Trusts and international tax planning: a brief world tour perspective

Professor Robert Anthony, Graham Busch, Brigitte Jakoby, Nick Domburg, Sergio Finulli, Fola Olaniyan, Robert R. Worthington, Angel Gabriel Viso, Ashish Bairagra and Ricky Wong
Independent member firms of Geneva Group International

The following article considers the efficacy of the trust as a means of tax planning, and considers how trusts are dealt with in a variety of jurisdictions.

I. Introduction

In the current environment of new legislation there are various questions that need answering. Some of them are listed below.

Are trusts and foundations still useful and are there any new obligations? What is the tax position on gifting assets to a trust/a foundation as well as any annual fiscal filing obligations? Is there domestic taxation on annual revenue and duty on donations to a trust/foundation? Can one use another jurisdiction's trusts/foundations? Are there any other important issues one should know? How does domestic legislation interpret trusts/foundations?

A sample of certain countries is explained in the article – France, United Kingdom, Germany, The Netherlands, Italy, Canada, Venezuela, India, and Hong Kong. . . A brief world tour!

The editor and authors work for independent member firms of Geneva Group International.

II. France

Article 14 of the French General Tax Code ("CGI") enacted in 2011 has created a new system of taxation for the foreign trusts of which the beneficiaries or the settlors, being physical persons, are or were fiscal residents of France. It is the unique administrative and financial responsibility of the named trustee to declare trusts to the French tax authorities.

This is a new obligation under French tax law.

The objective of the French legislator is to identify the trust by subjecting the trustee to severe administrative and financial obligations for French connected persons and assets.

France does not allow the creation of trusts in law, although it does have the ability to approve foreign trust structures.

The law defines the settlor of the trust as the person who created it as well as the person who transferred the assets or rights, and the real person behind the trust. To allow the application of law in the course of future transfers, the beneficiary of a trust from which the original settlor has died is fiscally assimilated as a settlor.

The settlor definition is very wide because it can include the ascendants of a current beneficiary.

The beneficiary can be a person with or without a hereditary tie to the settlor or a legal person (entity, body, foundation, etc.).The legislator establishes a definition following the nature of the taxation.

The beneficiary of the trust is often an individual person, an heir or, in the case of no family ties, a dedicated beneficiary at a rate of 60 per cent taxation.

The capital tax and the new forfeit on trusts apply only if the beneficiary is an individual person.

Article 990 J CGI specifies "the individual persons constituting or profiting by way of a trust defined in the article 792-0 bis are subjected to a specific taxation."

The new fiscal rules under article 1649 AB of the CGI impose new trust filing and disclosure obligations.

The French consider the administrator as the trustee.

The law defines the settlor of the trust as the person who established it and, if it was established by a person acting professionally or by a legal entity, the person who transferred the assets or rights as well as the real person behind the trust.

A "fiscal settlor" allows the application of law in the course of future transfers: the beneficiary of a trust from which the original settlor has died is fiscally assimilated as a settlor which means it can include the ascendants of a current beneficiary.

To allow the application of the new fiscal rules, a new article 1649 AB of the CGI imposes new filing and disclosure obligations relative to trusts.

According to the article 792-0 *bis* the administrator of a trust of which either the settlor or at least one of the beneficiaries have their tax residence/domicile in France, or which includes the assets or the rights which are situated there, will be obliged to ensure that the required declarations are made to the French administration.

Trusts have to be declared when, the settlor is resident/domiciled in France, the beneficiary is resident/domiciled in France, or assets or rights are situated in France.

The penalties in case of non-disclosure are a fine equal to EUR 10,000 or in the case or of larger amounts, five per cent of the assets of the trust. Taxation is only levied on the distributed income.

On the death of the constituent (the settlor) the inheritance, including the assets initially placed in the trust, will be taxed on their market value at the date of the transmission, i.e. the date of the death at a rate dependent on the relationship to the family, the settlor and the beneficiary.

Transfer by gift or inheritance: what are the chargeable rates for the inheritance taxes?

- The net market value of the assets, and/or the rights at the date of the transmission are subjected to transfer taxes which are related to the family tie existing between the settlor and the beneficiary.
- The law concerning transfers and about its application to trusts, applies when the gift or the inheritance can be clearly established. In other cases please take advice. It is noted that, where there are no family links, the tax rate of 60 per cent is then applied. The text aims at the law to which the trust is subjected to. This rate applicable between non-relatives (that is 60 per cent) applies, in every case, if the trustee is subjected to such a law of a State or a not cooperative territory.

The beneficiary of a succession or a gift is liable legally to pay tax, that liability to be jointly or severally shared with the heirs if necessary. The trustee has an administrative and financial responsibility in a large number of situations planned by new article 792-0 bis of the CGI.

