

The application of Bermuda stamp duty to trust structures

Briefing Summary: This article explores some important Bermuda stamp duty implications applicable to instruments that trustees of Bermuda law trusts often enter into. It also considers the consequences of not paying stamp duty within the required time when an instrument is chargeable with stamp duty. It applies in respect of the law in Bermuda in force as at 20 January 2022 and is not intended to be exhaustive or constitute legal advice. Bermuda continues to be a popular jurisdiction to establish or re-domicile trusts and family offices. It has attractive laws that facilitate flexible, efficient trust structuring and restructuring. Bermuda law does not impose income tax, corporation tax, capital gains or wealth taxes. "Exempted undertakings" may apply to the Minister of Finance for a tax assurance certificate certifying that the exempted undertaking will not be subject to any such taxes if introduced in Bermuda before 31 March 2035.

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However, while there are certainly considerable fiscal and other benefits to establishing and administering a trust structure in Bermuda, it is incorrect to say that Bermuda is "tax free". Bermuda, like many other international financial centres (whether considered "onshore" or "offshore") has developed a tax regime that has evolved to take into account the costs of its government's maintenance of infrastructure provision of health care and benefits, including social security and initiatives to combat Covid. Consequently, Bermuda law does impose certain taxes in certain circumstances. Such taxes include stamp duty (including on affidavits of value in respect of "Bermuda property" forming part of the value of a person's deceased estate), payroll tax, land tax and customs duty.

In many cases, instruments executed in relation to Bermuda law trusts are ordinarily only chargeable with nominal stamp duty (if chargeable at all) provided they do not affect a disposition of "Bermuda property" and provided a "local trustee" or an "international business" is properly a party to the instrument.

However, there are some discrete issues to be mindful of, particularly in connection with:

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- instruments that effect a disposition of "Bermuda property";
- instruments that neither a "local trustee" nor an "international business" is properly a party to (irrespective of whether or not the instrument effects a disposition of Bermuda property); and
- promissory notes.

In some cases, the above instruments may be chargeable with a form of *ad valorem* stamp duty.

There is little jurisprudence regarding the application of many provisions of Bermuda's stamp duties legislation. Many Bermuda lawyers have adopted a practical and consistent approach to the construction of complex provisions of Bermuda's stamp duty legislation that are frequently encountered. However, practitioners' views may differ on some of the more complex questions of construction.

When the time comes for finalising drafts of instruments that may be chargeable with stamp duty in Bermuda, it is recommended to have a Bermuda qualified lawyer advise on the stamp duty implications. A Bermuda lawyer may be asked to prepare a brief stamp duty certification to include in the instrument (typically under the execution provisions). The stamp duty certification may state the amount of duty with which the Bermuda lawyer determines the instrument is chargeable (if any), the time within which the duty must be paid, any exemption relied upon (if applicable), and the relevant provision(s) in Bermuda's stamp duty legislation relied on for the certification. In some cases, it may be recommended or necessary to have an instrument assessed for duty by Bermuda's Tax Commissioner.

Rules applicable to interpretation of Bermuda's Stamp Duty legislation

It is well-established, particularly following *Barclays Mercantile Business Finance Ltd Mawson* [2005] 1 AC 684, that a taxing statute is to be interpreted by reference to the ordinary principles of statutory construction by giving its provisions a purposive construction in order to identify its requirements. It is suggested that this approach would apply to the interpretation of Bermuda's stamp duty laws.

Instruments chargeable with Duty

Section 2 of Bermuda's Stamp Duties Act 1976 (the Act) provides that, subject to certain exemptions, stamp duty is chargeable in the amounts specified under the relevant head (Head) of the Act's schedule (Schedule), on:

"(a) every instrument *specified in the Schedule* as an instrument chargeable with stamp duty which, not having been previously executed by any person, is *executed in Bermuda* after 31 March 1976;

(b) every *bill of exchange or promissory note drawn or made out of Bermuda after 31 March 1976, and accepted or paid, presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in Bermuda*; and

(c) every instrument (*other than a bill of exchange or promissory note*) specified in the Schedule as an instrument chargeable with stamp duty which is executed out of Bermuda after 31 March 1976 and is *brought into Bermuda* after 31 March 1976 *and which requires stamping under section 3.*" (*Emphasis*)

Section 1 of the Act defines "instrument" to include "every written document". The definition does not exclude instruments that are governed by a law other than that of Bermuda. However, often, instruments that are not governed by Bermuda law will relate to transactions exclusively concerning a subject matter not connected with Bermuda and may consequently benefit from an exemption such as those provided by section 4 of the Act (set out below).

