

Foreign implications for New Zealand domestic trusts

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Disclaimer: This presentation is of a general nature only. Please obtain specific advice on client situations as minor changes may result in significantly different outcomes. This presentation does not purport to cover all aspects of law and accounting relevant to the topics covered.

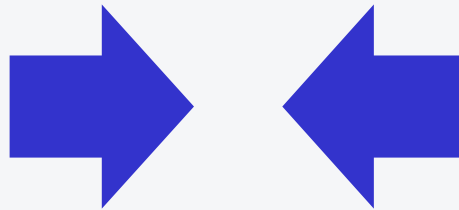
Overview

- Know your client
- International transparency measures
- Foreign treatment of trust interests
- Trust administration and planning



Know your client

- Continental Europe - civil law
 - forced heirship rules – descendants and ascendants
 - cultural perception of trusts
- Private international law
- Residence, nationality, domicile and citizenship
- Treatment of rights/ trust benefits by overseas jurisdictions
- EU Succession Regulation – testamentary trusts/ settlements on trusts



Succession

- Treatment of legacies/ testamentary trust
- EU Succession Regulation example:

New Zealand national living and working in Italy dies in France, where his de facto partner and 3 young children are living
- **Option 1:** no testamentary choice of New Zealand law
 - Habitual residence but modified
 - Worldwide estate subject to French law, including forced heirship rules
 - Children must inherit $\frac{3}{4}$ of the worldwide estate, claw back previous dispositions
 - If a testamentary trust is established for the children - taxed at 60%, further taxation
 - De facto partner – unrecognised marriage regime – taxed at 60%
- **Option 2:** effective testamentary choice of New Zealand law has been made
 - New Zealand law applies to the worldwide estate
 - Testamentary freedom subject to New Zealand law limitations
 - Ability of jurisdictions to tax assets or their residents unchanged
 - Marriage regime recognition unchanged

Global transparency

- Foreign Account Tax Compliance Act (FATCA) - USA
- Common Reporting Standard – OECD, G20
- Multilateral Convention on Mutual Administrative Assistance in Tax Matters, DTA's and TIEA's
- Panama Papers - public perception, acceleration of transparency & AML/ CFT measures
- Beneficial ownership - publication of confidential details
- Crown Dependencies and British Overseas Territories – reporting from 2016 to the UK
- EU Fourth AML Directive – proposed trust disclosure rules



Common Reporting Standard

- 101 committed jurisdictions – 2017 or 2018 to commence exchange
- Trusts
 - an entity under CRS, different classifications
 - residence of trustees – report in all trustees' respective jurisdiction of residence
- Due diligence on settlor, beneficiaries, protectors, all persons exercising control (including date and place of birth, ascertain tax-residence status)
- Treaty partners – treatment of trust information



New Zealand transparency measures

Foreigners:

- Company incorporation changes when foreign director, tax identification numbers for property transactions
- Residential Land Withholding Tax
 - Intent/ two year bright-line test – two-year period from date of acquisition
 - New Zealand citizen/ presence in NZ within the past 3 years or visa/ presence in NZ within past 12 months
 - Responsibility with conveyancer, including identification of offshore RLWT person

•New Zealanders:

- Tax residency difficult to lose – absent more than 325 days in a 12 month period **and** no longer have a permanent place of abode (PPA)
- PPA – irrespective of foreign place of abode / structure e.g. home owned by trustees of a family trust
 - Overall circumstances at any given point
 - Ties to NZ – memberships, stored effects, family, rented property, NZ bank account
 - Nature and use of / connection to the PPA
- Foreign trust upon no longer being a New Zealand tax resident
- Loss of NZ residency / dual British nationality example

Foreign beneficiaries/ settlor moving overseas

- Spain – look-through approach – income and succession
- United Kingdom – domicile/ intention, taxation of “settlor-interested” trust, English client emigrating/ Cayman Islands case (Re the Hexagon Settlement & the Hope Trust (Unreported) [22 October 2014]), proposed tax avoidance sanctions on advisors equal to 100% of tax lost to HMRC
- France – reporting obligation for trustees, transparent treatment, 12.5% on gross value of trust assets for each non-disclosure, discretionary French beneficiaries
- Belgium – disclosure Belgian residents’ trust interests, French approach
- Italy - trustee disclosure obligations, taxation where settlor/ beneficiary influence



Foreign beneficiaries/ settlor moving overseas

- Australia – capital gains tax, foreign trust when settlor is no longer NZ resident, tax implications upon return to NZ
- Israel – trust taxed in Israel on worldwide income and gains, reporting by Israeli beneficiaries
- Argentina - settlor/ beneficiaries reporting similarities to French requirements/ penalties USD 100,000 depending upon income levy
- China – treatment of interest held by Chinese residents, difficulty to verify source of funds
- United States of America – US persons – parents/ green card, reporting interest in non-financial assets including trusts, USD 10,000 penalty for each late return

USA – trust compliance

- Accounting – accrued income treatment/ distribution to US beneficiary – anti-avoidance rules/ throwback tax rules
- Estate planning – spousal credit benefits
- Compliance
 - Report of Foreign bank and financial accounts (“FBAR”) – income and assets
 - Reporting trust interests – USD 10,000 penalty for *each* undisclosed account for each year
 - Nature of trust interest – grantor trusts (revocable or settlor and/ or spouse only ones able to benefit during their lifetime)
 - Remedy non-disclosure
 - IRS policy – can change at any time
 - Navigation of options depends upon failures
 - Current favourable disclosure programme for non-wilful failures
 - 3 years’ tax returns, tax and interest, 6 years of FBAR’s, potential for no penalty for “offshore” US persons



Practical implications

- Consideration of information that will flow – criminal & financial penalties – risk for advisors
- Compliance in all jurisdictions – legal and tax
- Tax advice up to date/ identify non-disclosed trust interests/ incidental tax benefits
- Review due diligence procedures
- Estate planning
 - Wills – specific requirements for families with EU connections
 - Testamentary trusts
- Trust administration with integrity, knowledgeable partners, fiduciary obligations to beneficiaries are enforceable
- Manage expectations - privacy, transparency, compliance, effective planning

