

**Resource Capital Fund III LP v
Commissioner of Taxation**

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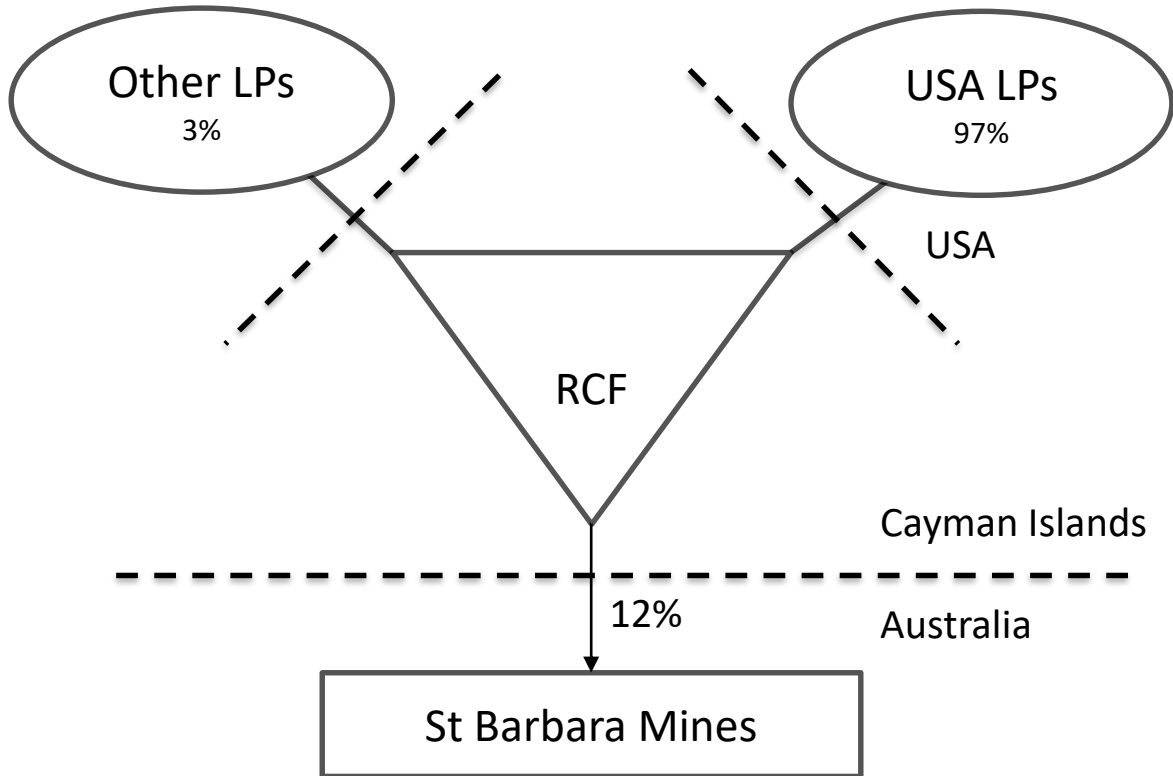
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Section 1

Background and Facts

The Legal Structure



Key Facts about the Legal Structure

- RCF is a limited partnership formed in the Cayman Islands on 17 January 2003
- More than 97% of the contributed capital of RCF is held by residents of the USA
- RCF held around 12% of the membership interests in St Barbara Mines
- St Barbara Mines is an Australian gold mining enterprise listed on the ASX
- Its main assets are mining tenements in Australia; it also owns associated plant, equipment, and mining information for use in the enterprise

The Relevant Transactions

- During the income year ended 30 June 2008, RCF disposed of all of its shares in St Barbara Mines
- The disposal resulted in a gain of around \$57.6 million
- RCF treated the gain as not giving rise to an Australian income tax liability
- The Australian Taxation Office considered that the disposal gave rise to a taxable capital gain for RCF, and also imposed administrative penalties

Procedural History

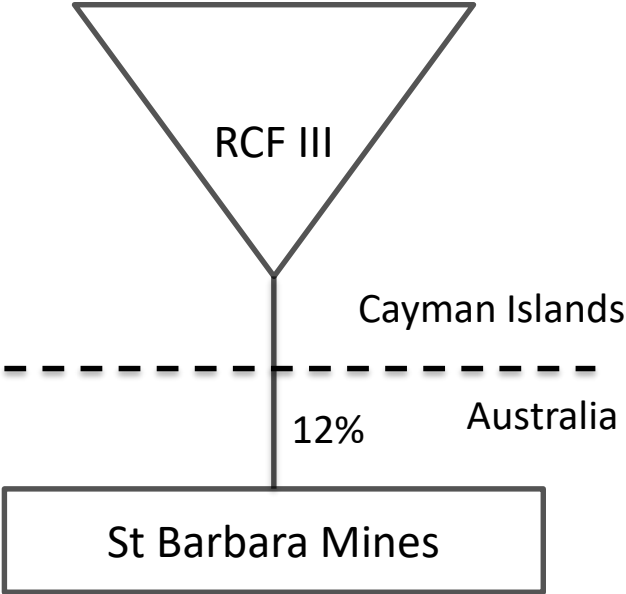
- RCF objected against the Commissioner's decision to impose tax on the gain, which was denied by the Commissioner
- RCF appealed against that decision to the Federal Court of Australia, which found in favour of RCF
- The Commissioner appealed the decision at first instance to the Full Court of the Federal Court, which held that the gain derived by RCF was taxable in Australia
- RCF applied for special leave to appeal to the High Court of Australia but was denied on the basis that the decision of the Full Court was not attended by sufficient doubt to warrant special leave

