THE AVER ADVISORY

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presented by Aver Associates Estate Planners & Trustees

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MALTESE FOUNDATIONS

Long awaited Maltese *Foundations (Income Tax) Regulations 2010* extend tax transparency principle to foundations

Legal Notice 312 of 2010 published 28 May 2010

As expected, the Maltese Government has extended the tax transparency principle to foundations as it applies to trusts so that only foundations for Maltese resident persons will be taxable in Malta.

The Minister of Finance, the Economy and Investment has made the following regulations:

- A foundation, shall, for the purposes of the Income Tax Acts, be treated in the same manner as a company.

  Thus, the general rule is that foundations are taxable at 35% and can make use of tax treaties.

- The administrators of a foundation may, by notice in writing to the Commissioner of Inland Revenue, irrevocably elect that a foundation shall be taxed under the provisions of the Act applicable to trusts.

  Such Maltese foundations set up by and for nonresidents are then effectively exempt from income tax.

- When a foundation is established with segregated cells in terms of article 20 of the Second Schedule of the Civil Code, each cell of the said foundation shall be deemed to be a separate foundation.

Under the old regime, only those foundations which the Commissioner of Inland Revenue accepted as philanthropic and were listed in a public notice in the Government Gazette were eligible for tax exemption.

Although foundations have long been established in Malta, it is only as recently as 2007 that parliament passed the necessary law to deal comprehensively with the various aspects pertinent to foundations.

With the coming into force of these income tax regulations, the registration of private foundations in Malta can now begin in earnest. ■

JERSEY-MALTA TAX TREATY

Jersey signs comprehensive double taxation agreement with Malta

25 January 2010. Jersey Chief Minister Terry Le Sueur and Malta's High Commissioner to the UK Joseph Zammit Tabona signed an income tax treaty. The treaty represents Jersey's sixteenth international tax agreement to meet the OECD tax standards on transparency and information exchange and its first tax treaty based on the OECD model convention.

Senator Le Sueur said: "The signing of the treaty with Malta is a significant step. We are keen to develop our business relationships with the EU and therefore we are delighted that, through the treaty, we will be further strengthening our political and business relationship with a Member State." ■

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IRREVOCABLE LIFE INSURANCE TRUSTS

Rare appellate level court case lowers standard for trustee's investment due diligence with respect to life insurance

In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128 (Indiana Court of Appeals, March 2, 2009)

Facts. The trustee of an irrevocable life insurance trust hired an insurance consultant to review insurance policies held by the trust. The policies provided for a collective death benefit of $8million.

Upon review, the consultant advised that the policies would likely lapse long before the insured (the settlor) reached his life expectancy.

The consultant recommended the purchase of a replacement policy with an expected face value of $2.78million guaranteed to age 100.

Soon after the purchase of the new policy, the insured died unexpectedly at the age of 53. The beneficiaries then sued the trustee for breach of fiduciary duty with respect to the management of the trust assets and, in particular, for selecting a policy with a lower death benefit.

Question. The trial court framed the question as follows:

> Was it prudent for the trustee to move the trust assets from insurance policies with significant risk and likelihood of ultimate lapse into an insurance policy with a smaller but guaranteed death benefit?

Decision. The trial court held in favor of the trustee, finding that it acted in good faith to protect the interests of the beneficiaries. The trial court focused on the prudence of replacing the old policies in general, rather than the prudence of choosing the new policy specifically.

The Court of Appeals agreed, finding that the trustee relied on guidance from an outside, independent entity with no policy to sell and without any financial stake in the outcome.

The court determined that the trustee did not imprudently disregard the independent guidance from its consultant and emphasized that the courts should not apply hindsight in addressing fiduciary investment decisions.

Commentary. This is a rare appellate level court case dealing with a claimed breach of fiduciary duty involving the management and investment of life insurance in a trust.

Acknowledging the exposure to potentially serious trustee liability, some jurisdictions have passed legislation that reduces the trustee's fiduciary responsibility where life insurance is purchased as an investment.

Consistent with legislative policy, this decision develops the case law and lowers the standard for a trustee's investment due diligence with respect to life insurance. ■

TRUSTEE NOMINEE

Jersey courts unwilling to impute trustee duties to agents

Chvetsov v. BNP Paribas Jersey Trust Corporation Limited and Maison Anley Property Nominee Limited [2009] JLR 217

Facts. A Jersey law trust held a flat located in London, which was occupied by the claimant beneficiary and his family.

BNP Paribas was the sole trustee of the trust, but the registered owner was Maison Anley, acting as nominee on behalf of the trustee.

The beneficiary requested that the property undergo certain renovation works. The trustee authorized the nominee to enter into a contract with a firm of architects for the work to be carried out.

The beneficiary brought an action alleging that the works were more expensive than they should have been and claiming that the trustee was in breach of trust in its failure to exercise the requisite skill and care to monitor, control and supervise the costs incurred with respect to the renovation.

The beneficiary also claimed breaches of trust and damages in tort on the part of the nominee.