Payment of stamp duty is ordinarily evidenced by affixing revenue stamps of the required value on the instrument (and counterparts or duplicates) and cancelling such stamps by handwriting the initials of the person, party or firm affixing the stamps and the date of such cancellation.

Time for payment of Duty

Each Head indicates the time within which the respectable instruments must be stamped (e.g., payment of duty/affixing and cancellation of stamps). The payment of stamp duty may be deferred in some instances (e.g., until released from escrow or until the instrument is brought into Bermuda in circumstances where the instrument is delivered outside Bermuda). The Act includes a process for adjudication by the Tax Commissioner upon application by a person who is uncertain whether and what amount of stamp duty is payable on an instrument. The Act provides the Tax Commissioner the power to grant special permission for the late stamping of an instrument provided certain conditions have been satisfied. A person dissatisfied with the Tax Commissioner's assessment has a right to appeal to the Supreme Court within 14 days after receiving the assessment.

Where an instrument chargeable with duty executed outside of Bermuda, while there may be different views, it is suggested that the time specified in the Schedule for its stamping commences on the day after the original instrument is brought into Bermuda.

Consequences of failure to pay Duty

The consequences of a failure to pay duty on a chargeable instrument can include:

- civil penalties being imposed on the parties liable for the duty;
- the instrument not being able to be relied upon by the parties so liable as evidence in civil court, arbitration or other proceedings; and
- the instrument not being accepted for filing or registration by any public officer or company in Bermuda.

It is an offence for a person to practice any fraudulent act, connivance or device to defraud the Bermuda Government of any stamp duty.

Instruments executed outside Bermuda

Section 3 of the Act indicates that where an instrument specified as an instrument chargeable with duty in the Schedule is executed outside of Bermuda it shall not be valid for any purpose in Bermuda unless stamped in accordance with the Act. However, an exception to this is that in respect of a settlement executed outside Bermuda, powers granted to a person to appoint a trustee (and powers supplementary to such power) shall be valid notwithstanding the settlement has not been stamped.

Exemptions

The Act and the Stamp Duties (International Businesses Relief) Act 1990 (the IBR Act) provide a number of generous exemptions from stamp duty.

Some of the exemptions apply broadly to certain types of entities or classes of transactions while others are specific to instruments that otherwise would be chargeable with duty under a particular Head.

It is important to note that just because an instrument is exempt from duty under one Head, it does not necessarily mean that it may not be chargeable under another Head.

The exemptions contained in section 4 of the Act include the following:

"No stamp duty shall be ... chargeable in respect of:

....

(b) any instrument for the *sale, transfer or other disposition*, either absolutely or by way of mortgage or otherwise, of any *vessel, aircraft or aircraft engine* (including a vessel, aircraft or aircraft engine under construction) or the rights of any person under an agreement for the *construction* of a vessel, aircraft or aircraft engine;

(c) any instrument for the *sale, transfer, lease or other disposition*, either absolutely or by way of mortgage or otherwise, of *land situate out of Bermuda* or any share, estate or interest in land situate out of Bermuda;

(d) any instrument (*not being a policy of insurance*) which relates exclusively to things to be done out of Bermuda;

(e) any instrument for the transfer on *sale... of any stock or marketable security issued by or on behalf of ... any corporation, company or body of persons incorporated formed or established out of Bermuda*, except shares registered in a register kept in Bermuda in conformity with any statutory provision;

