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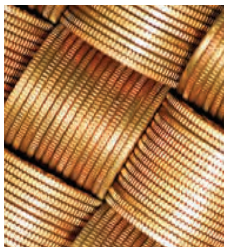

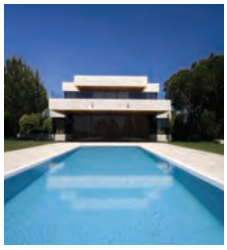





Published in Jersey by the
International Tax Planning Association

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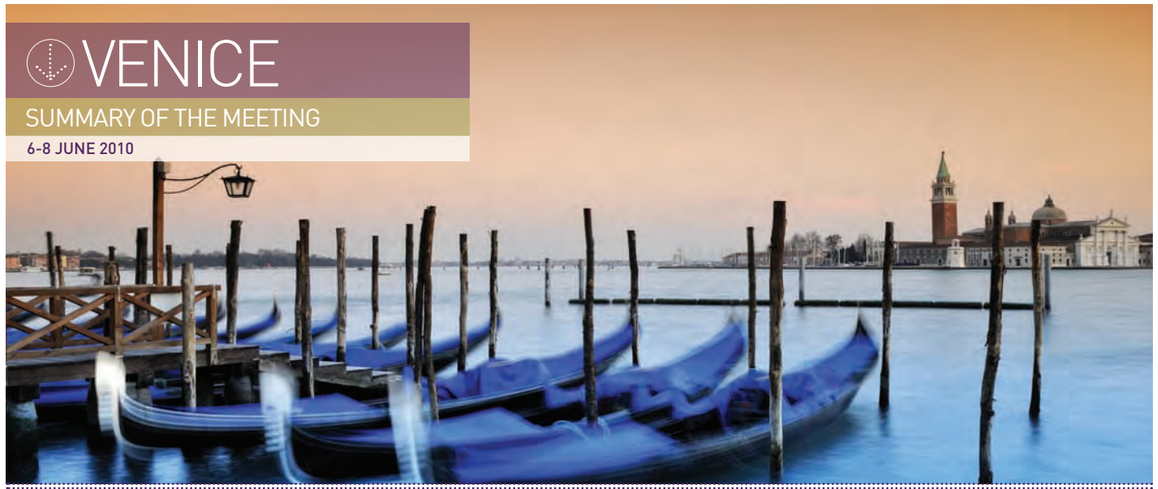


VENICE

SUMMARY OF THE MEETING

6-8 JUNE 2010

New pathways in international tax planning

Milton Grundy

THE PROTAGONISTS IN THE SIX FISCAL FABLES ARE INDIVIDUALS who arrange their affairs in a tax-efficient manner. Mr. Smith – a UK resident – increases the base cost of his shareholding in a new company; Mr. Shah – resident but not domiciled in the United Kingdom – frees his estate from inheritance tax on his UK home; Mr. Lee uses twin trusts to support UK-resident beneficiaries; the Englishman Abroad finds that he does not have to go to a zero-tax jurisdiction in order to pay no tax, but needs a 'window' between his two residences. Their stratagems relate to provisions in the UK tax code, though this may have application elsewhere. The procedures adopted by Jack and Nigel, however, may be of more general use – Jack's transaction exploring the possibilities of assets which, taken separately, have no value, but taken together have considerable value, and Nigel's transaction looking at the use of liabilities with similar characteristics.

Their stratagems relate to provisions in the UK tax code, though this may have application elsewhere.

Trusts in civil law countries

Richard Pease

THE ANIMAL INVENTED IN A common law country has a mixed reception in civil law countries. Recognition of trusts in civil law countries comes through the Hague Convention, statutory provision and case law (notably in France).

Since 1985 only 12 countries have ratified the Hague Convention, of which seven are civil law countries. The Convention obliges ratifying States to recognise the core features of the trust. Belgium is a prime example of a country which has engrafted trust principles in its domestic law. *Courtois v. de Ganay* is a French case of 1970, in which the trust was recognised. *Ziesennis* of 1996 held that a transfer into trust was a deferral gift by the settlor, perfected on distribution. For the *Fiducie*, only a company can be a settlor.

National attitudes to trusts vary from the benign to the indifferent to the hostile. Italy has taken to trusts with some enthusiasm, with the Finance Act of 2007 and Circular of 2007 and 2008. Generally a trust is taxable like a corporation, which may be resident or deemed resident in Italy. Income may be attributed to identified beneficiaries. Transfers into trust trigger a gift tax liability, but there is no further gift tax on distributions; this works well if the trust is located in a White List country. In France, the income of an offshore structure may be attributed to a French resident. In *Poillot*, it was held that a discretionary interest had no value for wealth tax, but the doctrine of *abus de droit* is always a danger.

In Switzerland, the trust has an attractive tax regime where the settlor and beneficiaries are non-resident. An individual who plans to immigrate, may consider the creation of a pre-immigration trust for gift, and inheritence, tax purposes.

Recent developments in trust law

Nigel Goodeve-Docker

TRUSTS ARE A CRITICAL feature of tax planning, and knowledge of their rules is important to practitioners.

