders, and occasionally, only one. There is not usually a separate manager of a private unit trust and the trustee is responsible for conducting the affairs of the trust as in the case of a typical family discretionary trust. Unit trusts can be, and are, tailored in their terms to accommodate the particular and varied circumstances of the individuals on whose initiative they are created.

IV. THE PRACTICAL ISSUE

As a matter of practice, units are treated in a very similar manner to shares in companies. They are traded as discrete items of property and the provisions of Part IIIA acknowledge this to be so. I agree with the view of the editors of the *CCH Australian Capital Gains Tax Planner* that for the purposes of Part IIIA the units in the case of a unit trust are to be regarded as the relevant assets so far as the unitholders are concerned, rather than any interest they may have in the assets owned by the trustee.[7]

An assignment of a unitholder's unit in a trust to another party is a disposal of an asset for the purpose of Part IIIA. As in the case of a trade of shares in a company, that transaction will be irrelevant to the affairs of the other equity holders in the unit trust.

Furthermore, if a share or a unit is redeemed by the company or the trustee of the unit trust respectively, this will also be a disposal of an asset for the purpose of Part IIIA. However, whereas the redemption of a share will also be a tax neutral transaction from the point of view of the remaining shareholders in the company, it is not clear whether redemption of a unit affects the capital gains tax position of the remaining unitholders in the unit trust. If the correct analysis of the issue is that it does affect the status of the remaining unitholders, it may have a major consequence if their interests were acquired before 20 September 1985. It is arguable that in that circumstance it will have the effect that the profit arising upon a disposal of the asset

6. R P Meagher and W M C Gummow *Jacobs' Law of Trusts in Australia* 5th edn (Sydney: Butterworths, 1986) para 312.
7. *Australian Capital Gains Tax Planner*, CCH Australia Limited, para 47-265.

which prior to the redemption would have been exempt from tax would thereafter be assessable under section 160ZO of the Tax Act.[8]

Those who argue that redemption is relevant to other unitholders would prefer an analogy between the interest of a unitholder and the interest of a partner, instead of the aforementioned analogy with shareholders.

The issue is not indisputably closed in relation to partnerships either, but it is the generally preferred view that upon the retirement of a partner the surrender of the retiring partner's interest in the partnership results in a corresponding acquisition by the remaining partners of an additional interest in the partnership. If a new partner is subsequently admitted his acquisition of an interest will necessitate the corresponding disposal by the old partners of an interest and a portion of what will have been disposed to the new partner is an asset acquired later than the acquisition by the old partners of their original interests in the partnership. As a result, a liability to capital gains tax may arise. An excellent practical illustration of how this may occur is given by Marks.[9] Woellner, Vella, Burns and Chippindale's commentary endorses the Commissioner's view that a partnership interest is not a discrete asset but will be affected by the admission and retirement of other partners, in addition to the acquisition of other assets by the partnership.[10]

An issue arises in similar terms in relation to the redemption of a unit in a unit trust where the remaining unitholders hold units acquired by them before 20 September 1985. In my experience, it is a common view amongst the promoters of unit trusts that the redemption of units will not have any effect on the status of the remaining units. The purpose of this article is to consider whether this view is correct.

8. M Binnetter, "Structuring Business Entities After The April Tax Statement" (BLEC, 1989) 62-65.
9. B Marks "Partnership Interests and Capital Gains Tax: Some Practical Problems" in R H Woellner, T J Vella, L Burns and R S Chippindale *Australian Taxation Law* 3rd edn (Sydney: CCH Australia Ltd, 1990) para 17-360.
10. Taxation Ruling IT 2540, para 10.

V. THE NATURE OF THE INTEREST

According to Grbich, Munn and Reicher[11] there are seven generally acknowledged characteristics of a unit trust, namely:

(i) the trust is not a separate legal entity;
(ii) the unitholders generally have an interest in all of the property and income of the trust;
(iii) there is no contract between the unitholders themselves;
(iv) the unitholders have unlimited liability to indemnify the trustee in relation to liabilities properly incurred for the benefit of the trust;
(v) the trustee is not the agent of the unitholders, that is, the trustee is not carrying on business on behalf of the unitholders;
(vi) the units are assignable; and
(vii) the unit trust is usually created by the declaration of the trustee or by a contract between the trustee and a manager.[12]

Notwithstanding that the above list is a useful guide in understanding the circumstances in which a trust may be meaningfully described as a unit trust, the contents are nevertheless only indicia of common understanding or practice and they are not legally prescribed criteria.