(f) *conveyances or transfers on sale of any personal property situated out of Bermuda* by instrument in writing made between parties *none of whom is domiciled, resident or incorporated in Bermuda* or regularly engaged in any gainful occupation, trade or business in Bermuda;

..." (Emphasis)

Exemption for certain instruments executed by an "International Business"

Further, section 3 of the IBR Act provides a broad exemption for instruments executed by international businesses as follows:

"Notwithstanding anything to the contrary in the Act but subject to section 4, an instrument is exempt for duty if it is an instrument executed on or after 1st April 1990 by an international business (being an international business properly a party to the instrument), or by a person in respect of an interest which he has in, or in property of, an international business, whether or not the instrument has also been executed by some other person."

An entity does not qualify as an "international business" simply because it was not established or is not existing under Bermuda law. International businesses are entities specifically established or existing under Bermuda law as "exempted undertakings". Exempted undertakings are typically established to carry on business outside of Bermuda and are not subject to the ownership and control requirements applicable to companies incorporated as "local companies" under the Companies Act 1981 (the Companies Act). More particularly, section 2 of the IBR Act defines "international business" as:

"any exempted company, permit company, exempted unit trust scheme... overseas partnership, exempted partnership or exempted LLC".

Section 4 of the IBR Act contains an important qualification to this "international business exemption":

"Section 3 does *not* have an effect in relation to any *instrument effecting a disposition* or constituting an agreement for the disposition, of *Bermuda property*." (*Emphasis*)

Private trust companies (PTC) that act as trustees of Bermuda law trusts to benefit non-Bermudians and not to hold "Bermuda property" are often incorporated under Bermuda's Companies Act 1981 (the Companies Act) as "exempted companies" and as such are each an "international business" for the purpose of the "international business exemption". Underlying companies of such trusts are also often established as exempted companies under the Companies Act. There are also some Bermuda licensed trust companies established as exempted companies that can also benefit from the exemption.

Exemption for certain instruments executed by a local trustee

Section 46C of the Act provides that:

"Stamp duty under *Head 6, 15, 17 or 40* is not chargeable on any instrument executed by a *local trustee, not being an instrument disposing of Bermuda property* but being an instrument to which that local trustee is properly a party, whether or not the instrument has also been executed by some other person; and for this purpose "*local trustee*" means a trustee who is not an international business as defined in section 2 of the Stamp Duties (International Businesses Relief) Act 1990." (*Emphasis*)

The instruments exempted from stamp duty under section 46C of the Act are as follows:

- instruments of appointment of a new trustee of a settlement (Head 6 of the Schedule) which are ordinarily chargeable with duty of BD\$100 (note that *ad valorem* duty may be payable in certain exceptional circumstances);
- instruments of conveyance or transfer on sale, other than instruments chargeable under Heads 14 and 16 of the Schedule (Head 15) which may otherwise be chargeable with *ad valorem* duty (including in some cases where the instruments effecting a sale of property other than Bermuda property);
- instruments of conveyance or transfer to effect a voluntary disposition *inter vivos* (Head 17), which may otherwise be chargeable with *ad valorem* duty; and
- settlement instruments and instruments of addition (Head 40 of the Schedule), which may otherwise be chargeable with *ad valorem* duty.

Similar exemptions from duty otherwise chargeable on instruments under Head 15, 17 and 40 are also granted with respect to certain pension and employee benefit trusts.

It is worth reiterating that the "local trustee exemption" does not apply to the above instruments that effect a disposition of Bermuda property.

