THE AVER ADVISORY

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presented by Aver Associates Estate Planners & Trustees

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PRIVACY

France's register of trusts ruled unconstitutional

French Constitutional Court, Decision n° 2016-591 QPC, October 21, 2016

In a landmark decision handed down in October 2016, France's Constitutional Court struck down and repealed the law introducing the French public register of trusts. The court held that public access to the register imposed a disproportionate infringement on the right to privacy, and did not advance the objectives of countering tax evasion. As such, the law was declared unconstitutional.

Background. In 2011, France introduced legislative changes affecting the taxation and reporting of trusts. Trustees were required to file annual reports, if either the trustee, the settlor and/or one of the beneficiaries of a trust were French tax residents, or if any of the trust assets were located in France.

In 2016, French authorities adopted a law to introduce an online register of trusts. The register was developed using data filed previously by trustees. While lauded by authorities as a step towards greater transparency and effective information exchange, the register raised serious concerns about the resulting loss of privacy for trust beneficiaries worldwide.

Legal challenge. Public access to France's online register of trusts, launched July 5, 2016, was suspended two weeks later, by France's highest administrative court, following a legal challenge from a beneficiary of one of 16,000 trusts made public.

The applicant, an 89-year old American woman who resides in France, argued that public access to the registry constituted an infringement of her privacy. She insisted that publication of such sensitive information should remain confidential until her succession. Otherwise, her heirs and potential heirs would be likely to exercise pressure on her to modify her estate plans.

The administrative court judge agreed noting that the personal information available on the public register could lead to the disclosure of testamentary intentions and thereby expose the applicant to undue pressure from people in her immediate circle.

This decision of the French Constitutional Court is important and likely to have some influence on the EU institutions that are currently debating publicly accessible registers of the beneficial ownership of companies and business-related trusts imposed in the EU by the Fourth Money Laundering Directive. ■

UK's highest court rules tax authorities breached duty of confidentiality

R (on application of Ingenious Media Holdings plc et al. v Commissioners for Her Majesty's Revenue and Customs; [2016] UKSC 54 (October 19, 2016 - UKSC 2015/0082)

The UK Supreme Court has ruled that the UK tax authorities unlawfully disclosed confidential information to journalists about financial advisors Ingenious Media. In June 2012, two Times journalists had a background briefing on tax-avoidance schemes with Dave Hartnett, then permanent secretary for tax. Some information from the briefing was used in a later Times story.

The court found the information supplied by Hartnett to the journalists about the taxpayer was confidential, in respect of which the tax authorities owed a duty of confidentiality. "The fact Hartnett did not anticipate his comments being reported is not a justification for making them," the court noted. Consequently, the court ruled that the tax authorities had breached their duty of confidentiality. ■

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INFORMATION EXCHANGE

New OECD proposal allows the US to escape CRS

In July 2016, G20 finance ministers met in China to discuss progress made on effective and widespread implementation of the internationally agreed standards on tax transparency.

The group endorsed an OECD list of criteria to identify non-cooperative jurisdictions.

Pursuant to the OECD proposal, jurisdictions would be able to avoid being considered "non-cooperative" if they satisfy at least two of the following three criteria:

- if they enjoy a "largely compliant" rating on international exchange of tax data
- if they have made a "commitment to implement the OECD *Common Reporting Standard* (CRS) by 2018
- if they have signed the OECD's multilateral tax assistance convention

Ironically, the United States is one of the only major countries not to have signed up to implement the CRS, which is designed to facilitate the automatic exchange of tax-relevant financial information globally.

Tax industry experts say the criteria have been designed to intentionally allow the US to escape the CRS.

The US has come under attack for becoming one of the world's newest tax havens. The US argues it has no need to participate in the CRS program, as it has its own tax-information collecting scheme known as the *Foreign Account Tax Compliance Act* (FATCA), which compels non-US financial institutions around the world to report to the IRS on any accounts held by Americans.

Critics say FATCA is far less stringent than the CRS, and that allowing the US to avoid the CRS risks making a mockery of the OECD's efforts for global tax transparency and information exchange. ■

FOREIGN BANK ACCOUNT REPORTING

Appellants continue challenge of US foreign bank account reporting regime

Mark Crawford et al. v. US Department of Treasury et al., No. 3:15-cv-00250 (US District Court Ohio), No. 16-3539 (US Court of Appeals for the Sixth Circuit)

In April 2016, a US district court dismissed a lawsuit brought by Senator Rand Paul and five other US citizens and former citizens who were challenging the legitimacy of the foreign bank account reporting regime.

Facts. The plaintiffs alleged they suffered significant banking difficulties—an inability to open foreign accounts or refinance mortgages with non-US banks; family disharmony with non-US spouses whose financial information was being reported to the US and foreign governments under the *Foreign Account Tax Compliance Act* (FATCA) and the associated intergovernmental agreements (IGAs) on information exchange; as well as fears of excessive fines being imposed under the Foreign Bank and Financial Accounts reporting regime (FBAR).

Paul, suing in his capacity as a US Senator, contended that the IGAs were invalid as they exceeded the proper scope of executive branch power and should have been submitted for Senate approval.

Decision. The court did not consider the merits of FATCA, the IGAs, the FBAR or FBAR penalties. Rather, in dismissing the case, the court held that all plaintiffs lacked the legal standing to sue.

The plaintiffs have appealed the decision alleging they are all individuals severely affected by the challenged FATCA, IGAs and FBAR provisions.

