

## What is a Partnership of discretionary trusts?

A partnership of discretionary trusts is simply a partnership in which each partner is a discretionary trust (actually, each partner is the trustee of a discretionary trust). This is to be contrasted with a normal partnership of individuals. Rather than each individual being a partner in the partnership, each individual's discretionary trust is the partner.

Operating a partnership of discretionary trusts is very complex. Although an overview is provided below with respect to some of the issues, we recommend that advice be sought from your accountant in this regard.

## What are the advantages of a Partnership of discretionary trusts?

### 1. Asset protection

Each partner in the partnership is jointly and severally liable for the debts of the partnership. However, as each partner is a discretionary trust, the personal assets of the individuals are generally protected.

### 2. Fixed interest

Each principal, through their family discretionary trust, has a fixed interest in the capital and income of the partnership.

### 3. Flexibility of distributions

The trustee of each trust can distribute the trust's share of partnership income among the trust's beneficiaries in any way it wishes.

### 4. Small business CGT concessions

For partnerships, where an asset is sold the capital gain arises in the partner. Whether or not a particular partner satisfies the relevant conditions to obtain the small business concessions has no effect on the ability of another partner to satisfy the relevant conditions.

### 5. Ease of making tax-free distributions

It is generally easier for tax-free distributions to be made through a partnership of discretionary trusts, as compared to a unit trust or a company.

### 6. Independence

Each partner trust is effectively independent of the others. A partner trust can sell its interest in the partnership without affecting the tax position of the other partners, although in practice it may be difficult to find someone to buy their interest. New partners can be admitted easily by simply becoming partners in the partnership, although this may cause tax implications to the existing partners. New partners need not operate through a discretionary trust. The new partner can be some other entity such as an individual, company or trust.

## Employment benefits

The individual principals can be employed by the partnership and obtain the benefits of salary packaging, employer sponsored superannuation etc. A partnership of individuals cannot employ the individual partners themselves.

There are also other benefits of carrying on business through a partnership of discretionary trusts, including capital gains tax advantages.

## Use of an agent/manager

A company agent/manager is sometimes used to act on behalf of the partnership of trusts. This is done predominantly for administrative ease. Each of the partners would generally have a proportionate number of shares in the company acting as agent and can appoint a director to the agent's board.

## **GST and ABN issues**

A partnership of trusts may make supplies and acquisitions. This will either be done by the partnership itself or, if it has an agent acting for it, through the agent.

If there is no agent, the partnership should obtain an ABN and, if it is necessary (i.e., its turnover is above the threshold) or it chooses to do so, register for GST.

However, if there is an agent, the question will arise as to who should account for GST and how should it be done.

Generally:

- ◆ The partnership will always need to register for GST (if its turnover is higher than \$50,000 a year or otherwise if it voluntarily opts in) and should lodge all BAS statements for the business.
- ◆ The agent will need an ABN if the partnership wishes to issue and receive tax invoices through the agent.
- ◆ If the agent does not register for GST, there may be problems with purchasers who think they cannot claim an input tax credit, but it will not have to lodge BAS statements.
- ◆ If the agent does register for GST, purchasers should have no reason to question the validity of tax invoices, but it will have the added hassle of lodging BAS statements (but these are likely to be nil statements).
- ◆ In any event, the agent will need to register for GST if it has its own enterprise, if it is paid by the partnership for its services as agent or if the partnership and agent use Division 153-B in accounting for GST (provided in all cases that it meets the turnover threshold or chooses to voluntarily register if not), and will lodge BAS statements taking any relevant supplies or acquisitions into account accordingly.

This is a complex area and it is recommended that you obtain professional advice if you are at all unsure about operating in this area.

## **Features of NTAA Corporate's Partnership of Trusts Agreement (with or without agent)**

This partnership agreement is a more complex agreement, designed for a partnership of trusts, as opposed to the more simple Partnership Agreement, used primarily by partnerships of individuals. However, even though it is described as a partnership of trusts, it can be used for a partnership of any entities (e.g., trusts, companies or individuals).

The following are some of the features of NTAA Corporate's Partnership of Trusts Agreement (with or without agent). However, the agreement should be read in full to fully ascertain the relationship between the partners.

