

Using a Mauritius Trust/Foundation in International Tax & Estate Planning

Better known as the prime gateway for the structuring of investments into India and Africa, Mauritius is nonetheless also a leading jurisdiction for private client services in the region. Mauritius enacted its first trust legislation in 1989 to allow local trusts to be set-up. In 1992, the Offshore Trusts Act was passed to allow non-residents to set up trusts in Mauritius. In 2001, a new Trusts Act was enacted to have a unique framework for resident trusts and non-resident trusts. The Trusts Act 2001 is probably one of the most modern and innovative Trust legislation in the world. Foundations, introduced onto the statute in 2012, is quickly becoming a success adding to the choice of structure available to professional advisers and their high net worth clients. Limited partnerships were also introduced in 2011 and widened the choice of structures and the options available to wealth management specialists.

Introduction

Strategically located in the Indian Ocean perched on the axis of on the axis of investments from Europe, Africa, the Middle East and Asia, Mauritius has throughout the last two decades forged a strong reputation as a premier international financial centre. The combination of fiscal and non-fiscal advantages together the diverse product-base have been the key ingredients of the Mauritius success story. Although Mauritius is better known as a gateway for the structuring of investments into India and increasingly Africa, it is also increasingly being used by professional advisers and their high net worth clients as a jurisdiction of choice for private wealth management services. The recent enactment of the Limited Partnership Act and the Foundations

Act has widened the choice of structures available to wealth management specialists in the context of private wealth management.

Trusts Versus Foundations

Traditionally, "trusts" have been the preferred planning tool in the context of wealth management planning for high net worth families. A well structured trust can be very effective, allowing for a number of advanced tax and estate planning strategies. Trillions of dollars' worth of assets are held through trusts worldwide. Trusts have a very long history – indeed the trust idea originates from the medieval times and personal trust law developed in England at the time of the Crusades, during the 12th and 13th centuries.

Foundations on the other hand are a new-comer to the world of financial services but are being increasingly considered by practitioners in the context of Private Wealth Management and/or for charitable giving. The Private Foundation finds its origin in 1926, when Liechtenstein created the Family Foundation by the Law of Persons and Companies. Today there are a number of jurisdictions which have enacted a law on private foundations namely Panama, Bahamas, Malta, Nevis, Anguilla, Isle of Man, Seychelles and now Mauritius.

Key Features of the Mauritius Trust

Trusts are one of the most important wealth management tools used by the Super Rich all over the world. Trillions of dollars' worth of assets are held through trusts worldwide. This is because

a Trust is able to deal with most matters that are relevant in PWM and which include:

- Preservation of family property and protection against risk
- Tax planning (which may include inheritance and / or capital gains)
- Avoidance of forced inheritance laws or probate formalities
- Succession & Business Planning

The Mauritius Trust has all the attributes for use in wealth preservation and management and has been the cornerstone of its PWM offering since the 1989 when the first Trust Act (which was an updated and improved version of the English Trustee Act 1925) was enacted. In 1992, the Offshore Trusts Act was enacted to specifically provide for many of the desirable features prevailing in other offshore jurisdictions. In 2001, a new modern and forward looking Trust Act was enacted. The Act contained most of the desirable features prevailing in other offshore jurisdictions but also brought about a number of innovative features paving the way for Mauritius to become an important jurisdiction for estate planning. In particular, the following are interesting features of a Mauritius Trust:

(a) Types of Trusts

The Trust Act allows for the setting-up of a multitude of trust types including fixed, discretionary, spendrift, charitable purpose, non-charitable purpose and sharia compliant trusts amongst others. In respect of charitable Trusts, they may also be set-up to privately benefit one or more persons or objects within a class of persons provided they are not resident in Mauritius. This means that a charitable Trust may be set-up, for example, for the advancement of education the client's children provided that the latter are not resident in Mauritius.