Plainly in all situations, the administration will be informed about assets held by a trust and, in addition, the deemed beneficiaries and settlors, although there is an exception for charitable trusts or similar.

A. What about the fiscal basis of the French trust tax?

Article 990 J of the CGI creates a specific tax covering assets placed in trusts which have not been declared in conformance with the wealth tax.

This tax is based on the market value on January 1 of every year: the rate of the French trust tax is equal to the maximum rate of wealth tax being 0.5 per cent on January 1, 2012.

The French trust tax does not apply "to trusts established to manage the rights for pensions acquired, in conformance with a professional activity, by the beneficiaries within the framework of a pension plan set up by a company or a company group", or to irrevocable trusts where the exclusive beneficiaries are covered by Article 795 CGI and the director is subject to the law of a State or territory which has concluded with France a convention on administrative assistance to the fight against fraud and tax evasion.

The new tax on trusts offers alternative taxation to the wealth tax, redressing the assets or the rights which would not otherwise have been declared to the administration.

III. United Kingdom

Whilst UK trusts are commonly used in domestic tax planning, these are of limited interest to individuals carrying out cross-border tax planning.

The text below therefore deals with offshore discretionary trusts.

These trusts can beneficially be used for tax planning purposes by UK resident non-domiciled individuals with non-UK assets and by UK non-residents in regard to both their UK and, if they wish, non-UK assets.

It is possible for an individual to be UK resident for tax purposes, but not domiciled for tax purposes. To be UK resident for tax purposes, an individual would need to be physically present in the UK for a defined number of days (this article does not explain further, as that would be a substantial exercise in itself). To be UK domiciled for tax purposes, an individual would need to consider his permanent home to be in the UK – past, present and future (again the many criteria for determining domicile are beyond the scope of this article). UK resident non-doms, subject to conditions, only pay UK taxes on their foreign income and gains which are brought into the UK. Furthermore, provided they have not been UK tax-resident for more than 16 out of the past 20 years, they do not pay inheritance tax (death duties) on their non-UK assets. UK resident non-doms therefore typically use offshore trusts to shelter foreign income and gains from UK taxes. If they are likely to become "deemed domiciled" for UK inheritance tax under the "+16/20" rule, they can place their non-UK assets into a trust. This will

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protect the assets from inheritance tax, even after the 16 years have passed.

For UK resident non-doms, there is a 20 per cent inheritance tax charge (the "lifetime charge") on gifts to a discretionary trust. However, this tax does not apply on the gifting of foreign assets.

Generally, there are no filing requirements for a discretionary offshore trust itself, unless it has reportable UK income (e.g. rent received) which will be subject to UK income tax. UK resident non-doms may need to report trust income and gains to the extent that these are matched by distributions to the individuals, and will then be liable for UK income tax and/or capital gains tax as relevant.

The trust will be liable to an inheritance tax charge on its net UK assets (i.e. UK or connected foreign liabilities may be deducted). The rate is 6 per cent and the tax is charged on the 10th anniversary of the trust and every 10 years thereafter. This tax is payable by the trustees. It is for this reason that UK assets are typically held by offshore companies, which in turn are owned by a trust. This avoids the charge.

Anti-avoidance rules exist, and the general effect of these rules is to attribute, in certain circumstances, the income and capital gains of non-UK trusts, and sometimes of their underlying offshore companies, to settlors and beneficiaries resident in the UK.

In appropriate circumstances, and if the parties are correctly advised, then such provisions can be avoided in an entirely proper and legal manner.

For non-UK trusts it is critical that the trust is properly managed and controlled by the non-UK trustees. Undue influence or interference by a settlor or potential beneficiary can lead to the trust being considered by the UK tax authorities to be a sham. This in turn can have adverse UK tax consequences for the settlor/beneficiary if he is resident in the UK, or in his country of residence if elsewhere.

At the time of writing, draft legislation is in place in regard to the ownership of UK *residential* property valued at more than GBP 2million, by corporate trustees of a trust. In respect of such properties, the trustees will be able to avoid paying stamp duty land tax at the higher rate of 15 per cent on acquisition by "non-natural persons" (introduced in April 2012). Instead, the applicable rate will be 7 per cent. They will also avoid the new annual residential property tax of between 0.3 per cent and 0.75 per cent on the value of the property. This is due to be introduced in April 2013. Further draft legislation is awaited by which it is anticipated that such properties will not be subject to capital gains tax on disposal.

IV. Germany

In Germany, trusts do not exist in the sense that they are understood in English/Anglo-American law.

