The Aver Advisory

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presented by Aver Associates Estate Planners & Trustees

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Life Insurance

Obligation to declare foreign life insurance products in Belgium

Belgian Federal Budget 2013 (Belgian Program Law, December 31, 2012)

The Belgian Government has elected to extend the existing requirement to declare foreign bank accounts to life insurance contracts concluded with a foreign insurer.

The new tax measure was introduced through the Belgian federal budget in 2013. Belgian tax residents are now obliged to declare, in their annual tax declaration, life insurance contracts concluded by themselves, their spouse or their children with a foreign insurance company.

The new measure raises a couple of interesting questions of domestic and European law. It should be kept in mind that up to today the income of foreign life insurance contracts is not generally taxable in Belgium. Some of the most renowned tax lawyers have therefore described the new measure as "unenforceable" and "psychological warfare" (only).

The obligation to declare has been implemented with immediate effect. There is no obligation to declare where the taxpayer is only a beneficiary of a life insurance contract concluded by a third person.

As most of you will imagine, this change of law has had our full attention since its earliest drafts. Please do feel free to submit any particular scenario that comes across your desk. It will be our pleasure to have a close look. ■

Changes to the taxation rules for life insurance in France

Finance Law of 2012 (III) (as modified) and Finance Act for 2013

In its budget proposal for 2013, the French Government has also introduced changes to the taxation rules for life insurance. French resident holders of life insurance policies issued by a foreign insurer must declare their policy and all operations during the calendar year in their annual income declaration.

The revised budget law for 2012 has introduced additional penalties in the event of non-declaration. Payments from abroad through non-declared life insurance policies are deemed to be taxable revenues, unless proven otherwise. If the total cash value of non-declared policies exceeds EUR 50,000, a financial penalty of 5% of the value of each non-declared policy will be applied.

Foreign assets and insurance policies for which the origin cannot be proven will be subject to the gift taxation rate of 60%. ■

Spanish Tax Form 720: Declaration of Goods and Rights Abroad

Spanish Budget Law 2013

The Spanish government has introduced a similar general reporting requirement. Residents of Spain have until April 30, 2013 to declare all relevant overseas assets worth more than EUR 50,000 and could face huge fines for not complying. The penalties for failing to declare an asset are a fine of EUR 10,000, as well as income tax on undeclared income, late-payment interest and penalties as high as 150% of the total tax due on the asset. ■

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DUTY OF CONFIDENTIALITY

Trustees subject to general duty of confidentiality to protect trust information

In Re B; B v T, Guernsey Court of Appeal, July 31, 2012

The Guernsey Court of Appeal has provided guidance on the scope of a trustee's duty of confidentiality.

Facts. The case concerned two Guernsey law trusts settled by a French resident who had died in 2001. The trusts were established in 1989 for the benefit of the settlor's sons and grandchildren. The trustee assumed office in 1999 and was described as part of a global banking and wealth management business.

The trust assets included agricultural property in France and other non real estate property of substantial value.

A criminal complaint was filed in Paris by the French tax authority, which considered that estate tax was payable in relation to the trust assets.

The trustee was called to appear at a pre-indictment hearing to investigate offences relating to its administration of the Guernsey trusts; in particular, its possession of stolen goods and complicity in tax evasion and money laundering.

To reduce the risk of criminal prosecution, the trustee wished to disclose. The Royal Court of Guernsey granted permission to disclose, holding that the trustee could disclose such information about the trusts that it reasonably considered necessary so as to protect the trustee's interests personally, as well as to protect the beneficiaries of the trust and the trust property.

A trust beneficiary appealed the decision, arguing that such disclosure would result in a breach of the trustee's duty of confidentiality.

Decision. The Guernsey Court of Appeal held that trustees are subject to a general duty of confidentiality, similar to that owed by bankers to their clients.

The general duty of confidentiality— and its limits— are dealt with in *Tournier* v *National Provincial and Union Bank of England*, which held that a bank may disclose (*inter alia*) where the interests of the bank require disclosure. ■

LIFE INSURANCE CLAIM

Insurer ordered to pay 8% interest after withholding payment of death benefit

Joseph Zammit Tabona as chairman of the Malta Stock Exchange plc et al. v. Joseph N. Tabone on behalf of Citadel Insurance plc, First Hall of the Civil Court - Malta, October 12, 2012

The Civil Court in Malta delivered a judgment ordering an insurance company to pay 15 years' worth of interest on a liquidated amount of indemnity payable to the insured.

Facts. Citadel Insurance had issued a business travel insurance policy to insure all employees of the Malta Stock Exchange for accidental bodily injury and medical expenses, which they could suffer on an overseas business trip in connection with their work at the Exchange. In November 1992, former chairman of the MSE Alfred Camilleri, drowned on a business trip to Brazil.

Citadel refused to pay compensation under the policy, claiming that Camilleri's death was not covered by the insurance policy.

In January 1997, the court ordered Citadel to pay the indemnity. In May 2007, Citadel paid EUR 230,000 under the policy. The Exchange and the heirs of the deceased demanded further damages in the amount of EUR 270,000, representing interest at the rate of 8% on EUR 230,000 for the delay in receiving payment between November 1992 and May 2007.

