

How Jersey shot itself in the foot:

an analysis of the implications of the
Trusts (Amendment No. 4) (Jersey) Law 2006

Richard Murphy BSc FCA

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Written by Richard Murphy BSc FCA for Tax Research LLP on behalf of the Association for Accountancy and Business Affairs and the Tax Justice Network

Tax Research LLP, The Old Orchard, Bexwell Road, Downham Market, Norfolk, PE38 9LJ
www.taxresearch.org.uk/blog/

Association for Accountancy and Business Affairs, PO Box 5874, Basildon, Essex, SS16 5FR
United Kingdom
www.aabaglobal.org

Tax Justice Network UK @ The New Economics Foundation, 3 Jonathan Street, London, SE11 5NH
United Kingdom
www.taxjustice.net

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The email that constitutes appendix 2 to this document was passed to Tax Research LLP by the Observer Newspaper. The press statement which constitutes appendix 3 to this document was intended to be in the public domain. The information that constitutes appendix 4 to this document was sent in an email to Tax Research LLP.

Executive Summary

This report has been written to show that Jersey has changed its trust laws knowing that this change increases the likelihood of those structures being used for tax evasion. The evidence used to support this suggestion is reproduced as appendices and comprises emails and statements by Jersey civil servants and tax officials, some approved by very senior Jersey politicians.

In the process of showing this to be the case an analysis of the new trust laws of Jersey is offered. That analysis reaches these conclusions:

1. Jersey trusts should no longer be considered as such in the UK and other countries with trust legislation similar to that in the UK. In English law, for example, they should now be considered to be bare trusts. These are trusts where the settlor of the trust is considered to have retained ownership and control of the assets in the trust and as such is taxable upon all income and gains arising from them during their lifetime;
2. This is the case because all Jersey trusts can now return both their income and capital to the settlor because the settlor has the power to make application to a Court to ask for this to happen and can provide evidence as to why it should take place and the trustees cannot object on behalf of the beneficiaries, not least because the settlor can now have the power to replace those trustees whenever they wish;
3. As a result any UK resident and domiciled person who has created a trust in Jersey will have to change the way they file their tax returns in the UK so that the income and gains of those Jersey trusts is now declared as their own. This is the case even if the trust they created said that it was irrevocable because all Jersey trusts are now revocable on application of the settlor, and Jersey has indicated that it wishes that this should be the case, meaning that its Courts are highly unlikely to object. This will almost certainly have similar unforeseen and unwelcome consequences for settlors in many other territories as well;
4. Because Jersey trusts are now mere nominee arrangements or bare trusts the EU Savings Tax Directive exemption for trusts is no longer available for any Jersey trust with an EU resident settlor and all the relevant income of such trusts is now subject to the provisions of that directive and will either have to be disclosed in the country in which the settlor now resides or be subject to tax withholding in Jersey;
5. The Jersey corporate 'Special Purpose Vehicle' market has depended upon the irrevocable nature of Jersey trusts. Since the report shows

that all Jersey trusts can now be revoked these Special Purpose Vehicles are no longer independent of the companies that promoted them and as such it seems that the debt that SPVs have securitised will now have to be shown on the balance sheets of their sponsoring companies, the precise outcome they sought to avoid.

There can be little doubt that the government of Jersey has not anticipated these consequences of the changes it has made to its trust laws. That is because when making the changes in its law it explicitly presumed that it could act in isolation from the rest of the world with regard to both trust law and tax, as is apparent from the drafting of that law and the emails and statements reproduced in this report. In doing so Jersey has forgotten a simple fact; it is a small island that seeks to attract financial services business from elsewhere. Its new laws might work in Jersey, but they do not work elsewhere. If the conclusions in this report are correct (and we are sure they are) the price Jersey is likely to pay for this error of judgement will be very high.

