



Information provided by **Christopher White and Raquel Moss, Hassans.**



Europort Anthony Lodislaus, Trust Administrator, Hassans

There are currently moves by the Government of Gibraltar to reform Gibraltar tax legislation. This arises from the need to ensure that Gibraltar continues to comply with EU and other international obligations. The proposed Government reforms of the Gibraltar tax system would result principally in the replacement of the Tax Exempt Company legislation with a non-discriminatory nil corporate tax regime. This new regime has the full support of the UK Government.

The EU Commission has challenged the proposed reforms on the grounds of “regional” and “material” selectivity. In short “material” selectivity deals with specific objections to the proposed plan, in other words the detail of the proposal does not in their view conform with the wider issues of State Aid. The issue of “regional” selectivity is much wider and focuses on whether Gibraltar should be allowed to have a tax system distinct from that of the member state responsible, in this case the UK.

The Government of Gibraltar is litigating the challenge of the Commission through the European Courts and interim measures have been agreed while the litigation takes place. The Government of Gibraltar, having obtained legal advice from European lawyers competent to advise on such matters, is publicly of the view that the position of the European Commission on regional selectivity is unsustainable and therefore will be challenged successfully in the European Courts. Certainly, Gibraltar is not part of the UK and it is the first time since Gibraltar joined the European Union in 1973 (with the UK) that the European Commission has raised an argument that Gibraltar should have the same corporate tax system as the UK. It should also be noted that the Government of Gibraltar has previously been successful in tax litigation against the European Commission. The UK Government has also intervened in the proceedings in support of the Gibraltar Government’s case.

The position on the EU Commission argument on material selectivity is not so clear but an adverse decision on this basis will leave the Government of Gibraltar in a position to put forward alternative acceptable tax proposals.

Meanwhile, the interim arrangements agreed with the European Commission will allow the Exempt Company regime to remain in place for an appropriate period of time pending the European Court litigation.

In summary, companies which were tax exempt companies at February 2005 will retain the benefits of their exemption until 31st December 2010, provided that there is neither a change in “ownership” and/or “activity”. If such a company changes either its ownership or its activity before 30th June 2006, it will be able to retain the benefit of its tax exempt status only until 31st December 2007. Existing exempt companies that change ownership and/or activity after 30th June 2006 will immediately lose their tax exempt status on breach of either condition. The EU announcement allows for new entrants to the exempt company scheme up to 30th June 2006 on a reducing scale subject to an overall cap. Those companies obtaining tax exempt status after February 2005 will be entitled to the benefits of that status until 31st December 2007, irrespective of any change of ownership or activity.

I Trust law

- (a) There have been no changes in Gibraltar trust law in the last year. Gibraltar has not adopted the provisions of the English Trustee Act 2000.
- (b) None.
- (c) Trusts in Gibraltar are recognised in accordance with the Trustees' Ordinance, based on the Trustee Act 1925 of England and Wales. Gibraltar has an active and well-established judicial system with ultimate recourse to the Privy Council and the courts of the European Union. It is relatively rare that cases involving trusts are litigated in the courts of Gibraltar but a handful have been seen over the past 5 years, proceeding as far as the Court of Appeal.

The Registered Trust Ordinance 1999, which came into effect on 1st January 2000, created a public trust register in Gibraltar. The main purpose behind the establishment of such a register was that many people within the industry (especially those from civil law jurisdictions) expressed the view that formal confirmation of the details of trusts from a government register, could prove to be useful.

By virtue of the provisions of the legislation, registration is voluntary unless the trustees have a specific duty to register the details as provided for by the instrument creating the trust.

Upon payment of the prescribed fee, the particulars of a trust will be entered into the public trust register index and a certificate of compliance will be issued by the Registrar.

Any person may, upon payment of the prescribed fee, inspect the index kept by the Registrar and may obtain a certified copy or an extract from the index.

