The Aver Advisory

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Tax Residency

Court sides with Maltese company on place of corporate tax residence

Decision 1811, Italian Supreme Court, Criminal Chamber, January 17, 2014

The Italian Supreme Court recently overruled a lower court decision and held that a company incorporated under the laws of Malta, that offered online gaming services in the Italian market, should not be considered an Italian tax resident because Italy was not the main place of business.

Facts. The case concerned a Maltese corporation that provided online gaming services through a server located in Malta. The service was offered almost exclusively to customers in Italy, and the company had obtained a license to operate in the Italian market. An Italian group company provided the Maltese company with marketing and client assistance services, while the gaming platform was managed entirely from Malta.

The Maltese company deposited the money it received from the online gaming activities into its bank account in Italy. The company requested a transfer of those funds to a foreign bank account, but the Italian bank suspended the request because of applicable anti-money-laundering legislation.

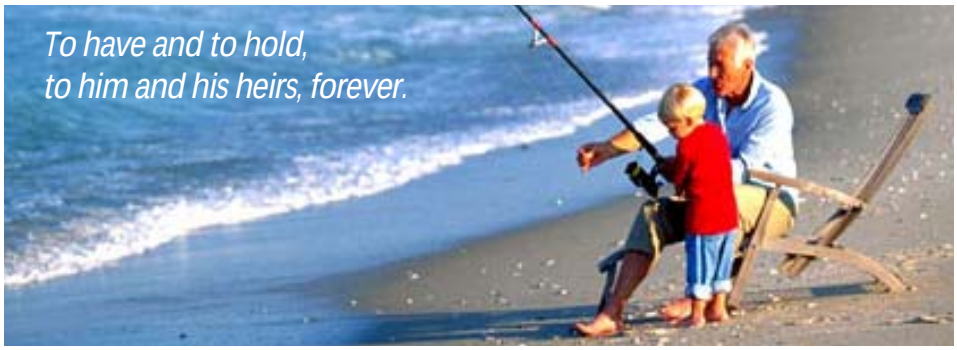
Based on these facts, the Italian tax authorities claimed that the Maltese corporation should be considered an Italian tax resident because its main place of business was Italy.

Therefore, as an Italian tax resident, the corporation should have regularly filed corporate income tax returns and paid corporate income taxes on the profits derived from the online gaming activities, the authorities said.

Decision. The Supreme Court acknowledged the objections of the Maltese corporation, which argued that the tax authorities incorrectly applied the definition of corporate tax residence in Italy (article 73 of *Presidential Decree 917* of December 22, 1986) and failed to apply the tiebreaker rules under article 4, paragraph 3 of the *Italy-Malta Tax Treaty*.

The Court held that the fact that the company obtained an Italian license to offer its online gaming activities in the Italian market was in itself insufficient to conclude that it must be considered an Italian tax resident based on the main place of business criterion. The Court clarified that the license is merely a formal requirement for a business to conduct online gaming activities in Italy, while the main place of business criterion requires an analysis of the actual activities carried out. Furthermore, the Court pointed out that to obtain a license, it is sufficient that a corporation has its registered office in another EU member state, and it does not need to have its seat in Italy.

Regarding the tiebreaker rules, the Court overruled the lower court's decision which had denied application of the tiebreaker rules of the *Italy-Malta Tax Treaty*. The lower court had held—though it confirmed that the Maltese corporation did not have its place of effective management in Italy—that the corporation must be considered a tax resident of Italy as well as Malta, in which case the double tax residence could not be resolved by the tiebreaker rules. However, the Supreme Court held that the fact that the place of effective management was not located in Italy was sufficient to determine that the Maltese corporation was not a tax resident of Italy. ■



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TRUST PROTECTOR

How performance of a protector's duties can result in their removal by the court

In the Matter of the A Trust, Royal Court of Jersey, [2013] JRC 169A

This case concerned the protector of two Jersey discretionary trusts, who preferred the settlors' wishes to the beneficiaries' interests in the guidance of his actions.