The purpose of this report

This report has been produced for a simple reason. I was asked by a journalist to explain why I think Jersey is ‘rotten to the core’ as I claimed following the publication of the mails and comments that form appendices 2 to 4 to this report. This report seeks to justify that claim. In so doing it shows how Jersey’s new trust laws, introduced in 2006 and which motivated that correspondence could in fact fundamentally undermine the financial services industry of that island. This report may not be as succinct as the journalist would have liked but I hope it is clear for a non-technical reader.

The argument runs through the following stages:

1. What a trust is;
2. What Jersey’s new trust laws say;
3. How Jersey expects the new laws to be abused;
4. What the consequence of that abuse is, and what the penalty for the perpetrator should be;
5. A consideration of whether Jersey knew this abuse was likely;
6. What the implications of these new laws might be for professional people preparing tax returns in the UK and elsewhere for those who have created these trusts, and what consequences should follow;
7. The implications of the new trust law for Jersey special purpose vehicles;
8. What the implications are for those professional people who act as trustees of trusts created under these new laws.

1. What a trust is

A trust is created when the following events occur:

1. A person (the settlor) gifts assets (e.g. cash, shares, land and buildings) to another person (the trustee) who does not, however have any right to enjoy that asset for their own benefit but who does instead manage the ownership of those assets in accordance with the irrevocable instructions given to them by the settlor, usually in writing (the trust deed);
2. The trustee holds the assets (the trust property) on behalf of one or more individuals or organisations (the beneficiaries). The trustee’s duty is to the beneficiaries, not the settlor;

3. The trustee pays the income earned from the trust property to those beneficiaries who are entitled to it either when it is earned (if they are absolutely entitled to it) or when they feel it appropriate (if the beneficiaries have a discretionary entitlement to it);
4. The trustees pass ownership of the trust assets to those eventually entitled to receive them when the conditions laid down in the trust deed are met (for example, when a person reaches a certain age or after the death of a person entitled to receive income).

In almost every circumstance the person creating a trust renounces any future entitlement they might have enjoyed to the trust property. If they do not then in almost all tax law they are deemed to remain the owner of the trust property and are taxed on all the income and gains it gives rise to. This is for obvious reason: they can in fact enjoy that income if they have not renounced it irrevocably and there is law in place that ensures that this remains the case.

There are therefore several distinct criteria that have to be met for a valid trust to be created:

1. There must be a settlor who gives up ownership of the trust property;
2. There must be a trustee who takes ownership of the trust property and then manages it in accordance with instructions received on behalf of the beneficiaries;
3. There must be beneficiaries who are neither the trustee, or if the trust is to have almost any effect for tax, the settlor;
4. So that the trustee is not a simple nominee for the beneficiary the interest in the trust property has to be split so that at least two people have different claims upon it e.g. one to the income during their lifetime and another to the asset on the death of the first. If this were not the case the trustee would either be 'bare trustee' for the sole beneficiary or, more simply, their nominee. The beneficiary would then have effective control of the asset at all times and would be taxable in full upon it since all entitlement to it would be theirs to enjoy.

This is a reasonable reflection of UK law. It was also the law of Jersey until 2006. Of course, exceptions can be found to all the points noted, but the generalities hold true in the vast majority of cases.

2. Jersey's new trust law.

Jersey's new tax laws, passed in April 2006 and still awaiting Royal Assent at the time of writing, fundamentally alter this arrangement. Most importantly for the purposes of this discussion, the settlor of a trust in Jersey can now reserve certain powers to themselves which they had previously to pass to the trustees, irrevocably. Under the new law settlors can now:

1. amend or revoke the trust;
2. appoint new trustees;
3. remove trustees;
4. appoint or remove an investment manager or investment adviser;
5. give directions to the trustee on the management of trust property;
6. give directions to the trustee for the distribution of trust property;
7. restrict the exercise by the trustee of some of their powers or discretions.

In a nutshell, as one Jersey law firm put it when promoting the advantages, as it saw it of these changes¹, these provisions allow the settlor of a trust to direct the trustee in the exercise of a range of powers. In fact, for all practical purposes they can instruct the trustees on any issue they desire because those who choose to ignore them can be dismissed.