2 Anti-money laundering

- (a) Following a visit to Gibraltar in April 2001, in October of that year the FATF published a favourable report on Gibraltar stating that: "Gibraltar has in place a robust arsenal of legislation, regulations and administrative practices to counter money laundering. The authorities clearly demonstrate the political will to ensure that their financial institutions and associated professionals maximise their defences against money laundering, and cooperate effectively in international investigations into criminal funds. Gibraltar is close to complete adherence with the FATF 40 Recommendations ...".
- (b) Gibraltar enacted the Criminal Justice Ordinance in 1995, implementing, on an all crimes basis (for all crimes which have a penalty of a 6 month custodial sentence), EU Directive 91/308/EEC on the Prevention of the Use of the Financial System for the purposes of Money Laundering. The Ordinance provides for various offences to supplement those existing in the Drug Trafficking Offences Ordinance with regards to money laundering arising from the proceeds of drug offences. It is important to note that anti-money laundering regulations in Gibraltar are of the same standard as in the UK. The legislation applies to trustees and trustee companies as it applies to anyone else and a trustee is obliged to report transactions where there are grounds for suspicion that the sums transacted are the proceeds of a criminal act.

All financial business is transacted on a "know your client" basis and providers of financial services will maintain an

audit trail, although that trail is not disclosed until there are grounds for suspicion.

3 What measures are there to combat the abuse of trusts to procure the concealment of assets?

Regulatory guidelines in Gibraltar require all trust and company formation agents to ascertain fully the identity of the settlor(s) of a trust and the ultimate beneficial owner of a company. This information is required to satisfy the "know your client" principle. Documentation required would normally take the form of a letter of reference on the relevant parties from a banker, accountant or lawyer, together with verification of the identity of the client in question through the obtaining of a certified true copy of a passport and proof of address. Regulatory guidelines also require banks to have such information disclosed to them. However, such information is completely confidential and is not disclosed to any other party, including foreign tax authorities.

Additionally, if a company wishes to apply for tax exempt status, similar information would need to be disclosed to the Finance Centre Director of Gibraltar. Again, however, this information is completely confidential and there is no disclosure to other third parties other than in very limited circumstances with a court order.

4 Asset protection trusts

In 1990 Gibraltar introduced several amendments to its Bankruptcy Ordinance to facilitate the establishment of asset protection trusts, which could be created to help provide a higher degree of creditor protection. This legislation was introduced partly due to the Fraudulent Conveyance Act 1571 and its various re-enactments. This Act stated that if a settlor created a trust with no immediate intention of defrauding creditors, but in contemplation of entering into a business which would be regarded as hazardous, trusts settled may subsequently be declared void at the instance of further creditors. By virtue of Sub-section 42(A) of the Bankruptcy Amendment Ordinance Nos. 1 and 2 1990, a disposition will not be voidable at the



Convent Anthony Ladislav, Trust Administrator, Hassans

instance of, or upon application by, any creditor of the settlor if (a) under or by virtue of any disposition made in respect of property, the same became settled property; (b) the settlor is an individual; (c) the settlor is not insolvent at the date of the disposition; (d) does not become insolvent in consequence thereof; and (e) the disposition is registered in accordance with the requirements of the relevant regulations.

The Act is therefore inapplicable if all of the above criteria are complied with. Section 42 of the Bankruptcy Ordinance is also made inapplicable if the above criteria are satisfied. This section generally provides that a settlement is void against an official trustee if made at any time within either 2 or 10 years from the bankruptcy of the settlor in various circumstances.

There is no legislation which reduces the period in which claims from creditors in other jurisdictions must be brought.

5 Shams

Gibraltar follows English law on this and it has no specific statutory provisions and English precedent will therefore have persuasive authority if the matter is ever raised before the Gibraltar court.

6 Forced heirship

Gibraltar has no specific provisions on this and English precedent will therefore have persuasive authority if the matter ever appears before the Gibraltar courts. No amendments are proposed.

7 Protectors

There is no legislation specific to protectors.

Protectors are usually appointed by the settlor under the terms of the trust deed but the trust property does not vest in them. With too wide-ranging powers a protector may be considered to be an effective trustee. Their abilities and powers will vary with the terms of the trust deed. There is no statutory authority in Gibraltar which states that protectors are regarded as fiduciaries. That being said, English precedent would have persuasive authority if the matter ever appears before the Gibraltar courts.

