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FISCAL & EXPATRIATE SERVICES

RECOGNITION OF TRUSTS IN PORTUGAL

For the first time, Portugal has formally recognised *Trusts* in mainstream legislation. *Trusts* are now defined as fiduciary structures and are now assessable for tax. Three forms of taxation may now be levied as defined in the new legislation: a flat 28% tax on income disbursed from a Trust; Capital Gains Tax when winding up a Trust; and Stamp Duty on gifts distributed from a Trust.

What is a fiduciary structure?

A fiduciary acts on behalf of another. There are many common examples of fiduciary roles in day-to-day life. A parent acts on behalf of a minor child. A guardian stands in for an incapacitated adult; an executor represents the intentions of a deceased person in settling an estate.

A *trust* is a device which creates a fiduciary relationship with respect to *assets*, typically separating the responsibility for management of the assets held in Trust from the beneficial ownership of those assets. In a Trust, the *Settlor* (the person who establishes the Trust) appoints *Trustees* (who administer the assets of the Trust according to the wishes of the Settlor) to the welfare and benefit of the *Beneficiaries* (those who receive the material benefit of the Trust).

Public Trust

A Public Trust represents the interests of a collective group. Typical groups using a *Trust* as an administrative instrument to meet defined requirements include:

Pension Trust is designed to manage assets to provide pension benefits to its members. Open pension trusts support at least one pension plan with no restriction on membership while closed pension funds support only pension plans that are limited to certain individuals. These are further sub-classified into Single Employer Pension Funds, Multi-employer Pension Funds, Related Member Pension Funds and Individual Pension Funds.

Charitable Trusts are a form dedicated to charitable goals. There are a variety of advantages to charitable trust status, including exception from most forms of tax and freedom for the trustees not found in most types of trusts. To be a valid charitable trust, the organisation must demonstrate both a charitable purpose and a public benefit. Applicable charitable purposes are normally divided into four categories: relief of poverty, promotion of education, religion and other types of trust recognised by the law, which includes trusts for the benefit of animals and a locality. There is also a requirement that the trust's purposes benefit the public or some section of the public, and not simply a group of private individuals.

Unit Trusts are a form of collective investment constituted under a trust deed and offer access to a wide range of securities. The underlying value of the assets is always directly represented by the total number of units issued multiplied by the unit price less the transaction or management fee charged and any other associated costs. Each fund has a specified investment objective to determine the management aims and limitations.

Private Trusts

Private Trusts are created to the benefit of one or more ascertainable beneficiaries. They are highly individualised in nature and receive different treatment than Public Trusts. These are the fiduciary structures that are being assessed under the new legislation.

The following comprise some of the purposes of Private Trusts:

Privacy: Trusts may be created purely for privacy. The terms of a will are public and the terms of a trust are not. In some families, this alone makes the use of trusts ideal.

Spendthrift protection: Trusts may be used to protect beneficiaries (for example, one's children) against their own inability to handle money. These are especially attractive for spendthrifts. Courts may generally recognize spendthrift clauses against trust beneficiaries and their creditors, but not against creditors of a settlor.

Wills and estate planning: Trusts frequently appear in wills. Conventional wills typically leave assets to the deceased's spouse (if any), and then to the children equally. A trust may come into existence until the contingency age of as minor is reached. The trustee will have powers to assist the beneficiaries during their minority.

Asset protection: Trusts may allow beneficiaries to protect assets from creditors. Tthe settlor may be in a position to benefit from the trust assets, without owning them, and therefore in theory protected from creditors. In addition, the trust may attempt to preserve anonymity with a completely unconnected name. Such strategies are ethically and legally controversial.

Tax planning: The tax consequences of doing anything using a trust may be better than the alternative are therefore frequently used for legal tax avoidance.

Co-ownership: Ownership of property by more than one person is facilitated by a trust. In particular, ownership of a matrimonial home is commonly effected by a trust with both partners as beneficiaries and one, or both, owning the legal title as trustee.

Discretionary Trusts

Discretionary Trusts are one of the most common forms of private trusts. The *Settlor* gives the *Trustees* full discretion to decide which (and when) beneficiaries are to receive either the income or the capital from the *Trust*. The *Settlor*'s intentions are expressed in a *Letter of Wishes*. The *Letter of Wishes* sets out the manner in which the *Settlor* wants the *Trustees* to exercise their powers and discretions.

However, this instrument is not binding on the *Trustees*. Any legal requirements must be contained in the trust instrument itself. A *Discretionary Trust* is unique in that the trustee has discretion on all particulars regarding the payment of income or capital to the beneficiaries. The distinction is important as it can affect the extent to which a *beneficiary* may be able to make demands upon the *trustee*.

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