Heading and Mitchell refer to the existence of "hybrid unit trusts" and observe that:

> With a unit trust the entitlement of the beneficiaries in respect of trust income and capital is usually fixed by reference to the number of units held. However, this is not always the case. Some more innovative trust deeds have the beneficiaries' interest under the trust quantified in units (often for ease of assignment). However, the trustee may nonetheless retain discretionary powers with respect to distribution of income or capital to all or some classes of units.[13]

Thus, although it is convenient for general discussion purposes to consider issues in relation to unit trusts on the assumption that a trust described as a unit trust will have certain characteristics, it would be unwise to draw any conclusions about any particular unit trust based on general

11. Y Grbich, G Munn and H Reicher *Modern Trusts and Taxation* (Sydney: Butterworths, 1978) 41.
12. Contrast with a discretionary or fixed trust where an asset is settled on the trustee by a third party for the benefit of a named beneficiary or class of beneficiaries or purpose.
13. J B L Heading and R B Mitchell "CGT Implications on the Winding Up of Trusts" *CCH Journal of Australian Taxation* (1990) vol 1 no 4, 13.

statements. The constituent documents of each and every trust need to be examined before endeavouring to answer the question raised in this article.

With the above reservation, it is fair to say that typically, "units are declared to confer on a unit holder an interest in the trust fund as a whole but no interest in any separate parts of the trust fund".[14]

It will be assumed for present purposes, unless stated otherwise, that the unit trust under discussion will be subject to a trust deed in these terms. Accepting that each unitholder has an equivalent interest in the trust, it is then necessary to consider the nature of that interest.

The case which is invariably cited when discussing the nature of a unitholder's interest is *Charles v Federal Commissioner of Taxation*[15] ("*Charles*"). The appellant in that case was an investor who held units in a unit trust which was constituted by a declaration of trust containing provisions limiting the trustee's investments to certain securities. The deed in *Charles* specifically provided that the trust fund of the trust was to be held in trust for the certificate holders, that is, the unitholders. The High Court held that a distribution of a share in the profits from realisation of the capital investment of the trust was not assessable income on ordinary precepts.

This case was principally concerned with whether the taxpayer was involved in a profit-making scheme and whether, therefore, the capital profit was income for the purpose of the Tax Act. The Court refused to draw an analogy between the distribution to the unitholders of a capital profit derived by the trustee and the declaration of an extraordinary dividend by a company as a result of realisation of a capital profit (which would clearly be income in the hands of the shareholder).

It is significant that the High Court was not influenced against the taxpayer by the fact that units were generally acquired at a price in excess of the proportional value of the assets of the trust. The additional sum was acknowledged to be payable as a method of rewarding the manager of the trust who did not receive fees otherwise. Notwithstanding that it was reasonably clear that the intent of the investor was to obtain a right to receive income, being a share of the income earned by the trustee on its investments, and not to invest in property the Court ruled that:

> [A] unit held under this trust deed is fundamentally different from a share in a company. A share confers upon the holder no legal or equitable interest in the assets of the

14. H A J Ford and W A Lee *Principles of the Law of Trusts* 2nd edn (Sydney: Law Book Co, 1990) para 2304.5.
15. (1954) 90 CLR 598.