8 Purpose trusts

- (a) Purpose trusts which would be considered non-charitable in, for example, the UK can be set up in Gibraltar, but not for commercial purposes.
- (b) Purpose trusts in Gibraltar allow for a wider range of non-human beneficiaries than contemplated by the Statute of Elizabeth 1601. By the Trustees (Incorporation) Ordinance a corporate trustee may be appointed by any body or association of persons established for any religious, educational, literary, scientific, social or charitable purpose. Such an appointment is made by the grant of the Governor of Gibraltar.
- (c) Not applicable.



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9 Tracing of trust assets

Gibraltar has implemented the Hague Convention on trusts and, as such, recognises the right of beneficiaries to trace trust assets where those assets have been mingled. The mechanics of tracing follow those of the UK.

10 Attacking trusts

The position is similar to that of the UK.

11 Ensuring trustees performance

Gibraltar follows English law on this and it has no specific statutory provisions. English precedent will therefore have persuasive authority if the matter is ever raised before the Gibraltar courts.

12 Conflict

- Migration of trust and changes of proper law are governed by the provisions of the trust deed. In the absence of relevant provisions, the Hague Convention applies.
- Trusts can migrate and change their proper law subject to 12(a) above.
- The Hague Convention is incorporated into local law by the Trusts (Recognition) Ordinance 1985. To our knowledge no case law has featured the Convention.

13 Succession

As in English law.

14 Trustees' powers of investment

- In the absence of specific provision in the trust instrument, trustees do not have complete freedom to invest trust funds at their discretion, but must adhere to Part III of the Trustees Ordinance - Investment of Trust Funds. In practice, this means that all practitioners will pay careful attention when drafting a trust instrument to ensure that specific provisions are indeed made.
- Trust investments are regulated in so far as professional trustees are regulated, but no special provisions apply.

15 Trading trusts

As in English law.

16 Taxation

- There is no capital gains tax in Gibraltar and the question does not arise.
- and (iii) No. There is no trust anti-avoidance legislation within the Income Tax Ordinance.
- Stamp duty is not prima facie chargeable on most transactions entered into by Gibraltar trustees.
- None.

17 Trustees' obligations to disclose trust information

Gibraltar follows English law on this and it has no specific statutory provisions. English precedent will therefore have persuasive authority if the matter is ever raised before the Gibraltar courts.

18 OECD, FATF, IMF and counter-terrorism

Gibraltar is considered cooperative by the FATF, not regarded as a tax haven by the OECD and has a FSF stability rating of 2 (that is on a descending scale from 1 to 4).

By virtue of Article 5(1) of the Terrorism (United Nations Measures) (Overseas Territories) Order 2001, the Governor of Gibraltar gave notice that funds are not to be made available to a number of entities known to be involved in terrorism, as set out in the said Order. The Al'Qaida and Taliban (United Nations Measures) (Overseas Territories) Order 2002 also applies.

19 Commercial trusts

Gibraltar follows English law on this and it has no specific statutory provisions. English precedent will therefore have persuasive authority if the matter is ever raised before the Gibraltar courts.

20 Regulation of corporate and trust service providers

The Gibraltar Financial Services Ordinance enacted in 1989 gave supervisory and regulatory powers, duties and responsibilities to an independent Financial Services Commission for the control of financial services, including the provision of professional trustee services. Such services are classed as a controlled activity and therefore a licence is required by any individual, corporate body, partnership or unincorporated association that wishes to carry on, in or from Gibraltar, the business of providing professional trustee services. In addition to being licenced, professional trustee providers have to adhere to regulations issued by the Financial Services Commission and are also audited annually to ensure compliance. The legislation makes failure to comply with any obligations imposed under it an offence, with penalty fees and, in some circumstances, prison sentences being imposed. The Financial Services Commission also has the power to revoke, vary, limit and suspend licences granted to professional trustee service providers in the event of non-compliance. No amendments are proposed.

Christopher White

Hassans

57/63 Line Wall Road
PO Box 199
Gibraltar

Tel: +350 79000
Fax: +350 77343

E-mail: info@hassans.gi
www.gibraltarlaw.com and

Raquel Moss

Hassans

57/63 Line Wall Road
PO Box 199
Gibraltar

Tel: +350 79000
Fax: +350 44970

E-mail: info@hassans.gi
www.gibraltarlaw.com