Remedies. The court set out the possible remedies that may be available to beneficiaries in respect of the actions of an agent, namely:

> (a) to request the trustee to pursue a claim on behalf of the trust against the agent; or if the trustee refused, then
>
> (b) the beneficiaries may institute an administrative action seeking a direction from the Court that the trustee should take proceedings against the agent; or
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> (c) as an alternative, in special circumstances, the beneficiaries may institute a derivative action against the agent. ■

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TAX RESIDENCY

UK tax court rulings on tax resident status

Laerstate Case

UK Revenue successfully argues that Dutch company is UK resident

Laerstate BV v The Commissioners for HMRC, [2009] First-tier Tribunal

September 2009. A decision from the UK First-tier Tribunal provides an important reminder that the maintenance of non-UK corporate residence requires careful management, particularly when influential persons are active in the UK.

Facts. The case concerned an appeal by the Dutch incorporated company, Laerstate BV against an assessment of UK corporation tax. The assessment was to tax on the gain arising from Laerstate's disposal of its shareholding in Lonrho plc. The tax was claimed on the basis that Laerstate was resident in the UK for tax purposes at the time the gain was realised in 1996.

Laerstate argued that it was not resident in the UK, either at the time it purchased its shareholding in Lonrho or at the time it disposed of it at a gain.

Laerstate was incorporated in the Netherlands and was therefore resident there for the purposes of Dutch domestic law. Initially, Laerstate had two directors, being a German resident, Bock, and Trapman, a Dutch resident. Bock was also the sole shareholder.

During the relevant period, Bock resigned as director and Trapman continued as sole director, as was permitted by the company's constitution. In 1993, Bock became joint managing director of Lonrho and kept an office in the UK, though he was only present in the UK for a third of the year from 1993-1995 and half the year in 1996.

Decision. The First-tier Tribunal applied the test of "central management and control" to determine that Laerstate was UK resident for UK tax purposes at the time of the sale of the Lonrho shares and that the UK was also the "place of effective management" for the purposes of the tie-breaker clause in the UK-Netherlands tax treaty.

The Tribunal held that Bock was making decisions and not the board (Trapman on occasion displaying a lack of understanding of what he was signing) and that this was true both during and after his directorship.

This case shows that a taxpayer has to establish that the board is, in fact, the decision-making organ.

Gaines-Cooper Case

Non-resident status denied despite spending no more than 91 days in UK

The Queen on the Application of Robert Gaines-Cooper and The Commissioners for Her Majesty's Revenue & Customs [2010] EWCA Civ 83, Case No: C1/2008/2488 and C1/2008/2690

February 2010. The UK Court of Appeal rejected an appeal by globetrotting business tycoon Robert Gaines-Cooper that he had been wrongly denied non-resident status. Gaines-Cooper now faces a UK tax bill of £30million for the years 1993 to 2004.

Facts. Gaines-Cooper argued that he did not owe taxes in the UK because he has been domiciled at his luxury villa in the Seychelles for more than 30 years and has religiously kept to the government's published guidelines by spending no more than 91 days a year in the UK.

Decision. The court found that Gaines-Cooper, who was born in Berkshire, never meaningfully cut ties with the UK. He maintained a mansion at Henley-on-Thames, which the court called his chief residence.

The mansion was also home to his Seychelles wife and son, and the location of his art and gun collections. In addition, his son attended an English school, his will was drawn up under English law and he regularly attended Ascot racecourse.

The court found that England remained the centre of his life and interests. The fact that Gaines-Cooper had not been in the country for more than 91 days in any one year since 1976 made no difference to his status. ■

CELEBRITY ESTATES

TRAVIS BARKER LAWSUIT

Estate of plane crash victim maximizes settlement with purchase of life annuity

March 2010. The estate of one of the victims of a 2008 private jet crash in South Carolina, involving rock star Travis Barker, has settled with Clay Lacy Aviation, Learjet, and Goodyear Tire for over $4million.

The victim Chris Baker was Barker's close friend and manager of Barker's punk-fashion boutique in Los Angeles. His estate will use the settlement funds to purchase an annuity guaranteed to pay $17.4million over the life of Baker's three-year old son.

The case illustrates the effectiveness of life annuities as an estate planning tool. ■

ESTATE OF CASEY JOHNSON

Johnson & Johnson heiress born in privilege, died in squalor

January 2010. Avoiding tragic stories like that of Casey Johnson is one reason wealthy clients seek the services of trustees and estate planners to help them restrict or control the passing of their hard earned wealth to their children.

Although Casey Johnson, heiress of the Johnson and Johnson fortune, was born into a life of privilege, the apartment in which her body was found was reportedly dirty, lacking electricity and water, and infested with rats in some areas.

Furthermore, a California rehabilitation centre—Renaissance Malibu—has claimed that the heiress went into rehab there in August 2009 and left the facility with an outstanding bill totaling $74,750.

Her estate is reportedly worth a mere $75,000, which will mean that her estate would be broke, if the bill is paid in full. Prudent estate planning ensured that the heiress was well provided for during her life, without placing the family fortune at any great risk. ■