There is a great variety of foundations in Germany. A foundation can be created to pursue every legal purpose – be it private or public benefit.

In recent years a strong growth can be identified in the foundation sector in Germany.

A. Tax

1. Is there taxation on gifting assets to a trust/a foundation?

(a) Establishing a tax privileged foundation (public-benefit purpose foundations)

In general donations are exempt from corporate or income tax and also from gift and inheritance tax.

(b) Establishing a non-tax privileged foundation or family foundation

If the founder donates his whole enterprise or independent division of his business to the foundation, then this act will be exempt from income tax. If the founder gives single assets of his company or shares hold in his company to a foundation, he will have to pay income tax on these transactions.

In general the foundation has to pay high gift and inheritance tax for single assets donated to the foundation (unfavourable tax class III). If one founds a family foundation then the tax class depends on how close the beneficiary is related to the founder. Relevant for the taxation is the tax class of that beneficiary who is the most distant relative. Therefore in the statutes of the foundation only beneficiaries with the favourable tax class I should be considered.

This favourable tax class can only be obtained by establishing the foundation. For later donations the foundation has to pay tax according to the unfavourable tax class III.

If the donation is a whole enterprise or independent division of a business or shares of more than 25 per cent, there are tax exemptions for gift and inheritance tax under certain circumstances for non-tax privileged and family foundations.

2. Are there any annual fiscal filing obligations?

Public-benefit purpose foundations have no annual fiscal filing obligations to fulfill. Normally every three years they have to file for the past three years.

Non-tax privileged foundations and family foundations have annual fiscal filing obligations:

- for corporate tax;
- for local trade tax (*"Gewerbesteuer"*) for business income.

A family foundation has to pay all 30 years a special inheritance tax (*"Erbersatzsteuer"*).

3. Who is liable for the taxation?

The foundation is tax debtor for annual corporate tax and local trade tax.

4. What is the domestic taxation on annual revenue?

The domestic rates of taxation on annual revenue are:

- 15 per cent corporate tax;
- 5.5 per cent of the corporate tax as solidarity surcharge (*"Solidaritätszuschlag"*);
- 7 per cent – 17 per cent local trade tax (depending where the foundation is located).

The manager fills in the tax declarations for the foundation.

If a beneficiary receives payments because of the statutes of the foundation, income tax must be paid on these payments.

5. Are there any exceptional taxes due?

A family foundation has additionally to pay a special inheritance tax ("*Erbersatzsteuer*") every 30 years.

Other private foundations or public-benefit purpose foundations don't have to pay this special inheritance tax.

B. Estate planning

1. What is the duty on donations to a trust/a foundation?

See explanations above.

2. What is the taxation or duty on any distributions?

For distributions to beneficiaries the foundation has to pay settlement tax (withholding tax on capital) with a rate of 25 per cent. The distributions do not reduce the income of the foundation.

C. General questions

3. Is there any anti-avoidance legislation relating to trusts/foundations?

(a) § 15 Auszensteuergesetz

§ 15 Auszensteuergesetz says:

- The net income of foreign family foundations or trusts is attributed to the founder or beneficiaries for tax purposes in Germany, if the founder or beneficiary is regular liable to income tax in Germany.
- Even if there are no distributions one has to pay tax.
- For family foundations with seat in the EU exists an escape-clause (§ 15 Abs. 6 Auszensteuergesetz) with certain restrictions.

(b) § 42 Abgabenordnung:

§ 42 Abgabenordnung is the general principle/rule in Germany concerning anti avoidance. It says: Because of the improper use of legal arrangements the tax law cannot be avoided.

(c) Double tax treaty avoidance clauses:

In most of its double tax treaties Germany has avoidance clauses covering non-taxation in the other country. In such cases, Germany has the right to tax.

4. Can one use foreign trusts/foundations? Are there any important issues one should know?

One can use foreign trusts and foundations, but you will have to take § 15 Auszensteuergesetz into consideration.

5. Have there been in recent years any major changes to domestic legislation or are there any pending changes?

The tax legislation proposes to change § 15 Auszensteuergesetz. One change is that the taxable income of foreign family foundations and trusts which is attributed to the founder or beneficiaries will be increased. Therefore the definition of taxable income will be altered.

Because of Community law there exists an escape clause in § 15 Auszensteuergesetz. It is planned that this clause will be restricted from 2013 onwards.

Some more alterations are planned in § 15 Auszensteuergesetz, but in Germany a discussion has already started that these changes disregard the European Community law.

6. How does domestic legislation interpret trusts/foundations?

German foundations are independent conglomerations of property without shareholders. The will/intention of the founder is important. Normally the life span of the foundation is unlimited.

