# The Aver Advisory

presented by Aver Associates Estate Planners & Trustees

SEPTEMBER 2009

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# ESTATE PLANNING

## Landmark decision favors wealth preservation in divorce case

**Radmacher v Granatino, [2009] EWCA Civ 649, Court of Appeal, Royal Courts of Justice, England and Wales**

**Facts.** At the centre of the dispute was the question of enforceability of a pre-nuptial agreement signed by Katrin Radmacher—a German heiress worth an estimated £100 million—and her ex-husband Nicolas Granatino—a Frenchman and former investment banker, who now earns £30,000 working as an academic at the University of Oxford.

Both were from very wealthy European families, although Radmacher was the wealthier on paper having inherited a share of her father's paper-making empire.

The couple married in London in 1998. They signed a pre-nuptial agreement in which Granatino agreed not to make any claim against Radmacher's inheritance in the event the marriage broke down.

Radmacher testified that the pre-nuptial agreement was presented at her father's insistence. She said he wanted to protect her inheritance and feared gold-diggers.

**Analysis.** Pre-nuptial agreements have been regarded as contracts that are void under English law because they are immoral. At first instance, the High Court gave very limited weight to the pre-nuptial agreement having found that the agreement was flawed and of negligible importance.

The High Court awarded Granatino an amount of £5.85 million based on his needs as both a husband and a father.

In July 2009, the Court of Appeal held that it had become increasingly unrealistic to regard such contracts as void, stating that such conclusions reflect the laws and morals of earlier generations.

The Court reduced Granatino's award to about £1 million based on his needs only as a father of the couple's two daughters.

**Commentary.** Pre-nuptial agreements are contractually binding documents in civil law jurisdictions.

Although they are not contractually binding under English law, it is clear they can now be given decisive weight in divorce cases.

While pre-nuptial agreements may appear unromantic and even immoral before a wedding, experience proves they are critically important to wealth preservation. ■

## Quantifying Hidden Assets in Divorce Proceedings

**Mahon v Mahon (2008) EWCA Civ 901, Court of Appeal, Royal Courts of Justice, England and Wales**

**Facts.** Brian Mahon is a qualified attorney and successful entrepreneur who married Iola Mahon in South Africa in 1983. The couple had thee children before moving to England in 1996 where they remained until the breakdown of their marriage in 2006.

Mr. Mahon disobeyed numerous directions for financial disclosure and claimed that none of his assets could be traced to him. He estimated the couple's wealth at approximately £3.5 million, which the court found was absurd.

**Analysis.** The court accepted a schedule of the parties' visible assets amounting to £10.5 million and granted an award to the wife in the amount of £9 million.

The husband then sought permission to appeal on the grounds that the award was plainly excessive. His application for permission to appeal was refused.

The husband agreed that his conduct in court was abysmal but argued that it was unfair to infer from such conduct that he had significant further resources. The court took the view that the guilty spouse has only himself to blame.

**Commentary.** This case highlights the need for legitimate estate planning structures which are capable of withstanding the scrutiny of full disclosure.

# INTERNATIONAL TAX PLANNING

## New guidance on tax framework applicable to trusts in Italy

**Italian Tax Court (Florence), Sentence No. 30, February 12, 2009**
**Italian Tax Authority, Tax Ruling No. 110, April 23, 2009**

The application of taxes to the trust instrument in Italy falls under the scope of the country's *Inheritance and Gift Tax Law,* pursuant to which taxes become payable upon the transfer of assets from the settlor to the trustee.

The applicable tax rates are determined by the family relationships between the settlor and the beneficiaries. An ambiguous situation, however, existed where the settlor reserves the right to appoint the beneficiary at a later stage.

**Tax Decision.** In a recent decision from the Tax Court in Florence, it was clarified that if the settlor does not immediately designate the beneficiaries, the trust is subject to a "suspensive condition" and the payment of taxes is postponed until the moment of designation of the beneficiaries.

The *Inheritance and Gift Tax Law* also provides for tax relief upon the transfer of a business or shares when the heirs:

- Carry on the operations of the business for at least five years, or
- Acquire control of the company, having more than 50% of the voting shares.

Application of the above rule was unclear in circumstances involving a trust instrument.

**Tax Ruling.** In a recent ruling from the Italian tax authorities, it was confirmed that the generational transfer, even if accomplished through a trust, qualifies for tax relief subject to the following conditions:

- The trust is set up for at least a five-year period.
- The final beneficiaries are the legal heirs and/or spouse of the settlor.
- The trust is irrevocable and nondiscretionary.
- The trustee keeps control of the company or carries on the business for at least a five-year period.
- Upon dissolution of the trust, the business or shares will be transferred to the heirs and/or spouse.

In the facts of the matter presented for a ruling, the trustee had the discretionary power to dispose of the shares in the business upon dissolution of the trust.

