THE AVER ADVISORY

JULY 2011

presented by **Aver Associates** *Estate Planners & Trustees* *contact@averassociates.com*

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INTERNATIONAL ADMINISTRATIVE ASSISTANCE

Beneficiary held not to be beneficial owner of trust's Swiss bank account — assistance denied

Parties X. contre Administration fédérale des contributions AFC, Amtshilfe USA, Berne (Bundesverwaltungsgericht A-7013/2010, Tribunal administratif fédéral, March 18, 2011)

In the scope of international administrative assistance with the United States, the Swiss Federal Administrative Court held that the beneficiary of an irrevocable discretionary trust was not the beneficial owner of the trust's Swiss bank account — thus denying assistance.

Facts. The case concerns UBS accounts among the 4,450 the Swiss government is obliged to disclose under the terms of the 2009 bilateral agreement with the US. In particular, the court had to determine the impact of an irrevocable and discretionary trust on government's obligation to disclose the identity of the trust beneficiary.

Decision. The court noted that the general rule when faced with trust accounts is that they are attributed to the beneficial owners of those accounts.

In the case of a discretionary trust, however, the court drew a distinction between legal ownership held by the trustee and equitable ownership held by the beneficiaries.

The court noted that, in the case of a discretionary trust, the beneficiaries merely hold an expectation and do not have any legal claims against either the trust or the trustee. The beneficiaries' equitable ownership is only realized if and when the trustee exercises his discretionary power.

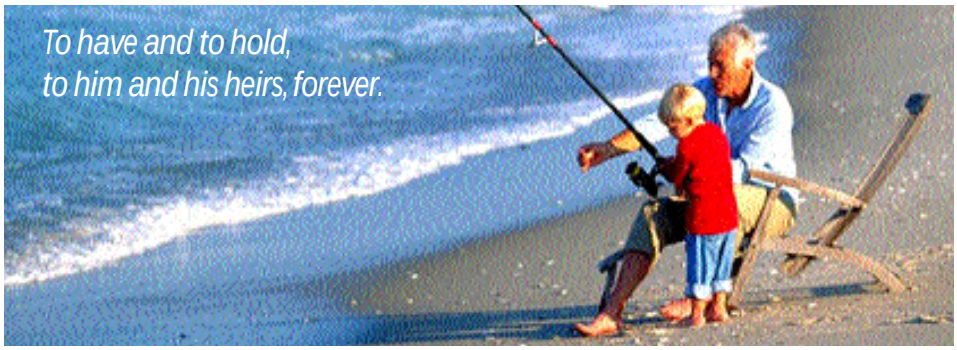
Furthermore, under Swiss tax law, the court noted that there is a fundamental difference between an expectation and a claim. Expectations may or may not realize, and they are not subject to any Swiss income or wealth taxes before they have in fact been realized.

The same expectation principle applies to pension plan income; that is, before the taxpayer actually reaches retirement age, the future payments from the pension plan are mere expectations. As such, they are not subject to any Swiss income or net wealth taxes.

The court then reviewed the trust deed and the bank account opening documents. Despite the fact that the account opening documents disclosed the identity of the beneficial owners of the irrevocable discretionary trust, the court found that the beneficial owners did not have the power to control or in any way dispose of the trust assets and revenues.

Consequently, the court relied on its expectation argument and held that the trust could not be treated as transparent.

The court ruled that the identity of the beneficial owners of the irrevocable discretionary trust must not be revealed to the US tax authorities. ■



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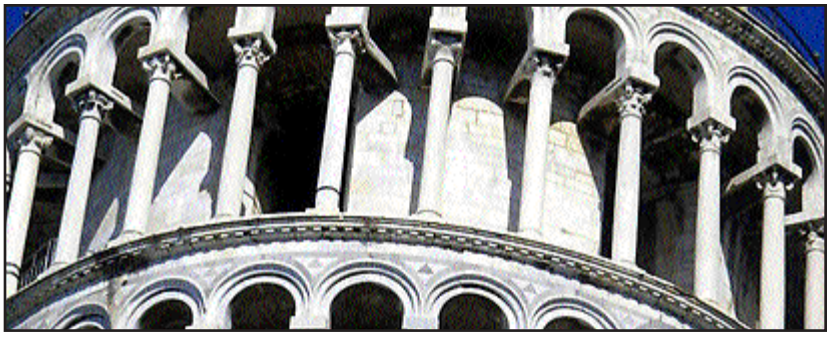

Estate Planning

Changes in Dutch tax law create new opportunities for use of trusts

In our last issue, we reported on a Dutch decision, which held in favour of a Dutch emigrant using a trust in a pre-2010 scenario. This led some readers to inquire about remaining opportunities.

