Moignard and Commissioner of Taxation (Taxation) [2015] AATA 841 (30 October 2015)

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| Division | **TAXATION & COMMERCIAL DIVISION** |
| File Number | 2012/3591 |
| Re | Stephen Moignard |
|  | APPLICANT |
| And | Commissioner of Taxation |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President K Bean** |
| Date | **30 October 2015** |
| Place | **Adelaide** |

The Tribunal decides that Mr Moignard’s application for leave to adduce further evidence at the rehearing of this matter is allowed in part as follows:

1. Leave is granted for Mr Moignard to adduce and rely on one additional document at the rehearing, namely, the “Audit Report” prepared by the Australian Taxation Office in 2003, and obtained by Mr Moignard after the original hearing via a Freedom of Information request; and
2. Leave for Mr Moignard himself to give further evidence at or for the purposes of the rehearing is refused.

............... [Sgd] ..........................................

**Deputy President K Bean**

# Catchwords

PRACTICE AND PROCEDURE - Appeal to Federal Court allowed - Matter remitted to Tribunal for rehearing - Order that unless proper cause shown to Tribunal, no further evidence to be adduced - Applicant sought leave to adduce further oral and documentary evidence - Relevant topics canvassed during applicant's oral evidence at original hearing - Application to adduce further oral evidence refused - Applicant granted leave to rely on one additional document only.

# Cases

Commissioner of Taxation v Moignard (2015) 228 FCR 456

Re Moignard and Commissioner of Taxation [2014] AATA 342

# REASONS FOR DECISION

**Deputy President K Bean**

**30 October 2015**

1. The substantive application in this matter relates to the correct income of the applicant, Mr Moignard, during the 2007/2008 tax year. In particular, it concerns whether Mr Moignard was ‘presently entitled’ to certain trust income during that year, such that he incurred a tax liability with respect to it.
2. The matter was first heard by the Tribunal, constituted by Senior Member Dunne, on 26 November 2013, and Senior Member Dunne handed down his decision on 30 May 2014,[[1]](#footnote-1) setting aside the decision under review. However, the Commissioner subsequently appealed that decision to the Federal Court of Australia and that matter was heard before his Honour Justice White on 2 February 2015.
3. On 3 March 2015, his Honour handed down his decision allowing the appeal and remitting the matter to the Tribunal for rehearing.[[2]](#footnote-2) In addition to ordering that the matter be remitted for rehearing *“before another member of the Tribunal”*, his Honour ordered that *“unless proper cause is shown to the Tribunal, no further evidence is to be adduced”* at the rehearing.
4. On 23 April 2015, Mr Moignard applied for leave to adduce further evidence[[3]](#footnote-3) and the Commissioner subsequently indicated that he opposed that request. An interlocutory hearing was accordingly held in relation to the issue before me on 3 August 2015, and it is that issue which is the subject of this Decision.
5. It is appropriate that I briefly describe the substantive issues that remain in dispute between the parties and the context in which they arise, before addressing Mr Moignard’s request for leave to adduce further evidence more directly.

# the substantive issues

1. As noted in the Commissioner’s written submissions in relation to this issue, *“the central issue in dispute at the original hearing was whether the Applicant was presently entitled to the whole or any part of the income of the Rupert Street Trust (RST) for the year ended 30 June 2008.”*[[4]](#footnote-4)There is no dispute that at all relevant times, Mr Moignard was the trustee and also a beneficiary of the Rupert Street Trust (“RST”) (later renamed “the Hundred of Comaum Trust” (“HoCT”).[[5]](#footnote-5)
2. His Honour concluded that the terms of the trust deed of the RST were relevant to that question. He described the effect of the trust deed as follows:

In short, the RS/HoCT is a discretionary trust by which the trustee may “pay, apply or set aside” the net income of the trust for any one or more of the general beneficiaries or may accumulate that income. If the trustee does not make a valid determination as to the net income of the trust fund by the end of each accounting period, then the trustee holds that income on a separate trust for each of the named default beneficiaries, who include Mr Moignard.[[6]](#footnote-6)

1. Later in his reasons, his Honour noted:

Having regard to the burden of proof on Mr Moignard, the elements of present entitlement for the purposes of s 97, and the provisions in the trust deed, it was necessary for Mr Moignard to satisfy the AAT that:

(a) he had not made a “determination” of the kind contemplated by clause 3 before the end of the 2007-2008 year to “pay, apply or set aside” the income of the RS/HoCT for his own benefit;

(b) he had before the end of the 2007-2008 year made a valid determination as to the payment, application or setting aside of the trust income to some other beneficiary (so that the default provision in clause 3(4) of the trust deed which would have resulted in him having one-third of the net income was inapplicable).[[7]](#footnote-7)

1. Ultimately, his Honour concluded that the Tribunal as previously constituted had not addressed all of the issues arising for its determination on the review:

In particular, it determined the issue of “present entitlement” without recourse to the trust deed and without addressing, and making the necessary findings of fact concerning, the question of whether Mr Moignard had, in the 2007-2008 year, made a determination or determinations with respect to the payment, application or setting aside of the net income of the RS/HoCT.[[8]](#footnote-8)

# the EVIDENCE SOUGHT TO BE ADDUCED

1. Mr Moignard now seeks leave to give further evidence, including the following:

1. In my capacity as the trustee of the Rupert Street Trust, I decided during the course of the year of income ended 30 June 2008, and prior to that day, to give the whole of the net income of the trust – which comprised profits generated from the sale of the property at Rupert Street – to the Wine Logistics Trust.

