The Aver Advisory

AUTUMN 2020

presented by Aver Associates *Estate Planners & Trustees* *contact@averassociates.com*

IN THIS ISSUE .....

Privacy

Landmark EU Court of Justice decision confirms privacy is a fundamental human right

Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (Case C-311/18), July 16, 2020

In July 2020, the Court of Justice of the European Union (CJEU) released the long-anticipated Schrems II decision. The case addressed digital data transfer mechanisms used to transfer the personal data of EU citizens from the EU to the United States.

Background. The case originated with Austrian lawyer Max Schrems, who was shocked by Facebook's lack of awareness of European privacy law. While studying law in the US, Schrems (then aged 25) made a request, under the European right of access to personal data provision, asking for Facebook's records on him personally. He received a CD containing over 1,200 pages of data.

In 2013, Schrems filed a complaint against Facebook Ireland Ltd, objecting to Facebook's routine transmission of data from its Irish operation to its US parent. He argued that the US legal system does not offer sufficient protection for personal data.

The EU's General Data Protection Regulation (GDPR), that became effective in May 2018, is the primary law regulating how companies protect EU citizens' personal data. All mechanisms that enable participating companies to meet the EU requirements for transferring personal data to third countries are measured against the GDPR to determine their compliance.

Facts. The court examined the so-called EU-US Privacy Shield framework. The Privacy Shield was a framework designed by the US Department of Commerce and the European Commission. It is relied on by more than 5,000 businesses—from major tech companies to large financial institutions—to transfer and process data from the EU to the US. Under the GDPR, personal data transfers to a third country are permitted if the processor provides appropriate safeguards, and if effective legal remedies are available to the injured party.

Decision. The court found that the EU–US Privacy Shield does not include satisfactory limitations in order to ensure the protection of EU personal data from access and use by US public authorities on the basis of US domestic law. The newly introduced US Ombudsperson mechanism in particular does not provide substantially equivalent guarantees to those required by EU law, as the court questioned its independence and observed a lack of authority to make binding decisions on US intelligence services.

Comments. The CJEU decision in Schrems II puts a stop to all transfers that rely for their legality on the Privacy Shield. This is extremely good news for all of our non-EU clients. Whether the current flows of automatic exchange of tax information can go on under the GDPR, even within the EU, is to be doubted.

There is a serious issue with the principle of data security under article 5.1(f) of the GDPR. The information exchanged under the Common Reporting Standard (CRS), for example, includes sensitive personal data (such as the name, date/place of birth and tax identification number of the account holder), as well as financial data about the financial account itself such as the account number and balance. This exposes account holders to risks of hacking and data loss, and could lead to identity theft on a grand scale.

THE AVER ADVISORY
AUTUMN 2020
contact@averassociates.com

We do not know where the information is all ending up. Certainly, a lot of it ends up in countries without data protection equivalent to that of the EU. As mentioned in Aver Advisory of October 2019 in July of last year, it was reported that the data of almost every adult in Bulgaria (five million individuals) had been stolen by hackers who accessed the IT-systems of the Bulgarian tax authorities. On 27 March 2020, it was reported that the German tax authorities in Niedersachsen had become victims of a "serious cyber-attack". On 7 July 2020, it was reported that a freelance information broker in the US pleaded guilty to charges of fraudulently obtaining peoples' tax data from the Internal Revenue Service, by using their social security numbers without their knowledge.

The CJEU decision in Schrems II also gives the Malta Financial Services Authority, and other supervising authorities of beneficial ownership registers in the EU, clear support to keep the doors closed for curious journalists without relevant credentials.

The European Data Protection Supervisor (EDPS) released a couple of statements right after Schrems II. In a statement dated 27 July 2020, the EDPS expressed its belief that the EU Commission should make the respect of fundamental rights of privacy and personal data protection a gold standard in this context; another clear sign that the GDPR takes us back in the right direction.