The rule against perpetuities was invented by Lord Nottingham in the Duke of Norfolk's case. It limited the duration of the trust for a 'life in being' plus 21 years. An interest which did not comply with this rule was void. The use of 'royal lives' was developed in the early 1900s, to facilitate the development of the discretionary trust. In 1964 in England, an 80-year period was introduced, together with a 'wait and see' rule. In 2009, a Bill was introduced to abolish the old rule against perpetuities; unfortunately, this simple reform was modified in the House of Lords so that the new 125-year period applies only to

new settlements. Special powers exercised in the future on the old trusts are still to be governed by the old rules. The will of a person dying in the future will still be governed by the old law if the will was executed before 5 April. The exercise of powers of appointment presents a similar problem. The rule is different – in different ways – in Jersey, Guernsey, Ireland, Bermuda, BVI, Cayman and Hong Kong. The English Act has abolished the rule against accumulations which has never been a feature of the law outside England.

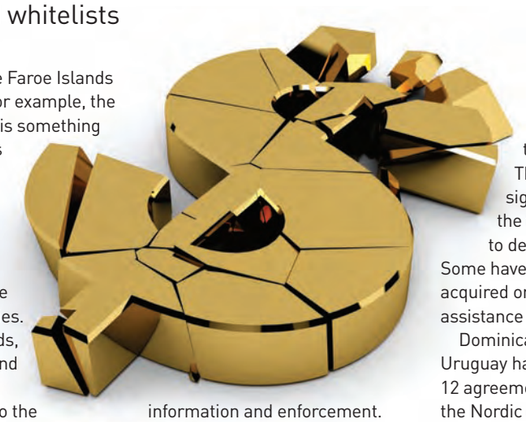
The desire to remove a trustee is often the result of a generation change. The trust instrument may make provision for this; it is a fiduciary power, though an attack on the exercise of the power on these grounds rarely succeeds. In some jurisdictions, there is a statutory power. The Court has an inherent power, which will be exercised if the circumstances justify a change (as in *Letterstedt v. Broers*). Some trustees are willing to go, others not.

The *Hastings-Bass* is an escape route, and a safe harbour for negligent trustees – a development encouraged by the insurance industry, but hated by the Inland Revenue. The rule originated in 1975, in the English Court of Appeal – ironically promoted by the Revenue, and is increasingly being applied. The rule applies only to the exercise of a discretion, not to a wrong decision. It appears that *Futter* decides that the exercise is void and not simply voidable, but the Court retains its discretion; but the case is to be appealed by the Revenue.

A new look at blacklists, graylists and whitelists

Marshall Langer

THE TAX COMPLIANCE provisions of the HIRE Act were intended to pay for the employment measures introduced by the Act, but are likely to have a disastrous effect on foreign investment in the United States. Banks are already refusing to have American depositors or to invest in the United States. The TIEA began in the US, but was taken up by the OECD. The US/Liechtenstein TIEA is important: it took effect on 1 January, and is expected to reveal information about foundations or companies in Liechtenstein. Little countries have been forced by big countries to sign TIEAs, and extend to dependencies. The Faroe Islands have TIEAs with, for example, the Cook Islands: this is something of a joke, but it has been necessary to get off the graylist by complying with the 'international standard'. There are now 74 or more whitelisted countries. Belize, Cook Islands, Liberia, Panama and others are on the way to getting on to the White List. On 27 May the OECD Ministers of 15 countries signed the Protocol on the Convention on Mutual Assistance in Tax Matters: it provides for exchange of information and enforcement. It now has 21 signatories of which 14 have ratified. Chile, Estonia, Israel and Slovenia are now OECD members – making 34 in all. The Protocol embodies the provisions of Article 26 and also opens the Convention to non-OECD countries. The treaty enables signatories to extend the treaty and its Protocol to dependent territories. Some have. The US has not acquired or granted collection assistance rights.



Dominica, Grenade and Uruguay have now signed their 12 agreements. By signing with the Nordic countries and their dependencies, a country can get seven agreements all at once. The Global Forum requires each of its 91 members to contribute 15,000 euros a year.

The peripatetic resident

Roy Saunders

THE TEST OF 'RESIDENCE' varies from one country to another. In the US, of course, citizenship and holding of a Green Card are criteria of tax liability, but resident aliens are also taxable, and an alien requires proof of residence elsewhere if he wants to escape this category. Australia has a 183 day test and an 'intentions' test. France looks at the location of the home, of carrying out professional activities, of the centre of economic activities. The residence of the spouse may be relevant. Italy has similar tests e.g. the location of the place of abode and the place of work, and here too the burden of proof is on the taxpayer. India has the more old-fashioned number-of-days test. The United Kingdom looks at number of days but looks at other features – highlighted in the *Gaines-Cooper* case. Canada applies a test of the 'settled routine of life'.

For those who *really* change their residence, there are windows of opportunity. The gap between dates of fiscal periods can be used. Australia, Denmark, US and other countries impose exit taxes. This may be followed by the United Kingdom. It may be mirrored by an updated base cost on immigration e.g. the UK resident who can move his shares into a holding company without a tax charge but have a high base cost for the purposes of the Spanish or Portuguese. Or a receipt which would be taxable in the UK but not taxable in the new country of residence. A purpose trust can have the effect of 'freezing' income or assets pending a change of residence, the individual not being entitled until a condition is satisfied.

The *forfait* arrangement is becoming less attractive but one advantage of Swiss residence is the absence of a general capital gains tax. To obtain principal private residence relief, there can be an advantage in becoming resident in the country where the property is situated.