2. I did not intend to distribute any net income of the Rupert Street Trust to myself, or to accumulate in the Rupert Street Trust.

He states that:

It is the **whole** of my case that my decision was an exercise of my powers to appoint or distribute income of the Rupert Street Trust as provided for by the trust deed, and that by my so deciding, the Wine Logistics Trust became presently entitled to the net income of the Rupert Street Trust during and for the year of income ended 30 June 2008.[[9]](#footnote-9) (emphasis in original)

1. He also seeks to give evidence as to why the Wine Logistics Trust (“WLT”) needed this money, and to explain why he decided to distribute the net income of the RST to the WLT. In addition, he seeks to give evidence as to the use of the funds:

… to corroborate my evidence of my decision to distribute or appoint the net income of the Rupert Street Trust to the Wine Logistics Trust in the year ended 30 June 2008, as the money that that net income represented was in fact expended by the Wine Logistics Trust in that year.[[10]](#footnote-10)

1. In his application for leave, Mr Moignard also stated that the reasons for the application included the fact that:

… I did not clearly give this evidence at the prior hearing before the Tribunal. With the benefit of hindsight, and having now read the transcript of the prior hearing, it is plain to me that I conflated my evidence and my submissions.[[11]](#footnote-11)

1. At the interlocutory hearing before me on 3 August 2015, Mr Moignard also sought leave to adduce an additional document, namely an “Audit Report” prepared by the Australian Taxation Office (“ATO”) in 2003, which I understand he obtained after the original hearing via a Freedom of Information request. In particular, he relies on a paragraph in that document which concludes that he was at the *“high risk end”* of the compliance model, and says that this is an indication of the ATO’s attitude towards him.

# The Commissioner’s position

1. The Commissioner does not oppose Mr Moignard’s request for leave to adduce the document referred to immediately above, which the Commissioner accepts came into Mr Moignard’s possession after the original hearing. However, with respect to his application to adduce further oral evidence, the Commissioner submits that Mr Moignard *“had ample opportunity to give, and did give, his evidence on this issue at the original hearing* *and he should not be given an opportunity to effectively reconstruct that evidence”*.[[12]](#footnote-12) The Commissioner also contends that *“the evidence [Mr Moignard] now seeks to give is contradictory to his earlier evidence…”.*[[13]](#footnote-13)
2. In particular, the Commissioner points to Mr Moignard’s evidence at the previous hearing to the effect that decisions regarding whether amounts were being distributed to a beneficiary were made following the end of the relevant income year on the advice of his accountants.[[14]](#footnote-14) The Commissioner also points to the fact that the Federal Court identified a number of elements of the evidence presented by Mr Moignard which were inconsistent with him (as trustee of the RST) having made a distribution of the whole of the income of the RST to the WLT within the terms of the trust deed.[[15]](#footnote-15)
3. With respect to Mr Moignard’s concern that matters put to the Tribunal as submissions at the original hearing should have been given as evidence, the Commissioner submits that:

Whether words spoken in the witness box should be treated as evidence or submissions is a question which … [c]an be addressed on the rehearing without the Applicant needing to return to the witness box and change what he said … .[[16]](#footnote-16)

# the parties’ submissions

## Applicant’s submissions

1. In his written submissions provided prior to the hearing on this issue, Mr Moignard contended that the Court had not intended to prevent him from giving further evidence:

However, Justice White ordered a rehearing, not a replay. The taxpayer argues that the limitation on adducing new evidence was made purely to enhance judicial efficiency, to save unnecessary tribunal resources, and not a prohibition designed to pre-determine the outcome of the rehearing – which he was clearly aware would turn on additional evidence being given by the taxpayer, seeing he had referred to an absence of key evidence on which to base inferences of trustee intention. If Justice White had intended to determine the outcome of the matter there and then, he had the power to do so and he did not.[[17]](#footnote-17)

He also contended that the evidence he now seeks to adduce is ‘fresh’ in the sense that:

… it was irrelevant regarding the Commissioner’s previous case and was not therefore adduced, but since the Commissioner’s case has evolved the evidence has become relevant and therefore “fresh” – and necessary to meet the Commissioner’s new allegations”.[[18]](#footnote-18)

1. Mr Moignard also submitted:

Fairness demands the taxpayer has the opportunity to shore up its case as the Commissioner has fundamentally changed the case the taxpayer has to answer.[[19]](#footnote-19)

1. He further contended that he should have an opportunity to address by way of evidence the inconsistencies identified by the Court and the Commissioner. He pointed out that:

The Commissioner will have the opportunity to cross-examine the taxpayer if he so desires, which should provide ample opportunity to test the credibility of the evidence.[[20]](#footnote-20)

1. In his oral submissions, Mr Moignard contended that all that was missing from his earlier evidence was a clear statement from him that he intended to distribute the income from the RST to the WLT in the relevant income year. He said he did not make that statement in evidence, partly because he was self-represented and did not understand its relevance. He acknowledged that he may have made the statement in submissions, but contended it would be a gross injustice not to allow him to confirm/clarify this in evidence. He reiterated that the Commissioner’s case had evolved and changed from that put forward at the original hearing, and he should be given the opportunity to meet that case. He acknowledged that if on the rehearing the Tribunal decided to treat some of his opening statements as being in the nature of evidence, this would go some way toward alleviating his concerns. However, he contended that this would not cure what he saw as the fundamental injustice of him not being allowed to adduce additional evidence to meet the Commissioner’s new case.
2. In the written transcript he provided of his oral submissions, Mr Moignard stated:

… where the respondent’s case is significantly different from that mounted at first instance, it would be entirely inappropriate to disallow the applicant the opportunity to provide evidence that can establish why the respondent’s new claim is excessive, and as to what the true taxation liability should have been.

There is no dispute between the parties that it is imperative to the applicant’s case that additional evidence relevant to the question of trustee intent be led. Justice White specifically referred to the lack of this particular evidence. The rehearing would be a forgone [sic] conclusion and a significant waste of judicial resources if the evidence is disallowed. Further, such an outcome would almost certainly not be the end of these torturous matters and ultimately would lead to further litigation.[[21]](#footnote-21)

1. By way of elaboration of his original request, Mr Moignard also explained that the evidence he sought to lead was in three parts:

a. A simple statement of the trustee’s intention to distribute profits from one trust against losses in another during the relevant financial year;

b. Further clarification by the trustee of the intention and purpose of contemporaneous documents already adduced that further evidences this intention; and

c. New documentary evidence obtained under FOI referred to earlier and relevant to the respondent’s original decision to refuse the objection that is the root cause of this action. This new evidence was not available at the time of either the original hearing or the appeal before Justice White.[[22]](#footnote-22)

I understand paragraph c. to be a reference to the “Audit Report’ referred to at paragraph 13 above.

1. Mr Moignard further submitted that the transcript of the original hearing did not support the Commissioner’s arguments as to contradictions in his evidence. He reiterated his contention that he had not had a fair opportunity to address by way of evidence the Commissioner’s reformulated case:

To the extent evidence was adduced on this point at the first instance, it was only adduced by the applicant under cross-examination, without notice, indirectly and beyond the specified parameters of the case the applicant had been put on notice to answer. As earlier stated, The applicant did not call any evidence-in-chief at first instance – all evidence in the transcript was adduced under the respondent’s cross examination.

While an experienced litigator may be expected to cope with such a turn of events and be capable of avoiding prejudice, a self-represented non-professional will be heavily prejudiced by **trial by ambush**. If this tribunal refuses to allow the required evidence to be adduced, it will be perpetuating this injustice permanently.[[23]](#footnote-23) (emphasis in original)

## The Commissioner’s submissions

1. In her oral submissions for the Commissioner at the interlocutory hearing, Ms Clark of Counsel conceded that there had been a change in the Commissioner’s case from the original hearing. However, she contended that the issue of the effect of the default provisions of the trust deed arose squarely during the original hearing. She submitted that the Commissioner’s argument based on the default provision in the deed was always an alternative argument, albeit this had now become a primary argument.
2. In response to questions from the Tribunal, Ms Clark conceded that, as he was self-represented, a ruling that Mr Moignard was not permitted to give any further evidence would be likely to present practical difficulties at the rehearing. She conceded it was likely that Mr Moignard would make relevant comments or assertions during the hearing, seeking to add to or clarify evidence he had previously given. However, whilst conceding this was likely to occur and would present difficulties for the Tribunal, Ms Clark maintained that the Tribunal should not permit Mr Moignard to make further statements having the status of evidence.
3. Ms Clark confirmed that there would only be one position advanced by the Commissioner on the rehearing, that being that there had been no valid distribution in accordance with the trust deed, and therefore the default provisions of the deed applied. She also contended that whilst the Commissioner’s position as to the application of the law had changed, the same facts were relevant, and Mr Moignard had had ample opportunity to address the relevant factual issues at the original hearing.
4. Ms Clark contended that the Court’s order was made in the terms it was in case further relevant documents came to light. However, she submitted that the order was not made with the intention of allowing Mr Moignard to give further oral evidence. She suggested that it would be appropriate for the Tribunal to read the transcript of the original hearing and form a view regarding whether the relevant topics were or were not canvassed. She contended that if they were, there was not sufficient reason to allow Mr Moignard to give further oral evidence. She further contended that the Commissioner’s position was that the oral evidence did canvass all of the relevant topics.
5. Ms Clark also questioned whether any evidence Mr Moignard gave now, some seven years after the relevant income year, would be reliable and of probative value, to the extent it was different from or additional to the evidence he gave previously. She contended that, in circumstances where Mr Moignard now knew what evidence he needed to give in order to achieve the outcome he sought, further oral evidence from him would have little probative value.
6. Ms Clark also pointed out that the proper test for the admission of fresh evidence in these circumstances was whether proper cause had been shown. She noted that it would have been open to the Court to simply remit the matter for a rehearing before the Tribunal, without any limitation as to further evidence. However, the fact that the Court placed the caveat on this which it did effectively created a presumption that no further evidence would be admitted unless circumstances justifying this were demonstrated.