(b) Trust Creation

A trust may be created by a disposition of property *inter vivos* or by will, or by holding property on

trust but shall be of NO effect unless created by an instrument in writing. By law, the instrument creating a trust shall contain at least:

- the name of the trustee;
- the intention of the settlor to create a trust, or the declaration of the trustee that he holds property on trust;
- the object of the trust, the beneficiaries or class of beneficiaries, as the case may be;
- the property transferred or held on trust; and the duration of the trust.

(c) Confidentiality

There are no registration or filing requirements for a trust and confidentiality is enshrined in the provisions of the Trusts Act. There can be no disclosure in the absence of a court order and the Trusts Act clearly defines the situations when the Court or the Judge in Chambers shall make an order for disclosure or production of any confidential information

(d) Management & Administration

Every Trust set-up in Mauritius must have at least one qualified trustee which is defined as a management company or such other person resident in Mauritius as may be authorized by the Financial Services Commission of Mauritius. This ensures that all trusts are professionally managed.

Trusteeship can also be split into a Custodian and Managing Trustee and Private Trust Companies may be set-up to act as Trustee for a particular Trust or group of related (underlying) Trusts and which does not need to be licensed as a Trustee.

Professional trusteeship and trust administration services would generally be provided by Management Companies which are specifically licensed by the Financial Services Commission of Mauritius to provide such services.

(e) Protectors

The Trusts Act allows for the appointment of a protector to a Trust to advise the trustee of the trust, and with such additional powers as may be conferred by the trust instrument. Unless otherwise provided in the terms of the trust, the protector shall have the following powers:

- to remove a trustee and to appoint a new or additional trustee;
- to determine the law of which jurisdiction shall be the proper law of the trust;
- to change the forum of administration of the trust;
- to withhold consent from specified actions of the trustees either conditionally or unconditionally.
- that the exercise by the trustees of any of their powers and discretions shall be subject to the prior consent of the protector.

(f) Anti-Attack Provisions

The Trust Act includes provisions aimed at preventing a trust from being attacked on the basis of succession rights, marriage or divorce and insolvency of a settlor or beneficiary. This allows a Mauritius trust to be set-up specifically for asset protection.

(g) Accounts & Records

A Trustee needs to keep proper books of accounts (but no requirement for audited financial statements) and keep its records in Mauritius.

(h) Migration/Redomiciations

It is possible for a Trust established under the law of another State to change its proper law to that of Mauritius. Foreign Trusts may also where allowed by their proper law to have a Mauritian Trustee.

(i) Tax Planning Opportunities

The Income Tax laws make a distinction between resident and non-resident trusts. A non-resident trust is a trust of which the settlor and the

beneficiaries are not resident in Mauritius. Such trusts are not subject to taxation in Mauritius. A resident trust is taxable on its chargeable income at the rate of 15% per annum. However resident trusts may apply for a Category 1 Global Business License (GBC1) which results in such trusts being taxable at the rate of 0-3%. In addition, such trusts may avail of the benefits under the various Double Taxation Avoidance Agreements (DTAA) that Mauritius has signed and ratified with a number of jurisdictions worldwide leading to interesting tax planning opportunities.

Potential Uses of the Mauritius Trust

On the basis of the foregoing, it is thus not surprising that a number of HNWI already use a Mauritius Trust for estate, succession planning and family office services. A Mauritius trust can be put to a number of possible uses, including but not limited to:

- Accumulation & Preservation of Wealth
- Succession planning
- Asset Protection
- Tax Planning
- Off balance sheet transactions
- Corporate finance/asset financing
- Securitization

Key Features of the Mauritius Foundation

Although there are a number of similarities between trusts and foundations, there are also many differences. The Foundation arguably has all the advantages of a trust but very differently to a trust, it is a legal entity in its own right and can therefore own assets directly. This is perhaps the most defining characteristic of a foundation as compared to a trust and perhaps one of the key advantages of foundations over trusts. Foundations are gaining in popularity and appeals in particular to clients based in civil law territories where they are less familiar with the trust concept. The legal framework in respect of foundations is contained in

the Foundations Act 2012 and the following are the key features of a Mauritius Foundation:

(a) Types of Foundations

The Act allows for Foundations to be set-up to benefit persons, a class of persons or to carry out a purpose which may be charitable, non-charitable or both. As is the case for charitable trusts, charitable foundations may also be set-up to privately benefit one or more persons or objects within a class of persons provided they are not resident in Mauritius.

