Do I need a fixed or standard unit trust?

What's the difference?

Key points

- In choosing between a fixed and standard unit trust, there are a number of differences you should take into account; because of the limitations in fixed trust deeds, they should only be used when necessary
- Many clients and advisers mistakenly believe that all unit trusts qualify as a 'fixed trust' as defined under the loss trust provisions of the *Income Tax Assessment Act 1936* (Schedule 2F) - this is not the case
- Not all fixed unit trusts will qualify as 'fixed trusts' for New South Wales land tax purposes
- Some of the key differences are summarised below

Fixed unit trust

1. Unless there are specific provisions limiting the power of the trustee to issue or redeem units and to vary the trust (as well as other issues) the trust will not be fixed.

2. There are a range of circumstances where clients may want to have a fixed trust:

   (a) A trust that holds shares in a company can only pass franking credits on dividends to beneficiaries if it is a fixed trust or makes a family trust election.

   (b) If a trust owns 51% or more of the shares in a company that has losses, the company will not satisfy the continuity of ownership test unless the trust is a fixed trust or makes a family trust election.

   (c) If any unitholders are superannuation funds, the trust should be structured as a fixed unit trust so that the trust income is not automatically treated as 'non-arm's length income' under section 295-550.

3. In PCG 2016/16, the ATO has outlined issues that it considers need to be addressed in a trust deed in order for the trust to qualify as a fixed trust.

   The difficulties in satisfying these requirements were highlighted in the *Colonial First State* decision.

4. Our fixed unit trust deed has a number of special features designed to ensure that the trust qualifies as a 'fixed trust' including the following:

   (a) The fixed unit trust deed only allows additional units to be issued to existing unitholders in proportion to their existing unitholdings. However, additional units can be issued to new unitholders if all existing unitholders agree.

   (b) When issuing or redeeming units, the value of the units must be determined on the basis of the net asset value in accordance with applicable Australian accounting principles. However, a different valuation methodology can be used if all unitholders agree.

   (c) Any changes to the deed that might result in the trust not qualifying as a fixed trust can only be made with a unanimous resolution of unitholders.

   (d) The deed does not allow for the issue of discretionary or partly paid units.

5. These provisions, which are designed to satisfy the criteria for fixed trusts, are quite restrictive and may not be appropriate where there are a number of arms-length parties holding units.

6. Also, if the trust owns or will own land in New South Wales, the client may require it to be a 'fixed trust' for land tax purposes, so that it can access the benefit of land tax thresholds. If this is the case, additional provisions must be included in our fixed unit trust deed to satisfy the requirements of Revenue NSW.

Standard unit trust

7. Our standard unit trust allows for the issue of ordinary units, partly-paid units and discretionary income units.

8. The deed does not require that unit issues and redemptions must be based on a net asset valuation approach.

9. Units can be issued to non-unitholders if 75% of unitholders agree.

10. The deed can be amended with the consent of 75% of unitholders.

11. This trust deed provides mechanisms for dealing with a unitholder who breaches the provisions of the trust deed and can allow for a forced redemption or transfer of their units.

For further information, please contact a member of our team on 07 3231 2444.