> company; it is a separate piece of property.... But a unit under the trust deed *before us* confers a proprietary interest in all the property, which for the time being is subject to the trust of the deed....[16]

Having determined that a unit is fundamentally different from a share and is not a piece of property in itself legally separate from the assets of the trust still leaves us far short of a resolution of the issue raised at the outset of this article. There can be no doubt that the interest of a beneficiary in a trust, whether it is expressed as a unit or not, is an asset for the purpose of Part IIIA because of the broad definition of "asset" in section 160A, which includes:

> (a) an option, a debt, a chose in action, *any other right*, goodwill and any other form of incorporeal property....[17]

The most fundamental right which a beneficiary, including a unitholder, has under a trust is what is known as the right to due administration of the trust. This is a reference to the beneficiary's capacity to enforce the terms of the trust against the trustee. That right may be described as an equitable chose in action,[18] and is an asset for the purpose of Part IIIA.

Furthermore, as stated by Ford and Lee:

> In some trusts the rights of a beneficiary under the trust are not adequately described by saying that the beneficiary has an equitable chose in action. That will be an adequate description where he is the object of a discretionary trust and his right can be put no higher than a right to due administration of the trust. But if the trust is one under which the trustee holds specific property on trust to transfer his title to it to the beneficiary whenever the beneficiary calls on him to do so, there is a natural tendency to say that though the trustee may be the owner of that property at common law the beneficiary is the owner of it in equity. In other words, the beneficiary is thought of as having not only rights of due administration giving him a proprietary claim to have the property restored to the trust in the event of maladministration but also a right to claim the specific property *for himself* if he so wishes. In such a trust, the beneficiary is treated as having an equitable proprietary interest in the very property held by the trustee.[19]

16. Ibid, 609 (emphasis added).
17. Emphasis added.
18. Ford and Lee supra n 14, para 148. Compare with *Gartside v Inland Revenue Commissioners* [1968] 1 All ER 121 Lord Wilberforce, 134:

    > [It] may be a right with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed.

19. Ibid.

It is also possible that, depending upon the terms of the trust or the powers of appointment which have been exercised under it, beneficiaries may have additional contractual interests. Ford and Lee state that:

> The unitholder's interest has two aspects: the unitholder has not only part of the beneficial ownership of all the assets of the trust but also important rights as against the manager, such as the right to require the manager to buy back the unitholder's interest.[20]

These rights would be in a different category to the beneficiary's usual right to due administration.

The critical issue is whether the interest or right which the unitholder has in the trust is the type of asset in which the other unitholders have a degree of shared ownership so that the surrender of that asset by the retiring unit holder has the effect of increasing or otherwise affecting the degree of ownership held by the remaining unitholders. Put another way, the issue is whether the other unitholders who have equivalent entitlements under the trust thereby have a share in the "asset" held by the retiring unit holder or whether they hold a different asset of an identical type. If the latter, it would warrant the conclusion that a redemption of a unit had no effect on the status of other units and the analogy with the change in partnership interests would not be valid.

The right to due administration is an equitable interest (or "mere equity") which entitles the beneficiary to sue the trustee if the assets of the trust are not dealt with for the benefit of that beneficiary in the manner contemplated by the terms of the trust. In my view, as any single beneficiary would be entitled to commence proceedings in his or her own name without joining the other beneficiaries, that equitable interest is a personal asset of the beneficiary, albeit that the other beneficiaries have similar assets.[21] The conclusion is only decisive of the issue if the right of due administration is the only interest of the unitholder in the trust and there is no proprietary interest in the assets.[22]

It appears to be a widely held view that even in the case of trusts under which the objects and their entitlement are not discretionary, the terms of the relevant trust deed can be drafted to preclude the beneficiaries from having a proprietary interest in the underlying assets of the trust.[23]

20. Ibid, para 2304.6.
21. Meagher and Gummow supra n 6, para 2303.
22. In this regard note the effect of s 160V(1) of the Tax Act.
23. See Pettit supra n 5 and Meagher and Gummow supra n 6, para 315.

However, the fact that a beneficiary has a right to due administration may in itself constitute an interest in the trust. In *Horton v Jones*,[24] Justices Rich and Dixon of the High Court of Australia were required to consider whether an oral promise to bequeath an interest in a deceased estate containing land was unenforceable because it failed to comply with a provision of the English Statute of Frauds 1677. The Court held that they did not need to determine that the promisor had any more than an equitable right to due administration of the deceased estate to find that the promisor had an interest in land.

