

Private Client Guide 2022 – British Virgin Islands (Legal 500)

Briefing Summary: This guide to BVI's private client sector includes commentary on tax, trusts, foundations and private wealth structures used within the jurisdiction, including charitable or philanthropic structures. It also looks at capital gains, withholding and wealth tax rules along with issues relating to real property, immigration, succession, making a will and estate planning considerations, legislative changes and disclosure obligations.

Service Area: Private Client, Taxation and Economic Substance Requirements, Trusts and Private Wealth, Corporate Trust Structures, Private Trust Structures, Regulation of Trust Company Business

Sector: Trust and Company Business

Location: British Virgin Islands

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1. Which factors bring an individual within the scope of tax on income and capital gains?

There are currently no forms of income or capital gains tax in the British Virgin Islands (BVI). The concept of residence and domicile is not applicable, however an individual is taxable in the BVI if they are gainfully employed (§2) or transfer ownership of BVI property (§8).

The way the BVI revenue laws are structured means, in practice, that they are unlikely to affect any transaction or structure which does not have a commercial operation within the territory.

2. What are the taxes and rates of tax to which an individual is subject in respect of income and capital gains and, in relation to those taxes, when does the tax year start and end, and when must tax returns be submitted and tax paid?

There are no capital gains taxes in the BVI.

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The BVI has a zero-rated income tax regime. However, payroll taxes are assessed on every employee and deemed employee for services rendered wholly or mainly in the BVI whether or not the remuneration is paid in the BVI.

Remuneration includes wages and salary however it does not include dividends paid by a company registered in the BVI and payments made by an employer for the benefit of an employee to any approved health insurance scheme or pension scheme.

Partners in a partnership and shareholders and members of a company or association carrying on business in the BVI and who participate, otherwise than as employees, in the income of the business will be deemed employees for the purposes of payroll tax.

Depending on the size of the enterprise and operations, payroll tax will be assessed at 10 per cent (if the enterprise employs fewer than 7 persons) or 14 per cent of total annual remuneration paid to the employee or deemed employee; 8 per cent may be deducted from the employee at source, whereas the remainder is paid by the employer or self-employed person. No deduction shall be made in respect of the first US\$10,000 of actual remuneration paid to an employee in any financial year (which currently corresponds with the calendar year).

Payroll tax is generally payable within 21 days of the end of the month in which the remuneration was paid. An annual return is due within 120 days of the end of the calendar year.

In addition, employees also pay 4 per cent social security contributions whilst employers must pay 4.5 per cent (both subject to a cap). In addition both employer and employee pay contributions toward national health insurance at a rate of 7.5 per cent of the employee's salary split equally between the employer and employee.

3. Are withholding taxes relevant to individuals and, if so, how, in what circumstances and at what rates do they apply?

There is no withholding tax. Arrangements are instead contemplated under the regime of tax information exchange agreements (TIEAs). The BVI has entered into TIEAs covering, amongst other matters, payroll and property taxes.

4. How does the jurisdiction approach the elimination of double taxation for individuals who would otherwise be taxed in the jurisdiction and in another jurisdiction?

As the BVI has no income or capital gains tax there is no ability for double taxation to occur. The BVI is not a signatory to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*.

5. Is there a wealth tax and, if so, which factors bring an individual within the scope of that tax, at what rate or rates is it charged, and when must tax returns be submitted and tax paid?

There is no wealth tax in the BVI.

6. Is tax charged on death or on gifts by individuals and, if so, which factors cause the tax to apply, when must a tax return be submitted, and at what rate, by whom and when must the tax be paid?

There are no estate duties, inheritance taxes or gift taxes, irrespective of the place of residence of the deceased or beneficiary of an estate, or of the donor or donee of a gift. There is however a stamp duty of US\$5 payable on the transfer of land as a gift of natural love and affection to a 'Belonger' (see question 9 below for general definition of 'Belonger') in the BVI. If title to BVI real property is acquired by way of gift or inheritance, a licence is required in order for non-belongers to hold that real property.

7. Are tax reliefs available on gifts (either during the donor's lifetime or on death) to a spouse, civil partner, or to any other relation, or of particular kinds of assets (e.g. business or agricultural assets), and how do any such reliefs apply?