# the original hearing

1. Having reviewed the transcript of the hearing on 26 November 2013, I have concluded that the question of whether Mr Moignard made a distribution from the RST during the 2007/2008 tax year, and in particular what, if any, distribution he made to the WLT, was canvassed during that hearing. In addition, the Commissioner squarely put the argument that there was not a relevant distribution in the 2007/2008 tax year, with the result that the default provisions in the deed applied, the net income of the trust flowed to the beneficiaries, and tax was payable by Mr Moignard in respect of his share of that income.
2. The possibility that Mr Moignard may have made a distribution to the WLT from the RST was canvassed in the Commissioner’s opening submissions, when Ms Clark stated:

The respondent’s position is that the profit that was made from the sale of that property was trapped in the trust that sold the property and made the profit and is not available to be offset against business losses in the Wine Logistics Trust. The onus is on the applicant to show how it is that those two amounts can be offset against each other. One way that it could be achieved was he, as trustee, made a distribution of the profit to the Wine Logistics Trust and the respondent’s position is that the evidence doesn’t match that contention.[[24]](#footnote-24)

Ms Clark also properly noted in her opening submissions that, depending on precisely what his contentions were, it was likely to be important for Mr Moignard to give evidence as to what his intentions were with respect to the trust income during the relevant year.[[25]](#footnote-25)

1. As it transpired, Mr Moignard did touch upon this topic at many points during his oral evidence.
2. Early on in his evidence, Mr Moignard noted that *“… a lot of the factory sale money was used for the losses incurred in the Wine Logistics business … that soaked up nearly all – well, a large proportion of those profits from the factory anyway …”*[[26]](#footnote-26). He also gave evidence that *“… my view as trustee was that I was combining the wine businesses into one trust.”*[[27]](#footnote-27) He added:

From the point of view of a theory of the relationship of the trusts and the profit and the net outcome from a taxation point of view, it didn’t matter to me as trustee of both trusts either way because on this theory the costs directly offset the gains and on the theory that was ultimately adopted, that there was a distribution, again the profits were offset.[[28]](#footnote-28)

1. Relatively early in his evidence, Mr Moignard was asked directly by Ms Clark as to whether there was distribution from the RST to the WLT:

Okay. If you could turn to page 603 now on a balance sheet under the Liabilities and Current Liabilities heading, we can see for the 2008 year a figure which was not quite as much as the 397,304 revised profit figure but, you know, close to it. 384,242 going to the Wine Logistics Trust. Is that what you say is your second theory, the one that you are maintaining in advance now, that there was a distribution of that amount from the HoCT to the Wine Logistics Trust?---I don't think that number is the right number. It should be the same number that was in the resolution of the trustee prepared at the end of the financial year for the Wine Logistics Trust - for the Hundred of - - -

Well, perhaps we had better have a look at that document then?---Yes. We have got that, haven't we?

It's in the T documents. Let me just turn it up. This is page 772?---T105, yes.

Have you got that?---Yes.

So that's the resolution that you are referring to?---Okay. So that is - is that the same amount? If that's the same amount then yes, that's what we are talking about.

Yes. So it does appear to be the same figure as is shown in the balance sheet on page 603, the same figure shown in your resolution at page 772?---Yes.[[29]](#footnote-29)

1. Ms Clark also asked Mr Moignard about when the distribution was made:

Now, this resolution is not dated. When do you say you made this resolution?---This resolution would have been prepared whenever I received the financial statements from the accountants.

The second version, that is?---Yes. That would be right.

And would it be after you had had your meeting with the representatives of the Commissioner where they made it known to you that they didn't accept the merger theory, if I can call it that, so you had discarded the merger theory as something that you would rely on and you at that point decided, "No, we will definitely make it a distribution," and to record that you made this resolution?---Well, this resolution was signed as part of the process of lodging financials with the objection, and given that the objection contained the trustee's - my position that we distributed all the profit to Wine Logistics that had a loss and that we weren't attempting to merge all the transactions even though that was initially what we thought happened, because the Commissioner had changed our reality we prepared these documents that we thought would be more satisfactory for the Commissioner's reality that there was just a simple distribution. So this was signed at the same time as the financials were submitted on objection, so these would have been signed to reflect my true intentions in 2011 that also reflect my intention as trustee as to what I intended to happen in 2007 - 2008 financial year.[[30]](#footnote-30)