If, as in *Commissioner of Stamp Duties (South Australia) v Softcorp Holdings Pty Ltd*[25] ("*Softcorp Holdings*"), a unit holder is entitled to "an undivided part or share in the trust fund" then we are concerned with a proprietary interest in the assets of the trust fund.

Softcorp Holdings was concerned with the interpretation of section 71(5)(e) of the Stamp Duties Act 1923 (SA) which exempts certain transactions from conveyance duty, including "a transfer of property to a person who has the beneficial interest in the property by virtue of an instrument which is duly stamped".

The facts of the case were that the trustee had transferred by the way of in specie distribution one quarter of a parcel of shares held by the trustee to each of four unitholders. The Commissioner of Stamp Duty argued that the unitholders did not have "the beneficial interest" in the particular share transferred to them. The Commissioner placed emphasis on the existence of the article "the", submitting that its existence necessitated that the beneficiary have the exclusive beneficial interest in the property transferred in order for the exemption to apply. Justice Bollen of the South Australian Supreme Court rejected this submission and stated that:

> The very nature of what was declared in the trust documents and what happened means that each [unit holder] had the beneficial interest in an equal number of shares.[26]

This case is relevant to the issue of whether the existence of one unitholder's interest in trust assets affects the interest of another unitholder in the same assets quantitatively. In my view it follows from the reasoning in *Softcorp Holdings* that an interest, being an undivided share in the trust fund, is a whole or an entire interest and therefore a whole or entire asset for the purpose of Part IIIA of the Tax Act. The asset being the entitlement to a share

24. (1935) 53 CLR 475.
25. (1987) 18 ATR 813.
26. Ibid, 818.

in the assets is not partitioned by the grant of a similar beneficial interest to another party. Similarly, the redemption of a unit which results in the surrender of another unitholder's beneficial interest in the trust asset would not affect the remaining unitholders' interests.

Although on one view it may seem strange that one of four units giving an entitlement to a one-quarter share in an asset of a trust would be the same asset if another unit is redeemed as a result of which each unit now gives rise to an entitlement to one third of the same trust asset, it is not inconsistent with the orthodox theory of property law. Although it is normal to speak of an object, for example, a car, as "my asset", as though the terms are synonymous, that is not strictly correct. Ownership of an object means a right to control that object, notably to exclude others from using it. In other words, the true asset is the parcel of rights giving the right to possession of the car.[27] The remaining unitholders' rights of possession or control over their assets, being their respective interests in the trust, are unaffected by the redemption.

It aids understanding to recognise that ownership is not concerned with value and that the reference to a number of units in a trust is merely a formula for valuing the particular unit holder's interest in the trust assets. An alteration in the number of units does not affect the quality of the rights attached to the interest represented by the units.[28]

On the other hand, the very use of the word "share" in many trust deeds is a retort to the proposition that a unit holder's asset is to be considered in isolation from the asset of a co-unitholder. As it could reasonably be argued that the unitholders are co-owners of the equitable interests in the trust assets, the consequences of co-ownership need to be considered.

> The essential characteristic of co-ownership is the right to the entirety of the object so that each co-owner exercises his right over the whole. His interest is in the whole of the object and not to a specified part. This is sometimes described as the "unity of possession", but such a phrase, while apt in relation to a tangible object is not applicable to an intangible object which is itself, ex hypothesi, incapable of possession. It is therefore preferable to describe the characteristic as an interest in the whole as distinguished from a part of the whole.
>
> While the whole proprietary interest may be sliced up into a number of different specific interests (eg in land there may be the holder of an interest in fee simple and the holder of an interest in a lease), the whole proprietary interest is distributed when there is a joint tenancy or tenancy in common only in the sense of giving interest in the whole (eg A, B and C are joint holders of an interest in fee simple). The participants share in the unity. The only unity which exists where there are specific interests is the rather artificial one of the whole proprietary interest.

27. D C Jackson *Principles of Property Law* (Sydney: Law Book Co, 1967) 8.
28. *Read v Commonwealth* (1988) 167 CLR 57 Mason CJ, Deane and Gaudron JJ, 356.