(b) Name of a Foundation

Every Foundation should have a name which has to end with either with the word "Foundation" or a word in a foreign language which has the same meaning as the word "Foundation". Furthermore, a Foundation cannot use the word "limited", "company", "partnership", "Société" or an abbreviation or a translation of these words. The inclusion of certain words which suggests, or is likely to suggest the patronage of the Government, a statutory corporation, a local authority or the Government of any other State requires the consent of the Minister of Finance. The Registrar can also refuse to register names which are undesirable or misleading.

(c) Creation of a Foundation

A Foundation may be created inter vivos or by will. However, a Foundation will not have legal personality unless it is registered and been issued with a certificate of registration by the Registrar of Companies which acts as the Registrar of Foundations. The following particulars extracted from its Charter will need to accompany the application for registration:

- The name of the Foundation;
- The date of the Charter; and any amendment made to the Charter before its submission to the Registrar;
- The purpose and objects of the Foundation;
- The date of the Articles, if any, of the

Foundation and any amendments made to them before its submission to the Registrar;

- Name and address of the Founder;
- Details of the beneficiaries or the manner in which the beneficiaries may be appointed or removed;
- The name and address of the secretary;
- The name and address of the Council Members;
- The address of the Registered Office of the Foundation;
- The Period, if any, for which the Foundation is established.

(d) Confidentiality

Although Foundations need to be formally registered, there is no requirement for the Foundation Charter to be registered but for minimum information extracted from it. Information filed in respect of offshore foundations (i.e. one founded by a non-resident of Mauritius) is not available for public inspection.

Additionally, confidentiality of information is enshrined in the Act and disclosure is permitted in very limited circumstances.

(e) Management & Administration

Every Foundation must have a Council which shall administer the property of the Foundation and carry out the objects of the Foundation. The Council must be comprised of at least one member ordinarily resident in Mauritius. However there is no requirement for that member to be licensed.

A Foundation also needs to appoint a secretary which needs to be an organization licensed by the Financial Services Commission of Mauritius and have a Registered Office in Mauritius.

Management Companies (MCs) which are service providers licensed by the FSC to manage and provide corporate & fiduciary services would generally provide secretarial, registered office and professional councilor services.

(f) Legal Personality

A Foundation duly registered and issued with a certificate of registration by the Registrar creates, in law, an entity with specific juridical personality, enjoying aspects of corporate ability. A Foundation can thus sue and be sued and hold property in its name.

(g) Protectors

The Act allows for the appointment of a protector or committee of protectors by a Foundation. It also allows the Charter to determine what shall be the powers and duties of the protector or committee of protectors.

(h) Anti-Attack Provisions

The Foundations Act includes provisions aimed at preventing a trust from being attacked on the basis of succession rights, marriage or divorce and insolvency of a founder or beneficiary. This allows a Mauritius Foundation to be set-up specifically for asset-protection purposes.

(i) Accounts & Records

A Foundation needs to keep proper books of accounts (but no requirement for audited financial statements) and keep its records in Mauritius at its registered office.

(j) Migration/Redomiciations

It is possible for a foundation established under the law of another State to make an application to redomicile in Mauritius as a Foundation established and registered in Mauritius.

(k) Taxation of Foundations

Mauritius income tax law makes a distinction between a resident Foundation and a non-resident Foundation. A Foundation will be non-resident when the founder is a non-resident and all the beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident in Mauritius.

A non-resident Foundation is exempt from taxation in Mauritius. A resident Foundation will be taxable on its chargeable income at the rate of 15% per annum but can apply for a Category 1 Global Business License (GBL1). A Foundation with a GBL1 will be taxed at the maximum rate of 3% and will also be able to access benefits under Double Taxation Avoidance Agreements (DTAA) that Mauritius has entered with a number of jurisdictions paving the way for interesting tax planning opportunities.

