The Aver Advisory

SPRING 2021

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

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Immigration Law

A new day for entrepreneur immigration to the United States

On May 10, 2021, the US Citizenship and Immigration Services (USCIS) updated its website with respect to the International Entrepreneur Rule (IER).

Under the IER, the US Department of Homeland Security may use its authority to grant a period of authorized stay, on a case-by-case basis, to foreign entrepreneurs who demonstrate that their stay in the US would provide a significant public benefit through their business venture.

Under the IER, foreign entrepreneurs who do not have a valid immigrant visa qualify for "temporary parole" in the US for up to five years (an initial 30 months with the possibility of another 30-month extension).

The IER is a program initially proposed by the Obama Administration at the very end of its term in January 2017 to increase the presence of foreign entrepreneurship in the US. It is estimated that the program would attract some 3,000 entrepreneurs a year, who would, in turn, drive the creation of about 100,000 jobs.

President Trump delayed and intended to end the program. The Biden Administration has now put the IER back on the table, following petitions from US venture capital firms.

Eligibility. Entrepreneurs applying for parole under the IER must demonstrate that they:

- Possess a substantial ownership interest (at least 10%) in a start-up entity created within the past five years in the US that has substantial potential for rapid growth and job creation (10 employees).
- Have a central and active role in the start-up entity such that they are well-positioned to substantially assist with the growth and success of the business.
- Will provide a significant public benefit to the US based on their role as an entrepreneur by showing that:
  - The start-up entity has received a significant investment of capital (at least $250,000) from certain qualified US investors with established records of successful investments;
  - The start-up entity has received significant awards or grants (at least $100,000) for economic development, research and development, or job creation from federal, state, or local government entities that regularly provide such awards; or
  - They partially meet either or both of the previous two requirements and provide additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.
- Otherwise merit a favorable exercise of discretion.

IER parole may be granted for up to three entrepreneurs per start-up entity. "America's economy has long benefitted from the contributions of immigrant entrepreneurs, from Main Street to Silicon Valley," noted the Director of USCIS at the time the IER was first published.

Historically, immigrant entrepreneurs have played a pivotal role in developing the US economy, particularly in the technology sector. A decade ago immigrant tech-founded companies employed over 550,000 people and generated close to $70 billion in sales. Over 40% of current Fortune 500 companies were established by immigrants or children of immigrants. ■

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Tax Residency

Concession made in one year does not preclude tax authority from taking a different view in a different year

Landbouwbedrijf Backx B.V. v. The Queen, 2021 TCC 2

The Federal Court of Appeal in Canada ruled that the Tax Court had committed no errors in finding that a taxpayer was resident in Canada, despite the tax authority having previously assessed it as a non-resident. We commented on the Tax Court decision already in the *Aver Advisory* of September 2018. We are mentioning it here again because of its importance in practice (and in the hope of convincing the most brave among our readers). This appeal decision is a reminder that just because a taxpayer's filing position in a tax return is accepted, it does not mean that the tax authority cannot (10 years later) arrive at a different conclusion.

Facts. The taxpayer, a Dutch limited liability company, was incorporated by a couple who were resident in the Netherlands at the time of incorporation. In 1998, the couple immigrated to Canada, resigned as directors, and appointed a sibling (the sister of the wife) resident in the Netherlands to act as the sole director.

The couple then purchased a dairy farm in Ontario in partnership with the Dutch company. For ten years, from 1998 to 2008, the Dutch company filed tax returns as a non-resident of Canada and paid taxes on its share of the partnership income.

In 2009, the Dutch company disposed of its Canadian partnership interest and claimed that it was exempt from Canadian income tax on the basis that the partnership interest was "treaty-protected property" taxable only in its home country; The Netherlands.

The Canada Revenue Agency (CRA) accepted the taxpayer's filing position. However, in 2009, the CRA assessed the Dutch company as a resident of Canada, finding that it was effectively managed and controlled in Canada by the couple.

Consequently, the CRA determined the partnership interest was not treaty-protected property and assessed the taxpayer on the basis that it had realized a capital gain of $1.7 million.