1. Ms Clark further asked Mr Moignard about the records that were kept of resolutions and distributions:

In terms of keeping track of the payments that you made from one trust to another, did you record trustee's resolutions like the one at page 772 at the time that you were making the payments?---No, not generally. Generally they were all done on the advice of the accountants at the end of the financial period. They would send me a huge bundle of documents or I would go to Melbourne and sit down in a room and sign a big bundle of documents undated at the time when they would request me to do that. I recorded the loans though in the bank statements.[[31]](#footnote-31)

1. The following exchange also took place in relation to characterisation of the relevant transactions:

And so in terms of whether a particular transaction was characterised as a loan or as a distribution or as something else, are you saying that you had that in your mind at the time you did it or that you sorted that out at the end of the financial year when you sat down with your external accountants in Melbourne?---It's a little bit of both, but in a gross sense, in the big picture sense as a controller running several businesses, I would have had an indication as to whether - through monthly reports whether the - an individual business was making money and how much it was going to make by the end of the year versus a business that was losing money. For instance, I was aware that Australian Mail Solutions was making sort of fifty or sixty thousand dollars a year but the Wine Logistics business was losing two hundred and fifty, maybe three hundred thousand a year. So in that knowledge, I would know as the end of the financial year approached that there was going to be no issue with taxation liabilities in a group, which is exactly how I felt in this financial year. The Wine Logistics business was losing so much money that I had no concern at all that the gain from the factory was going to be - push me into a situation where I was writing cheques to the Commissioner.

But to your mind it was a simple exercise of so long as there is one loss over here in the group and the profit from the sale of Rupert Street over here, they will be offset against one another and there won't be (indistinct)?---Not the simple matter, but I understood that the fact that I was a trustee of these trusts, they were compatible with each other in terms of distributions. I understood the process of distributing the profit from one to another that had a loss. I understood the process of my intention was the main determining factor on that and I understood that my accountants had in the past been able to document my intentions with a bit of input from me fairly easily, and it had - it just hadn't been an issue in the past. I mean, as far as I was aware, the trusts were synergistic and yes, of course, they were entities of their own, and yes, the trusts had other beneficiaries and sometimes other trustees as well, but in principle it was like a - it was like the profit and loss account of a single entity. In principle you don't have to pay tax if you have spent more than the profit on expenses group-wide, correct.[[32]](#footnote-32)

1. Mr Moignard was also asked specifically about the distribution of *“just over”* $384,000.00 to the WLT, and gave the following response:

Okay. Turning to the distribution of this amount of just over $384 - - -?---Thousand.

$384,000 to the Wine Logistics Trust, when do you say that distribution was made?---I don't know.

…

Are you able to point the Senior Member to when and where you say that distribution was made in the 2008 financial year because that's what you are here to do. You need to establish that?---Absolutely. …[[33]](#footnote-33)

1. He went on to explain (referring to a particular NAB bank account) that:

The Wine Logistics Business itself received $413,000 out of this trust account. So the respondent asks, “Well, where’s all that money, where’s the – where’s that distribution?” Well, I would say it’s inside that amount. Inside that $413,000 is the distribution you're looking for. Now, the distribution doesn't have to be - and this - we'll get to this when we deal with section 101, but a distribution does not have to - the physical payment of a distribution is not to the point; it's the allocation, and my position is the allocation was made and how the funds were actually sent out is recorded in these documents and in a ledger.[[34]](#footnote-34)

1. A further exchange also ensued in the course of which Mr Moignard explained that a couple of the transactions recorded were loans, but the bulk of them were distributions.[[35]](#footnote-35)
2. Mr Moignard was pressed further on this topic and the following exchange ensued:

Can I just take you back to that $413,640 figure that you've got at the end there as being the total amount going to the Wine Logistics business. Do I take it from the evidence that you've just given that you say except for the $27,000 that you have identified as being loans, that is, one on 25 March 2008, one on 28 March 2008, but apart from that 27,000 the rest of that payment is in the nature of a distribution?---What I'm saying is I'm going off the narrations from way back when in 2008 like you are and I'm seeing a pattern that indicates to me payments to the Wine Logistics Trust and in answer to your question where's the money that was supposedly distributed to the Wine Logistics Trust? I'm theorising - - -

It's somewhere in that - - -?--- - - - that either in this year or in the following year which another million-odd dollars was spent on the Wine Logistics Trust from the same account that in either of those years the money will be found. If we were to trace it we will find some distributions that account for this $380,000 that has been distributed formally. So my argument is it was clearly allocated. There is evidence of payments being made. The precise actual transactions that make up those payments I can't tell you, but clearly they are, as the respondent argues to me, that there must have been profit in the amount of a cheque deposited in the account somewhere because the amount of profit is smaller than the total cheque. I argue the same way. The amount of the distribution is smaller than the amount of the turnover in the account so, therefore, it's in there somewhere. As I say, it may not be this year, maybe it's - the cash was actually transferred the following year, I'm not sure …[[36]](#footnote-36)