As mentioned, there are no estate duties, inheritance taxes or gift taxes. Accordingly, no tax reliefs apply.

8. Do the tax laws encourage gifts (either during the donor's lifetime or on death) to a charity, public foundation or similar entity, and how do the relevant tax rules apply?

As mentioned, there are no estate duties, inheritance taxes or gift taxes and therefore there are no incentives to encourage gifts during a person's lifetime or on their death.

9. How is real property situated in the jurisdiction taxed, in particular where it is owned by an individual who has no connection with the jurisdiction other than ownership of property there?

Stamp duty is payable in connection with the acquisition and disposal of interests in real estate and land or shares in companies which own (directly or indirectly) real estate and land in the BVI. Stamp duty is currently assessed at 4 per cent for belongers or 12 per cent for non-belongers on either the purchase consideration or the market value of the property, whichever is higher.

The concept of belonging has a complicated meaning under BVI law but, broadly, refers to people of BVI ancestry, or those who have been granted belongership through marriage or long residence. It is not synonymous with citizenship and a person can be a believer without being a citizen and vice versa.

Similarly, a non-belonger company is any company incorporated outside the BVI or any company incorporated in the BVI in which any one of the directors is a non-belonger or where anyone of its shareholders, being a non-belonger, holds more than one-third of its shares. Companies under the control of non-belongers require a licence to hold land.

Stamp duty is payable on instruments as opposed to transactions. Unless an instrument that is stampable has been duly stamped, it cannot be admitted into evidence at court (and will thus be unenforceable) or registered at the Land Registry.

In addition, land and property tax is payable on the assessed value of every house and every acre of land in the BVI. The annual rates of land tax vary between landowners who are belongers and non-belongers. Land tax for non-belongers is US\$50 per half acre or less, US\$150 for more than a half-acre but less than an acre and any additional acre will be taxed at an additional US\$50 per year. Non-belongers pay 1.5 per cent of the purchase price plus the first 20 years of rent. House tax is assessed at 1.5% of the annual rentable value of the house and applies to both belongers and non-belongers alike.

10. Are taxes other than those described above imposed on individuals and, if so, how do they apply?

Except as set out above, there are no forms of direct taxation applicable to individuals in the BVI.

Indirect forms of tax include customs duties, cheque duty, tourist taxes, charter duties and property taxes.

11. Is there an advantageous tax regime for individuals who have recently arrived in or are only partially connected with the jurisdiction?

Individuals can avail themselves of the BVI revenue law regime upon arrival in the jurisdiction or, if resident in a foreign jurisdiction, through the use of BVI law structures.

12. What steps might an individual be advised to consider before establishing residence in (or becoming otherwise connected for tax purposes with) the jurisdiction?

To the extent that the individual intends to acquire BVI situs land or real estate, they should seek advice on whether they can avail themselves of 'belonger' status, as higher rates of stamp duty and property taxes will otherwise apply. Non-belongers, which includes both foreign companies as well as BVI companies owned or controlled by non-belongers, also require a license to hold property in the BVI (§8).

Individuals who will, or are likely to, become domiciled in the BVI should also give consideration to appropriate estate planning, including making a BVI will (§§12-17).

13. What are the main rules of succession, and what are the scope and effect of any rules of forced heirship?

There is no forced heirship regime in the BVI and persons who die domiciled in the BVI have complete freedom of testamentary disposition. In addition, the use of BVI trusts can prevent the impact of foreign forced heirship rights given the robust firewall provisions set out in the Trustee Act.

According to those provisions, no rule relating to inheritance or succession of the law of domicile of a person shall affect the transfer or disposition of personal property into a trust or otherwise affect the validity of such trust.

In relation to lifetime transfers into trusts governed by BVI law, there is a comprehensive set of conflict of laws rules designed to prevent a challenge to the validity of a trust on forced heirship grounds.

An heirship right under foreign law does not affect the rights of ownership of BVI property subject to a BVI law governed trust. Additionally, heirship rights conferred by foreign law shall not constitute a person a creditor for the purposes of section 81 Conveyancing and Law of Property Act (pursuant to which every conveyance of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced).

14. Is there a special regime for matrimonial property or the property of a civil partnership, and how does that regime affect succession?

