Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

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Oliver Piper

Farrer & Co LLP
66 Lincoln's Inn Fields
London
WC2A 3LH
oliver.piper@farrer.co.uk
+44 (0)20 3375 7000

General Reporters:

Cosima von Rechteren Bär & Karrer AG Brandschenkestrasse 90 CH – Zurich 8027 Phone: +41 58 261 56 01 E-mail: cosima.vonrechteren@baerkarrer.ch	Roos Jongeneel Taxand Netherlands Piet Heinkade 133 Amsterdam, The Netherlands Phone: +31 20 435 64 09 E-mail: Roos.Jongeneel@taxand.nl

INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing

transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts are usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Domestic and almost all foreign trusts under the Hague Trust Convention are recognised in England and Wales. Types of domestic trust include:

- Bare trusts: the beneficiary is absolutely entitled to the income and the capital.
- Interest in possession trusts/life interest trusts: a beneficiary (the life tenant) is entitled to the trust income as it arises but not the capital.
- Discretionary trusts: the trustees have power to decide how to use the income and/or the capital of the trust for the benefit of a defined class of beneficiaries.

Usually, discretionary trusts are the most appropriate type of trust to use for asset protection purposes because they allow trustees the flexibility to take wide-ranging decisions to protect the assets in the trust.

There are no restrictions on settlors also being beneficiaries, although there may be adverse tax consequences regardless of whether or not the settlor actually benefits, in particular if the settlor is a beneficiary of the trust, i.e.:

- for inheritance tax purposes the settlor is treated as still owning any assets he has given to the trust;
- trust income will be attributed to the settlor for income tax purposes; and
- for capital gains tax purposes, hold-over relief is usually not available.

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

Private foundations are not automatically recognised in England and Wales and there is no provision for them in UK law. However, depending on the country of origin of the foundation and its particular structure they may be treated as fulfilling the characteristics of a recognised structure (such as a company) for tax purposes.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Other possible asset protection vehicles include Family Investment Companies and Family Limited Partnerships although these may have tax and practical disadvantages and therefore are not widely used.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

While England and Wales has a number of characteristics that can be described as 'asset-protection friendly', the concepts of a sham trust and of 'piercing the corporate veil' have both been established in the jurisdiction.

In England and Wales, the fundamental hallmark of sham is that the trust documents are intended to give third parties the appearance of creating legal rights and obligations different from those the parties intend to create. Where a trust is declared by a settlor and trustees (rather than by the settlor acting alone), the trust will only be a sham if both the settlor and the trustees have a common intention to treat the trust as a sham. If a new trustee exercises his powers properly the trust will not be a sham.

The ability to "pierce the corporate veil" – to ignore the separate legal status of a company and hold its shareholders to account – is only applicable in very limited circumstances in England and Wales. The court can only look beyond a company's legal personality where:

- a person who controls a company is under an existing legal obligation or restriction;
- he deliberately avoids or frustrates that obligation or restriction;
- he uses the company he controls to achieve that avoidance or frustration;

- in so doing the company or the person gain some advantage; and
- there are no other legal remedies available to someone who has suffered loss as a result of the actions of the company or its controller.

The test is very complex and comes from the relatively recent case of *Petrodel Resources v Prest* [2013] UKSC 34. Its application has not been well tested and it is difficult at this stage to tell in practice how it will apply.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favourable civil procedural rules (e.g. in relation to the (non) recognition of foreign judgments) and have there been any changes to these principles recently?

England and Wales is regarded as a favourable jurisdiction to hold certain assets – particularly property – due to political and financial stability, strong respect for the rule of law and developed financial systems. However, the recent application of the FATCA regime and other international transparency agreements make it more difficult than in the past to maintain a desired level of privacy. Additionally, judgements from the EU, the Commonwealth and certain common law jurisdictions may be enforceable in England and Wales.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

See *Petrodel v Prest* above.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

When a settlor makes a gift into a trust, he may incur a personal tax liability.

Strictly speaking a trust will not ***itself*** be liable for any tax, but the trustees are usually liable to pay tax on trust income and gains during the lifetime of the trust. When the trust makes distributions to its beneficiaries, the beneficiaries may incur a personal tax charge.

