UK (England and Wales)

Andrew Goldstone and Sarah Albury, Mishcon de Reya

www.practicallaw.com/7-500-9209

TAXATION - GENERAL

1. When does the official tax year start and finish in your jurisdiction and what are the tax payment dates/deadlines?

The tax year runs from 6 April to the following 5 April.

Tax returns must generally be submitted by the following date after the end of the tax year:

- 31 October (for paper tax returns).
- 31 January (for online tax returns).

There are penalties for late returns.

For employees, tax is deducted at source from their salary. Any additional tax liability (for example, on investment income) is generally payable by 31 January after the end of the tax year. Interest is charged if payment is late and penalties can also apply.

Self-employed taxpayers pay tax in two equal instalments based on the previous year's liability. The first instalment is due on 31 January in the relevant tax year. The second instalment is due on 31 July after the end of the tax year. On the following 31 January, a final balancing payment or refund is paid.

DOMICILE AND RESIDENCE

2. Does your jurisdiction have concepts of domicile and residence? In what context(s) are they relevant and how do they impact on a taxpayer?

Residence

An individual is UK resident if he either:

- Spends 183 days or more in the UK in a given tax year.
- Visits the UK for at least 91 days on average per tax year over a four-year period.

An individual is ordinarily resident in the UK if he is habitually resident there.

An individual who is UK resident pays tax on his UK income and gains. He may also have to pay tax on his foreign income and gains, depending on his domicile.

Domicile

There are two types of domicile:

- **Domicile of origin.** This is usually the same as his father's domicile when the individual was born.
- **Domicile of choice.** An individual can acquire a different domicile of choice if he settles in a new country and intends to stay there permanently or indefinitely.

An individual who is UK resident but foreign domiciled can claim the remittance basis in relation to his foreign income and gains (*see Question 5, UK residents* and *Question 6*).

For inheritance tax (IHT) purposes, an individual who is domiciled outside the UK is treated as UK domiciled if he has been resident in the UK for at least 17 of the previous 20 tax years. An individual who is neither domiciled nor deemed domiciled in the UK is subject to IHT only on his UK assets (*see Question 9*).

3. Does your jurisdiction impose any tax when a person leaves (for example, an exit tax)? Are there any other consequences of leaving (particularly with regard to individuals domiciled in your jurisdiction)?

There is no exit tax imposed on individuals.

Long-term UK residents who become non-resident for less than five years can be taxed on their return to the UK on capital gains realised during the period of non-residence (*see Question 5*).

A UK-domiciled individual who leaves the UK permanently is still treated as UK domiciled for IHT purposes for a further three years.

If the trustees of a settlement become non-resident, this triggers a disposal for capital gains tax (CGT) purposes (*see Question 31*).

4. Does your jurisdiction have any particular rules affecting temporary residents?

An individual who comes to the UK for a temporary purpose, with no view to establishing his residence in the UK, and who has not spent 183 days in the UK in that tax year, is treated as non-resident for certain income tax (ICT) purposes.

TAXES ON GAINS AND INCOME

5. How are gains on property/assets owned by a foreign national taxed? What are the capital gains tax rates?

There is a CGT charge at the rate of 18% on gains realised on the disposal of assets (this includes a sale or a gift). CGT is not charged on:

- Transfers to a spouse or civil partner.
- Disposal of a main residence.

UK residents

An individual who is UK resident but non-UK domiciled is only taxed on overseas gains to the extent that the gains are received in or remitted to the UK (remittance basis). A UK resident foreign national can therefore usually avoid CGT on the disposal of foreign assets if the entire sale proceeds are kept outside the UK. However, when he has been UK resident for seven out of the previous nine years, he must pay GB£30,000 (about US$48,050) for each year he claims this favourable tax treatment.

Long-term UK residents (including foreign nationals) who leave the UK for less than five years pay CGT on their return on gains made while abroad (*see Question 3*).

Non-UK residents

Non-UK residents are exempt from CGT, even on the disposal of UK assets.

6. How is income received by a foreign national taxed? Is there a withholding tax? What are the income tax rates?

The ICT rates are:

- 20% (basic rate) on income up to GB£37,400 (about US$59,900).
- 40% (higher rate) on income of more than GB£37,400.
- 50% on income of more than GB£150,000 (about US$240,255) (from 6 April 2010).

There is a 10% savings rate on savings income only, up to a maximum of GB£2,440 (about US$3,910).