While the Netherlands has long recognized trusts, Dutch authorities treated them as transparent for tax purposes; particularly if their effect would be that neither the settlor nor the beneficiaries would be subject to tax on the assets held in trust.

Nonetheless, efforts of authorities to attribute trust assets to either the settlor or the beneficiaries were not always successful. Consequently, new legislation has entered into force creating a general rule that trusts are deemed to be transparent for tax purposes as of January 1, 2010.

Notwithstanding the aim of the new legislation, the law has created certain opportunities for the use of trusts in the Netherlands. These include:

Non-Dutch resident settlor. The new law is clear that the assets and income of a trust will be allocated to the settlor and not the beneficiaries. As such, a non-Dutch resident parent with children in the Netherlands may now confidently settle a trust for the benefit of his children without creating a Dutch tax liability for them. Furthermore, any distributions from the trustee to the children will also be free of Dutch gift tax.

Dutch resident settlor. The previous application of Dutch gift tax had mainly discouraged the use of trusts for non-tax purposes. The new law is clear that no Dutch gift tax will be levied where a Dutch resident settlor settles assets into a trust. This certainty opens up new, non-tax, estate planning and asset protection opportunities for Dutch resident settlors. ■

Taxation of Trusts

Italian tax authorities issue circular on trust arrangements

Circular Letter 61/E on Trusts (Italian Tax Administration, December 27, 2010)

The Italian Tax Administration recently issued Circular 61/E, which provides clarification on the tax treatment of trusts. The new guidelines focus on the issue of fiscally ineffective trusts. Impacted trusts will be disregarded for tax purposes, such that the assets will be deemed not to have been transferred from the settlor.

The definition of a fiscally ineffective trust includes trusts where:

- The settlor may terminate the trust for his own benefit or for the benefit of others.
- The settlor can at any time appoint himself as a beneficiary or has an express power to change the beneficiaries.
- The trustees cannot make decisions without the consent of the settlor or have an obligation to follow his instructions.
- The settlor can force the trustees to distribute trust assets, or has an express power to assign trust assets or grant loans.
- The beneficiaries or settlor can vary or influence trustee decisions.

In light of the new guidelines, not only will the nature of the trust deed be important, but also the manner in which informal decisions are made by settlors, beneficiaries and trustees.

The changes should be considered carefully for trusts with Italian resident beneficiaries, especially for insurance trusts where Italian-resident beneficiaries have accepted the benefit of an underlying insurance contract. ■

Inheritance Dispute

Fiancée keeps death of lawyer secret from his family

June 2011. In an ongoing contested Will case, the High Court in London heard how the Belgian fiancée of a UK lawyer kept his death secret from his family for four months.

Owen Davies died in Paris where he had worked as a patent lawyer since 2001. He was engaged to be married to his Belgian fiancée, who is also a patent lawyer.

Davies executed a Will in 1996 leaving his entire £800,000 estate to his uncle. His fiancée claims that Davies gave her instructions to keep his death secret. Only his uncle knew that Davies had died and he was the only family member to attend the funeral.

His fiancée denied conspiring to deceive Davies' family by sending text messages from his phone pretending he was still alive.

The family, including Davies' mother and siblings claims the Will is invalid and is contesting the administration of his £800,000 estate. His family is arguing that, because Davies was domiciled in Belgium, his UK Will is not valid.

During the week, the couple lived in a Paris home owned by Davies. They would travel on weekends to Belgium where they stayed at a home owned by his fiancée. Davies also owned property in the UK.