Interestingly, the "local trustee exemption" does not extend to a number of types of instruments that trustees may often enter, including:

- instruments of appointment on execution of a power of any property by any instrument not being a will or other testamentary disposition (ordinarily chargeable with duty of BD\$100 under Head 7);
- instruments effecting a retirement of a trustee (which if in the form of a deed may be chargeable with duty of BD\$100 under Head 21);
- instruments of conveyance made for the purpose of effectuating the appointment of a new trustee if such conveyance is made by some instrument other than the instrument by which the new trustee is appointed (ordinarily chargeable with duty of BD\$200 under Head 16);
- instruments declaring or revoking of any use or trust under seal of or concerning any property by any writing not being a will, or an instrument chargeable with duty as a settlement (ordinarily chargeable with duty of BD\$100 under Head 20);
- loan agreements (note that loan agreements are not specifically identified in the Act but may be chargeable with duty of BD\$25 under Head 3 or duty of BD\$100 under Head 21 if executed as a deed);
- promissory notes, which may be chargeable with duty of 1/30th per cent of the amount promised under Head 37 (See discussion on promissory notes below);
- instruments of novation (which may be chargeable with duty of BD\$25 under Head 3 if executed as an agreement, duty of BD\$100 under Head 21 if executed as a deed and in some cases duty of BD\$200 under Head 16);
- powers of attorney (with the exception of powers of attorney for appointing a proxy to vote at a specified meeting or revocation thereof) are ordinarily chargeable with duty of BD\$25 under Head 36;

- other deeds that may be chargeable with duty under Head 21 and other agreements that may be chargeable with duty under Head 3 (see below for more on Heads 3 and 21).

Perhaps counterintuitively, a trustee who is resident, incorporated or existing outside Bermuda may also meet the definition of "local trustee" on a plain English interpretation of the definition in section 46C of the Act.

Exemptions for certain transaction instruments for charitable purposes

A number of instruments that effect transactions involving Bermuda registered charities or charitable purposes are exempt from duty under the Act. Such instruments can include:

- instruments settling real or personal property on a Bermuda registered charity (which otherwise may be chargeable with *ad valorem* duty under Head 40);
- instruments effecting a voluntary conveyance *inter vivos* to a Bermuda registered charity (which may otherwise be chargeable with *ad valorem* duty under Head 17);
- instrument of conveyance or transfer on sale of land (which otherwise may be chargeable with *ad valorem* duty under Head 14).

In certain circumstances, the Act provides Bermuda's Minister of Finance with the power to grant an instrument exemption from duty if the Minister determines the instrument effects a disposition for charitable purposes taking into account an entity's and the purpose's connection with and benefit to Bermuda.

Notably, these exemptions extend to instruments irrespective of whether or not they effect a disposition of Bermuda property.

Exempt Policies

"Exempt policies" are exempt from stamp duty that would otherwise be chargeable on insurance policies under Head 35 of the Schedule.

Section 1 of the Act defines an "exempt policy" as:

"(a) a policy of insurance written in Bermuda where the risk insured against is situated outside Bermuda including–

(i) real property outside Bermuda;

(ii) personal property ordinarily situated outside Bermuda including vessels or aircraft registered in Bermuda if so situated;

(iii) the life or health of a person ordinarily resident outside Bermuda;

(b) a policy of reinsurance."

Other exemptions

The application of Bermuda stamp duty (including further exemptions that apply in certain circumstances with respect to instruments of appointment of trust property, settlements, instruments of addition and promissory notes) are discussed further below.

Voluntary conveyances *Inter Vivos*

Head 17 of the schedule imposes *ad valorem* duty on instruments of voluntary conveyances *inter vivos*. Section 39(3) operates to exclude an instrument from being chargeable with duty under Head 17 as a "voluntary conveyance *inter vivos*". Section 39(3) of the Act provides:

"A conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan or made for *effectuating the appointment of a new trustee or the retirement of a trustee*, whether the trust is expressed or implied, or *under which no beneficial interest passes* in the property conveyed or transferred, or *made to a beneficiary by a trustee* or other person in a fiduciary capacity under any trust, whether expressed or implied, shall not be charged with duty *as a voluntary conveyance inter vivos*." (Emphasis)

Consequently, by virtue of section 39(3) of the Act, the following instruments are not chargeable with duty under Head 17 irrespective of whether the instrument effects a disposition of Bermuda property:

- instrument of appointment or retirement of trustees;
- instrument of appointment (gift) of trust property;
- instrument effecting a transfer of legal ownership of property, not being a transfer of beneficial interests.