Things are changing and dominoes are starting to fall. Recent developments in domestic legislation in Malta and Luxembourg regarding the privacy of trusts and private foundations are based on the GDPR and are extremely encouraging. Schrems II confirms that a new era has started where fundamental human rights take priority again in tax and financial matters. The word "privacy" is no longer a dirty word and we can speak out about it once again. Thank you Facebook (and Max Schrems of course)! ■

TRUSTS

Court rules on executor's right to information from trustee

Federal Supreme Court of Switzerland, Case No. 5A_30/2020, May 6, 2020

In May 2020, the Supreme Court of Switzerland addressed issues arising when an heir of a settlor seeks to obtain information from a third party trustee.

Facts. In 2014, B died in Florida. In her Swiss will, she named A as testamentary executor and left her estate to her brother. In 2015, the executor learned that the deceased had established an irrevocable New Zealand discretionary trust. The trustee was New Zealand-based J Limited, which had signed a services agreement with CSA (Geneva). In 2016, the executor made a request to CSA to obtain all documents related to the trust. CSA refused to provide any documents, contending that it was not the trustee.

Decision. The court held that the deceased had lost legal title to the assets contributed to the trust, and that the trustee, J Limited, was the legal owner of the assets. The court held that the right of the executor to obtain information from a third party is contractual in nature, and that an irrevocable and discretionary trust constitutes an estate separate from the estate of the deceased. As such, CSA cannot be forced to release information. ■

TAX TREATIES

European courts rely on tax treaties to further recognize trusts

Court of First Instance of Brussels, A.R. no. 2018/4033, March 11, 2020
Italian Supreme Court – Corte Suprema di Cassazione, Cassazione Civile, Sez. V, 5 February 2020, nn. 2617-2618

As trust structures are not formally recognized in many civil law jurisdictions, recognition often involves the application of conflict of law arrangements, or equating the trust's characteristics into legal concepts that do exist within the civil law country.

In February 2020, the Italian Supreme Court confirmed that trusts are recognised in Italy and that provisions of the Italy-UK tax treaty are applicable to trusts under the definition of "person".

Facts. NatWest Bank, as trustee of the Baring Global Growth Trust, sought a reimbursement of tax credits in accordance with the Italy-UK tax treaty. The Italian tax authority claimed that the trustee of a trust could not be considered a "person" under the tax treaty as there are no regulations in Italian law governing the role of trustees and, therefore, the concepts of "residence" and "beneficial owner" could not be applied.

Decision. The court noted that trusts were recognised in Italy in 1992, following ratification of the Hague Convention and had been regulated for tax purposes since 2007. The court also accepted that the structure of a trust was not always the same and, therefore, a case-by-case analysis was required. To benefit from the tax treaty provisions, it would be necessary to provide evidence of the trust structure, the powers of the trustees and identify the beneficiaries. Last but not least evidence needs to be provided also that the trust's income is taxed effectively in the other state.

In March 2020, a Belgian court considered the impact of a conflict between its national law and its double taxation treaties. The court confirmed that its tax treaty obligations take precedence over national law and, consequently, that a trust structure that qualifies as a tax resident of a treaty partner must be considered as the sole beneficiary of the income it receives.

Facts. The taxpayer was a Belgian-resident and founder of a Canadian trust. The Belgian tax authorities sought to apply Belgium's look-through principle to assess the trust's income in the hands of the individual Belgian taxpayer.

Decision. The court held that the application of look-through principles under Belgian national law is contrary to the double taxation treaty between Belgium and Canada. The court added that it is not a question of combating economic and legal double taxation, but of respecting the fiscal legal personality of an entity that is recognized by an international treaty as tax resident of a contracting state and that Belgium has undertaken to respect. ■

THE AVER ADVISORY
AUTUMN 2020
contact@averassociates.com

Access to Information

Shareholder barred from using California law to inspect Delaware corporation

JUUL Labs, Inc. v. Grove, C.A. No. 2020-0005-JTL, Delaware Court of Chancery, Aug. 13, 2020

In August 2020, the Delaware Court of Chancery held that stockholder inspection rights for Delaware corporations are governed exclusively by Delaware law.

Facts. JUUL Labs, Inc. is a Delaware corporation with its principal place of business in California. The defendant shareholder issued a demand to inspect the company's books and records pursuant to the *California Corporations Code*. JUUL asserted that the defendant could only possess statutory inspection rights under Delaware law.