1. Mr Moignard was also asked during his evidence about his understanding as to the effect of the default clause in the deed.[[37]](#footnote-37) He also gave detailed evidence as to the assistance received from his external accountants, the pattern of his contact with them and their role with respect to the financial affairs of the various trusts.[[38]](#footnote-38)
2. At the conclusion of his evidence, Mr Moignard was also asked specifically as to whether the net income of the RST ($384,242.00) was only allocated, or allocated and paid in the relevant tax year, and the following exchange occurred:

That's what I'm trying to get to the bottom of. Do you say that they vested but – sorry, were allocated but not paid in that year? Or do you say that, yes, they were allocated and, indeed, they were paid as part of that $413,000?---I say they were allocated. I am assuming they were also paid but I'm not really concerned either way if they were paid. I'm – I am saying that they were allocated as per that resolution and, you know, they were irrevocably allocated as per that resolution. And whether they were paid as part of that $400,000 odd or not, is not to the point.[[39]](#footnote-39)

1. In his closing submissions, Mr Moignard acknowledged the Commissioner’s argument that there was no evidence of a distribution to the WLT from the RST, summarising his understanding of the Commissioner’s case as follows:

The respondent asks that in her opening – that the profit was – that their argument was that the profit was trapped. If the section 101 argument was not successful, then the respondent argues that the profit is trapped. That there's no evidence of a distribution to the Wine Logistics Trust from the Hundred of Comaum Rupert Street Trust. And, that the other theory that was put during audit by the applicant was that there was a merge of the Wine Logistics Trust and the accounts were prepared on that basis in that initial discussion provisional sense. However, we've also seen, though, that if the section 101 argument fails, and the distribution to Wine Logistics Trust fails and there was no merger of trusts, then the default distribution of this profit is to the corpus via the trustee. So, in any of those arguments, there is no additional taxation liability to the applicant.[[40]](#footnote-40)

1. Mr Moignard also acknowledged in his closing submissions that one of the issues for the Tribunal was what his intentions were during the relevant tax year and what the evidence showed as to any ‘allocation’ or ‘distribution’.[[41]](#footnote-41) He submitted at one stage *“Therefore, the outcome of the matter really hinges on the question of trustee intentions”*.[[42]](#footnote-42)
2. During his closing submissions, Mr Moignard also stated:

Taken together the intentions of the applicant as trustee are extremely clear. I intended to distribute the trust income to the trust that had a trust loss. In fact, it is so clear that if this deposit is held by the Tribunal to be deemed distribution under section 101 then my intentions are so clearly contrary that at equity it could be described as a distribution by mistake and, as such, the funds would have been held by the applicant on constructive trust for the Hundred of Comaum Trust.[[43]](#footnote-43)

1. He contended later:

In this case the applicant believed his own characterisation of the trust distribution between the Rupert Street Trust and Wine Logistics Trust was effective ...[[44]](#footnote-44)

Mr Moignard further stated:

Finally, the conclusion: firstly, the financial data provided by the respondent (sic) at objection is plausible, lawful and accurate and should be given due weight. The Hundred of Comaum/Rupert Street Trust under any fair analysis intended to distribute a hundred per cent of its trust floor income, whatever the amount, to the Wine Logistics Trust - and that's on either view, pre, during the audit or post objection, that was the effect.[[45]](#footnote-45)

1. In the course of her closing submissions, Ms Clark acknowledged Mr Moignard’s contention that:

… he is relying on a distribution, or more properly a series of distributions, being made out of the NAB Classic Bank Account in his name but in his capacity as trustee for the HoCT to the Wine Logistics Trust which the applicant says is consistent with his resolution as trustee.[[46]](#footnote-46)

1. In her closing submissions, Ms Clark maintained the position that Mr Moignard had made a distribution to himself. However, she also clearly articulated an argument based on the default provision of the deed:

If, however, it’s accepted that he did not make a distribution, whether an intentional one or a deemed distribution, it then becomes the question, well, were there valid distributions during the course of the 2008 income year and that takes us back to the trust deed, which starts at page 149 in R1, and the respondent differed in his assessment of how that trust deed operates vis-à-vis the argument that’s been put to the tribunal this afternoon by the applicant.[[47]](#footnote-47)

1. Ms Clark then explained the Commissioner’s construction of the default clause, being that if there had not been a valid distribution of all of the net income, the net income of the trust would be set aside or allocated for the specified beneficiaries.[[48]](#footnote-48) She added:

So, that is one possible finding that the tribunal could make is that because there was no real intention by the applicant to make any distributions by the end of the 2008 financial year, that the provisions of the trust deed take over.[[49]](#footnote-49)

1. In her closing submissions, Ms Clark clearly articulated an argument based on the default provisions of the deed, as follows:

So, that’s an example which suggests that the applicant didn’t actually make a definite and deliberate distribution to anybody, any beneficiary, in the course of the 2008 year but that leaves open, in my submission, the possibility of a deemed distribution to himself and it also leaves open the possibility that the trust deed is left to do its work in terms of setting money aside for the specified beneficiaries because there was a failure to make a valid distribution during the 2008 year.

