

A discretion for Family Trust Elections like the Excluded Election Trust

Under the EET election proposed for the discretionary trust minimum tax, for certain compliance failures, the Commissioner has the discretion to prevent automatic revocation where revocation would be unreasonable, taking into account matters including inadvertence, quantum, tax impact, trustee control and remedial action (section 102UYH).

The EM states:

"It is appropriate for the Commissioner to have a discretion to disregard the automatic revocation of an EET election because automatic revocation may otherwise arise from technical administrative errors, unforeseen and exceptional circumstances or immaterial departures from the EET nomination, such as from rounding of amounts. The discretion ensures that the consequences are imposed only where they are unintentional and proportionate to the non-compliance and prevents outcomes that would be unduly harsh."

These exact words could be used in relation to the issues many taxpayers are experiencing with Family Trust Elections (FTE). There are numerous technical errors and immaterial departures from the FTE and these lead to worse penalties than a breach of the EET rules (amazingly harsh and not proportionate to the error).

Therefore, a discretion, identical to section 102UYH in relation to a Commissioner discretion for breaches of EET elections, should be added to the FTE rules.

This is imperative as the Commissioner has a GIC 80% amnesty but this ends on 31 December 2026.

An example of an FTE breach with inappropriate outcomes

Husband and wife each run their own business (started before they met) in two different trusts. The specified individual for wife's trust is the wife under its FTE. The specified individual for husband's trust is the husband under its FTE.

There are no Interposed Entity Elections and no other no individual entities (companies or trusts owned by wife and husband or their family).

The individuals in the family group under the FTE rules of each trust are identical.

However, each trust is not in the family group of the other trust as they have a different specified individual.

Husband's trust need financing and wife's trust offers to fund it. In most years wife's trust loans the amount to the husband who on-loans the amount to his trust. There is no interest charged or paid on these loans. There is no breach of the FTE rules here.

To simplify the back to back loans, in one year the wife's trust instead loans to amount directly to husband's trust.

For no obvious reason as it has an identical outcome as the previous years and the trusts have the same individuals in their group, this is a breach of the FTE rules. The penalty is 47%, and there is no amendment period so when this is found decades later the interest can be multiple times the Family Trust Distribution Tax of 47%.

This is a technical error, there is no mischief, but the Commissioner says he has no choice but to apply these rules (no discretion and no use of his general administrative powers).

This is obviously the same issue as a technical breach of the EET and it makes no sense to have a discretion for the EET rules and not for the FTE rules.

Therefore, the discretion given to the Commission in relation to the EET in this Bill should be given to the Commissioner in relation to FTEs. It would make sense to do both of these changes in the same Bill and the Committee should recommend this be done.

Should you wish to discuss this further I am happy to be contacted on 0429 566 516 or ken@taxrambling.com.

Ken Mansell

90 Doyle Tce Chapman ACT