V. The Netherlands

Unlike trusts, which are not incorporated in Dutch law, the use of the foundation ("Stichting") is still gaining popularity and its applicability is broad.

In the last two years the Dutch Ministry of Finance has developed new, attractive rules for the so-called "ANBI", or "Charitable Foundation".

Dutch foundations (stichtingen) are used in domestic and international legal structures, for either asset protection or charitable purposes.

A. Main legal characteristics of a foundation

A foundation is a legal entity under Dutch law. Like other legal entities, such as NV or BV, a foundation can thus hold title to assets in its own name. It cannot make distributions to its founders or members of the board. A foundation may nevertheless make distributions to charity or distributions that are part of a pension scheme that is administered by the foundation. Originally, foundations were mainly used for non-profit and charitable purposes. Over the last decades, however, foundations are more and more used for commercial purposes as well. Unlike in many other jurisdictions, there is no limitation to the commercial activities that can be performed by a foundation. Although it cannot have members or shareholders it may, however, issue depositary receipts ("certificates") that give beneficial rights to assets that are legally owned by the foundation. A foundation that has issued depositary receipts is generally referred to as a "STAK" (STichting AdministratieKantoor). Through issuing depositary receipts, the voting rights and economic rights to the assets, often shares, are split. Other relevant legal characteristics include (i) no obligation to contribute equity to the foundation; (ii) the foundation board is the only body that represents the foundation, and (iii) the liability of board members is limited. Since there are only few formal requirements,

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a foundation can be incorporated and be operational within a couple of days, before a notary.

B. Tax treatment

A foundation is only subject to tax (Dutch CIT at normal rates) in as far as it is involved in a business enterprise. It may have to divide its activities into taxable and non-taxable.

C. Asset protection structures

In Dutch and international tax structures the foundation is frequently used as an asset protection vehicle. Generally such foundation is set up as a STAK holding shares of a holding company. The STAK is in principle not subject to corporate income tax. In fact, the STAK is considered transparent for Dutch tax purposes so that any tax is levied at the level of the depositary receipt holders only.

The former shareholders of a holding company receive depositary receipts issued by the STAK. Through this mechanism there is a clear separation of the voting rights and the beneficiary rights: the voting rights rest with the STAK, whereas the economic/beneficial ownership rests with the holders of the depositary receipts.

D. Charitable foundation

Foundations are also often used as vehicles to perform charitable activities. These charitable activities can be performed both in and outside the Netherlands. Upon request and provided certain conditions are met, the Dutch tax authorities certify that the foundation is considered as a charitable institution ("algemeen nut beogende instelling", ANBI) which will give rise to a number of benefits, such as:

- gifts to the charitable foundation can be deductible for Dutch personal and corporate income tax purposes;
- gifts to and by the charitable foundation are not subject to Dutch gift tax;
- inheritances received by the charitable foundation are not subject to Dutch inheritance tax.

The conditions to qualify as an ANBI are relatively easy to fulfil. As a consequence a number of non-Dutch entities have moved to the Netherlands, or have now registered with the Dutch tax authorities.

E. Other uses of the foundation

1. General partner in limited partnership

A Dutch foundation is often used to act as a general partner in a limited partnership to reduce the liability risk of such general partner.

2. Securitisation SPV

As being a separate legal entity foundations are also used as Special Purpose Vehicle (SPV) in securitisation structures. It may hold assets (generally receivables) and will issue securities to the market, often without being subject to Dutch corporate income tax.

3. Estate planning

Last but certainly not least (charitable) foundations are frequently used in estate planning structures, as it is possible to stipulate in a will that a certain portion of the estate is to be transferred to a foundation. If correctly planned this transfer of part of the estate may not be subject to Dutch inheritance tax if the deceased was resident, or was deemed to be resident, of the Netherlands. It is also possible to stipulate in the will for the charitable foundation to be incorporated at the time of the decease.

VI. Italy

Trusts can be used in Italy thanks to the adoption of The Hague Convention (July 1, 1985), in force from January 1, 1992; therefore Italy has no complete and organic regulation on trusts, and domestic trusts can be established only referring to foreign regulations.

The last relevant changes relate to income taxation and are applicable from the year 2007.

According to Italian law, a foundation can only be incorporated as a charity with legal personality: on the basis of the purposes of the foundation, exemption of gift tax can be allowed.

Foreign foundations can be considered as domestic foundations (charities) only according to reciprocity rules, and tax advantages can therefore be applied.

Other foundations (for example foreign family foundations) are considered generically *"other institutions"* for tax purposes and the same tax rules of trusts are applicable.