Instruments relating to several distinct matters

The application of section 17 of the Act needs to be borne in mind to the extent the instruments may deal with several distinct matters. Notably, section 17(a) provides that:

"Except where express provision to the contrary is made by this Act—

a) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters ...".

Instruments chargeable under more than one head

Section A 18 of the Act provides that an instrument that is chargeable under more than one Head shall be charged under the Head which imposes the highest duty.

Deeds not falling under any other head

Head 21 of the Schedule provides that duty of BD\$100 is chargeable on a "deed of any kind whatsoever *not described in this Schedule*" (*Emphasis*)

Agreements not otherwise chargeable

Head 3 of the Schedule of the Act imposes duty of BD\$25 on an:

"Agreement, or memorandum of agreement made under hand only and *not otherwise charged with duty*, whether the same be the only evidence of a contract, or obligatory upon the parties from its being a written instrument."
(*Emphasis*)

Head 3 contains a number of exemptions, none of which are specifically for the benefit of trust structures.

Duplicates and counterparts

Head 22 of the Schedule provides that counterparts and duplicates of an instrument are chargeable with duty of BD\$25.

What is "Bermuda Property"?

The definition of "Bermuda property" in relation to an instrument is contained within sections 1 and 47 of the Act includes:

"(i) *real and personal property* of any kind *situated or being in Bermuda* and the proceeds of the sale thereof and any investment for the time being representing the same; and

(ii) the value of any *vessel or aircraft* or any share of a vessel or aircraft which is *registered in Bermuda* notwithstanding such vessel or aircraft, at the date of execution of the instrument, may have been at sea or elsewhere out of Bermuda." (*Emphasis*)

However, section 47(3) of the Act, among other things, specifically provides that "Bermuda property" does not, include:

"(a) any moneys in an institution licensed as a bank or deposit company under the Banks and Deposit Companies Act 1999, being moneys denominated in a currency other than Bermuda area currency; or

(b) any security held in an exempted undertaking as defined in section 1 of the Exempted Undertakings Tax Protection Act..." [Note that an "exempted company" or other "international business" (as those terms are defined under section 2 of the IBR Act) is an "exempted undertaking" for the purposes of section 1 of the Exempted Undertakings Tax Protection Act].

Section 47(4) of the Act provides that shares that qualify an instrument for exemption from stamp duty by virtue of section 4(e) of the Act (set out above) shall not be deemed to be property situated or being in Bermuda.

Therefore, by virtue of section 3 of the IBR Act:

- instruments executed by a trustee or underlying entity to transfer security in an "international business" are not chargeable with stamp duty; and
- a sale and purchase agreement or other instrument in respect of property other than Bermuda property would not be chargeable with stamp duty if an "international business" is properly a party to the instrument.

Instruments transferring interests of shares in "local companies" (as defined in the Companies Act) are ordinarily chargeable with stamp duty under Head 15, subject to certain exemptions. The shares in local companies ordinarily constitute "Bermuda property". Local companies are essentially companies predominantly owned and controlled by Bermudians. As an aside a trustee of a trust that was not established for the benefit of Bermudians or to benefit Bermuda is not ordinarily considered "Bermudian" for these purposes under the Companies Act. An exempted company is also not ordinarily considered "Bermudian" for these purposes.

It is recommended that consideration be given to the application of anti-avoidance provisions in the Act and Bermuda's exchange control requirements in circumstances where Bermuda denominated assets are being converted into non-Bermuda dollar denominated assets before, for example, settling property representing those assets into a settlement.

Settlement instrument and instruments of addition of *corpus* to a settlement

Subject to certain exemptions, settlement instruments and instruments of addition to the *corpus* to a settlement in respect of Bermuda property or to a settlement which does not have a "local trustee" or an "international business" as trustee may be subject to *ad valorem* stamp duty.

Notably, section 42 of the Act provides that:

"Every addition of property to a *settlement inter vivos* ... shall be evidenced by an instrument of addition chargeable with duty under Head 40." (*Emphasis*)

The definition of "settlement" in section 1 of the Act does not appear to include a testamentary trust.