- ◆ The agreement allows for the appointment of an agent but, if no agent is appointed or the agent ceases acting and is not replaced, the powers of the agent may be exercised by the partners acting jointly.
- ◆ If there is an agent, the agent will be entitled to conduct the partnership business as if it were the sole beneficial owner of the business and the assets of the business (except when it comes to selling the business or a majority of it).
- ◆ The partners indemnify the agent in relation to any costs it incurs when acting as their agent.
- ◆ The agent can be removed by a resolution of partners holding together at least a 75% interest in the partnership. The agent can also retire by giving one month's written notice.
- ◆ If necessary, the partners will need to register the name of any business carried on by the partnership with the authority responsible for registering business names in the relevant state or territory.

- ◆ If there is an agent, then the agent will open a bank account and be signatory to any cheques made out from that account. If there is no agent, then the partners will need to open the account and agree on how cheques should be signed (e.g., by a certain number of partners or by specific individuals) and should work this out with their bank.
- ◆ Each partner's initial interest in the partnership is specified as a percentage in the schedule. This will generally be calculated by reference to the capital contribution of each partner, but the interest is the same with respect to both the income and capital of the partnership. For example, if the partner has a 50% interest in the partnership, the partner is entitled to 50% of the income (or loss) of the partnership and has a 50% interest in the assets of the partnership. If a partner is entitled to a proportion of capital that does not reflect the capital the partner has contributed, that partner must pay the other partners to make up the balance (from the profits of the business or as otherwise agreed). The partners can agree in future if they wish to share income and capital in different proportions.
- ◆ If a partner puts in extra capital, that will not affect the partner's percentage share, but will instead be treated as a debt owing by the partnership to the partner, with interest, unless otherwise agreed by the partners.
- ◆ The partner's may draw money from the profits of the partnership on a quarterly basis or otherwise as and when they agree. If it is found that any drawings for the year exceed the available profit, the partner or partners who overdraw their share may be required to repay that amount to the partnership. The partners may also agree to pay one or more partners a salary from the partnership (although this is to be treated as a "working expense", it may not be treated like this for taxation purposes – speak to your accountant about this).
- ◆ Other amounts owing by a partner to the partnership or by the partnership to a partner may carry interest.
- ◆ Each partner owes certain duties to the partnership and is also prohibited from doing certain things without the consent of the other partners, including transferring, or effectively transferring, their interest in the partnership. The partners should be careful of these duties and prohibitions, because the other partners may be able to expel any partner who breaches them or other material provisions of the agreement.
- ◆ A partner can resign from the partnership by giving notice to the other partners of the period specified in the schedule, and if his or her interest is not bought by the other partners, the partner can sell their interest to someone from outside the partnership.
- ◆ The partnership does not come to an end by reason only of a partner leaving or dying, or another partner being added, and the remaining/continuing partners expressly agree that the partnership will continue beyond such an event, unless there is only one partner left or all the partners agree to bring the partnership to an end.
- ◆ The agreement provides for meetings between the partners and/or the agent, and a partner may appoint a representative to attend meetings in their place. The chair of a meeting of Partners does not have a casting vote.
- ◆ If the partners cannot agree on something or otherwise are in dispute, the dispute must generally first be referred to mediation, and then (if unsuccessful) to arbitration, before they can go to court.
- ◆ No partner can sell or assign his or her interest in the partnership (except in certain specified circumstances) without the prior written consent of all of the other partners and any new partner must sign an agreement with the same effect as this agreement.
- ◆ The partners can vary the agreement at any time by all signing a written variation, amendment or further agreement.

- ◆ Some partnership agreements include a “restraint of trade” clause. This one does not, as the terms of such restraint are often specific to the requirements of the particular partnership (and overly restrictive ones can be struck down by the courts). If the partners desire that any partners leaving the partnership should be restrained from entering or carrying on similar businesses, they should enter into a separate agreement to that effect.
- ◆ Depending upon the state or territory in which the partnership carries on business, the partners may be required to notify the public when the partnership comes to an end. This requirement is reflected in the agreement.

### **Disclaimer**

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