…

I mean my reading of the way that would operate is that in the event that no distributions are validly made in the year that the net income of the trust is set aside for the specified beneficiaries. It may not be paid to them but it’s set aside and held separately and would continue to be so held until the vesting day unless the trustee’s actively revoked that or took some other step.[[50]](#footnote-50)

1. Mr Moignard addressed the distribution issue again in his reply, when he said:

Now, the applicant says the evidence is clear that he was going to distribute something and on all the evidence he was going to distribute 100 per cent. There’s no question of anything else. So, I think there is enough evidence here, if your judgment is to be fair replacement judgment of the decision of the Commissioner, you have the information in front of you to solve this distribution problem and the distribution was that the applicant intended to distribute as much as was necessary. That’s the inference and it was up to the accountants to tell me, and they did, and so, therefore, the question of the timing and the retrospectivity of everything is not to the point.

At the time, in the year that the gain was incurred, my intention at all times was to distribute all the gains to the Wine Logistics Trust. The evidence is there.[[51]](#footnote-51)

1. Mr Moignard also addressed these issues in the written version of his oral submissions, where he stated:

Taken together, the intentions of the applicant as trustee are extremely clear. He intended to distribute his trust income to the trust that had a trust loss. [[52]](#footnote-52)

# consideration

1. As I have indicated above, based on my review of the transcript of the hearing of 26 November 2013, I have concluded that Ms Clark clearly articulated the Commissioner’s alternative argument based on the default provisions of the trust deed, in combination with the absence of any distribution of the relevant trust income during the 2007/2008 tax year. In addition, Mr Moignard addressed both in his evidence and submissions, the question of what distributions were made from the RST at the relevant time, and when he made those distributions. He also addressed the issues of what the amount of the distributions was and how they were recorded.
2. Mr Moignard not only gave evidence on all of those topics, on my reading of the transcript, he also understood that the question of what distributions were made was potentially relevant to the application of the trust deed, including the default clause. More importantly, he was given every opportunity to explain what the correct factual position was during the relevant tax year.
3. If these topics had not been canvassed during the original hearing, or had been canvassed in a different context, clearly there would have been a real issue as to whether fairness required that Mr Moignard be given an opportunity to give further evidence. In the circumstances I have outlined, however, I am not persuaded that it is necessary or appropriate to allow Mr Moignard an opportunity to give further evidence on this topic. With respect to Mr Moignard’s concern that at the original hearing he “conflated” his evidence and submissions, I accept Ms Clark’s submission that, to the extent necessary, this can be addressed by the Tribunal determining, in due course, whether some aspects of Mr Moignard’s submissions at the original hearing should, as a matter of fairness, be treated as having the character of evidence.
4. In addition, whilst the Court did not expressly set out the reasons for the order which it made, I also accept Ms Clark’s submission that in the circumstances which have arisen, and in light of the evidence which was given at the original hearing, it is unlikely the Court intended that Mr Moignard be allowed an opportunity to give further evidence on topics which had already been addressed at the original hearing. It is likely that the order was made out of abundant caution in case any further relevant documentary material came to light, rather than in contemplation of further oral evidence from Mr Moignard. In fact, in all the circumstances, it seems likely that the primary intention of the order was to exclude further evidence from Mr Moignard which may be influenced by the Court’s decision, and be unhelpful for that reason.
5. For these reasons, I have decided not to grant Mr Moignard’s application to give further evidence himself, although for the reasons already explained, I will grant him leave to adduce the additional document he wishes to rely upon, noting that that request is not opposed by the Commissioner. For abundant clarity, I am not satisfied that proper cause has been shown for Mr Moignard himself to give further evidence.

# decision

1. The Tribunal decides that Mr Moignard’s application for leave to adduce further evidence at the rehearing of this matter is allowed in part as follows:
2. Leave is granted for Mr Moignard to adduce and rely on one additional document at the rehearing, namely, the “Audit Report” prepared by the Australian Taxation Office in 2003, and obtained by Mr Moignard after the original hearing via a Freedom of Information request; and
3. Leave for Mr Moignard himself to give further evidence at or for the purposes of the rehearing is refused.

|  |
| --- |
| I certify that the preceding 59 (fifty-nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President K Bean |

...... [Sgd] ............................................

Associate

Dated 30 October 2015

|  |  |
| --- | --- |
| Date of hearing | **3 August 2015** |
| Applicant | **In person** |
| Counsel for the Respondent | **Ms K Clark** |
| Solicitors for the Respondent | **Ms M Mackie**  **ATO Legal Practice** |