Decision. The court noted that the common law rule of *issue estoppel*—which prevents a party from re-litigating an issue that has already been decided in a previous proceeding—cannot preclude the tax authority from exercising its statutory duties (and going back a decade).

The court found the evidence supported the conclusion that the taxpayer became a resident of Canada in 1998. The CRA's assessment of the capital gain realized in 2009 on the disposition of its partnership interest was therefore valid. ■

Tax Residency

Lack of intention to leave and lack of meaningful connection with another country

Henkes v HMRC [2020] UKFTT 159 (TC)

The UK First-Tier Tribunal recently provided guidance on the residency of long-term non-domiciled taxpayers. The case illustrates the importance of maintaining strong ties with a country other than the UK and that intentions should be in line with actions, particularly husband and wife being aligned in this regard.

Facts. The taxpayer Henkes was born in Venezuela and is a Dutch citizen. He was raised in South America and educated in the US. He had status as non-UK domicile of origin, which was not disputed by the tax authority. Henkes claimed the remittance basis of taxation, thereby paying UK tax only on foreign source income and gains to the extent remitted to the UK. The UK tax authorities (HMRC) found that Henkes had acquired a domicile of choice in the UK and was therefore liable to worldwide taxation.

Decision. The court agreed with HMRC and found that Henkes had indeed acquired a UK domicile, based on the findings below:

- His primary residence was in the UK; the property in Spain was a holiday home only.
- He had lived in the UK for a lengthy period of time (since 1967) and had strong family ties there.
- He did not have a meaningful connection with another country, notwithstanding his Spanish vacation home and his Dutch citizenship.
- Neither he nor his wife proved or expressed any intention of leaving the UK in the future. On the contrary, Mrs Henkes was reluctant to leave the UK. ■

Trusts

Court confirms tax liability solely on final distribution of trust property to beneficiaries

Ruling no. 8719 of March 30, 2021 (Cass. no. 8719, 30-3-2021), Italian Supreme Court

The Italian Supreme Court recently held that no gift tax applies when trust assets are distributed back to the settlor, upon termination of the trust, following the trust beneficiaries' disclaimer of their beneficial interests under the trust.

Facts. The trust was governed by the laws of Jersey. The beneficiaries disclaimed their interests under the trust and there were no other persons who could become beneficiaries. The trust property was held in trust by the trustee to the benefit of the settlor. The trust was terminated and the trust property was returned to the settlor.

Decision. The court noted that the transfer of property to a trust is just a provisional, transitory step towards the eventual distribution of the property to the trust beneficiaries. Italian gift tax applies only when the gift is complete. The initial transfer of the property from the settlor to the trust is just the first, transitory step of the gift, which is insufficient to trigger application of gift tax. ■

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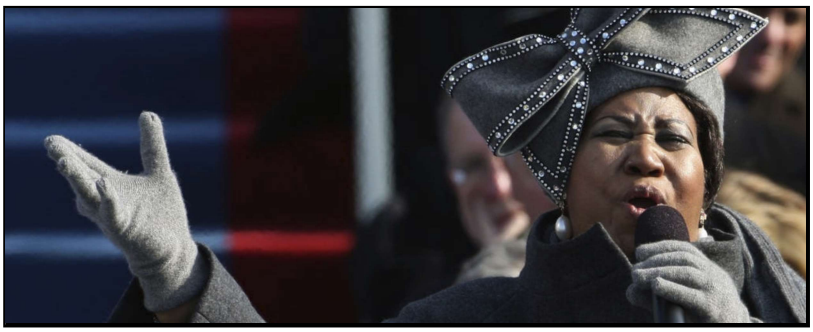

Trusts

Court holds trustee liable for reckless advance of trust assets

Sofer v Swiss Independent Trustees SA, [2020] EWCA Civ 699

A recent UK Court of Appeal case illustrates how a trustee's labelling a payment to beneficiaries of a trust as a "loan" does not necessarily make it so.