Question of Law. The court must determine whether Davies was domiciled in Belgium or in the UK at the time of his death. Should the family be successful, Davies' estate would be divided according to Belgian succession law. In such case, Davies' mother and siblings would divide (a quarter of) his estate among themselves. ■

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LIFE SETTLEMENTS

Incontestability clause overrides deliberate misrepresentations

Settlement Funding v. AXA Equitable, 2011 U.S. District Court (Manhattan), LEXIS 28798

Despite the presence of fraudulent representations in the procurement of an insurance policy, a US life insurance company—unable to overcome the two-year incontestability clause in the policy—was ordered to pay $5 million to the third party trust beneficiary.

Facts. In the context of a stranger-originated life insurance scheme, AXA Equitable approved and issued a $5 million life insurance policy to the Esther Adler Trust.

The case involved misrepresentations and fraudulent actions including forged signatures and a claim that the insured had a net worth in excess of $12 million, when in fact her net worth was less than $100,000. Following Adler's death, the policy was transferred to Settlement Funding. The evidence showed the latter had:

- No involvement in or knowledge of the fraud.
- Relied on AXA's statements that the trust owned the policy and that it was enforceable and beyond contestability.
- Relied on AXA's statements that the policy's contestability period had expired.

Decision. The court noted that while incontestability clauses prevent challenges to the validity of a policy, they were not intended to bar any and all actions related to a policy.

In this case, however, the court found that both the policy and the incontestability clause were valid and that Settlement Funding had committed no wrong in connection with the purchase, sale, repurchase or assignment of the policy. In addition, AXA indicated to Settlement Funding that the policy was in fact valid. It cannot now argue that the policy was void *ab initio*, so that no incontestability provision exists to bar its challenge.

AXA was thus liable to pay $5 million to Settlement Funding. ■

LIBERATING FROZEN FUNDS

Suharto's son wins case against Guernsey financial crime force

Garnet Investments Ltd v Chief Officer of the FIS, Customs & Excise, Immigration and Nationality Service, No 5/2011 (Royal Court of Guernsey, April 15, 2011)

An investment company owned by Tommy Suharto, son of the late Indonesian president Haji Muhammad Suharto, has won a case against the Guernsey Financial Intelligence Service, which had frozen its assets.

Facts. Garnet Investments, a BVI company owned by Tommy Suharto, deposited money with BNP Paribas in Guernsey in 1998, weeks after the fall of President Suharto.

In 2002, BNP refused to transfer assets owned by Suharto's Garnet Investments to another bank, on the grounds that Suharto and his father, who died in 2008, may have been involved in corrupt activities. After several interventions, Garnet issued a fresh instruction to BNP and, in 2009, the FIS refused consent without giving reasons for its decision.

Decision. The court ruled that the actions of the FIS were unreasonable as it had no grounds to block the transfer because there were no known criminal proceedings against Suharto anywhere in the world. The court also noted that the FIS failed to act within a reasonable time, and failed to give reasons explaining its decision to block the transfer.

Comments. This ruling highlights the limitation of power on authorities dealing with frozen assets, and offers encouragement to entities to challenge such decisions in the courts. ■

CHILD BENEFICIARIES

Lovechild loses right as beneficiary to JFK fortune

John Fitzgerald Kennedy v. the Trustees of the Testamentary Trust of the Last Will and Testament of President John F. Kennedy, 2010 U.S. App. LEXIS 22573 (October 28, 2010) (New York)

A New York Court of Appeals has ruled that a middle-aged man, who claimed to be the illegitimate son of Marilyn Monroe and President John F. Kennedy, does not have a right to the late president's fortune.

Facts. The terms of JFK's will provided that each of his children were to receive a certain amount of money each year.

John R Burton, who legally changed his name to John Fitzgerald Kennedy, sued the trustees of JFK's estate in October 2008, alleging breach of fiduciary duty for failure to investigate his claims that, as a Kennedy child, he is entitled to an unspecified past and present share of Kennedy's estate.

Decision. The Court did not consider whether Burton's lineage claims are true and ruled that a fiduciary duty was only owed to beneficiaries of the trust, or President Kennedy's children.

The Court found that at the time the will was executed, and in the absence of any contrary intent, the word children referred only to children born in wedlock. The plaintiff failed to allege any facts that could overcome the presumption that the term children included only those born in wedlock.