The BVI does not have any community of property or matrimonial property regimes. However, the family courts do have wide powers to make orders for the division of property between parties on divorce.

Civil partners are not currently recognised under domestic BVI law.

15. What factors cause the succession law of the jurisdiction to apply on the death of an individual?

The law governing succession of a deceased person's estate depends on the nature of the assets. In the case of immoveable property, it is the law of the jurisdiction where the assets are situated (i.e. the *lex situs*). In the case of movable property, it is the law of the deceased's domicile at the time of their death.

16. How does the jurisdiction deal with conflict between its succession laws and those of another jurisdiction with which the deceased was connected or in which the deceased owned property?

Any conflict will be resolved according to the provisions of the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 1961. Although there is some uncertainty as to whether the Convention has been given effect in domestic BVI law (by way of an order in council passed by the UK), it has been extended to the BVI as a matter of public international law.

The doctrine of *renvoi* will be applicable in relation to succession to immovable property to the same extent as under English common law conflict of law principles.

17. In what circumstances should an individual make a Will, what are the consequences of dying without having made a Will, and what are the formal requirements for making a Will?

Individuals who are domiciled in the BVI and those who are not domiciled in the BVI but personally own BVI situs immovable assets (such as land and real estate) should consider making a separate will governed by BVI law to dispose of such assets and to facilitate the later probate process.

The formal requirements for validity of a will are that the will must be (i) in writing; (ii) signed by the testator in the presence of two witnesses present at the same time, who must also sign in the testator's presence; and (iii) the testator must intend by his or her signature to give effect to the will.

For persons dying domiciled in a foreign jurisdiction, the intestacy rules governing their BVI movable assets are that of their jurisdiction of domicile.

For persons dying domiciled in the BVI and/or holding immovable BVI assets, the residuary estate shall be distributed according to the following intestacy rules under the BVI Intestates Estates Act.

It is not possible for beneficiaries to challenge the adequacy of the provision made for them under the intestacy rules.

18. How is the estate of a deceased individual administered and who is responsible for collecting in assets, paying debts, and distributing to beneficiaries?

The personal representative or representatives (PR) appointed under a BVI grant of representation (or a foreign grant that has been re-sealed) has the sole right of, and responsibility for, administering a deceased person's BVI situs estate. If foreign property is disposed by the will, separate probate applications will be needed in each of the jurisdictions in which property disposed of by the will is situated.

A grant of probate or letters of administration (or a re-sealed foreign grant) is required in order to establish title to the estate and allow the PR to collect in the assets (except for assets that will vest separately, for example, by survivorship in the case of joint tenancies).

The powers and duties of the PR are determined exclusively under BVI law and include gathering in the deceased's assets, paying or making due provision for the estate's worldwide liabilities out of the BVI situs estate and distributing the remaining assets to the beneficiaries entitled to them under and in accordance with the applicable succession law (which may be a system of law other than that of the BVI).

19. Do the laws of your jurisdiction allow individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth and, if so, which structures are most commonly or advantageously used?

A range of trusts may be established in the BVI, including discretionary trusts, fixed interest in possession trusts, reserved powers trusts and charitable purpose trusts.

In addition, non-charitable purpose trusts can be established to benefit persons and/or achieve or further any lawful purposes, whether charitable or not, provided they are neither immoral nor contrary to public policy. These trusts must appoint an enforcer who has exclusive standing to enforce the purpose for which the trust was established and can be particularly useful to create dynasty trusts which exist indefinitely (as purpose trusts are not subject to the rule against perpetuities), to create orphan holding structures (for example, to hold shares of a private trust company), or for philanthropic or impact investing (but where these might not qualify as strictly charitable purposes).

There is a special regime under the Virgin Islands Special Trust Act 2003 (VISTA), which may apply to all types of BVI trust. The VISTA enables a settlor to create a trust holding shares in a BVI incorporated company under which the trustee may be disengaged from managerial responsibility in relation to the company's affairs, thereby leaving greater control to the settlor or his or her nominees to run the company as they see fit. An appropriate use of VISTA can also provide a vehicle that can do away with the need for obtaining a grant of probate in the BVI upon the death of an owner of BVI shares, whilst at the same time allowing the individual effective management and control of the company after having divested himself of such ownership.