Part of the background for the treatment of testamentary trusts under the Act may be that in order to obtain probate or letters of administration in Bermuda, an application needs to be made to the Supreme Court accompanied by an affidavit of value of the estate. The affidavit of value is chargeable with duty under Head 2 of the Schedule at *ad valorem* rates on the value of the Bermuda property that forms part of the estate. The rates of duty under Head 2 are higher than those under Head 40.

Subject to available exemptions, Head 40 imposes stamp duty as follows:

"Nature of instrument: **SETTLEMENT.**

1. **INSTRUMENT OF SETTLEMENT OR AGREEMENT FOR SETTLEMENT.**

Stamp Duty: BD\$250 plus—

(i) in respect of Bermuda property (but so that in the valuation of that property there shall be deducted the value of any benefit conferred on a settlor's spouse and the cost of valuing any Bermuda property)—

(aa) on the first BD\$50,000 of the amount or value, nil;

(bb) on the next BD\$150,000 of the amount or value, 5 per centum

(cc) on the next BD\$800,000 of the amount or value, 10 per centum;

(dd) thereafter, 15 per centum.

...

(ii) 1/10 per centum of the amount or value of other property.

2. **INSTRUMENT OF ADDITION** to the *corpus* of any settlement.

Stamp Duty:

(i) (aa) up to the point at which the total amount of any duty paid on Bermuda property under this Head (whether in respect of an instrument of addition or otherwise) *equals BD\$7,750 in the aggregate*, 5 per centum of the amount or value of the *Bermuda property* added;

(bb) on the next BD\$500,000 of the amount or value of the *Bermuda property* added, 10 per centum;

(cc) thereafter, 15 per centum of the amount or value of the *Bermuda property* added; and

1/10 per centum of the amount or value of *other property* added.

..." (*Emphasis*)

As mentioned earlier, certain exemptions under Head 40 are available for settlements or additions for Bermuda registered charities and certain other bodies in some cases. It is worth reiterating that the "local trustee exemption" and "international business exemption" do not apply in respect of settlements and instruments of addition that effect dispositions of *Bermuda property*.

Notably, instruments of settlement and instruments of addition in relation to dispositions of property other than Bermuda property may also be chargeable with duty in certain circumstances (e.g., where neither an international business nor local trustee are party or where the settlement or addition is not deemed charitable) but the duty on such instruments are limited to BD\$7,500 in aggregate in respect of the settlement.

Questions may arise as to whether *ad valorem* stamp duty may be chargeable in connection with instruments of appointment of property exercised under a settlement (particularly instruments of appointment of Bermuda property, which are generally less likely to qualify for an exemption) that:

- create one or more sub funds (e.g., including where a trustee declares in an instrument that it holds all or part of the property of a settlement on modified or restated terms);
- make an appointment of property in the settlement onto one or more (sub) funds already existing within and as part of a settlement;
- irrevocably create a separate settlement; or
- make an appointment onto a settlement that is already in existence at the time of delivery of the instrument of appointment.

Could any of the above types of instruments of appointment be deemed to be a "settlement" or require preparation of an instrument of addition chargeable with duty for the purpose of Head 40? It is suggested that the context of the particular instrument should be carefully considered.

Section 1 of the Act defines "settlement" as follows:

"settlement" means any *non-testamentary disposition* in writing whether made voluntarily or upon a good and valuable consideration other than a *bona fide* pecuniary consideration whereby any definite and certain property is settled or agreed to be settled in any manner for any purpose whatsoever". (*Emphasis*)

"Disposition" is not defined in the Act. Section 2 of the IBR Act provides that:

"disposition" means disposition of any kind, whether by way of sale, lease, loan, gift or otherwise".

The Tenth Edition of *Black's Legal Dictionary*, (edited by Bryan A. Garner and published by Thomson Reuters in 2014) defines "disposition" as:

"The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property."