Facts. Hyman Sofer was a wealthy South African bookmaker and investor, who died in 2016 at age 97. With his first wife, Sofer had two children: Robert and Tamara. In 2006, Sofer set up a trust structure comprising four trusts. Each of the trusts was named after a footballer who played for Barcelona football club: the Jordi Unit Trust, the Gabri Trust, the Puyol Trust and the Xavia Trust. The Puyol Trust, which was intended for the benefit of Robert, was the focus of the proceedings.

Under the Puyol Trust, the trustee was given the power to lend trust assets to beneficiaries, but was prohibited from paying or transferring trust property to the beneficiaries prior to the death of Hyman Sofer. Between 2006 and 2016, the trustee paid substantial sums out of the trust to Sofer and recorded the payments as loans. The trustee made no provision for security, interest, or repayment. When Sofer died, the total net amount paid out of the trust to him was over $19 million, which his estate was unable to repay.

Robert filed a claim alleging breach of trust in that the payments were gifts rather than loans, and sought orders that the trustee reconstitute the trust fund and be removed as trustee. The trust deed contained an exoneration clause which applied to exclude any liability on the part of the trustee, except where the loss was caused "by acts done or omissions made in personal conscious and fraudulent bad faith".

Robert made various factual allegations against the trustee, including that:

- Sofer had dementia and the trustee knew of his condition.
- The payments were gifts.
- No enquiries had been made as to why Sofer needed the money and whether he was able to repay the purported loans.

Decision. The court found that these allegations combined were sufficient to show that the trustee acted in a way that was recklessly indifferent to the interests of the beneficiaries.

Although loans are often used by trustees as a tax-efficient way for beneficiaries to receive benefit from a trust, the Sofer case highlights the risks associated with advancing monies in this way; where a purported loan may later be designated as a distribution of assets from the trust. ■

Celebrity Estates

Tumultuous estate of R&B singer Aretha Franklin highlights importance of having a definitive estate plan

The Queen of Soul, Aretha Franklin, died in Detroit in 2018 of pancreatic cancer. At the time of her death, she was 76 years old and a single mom. Franklin was married twice (and divorced) and has four sons (out of several relationships). Franklin's estate, including real estate, luxury cars, furs and jewelry, has been estimated at $80 million. The legendary singer left no formal will, but three hand-written documents were discovered in her home.

In March 2021, a fourth document emerged that lawyers for two of Franklin's sons say is a draft of yet another will. The eight-page document, titled "The Will of Aretha Franklin" was apparently drawn up in 2018 after a two-year legal consultation process, along with a 23-page draft that lays out the terms of a trust. After falling ill, Franklin was unable to sign the papers.

Both the will and the trust notes are stamped "draft". Despite being unsigned, the newly discovered document could dictate the terms of Franklin's estate, if evidence shows that she intended it as such. The absence of a clear estate plan, however, has already upset the peace among Franklin's sons and led to the resignation of her niece as executor. In addition, Franklin's estate is now exposed to litigation costs and loss of privacy.

Legal disputes within a family are some of the most traumatic experiences in settling an estate, as naked raw emotions of grieving are combined with greed and the inherent stress of litigation. This can all be avoided by making an estate plan and signing it. The plan can be reviewed and changed afterwards. More complicated family relations (second and third marriages, for example) demand an explicit plan and one that is clearly communicated (at least to a trustee or executor). Diligent preparation beforehand can go a long way in preventing extensive legal costs and the splintering of family relations. ■

CyberSecurity

A quick reality check on the strength of your passwords

Compromised passwords cause 80% of all data breaches, according to a recent study by ecommerce platform BigCommerce. Once cracked, cybercriminals can use passwords and personal data to commit financial crimes, steal credentials, start disinformation campaigns, and even spy on users through WiFi-connected security cameras.

We must be mindful of how we secure access to our assets online. Conventional wisdom tells us to create a password that's hard for humans to guess. It will be full of symbols and numbers, and be very difficult for humans to memorise. Surprisingly, the password X£85GvO# would take a computer only eight hours to crack. The password AverAssociatesNewYork, on the other hand, would take 16 quadrillion years.

As you may have guessed, a long password is a secure password. The more valuable the asset, the longer the password should be. You can test the strength of your password at security.org. ■