The Cancer and Bowel Research Trust (the Trust) was established by a deed made on 20 February 1998 between Nicholas Michael John Baldock as settlor and Cancer and Bowel Research Association Incorporated (applicant) as Trustee. This hearing concerned the revocation by the Australian Taxation Office (ATO) of the applicant’s endorsement as a tax concession charity, and as a deductible gift recipient (DGR).

The facts showed that:

- The Trust was endorsed as a DGR with an initial eligibility period from 20 February 1998 to 30 June 2000 pursuant to section 78(5) of the Income Tax Assessment Act 1936 (Cth) (1936 Act).
- On 19 May 2000, the Trustee applied for exemption from income tax as a tax concession charitable institution, and was subsequently granted that endorsement.
- The Commissioner of Taxation (the Commissioner) later issued formal advices of the endorsements that had been approved with effect from 1 July 2000.
- The advice in respect of the income tax exempt charity status referred to ‘The Trustee for the Cancer & Bowel Research Trust’, with the endorsement made by reference to ‘Item 1.1 – charitable institution’ as the relevant item in Subdivision 50-5 of the ITAA 1997.
- A record of a search of the Australian Business Register, using the same ABN, recorded the same endorsements, except that in the case of the tax concession status, the relevant entity is described as ‘The Trustee for THE CANCER & BOWEL RESEARCH TRUST, a Charitable Institution’; the search also records that the entity is entitled to a GST concession, and an FBT rebate, in each case from 1 July 2005.
- The applicant (as Trustee) had been endorsed to access charity tax concessions in its own right, from 1 December 2002. Those concessions comprised an exemption from income tax as a charitable institution under Subdivision 50-B of the ITAA 1997, GST concessions from 1 July 2005 as a charitable institution under Subdivision 176 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GST Act), and FBT exemption from 1 July 2005 under section 123D of the Fringe Benefits Tax Assessment Act 1986 (Cth) (FBT Act).
- The Commissioner subsequently reviewed what were described as the endorsements of The Cancer & Bowel Research Trust as a ‘deductible gift recipient and as a charitable institution’. By letter dated 16 February 2012 the Commissioner advised that he had decided that the Trust did not satisfy the requirements for endorsement as a DGR or as a charitable institution for the purposes of the ITAA Act 1997, the GST Act or the FBT Act, and had not satisfied those requirements since 1 July 2000. The Commissioner further decided to revoke the endorsements from 1 July 2000, and enclosed reasons for the decision. The letter advising the Commissioner's decision was addressed to the Trust for the attention of its chairman.
The applicant objected to the decision by the Commissioner. In a letter dated 20 August 2012 the Commissioner advised that he disallowed the objection.

The issues before the Tribunal were:

(a) whether the applicant was entitled to be endorsed as a DGR as at 16 February 2012, being the date of the Commissioner's decision to revoke its endorsement as a DGR;
(b) whether the applicant, as trustee for the Trust, was entitled to be endorsed as exempt from income tax, FBT and GST as at 16 February 2012;
(c) should any revocation of the endorsements granted to the applicant take effect from 1 July 2000, or some other and what date;
(d) whether the applicant was entitled to be endorsed as a health promotion charity on or after 4 October 2010, being the date of its application for that endorsement; and
(e) what was the date at which the tribunal should determine these issues.

There was a preliminary issue concerning the various endorsements, some of which were addressed to the Trust, which is not a legal entity, and some of which were addressed to the Trustee of the Trust (the proper legal entity concerned, and the proper applicant in this hearing). The Deputy President was concerned about the Tribunal's jurisdiction (at [10]):

I had initially been concerned that the primary decision by the Commissioner to revoke the endorsements arguably did not relate to the applicant, because it was addressed to the Trust, and if that were the case there might be an issue as to whether the objection and the objection decision, insofar as they relate to the endorsements as a charitable institution in respect of exemptions from income tax, GST and FBT, were a nullity, with the consequence that this tribunal would then have had no jurisdiction to review the purported revocation of those endorsements. However, although the Commissioner's letter that gave notice of the revocation was addressed only to the Trust, it is clear from the reasons for decision enclosed with the letter that the Commissioner had considered the entitlement of the Trustee as trustee for the Trust to the above endorsements, as well as the entitlement of the Trust as a DGR. I am therefore satisfied that there is no issue as to my jurisdiction.

The trust deed of 20 February 1998, which created the Trust, included a declaration by the Trustee that it would hold the Trust Fund (as defined) upon trust to distribute the net income thereof among the Eligible Beneficiaries in the manner described in the deed. The deed further provided that on the vesting day the Trustee would stand possessed of the net proceeds of sale of the Trust Fund upon trust to pay the same among some or all of the Eligible Beneficiaries then existing in the shares and proportions determined by the Trustee. The Trustee was also empowered in its discretion to distribute property of the Trust Fund in excess of the immediate requirements of the Trust among the Eligible Beneficiaries or one or more of them.