When a trust is established, gifting assets is subject to 8 per cent gift tax, and if real estate is donated to a trust on top of 8 per cent gift tax, the donation is subject to 2 per cent mortgage tax and 1 per cent cadastral duties.

Only if a foundation can be considered a charity are fixed rate taxes or duties levied.

If beneficiaries of the trust are legal heirs, gift tax reduction for families are applicable under specified circumstances.

When real estate is transferred to a trust, capital gains taxation may arise for the settlor if he is acting as an entrepreneur.

When a trust transfers assets to beneficiaries, no taxation arises excepted the case of the transfer of real estate where 2 per cent mortgage tax and 1 per cent cadastral duties have to be paid.

With regard to income taxes, the trust itself is liable for taxation, but only if beneficiaries are identified and have a right to the distribution of incomes; taxation is charged to them on the basis of their income's share calculated by the trust.

Annual revenue is subject to 27.5 corporate tax (IRES) and if business activities are carried on by the trust 3.9 per cent regional tax (IRAP) is levied.

Only if a foundation can be considered a charity is corporate tax (IRES) rate reduced to 50 per cent of the ordinary rate.

The trustee, considered as the director, is liable to taxation for trust: every year an income tax return must be filed with the Tax Authority.

Real estate belonging to the trust is subject to ordinary real estate taxation (IMU) at a basic rate of 0.72 per cent.

Relating to trust there is the following specific anti-avoidance legislation:

a) trusts established in blacklist countries in which at least one of the settlors or one of the beneficiaries is a resident of Italy are considered residents of Italy for tax purposes except when differently proved;
b) trusts established in blacklist countries are considered a resident of Italy for tax purposes when, after the incorporation, they receive real estate by a resident of Italy;
c) foreign income received by an identified beneficiary of a foreign trust resident of Italy is taxable in Italy.

VII. Canada

Under the Canadian Income Tax Act (the "Act"),[1] a trust is subject to tax as if it were an individual,[2] and income is either taxed at the trust level or at the beneficiary level, but not both. Income which is "paid or payable"[3] to a beneficiary in a taxation year and deducted from the trust income for tax purposes must be included in the income of the recipient beneficiary.[4]

The taxation year of an inter vivos trust is the calendar year. The taxation year of a trust created under a will (a testamentary trust) does not necessarily coincide with the calendar year.[5] Trusts typically file a return of trust income (T3) within 90 days from the year end. A "personal trust" is generally deemed to dispose of capital property at fair market value every 21 years, potentially triggering a taxable capital gain.[6] One common method of deferring any resulting tax is to transfer the trust property to a beneficiary in full or partial satisfaction of that beneficiary's capital interest in the trust, which can usually be achieved on a tax-deferred basis.[7]

Canada does not impose a gift tax. However, the contribution of property to a trust is generally a taxable disposition, but a tax-deferred "rollover" is available to certain types of trusts mentioned below.

A. Testamentary Trusts

A testamentary trust is taxed at the graduated rates that are applicable to individuals, not at the top marginal rate, allowing for tax planning opportunities in drafting wills. There is no rollover on a transfer of property to a testamentary trust. Although Canada does not have estate or inheritance taxes, a taxpayer is deemed to dispose of his or her property on his or her death, potentially resulting in taxable capital gains.

B. Discretionary Family Trusts

Discretionary family trusts are useful for tax and estate planning partly because, if properly structured, they provide the opportunity to split income among family members in a very flexible manner. Under these types of inter vivos trusts, trustees have discretion as to whether to distribute income or capital to particular beneficiaries and to determine the amounts of any distributions. The transfer of property to a discretionary family trust is a taxable transaction. For this reason, care must be taken when structuring these trusts to avoid unintended tax consequences.[8]

Subject to the "kiddie tax" and a number of complex attribution rules in the Act, these trusts create the potential to shift income to lower income-earning family members to take advantage of their lower marginal tax rates.

C. Spousal Trusts

In Canada, a spousal trust or common-law partner trust (a "spousal trust") enjoys a tax-deferred rollover when property is transferred to the trust. It is possible for the taxpayer to elect to pay tax on the transfer of property to such a trust, and this election can be made on a property-by-property basis, allowing for flexibility in tax planning. An additional benefit of a spousal trust is the tax that is normally triggered on the death of the spouse who passes away first is deferred until the second spouse passes away.

The 21-year deemed disposition rule does not apply during the lifetime of the settlor. Instead, a spousal trust is deemed to dispose of its property every 21 years beginning on the date of death of the spouse who is the last to die.