Trust structures attract a number of taxes, and the rules are generally different depending on the type and nature of trust. In a very general sense, these taxes are:

- Capital Gains Tax (CGT): the trustees pay tax at 28% on the gains made on the disposal of chargeable assets. There may also be a tax charge when assets standing at a gain are distributed to beneficiaries. Trustees have an annual tax-free allowance, the amount of which varies depending on how many trusts the settlor has created.
- Inheritance Tax (IHT): most lifetime trusts are charged to IHT on each ten year anniversary of the trust and also when assets are distributed. Some trusts have favoured status for IHT purposes (e.g. certain children's trusts). In addition some types of life interest trusts are taxed as though the life tenant owned the property outright.
- Income tax: tax is usually paid by the trustees on income that arises on the trust fund, but if the settlor or his family can benefit from the trust the income may be attributed to the settlor for tax purposes. If so, he can claim reimbursement from the trustees. In some circumstances beneficiaries may need to pay tax if they receive trust income.
- Annual Tax on Enveloped Dwellings (ATED): introduced in April 2013, this tax applies to residential properties valued at over £1 million (soon to be reduced to £500,000) held by UK and non-UK 'non-natural persons' (i.e. companies, collective investment vehicles, or partnerships with a corporate member). The tax must be paid every year and is calculated by reference to the value of the residential property.
- Stamp Duty Land Tax (SDLT): if a trust buys land the trustees will be liable to pay SDLT on the value of the land transferred. In addition a higher SDLT rate may apply where a company is used to buy a property. There is usually no SDLT when a settlor transfers land into trust by way of gift.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

The Government has introduced regulations to implement CRS which will have effect from 2016.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

The UK entered into a bilateral FATCA agreement on 12 September 2012, and regulations took effect on 30 June 2014 to give effect to this. The regulations set out:

- who needs to report account information to HMRC;
- what kind of accounts must be reported; and
- what information must be provided.

The broad effect of these regulations is to oblige a number of UK-based entities to register with the IRS and/or HMRC and to identify and submit returns on their US account holders. HMRC must also be informed of international payments where the receiving jurisdiction has no comparable FATCA agreement. A failure to follow the rules can lead to financial penalties.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

I am not aware of any recent developments in connection with the FATF. The UK has been a member of the FATF since 1990.

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

As an EU member the UK (which includes England and Wales) is obliged to implement 4AMLD by 26 June 2017.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

N/A

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

The Small Business Enterprise and Employment Act 2015 will require UK companies to keep a publically searchable register of 'persons with significant control' of a company. The obligations under the Act are expected to come into force later this year.

In addition in July 2015 the Government announced that the Land Registry will introduce a central public registry of UK properties owned by foreign companies and will explore plans to identify the true owners of such companies.

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

In the UK, the nature of the income received determines the transparency obligations that apply, and the concepts of **'residence'** and **'domicile'** are key to determining the extent that an individual will be taxed.[2]

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[2] **Domicile** is not defined in statute but is decided under general law, which means it must be interpreted according to previous rulings of the courts. Broadly speaking, a person's country of domicile is his permanent home which, if he has left it, he intends to return to.

A person has a domicile of origin based on the domicile of the parents: the child of married parents will take his father's domicile, whereas for unmarried parents the child will take his mother's domicile. The domicile of origin can be displaced by a domicile of dependency or a domicile of choice. A domicile of dependency would be found for unmarried children under the age of 16, mentally disordered persons, and married women before 1 January 1974. A domicile of choice requires actual residence in a new country combined with an intention to reside in the new country permanently and indefinitely. Intention can be inferred from all the circumstances of the person's life, including what they say or do.

Residence is now defined under the Statutory Residence Test (SRT), which was introduced with effect from 6 April 2013.

Under the SRT a person is automatically resident in the UK if any of the following tests is met:

- if he spends 183 days or more in the UK in a tax year;
- if he has a home in the UK, is in that UK home on 30 separate days or more in the tax year, and for a period of at least 91 consecutive days has no home overseas or has one or more overseas homes but is present in each on fewer than 30 separate days in the tax year; or
- if he carries out full-time work (whether employed or self-employed) in the UK.

Note that a "home" does not require property ownership.

A person is automatically not resident if any of the following tests is met:

- if he spends fewer than 46 days in the UK in the tax year and was not UK resident in any of the previous three tax years;
- if he spends fewer than 16 days in the UK in the tax year and was UK resident in one or more of the previous three tax years; or
- carries out full-time work (whether employed or self-employed) abroad.

