An alternative approach

Henry Brandts-Giesen considers the separation of trustee functions in New Zealand

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Private banks and trust companies resident in 'offshore' financial centres are increasingly faced with obstacles when structuring for their international clients due to negative perception and, in some cases, 'blacklisting' by central governments, revenue authorities and supra-national organisations, such as the G20, the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force (FATF). Harsh and generally unfair measures are taken against these financial services providers to punish their 'tax haven' status and the perceived lack of transparency in the 'offshore' financial centres.

Unfortunately, this also has the effect of preventing quite legitimate wealth structuring using many of these very reputable, well regulated and fiscally transparent jurisdictions. Increasingly relationship managers in the 'offshore' financial centres are winning new business or looking to diversify into emerging markets only to find that they are constrained from using a structure in the 'offshore' jurisdiction in which their private bank or trust company operates.

The alternatives include: referring the business to another service provider in a jurisdiction which is not perceived as 'tax haven', or included on any 'blacklists', or establishing a wholly owned and fully operational subsidiary company in such a jurisdiction. The first option will probably result in a permanent loss of that business with no guarantee of reciprocity. The second option may allow the business to be retained within the organisation, but will inevitably require significant capital expenditure to satisfy licensing requirements and other 'start up' and maintenance costs, with no guarantee that future work flows will justify that expense.

A possible compromise is the establishment of a managed trust company, with a reputable legal and fiduciary services provider in New Zealand. However, there are further alternatives often not considered by international wealth advisors.

Remote controls

New Zealand trust law provides a point of difference from many other jurisdictions in that sections 49 and 50 of the *Trustee Act 1956* permit family advisors, settlors and beneficiaries to influence the exercise of powers by the trustees through the use of a mechanism which separates powers between: custodian trustees, managing trustees and advisory trustees.

These are sometimes referred to as 'remote control' powers and, it is believed, were brought into New Zealand trust law to facilitate early settlement of British migrants to New Zealand when the migrants were reluctant to hand over absolute control of their New Zealand situs assets to colonial trustees.

Interestingly, these provisions can now be used for a similar purpose by international wealth planners in relation to assets that are not usually situated in New Zealand. They can be invaluable tools to cut across time zones and appease settlors unwilling to cede complete control to trustees in what is now a fully independent, albeit geographically remote, jurisdiction.

For example, all things being equal, a New Zealand resident custodian trustee (perhaps a private or managed trust company) could hold registered title to an investment portfolio comprising equities and bonds listed on major international exchanges. The client relationship management and day to day administration of the trust could be exercised by a managing trustee company based in Jersey. That managing trustee could delegate discretionary management over the investment portfolio to an investment firm in Singapore.

Meanwhile, a trusted family advisor, resident in the same jurisdiction as the settlor, say Italy, could hold office as advisory trustee.

Of crucial importance for the managing trustee is that section 49 of the *Trustee Act 1956* provides that where any advice is tendered or given by the advisory trustee, the managing trustee may follow the same and act thereon but, if it does do so, it shall not be liable for anything done or omitted by reason of following that advice or direction.

Binding directions in relation to the assets would then, from time to time, be given to the New Zealand resident custodian trustee by the Jersey resident managing trustee. All transactions would be implemented by the New Zealand resident custodian trustee on an 'execution only' basis.

The New Zealand resident custodian trustee would retain power to apply to the court for directions and retain certain core fiduciary duties. However, subject thereto, the New Zealand resident custodian trustee would not be liable for acting on properly given directions. Significantly, as far as third parties are concerned, the registered 'owner' of the investment portfolio is the New Zealand resident custodian trustee. This may provide a solution for the 'offshore' managing trustee company, which worked hard to develop the relationship with a client only to be constrained by domestic policy.

Taxation of trusts in NZ

Where the settlor of the trust is resident outside New Zealand the trust will be exempt from assessment in respect of New Zealand tax on income and capital gains arising outside New Zealand. Accordingly, the trustee may make distributions out of a trust fund established in New Zealand without any withholding or deduction for New Zealand income or capital gains tax. There are no inheritance, wealth or capital gains taxes levied in New Zealand, nor is there any gift duty, stamp duty, value added tax or equivalent forms of indirect taxation charged on the creation or transfer of assets to a trust by a non-resident of New Zealand.

Summary

The ability to separate the various functions of the office of trustee under New Zealand law, together with the tax neutrality afforded to 'foreign' trusts, is a relatively unique and attractive feature of New Zealand trust law, the potential of which has not yet been fully realised by many international wealth planners. ■