ICT at the basic rate of 20% is withheld at source from bank interest.

Dividend income is taxed at:

- 10% for basic rate ICT payers.
- 32.5% for higher rate ICT payers (or 42.5% for individuals with a taxable income of GB£150,000 or more from 6 April 2010).

A 10% tax credit is available.

A UK-resident individual (including a foreign national) domiciled outside the UK is subject to:

- ICT on his UK income.
- ICT on the remittance basis on foreign income that he receives or remits to the UK, in the same way that he is taxed on the remittance basis on his foreign gains (see *Question 5*).
- ICT on foreign income remitted to the UK while non-resident, if he left the UK for less than five years. Liability arises on his return to the UK.

A non-resident is taxed only on UK income. If that income is also taxed in his country of residence he may be entitled to relief under a double taxation treaty (*see Question 13*).

INHERITANCE TAXES

7. What is the basis of the inheritance tax or gift tax regime (or alternative regime if relevant)? Please explain whether the rate of tax depends on:

- **How much the beneficiary receives.**
- **Who the beneficiary is.**
- **How wealthy the beneficiary is.**

IHT is paid on everything the deceased owned at the time of his death. However, for IHT purposes, it can also include assets that the deceased gave away less than seven years before his death.

IHT is also due on lifetime gifts to trusts.

The rate of IHT payable on death does not generally depend on:

- The amount the beneficiary receives.
- How wealthy the beneficiary is.
- The relationship between the parties.
- The beneficiary's residence or domicile.

However, no IHT is due on transfers to:

- The deceased's spouse or civil partner.
- Charity.

8. What are the inheritance tax or gift tax rates (or alternative rates if relevant)? Please consider the following:

- **Tax-free allowances.**
- **Exemptions (for example, for inheritances by spouses).**
- **Techniques to reduce liability (for example, gifting assets during the testator's lifetime, selling assets but retaining a life interest, establishing a trust or purchasing through an offshore company).**
- **Any other ways to reduce liability.**

On death, IHT at 40% is due on the deceased's assets that exceed the nil rate band (NRB) (GB£325,000 (about US$520,550)), unless exemptions or reliefs apply (*see below*).

If the deceased's NRB is not entirely used, the unused proportion of his NRB can be added to his surviving spouse's or civil partner's NRB.

IHT exemptions

IHT exemptions include:

- Legacies to a spouse or civil partner. This exemption is limited to GB£55,000 (about US$88,090) on transfers to a non-UK domiciled spouse or civil partner.
- Annual exemption of GB£3,000 (about US$4,805).
- Gifts or legacies to UK charities.
- Wedding and civil partnership gifts:
  - GB£5,000 (about US$8,010) from parent to child;
  - GB£2,500 (about US$4,005) from grandparent to grandchild.
- Gifts of up to GB£250 (about US$400).
- Normal expenditure out of income (for example, regular payments made out of taxed income to support an elderly parent).
- Maintenance payments.
- Outright gifts if the donor survives the gift by seven years.

If the donor makes a lifetime gift but continues to benefit from the transferred asset (for example, if the donor gives his house to his children but continues living there rent-free), the asset remains part of his taxable estate.

IHT reliefs

IHT reliefs exist as follows:

- If the donor were to die between three and seven years after making a gift, taper relief reduces IHT liability (taper relief increases with the number of years the donor survives the gift, starting at 20% for three years).
- If certain conditions are satisfied, business property relief (BPR) or agricultural property relief (APR) at 50% or 100% is available for business and agricultural assets.

Limiting IHT liability

Ways of limiting IHT liability include:

- Making outright gifts and surviving them by at least three years.
- Making regular gifts out of surplus income.
- Making gifts of the NRB into a trust every seven years.
- Giving away assets with a low value but the potential for significant growth, as their value, including all future growth, falls outside the donor's estate.
- Investing in assets that attract BPR or APR.

9. Does the inheritance tax or gift tax regime apply to foreign owners of property/assets?

An individual who is not domiciled in the UK is subject to IHT only on his UK assets. However, if he has been resident in the UK for at least 17 of the previous 20 tax years, he is deemed UK domiciled for IHT purposes and is subject to IHT on his worldwide assets.

If he transfers his non-UK assets to a trust before he has been resident in the UK for 17 years, the assets will be excluded from IHT even after he becomes deemed domiciled in the UK.