Decision. The court held that the scope of the defendant's inspection rights is a matter of internal corporate affairs, to which Delaware law applies. The court explained that the internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—otherwise, a Delaware corporation could be subjected to different provisions and standards in jurisdictions around the country.

As a result, the court held that the defendant shareholder, cannot rely on a California statutory provision to obtain the books and records of JUUL Labs, a Delaware corporation. ■

Celebrity Estates

Bronfman saga highlights vulnerability of large inheritance with no safeguards

In September 2020, Clare Bronfman, the heiress to the Seagram liquor fortune, was sentenced to almost seven years in jail for her role in a criminal and fraudulent self-help and executive coaching organization led by Keith Raniere.

Seagram was a Canadian multinational conglomerate formerly headquartered in Montreal, Quebec. Originally a distiller of Canadian whisky, it was once (in the 1990s) the largest owner of alcoholic beverage lines in the world. Seagram later imploded, with its beverage assets wholesaled off to various industry titans, such as The Coca-Cola Company and Pernod Ricard.

Raniere was found guilty in June 2019 on seven felony counts, including racketeering and sex trafficking. Though not directly involved in Raniere's crimes, Clare was responsible for financing the group's operations.

Clare was introduced to the group in 2002, at age 23, after a family friend recommended a life-coaching program to help her fulfill her dream of making the US Olympic equestrian team. Largely due to her financial contributions, Clare quickly rose to the top ranks of the organization. By October 2003, her father Edgar Bronfman Sr. had concluded that the group was a cult, but it was already too late.

In short order, Clare came under the influence of Raniere and turned against her father. Using Clare's money, Raniere siphoned off more than $100 million from the Seagram fortune.

Clare's choices and decisions show how quickly wealth can be lost in the absence of guardrails to guide the family wealth. Clare's total inheritance was estimated at $200 million and was reportedly held in a trust. However, as she was able to funnel more than half of her inheritance to Raniere over a period of 15 years, her money was most likely disbursed from a trust with little or no direction on how it could be used.

This case once again highlights the vulnerability of heirs that come into possession of substantial sums of money and the need for careful planning, as well as having the right trust and independent professional trustees in place. ■

Tax Planning

Florida man fails to prove that nearly $25 million in transfers to him were gifts

Kroner v. Comm'r, T.C., No. 23983-14, 6/1/20

The US Tax Court recently held that a friend's $24,775,000 in transfers to a taxpayer were not tax-free gifts.

Facts. The taxpayer, Burt Kroner, worked in the finance industry. In the 1990s, Kroner developed a business relationship with David Haring, who is a high-net-worth British citizen. During 2005, 2006, and 2007, Kroner received wire transfers from Haring, or entities associated with Haring, in the amounts of $4,425,000, $15,350,000, and $5,000,000, respectively. The amounts were transferred to Kroner, the Kroner Family Trust in Nevis, and Kroner's businesses that were owned by the Nevis trust or his Bahamas trust.

Robert Bernstein, an attorney who represented both Haring and Kroner, advised Kroner that the transfers were gifts on the basis of a conversation with Kroner and a note he drafted for Haring stating they were gifts. On his tax returns for the years at issue, Kroner did not report any of the transfers from Haring as income.

Decision. The court noted that a gift is a transfer that proceeds from a disinterested generosity, out of affection, respect, admiration, charity, or like impulses. This rules out payments made from a moral duty or other expectation, or for services, even if made under no legal compulsion. The most important consideration in ascertaining whether a gift has been made is the intent of the donor. However, the donor's characterization of intent is not determinative, and courts must objectively inquire into it.

In the court's view, Kroner's story was unconvincing and the testimony of two other witnesses in his support was not credible.

The court found that Kroner's evidence was simply insufficient to prove that he and Haring had anything more than a business relationship where occasionally personal matters were discussed. Consequently, the court held that the transfers were not gifts that qualify for an exclusion under the Internal Revenue Code and must therefore be included as taxable income. ■