The consequences are clear:

1. A trust that can be revoked is not a proper trust at all because the settlor can have the trust property back whenever they like. The arrangement is instead the appointment of a temporary nominee to take notional ownership of the assets for a period of time;
2. A trustee who has to act in accordance with the specific instructions of a settlor is not a trustee; once more they are a mere nominee as they have no powers of management of their own, which a proper trustee must have due to their legal ownership of the trust property;
3. A trustee who can be told how they must distribute the property when discretion as to distribution has been given in the trust deed is not a trustee because they do not have the power to exercise the function they have been asked to fulfil, not least because they can be dismissed if they refuse to comply;

¹ <http://www.voisinlaw.com/pg605.htm>

4. A trustee who has restricted powers is in fact not a trustee at all.

The conclusion is obvious. These new arrangements do not describe a proper trust because:

1. The settlor has not gifted the property to the trustees; they retain control of it at all times;
2. There is no trust because the trustees do not have legal possession of the property, which can be taken from them at any time;
3. There are no trustees because the persons bearing that title do not have the power to exercise the role of trustee;
4. Since the class of beneficiaries must include the settlor, who has the entitlement to reclaim the assets at any time, there is in fact no proper trust in existence.

What there is instead is a 'bare trust'. These are defined (albeit in Wikipedia², but quite competently in this case) as:

A bare trust (sometimes referred to as a simple trust) is one in which the beneficiary has a right to both income and capital and may call for both to be remitted into their own name, they are also entitled to take actual ownership and control of the trust property. Although there are trustees, they are only effectively nominees and must act according to the beneficiary's instructions.

This is a good description of the trust arrangement Jersey has now created. Detailed reasoning based on the new legislation as to why this is the case is presented as appendix 1 to this report.

The consequence is clear. A trust created under this legislation might be entirely legal in Jersey but it might be fraudulent to represent it to be a trust in a country, such as the UK, where the concept of a trust is as described in the first section of this document. The fraud is the representation that a proper trust exists when that is not in fact the case because no gift has been made, there are no trustees and the assets remain available for the benefit of the named settlor at all times whatever the trust deed says.

The result is that whilst Jersey created these laws, knowing as the attached correspondence proves, that they might be used for tax evasion what it did

² http://en.wikipedia.org/wiki/Bare_trust accessed 2-10-06

not seem to expect was that it might in consequence be undermining the legal status of all existing Jersey trusts when viewed from a place such as the UK, where the concept of a trust is now fundamentally different from that in use in Jersey. By failing to consider this point the Jersey government has effectively made all existing Jersey trusts into bare trusts, with massive potential consequences for all those who use these trusts as part of their financial planning. By promoting trusts suitable for use for tax evasion Jersey might have crossed a ‘tipping point’; its trusts may now not be suitable for tax planning at all.

3. How Jersey expects its new trust laws to be abused

There can be no doubt that Jersey expects its new trust laws to be used for tax evasion (a practice conveniently called avoidance in Jersey because most trusts have no tax liability there and as such cannot evade tax, there being none due in Jersey). In an email dated 14 September John Harris, Director of International Finance for the States of Jersey, said:

I am very concerned by the apparent retrospective attack - inspired it seems by the AG - on a major feature of the recent trust law change on the ground that it ostensibly facilitates greater tax avoidance.

The AG in question is the Attorney General of Jersey, its senior law officer and the person most likely to know whether tax avoidance using this arrangement is likely or not. The major feature the Attorney General attacked was the reservation of powers by a settlor as detailed above.

John Harris wrote a disingenuous argument as to why this could not be true. But no one else in the discussion agreed that he was right. Paul de Gruchy, the lawyer and civil servant who reports to the Chief Minister of Jersey and who was responsible for the changes in Jersey’s trust law said in a mail on the same day:

I imagine that a large number of wealthy people all over the world (including Jersey) place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled-up income tax free. If 0/10 is implemented with look-through provisions, for example, I would expect many wealthy people who might own a private Jersey investment company to simply move the assets to a company in another jurisdiction, place the shares of that company in a trust, and let the assets roll up.