10. Are there any other taxes on death or on lifetime gifts?

There are no other taxes on death. However, CGT at the rate of 18% is payable on gains realised on lifetime gifts (*see Question 5*). In some cases the gain can be "held over" so that the tax is deferred until the donee later disposes of the assets.

BUYING PROPERTY

11. Are there any other taxes that a foreign national must consider when buying assets/property in your jurisdiction? For example:

- **Purchase and gift taxes.**
- **Annual rates.**
- **Wealth taxes that apply to foreign nationals with assets above a certain value in your jurisdiction.**

Stamp duty land tax (SDLT) arises on the purchase of UK property at the following rates:

- 1% on values between GB£175,000 (about US$280,300) (or GB£125,000 (about US$201,810) from 1 January 2010) and GB£250,000 (about US$400,425).
- 3% on values between GB£250,000 and GB£500,000 (about US$800,850).
- 4% on values above GB£500,000.

SDLT does not generally apply to a gift unless the property is subject to a mortgage.

Stamp duty is payable at 0.5% on the price paid for shares in UK companies. It does not apply to gifts of shares.

There is no annual wealth tax, although council tax on residential property and business rates on commercial property are payable annually.

Value added tax (VAT) at 15% (or 17.5% from 1 January 2010) arises on goods and services. Lower rates and exemptions may apply.

12. What tax-advantageous property holding structures are available in your jurisdiction for non-resident individuals?

A non-resident individual can hold UK property personally or through an offshore company.

If he holds it through an offshore company and he is non-UK domiciled, his shares in the offshore company are exempt from

IHT. The company will pay ICT on any rental income but at the basic rate only.

INTERNATIONAL AGREEMENTS

13. Is there a wide network of double tax treaties? If so, please provide examples (including any treaties with the UK and the US).

The UK has entered into a wide network of double taxation treaties for ICT and CGT.

Double taxation treaties can provide for:

- Certain foreign income and gains to be exempt from UK taxation.
- A credit to be given against an individual's UK tax liability (or vice versa). For example, under the UK's double taxation treaty with the US, the country in which the recipient is resident charges tax on interest, irrespective of the source of the interest.

The UK has also entered into several double taxation treaties for IHT. The pre-1975 double taxation treaties with India, Pakistan, France and Italy offer specific IHT advantages for an individual who is domiciled in any of those countries but who is deemed domiciled in the UK (*see Question 9*).

WILLS AND ESTATE ADMINISTRATION

14. Is it essential for an owner of assets in your jurisdiction to make a will in your jurisdiction? Does the will have to be governed by the laws of your jurisdiction?

It is not essential for an owner of assets in England and Wales to make a will there, but it is advisable.

A will made under the law of a foreign jurisdiction can apply to assets in England and Wales (*see Question 17*).

15. What are the formalities for making a will in your jurisdiction? Do they vary depending on the nationality, residence and/or domicile of the testator?

Wills must be:

- In writing.
- Signed by the testator in the presence of two independent witnesses, who must sign the will in the presence of:
  - the testator; and
  - each other.

The statutory definition of a will in England and Wales includes any testamentary instrument validly made under the law of another country.

16. Is it possible to make a post-death variation (that is, are there any special rules which apply if testamentary provisions or the provisions of intestacy rules are varied after the date of death by the agreement of the beneficiaries, or are such variations treated as lifetime dispositions by the beneficiaries)?

Post-death variations of wills (or of the provisions made under the intestacy rules) are commonly used to reduce IHT liability.

For IHT and CGT purposes, a post-death variation is treated as if the gifts contained within it had been made by the deceased (if it is made within two years of death and the appropriate tax elections are made).

17. Please describe how/to what extent wills made in another jurisdiction are recognised as valid/enforced in your jurisdiction. Does your jurisdiction recognise a foreign grant of probate (or its equivalent) or are further formalities required?

Validity of foreign wills

A will is recognised as valid if it complies with the law of the country where one of the following applies:

- The testator was domiciled at the time the will was executed or at his death.
- The testator was habitually resident at the time the will was executed or at his death.
- The testator was a national at the time the will was executed or at his death.

Validity of foreign grants of probate

Generally, a grant of probate under the law of England and Wales is required to administer property owned by the deceased in England and Wales.

The court in England and Wales will issue a grant of probate to the person entrusted with the administration of the deceased's estate by the court having jurisdiction in the place where the deceased died domiciled.