Private Trust Companies (PTCs) are another attractive vehicle used to act as trustees of private family trusts where the sole business of the PTC is to act as trustee of such trust. The BVI PTC Regulations were recently reformed (as of 9 July 2021) to increase the flexibility and attractiveness of BVI PTC structures by removing a number of cumbersome requirements such as the need to carry on no other business but trust business (something which created a level of uncertainty around what exactly a PTC could legally do). This type of structure enables a greater degree of control by the settlor or other family members over the administration of the trust and specific investment objectives (for example to engage in more speculative investments). They are often favoured by settlors from civil law jurisdictions who can be more apprehensive to transfer their wealth to an independent third party. Rather than holding the shares in the PTC personally, however, a common structuring mechanism for succession planning purposes is for the PTC shares to be held in a VISTA trust.

There is no legislative provision for the establishment of foundations under BVI law.

20. How is any such structure constituted, what are the main rules that govern it, and what requirements are there for registration with or disclosure to any authority or regulator?

The principal legislation applicable to BVI trusts is the Trustee Act 1961 (as amended), and trustees are subject to the jurisdiction of the BVI courts. In March 2021 an amendment to the Trustee Act introduced (among other things) new provisions resulting in (i) the courts having wider power to set aside invalid variations taken under a fiduciary power, strengthening the 'firewall' protections discussed above and (iii) introducing reserved powers legislation.

Most trusts (especially in the context of financial planning of high net worth individuals and families) are created in writing. This may be either by way of a settlement of trust signed by both the settlor and the trustee, or by a declaration of trust signed by the trustee alone. Following execution of the trust instrument, a trust will come into existence upon settlement of the initial property.

BVI trusts are exempt from registration under the Registration and Records Act and trustees are exempt from reporting and filing requirements, ensuring a high degree of confidentiality.

Trustees are under a general common law fiduciary duty to keep proper records and accounts of their trusteeship and with respect to the trust fund. Additionally, there is a statutory obligation to keep accounts of the trust within the BVI in the case of a non-charitable purpose trust.

21. What information is required to be made available to the public regarding such structures and the ultimate beneficial ownership or control of such structures or of private assets generally?

BVI trusts are exempt from registration under the Registration and Records Act and trustees are exempt from reporting and filing requirements, ensuring a high degree of confidentiality.

22. What is the jurisdiction's approach to information sharing with other jurisdictions?

The BVI has entered into various intergovernmental agreements for the automatic exchange of financial account information to allow for ease of compliance with FATCA and CRS. In addition the BVI operates a secure system known as the "Beneficial Ownership Secure Search System" (BOSS) which allows immediate access to beneficial ownership on all corporate and legal entities incorporated in the BVI by designated persons, at the request of certain designated law enforcement and other governmental agencies.

23. How are such structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

BVI law trusts are generally exempt from taxation. However, the exemption does not apply to distributions to beneficiaries who are resident in the BVI or to BVI trusts which own land or carry on business in the BVI. As the BVI is zero-rated for income tax and does not have any other applicable taxes, this provision has no practical implication at present.

A nominal trust duty of USD200 is payable on the establishment of a new trust.

Professional services providers acting as trustee of a trust will be subject to payroll tax to the extent they have employees rendering services to the trustee wholly or mainly in the BVI. However, these charges are imposed on the trustee in its personal capacity as an employer and cannot be satisfied from the assets of the trust.

24. Are foreign trusts, private foundations etc recognised?

The Convention on the Law Applicable to Trusts and their Recognition of 1985 (Hague Trusts Convention) has been extended by the UK government to the BVI and forms part of BVI domestic law. As a general rule, most trusts established under the laws of foreign jurisdictions created for the benefit of foreign persons will be recognised by the BVI courts.

25. How are such foreign structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

Not applicable.

26. To what extent can trusts, private foundations etc be used to shelter assets from the creditors of a settlor or beneficiary of the structure?

Although the BVI statutory regime does not provide specifically for the creation of asset protection trusts, a discretionary trust can provide substantial protection to shelter assets from the creditors of a settlor or beneficiary.