Section 2

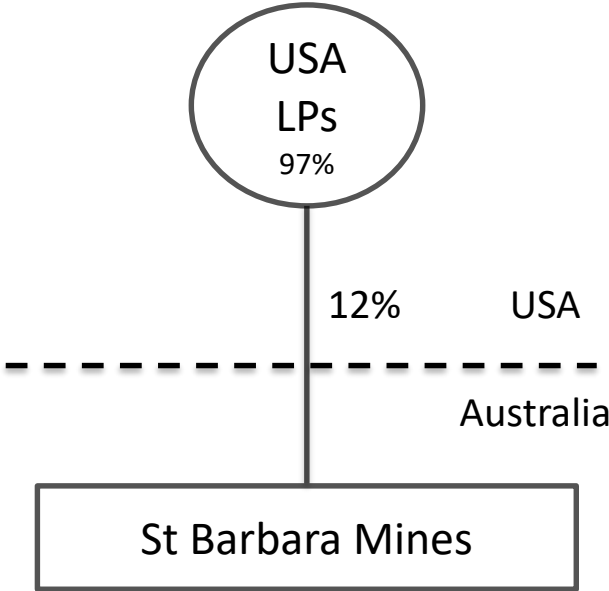
Australian and USA Law

Divergent Perspectives

The Australian Tax Perspective



The USA Tax Perspective



Australian Tax Treatment of RCF

- RCF is a limited partnership and a “Corporate Limited Partnership” for Australian tax law purposes.
- Australian income tax law applies to Corporate Limited Partnerships as if they are companies: ie RCF is a taxable entity under Australian tax law.
- Australia taxes non-resident companies on their Australian sourced income, and taxes direct and indirect capital gains on Australian real property

USA Tax Treatment of RCF

- RCF is not a taxable entity under USA tax law
- Rather than recognising limited partnerships as taxable entities, for USA tax purposes they are treated as “fiscally transparent” or “flow-through”
- The partners in RCF, not RCF the partnership, are taxable on their individual shares of Australian sourced gains made by RCF

Section 3

Issues before the Full Federal Court

Issues Raised before the Full Federal Court

1. Whether the provisions in the Australian tax law imposing a liability on RCF were inconsistent with the provisions of the DTA between Australia and the USA
2. Whether the shares in St Barbara Mines were “taxable Australian property”, and thus whether the gain on disposal was subject to Australian income tax

Section 4

The DTA Issue

The Australia-USA DTA

- In Australia:
 - DTAs have the force of law according to their tenor
 - DTAs have effect notwithstanding any inconsistencies with any Australian tax law other than the general anti-avoidance rules.

The Australia-USA DTA

- Art 1 provides that the DTA applies to persons who are residents of one or both of Australia and the USA
- Art 4 defines which entities are residents for the purposes of the DTA
- Art 7 states that business profits will be taxable in the country of residence, unless it is from a permanent establishment. However, Art 13 is given precedence where it could apply to the same gain
- Where a resident of one country disposes of real property in the other country, Art 13 permits the country in which the real property is located to tax any gain on disposal

Submissions on the DTA Issue

- The Commissioner's position on appeal was that the DTA could only apply to RCF if it was a resident of the USA
- Even if RCF was a resident of the USA, Art 13 would give Australia taxing rights in respect of the disposal of membership interests in St Barbara Mines
- RCF's position was that the DTA applied to the gain made by the USA resident limited partners, rather than to RCF
- Art 7 of the DTA applied to prevent Australia taxing the gain
- Only Art 13 could authorise Australia to tax gains derived by USA residents

The Decision at First Instance

- The primary judge held that:
 - RCF was not a resident of the USA for the purposes of the DTA because the USA treats it as a fiscally transparent entity
 - the USA resident limited partners were the relevant entities capable of obtaining the benefits under DTA
 - Art 13 did not “authorise” Australia to tax RCF

The DTA allocates the taxing rights in respect of the gain on disposal of the membership interest in St Barbara Mines by RCF to the USA

The Decision on Appeal

- There is an inconsistency between USA tax law and Australian tax law with respect to the tax treatment of limited partnerships:
 - The USA attributes to the partners the liability for any tax payable on a gain made by RCF
 - Australia attributes the liability for any tax payable to RCF
- As Australian law imposes tax on RCF, which is neither a resident of Australia nor of the USA, the DTA can have no application to modify that outcome

The Decision on Appeal

- It is permissible to have regard to the OECD Commentary to assist in ascertaining the meaning of the provisions of the DTA
- However, commentary in relation to the mismatch between the treatment of partnerships as between the USA and Australia does not modify the application of the DTA
- The fact that the USA treats RCF as “fiscally transparent” does not detract from the fact that the Australian tax law taxes certain partnerships as if they were companies

Thank you
For your attention



Thank you!