Alternatively, a grant of representation under the law of England and Wales will be issued to the persons entitled to administer the estate in the country of the deceased's domicile where either:

- A grant application has not yet been made in that jurisdiction.
- The court in that country does not appoint personal representatives recognised under the law of England and Wales.

If the deceased died domiciled in a country to which the Colonial Probates Acts 1892 and 1927 apply and a grant of probate has already been issued in that country, an application can be made for that grant to be resealed so that it may be used to administer the estate in England and Wales.

18. Are there any particular practical issues that are relevant if foreign nationals die in your jurisdiction?

Where individuals from another jurisdiction die in the UK, executors may find that certain assets have vested directly in the heirs

in accordance with the law of the deceased's domicile and that those assets are not available to them for the payment of debts or taxes in the UK.

19. Please outline the role and powers of the executor(s). Does the estate vest initially in either:

- **Personal representatives who are responsible for administering the estate?**
- **The heirs?**

Executors and administrators (personal representatives) are responsible for administering the deceased's estate. Executors are appointed by will and administrators are those entitled to administer the estate under the intestacy rules. The deceased's estate vests in the personal representatives, who then distribute it to the heirs.

The powers and responsibilities of a personal representative include:

- Ascertaining and collecting in the assets of the deceased.
- Obtaining a grant of representation.
- Ascertaining and paying the deceased's debts (including all taxes).
- Distributing the remaining assets to those entitled under the will or on intestacy.

20. What is the procedure on death in your jurisdiction for tax and other purposes in relation to:

- **Establishing title and gathering in assets (including any particular considerations for non-resident executors)?**
- **Paying taxes?**
- **Distributing?**

Procedure for establishing title and gathering in assets

A grant of representation (for example, a grant of probate if there is a valid will) is usually required to establish title to the deceased's estate.

Certain assets, such as those owned jointly with another, may not pass under the will or laws of intestacy on death (*see Question 35*).

To gather in and sell the deceased's assets, the personal representatives need to produce the grant of representation to:

- Relevant banks.
- Company registrars.
- Purchasers of real property.

Procedure for paying taxes

Personal representatives must file an account with HM Revenue & Customs (HMRC), giving full details of the deceased's estate for IHT purposes. There are time limits for filing the account (*see Question 21*).

On the death of a foreign-domiciled person with assets in the UK, the IHT account must be filed at the Charity, Assets & Residence IHT section of HMRC for consideration of the deceased's domicile status and assessment to tax.

A grant of representation will not be issued until the IHT account has been produced to the relevant Probate Registry showing that all IHT payable on delivery of the account has been paid. This can prove problematic, as the deceased's assets are frozen and inaccessible until the grant of representation has been obtained and produced to the relevant banks and other asset holders. Personal representatives sometimes therefore have to borrow to pay the IHT.

Procedure for distributing the estate

Claims can be brought against the deceased's estate within six months of the grant of representation (*see Question 22*). Personal representatives may therefore prefer not to distribute before the six-month period has elapsed.

Winding up an estate can often be delayed because of the need to:

- Obtain clearance that all the IHT has been paid.
- Pay any ICT and CGT due.

In these cases personal representatives may consider making an interim distribution to the beneficiaries.

It is good practice:

- For estate accounts to be prepared.
- For a copy of the estate accounts to be sent to each residuary beneficiary, who should be asked to sign them by way of receipt, discharge and indemnity to the personal representatives.

21. Are there any time limits/restrictions/valuation issues that are particularly relevant to an estate with a foreign element?

The IHT account must be filed with HMRC within 12 months of the date of death. There is a GB£200 (about US$320) penalty for late filing.

IHT is payable within six months from the end of the month of the date of death. If payment is late, interest is currently payable at the Bank of England base rate plus 2.5% (*www.hmrc.gov.uk/cto/newsletter-aug09.htm#2*). These rules apply to all estates, not just those with a foreign element.

All valuations of foreign assets must be in Pounds Sterling, using the exchange rate at the date of death.

22. Is it possible for a beneficiary to challenge a will/the executors/the administrators? If so, how?

The following individuals can make a claim for financial provision out of the estate if the will or the intestacy rules do not make reasonable financial provision for them (*Inheritance (Provision for Family and Dependants) Act 1975*):

- Current or former spouses and civil partners (provided they have not remarried or entered into a new civil partnership).
- Cohabitees who had lived with the deceased for two years immediately prior to death.
- Other individuals who were being financially maintained by, or who were financially dependent on, the deceased.