He explained that the purpose of the new legislation was:

The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out. Currently, it is common for assets such as shares in a family company to be placed in trust, but for the settlor to wish to retain control over how the company is operated. Or an investment portfolio may be placed in trust, but the settlor may wish to manage the investments.

Extraordinarily he recognised that under pre-2006 Jersey trust law (which as noted above, broadly matched that of the UK):

if the discretion of the trustee is fettered [to give control for the settlor] there is a risk that the trust could subsequently be attacked as a sham. For an international client, these are reasons to not use a Jersey trust.

Despite appreciating this he assisted the drafting of legislation that, instead of respecting the norms of trust law did instead seek to legitimise the sham he described by effectively reducing the role of the trustee to one of mere nominee because all their powers have effectively been removed in Jersey law. The consequence is obvious; whilst Jersey trusts that reserve powers for the settlor are no longer a sham under Jersey law for the purposes of most other states all Jersey trusts have become shams unless they are declared to be the bare trusts that they actually are.

Almost amusingly it seems that Jersey anticipated the conflict between its laws and those of other states. It did so in Section 9A of the new law which says that in determining the law of trusts in Jersey the law of any other country (and quite specifically one can assume in this case the UK, on whose laws Jersey's are usually modelled and with which this new law is in fundamental conflict) must be ignored. That of course may work in Jersey, but as is noted in this report, it certainly will not help the tax payer who is resident elsewhere.

It is clear that the government of Jersey knew that this new provision would be abused. For example, Malcolm Campbell, its head of taxation wrote on the same day:

on the face of it, if the settlor has a new power to instruct the trustees of a trust he has settled then, is it not possible for a Jersey resident to settle assets / property in such a Jersey trust then appoint, say, Guernsey resident trustees, thereby achieving a 'no tax' situation in both jurisdictions and, after several years, he - the settlor - becomes non resident in Jersey and then instructs the Guernsey trustees as he wishes re the disposition of the assets in the trust, ie, he gets the assets and income diverted for his own use?

The entire email correspondence was about the need to prevent this happening in Jersey. Jersey knows it cannot afford such abuse. And yet, as

Paul de Gruchy has made clear, the legislation is designed to appeal to the international client. He wrote:

As Jersey is squarely pitching itself at the expert/sophisticated/ultra-high net worth end of the market, we need settlor reserved powers in order to offer an attractive product to international clients.

Despite which, Malcolm Campbell in his statement to the press on this issue said:

I am now content that I will have ... powers to attack any tax avoidance of any sort arising on the domestic tax front and consider that these powers mirror those found as a matter of practice generally in most countries worldwide. It is a matter for other jurisdictions world-wide to take powers to themselves in their own domestic tax laws if they feel that their citizens are avoiding or evading their own domestic taxes.

In other words, he believed he could stop the abuse of the new law domestically but is quite indifferent to its abuse internationally. He went on to say:

For international clients using Jersey trusts, the introduction of clauses in the Trusts (Jersey) Law confirming the efficacy of “settlor reserved powers” simplify codify what many practitioners believe to be the current position. There is nothing novel in the proposed changes (n)or do they do anything to make tax avoidance or evasion any more likely than would be the case under the present statute - as a proper reading of the full e-mail exchanges will make clear.

This statement is disingenuous. As Paul de Gruchy makes clear in the mails Malcolm Campbell refers to, if powers of the type now planned were included in existing trust deeds those trusts would be shams. As such the change is novel; it changes the law to ensure that this is not the case in Jersey. And the fact that it legitimises existing common practice amongst the Jersey financial services industry, its accountants and lawyers, some of whom, he seems to think, have commonly allowed the use of sham trusts to date cannot be used as a defence to the claim that they make tax avoidance or evasion more or less likely; the fact that the current law has not stopped tax evasion does not mean that giving the practice a veneer of respectability makes that evasion more acceptable.

