

ENHANCED ASSET PLANNING VEHICLES IN BARBADOS: TRUSTS, PRIVATE TRUST COMPANIES AND FOUNDATIONS

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The traditional structure which has been recommended by wealth management advisors to clients in their desire for estate planning; asset management and protection; the preservation of wealth; tax planning and business continuation has been the *Trust*. A Trust is administered by a trustee who has title to all of the assets and usually owns the shares of a privately held underlying company. The company can own a variety of assets ranging from bank accounts to real property to chattels, or may simply have the right to receive income from a third party. In recent times Barbados has expanded its offerings to include alternative structures, as a means of increasing its ability to attract a multiplicity of new wealth management business from different regions, while meeting the changing needs of its existing clientele.

Trust services has been widely offered in Barbados for more than three decades. Trusts were utilized primarily by wealthy individuals from the major common law countries, but it is now accepted as a major vehicle for asset protection. The International Trusts Act Cap. 245 provided Barbados with a modern, comprehensive, business-oriented trust regime which has proven attractive, particularly to corporate clients. In keeping with global trends, Barbados has amended its Trustees Act Cap. 250 to provide for reserved powers to settlors, which basically bestows the settlors the legal right to make certain decisions affecting the trust property and in the administration of the Trust. This new, wider market-place for trusts is not necessarily concerned so much in effective tax planning, but in the efficient management of wealth in a more general sense. As such Barbados remains committed to preserving a reputable, innovative and world class jurisdiction that facilitates new and emerging products through progressive legislative framework.

Some of the features of the most popular types of trusts in Barbados are:

Domestic Barbados Trust

- Majority of trustees must be resident in Barbados.
- Trust deed does not specify that the International Trusts Act applies.
- Trustee can be an individual or a trust company licensed under the Financial Institutions Act 1996-16.
- Liable to tax on its world-wide income.
- Expenses are subject to Value Added Tax (VAT) in Barbados.

- Exemption from exchange controls may be received if the Trust has foreign assets, non-resident beneficiaries and deals primarily in foreign currency.
- The domestic trust has a perpetuity period of 80 years.
- No registration or filing requirements. Trustees may file an annual tax return.
- Domestic trusts are entitled to benefits from double taxation treaties, which serves to substantially reduce or even eliminate tax in the other treaty jurisdiction

International Trust

- Subject to the International Trusts Act.
- Provides asset protection.
- Provides for a non-charitable purpose trust where beneficiaries need not be named.
- At least one (1) of the trustees must be resident in Barbados. Trustees are now required to be licensed under the Corporate and Trust Service Providers Act 2015-12.
- The settlor must be resident outside of Barbados.
- No beneficiary is a resident of Barbados with certain exceptions.
- The trust instrument must specify that the International Trusts Act applies.
- Does not own immovable property in Barbados.
- Taxed on income derived within or remitted to Barbados.
- VAT is zero-rated, exempt from exchange controls and Barbados withholding tax.
- The perpetuity period is up to 100 years.
- Is required to be registered; registration is not public.

Barbados in its continued efforts to attract diverse and spontaneous investment has enacted legislation which allows for the formation of *Foundations* and *Private Trust Companies* (PTCs). Barbados PTCs are governed by the Private Trust Companies Act, 2012. PTCs were borne out of the necessity for greater control by families over their trust and have become a very attractive option. This unique type of trust company complements an already expansive financial services landscape and provides asset management services within an existing international business framework. The settlor and family can legally exercise greater control over the administration of the assets of the trust. Such flexibility is favored over the traditional trust structures, where the trustee is the legal owner and custodian of assets, and the beneficiaries are subject to the total and complete discretion of the trustee, who must approve all actions. Such flexibility is

avored, as it safeguards the confidentiality of family wealth while protecting the validity of the underlying trust.

After incorporation of the PTC under the Companies Act Cap.308, and obtaining the relevant license, PTCs stands in a preferential tax and domicile position, and offers the structuring of inheritance planning to high net worth individuals and their families. A Barbados PTC is required to appoint a Special Director, has a Registered Agent and maintains its registered office at the office of the Registered Agent. A Registered Agent is essentially a licensed trust company or a licensed service provider in Barbados. The Special Director has to be a resident of Barbados and is responsible for the general administration of the PTC. A PTC shall not conduct any trust business other than connected trust business, which essentially means that the contributors of the trust must be connected persons. The list of connected persons is exhaustive and ranges from spouses, parents, children to stepchildren and in-laws.

The *modus operandi* of the PTC will allow the settlor to make administrative changes as necessary, without actually affecting the trustee position; allow family members to customize the trustee service to meet their evolving needs; as well as allow them to be actively involved in key investment strategies and decisions. Such intimate involvement does not exist within professional trustee services, and in fact if a change of trustee is required it is usually a lengthy and expensive process. Good governance practices will be key to the proper administration of PTCs as there are risks that have to be mitigated or removed outright. These range from the concentration of power of the Special Director, to the more practical considerations, such as income tax issues and generational representation that may arise if a trust is contested. Additionally, the directors will have to be prudent in their decision making to ensure that the beneficiaries' interests are protected.