Potential Uses of a Mauritius Foundation

Foundations have some of the attractions of a trust vehicle and can thus potentially be used for purposes that trusts are used as described above. However, compared to the trust which is a common-law concept, the Foundation will appeal to clients based in civil law territories where they are less familiar with the trust concept.

Because the Foundation is an independent legal person, assets may be directly held by a Foundation unlike a trust where the assets are held by the Trustee on trust. This means that foundations may be more appropriate to hold assets which are "wasting" or subject to volatility in value. In traditional trust structures, careful drafting of the trust instrument is often necessary where the purpose of the trust is to hold a single asset such as a business, or exotic assets such as an artwork, an airplane or a boat. Given the trustee's duty to diversify, act prudently, and in the best (financial) interests of the beneficiaries, trustees are often nervous about holding such assets. Foundations may become the preferred vehicle for such assets. It will be possible to establish a Foundation specifically to hold such an asset and the Council will not be subject to the same duties as trustees. The Council's duty will be to ensure the object of the Foundation (namely the holding of the asset) is achieved.

It is also a much more effective financial planning tool for those clients who want to maintain more personal control of the assets. Frequently trust

deeds will be drafted with an express reservation of powers in the hands of the settlor of the Trust (or a third party of his choice), the most common power to be reserved being that of investment. However, case-law has shown the danger of settlor reserved powers, often leading to sham arguments and other problems. Most importantly, the performance by a settlor of a reserved power does not disengage the trustee from its fiduciary duties. The attraction to using a Foundation as opposed to a trust where the power to direct investments is to be reserved is that the overriding duty to monitor the performance of the investment to which a trustee is subject is not one to which the Council of a Foundation will be subject.

Other Key Benefits

(a) Regulatory framework

The success of Mauritius as a centre for the provision of financial services depends upon the maintenance of its reputation of probity. Our small island prides itself in having a sufficiently robust regulatory framework within a business friendly environment. Mauritius fully supports international initiatives (FATF, Basel, IOSCO, IAIS) aimed at preventing the jurisdiction from being used for money laundering and terrorist financing. It is worth noting that Mauritius has never been blacklisted. The two regulators for the Financial Services Sector, namely the Financial Services Commission and the Bank of Mauritius are dedicated to the supervision of the bank and non-bank financial services sector.

(b) Investment Protection

Mauritius has signed a number of Investment Promotion and Protection Agreements (IPPAs) which inter alia, provide for free repatriation of investment capital and returns, guarantee against expropriation, provide for a most favored nation rule with respect to treatment of investors, and compensation for losses in case of war, armed conflict or riot and further provide arrangements for the settlement of disputes between investors and the contracting states.

(c) Regional involvement

Mauritius is a member of the major African regional organizations which provide preferential access to markets in the Africa region such as the African Union, Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the Indian Ocean Rim – Association for Regional Cooperation (IOR-ARC). Its membership in these regional organizations, and being a signatory to all the major African conventions, can make Mauritius the best regional financial service centre for private wealth management services.

(d) Mauritius, a reference in the region...

Mauritius is a worldwide reference for political stability in this side of the world with a presidential democracy modeled on the British parliamentary system with the highest court of appeal being the Privy Council of the United Kingdom. Mauritius also offers a diligent, educated, multilingual and experienced professional labor force. The literacy rate is currently at 86%. Apart from professionals who are trained abroad in renowned institutions, professional and specialized training are also available through its two state universities and private local institutions affiliated to foreign universities. Mauritius benefits from a low cost of operations and there are also a series of attractive fiscal incentives such as no tax on dividends, no withholding tax on interest, royalties and dividends, no estate duty, inheritance, wealth or gift taxes, no stamp duties, registration duties and levies.

Conclusion

Initiatives on the regulatory front, coupled with the measures and policies implemented by the government and continued innovation have contributed in making Mauritius the undisputed centre for private wealth management services in this part of the world.



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