The issue of real importance though is that making such a practice legitimate in Jersey does not stop the practice being tax evasion elsewhere. Tax evasion in this context has to be assessed in the eyes of the territory in which the international client lives (since for these people there is no tax due in Jersey and as such evasion cannot take place there). It is hard to see

how the people engaged in this correspondence did not know that. As such these Jersey officials must know that its international clients will use the new law for exactly the same purpose as that which they fear it will be used for by Jersey residents. In other words, people will put assets into structures which are claimed to be trusts in Jersey and will declare that the assets in question are no longer their property and that they have no interest in them. As such they will claim they are not taxable upon the income and gains derived from the trust assets under the law of the country in which they will continue to live. But, when it is convenient for them to do so they will swap country of residence (a relatively easy thing for the *'ultra-high net worth end of the market'* to do when they are almost bound to have homes in several countries) and then reclaim the assets that have been left in the Jersey trust as their own, and will not then be taxed on any of the income and gains made in the trust (unless tax authorities around the world take action to reappraise the status of all Jersey trusts) because:

1. Jersey will not have taxed the trust because it will have been set up for non-resident people;
2. The country in which the settlor will have been resident whilst the trust has been in operation will not tax the trust income and gains if they believe the statement the settlor will have made that the assets are not his and he has no right to them.
3. No one else will probably have been given a right to that income as most Jersey trusts are discretionary, as a result of which the income will not have been paid to anyone but will have simply been left to accumulate by the trustees. As a result no one else will be taxed on the income either;
4. The country to which the settlor moves cannot tax the income because it will have arisen before the settlor became resident there;
5. The country the settlor will have left cannot tax the income when it is paid back to the settlor because that settlor will have ceased to be resident and therefore taxable there before the income is paid back to them.

The result is that the trust income and gains will fall out of tax unless, as we now hope, the status of all Jersey trusts is reviewed and they are now all considered to be bare trusts by the tax regimes who will otherwise lose as a result of this planned abuse, so putting an end to it by allowing those tax authorities to tax the settlor on the income and the gains of the trust from now on.

4. The consequence of the abuse

The consequence of this action is that (unless the status of all Jersey trusts is reviewed by taxation authorities around the world) a fraud will have been committed. The person claiming to have settled a trust in Jersey but who subsequently reclaims that asset having in the meantime declared they have no interest in it or any right to receive the income or gains arising from it will have provided a fraudulent misrepresentation of their intent.

This would be of limited consequence if they did not intend to benefit from that fraudulent misrepresentation but this is exceptionally unlikely to be the case. No one pays to establish and run trusts in Jersey (whether real or sham) unless they hope to obtain an advantage from doing so. In this case the advantage is that they do not pay tax in their country of residence on the income and gains derived from the trust property. In other words, they obtain a tax saving from having created the trust with regard to which they will have made a fraudulent misrepresentation. Obtaining a financial advantage by deception is theft. That theft is tax evasion. It is a criminal offence in the vast majority of countries in the world. It is this crime which the new Jersey trust laws are designed to facilitate.

The person using a trust for this purpose is likely to be committing a criminal offence in their country of residence and may be prosecuted for it.

5. Did Jersey know this abuse was likely?

There seems no doubt that officials in Jersey knew of this possibility when drafting the new law. The comments quoted above from Paul de Gruchy and Malcolm Campbell show that they appreciate the issue, and are aware of the current Jersey practice which they were trying to facilitate.

It is notable that the Attorney General raised his comments on the law retrospectively according to John Harris. Perhaps he was not consulted on the consequences of it. His opinion does, however seem clear. He is sure that the new law can be used for the purposes of tax abuse.

The only person who seems to dispute this is John Harris. He has the job of marketing Jersey overseas. In the circumstances his comments appear to be a sales pitch, not reasoned comments.