The Trust was initially meant to support the research of a PhD student into issues concerning bowel cancer. The Trust was amended several times, and engaged in various kinds of activity.
A replacement trust deed was made in 2011 to amend the objectives of the Trust. The First Schedule to the 2011 Deed included a heading ‘Charitable Purposes’, and provided as follows:

**PRIMARY OBJECTIVE**

1. Educate and increase general community awareness of cancer and measures considered a preventative of cancer.

**ANCILLIARY [sic] OBJECTIVES**

1. Provide accommodation for the benefit of cancer patients and/or their families;
2. Support Scientific and medical research into causes, cure or prevention of cancer;
3. Purchase equipment used at treatment, research and diagnostic levels;
4. Provide financial assistance to cancer patients and/or their families for any purposes considered beneficial to their treatment, or recovery, whether physical or therapeautic;
5. To assist, establish and promote in the research or promotion of, and to subscribe to or become a member of or associated or amalgamated with any such association, trust, foundation or any other entity whose objectives are analogous to those of this trust.
6. To provide services and support to any other association, trust, foundation or any other entity whose objectives and/or purposes are analogous to this trust.

In his reasons for the decision to revoke the relevant endorsements, the Commissioner concluded that the 2011 Deed was legally ineffective, primarily because the provision in the original trust deed to vary the trusts on which the Trust Fund was held empowered the Trustee to effect variations, whereas (it seemed) the Commissioner claimed that it was the Settlor, and not the Trustee, who had amended the Deed. This proposition was reiterated in the Commissioner’s reasons for the objection. The Tribunal did not agree with this conclusion (at [61]):

...this aspect of the Commissioner’s reasons was misconceived. I consider that the 2011 Deed constituted a valid variation of the trusts of the original deed, because clause 2.6 of the 2011 Deed provides expressly that it is the Trustee, and not the Settlor, who had amended the Deed. This proposition was reiterated in the Commissioner’s reasons for the objection. The Tribunal did not agree with this conclusion (at [61]):

The Commissioner’s reasons also referred to provisions in the 2011 Deed which purported to give the variations to the Trust retrospective effect, and stated that the original deed, and the beneficial interests created by the original deed, could not be varied so as to have retrospective effect.

The Tribunal again disagreed with the Commissioner (at [63]):

I agree that the 2011 Deed could not retrospectively vary the terms of the trusts created by the original deed. By virtue of the general law relating to trusts, the 2011 Deed could only operate from the date when it was made, namely 8 February 2011. But in my opinion, the 2011 Deed was valid and effective from that date.
Therefore, the 2011 deed was the relevant one for consideration. On the basis of that deed, was the Trust entitled to endorsement as a DGR? The Tribunal said that it was not (at [65]):

This issue can be disposed of shortly. As mentioned above, under ss 30-125(6) and (7) of ITAA 1997, to be eligible for endorsement as a DGR, the document constituting the entity or rules governing the entity’s activities must require the entity, on the winding up of the fund, authority or institution or the revocation of the entity’s endorsement as a DGR, to transfer any surplus assets to another fund, authority or institution which is itself endorsed as a DGR. Clause 6.1 of the 2011 Deed requires any surplus assets on a winding up to be transferred to an entity to which income tax deductible gifts can be made. However, the 2011 Deed does not require such a transfer of funds to be made in the event that the Trust’s endorsement as a DGR is revoked. Further, clause 6.1 also contemplates that on a winding up, surplus assets can be transferred to any other organisation with similar charitable purposes as the Trust, and does not require that any such other organisation be endorsed as a DGR. The Trust is therefore not eligible for DGR endorsement because its Trust Deed does not comply with s 30-125(6).

The winding up clause in the original trust deed had contained a similar omission, and the Tribunal therefore held that it was appropriate that the revocation of the DGR endorsement should take effect on and from 1 July 2000.

Was the Trust entitled to endorsement as a charitable institution pursuant to Sub-division 50–A of the ITAA 1997 and the relevant provisions of the GST Act and the FBT Act? The Tribunal considered first whether it was an ‘institution’. The Tribunal said that it was apparent from its history that the Trust had originally operated as an ancillary fund, but over time its activities were such that it became an institution within the meaning of item 1.1 of the table in section 50-5 of the ITAA 1997.

Should the Commissioner have revoked the endorsements retrospectively? The relevant power is contained in section 426–55 of Schedule 1 of the Taxation Administration Act 1953 (Cth) TAA). This section provides:

1. The Commissioner may revoke the endorsement of an entity if:
   a. the entity is not entitled to be endorsed; ...
   ...
2. The revocation has effect from a day specified by the Commissioner (which may be a day before the Commissioner decided to revoke the endorsement).