Trusts are also commonly employed to hold assets in a secure and stable political environment, to hold trust assets in a jurisdiction which does not recognise the concept of a trust (where used in combination with a company structure), or to safeguard against political or strategic risks.

27. What provision can be made to hold and manage assets for minor children and grandchildren?

The legal age of majority is 18 years. Although there is no general bar on a minor's owning assets (other than land), it may impede their transferability and it is therefore generally not advisable for commercially valuable assets to be held in the name of minors. Assets can instead be held by trustees on a minor's behalf, either on express lifetime or testamentary trusts or on the statutory trusts which arise on intestacy (§16).

28. Are individuals advised to create documents or take other steps in view of their possible mental incapacity and, if so, what are the main features of the advisable arrangements?

The authority given to an attorney under powers of attorney will cease on the donor's death or incapacity. BVI law does not currently provide for general lasting or enduring powers of attorney. However, the provisions of the Mental Health Act 2014 apply to persons who are incapable of managing and/or administering their property and affairs by reason of mental disorder.

Other measures that a person might consider taking in view of possible mental incapacity include inserting appropriate provisions in a BVI company's memorandum and articles (for example, to deal with their automatic resignation from the board) and establishing *inter vivos* trusts to hold assets.

29. What forms of charitable trust, charitable company, or philanthropic foundation are commonly established by individuals, and how is this done?

Charitable trusts can be established under BVI law to create a charitable fund or to make provision for existing charitable institutions or purposes. Charities are commonly structured through the use of companies (usually limited by guarantee), unincorporated associations or trusts. In the case of charitable trusts, the categories of charitable purposes recognised by BVI law are the relief of poverty, the advancement of religion or education or other purposes that benefit the community as a whole (including where the benefit is for the public or a section of the public outside the BVI).

The regulatory framework for certain charities and non-profit organisations operating predominantly in the BVI is provided by the Non-Profit Organisations Act 2012. It applies to organisations which operate primarily in the BVI. Relevant organisations must be registered, adhere to minimum establishment and annual reporting requirements and remain subject to supervision and monitoring.

30. Have any specific tax policies or approaches been implemented, on a temporary or permanent basis, to take account of the COVID 19 pandemic?

N/A

31. No tax policies have been introduced as a result of COVID 19. What important legislative changes do you anticipate so far as they affect your advice to private clients?

Recent legislative developments have been dominated by the international policy landscape focussed largely on transparency and regulation, such as the disclosure of beneficial ownership information and automatic exchange of information regimes.

While there are no legislative proposals currently under consultation, several areas are long overdue reform.

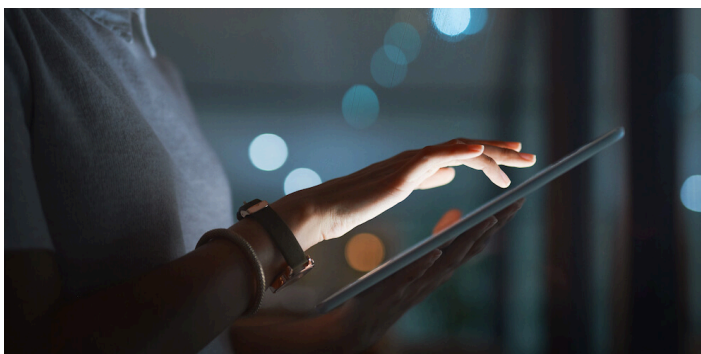
For instance, there have been calls for a wholesale repeal of the Stamp Act in favour of a comprehensive system of land transfer tax. The Stamp Act has been amended more times than any other statute in BVI legal history (and each time provision is made for the amendment in a separate statute, there being no official consolidation of the Act). There has also been fragmentation of taxes that would otherwise have been regarded as stamp duty but have been re-characterised as another form of documentary tax.

Similarly, a law giving effect in domestic law to the Hague Testamentary Dispositions Convention could be enacted with retrospective effect to simplify the conflict of laws provisions concerning the law of wills and testamentary dispositions in the BVI.

Finally, it remains to be seen whether the BVI enact civil or domestic partnership legislation, as some of its neighbours in the region have done.

Carey Olsen (BVI) L.P. is registered as a limited partnership in the British Virgin Islands with registered number 1950.

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