

**TRUST SITUS
AND
FIDUCIARY INCOME TAX;
CURIUSER AND CURIUSER**

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**A TRUST CAN BE A RESIDENT TRUST FOR
FIDUCIARY INCOME TAX PURPOSES**

IN MORE THAN ONE STATE;

**AND CAN BE A RESIDENT TRUST FOR FIT
PURPOSES**

IN NO STATE

WHAT MAKES A TRUST A

RESIDENT TRUST

**FOR STATE FIDUCIARY
INCOME TAX PURPOSES?**

**This Program:
Non-Charitable Trusts;
Non-Grantor Trusts;
US Situs Only**

DOMICILE OF SETTLOR/TESTATOR

DOMICILE OF TRUSTEE

DOMICILE OF BENEFICIARY

**PRINCIPAL PLACE OF
ADMINISTRATION (SITUS)**

PENNSYLVANIA FIT

- Resident and Non-Resident Trusts
- 3.07% on Retained Realized Gains
- Resident Trust has PA Settlor/Testator
- No Grantor Trusts (only state)
- McNeil Trusts v. Commissioner,
67 A.3d 185 (Pa. Commw. Ct. 2013)

McNEIL

- PA Settlor Long Since Dead
- DE situs From Inception
- No PA Trustee
- No PA Asset
- No PA Source Income
- But PA Discretionary Beneficiaries

PENNSYLVANIA FIT

Based on McNeil, PA Dept Revenue revised **instructions** to PA-41, addressing when a resident trust can “become a nonresident trust”:

“A nonresident trust is any irrevocable trust that is not a Pennsylvania resident trust. An inter vivos trust or a testamentary trust created by a resident can become a nonresident trust if the **settlor is no longer a resident or is deceased, and the trust lacks sufficient contact with Pennsylvania to establish nexus**. Any one of the following conditions provides sufficient contact for a resident trust to remain a resident trust or to requalify as a resident trust:

- The trust has a **resident trustee**;
- Any trust **administration occurs in Pennsylvania**;
- Trust assets include:
 - Real or tangible personal property **located within Pennsylvania**, or
 - Stock, securities or intangible personal property, evidence by the documents, certificates or other instruments that are **physically located, or have a business situs within Pennsylvania**; or
- The **situs of the trust is Pennsylvania** as provided in 20 PA. C.S. §7708.”

DOMICILE OF SETTLOR/TESTATOR

- AL; AR; CT; DE; DC; ID; IL; IA; LA; ME; MD; MA; MI; MN (post 1995); MO; MT; NB; NJ; NY; OH; OK; PA; RI; UT; VT; VA; WV; WI

BUT:

- Fielding v. Commissioner of Revenue, 916 N.W.2d 323 (Minn. 2018), aff'g 2017 WL 2484593 (Minn. Tax Ct. May 31, 2017)
- McNeil Trusts v. Com., 67 A.3d 185 (Pa. Commw. Ct. 2013)
- Residuary Trust A (Kassner) v. Dir., Div. of Taxation, Dep't of Treasury, 28 N.J. Tax 541 (N.J. Super. Ct. App. Div. 2015)
- And more....

FIELDING

- Minnesota Settlor of inter vivos trust
- 2009 Grantor Trust until 2012
- Became MN resident trust in 2012 b/c MN Settlor
- No MN trustees
- No administration in MN, or any trust records
- MN governing law
- MN current beneficiary
- Gain on 2014 sale of MN S-corp stock positioned as intangible personal property located outside of MN
- Was Minnesota's definition of "resident trust" as applied to the trusts unconstitutional?
- Settlor's connections to MN "are not relevant to the relationship between the *Trusts'* income that Minnesota seeks to tax and the protection and benefits Minnesota provided to the *Trusts'* activities that generated that income."

DOMICILE OF TRUSTEE

- AZ; CA; DE; HI; ID; IA; KY; MT; NM;
ND; OR; VA
- But what about **PA**?

DOMICILE OF BENEFICIARY

- CA; GA; MT; NC; ND; TN
- Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue, 814 S.E.2d 43 (N.C. 2018).

PRINCIPAL PLACE OF ADMINISTRATION

- CO; HI; ID; IN; IA; KS; LA; MD; MN (pre-1996); MI; MT; NM; ND; VA; WI
- But what about **PA**?