Claims must be brought within six months of the grant of representation and can only be made if the deceased died domiciled in England and Wales.

Anybody with a potential interest in the estate can challenge the validity of the will on the following grounds:

- The will was not executed properly.
- The deceased lacked testamentary capacity.
- The deceased did not know and approve of the will's contents.
- Undue influence was brought to bear on the deceased.
- There was forgery or fraud.

SUCCESSION REGIMES

23. What is the succession regime in your jurisdiction (for example, is there a forced heirship regime)?

There is full testamentary freedom in England and Wales. There is no forced heirship regime.

However, the testator should bear in mind:

- The grounds on which a beneficiary can challenge a will (or a provision made under the intestacy rules) (*see Question 22*).
- The rules concerning jointly owned assets (*see Question 35*).
- The rules concerning intestacy (*see Question 27*).

The laws relating to succession can differ for Scotland.

24. If there is a forced heirship regime in your jurisdiction, please state whether:

- **It can be avoided (for example, by buying assets through an offshore or other entity and/or holding assets in joint names).**
- **It takes into account assets received by beneficiaries in other jurisdictions.**
- **The forced heirship rights are mandatory on the forced heir or whether the forced heir can agree to a different distribution during the testator's lifetime.**

See *Question 23*.

25. Are property/assets owned by a foreign national subject to your succession laws or the laws of the foreign national's original country?

If an individual domiciled in a foreign country dies owning immovable assets in England and Wales, the law of England and Wales governs their succession. The law of the individual's foreign domicile generally governs the succession of his movable assets (regardless of whether he was habitually resident in England and Wales or a British national).

Whether an individual is domiciled in England and Wales is determined according to the law of England and Wales (*see Question 2*). Many foreign legal systems define domicile differently to the definition applied in England and Wales.

26. Do your courts accept a reference back to your jurisdiction where your laws refer succession issues to the foreign national's home jurisdiction, whose courts have refused jurisdiction because the issues concern immovable property?

The courts of England and Wales apply the law of England and Wales to determine whether domestic law or that of a foreign jurisdiction is applicable. The law of England and Wales, in general, incorporates the doctrine of *renvoi*, meaning that where foreign courts have refused jurisdiction the courts of England and Wales will, in certain circumstances, accept a reference back. This is a complex area of international law.

INTESTACY

27. What different succession rules, if any, apply to the intestate?

The applicable rules depend on whether there is a surviving spouse or civil partner and whether there are any surviving issue (children, grandchildren and so on) (*see below*).

Minors entitled under intestacy inherit at the age of 18 *(see below, Inheritance of minors*).

Surviving spouse or civil partner with no issue

If the net estate does not exceed GB£450,000 (about US$720,765) the surviving spouse or civil partner receives the entire estate.

If the net estate exceeds GB£450,000 the surviving spouse or civil partner receives:

- Personal chattels.
- GB£450,000.
- Half of the remainder. The other half of the remainder passes to the surviving parents. If no parents survive the other half passes to:
  - full siblings; or
  - the issue of any full siblings (if the full siblings predeceased the intestate).

Surviving spouse or civil partner with issue

If the net estate does not exceed GB£250,000 (about US$400,425), the surviving spouse or civil partner receives the entire estate.

If the net estate exceeds GB£250,000, the surviving spouse or civil partner receives:

- Personal chattels.
- GB£250,000.
- A life interest in half of the remainder (which reverts to the children on the death of the spouse or civil partner). The other half of the remainder passes to the children, either outright if adults or on "statutory trusts" if minors.

Surviving spouse or civil partner with no issue, parents or full siblings or their issue

Irrespective of the net value of the estate, the surviving spouse or civil partner receives the entire estate.

No surviving spouse or civil partner but issue

The intestate's children who reach 18 years (or marry or enter into a civil partnership under that age) receive the estate in equal shares.

The issue of predeceased children receive the share to which their parent would have been entitled.

Other circumstances

The Administration of Estates Act 1925 provides the rules where more remote relatives survive, or there are none at all.

Inheritance of minors

The "statutory trusts" provide that minors entitled under intestacy only inherit at the age of 18 unless they marry or enter into a civil partnership under that age. Until then, their share of the estate is held on trust, with the income being used for their maintenance, education or benefit.