D. Alter Ego And Joint Spousal Trusts

An alter ego trust is created for oneself as the sole beneficiary during one's lifetime by an individual taxpayer who is at least 65 years of age. A joint spousal trust is similar to an alter ego trust, but the beneficiaries can include one's spouse or common-law partner during the settlor's lifetime. These trusts may have other beneficiaries after the settlor's death. Commonly used for estate planning and to avoid the need for probate, these trusts enjoy a tax-deferred rollover on the transfer of property.

Similar to spousal trusts, the 21-year deemed disposition rule does not apply during the settlor's lifetime, but there is a deemed disposition on the death of the taxpayer (for an alter ego trust) and on the death of the surviving spouse or common-law partner (for a joint spousal trust) and every 21 years thereafter.

E. Foreign Asset Income Trust

"Income trusts" are publicly-traded trusts that were popular in the Canadian capital markets in the early 2000s. Their popularity was due to the fact that there is no taxation at the trust level provided that all income is distributed to the unit holders, resulting in a tax-efficient structure and greater after-tax returns for most investors, particularly exempt investors such as pensions and registered retirement accounts. To curtail the use of income trusts, Canada introduced the specified investment flow-through rules (the "SIFT rules") in 2006, which impose a tax on any income trust that is a "SIFT trust"[9] (typically, publicly-traded trusts) at the entity level to attempt to mimic the tax that would be paid if the trust were a corporation.

An income trust is still a tax-efficient vehicle, however, if it owns only foreign assets. Generally speaking, a publicly-traded trust that does not hold Canadian property or carry on a business in Canada is not con-

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sidered a SIFT trust,[10] and therefore entity-level taxation can be avoided if all its income is distributed to unit holders.

The 21-year deemed disposition rule does not apply to a foreign asset income trust.

F. Immigration Trust

A non-resident trust that has a Canadian "resident beneficiary" or a "resident contributor" may be subject to Canadian tax. An exception, often referred to as a "5-year immigration trust", is if all persons who contribute directly or indirectly to a trust that is not otherwise resident in Canada have not resided in Canada for periods totalling 60 months. In effect, a 60-month tax holiday is available for properly-structured immigration trusts.

The above discussion has been a very brief and broad summary of the Canadian tax rules relating to trusts and their beneficiaries. A qualified Canadian tax practitioner should be consulted for proper professional advice and further details.

VIII. Venezuela

Trusts do not exist in Venezuela as a legal institution. There is a similar institution called the "Fideicomiso". Under Venezuelan legislation, only the banks and insurance companies may be "Fiduciarios" (the equivalent to the trustees). The foundations are legal entities whose purpose can only be of general interest, such as artistic, cultural, literary, social, or charity. The foundations for private purposes do not exist in Venezuela. Taxation of trusts is very little developed under Venezuelan tax laws. Therefore, for tax and succession planning as well as for assets' protection, foreign trusts and foundations are commonly used.

Any gift of assets is taxable according to the Law of Taxes upon Successions, Gifts and other Related Matters, that is to say that the beneficiaries of gifts constituted by assets situated in Venezuela must pay a tax. When the law determines whether the assets are to be considered as situated within the national territory, it includes certain extraterritorial situations. According to the law, the following assets are deemed situated in Venezuela:

a) shares, obligations and securities issued in Venezuela and those issued outside Venezuela by legal entities incorporated or domiciled in the country;
b) shares, obligations and other instruments of credit issued outside Venezuela by foreign legal entities when they are owned by individuals or legal entities domiciled in the country;
c) rights or shares which correspond to assets situated in the country; and
d) personal rights or obligations whose legal origin is in Venezuela.

If the assets are not situated in Venezuela or deemed situated in Venezuela, there is no tax.

In the case of a gift received by a foundation, the tax is paid upon the transfer of the assets to the foundation unless there is an exemption (see last paragraph of this article). Nevertheless, in the case of the trusts, the tax is to be paid upon distribution of the assets by the trustee to the beneficiary, not before.

If the assets are constituted by real estate, there is a municipal tax to be paid on the basis of the real property's value. It varies from one municipality to another. The tax is established on an annual basis and normally is filed and paid quarterly. The tax payer is the owner of the real estate. Therefore, if the trustee or the foundation appear to be the owner, they are liable for said taxes.

If the assets generate an income, income tax will be filed and paid on an annual basis.

Depending of the kind of asset transferred, other taxes may be paid, such as stamp taxes and registration taxes.

With respect to the person who is liable for the taxation, one must distinguish whether we are facing (i) the transfer of the assets from the trustee to the beneficiary or from the settlor to the foundation (taxation on gifts); or (ii) the income produced by the assets before the distribution to the beneficiary is made (income tax).

In the first case, the beneficiary is primarily liable for taxation. However, the donor is jointly and severally liable for the payment of the tax obligations.

