THE AVER ADVISORY

AUGUST 2013

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IN THIS ISSUE .....

TRUSTS

Belgium imposes trust reporting obligations

Law of 30 July 2013 concerning miscellaneous measures

On July 30, 2013, a new Belgian law introduced reporting requirements for legal constructions set up by resident private persons. While the law covers foreign trusts, foundations, companies and partnerships—including the Anstalt in Liechtenstein and Bahamas limited corporations, which are explicitly mentioned in the legislation—it applies to a much wider range of structures that fall into one of two classes.

The first class is defined as legal relationships under which an administrator owns and manages assets for a beneficiary or some other goal. The second includes any non-resident entity in which a Belgian resident has a beneficial interest, and that pays substantially less tax in its jurisdiction of establishment than it would in Belgium.

Parliamentary documents associated with the new Act suggest it is connected with proposed revisions to the *EU Savings Directive* allowing tax authorities to look through trusts, foundations, Stiftungen, etc. to identify the ultimate beneficiaries. The law clearly aims at capturing any Belgian individual tax resident that is directly or indirectly involved with a private estate or offshore structure as defined above.

The notification measure will not only apply to those who established a legal construction, but also to those who "to their knowledge are a beneficiary or even potential beneficiary of the legal construction, in any way or at any time." Thus, from tax year 2014 onwards, Belgian resident taxpayers must disclose any such arrangements in their annual tax returns, even if the real beneficiary (or founder) is their spouse or minor children.

As with the reporting obligation on foreign life insurance contracts introduced at the end of last year, this new measure raises various questions of domestic and European law. It goes without saying that, more than ever, these are times for action! ■

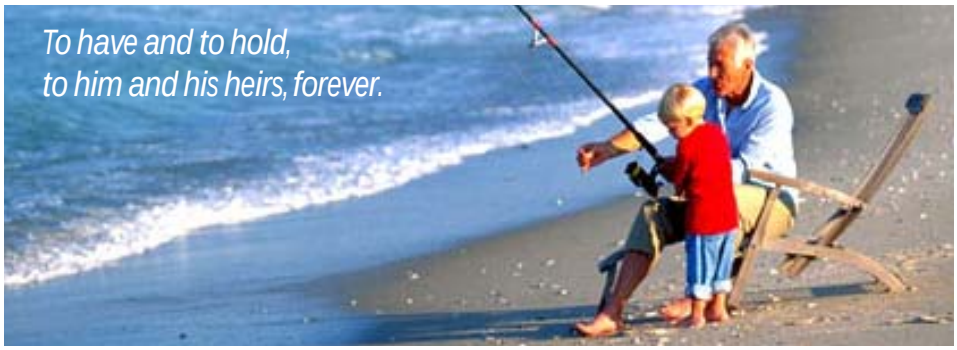
PRIVACY

Court upholds taxpayer's right to notification on request for banking information by foreign tax authority

In Re: Liga van Belastingplichtigen, Alexis Chevalier, Olivier Laurent, Frédéric Ledain and Pierre-Yves Nolet, Belgian Constitutional Court, May 16, 2013, Case No. 2013-066

The Belgian Constitutional Court recently dealt with an application by taxpayers to repeal certain laws enacted in 2011, which amended the *Belgian Tax Code*; in particular, a provision that effectively removed the taxpayer's right to notification in cases of a request for banking information by a foreign tax authority.

In upholding the applicant's demand, the Court noted that notification to the taxpayer constitutes an important safeguard against violation of the right to privacy. This procedural obligation is meant to secure the taxpayer's right to organize a suitable defense of their case with the relevant tax administration. ■



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TRUST RECOGNITION FOR TAXATION

No tax burden on settlor who did not retain power to dispose of trust assets

Court of Appeal of Amsterdam, November 8, 2012

The Court of Appeal of Amsterdam recently ruled that a settlor of a trust was not liable for so-called box 3 tax (income from savings and investments) on the assets (about €2 million) that he had transferred to the trust.