Any surplus income is accumulated and paid out when the minor reaches 18 years, or marries or enters into a civil partnership under that age.

OVERSEAS PROPERTY

28. How are residents in your jurisdiction with property/assets overseas taxed?

ICT and CGT

An individual who is resident and domiciled in the UK pays ICT and CGT on his worldwide income and gains.

However, if the individual is UK resident but foreign domiciled and claims the remittance basis, he is taxed only if his foreign income or gains are remitted to the UK, though he may need to pay the GB£30,000 (about US$48,050) charge to claim this favourable tax treatment (*see Questions 5 and 6*).

IHT

UK residents are subject to IHT on their worldwide assets (unless they are neither domiciled nor deemed domiciled in the UK, in which case their foreign assets are not taxable).

Double taxation

UK residents with income or gains from overseas assets may be subject to tax in the UK and in another country. To avoid double taxation, the UK has negotiated double taxation agreements with many countries (*see Question 13*).

TRUSTS

29. Are trusts (or an equivalent structure) recognised in your jurisdiction? Please describe the trust (or equivalent structure), including:

- **How it is taxed.**
- **How its residence status is established.**

Trusts are recognised in the UK. A trust is an obligation binding the trustee to deal with property in a particular way for the benefit of one or more beneficiaries. The trust assets are generally provided by the settlor. The settlor can also be a trustee or even a beneficiary. Trustees do not have to be, but often are, professional.

Although a trust is not a separate legal entity like a company, it is a separate taxable entity distinct from both the settlor and the beneficiaries. As a result, UK resident trustees are responsible for completing tax returns and paying tax.

Types of trust

The following types of trust exist:

- **Discretionary trusts.** These have the following features:
  - distribution of trust income and capital is left to the discretion of the trustees;
  - there is a 20% IHT charge on the value of the assets given to the trust at the outset;
  - there is an IHT charge of up to 6% every ten years;
  - there is an exit charge of up to 6% when assets are distributed between ten-year anniversaries; and
  - trust assets do not generally form part of an individual's personal taxable estate.
- **Accumulation and maintenance trusts (A&M).** A&Ms for children or grandchildren previously offered IHT advantages but are now taxed like discretionary trusts.
- **Life interest trusts.** The life tenant of the trust has a right to receive trust income during his lifetime. The trustees may have a power to pay the life tenant trust capital. After the life tenant's death, the remaining trust capital may remain in trust for other beneficiaries or it may be paid outright to beneficiaries known as "remaindermen".

  The tax treatment of the trust depends on the date of creation:
  - before 22 March 2006: the trust assets are treated as part of the life tenant's taxable estate on his death; or

- from 22 March 2006: an *inter vivos* life interest trust is taxed like a discretionary trust and the assets do not generally form part of an individual's personal taxable estate (*see above, Discretionary trusts*).

Resident trustees pay ICT on trust income at the relevant rate, depending on the nature of the income. Beneficiaries are taxed at their marginal rate on income they receive from the trust, usually with a credit for any tax already paid by the trustees on that income.

Trustees pay CGT at 18% on gains on a disposal of trust assets.

Residence of trusts

A trust is treated as UK resident if either:

- All of the trustees are UK resident.
- At least one trustee is UK resident (provided in this case that the settlor was either UK resident or domiciled when he made the trust).

Non-UK resident trusts do not pay CGT and only pay ICT on UK income.

However, in some circumstances the income and gains of an offshore trust may be attributed to a UK-resident settlor or beneficiary and taxed as his income or gains.

30. Does your jurisdiction recognise trusts that are governed by another jurisdiction's laws and are created for foreign persons?

The UK has adopted the Hague Convention of the Law Applicable to Trusts and on their Recognition and therefore recognises trusts created for foreign persons that are governed by the law of another jurisdiction.

31. What are the tax consequences of importing/exporting a trust to/from your jurisdiction?

Importing a trust

Importing a foreign trust should not in itself trigger a UK tax charge. However, the future tax position of the trust changes:

- **ICT and CGT.** Once imported, the trustees will pay ICT and CGT on all future trust income and gains. Moreover, a distribution of trust capital to a UK beneficiary may even give rise to an ICT or CGT charge on previously untaxed trust income or gains that arose before the trust was imported.
- **IHT.** The trust's IHT position will be unaffected.