The relevant deed was the 2011 deed. Had the activities of the Trust been charitable under the terms of that deed? The Commissioner had contended that they were not. The Trust had been audited in 2007–2008. There were various transactions of concern to the Commissioner, including substantial payments to restaurants and hotels. On this point, the Tribunal said (at [98]):

I agree with counsel’s criticism that it is inappropriate for a charitable institution to incur substantial entertainment expenses. Nevertheless, in most organisations, some degree of entertainment expense will be incurred, and can be of benefit to them. The total amount of the entertainment expenses paid by the applicant [$27,475.37 in 2007 and $27,541.05 in 2008] must be viewed in the context of the total income of
the Trusts, which was in excess of $5 million in each of the years in question. The applicant’s accounts were audited each year by reputable independent auditors, and no query was raised regarding this item of expenditure (or for that matter, regarding any of the so-called related party payments referred to by the Commissioner).... In all of the circumstances, I do not think that this expenditure was such that it should result in the applicant’s endorsement as a charitable institution being revoked.

Another issue of concern to the Commissioner was the amount being expended by the Trust for its fundraising activities. In evidence, the applicant’s spreadsheet included its estimate of expenditure for charitable purposes as a percentage of revenue, and showed a range of percentages between a low of 15.8% to a high of 41.85% in the years 2005 to 2011. The spreadsheet then attributed a further percentage of the fundraising costs to what is described as ‘relief of poverty’. This apparently related to an estimate of the amount paid to the persons engaged by the applicant to carry out its fundraising activities (who would otherwise be unemployable), and was calculated at 20% of total fundraising costs. This additional amount increased the percentages paid for fundraising to a range of 27.73% to 50.25% in the years from 2005 to 2011. This was a relatively high amount compared to the average in New South Wales of about 21%.

However, the Tribunal did not accept that this was unreasonable. The appropriate amount to devote to such purposes was difficult to quantify (at [108]–[109]):

For my part, I do not regard it as possible to quantify the dollar value of this aspect of the awareness and prevention activities of the applicant, or to express it as a percentage of revenue, other than to say that the applicant should be given credit for a reasonable proportion of its total fund raising expenditure under this heading, and that that proportion should not be regarded as immaterial in assessing whether the applicant was acting as a charity.... Further, the 2011 Deed expressly authorises the Trustee to employ persons. The engagement of persons who would otherwise have been unemployable did not constitute a breach of trust, and I think could be taken into account in considering whether the applicant was engaged in charitable activities.

The Commissioner was also concerned about the amount being distributed each year for the Trust’s charitable purposes. He contended that the Trust was a profit making business, rather than a charity. However, the Tribunal was again unmoved. It was ‘not persuaded that the ...[argument about distribution] would warrant the revocation of the applicant’s endorsement as a charitable institution’ (at [112]).

On a further issue of endorsement as a charity, the Trust had made a separate application for endorsement as a health promotion charity in 2011. However, this had also been rejected by the Commissioner, objected to, and the objection disallowed. The Tribunal said (at [119]):

It is clear that the 2011 Deed, made on 8 February 2011, authorises the applicant to conduct a health promotion charity, having regard to the primary objective referred in the First Schedule to that deed.

The Tribunal said this was really an unresolved matter, and required further consideration by the Commissioner in the light of additional information which should be provided by the applicant. It set a deadline of 23 September 2013 for the Commissioner to reconsider this
matter. The Tribunal pointed out that the Commissioner’s decisions might now be affected by the ‘new regulatory regime under the auspices of the Commissioner of the Australian Charities and Not-for-profits Commission’ (at [117]).

Overall, the Tribunal found that it was proper for the Commissioner to revoke the DGR status of the Trust, and to make this revocation retrospective to 1 July 2000.

However, insofar as the decision related to whether the applicant was entitled to be endorsed as an entity exempt from income tax under section 50-105 of the ITAA 1997, and as a charitable institution under section 176-1 of the GST Act and section 123E of the FBT Act, the Tribunal decided that the matter should be remitted for further consideration under section 42D of the Administrative Appeals Tribunal Act (Cth).

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/AATA/2013/336.html

Implications of this decision

As the Tribunal pointed out, the Trust was an established entity, and would no doubt reapply for DGR status (at [117]):

...the applicant is an established organisation with experienced managers and employees who have been trained in its activities, and has a database of donors and procedures that it employs to pursue its charitable activities. I assume that the applicant will be making an application to obtain endorsement as a DGR, and if that application is successful, its capacity to raise additional funds and so increase expenditure on charitable purposes will be enhanced. I am also mindful that on the evidence before me, the applicant has up to 200 employees and contractors for whom it provides employment, and a significant proportion of those people might otherwise be unemployable, and become dependent on social welfare, if the issues that have arisen cannot be resolved, and the applicant is wound up.

Therefore, there was a need for the Commissioner of Taxation to consider the matter in the light of additional information to be provided by the Trust, and for a further hearing in the AAT to resolve the matter fully.