Facts. The protector's relationship with the majority of the beneficiaries irretrievably broke down following the death of the settlors. In affidavit evidence, the protector stated that, in addition to his duty to act in the best interests of the beneficiaries, he felt he had a duty to also ensure that the wishes of the settlors were adhered to in principle.

The Court identified examples of the protector playing an overactive part in the management of the trusts, and found this was caused by the protector's misunderstanding of his role. These actions had, at times, resulted in significant tensions between the protector and at least some of the relevant personnel in the trustee.

Decision. While finding that the protector acted in good faith, the Court determined that his misconceived view of himself as the living guardian and enforcer of the settlors' wishes was the cause of much of the unhappiness between the protector and most of the adult beneficiaries.

The Court stated that it can be no part of the function of a protector, with limited powers of the kind conferred in this case, to ensure that a settlor's wishes are carried out.

A trustee's duty as regards a letter of wishes is no more than to have due regard to such matters without any obligation to follow them. And a protector's duty can, correspondingly, be no higher than to do his best to see that the trustees have due regard to the settlor's wishes.

The protector's readiness, for example, to allow the entirety of the proceeds of liquidation of a substantial portfolio of investments to remain on deposit with a bank that was part of the same group as the trustee, was hardly in the best interests of the beneficiaries. The protector also acted with indifference when the beneficiaries' interests demanded that he protect the trust assets.

These actions were sufficient to persuade the Court that the protector of the A and B trusts should be removed. ■

TRUSTEE CONFIDENTIALITY

Trustee may need to disclose information to extent reasonably necessary to protect its interests

In Re B, Guernsey Court of Appeal, July 31, 2012

A recent case from Guernsey shows that a trustee's duty of confidentiality is subject to the qualification that the trustee has the right to disclose such information when and to the extent to which it is reasonably necessary to protect its interests.

Facts. The respondent was a subsidiary of an international group and was the Guernsey resident trustee of two Guernsey trusts. Both trusts had been settled by S (who was deceased) for his family members. Some of the trust assets were located in France, but most were outside.

In January 2012, the Trustee was summoned to appear before the French investigating magistrate to face possible charges of possession of stolen goods, complicity in tax evasion, and aggravated money laundering. All of the acts complained of took place in Guernsey.

One of the beneficiaries sought an order that no details concerning the trust be disclosed. The trustee countered that it be permitted to disclose trust information in order to defend itself. The Court issued an order allowing the trustee to disclose information, but this was suspended pending the outcome of the appeal.

The French investigating magistrate did not avail himself of the usual provisions for mutual assistance in criminal matters. The beneficiaries maintained that the Magistrate had acted in the way he had to bypass the mutual assistance provisions where he would have had to have shown reasonable grounds for the suspicion of an offence.

The trustee argued that as it considered it had done nothing wrong, it should be able to demonstrate its innocence to the French investigating magistrate. Furthermore, the allegations were very damaging to the integrity of it and its parent company.

Decision. There were no terms in the trust deeds enjoining any express duties of confidentiality and the *Trusts (Guernsey) Law, 2007* does not impose any such duties. Therefore, the rules applying to bankers (*Tournier* v *National Provincial and Union Bank of England*) would be applicable.

On the evidence, the Court concluded that the French investigating magistrate was likely to continue to suspect the trustee of involvement in criminal activity. The Court also found that the criminal investigation created a real risk of damage to the trustee's reputation.

As regards the beneficiaries, it was accepted that there were risks of asset seizure and further legal actions if the confidential information was disclosed. However, although there were these risks to the beneficiaries, the risks to the trustee were great.

The Court held that an order should not be made to prevent the trustee from potentially showing that absolutely no wrong had been committed. ■

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Celebrity Estates

Missed opportunity in estate planning for Michael Jackson

Five years after the death of Michael Jackson, the pop star's assets are still tied up in probate court. Hundreds of motions, matters, and claims have been filed against the Michael Jackson Estate, and disbursements from discretionary trusts set up for Jackson's children are still frozen.