The court found that the settlor of the trust did not actually retain power to dispose of the trust assets. The assets were therefore held not to be "property" liable for tax under box 3.

Facts. The case concerned an irrevocable trust that was established under the laws of Jersey in 1985. The settlor of the trust had lived and worked abroad for most of the time from 1958 until his return to the Netherlands in 1998.

At the time of establishment of the trust, the settlor was a resident of the UK. The administrator of the trust was a professional trustee with full discretionary powers. The settlor had assigned two French charities and a natural person as potential beneficiaries.

In a letter of wishes to the trustee, the settlor had indicated which actions should be carried out after his death with respect to certain assets and how the annual income of the trust was then to be distributed.

Decision. In determining the income tax assessments for the years 2002 to 2006, the Dutch tax inspector added the assets of the trust to the tax base of the settlor in The Netherlands. This resulted in an additional box 3 charge of €87,000 per year.

The tax inspector did not accept the discretionary nature of the trustee's powers and considered that the settlor had retained certain rights over the trust assets.

Based particularly on the provisions of the trust deed and the letter of wishes, the court found that the settlor could not dispose of the trust assets as if they were his own. All other arguments raised by the inspector did not lead the court to a different conclusion.

Commentary. This judgment is important for the years up to 2009. The tax rules on trusts were substantially amended in The Netherlands as of January 1, 2010. Foreign trusts and foundations are now looked through, unless certain conditions are met. ■

TRUST RECOGNITION

Hungarian law now recognises trusts

With the adoption of its new civil code, Hungarian law will now allow for the creation of trusts. The *Civil Code* will adopt the institution of trusts as found in common law; the settlor (trustor) will transfer ownership of his assets to the trustee who will manage those assets for the beneficiaries of the trust.

Trusts will provide a form of asset protection, because under the new law, creditors cannot make claims on a beneficiaries' distribution from the trusts, until the distribution of the assets is due.

The trustee will own the assets of the trust and shall have all the rights and obligations of a property owner. Trusts must be accounted for separately from the trustee's own assets. In the absence of a separate account, the presumption that the assets belong to the trustee prevails. The trustee owes fiduciary duties to the settlor and the trust's beneficiaries, including duties of diligent management, communication, accounting, and confidentiality. The trustee is to act in the beneficiaries' best interest in his management of the trust. Should the trustee breach his fiduciary duties, the *Civil Code* prescribes the following specific remedies:

1. If the trustee profits from his irresponsible management of the trust, the settlor and beneficiaries may claim on those assets.
2. If the trustee transfers the assets of the trust to a third party, the settlor and beneficiaries may reclaim those assets, provided the third party was not a good faith purchaser.
3. If the trustee is in serious breach of his duties, and the settlor is deceased with no legal successor, a beneficiary may seek appointment of a new trustee. The court may not appoint a trustee to which any of the beneficiaries object.
4. Remedies available under contract law also apply.
5. If there are multiple trustees, the trustees are joint and severally liable to the settlor and beneficiaries.

The *Civil Code* also recognises duties owed by the trustee to third parties. If the trustee harms a third party in his management of the trust, and the third party is unaware of the existence of the trust, the trustee may be personally liable. Similarly, if there are multiple trustees, they may be held jointly and severally liable.

All trust agreements must be in writing. Trust agreements will terminate after 50 years. Trusts may also be terminated if: the assets of the trust are exhausted; the trustee relinquishes his duties with three months' notice; there is no trustee for three months; or the settlor, who is the only beneficiary, dies. The trust does not terminate with the death of the settlor, trustee, or a beneficiary.

The *Civil Code* imposes some limitations on the drafting of trust agreements, and certain clauses will be considered null and void. Trust agreements cannot allow for beneficiaries to make demands of the trustee in his management of the trust, with the exception of demands allowed by statute (i.e., seeking appointment of a new trustee under specific circumstances).