Further, the exemptions to Head 40 include an exemption for an:

"instrument of appointment relating to any property in favour of persons especially named or described as objects of a power of appointment, where duty has been paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power." (*Emphasis*)

One may argue that an instrument of appointment that appoints funds to a separate settlement with one or more common objects of settlement from which the appointment is being made may qualify to exempt the instrument of appointment from being chargeable with duty under Head 40. Again, the facts of each of case need to be carefully considered to ensure the exemption applies.

Additionally, careful consideration needs to be given as to whether and in what circumstances an instrument of addition chargeable with duty under Head 40 may be required in respect of the settlement or fund receiving the property appointed. There may be a persuasive argument that an appointment that creates (or pays property of a settlement into) a sub fund existing within the settlement (not being separate to the settlement) does not trigger the requirement under section 42 for preparation of an instrument of addition because the instrument of appointment is not transferring or relinquishing property to a separate settlement.

In the context of the application of UK capital gains tax, in *Bond v Pickford* [1983] STC 517 Lord Wilberforce indicated the question whether a particular set of facts amounts to a new or separate settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude.

When considering whether an instrument of addition chargeable with duty under Head 40 is required in respect of an appointment to create or allocate funds into a sub fund, it is suggested the following factors may be among those that are relevant:

- Is the sub fund revocable?
- On failure or termination of the sub fund does the property in the sub fund revert to the settlement from which the appointment funding the sub fund was made?
- Can the instrument of appointment be properly construed as merely effecting an amendment or restatement of part or all of the terms of the settlement (as opposed to disposition onto a separate settlement)?

Promissory Notes

A question may arise as to whether a particular instrument is a promissory note and, secondly, whether the promissory note is chargeable with duty under the Act.

Section 1 of the Act and section 75 of the Bills of Exchange Act 1934 provides that:

"(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand, or at a ***fixed and determinable future time, a sum certain in money*** to, or to the order of, a specified person ***or to bearer***.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is endorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within Bermuda is an inland note; and the other is a foreign note." (*Emphasis*)

A promissory note that is drawn or made out of Bermuda and accepted or paid, presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in Bermuda, subject to the application of exemptions, the promissory note may be charged with duty under Head 37 as a:

"Promissory Note of any kind whatsoever (except a bank note), if drawn, or expressed to be payable, or actually paid or endorsed, or in any manner negotiated within Bermuda."

The rate of duty on a promissory note chargeable with duty under Head 37 is 1/30th per centum of the amount promised. Head 37 provides exemptions for stamp duty otherwise chargeable on a promissory note under Head 37:

"(a) issued by or in favour of an *exempt undertaking* or its nominees.

1. issued by or in favour of the trustees of a trust or settlement *which is not resident in Bermuda for the purposes of the Exchange Control Regulations 1973.*" (Emphasis)

Section 3(5) of the Exchange Control Regulations 1973 provides that:

"The *trustees of a trust or settlement* established or *made by a person who is not resident in Bermuda* shall, in their capacity as such, be *deemed not to be resident in Bermuda* and the moneys comprised in such settlement shall be deemed to be held to the account of a person not resident in Bermuda."
(Emphasis)

The paragraph (b) exemption is of particular benefit to trusts or settlements established by settlors who are not deemed to be resident in Bermuda for these purposes.

Conclusion

Bermuda stamp duty legislation contains a number of important exemptions that serve to facilitate Bermuda's international trust business, particularly those exemptions applicable to:

- "international businesses";
- "local trustees";
- instruments effecting transactions relating to things exclusively to be done outside of Bermuda; and
- trusts that are not deemed to be resident in Bermuda for the purposes of Bermuda stamp duty.

However, each instrument prepared in relation to a trust structure requires consideration to ensure that it does not constitute an instrument chargeable with duty and fall outside an exemption. While a number of exemptions apply to instruments that do not effect a disposition of Bermuda property or do not relate to things to be done in Bermuda, it can be dangerous to assume that such exemptions will apply in all cases.

While the article is my responsibility, I am grateful to my colleague **Stephanie Bernard**, for taking a look at and providing some valuable comments in relation to it.

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