When he died in 2009, Jackson's empire was worth nearly $750 million. The IRS recently assessed a tax bill of over $700 million, notwithstanding that the estate has already paid $100 million in estate taxes.

Much of the dispute centers on the value of Jackson's image and likeness at the time of his death. The IRS claims it was worth over $400 million, while the estate gave it a value of only $2,000.

Certainly, the Michael Jackson Estate has done well in generating more than $600 million since the pop star's death. Lost in the numbers, however, is the fact that years of litigation could have been avoided with better succession planning.

Jackson's will established revocable trusts for his three children–Prince (15), Paris (14), and Blanket (10). Use of irrevocable trusts would have placed the assets outside of the settlor's estate, thereby insulating them from estate tax.

Testamentary Will

Will on iPhone accepted

In re: Estate of Karter Wu, Supreme Court of Queensland, Australia, 2013

In the Estate of Karter Wu, the Supreme Court of Queensland, Australia, admitted to probate a Will created and stored on the decedent's iPhone.

Facts. Karter Wu committed suicide in September 2011. Shortly before he died, he created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will.

The Will began with the words "This is the last Will and Testament" of the deceased, and referred to his address. The Will set out the decedent's testamentary intentions. It dealt with the whole of his estate, and provided for its distribution at a time when he was contemplating his imminent death. It named an executor, and a successor executor. It authorized the executor to deal with his affairs. The decedent typed his name at the end of the document in a place where, on a paper document, a signature would appear, followed by the date and a repetition of his address.

Decision. The Supreme Court of Queensland held that an atypical document could be admitted as a Will if it met three conditions: it must be a document, it must purport to state the decedent's intentions, and the decedent must have intended it to form his Will. The court held that the Wu will met these criteria and admitted it to probate.

In some jurisdictions, a Will on an iPhone, iPad, or a computer might be admitted to probate if the proponent can establish that the decedent intended it to be his or her Will. ■

Philip Seymour Hoffman: Estate planning lessons

The death of actor Philip Seymour Hoffman at age 46 last month is yet another reminder of the importance of estate planning. Most of us go along each day not thinking or worrying about what would happen to our loved ones if we should suddenly die. Some, in an attempt to be conscientious, draft an estate plan but fail to keep such plan up to date. Most people, however, die without ever doing any estate planning at all, thus leaving state laws and the courts to decide who should receive the proceeds from their estate.

When estate planning matters are neglected, surviving family members can be left with momentous legal, tax and financial problems, including delays, uncertainty and expensive attorney fees to sort it all out.

Although Mr. Hoffman drafted his will in 2004, he failed to update it after having two children and even after some significant changes in estate tax laws. Mr. Hoffman's 2004 will leaves everything to the mother of his children, Marianne O'Donnell. He was not married to her and this is where the problems start, at least from an estate tax perspective.

It is estimated that Mr. Hoffman's estate was around $35 million. Currently, $5,340,000 is exempt from US federal taxes (the so-called unified credit) with amounts above that amount being subject to federal estate tax at 40%. It would appear that roughly $30 million of his estate would be subject to estate tax at a 40% rate. This would generate a whopping $12 million in federal estate taxes!

New York also has an estate tax with an exemption of $1 million. This New York estate tax has graduated tax rate that goes as high as 16%. It is estimated that roughly another $3 million in will be paid in New York estate taxes. Combined estate taxes: $15 million.

In the US, estate taxes are due nine months after the date of death. Hopefully, Mr. Hoffman's estate has enough liquid assets to avoid a forced sale of assets to meet his tax obligations. It is not known whether Mr. Hoffman had life insurance, but having life insurance to provide for liquidity is sometimes essential.

The point is that even though, in 2004, Mr. Hoffman may have explored marriage as a simple way to save estate taxes, he may not, for whatever reason, have wanted to be married at that time. It also could have been that his wealth was not that great in 2004.

Circumstances change and so should one's estate plan. ■