The *Civil Code* will enter into force on 15 March 2014. Specific rules for the taxation of trusts, are yet to be adopted. ■

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Celebrity Estates

Lessons in estate planning following the death of Sopranos star James Gandolfini

James Gandolfini, the actor who played Tony Soprano, died this past June while on vacation in Italy. Gandolfini lived in Manhattan and was only 51 years old. While most people live substantially longer, he had a Will in place to provide for the possibility that he might die prematurely.

Gandolfini was divorced from his first wife Marcella in 2002. He had a son, Michael, from his first marriage. Michael was born in 2000 and was 13 years old at the time of Gandolfini's death.

Gandolfini married his second wife Deborah in 2008. He and Deborah had a daughter Liliana, who was born in 2012 and is less than a year old.

Estate planning. Gandolfini's Will, which he created in December 2012, provides as follows:

- He left his home in Italy in trust for his children until they both reach age 25.
- He left $200,000 to his assistant; $50,000 to a friend; $500,000 to each of his two nieces; $100,000 to his godson; $200,000 to a second friend; and $50,000 to a third friend, with the hope it will used for the benefit of his son.
- He left 30% of his residual estate to one sister; 30% to another sister; 20% to his wife; and 20% to his daughter, subject to a trust to age 21 in the case of his daughter.

In addition, Gandolfini made special mention in his Will of separate planning for his son: "I have in mind my beloved son, Michael Gandolfini, but I am not providing for him other than as set forth in this my Last Will and Testament because I have made other provisions for him."

Life insurance. The "other provisions" refer to an insurance trust created for the benefit of his son Michael, which Gandolfini settled with $7 million of insurance on his life.

The trust was established in connection with Gandolfini's divorce from Marcella and also included an option to purchase his New York condominium apartment and parking space at its fair market value. The purchase price in 2001 was $1,975,000.

Life insurance is an inexpensive way to protect against the risk of a premature death. A quick calculation of the likely total annual premiums paid by Gandolfini (estimated at $36,625 per annum x 12 for a whole life policy), reveals that the return on investment is close to 16 times the premiums paid in!!

Had Gandolfini lived longer, the cost of the insurance premium would have remained a fraction of the amount guaranteed to be paid out. When an insured is age 40 at issue of the policy (Gandolfini's scenario), the pay-out remains close to 250% (2.5 times the total premiums paid in) at a death age of 120!

There are very few ways to make as much money for one's estate than with US life insurance. By putting the policy in a trust, the proceeds will not be subject to estate tax. ■

Celebrity Estates

Ikea founder to return to Sweden after 40-year residency in Switzerland

The 87-year-old founder of IKEA, Ingvar Kamprad, who left Sweden in the 1970s to escape the country's high income and corporate taxes, has stated that he now intends to return to his native country. Since his departure in 1973, the Nordic country's tax laws have softened somewhat; a wealth tax has been abolished and income taxes have been lowered.

The closely-held furniture company is controlled through a complex corporate structure, with the main holding company owned by a foundation based in Liechtenstein.

Kamprad's decision to return to Sweden comes after several corporate planning moves to prepare for a handover of power to the next generation.

The company recently announced that Kamprad's youngest son would take over as chairman of a key company within the business.

According to a recent Bloomberg billionaires list, Kamprad is the fourth-wealthiest person in the world, with a net worth of nearly $52 billion.

Kamprad, who has built a public image of himself as a frugal man, disputes the Bloomberg calculation and claims to be worth less than $1 million. ■

Malta Residency

Malta launches new residence program for HNW individuals

On June 1, 2013, Malta launched the Global Residence Program, which replaces the High Net Worth Individual Scheme. Like its predecessor, the new program is designed to attract affluent individuals seeking to take up residence in Malta.

Previously, individuals from outside the European Union and outside the European Economic Area had to enter into a contract with the Malta Government and provide a bond amounting to €500,000, plus an additional €150,000 per dependant. This obligation has been removed.

For new residents, tax is paid only on income remitted to and kept in Malta. No tax is due in Malta on foreign income that is not remitted to Malta nor on any foreign-sourced capital gains, even if remitted to Malta. Further, estate tax applies only to property in Malta (real estate and Maltese company shares). ■