In the second case, the income produced by the assets transferred to the trustee must be paid by the beneficiaries of the trust. Nevertheless, if the mass of the assets were deemed as the beneficiary of said income, the law provides that the settlor is the owner of the assets and, therefore, the taxpayer. That doesn't avoid a situation in which the mass of assets is liable for for the payment of income tax.

The tax rates of the donations vary according to the proximity or relationship of the beneficiary of the gift to the donor and according to the importance of the value of the gift. The tax rates vary between 1 per cent and 55 per cent.

With respect to the income tax, for individuals, the tax rates vary between 6 per cent and 34 per cent. If the individual is non-resident in Venezuela, the tax rate is 34 per cent flat. For corporations, the tax rates vary between 15 per cent and 34 per cent.

Taxpayers owning directly or indirectly (including through the means of trusts and/or foundations), investments in low tax jurisdictions,[11] must submit an annual disclosure statement and determine the income or tax loss. Otherwise, there are no filing requirements. Since in Venezuela the substance has prevalence over form, the interpretation of the tax law is made in accordance with its economic meaning; contracts and/or legal entities such as trusts and/or foundations can be disregarded if they are clearly inappropriate to the economic reality of the business.

The tax laws have been very stable in Venezuela during the last ten years. There is always a discussion upon the necessity of eliminating the tax on inheritances and gifts.

Apart from what has already been said, there are a few rules with respect to Venezuelan foundations: (i) the tax administration can exempt them from the payment of the tax on gifts if their main purpose is scientific, artistic, cultural or they promote sport, charity and similar objectives; (ii) generally, they are exempted from the payment of income tax if they don't distribute dividends, revenues or any other kind of benefit to their founders, associates, members, etc. However, if they are not exempted, they follow the

same regime as the individuals; (iii) taxpayers can deduct as expenses payments made to foundations with certain limits.[12]

IX. India

It is a known fact that taxation of trusts in India has been the topic of discussion amongst various global circles. Just like other issues, there are conflicting judgements on taxation of trusts by the courts in India. To make it relatively simple, this article revolves around private (family) trusts only.

Despite the above, increasingly Indian families have started to form trusts to avoid the issues which arise in a Will. A trust structure ringfences the family inherited assets to ensure that a person's future generations are protected and assets distributed as per his / her directions and that these future generations do not drag each other to court over the distribution of these assets. Also, high net worth individuals are setting up trusts, to avoid any potential attachment of the family assets if things were to go wrong. Hence it is evident that despite the hazy tax situation, Indians have realised the other benefits of setting up private trusts.

Though there is no direct tax on gifting assets to a trust, the transfer can invoke stamp duty obligations and registration formalities. The rate of such stamp duty will depend on the nature of the assets and the location of these assets, since stamp duty is a state government subject and each state has different rules and regulations with respect to such assets and such transfers.

The taxability of trusts and the person responsible for such tax can broadly be determined based on the following parameters:

- income of Revocable Trusts – taxed in the hands of the settlor at the respective rate of tax;
- income of Irrevocable Trusts – either the trustee is liable for the tax or the beneficiary is liable for the tax. To determine in whose hands the income will be taxed, one has to evaluate the following:
  - if the shares of the beneficiaries are indeterminate / unknown – Trustee is liable to be taxed as a representative assessee, at the maximum marginal rate, including on the business income of the trust but there are exceptions to this condition;
  - if the shares of the beneficiaries are determinate / known – the income is taxed either in the hands of the beneficiary or in the hands of the Trustee, as a representative assessee, at the rate applicable to each of the beneficiary. Business income of the trust is continued to be taxed at the maximum marginal rate, but there are exceptions to this condition.

It is important to note that in India, all trusts have annual tax filing obligations. In addition, trusts have to get their books of accounts audited and submitted to the respective authorities.

Foreign trusts can have Indian beneficiaries, in compliance with the Foreign Exchange Management Act, the rules and regulations with respect to anti-money laundering and any other rules and regulations based on the individual facts of the case. Though there are no specific anti-avoidance regulations, General Anti-Avoidance Rules may apply to Trusts, when these are formally introduced in the year 2016.

X. Hong Kong

Trusts are commonly used in Hong Kong for asset protection and succession planning. A Hong Kong trust is one established under Hong Kong law and the trustee is usually a company incorporated in Hong Kong. Hong Kong is well known for its simple tax system. There is no tax on capital gains, dividend and interest. Only trust income arising in or derived from Hong Kong is taxable.

