

SOMMERER V. R

In this case, an Austrian private foundation was to be not a trust but sufficiently similar to be treated as a trust for tax purposes

Miller J.:

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Can the arrangement whereby Mr. Herbert Sommerer endowed the SPF [the Sommerer Private Foundation] with funds for the purpose set forth in the SPF Deeds be viewed as a trust for purposes of the application of the Income Tax Act? I note both parties framed this issue as whether the SPF was a corporation or a trust. I suggest this is an inappropriate way of framing it. The SPF is a separate legal entity: a trust under Canadian law is not; it is a relationship describing how property is held. The SPF could be a trustee. The question is simply whether a trust existed, not whether the SPF is a trust or a corporation. Further, notwithstanding argument as to the characterization of the SPF as a corporation, this is not an issue. If I find there is a trust, it is immaterial to determine whether the SPF is a corporation. If I find there is no trust, the parties are agreed the SPF can be viewed as a corporation, although they disagree on the application of the Foreign Accrual Property Income (FAPI) regime.

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I have concluded that, depending on the terms of the Foundation Declaration and Supplemental Declaration, an Austrian Private Foundation could be considered a trust company, acting as a trustee, and with respect to the SPF, I find that that is as good a label as can be attached, when looking at it through the eyes of Canadian laws.

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On balance, I have not been convinced that there is no fiduciary duty enforceable by the Sommerer family. Certainly, the rights may not be as extensive as one might find in many common law trusts, but for purposes of trying to determine if an arrangement involving an Austrian Private Foundation has the elements of a common law trust, it is unnecessary to find every possible right of a beneficiary against a trustee, but more appropriately the question should be, are there sufficient rights that reasonably resemble those found in the Canadian Trust? I conclude there are.

It should be clear that in reaching this conclusion, I am not finding the SPF is a trust: I am finding the relationship between Mr. Herbert Sommerer, the SPF and the beneficiaries constitutes a trust, with the SPF as the trustee. Further, I do not make this finding in any way as a generalization that all relationships involving an Austrian Private Foundation are trust relationships. There may well be a Foundation Declaration that is found to be more akin to a

power of appointment, for example, by stripping away any rights of enforceability a beneficiary might have. Here, on balance, there are sufficient indices of the essential features of a trust to find the arrangement can be considered a trust.

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