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HELPING *SHARE* GROWTH



INCENTIVES AND
EMPLOYEE SHARE PLANS

Employee Trusts

Challenges & Opportunities for Trustees

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Overview

1. Developing Case Law
2. Scrutiny & Criticism of Offshore Financial Centres
3. Changing Roles & Responsibilities for Trustees
4. Opportunities for Trustees

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1. Developing Case Law

Developing Case Law

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➤ The Rangers Case

- *“This appeal concerns a tax avoidance scheme by which employers paid remuneration to their employees through an employees’ remuneration trust...”*
(Lord Hodge)

➤ *Landid Property & Others v HMRC*

- The Rangers Case reasoning applied to further EBT structures using sub-funds.
- Including artificial contingencies on vesting amounts (e.g. *requiring the death of both Prince William and the President of the USA*) will be disregarded by courts applying a realistic view of the facts.

Developing Case Law

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➤ The *Roadchef* Case

- EBT Trustees had breached their duties by benefitting beneficiaries of a second EBT rather than being solely concerned with the trust for which they were responsible.
- Demonstrates that trustees owe extensive duties, including acting at all times in the interests of the beneficiaries and avoiding conflicts of interests.
- Implies a requirement for independent decision-making and full disclosure of potential conflicts.

Developing Case Law

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- *Zhang Hong Li & Others v DBS Bank (Hong Kong) Ltd & Others* [2017]
 - A Jersey trust took investment advice from one of its settlors - an ‘astute and experienced investor’ - on over 500 transactions.
 - The global financial crisis hit, the value of the trust fund decreased substantially and the “astute and experienced investor” sued for recovery of investment losses.
 - Inter alia, the Trustee was liable for breach of trust and had failed to discharge its overarching supervisory duty.
 - Highlights the need for trustees to act independently and not allow their autonomy to be compromised when acting in the best interests of the beneficiaries of the trust.

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2. Scrutiny & Criticism of Offshore Financial Centres

Scrutiny & Criticism of Offshore Financial Centres

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- Movement towards boosting transparency.
- Set against the backdrop of Government ‘clampdowns’ on tax avoidance in light of the Panama and Paradise Papers.
- Government intends to “spearhead international efforts to improve tax transparency”.
- EU updates to the tax havens blacklist of non-cooperative jurisdictions (Bahamas, Saint Kitts and Nevis added; Bahrain, the Marshall Islands and Saint Lucia removed).

Scrutiny & Criticism of Offshore Financial Centres

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- Recent OECD publication of “Model Mandatory Disclosure for Common Reporting Standard Avoidance Arrangements and Opaque Offshore Structures”
- Trusts Registration Service
- Follower Notices
- Accelerated Payment Notices

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3. The Changing Role & Responsibilities of Trustees

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- Greater emphasis on trustee responsibility and independent decision-making.
- Greater emphasis on risk management of trust arrangements.
- Trustees are not expected to be tax experts but they should take account of the tax consequences of their action for beneficiaries and take appropriate advice.

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4. Opportunities for Trustees

Opportunities for Trustees

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- Employee-Ownership Trusts:
 - Business sells a majority stake (51%+) to an EOT to hold for the benefit of the employees as a whole.
 - Generous tax reliefs:
 - Sale = free from CGT
 - Payments from company to trust to fund the sale = tax free
 - Annual employee bonuses of up to £3,600 = free from income tax
 - Also possible to operate tax-advantaged share schemes
 - Trustee required to take an active role.
- Trusts for commercial rather than tax purposes.

Opportunities for Trustees

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- Focus on transparency reinforces the need for quality = opportunities for Trustees who deliver that quality.
- Demise of EMI (whether temporary or not) = potential increase in use of share acquisition rather than option plans (e.g. JSOPs).
- Trustees should be ready to respond to demand & consider how they will meet it.

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Questions?

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