Exporting a trust

There are the following taxation consequences:

- **ICT and CGT.** Any trust income which arises in the tax year of export will be taxable. No additional ICT will be payable on trust income except where it derives from UK assets.

When a trust is exported, the retiring UK trustees are treated as disposing of the trust assets at market value and pay CGT on their deemed gain. Once the trust has been exported, they do not pay CGT on any future trust gains, although their gains may be attributed to the settlor or beneficiaries in certain circumstances.

- **IHT.** The trust's IHT position will be unaffected.

32. If your jurisdiction has its own trust law:

- **Does the law provide specifically for the creation of non-charitable purpose trusts?**
- **Does the law restrict the perpetuity period within which gifts in trusts must vest, or the period during which income may be accumulated?**
- **Can the trust document restrict the beneficiaries' rights to information about the trust?**

Purpose trusts

UK law does not provide for the creation of non-charitable purpose trusts. Trusts must usually have at least one human beneficiary. Charitable trusts are an exception to this rule.

Perpetuities and accumulations

Every UK trust has perpetuity periods for trust capital and income:

- **Trust capital.** The maximum length of perpetuity period for most existing trusts is usually 80 years. However, the Perpetuities and Accumulations Bill 2009 will provide a fixed perpetuity period of 125 years for trusts created and wills executed after it comes into force, even if the trust document or will specifies a different period. The Bill has received Royal Assent but has yet to be brought into force. It is anticipated that it will come into force in 2010.
- **Trust income.** Income can be accumulated for a period of no more than 21 years. However, for trusts created and wills executed after the coming into force of the Perpetuities and Accumulations Bill 2009 (and subject to any express provision in the trust instrument) it will be possible to accumulate income throughout the lifetime of the trust.

Beneficiaries' rights to information

A beneficiary's right to information is based on the duty of the trustees to keep that beneficiary informed and to provide accounts, rather than a proprietary right to see trust documents.

If a beneficiary requests information about the trust, the trustees:

- Should bear in mind that the beneficiary is not entitled to information but does have a legitimate expectation of disclosure.
- Have discretion and should conduct a balancing exercise, considering all the relevant circumstances at the time.
- Should consider what is in the best interests of the beneficiaries as a whole.
- Should consider the purpose of the beneficiary's request.

Whether or not the trustees decide to exercise their discretion to disclose may depend on the type of document requested. A ben-

eficiary must prove that his prospect of benefiting under the trust is sufficient to warrant the disclosure he is requesting.

33. Does the law in your jurisdiction recognise claims against trust assets by the spouse/civil partner of a settlor or beneficiary on the dissolution of the marriage/partnership?

On or after granting a decree of divorce or dissolution of civil partnership, the court can make one or more of the following orders:

- An order varying trusts made before or after the marriage or civil partnership for the benefit of the:
  - couple;
  - children of the family.
- An order removing or reducing the interest of either of the parties to the marriage under any trusts made before or after the marriage or civil partnership.

For these purposes, the court's powers of variation apply regardless of whether:

- The trust is governed by foreign law.
- The trust is administered by trustees outside the jurisdiction.
- The assets of the settlement are situated outside the jurisdiction.

34. To what extent does the law of your jurisdiction allow trusts to be used to shelter assets from the creditors of a settlor or beneficiary?

Bankruptcy

If a settlor becomes bankrupt, the court can make an order to set aside trusts created by the settlor either (*Insolvency Act 1986*):

- Up to two years before the settlor became bankrupt.
- Up to five years before the settlor became bankrupt where the settlor was insolvent at the time or became insolvent as a result of the trust's creation.

Transactions at an undervalue, including the transfer of assets into trust, can be set aside without time limit if the motive behind the transaction was to put assets beyond the reach of creditors. This rule applies at any time after the creation of the trust, regardless of the solvency or insolvency of the bankrupt at the relevant time.

Sheltering beneficiaries

A trust can be used to shelter assets from vulnerable beneficiaries. Protective or life interest trusts are often used for this purpose. However, the use of trusts for this purpose is now less attractive because of the changes to the IHT treatment of trusts introduced in 2006 (*see Question 29, Types of trust: Life interest trusts*).

CO-OWNERSHIP

35. What are the laws regarding co-ownership and how do they impact on taxes, succession and estate administration?

Two types of joint ownership exist in England and Wales.

Joint tenants

Joint tenants are two or more individuals who each own an indivisible share in a property, that is, they each own the whole rather than an identifiable part of the property.