1. [2014] AATA 342. [↑](#footnote-ref-1)
2. (2015) 228 FCR 456.. [↑](#footnote-ref-2)
3. Applicant’s Outline of Proposed Additional Evidence and Reasons Why Leave is Sought, dated 23 April 2015 (“Applicant’s Outline”). [↑](#footnote-ref-3)
4. Respondent’s Submissions for Hearing on Application to Adduce Further Evidence, dated 18 June 2015, (“Respondent’s Submissions), [9]. [↑](#footnote-ref-4)
5. (2015) 228 FCR, [3]. [↑](#footnote-ref-5)
6. (2015] 228 FCR 456, [44]. [↑](#footnote-ref-6)
7. (2015) 228 FCR 456, [57]. [↑](#footnote-ref-7)
8. (2015) 228 FCR 456, [73]. [↑](#footnote-ref-8)
9. Applicant’s Outline. [↑](#footnote-ref-9)
10. Applicant’s Outline, p 2. [↑](#footnote-ref-10)
11. Applicant’s Outline, p 2. [↑](#footnote-ref-11)
12. Respondent’s Submissions, [12]. [↑](#footnote-ref-12)
13. Respondent’s Submissions, [13]. [↑](#footnote-ref-13)
14. Respondent’s Submissions, [14]. [↑](#footnote-ref-14)
15. (2015) 228 FCR 456, [67]. [↑](#footnote-ref-15)
16. Respondent’s Submissions, [13]. [↑](#footnote-ref-16)
17. Applicant’s Submission for Hearing on Application to Adduce Further Evidence, dated 14 July 2015, (“Applicant’s Submission”), [14]. [↑](#footnote-ref-17)
18. Applicant’s Submission, [17]. [↑](#footnote-ref-18)
19. Applicant’s Submission, [18]. [↑](#footnote-ref-19)
20. Applicant’s Submission, [24]. [↑](#footnote-ref-20)
21. Applicant’s Oral Submission for Hearing on Application to Adduce Further Evidence, filed on 4 August 2015 (“Applicant’s Oral Submission”), [10] and [11]. [↑](#footnote-ref-21)
22. Applicant’s Oral Submission, [14]. [↑](#footnote-ref-22)
23. Applicant’s Oral Submission, [59] and [60]. [↑](#footnote-ref-23)
24. Transcript, 26 November 2013, p 7, lines 5 – 12. [↑](#footnote-ref-24)
25. Transcript, 26 November 2013, p 9, lines 15 – 19. [↑](#footnote-ref-25)
26. Transcript, 26 November 2013, p 24, lines 1 – 4. [↑](#footnote-ref-26)
27. Transcript, 26 November 2013, p 26, lines 11 – 12. [↑](#footnote-ref-27)
28. Transcript, 26 November 2013, p 26, lines 26 – 31. [↑](#footnote-ref-28)
29. Transcript, 26 November 2013, p 28, lines 25 – 46; p 29, lines 1 – 2. [↑](#footnote-ref-29)
30. Transcript, 26 November 2013, p 29, lines 4 – 25. [↑](#footnote-ref-30)
31. Transcript, 26 November 2013, p 32, lines 37 – 44. [↑](#footnote-ref-31)
32. Transcript, 26 November 2013, p 33, lines 17 – 47; p 34, lines 1 – 4. [↑](#footnote-ref-32)
33. Transcript, 26 November 2013, p 34, lines 5 – 18. [↑](#footnote-ref-33)
34. Transcript, 26 November 2013, p 35, lines 36 – 44. [↑](#footnote-ref-34)
35. Transcript, 26 November 2013, p 35, lines 46 – 47; p 36, lines 1 – 7. [↑](#footnote-ref-35)
36. Transcript, 26 November 2013, p 36, lines 30 – 47; p 37, lines 1 – 7. [↑](#footnote-ref-36)
37. Transcript, 26 November 2013, p 44, lines 26 – 47; p 45, lines 1 – 39. [↑](#footnote-ref-37)
38. See, for example, Transcript, 26 November 2013, p 51, lines 17 – 32. [↑](#footnote-ref-38)
39. Transcript, 26 November 2013, p 53, lines 5 – 12. [↑](#footnote-ref-39)
40. Transcript, 26 November 2013, p 59, lines 27 – 38. [↑](#footnote-ref-40)
41. Transcript, 26 November 2013, p 67, lines 13 – 21. [↑](#footnote-ref-41)
42. Transcript, 26 November 2013, p 73, lines 38 – 39. [↑](#footnote-ref-42)
43. Transcript, 26 November 2013, p 74, lines 32 – 38. [↑](#footnote-ref-43)
44. Transcript, 26 November 2013, p 75, lines 45 – 47. [↑](#footnote-ref-44)
45. Transcript, 26 November 2013, p 78, lines 29 – 34. [↑](#footnote-ref-45)
46. Transcript, 26 November 2013, p 80, lines 14 – 17. [↑](#footnote-ref-46)
47. Transcript, 26 November 2013, p 81, lines 41 – 47. [↑](#footnote-ref-47)
48. Transcript, 26 November 2013, p 82, lines 2 – 23. [↑](#footnote-ref-48)
49. Transcript, 26 November 2013, p 82, lines 36 – 38. [↑](#footnote-ref-49)
50. Transcript, 26 November 2013, p 85, lines 6 – 12; 27 – 32. [↑](#footnote-ref-50)
51. Transcript, 26 November 2013, p 89, lines 25 – 38. [↑](#footnote-ref-51)
52. Applicant’s Final Submission filed on 25 November 2013, [298]. [↑](#footnote-ref-52)