While initial startup costs for PTCs may be considered high compared to other structures, the clients of PTCs enjoy the flexibility and advantages of personal control. In addition, the client receives peace of mind, that they are actively involved in the management of family assets, which can include succession planning; being able to give greater assurances of consensus after death of the settlor and the tailoring of investment policies to meet family needs.

Barbados Foundations are governed by the Foundation Act 2013-2 and can best be described as a fund which has been endowed by its founder to be utilized for such persons and purposes, as detailed in its charter. Unlike a traditional Trust, a Foundation is a legal entity that has no owners, but instead, is a legal person that can bring and defend legal action and has unlimited capacity to contract on its own behalf. Under the Foundations Act, a Barbados Foundation will come into existence after being registered in the Registry of Corporate Affairs in the manner specified. A Foundation Council is appointed to make administrative decisions consistent with the by-laws of the Foundation. The fiduciary duty of the Foundation Council is to the Foundation and the Beneficiaries. Assets placed or transferred to a Foundation become the property of the Foundation and therefore are independent of the Founder or the Beneficiaries.

A Barbados Foundation must hold assets with the value greater than BDS\$10,000 (US\$5,000). A Foundation can be set up for any purpose provided that the activity is not prohibited under the laws of Barbados, or is engaging in any financial services without first obtaining a license issued by the Financial Services Commission or the Central Bank of Barbados or other applicable regulatory authority.

A Founder or a person who acts on behalf of the Founder (that is, a trust company, finance company, a licensed service provider) may apply at the Registry of Corporate Affairs to have a Foundation registered in Barbados. Foundations are registered in a public registry in Barbados, and their creation, amendments and dissolution are a matter of public records. The charter of the Foundation provides for the name of the Foundation, the details of the Founder(s), the purposes and objects, the initial assets of the Foundation, the Beneficiaries, the period of the Foundation, details of the Registered Office, Registered Agent and Secretary of the Foundation. The charter may also contain any reservation of rights or powers of the Founder(s), the appointment, removal, powers, duties, obligations of each of the Councilors, Auditors, Guardian, and also authorizing the enactment of by-laws. The charter of the Foundation takes the form of a deed.

As it relates to Foundations, it is of significance that Barbados has recently concluded various double taxation treaties with several Central and Latin American countries, in which there is no practice of utilizing trust structures under civil law regimes. Indeed Barbados has attracted more international business using Foundations as the answer for affluent individuals, from civil law jurisdictions, who want to manage wealth in an internationally respected and reputable jurisdiction. Foundations will afford these individuals the ability to transfer ownership to a separate legal entity while still retaining control on how the assets are managed and distributed.

Some of the highlights of the Barbados Foundation are as follows:

- The Foundation is a registered legal entity with the same capacity, rights and privileges as a natural person. Evidence of registration is conclusive of its status as a legal person.
- A Foundation shall have a council that is responsible for the day to day management and operations of the Foundation, and ensuring that the objects and purposes of the Foundation are being fulfilled. The Foundation shall manage, administer, invest and disburse its assets in accordance with its charter, by-laws and the Foundations Act.
- The duration of the Foundation is stipulated in the Foundation's charter and thus the Foundation can exist in perpetuity or have a finite period as defined in its charter.
- While the Foundation must be registered, legislation provides that the Councilors have a duty of confidentiality and details of the Foundation such

as the nature and assets of the foundation can only be requested by the Registrar of Corporate Affairs, Founder, Guardian and Beneficiary (in accordance with the charter and by-laws of the Foundation) and pursuant to a court order.

- The Barbados Foundation Act allows for both domestic and international foundations.
- Currently the applicable tax rate of a Foundation is determined by the Minister of Finance. It is proposed that a Domestic Foundation will be taxed on its income at the same rate applicable to domestic Barbados companies, and an International Foundation is taxed at the sliding scale of 0.25% to 2.5% based on the level of income.
- International Foundations are exempt from withholding tax for distributions made to non-residents and are not subject to exchange control restrictions. Foundations are also exempt from ad valorem stamp duty.
- A non-resident Beneficiary is not subject to Barbados income tax on distributions made to him/her by the Foundation.
- It allows the Founder to reserve certain powers such as the right to direct and approve the investment activities of the Foundation, amendment of the charter or by-laws, the addition or exclusion of a Beneficiary, *and so on*.
- Foundation has the ability to re-domicile to and from Barbados.
- A Barbados Foundation is not subject to forced heirship laws of a foreign jurisdiction.

In today's world where flexibility, innovation and effective governance are essential to a country's economic survival and success, Barbados continues to seek to advance its position as a leading international financial centre, through the exercise of modern legislative prowess. The amended Trustees Act and the enactment of legislation to govern PTC and Foundations as alternatives to asset protection structures have enhanced the products available to wealth management practitioners who need to be prepared for the changing needs and fortunes of clients and civil law regimes. The allure of these sensible and transparent structures permeates international business in Barbados.