When a settlor gifts assets to a trust, no profits tax will arise unless the assets are connected with a trade or business owned by the settlor, e.g. if a trade or business operated by the settlor gives or donates stock to a trust (not being a recognised charitable organisation) with nil consideration, the commissioner might ascribe a fair value to the stock and the difference between the fair value and the carrying value of the stock is subject to profits tax. If the assets represent immovable properties or shares in Hong Kong, stamp duty is payable on the transfer. Stamp duty on transfer of ownership of immovable properties in Hong Kong is charged at rates varying with the amount or value of the consideration ranging from HKD 100 (under HKD 2,000.000) to 4.25 per cent (over HKD 21,739,120). Stamp duty on sale or purchase of any Hong Kong stock is normally charged at 0.1 per cent on the amount or value of the consideration.

There is no annual tax filing obligation for a trust, unless the trust holds assets for income earning in Hong Kong, e.g. an immovable property for rental income. If the assets generate income sourced in Hong Kong, the holder of the property, either a company established by the trust to hold the property or the trustee itself, will have to file an annual tax return and be liable to pay profits tax or property tax in Hong Kong.

The rate for profits tax and property tax in Hong Kong is 16.5 per cent and 15 per cent respectively. Distributions to beneficiaries, either income or capital, are not taxable on their hands.

Hong Kong has abolished estate duty since 2006. There is no estate duty on passing assets from a deceased's estates to a trust or foundation. General anti-avoidance rules under the Hong Kong Inland Revenue Ordinance are applicable to profits tax, property tax or stamp duty, with no specific emphases on trust arrangements.

Residents and non-residents of Hong Kong might choose to use foreign trusts as well. As long as assets under foreign trusts do not produce income arising in or derived from Hong Kong, there will be no tax implications in Hong Kong.

The Hong Kong government has just completed a round of public consultations with a view to reforming the Trustee Ordinance (Cap 29). Some of the areas to be updated include trustees' statutory duty of care, trustees' power to employ nominees and/or custodians, trustees to insure; remuneration of professional trustees, abolition and simplification of the rules against perpetuities and excessive accumulation of income, etc.

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The trust law in Hong Kong recognises a trust as being a legitimate vehicle for holding assets for the purpose of confidentiality, asset protection and tax planning. It offers much flexibility for settlors and trustees to set up trusts for their special needs.

XI. Conclusion

It can be seen that jurisdictions treat trusts differently. This article is just a sample of different approaches and is by no means complete. It is worth reviewing your domestic home country to compare its treatment of trusts. As it can be seen there is still a use for trusts in global tax planning despite the evolution of tax avoidance legislation and the fact is it is not in one's own legislation to constitute a trust, this doesn't preclude the use of a foreign trust. Attention is needed however in civil code countries as to their case laws and interpretation.

Professor Robert Anthony is a UK Chartered Certified Accountant and Principal Partner at Anthony & Cie, France.
Graham Busch is a Partner at Lawrence Grant, Chartered Accountant, Harrow.
Brigitte Jakoby is Principal Partner at Jakoby Dr. Baumhof, Rothenburg ob der Tauber, Germany.
Nick Domburg is the owner of LIMES international, Noordwijk, The Netherlands.
Sergio Finulli is a Dottore Commercialista and Revisore Contabile at Comma'10, Milan.
Fola Olaniyan LL.B., LL.M and Robert R. Worthington are Associates at Shea Nerland Calnan LLP, Calgary.
Angel Gabriel Viso is a Partner at Escritorio Viso, Rodríguez, Cottin, Medina, Ramírez & Asociados, Caracas.
Ashish Bairagra is a Partner at M L Bhuwania & Co., Mumbai.
Ricky Wong is a Partner at Wong Brothers & Co, Hong Kong.
Please note that the views expressed are personal views of the authors.

NOTES

[1] Income Tax Act, RSC 1985, c.1 (5th Supp.), as amended.
[2] Subsection 104(2) of the Act.
[3] Income is "payable" in a taxation year to a beneficiary if it is "paid" in the year to the beneficiary, or, if, although it was not actually paid, the beneficiary "was entitled in that year to enforce payment thereof": s.104 (24).
[4] Subsections 104(6) and (13) of the Act.
[5] A testamentary trust must pay its Part I tax payable for the year within 90 days after the year end.
[6] Subsection 104(4).
[7] Subsection 107(2).
[8] For a private corporation and its shareholders, one common method of structuring a discretionary family trust is via a reorganisation known as an estate freeze.
[9] Defined in section 122.1 of the Act.
[10] Subsection 122.1(1), definitions of "SIFT trust" and "non-portfolio property".
[11] There is a list issued by the Tax Administration stating which countries are considered low tax jurisdictions.
[12] Maximum 10 per cent.

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