Citadel maintained that it acted reasonably and in good faith and that payment was effected soon after the court decision was confirmed in 2007. The insurance company also argued that:

i) It was not to blame for the delay as it acted diligently in the circumstances.
ii) Any claim for damages lapsed after two years.
iii) It was contrary to public order to request interests on interest.
iv) The amount requested as interest exceeded the capital and this was not permissible at law.

Decision. Malta law states that damages, arising from the withholding of payment of a liquidated sum, are limited to interest of 8% on the sum due. Furthermore, as damages were continuous and persisted until payment was made, prescription could not take place.

Contrary to what Citadel argued, the court found that the plaintiffs were not requesting interest on interest. They simply invoked their right to 8% interest owing on late payment.

The court found that it could not be stated that the insurance company acted reasonably, in particular when it failed to perform its obligations under the policy.

For these reasons, the court found in favor of the Exchange and the heirs of the late Camilleri. The court condemned the insurance company to pay damages of nearly EUR 270,000, representing 8% per year for the period between November 1992 and May 2007, according to law.

The court also condemned the insurance company to pay interests on the EUR 270,000 with effect from May 2007 until the date of payment. ■

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SUCCESSION DISPUTE

Court denies access of heirs to information on trusts assets through estate inventory process

AX and BX v. L, Swiss Supreme Court, December 18, 2012

A recent decision, dealing with trusts in a succession dispute, held that heirs cannot resort to the estate inventory procedure to compel a trustee into disclosing information on the trust assets.

Facts. The deceased was a British citizen, who died in 2003 in Geneva where he was last domiciled. The deceased was diagnosed in 1997 as suffering from senile dementia. He is survived by his two daughters and his long-time partner, with whom he shared his household in Switzerland.

Prior to his diagnosis of dementia, the deceased placed his fortune in a complex structure composed of several offshore companies domiciled in Panama and Bermuda. These companies were in turn controlled by a discretionary trust established in the British Virgin Islands.

The heirs argue that the partner received undue amounts from the trust and that it is necessary to investigate the estate planning structure, as well as the composition of the trust and its assets in order to determine the extent of any payments made to third parties.

Dissatisfied with a court-ordered inventory of assets, the heirs now wished to resort to the estate inventory procedure to compel the trustee to disclose information and documents relating to the trust assets and certain distributions therefrom.

Decision. The court noted that the inventory procedure is a security measure designed solely to ensure the conservation, management and devolution of property of the estate. The inventory must include assets existing at the time of death and does not extend to dispositions made *inter vivos*, or to any claims that may result therefrom.

The court found that the inventory of assets of the trust at the time of death was not in dispute. As a result, the court held that the heirs cannot resort to the estate inventory procedure to compel the trustee to disclose information regarding assets of or distributions from the trust. ■

CELEBRITY ESTATES

Beckham bends it around French income tax with charity plans

French members of Parliament have been crying foul over British soccer star David Beckham's decision to donate his salary from the Paris Saint-Germain football club to charity. It was noted that the charitable donation will shield Beckham from France's exorbitant income tax rates, including a proposed 75% French tax on the wealthy.

Beckham plans to live in a hotel during the five months of his contract—thus retaining his UK residency—while his family will live in London. As a British resident, Beckham will avoid paying French income tax on income earned outside France during his five-month stay. He will also avoid the country's 3% surtax on higher yearly incomes.

Beckham's announcement riled politicians who see his decision as additional evidence against Socialist President François Hollande's ambitious plan to impose a 75% tax rate on individuals earning more than one million euros annually.

The proposed 75% tax on the wealthy has already been blamed for the departures of Bernard Arnault, head of luxury company LVMH, and French film star Gérard Depardieu, both of whom have established their new residency in Belgium.

In January of this year rumors have started flying that former President Nicolas Sarkozy may also turn tax exile if the tax increase on the rich comes to fruition. However, Hollande's plan suffered a setback late last year, when the French Constitutional Council struck down the proposed 75 percent income tax in a surprise decision. ■

CELEBRITY ESTATES

Royal use of foundation to avoid inheritance tax

Belgium's Queen Fabiola became the subject of intense criticism when it was revealed that she had set up a Belgian foundation that would allow her to bequeath her fortune without having to pay the maximum rates of 70% to 80% inheritance tax applicable in the Brussels region.

The Queen has received a publicly funded stipend of around 1.4 million euros since her husband King Baudouin's death in 1993. Born Fabiola de Mora y Aragon to a Spanish count and countess, critics claim that the Queen was planning to funnel the funds to Spanish relatives and Catholic charities via the foundation.

The Queen has insisted that she uses her publicly-funded stipend on the expenses of her home—the main item being the wages of housekeeping staff—and that the foundation was funded with her own resources, including private art works.

The foundation's statutes state that the childless Queen's nieces and nephews may only receive financial aid for a limited period and only on condition of facing serious physical, material, psychological or moral difficulty.

The Queen and eight others make up the foundation's board of directors, and in the event of dissolution, the funds are to go to the Astrida Foundation and a second, unidentified foundation set up by the Queen in 1999 in her native Spain.

Politicians called the plan morally flawed, even if it was strictly legal. The structure, they say, causes ethical problems, particularly in times of austerity when the royals must set an example.

The Queen originally brushed off her accusers, but has since decided against the foundation and apologized that it had created such negative reaction. ■