> The first case is analogous to an orange sliced into various pieces with a person holding an interest in each. Put them together and one has the whole, but they are separate pieces. The second case is the unsliced orange with perhaps the same number of persons as in the first case but each claiming a share in the whole - a share as yet physically unspecified - but a share nevertheless.[29]

The ownership by the trustee of the legal estate in trust assets plus the beneficiaries' co-ownership of the beneficial interest in the trust assets is an example of the first case mentioned in this quote. The amalgam of the legal estate and the beneficial interest will compromise the whole. The beneficiaries' co-ownership of the beneficial interest is an example of the second case.

Co-ownership is traditionally divided into two categories, joint tenancy and tenancy in common. In the majority of cases, co-ownership by unitholders would not be as joint tenants for a number of reasons, not least of which is that one of the requirements of a joint tenancy is that each joint tenant must have the same proportionate interest in the whole. Further more, a joint tenancy involves a right of survivorship. Generally, therefore, if it is appropriate to describe unitholders as co-owners of trust assets, they will hold as tenants in common.[30]

> A tenancy in common is similar to a joint tenancy in that it exists where a number of persons jointly share the whole proprietary interest.
>
> In contrast to a joint tenancy the only unity required in a tenancy in common is the unity of interest, although those unities that are required for a joint tenancy may exist in a relationship of co-ownership which, because of lack of the right of survivorship or the mode of creation, is a tenancy in common rather than a joint tenancy.
>
> Moreover, as there need be no unity of interest, in the sense of need for identical types of interest, time or title in a tenancy in common the alienation by one tenant does not necessarily destroy the relationship as it does in relation to a joint tenancy. It will continue to exist as long as the shares of the tenants are undivided parts of a whole.[31]

It is arguable that a co-owner who is a tenant in common has an asset, being an undivided share in property which is not affected by the alienation of a co-owner's interest. However, that may only be true so long as the alienation is in favour of another party and is not to the tenant in common

29. Jackson supra n 27, 129.
30. Consistently, it is presumed that partners hold as tenants in common unless agreed otherwise. See P F P Higgins and K L Fletcher *The Law of Partnership* 4th edn (Sydney: Law Book Co, 1981) 142.
31. Jackson supra n 27, 134.

himself (which would include, effectively, a surrender).[32] The interests of tenants in common are invariably expressed in fractions, and the acquisition of another's interest would result in a bigger fractional entitlement. However, the question whether that is merely a measure of value, or constitutes a new asset is difficult to answer.

VI. RELEVANT PROVISIONS IN THE TAX ACT

As J De Wijn has argued:

> [T]he use of the term 'unit' in trust deeds, partnership agreements, superannuation schemes or insurance is merely a drafting or accounting tool. It enables one to cut down on the number of pages used. A unit in a trust is merely a means of describing or quantifying one's interest in a trust just as a unit in a unit partnership is a means of conveniently dealing with partnership equity .... [T]here is nothing under a unit trust deed which cannot be provided for under an 'ordinary' trust.[33]

I would adopt De Wijn's statement wholeheartedly as a correct expression of trust law. Nevertheless, the Tax Act clearly distinguishes trust units from other types of interest in trusts. In relation to assessability of income, Divisions 6B and 6C of Part III (applying to "corporate unit trusts" and "public trading trusts" respectively) effectively treat units in such trusts as shares in a company.

In Part IIIA itself, there are numerous provisions which refer specifically to units to the exclusion of other interests and trusts. Correspondingly, Division 6 of Part IIIA is entitled "Trusts other than Unit Trusts". Although such a distinction is explicable as an acknowledgment of commercial reality, it is noteworthy that the distinction is maintained even when the treatment of the two types of interest is the same. Section 160ZM(1) refers to payments by trustees to beneficiaries "in respect of an interest or units in the trust".

Just as Part IIIA is painstaking in creating a distinction between units and other interests in a trust, it creates a clear parallel between units and shares in companies. Consider the following parallel provisions:

Division 7 - Bonus Units in a Unit Trust;
Division 8 - Bonus Shares;
Division 10A - Rights to Acquire Units in a Unit Trust;

32. It is noteworthy that s 160ZN which deems a surviving joint tenant to have acquired a half share interest from the deceased implies that a tenant in common who acquires an additional interest thereby had two separate interests, at least for the purpose of the timing of the acquisition.

