



To trust or not to trust

The trust is a typical Anglo-Saxon concept that civil lawyers struggle with. Considering the origin of the trust and its effects, that is understandable. It is completely different from anything they know.

One story is that the first trusts were set up when English knights left their families for the crusades. They entrusted a close friend with their wife, children and properties. They literally handed over their assets trusting that their trustee would use them to look after the families. And what was a relationship of trust developed into a highly related legal concept. The trust assets are handed over to the trustee under the terms of a trust deed. That is a will or a contract in which the settlor tells the trustee how he wants him to manage the assets he puts into the trust for the benefit of the beneficiaries. These can be the settlor's family, complete strangers, the International Red Cross or the settlor himself.

This is only a brief and incomplete description, but it helps understand a complex legal relationship. Trusts can have many uses: to organise successions, to protect minors against sudden wealth, as a charity or a holding company, or simply to hold your possessions in a separate fund. Nowadays, trusts have become a commercial product. And trustees are usually trust companies set up by banks or professionals ... quite often on the Channel Islands.

Belgium has never been sure of how to deal with trusts. In a couple of cases, Belgian courts have accepted them as long as they did not infringe the fundamental rules of Belgian law. In practice, this meant that Belgium accepted that you could set up a trust, as long as your national law has a concept of trust. But the courts would never allow you to disinherit your children completely.

On 1 October Belgium will have a Private International Law Code. That is one law that contains all the rules for international and cross border legal situations. And for the first time this code will officially recognise the trust. That may help clarify a number of things, and even Belgians may now be able to set up trusts.

How are trusts taxed ? Nobody really knows because there are so many forms of trust. And because the trust is an alien concept, Belgians tend to look at it in black and white. And then they see two types of trust : the fixed interest trust and the discretionary trust.

In a fixed interest trust, the settlor just transfers his investments to the trustee to look after, while he appoints himself as the beneficiary. The trustee is really just an investment adviser or a bank manager, who follows the beneficiary's instructions.

On the other side of the spectrum, there is the irrevocable discretionary trust. The trustee receives the trust assets and is fully in charge. He decides how he will invest them, and whether and when he pay out something to the beneficiaries. This is more the traditional sort of trustee who has the full trust of the settlor.

The taxman has never said how he treats the trust. To determine how a trust is taxed, we need to look at similar situations and make assumptions. In the case of a fixed interest trust, the Belgian tax authorities would look through the trust and consider that the trusts are just transferred to the beneficiaries. With all the consequences for the beneficiaries.

On the other hand the taxman would consider a trustee under a discretionary trust because he has full powers. He would not ignore the trust in order to tax the beneficiaries. And because trust



companies are usually based in a tax haven, that is good news. As for the beneficiaries, they would not necessarily be taxed when they receive something from the trust. Between the trustee and them that would be nothing but a gift.

From a tax point of view, the irrevocable discretionary trust has many advantages. They can help avoid inheritance tax, income tax and gift tax. That appeals to settlors, but the idea of giving up all control over their assets is a leap of faith. That is why they try to keep some sort of control over the trust. They want to have their cake and eat it. They want both the tax benefits of the discretionary trust, but the control of the fixed interest trust. And these two do not really go together.

Marc Quaghebeur
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