**CAN YOU CHANGE IT UP TO
ELIMINATE OR
REDUCE STATE FIDUCIARY INCOME
TAX?**

MAYBE

ONE OR MORE FACTORS

- **What factors are relevant?**
- **Matrix of factors / moving parts**
- **Assess FIT impact of changes**
 - **Change of domicile of settlor**
 - **Change of domicile of trustee**
 - **Change principal place of administration**
 - **Change to source income**

ONE OR MORE FACTORS

- **Is imposition of tax valid?**
- **Is state FIT under siege?**
- **Can tax be avoided?**
- **“Do the math”**
- **State Source Income?**
- **Material Participation / NII?**
- **Planning at inception**
- **Administrative changes**

DUTY TO CHANGE IT UP?



TRUSTEE DUTY?

UTC §108(b) provides that “[a] trustee is under a **continuing duty** to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.”

UNIFORM PROBATE CODE

§7-305

A “trustee is under a **continuing duty** to administer the trust at a place appropriate to the purposes of the trust and to its **sound, efficient management.**”

UNIFORM PROBATE CODE

§7-305

“If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, **removal of the trustee and appointment of a trustee in another state.**”

TRUSTEE DUTY?

- PA Comment: “UTC §108(b) is omitted to avoid the implication of a duty that the trustee consider the laws of all conceivable jurisdictions to which the situs of a trust may be moved and establish and re-establish situs accordingly.”

**BUT HOW MANY U.S.
JURISDICTIONS HAVE
ADOPTED A DUTY PROVISION
PER THE UTC OR UPC?**

28!

**(including New Jersey, but NOT
Pennsylvania)**

RESTATEMENT (THIRD) OF TRUSTS

Even if a state has not adopted these parts of the UTC or UPC, note that Comment b(2) to Restatement (Third) of Trusts §76 is also pretty worrisome.

RESTATEMENT (THIRD) OF TRUSTS

A “trustee's duty to administer a trust includes an initial and continuing duty to administer it at a location that is reasonably suitable to the purposes of the trust, its sound and efficient administration, and the interests of its beneficiaries. Terms of the trust, however, may establish expressly or by implication a place of administration, initially at least, and may affect the trustee's duty in the matter.”

RESTATEMENT (THIRD) OF TRUSTS

And adds: “[u]nder some circumstances the trustee may have a duty to change or to permit (e.g., by resignation) a change in the place of administration. *Changes in the place of administration by a trustee, or even the relocation of beneficiaries or other developments, may result in costs or geographic inconvenience serious enough to justify removal of the trustee.*”

ATTORNEY DUTY?

- **Failure to advise trustee-client to consider moving trust?**
- **Failure to advise beneficiary-client?**
- **What if likely liquidation / realization event?**
- **Duty to know all laws of US and beyond?**



CHANGE SITUS?

- **How?**
- **When?**
- **Annual “physical”?**
- **Must consider and discuss**
- **Materials**

SCENARIOS

SCENARIO 1

	Now	After Changes
Domicile of Settlor	New Jersey (Inter Vivos)	(Deceased)
Situs	New Jersey	Pennsylvania
Residence of Beneficiaries	New Jersey Pennsylvania Arizona	Unchanged
Residence of Trustees	New Jersey – Individual & Corporate	Pennsylvania
Residence of Committee Members	N/A	N/A

SCENARIO 2

	Now	After Changes
Domicile of Settlor	Connecticut (Testamentary)	(Deceased)
Situs	Tennessee	New Hampshire
Residence of Beneficiaries	Maryland Tennessee	Same / Unchanged
Residence of Trustees	Colorado - Individual Virginia – Individual California - Corporate	Colorado – Individual Virginia – Individual Virginia – Corporate
Committee Members	Colorado	Same / Unchanged

SCENARIO 3

	Now	IF CHANGED
Domicile of Settlor	Pennsylvania (Inter Vivos)	(Deceased)
Situs	Pennsylvania	South Dakota
Residence of Beneficiaries	Pennsylvania	Pennsylvania
Residence of Trustees	Pennsylvania – Individual (materially participates) & Corporate	South Dakota - Corporate

THE END
(for now)