33. J De Wijn *Discretionary Trusts and Private Unit Trusts* Taxation Institute of Australia, Intensive Seminar on Capital Gains Tax, 1987.

Division 11A - Unit Trust – issued Options to Unitholders to Acquire Unissued Units;
Division 11 - Company-issued Options to Shareholders to Acquire Unissued Shares; and
Division 12A - Convertible Notes - Unit Trusts;
Division 12 - Convertible Notes - Companies.

Even more parallel provisions are noted by Cooper, Krever and Vann who make the following observation:

> So extensive is the correspondence of tax treatment of companies and unit trusts under the capital gains tax that it is arguable that the reasoning of the *Charles Case* is not applicable in this area, and that a unitholder is not to be treated as having an interest for capital gains tax purposes in the property of the unit trust.[34]

One parallel treatment of units and shares which is particularly significant in the context of this article is contained in section 160M(5). Subsection 160M(5)(aa) provides that:

> An issue of units in a unit trust by the trustee of the unit trust constitutes an acquisition of the units by the person to whom they were issued but does not constitute a disposal of the units by the trustee of the unit trust.

Subsection 160M(5)(a) is a provision in similar terms with respect to the issue or allotment of shares. The provision concerning shares is clearly consistent with the usual principle that an issue or allotment of shares is not a conveyance and is never the subject of stamp duty - unlike a transfer of shares. As a share is akin to a chose in action in a company, it is not consistent with corporate theory that a company can hold its own share as an asset.[35]

Nevertheless, because of the deeming provision in section 160M(6), it was clearly prudent to enact section 160M(5)(a) because otherwise the allotment of the share might have been deemed to be an asset which did not previously exist but was created by the disposal.[36] However, I am not convinced that it was necessary because it is difficult to see how a person can dispose of an asset which he does not own.[37]

As observed previously, an issue of units will bestow on the unit holder a proprietary interest in the underlying assets and an equitable chose in action, being the right to due administration. With respect to the equitable chose in

34. G S Cooper, R E Krever, R J Vann *Income Taxation: Commentary and Materials* (Sydney: Law Book Co, 1989) 907.
35. H A J Ford *Principles of Company Law* 5th edn (Sydney: Butterworths, 1990) para 838.
36. *Australian Capital Gains Tax Planner* supra n 7, para 11-230, page 16, 203.
37. See the comments of Justice Hill in *Federal Commissioner of Taxation v Cooling* (1990) 90 ATC 4472, 4487.

action there is a genuine parallel with the case of shares. With respect to the proprietary interest, it can be argued that section 160M(5)(aa) is unnecessary because the legal ownership of the trustee in the asset of the trust has not altered and the trustee never had any beneficial ownership which is the interest which the new unitholder obtained. If any other parties' interests have altered as a result of the acquisition of the unit it would be that of the other existing unitholders. Can a conclusion that other unitholders are not affected be drawn from the fact that the legislation does not refer to these pre-existing unitholders? If the view that redemption affects remaining unitholders is correct, it should apply equally to pre-existing unitholders upon the issue of new units.

Perhaps the most striking example of parallel treatment of units and shares under Part IIIA occurs in sections 160ZZPA and 160ZZPC. The first mentioned section provides roll-over relief in the event of an exchange of units in the unit trust for shares in a company where the company becomes interposed between the original unitholders and the unit trust after a reorganisation. The effect of the roll-over relief is that the shares are deemed to have been acquired at the same time as the units were originally acquired.