The rule of survivorship applies so that on the death of a joint tenant his interest in the property automatically passes to the other joint tenants, regardless of the terms of his will or the laws of intestacy.

For IHT purposes, a deceased joint tenant's share of the property forms part of his estate even though its destination is not governed by his will or the laws of intestacy.

Tenants in common

Tenants in common are two or more individuals who each own a separate and fixed share in a property.

On the death of a tenant in common his share of the property passes according to his will or the laws of intestacy. For IHT purposes, the deceased's share of the property forms part of his estate.

FAMILIAL RELATIONSHIPS

36. What matrimonial regimes in trust or succession law exist in your jurisdiction? Are the rights of cohabitees/civil partners in property or other assets protected by law?

Matrimonial regimes do not exist in England and Wales. However, where property is jointly held the rule of survivorship may be relevant (*see Question 35*).

Marriage and civil partnership

By marriage or civil partnership an individual acquires legal rights and duties that cannot generally be varied or avoided.

During a marriage or civil partnership the court has the power to vary or suspend an owner's rights of occupation of a property if there is a dispute over ownership of the property.

On the dissolution of a marriage or civil partnership the court has the power to vary an individual's right to assets held in his sole name or jointly with another person.

Cohabitants

On the breakdown of a relationship, cohabitants have no entitlement to financial relief from one another.

A cohabitant can sometimes successfully claim entitlement to a share of a property held in the other's name (for example, if he contributed to its purchase or upkeep).

37. Please describe how the following terms are defined in law:

- **Divorced.**
- **Married.**
- **Adopted.**
- **Legitimate.**

Divorced

Divorce means the dissolution of a marriage other than by death. It is sometimes also used colloquially to describe the dissolution of a civil partnership.

Married

Marriage means the fulfilment of a contract that creates by law a relationship between the parties to it.

For a marriage to be validly constituted:

- Both parties must consent.
- Both parties must not already be married.
- There must be no other legal factor invalidating the marriage (for example, the age of the parties, incapacity or relationship).

Adopted

Adoption involves the legal rights and duties between a child and his natural parents being terminated and then transferred to the adoptive parents.

Legitimate

A child is legitimate if he was born to married parents. If his parents were divorced at the date of his birth, a child is legitimate if they were married at the date of his conception.

MINORITY

38. What rules apply during the period when an heir is a minor?

The age of majority is 18.

On the intestacy of the deceased, a minor's interest is held on "statutory trusts" until he is 18 (*see Question 27, Inheritance of minors*).

If a minor inherits under a will, the terms of the will govern the way in which his inheritance is held (which will generally cover whether he is entitled to income from the fund while he is a minor). Wills often provide for a minor's inheritance to be held on trust until a specified age beyond 18 years.

CAPACITY

39. Please outline the procedures that apply when a person loses capacity? Does your jurisdiction recognise powers of attorney (or their equivalent) made under the law of other jurisdictions?

When a person loses capacity, their appointed attorney under a lasting power of attorney (LPA) manages their financial affairs.

An LPA is valid only if the person appointing the attorney had full capacity when it was signed. In the absence of a valid LPA, the court can appoint a deputy to manage the property and affairs of the incapacitated person.

England and Wales recognises foreign equivalents to LPAs (protective measures) if the incapacitated person is habitually resident in that jurisdiction. Recognition can be refused if, for example:

- It was not essential at the time to take the protective measure and the person on whose behalf the attorney has been appointed was not given an opportunity to be heard.
- The measure is inconsistent with a protective measure under the law of England and Wales (for example, an LPA).
- Recognition would be contrary to public policy.

In relation to protective measures, the person appointing the attorney can specify that the law applicable to that power is the law of any country:

- Of which he is a national.
- In which he is habitually resident.
- In which he owns property.

CONTRIBUTOR DETAILS

Andrew Goldstone and Sarah Albury
Mishcon de Reya
T +44 20 7440 7205
F +44 20 7404 2054
E *andrew.goldstone@mishcon.com*
sarah.albury@mishcon.com
W *www.mishcon.com*

Country Q&A

Mishcon de Reya Solicitors

Getting Personal

- Tax, trusts and probate
- Family
- Art
- Contentious trusts and probate
- Employment
- Privacy and defamation
- Immigration
- Regulatory investigations

Personal
Business
Real Estate
Dispute Resolution

www.mishcon.com