If neither automatic test is met, then the "sufficient ties" test applies, which involves a mixture of day counting and assessing ties to the UK. The more UK ties a person has, the fewer days he can spend in the UK without becoming resident. There are slightly different rules for "arrivers" (individuals not resident in any of the previous three tax years) and "leavers" (individuals resident in one or more of the previous three tax years). The UK ties are:

- Family (spouse, partner, or child under 18 unless that child is in full-time education and spends fewer than 21 days in the tax year in the UK outside term-time);
- Accommodation (no legal interest required; available for at least 91 days and he spends one night there, or 16 nights if it belongs to a close relative);
- Work (40 days, more than 3 hours per day);
- 90 days (spent in UK in either of previous two tax years); and
- Country (for leavers only - more days spent in the UK than any other country).

The remittance basis rules mean that non-UK individuals domiciled but UK resident will be taxed on foreign-source income when that income is 'remitted', or in other words brought to or received or used in, into the UK in some form. They must pay income tax on all income arising in the UK, and may lose the right to claim income tax personal allowances once they have elected to be taxed on the remittance basis. If a resident non-domiciled individual has remained in the UK for seven years or more they may have to pay a substantial annual charge in order to make use of the remittance basis.

There are proposed changes that are expected to come into force next year which will significantly impact the taxation of non-domiciled individuals. In particular it is proposed that individuals who are resident in the UK for 15 out of 20 tax years will become deemed domiciled in their 16th tax year of residence and so lose the benefit of the remittance basis Another change is where individuals are born in the UK with a UK domicile of origin but acquire a foreign domicile of choice they will be deemed domiciled when they return to the UK if they have been UK tax resident for at least one of the last two tax years.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

England and Wales is expected to implement the OECD's model template for tax reporting imminently. The new rules are likely to require multinationals to provide annual financial information and to disclose taxes paid in each country in which it has a presence. The current UK transfer pricing rules require companies to self-assess transfer pricing adjustments and pay tax by reference to arm's length terms. There are penalties for non-compliance. There are further regulations to keep sufficient documents to satisfy HMRC that companies are applying the arm's length pricing test in accordance with the rules. There are also numerous double tax treaties and arrangements which have regulations which will affect companies operating in certain jurisdictions as well as the UK.

2.1.3. Does the national law currently include obligations to report tax schemes?

UK law contains obligations to report tax schemes that fall within the Disclosure of Tax Avoidance Schemes (DOTAS) rules which cover CGT, IHT, ATED, SDLT and corporation tax (separate regimes apply for VAT and national insurance contributions). The rules that govern whether these regimes will apply are complex. A tax arrangement must be disclosed to HMRC when:

- It will, or might be expected to, enable any person to obtain a tax advantage.
- That tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement, and,
- It is a tax arrangement that falls within any description or 'hallmark' prescribed in the relevant regulations.

Failure to report the scheme will trigger penalties. Disclosure is generally required to be made by the scheme 'promoter' as defined by the regulations.

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

To date the UK has signed a number of Tax Information Exchange Agreements (TIEAs) based on the OECD model and in relation to the EU directive on the taxation of savings income (Council Directive 200-34-8EC). In addition, many of the Double Taxation Agreements entered into by the UK include tax information exchange provisions. The regulations differ depending on which jurisdictions are being considered.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

Legislation implementing Directive 2011/16/EU came into force in England and Wales on 1 January 2013.

Under the Automatic Exchange of Information rules, certain financial institutions may be subject to requirements to provide information about UK bank account holders and their residence status. This obligation also extends to public authorities. The information will be shared to OECD signatories of the multilateral competent authority agreement.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

Please refer to 2.2.1

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

BEPS Action Plan no. 5 – counter harmful tax practices more effectively taking into account transparency and substance.

Work so far on substantial activity has focused on IP regimes and has therefore directly impacted on the UK's Patent Box. The government is now looking for a process whereby the research and development undertaken to develop an IP asset has taken place within the territory of the preferential IP regime providing the link or nexus between research and development expenditure and IP income. As of 1 January 2016 no IP assets are to be shifted, and those assets outside of the existing IP regimes may no long access the tax benefit of the 'grandfathering provision' which in turn will be abolished 20 June 2021. The so called 'nexus approach' will be enacted July 2016.

BEPS Action Plan no. 12 – Mandatory disclosure rules

See DOTAS above.

BEPS Action Plan no. 13 – Re-examine TP documentation and Country by Country Reporting.

The new country by country report requirements apply for financial years on or after 1 January 2016.