They have also added, in their appeal, that they have a reasonable expectation of privacy in their banking records, and that the risk of identity and personal information theft and security breaches are not speculative, but present real risks of immediate harm. ■

France's 5 percent penalty for non-disclosure of bank accounts ruled unconstitutional

French Constitutional Court, decision n°2016-554 QPC, July 22, 2016

The French Constitutional Court ruled that the 5 percent penalty which may apply in case of failure to disclose offshore bank accounts which total balance exceeds EUR50,000 as at 31 December of the concerned year is unconstitutional.

The Court referred to article 8 of the *Declaration of Human and Civic Rights*, 1789 according to which "The law must prescribe only the punishments that are strictly and evidently necessary; and no one can be punished except by virtue of the law drawn up and promulgated before the offence is committed, and legally applied."

The Court had to determine whether there is a disproportion between the infringement and the applicable above penalty. The 5 percent penalty only depends on the total balance of the undisclosed bank accounts, even if there is no tax evasion or fraud in relation to these accounts.

The Court considered consequently that a 5 percent rate applicable as a result of the non-compliance with a mere reporting obligation is disproportionate considering the aim being pursued.

In practice:

• As of the date of the decision, 22 July 2016, the 5 percent penalty cannot be applied anymore. The flat EUR1,500 or EUR10,000 will be applicable.

• For the past, the 5 percent penalty can be refunded within the statute of limitations. ■

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Celebrity Estates

Prince's lack of estate planning could cost his heirs plenty

Prince Rogers Nelson (Prince) was a singer, songwriter, musician, record producer and actor. He was only 57 years old when he died earlier this year, unexpectedly and without a will.

Prince did not leave a surviving spouse, any issue, or parents. He is survived by six siblings, half-siblings, and one niece, each of whom is entitled by State law to an equal one-seventh share of the estate.

His lack of proper estate planning will almost certainly cost his estate millions in taxes and legal fees. Various estimates place the value of his estate at around $300 million, not including his unpublished music. Roughly half of his estate could go to the US government in taxes.

Had Prince taken steps to properly plan for his eventual death, he could have set up trusts and then transferred his music and other assets into those trusts. Prince could have, for example, transferred his unreleased music to a dynasty trust. He would have paid a gift tax on the value of the music at the time of the transfer, but after his death, the trustee could release that music and the value of this work would increase with no estate tax implications.

Another concern is distribution of the estate property. State laws determine what heirs are to receive the estate and in what portion. Prince's heirs will most likely end up in a legal battle over who is to receive what assets.

Given the difficulty of assessing the value of his image, his unpublished material, and the fact that his current music has increased significantly in value since his death, Prince's estate could be embroiled in legal disputes for years to come.

With proper estate planning, Prince could have saved transfer taxes for his family, protected his siblings' and his niece's inheritances, avoided a costly and cumbersome guardianship for his niece, and named executors and trustees of his choice. ■

Muhammad Ali—the fight is likely to go on

Muhammad Ali was never one to shy away from battles. From heavyweight championships in the boxing ring, to the United States Government, and to the ravaging effects of Parkinson's disease, Ali continued to fight. Now there are growing fears that the fight will follow him into the grave, with mounting reports of trouble on the horizon for his estate and his legacy.

The circumstances are ripe for an estate battle. Muhammad Ali fathered nine recognized children (including his adopted son from his most recent marriage) over the course of four different marriages. Estate disputes between the surviving spouse and children from prior marriages are the most common source of trouble in courts worldwide. Add in the reality of Ali's long-standing struggles with Parkinson's disease — which can have not only physical effects, but mental as well—and there is a strong possibility that unhappy heirs may file challenges in court.

And, of course, there is the reality that so much money is on the line. Initial reports are that Muhammad Ali's fortune ranged between $50 million and $80 million.

Because of these circumstances, the early reports of potential estate fighting have to be taken seriously. It was reported that Ali's only known biological son, Muhammad Ali, Jr., has been disgruntled ever since his father married Lonnie, wife number four, in 1986. Ali, Jr., claims that Lonnie cut him out of his father's life and rarely allowed him to visit. Ali, Jr., says he was living in poverty and is now trying to sell a tell-all book in hopes of cashing in on the difficult family dynamics. He also may file a court proceeding in the hopes of receiving an inheritance.

Muhammad Ali's second wife, Khalilah Camacho-Ali, had to protect Ali from paternity suits during their marriage, comparing him to Arnold Schwarzenegger and Tiger Woods. She expects claims by illegitimate children to swamp Muhammad Ali's estate, saying, "They're going to come out of the woodwork like roaches."

Muhammad Ali is believed to have created a will placing his fourth wife, Lonnie, in charge of his estate. This makes sense considering she is widely recognized for having helped manage his financial and business affairs throughout their marriage.

Several media outlets reported that Ali, with the help of an attorney and others, executed a very-detailed funeral and burial plan, which he reviewed carefully and changed over time. The plan was spelled out in a two-inch-thick "Book" that left no detail open to chance, from the identity of his pallbearers and speakers at his memorial service, to how and where he wanted to be laid to rest.

It would be hard to imagine that Ali would have taken such great care with his funeral plan without also protecting his wife, his other heirs, and his financial legacy with a will and other estate planning documents.

It is only a matter of time before the extent of his planning is revealed. When it is, the date that his estate planning documents were finalized will be of critical importance. The closer to his date of death, and the weaker he was when he signed the will or other legal documents, means the greater likelihood that disgruntled heirs or others can launch a meaningful challenge to the validity of the documents. If Ali signed the will and other estate planning documents before Parkinson's disease had an impact on his mental state, their claims will likely fall short.

The difference between the estates of Ali and Prince will be interesting to watch over time and will likely provide a valuable lesson. ■