The Tax Authority found that such discretionary power creates uncertainty as to whether the fiscal policy objectives of granting tax relief to generational transfers would be satisfied. Consequently, the tax exemption was denied. ■

## Estate of Giovanni Agnelli

**Family dispute exposes estate of former Fiat chairman**

A bitter inheritance battle between the descendants of Italy's most famous industrialist Giovanni Agnelli—who ran the Fiat empire for three decades and died in 2003—has led to the launch of a tax probe by Italian authorities.

The trouble started after Agnelli's only surviving child, Margherita Agnelli de Pahlen, traded her shares in the family business for a one-off inheritance worth about $2 billion. She suspected assets had been hidden from her by Agnelli's advisers when she agreed to her share of his wealth.

In 2007, Agnelli's daughter sued her father's most trusted advisers, accusing them of failing to give her a proper accounting of his estate, particularly in respect of assets held abroad. The allegations were strongly denied by Marella Agnelli, her mother and widow of the late Fiat boss.

In July 2009, a Turin court ruled that evidence brought by Agnelli's daughter was inadmissible.

Tax authorities, however, reasoned that, if Margherita's claims are true, part of the Agnelli fortune may belong to them.

In August 2009, Italy's tax-collecting agency, Agenzia delle Entrate, confirmed that an investigation into the Agnelli estate has been opened. More than $1 billion in alleged undeclared assets is now under investigation.

# Clarification of tax treatment on trusts in Spain

**Spanish General Tax Directorate, Tax Ruling No. V1991-08, October 30, 2008**

As Spanish civil law does not recognise the common law institution of a trust, the application of Spanish tax laws to a foreign trust is uncertain where:

- The settlor and/or the beneficiaries are tax resident in Spain.
- The trust generates income or capital gains in Spain.
- Part of the trust property is located within the Spanish territory.

**Tax Ruling.** Last year, the Spanish General Tax Directorate issued a ruling concerning the taxes payable on assets held on trust for beneficiaries who are resident in Spain for tax purposes.

The case involved a Panamanian woman who set up a trust in Guernsey, under which she was the sole beneficiary. At the time of her death, she resided in the Autonomous Region of Madrid. Her grandchildren were residents of Spain and became beneficiaries of the trust upon her death.

Tax authorities ruled that distributions made as a consequence of her death must be treated as if they were made directly between the grandmother and the beneficiaries. Accordingly, no prior transfer from the settlor to the trustee had taken place for the purpose of Spanish tax.

**Commentary.** In light of this ruling, it may be concluded that Spanish tax authorities will treat the trust institution as transparent and without effect by for purposes of application of the *Spanish Inheritance and Gift Tax Law*. ■

# Entitlement of trusts to tax treaty benefits in Portugal

**Portuguese Tax Authority, Circular Letter No. 6/2009, April 6, 2009**

Similar to Spain, Portugal does not have a legal institution that directly corresponds to a trust. Consequently, it may be reasonable to expect Portugal to adopt a blanket position to deny tax treaty benefits to trusts.

**Tax Ruling.** The Portuguese tax authority recently issued a ruling to clarify the entitlement of trusts to tax treaty benefits in respect of Portuguese-source income.

The position of the tax administration is that trusts do not qualify automatically for tax treaty benefits and may only claim such benefits on two conditions:

- The tax treaty must include an express reference to trusts.
- All requirements and conditions, set out in the treaty must be met.

Portugal has signed tax treaties with the United States, Canada and Turkey, in which there is an express reference to trusts.

**Commentary.** The ruling does not provide further guidance on satisfying the treaty conditions. As such, provided all prescribed tax forms are duly certified by the tax authorities, the trust should be entitled to treaty benefits in limited cases. ■

## Estate of Michael Jackson

**Family members battle with executors to control performer's estate**

Pop star Michael Jackson, who died last June at the age of 50, left behind three children as well as his well-known brothers, sisters, mother, and father.

Under Jackson's will, his mother Katherine Jackson will receive 40% of the estate in trust. Jackson's children also receive 40%, while the remaining 20% goes to unspecified charities to benefit children.

Jackson's mother immediately sought to wrest control of the estate from the executors, but was denied by a judge.

Jackson's will contains a "no contest" clause, which typically means that if a beneficiary unsuccessfully challenges the will's validity, that person forfeits their inheritance. As such, Mrs. Jackson, did not challenge the will directly, but raised only potential conflicts of interest.

More recently, Mrs. Jackson has sought to be named as an additional executor or as a co-trustee. The permanent executors have resisted, partly because they say that having a beneficiary also serve as a trustee could result in more taxes being owed.

While family members of the late pop star battle with executors, it is clear that Jackson's posthumous business empire will be record-breaking. Experts estimate the business of Michael Jackson could generate about $50 million to $100 million annually.