Section 160ZZPC provides for similar roll-over relief for shareholders, as opposed to unitholders, where under a reorganisation they subsequently become the shareholders in an interposed holding company of the original company. The most dramatic aspect of this example is that section 160ZZPC does not trouble to reiterate the whole of the provisions of section 160ZZPA but deems the provisions of that section to apply as if "references in that section to units in the unit trust shall be read as references to shares in the original company".[38]

The fact that Parliament perceives a need for roll-over relief in the above circumstances is, I submit, inconclusive to the issue with which this article is concerned. One cannot draw from these provisions an implication that redemption does affect the beneficial ownership of all units because the provisions concern the case where the entire beneficial interests in the trust are being transferred to an interposed company which is clearly a separate legal entity.

38. S 160ZZPC(b).

However, section 160ZZPAA does assist in the drawing of some conclusions on the issue. Subsection 160ZZPAA(1) provides that the section applies where:

(a) after 28 January 1988, the trustee of a unit trust redeems or cancels all the units of a particular class in the unit trust;

(b) a taxpayer holds units of that class in the unit trust (in this section called the "original units");

(c) ....;

(d) the trustee of the unit trust issues to the taxpayer other units in the unit trust (in this section called the "new units") in substitution for the original units;

(e) the market value of the new units immediately after they were issued is not less than the market value of the original units immediately before the redemption or cancellation;

(f) the taxpayer did not receive any consideration other than the new units because of the redemption or cancellation....

The other provisions of that section enable the taxpayer to elect to obtain roll-over relief in respect of the new units. That roll-over relief is clearly confined to the taxpayer whose units were cancelled or redeemed and not any other unitholder of the trust. This is strong support for the proposition that the redemption of units does not affect the status of the remaining units in the trust. The argument has two limbs. First, it is clear from the fact that roll-over relief is provided that Part IIIA is concerned with the unit as an asset itself and rejects the "proprietary interest in trust assets" approach. If the latter view had been followed, no relevant change would have occurred. Secondly, despite the perceived need for roll-over relief for unitholders taking an active part in the transaction, the legislation does not grant any similar relief to the remaining unitholders, notwithstanding that they are more deserving of it as the passive parties. The most logical explanation for the omission is that it is not necessary because a transaction involving the redemption of some units is irrelevant to other units.

Admittedly, section 160ZZPAA is not applicable unless the whole of the units of a particular class are cancelled or redeemed but I do not consider that that lessens the strength of the argument because classes of units may be categorised otherwise than by reference to an exclusivity of interests in the assets of the trust. For example, one class may have a preferred income right but both classes may be entitled to share equally in the capital of the trust.

Of course, the Commissioner of Taxation is not bound to be consistent in the interpretation of expressions used variously throughout the Tax Act. For example, see Taxation Ruling IT 2004 issued prior to the enactment of Part

IIIA. The Commissioner drew a distinction between a distribution of a capital profit by what he described as "short term" and a "long term" property trust. In the former, such distributions were assessed as income similar to a dividend in a company and under the later category were treated as a capital receipt which was at that time, tax free. This significant distinction was made by the Commissioner based not on any conceptual difference in the nature of the trusts concerned, but on an assessment of the prospective life of the trust. An arbitrary benchmark of ten years was named, although admittedly scope for flexibility was indicated in the ruling.

VIII. CONCLUSION

Unfortunately, the preceding analysis does not lead to a definitive answer to the question raised in this article. Nevertheless, I venture some tentative conclusions.

If one analyses the issue using orthodox principles of trust law, the immediate conclusion is that all unitholders have a shared proprietary interest, and that leads to the further conclusion that a variation in the share creates a different asset, either in addition to or in substitution for the asset represented by the original interest.

The challenge to orthodoxy that I would make is to query whether the second of the above conclusions is a necessary result of the first. I submit that there is a reasonable argument that the interest of unitholders in the same trust are "shared" only in the sense that they are identical in nature, but that they are nevertheless separate.

The alternative approach to the issue is to consider it in the context of the treatment of units generally in the Tax Act, and particularly Part IIIA. On that approach, to the extent that it can be isolated from the former, it is tempting to draw some emphatic conclusions. There is a very clear implication in Part IIIA that units are to be given identical treatment to shares in companies. If this treatment were to be universal, as fairness would dictate, the question raised at the outset would be clearly answered in the negative. Unfortunately, to paraphrase a famous quote, taxation is not about fairness, but about revenue!