The same is true of the comments made by Malcolm Campbell to the press. In that paper he said:

The intention behind the changes is to clarify and formally codify the responsibilities and obligations of the parties to the trust. We believe that a trust should be a transparent vehicle, with the declaration of trust setting out unambiguously the extent of the powers of both the settlor and trustee. The effect of the proposed

changes will be to enhance transparency and accountability, something that can only be of benefit to those who establish trusts; those who administer them and, indeed, those who seek to challenge them. In actual effect, they will limit the possibility of sham trusts rather than increase it and enhance rather than reduce transparency of the overall trust settlement in the case of subsequent disputes between the parties.

It is curious that he referred to 'sham trusts'. Paul de Gruchy made clear in his comments that existing trusts in Jersey appear to be dangerously close to having that status. It is true that under Jersey law this ambiguity has been removed by the 2006 law. The sham has been legitimised. But, that is only true of Jersey. It is not true of elsewhere. Jersey might now say black is white, but everywhere else it remains black; a fact they seem to have ignored.

And the statement made by Malcolm Campbell is disingenuous. The reasons are:

1. There is no register of trusts in Jersey. No one knows how many there are, for example;
2. There is no requirement for a trust in Jersey to publish its trust deed, to anyone;
3. The duty of a trustee in Jersey is to conceal the identity of the settlor, the trust deed and the actions of the trust. This is implicit in the professional relationship of client confidentiality, which is not in any way over-ridden by statute in Jersey with regard to trusts. This duty is reinforced by the law of Jersey, as is noted in section 6, below;
4. No trust has to file accounts in Jersey, and if the trust is created for a non-resident person they do not have to submit tax returns.

To therefore suggest that what Jersey is doing is to 'enhance transparency and accountability' is misleading: there is no concept of either transparency or accountability inherent in Jersey trusts or the law and practice of them and as such enhancement is not possible. Doubling zero disclosure remains zero disclosure. And this is exactly what the law intends should be the case: Article 25 of the Trusts (Jersey) Law 1984 (which is unchanged by the new law) says:

Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which -

(a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based; or

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust,

unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust [or the enforcer in relation to any non-charitable purposes of the trust].

To talk about transparency and accountability when this clause shows that secrecy is legitimised by Jersey law is absurd. And given that opaqueness and impregnability are the objectives of Jersey trusts all parties to this correspondence must know that just as this new law enhances the opportunity for abuse in Jersey so it follows that it must increase the chance for abuse elsewhere as well, an abuse which those other countries have little or no chance of tackling directly precisely because Jersey's law is designed to make sure that the perpetrators of tax evasion are beyond reach.

It is difficult to believe that this was not known to Jersey when the law was passed given the comments that have been made. This is why I believe that the comment that 'Jersey is rotten to the core' is justified.

6. The implications of these new trust laws

It is one thing to note that Jersey deliberately created this opportunity for abuse. It is unlikely that those who done so will be called to account for their actions.

It is also interesting, but maybe not helpful, to note that those using the new trust law to evade tax might not be prosecuted for doing so; as is noted above the reality is that this may be difficult unless tax authorities around the world rapidly reappraise the status they give to Jersey trusts as settlors may otherwise have ceased to be resident in the country in which the evasion took place by the time that the evasion is discovered.

It would, however, be surprising if this precluded an attack on the evasion that was occurring and it would seem that there are several ways in which this attack could be mounted. One way in which this could happen would be for tax authorities outside Jersey to simply now assume that all Jersey trusts are bare trusts. Appendix 1 to this report shows that this would be justified because all Jersey trusts are now revocable. They would then cease to have any taxation effect in most cases, so entirely eliminating their usefulness for most existing users of them. Settlers would be taxed on the incomes and gains of those trusts as if they had never been created.

There is another alternative. The assumption underpinning this option is simple. Jersey trusts are not usually created for the benefit of Jersey resident people; indeed, Jersey's anti-avoidance tax legislation does now, and will increasingly in the future make it hard for them to benefit from such a structure. Jersey trusts are designed to be used by 'international clients'. Some of those international clients will use a trust without ever advising their country of residence of the fact. Almost invariably that will be an act of tax evasion and it is to be hoped that professional people are not party to that.

There will, however, be many occasions when the settlor will have reason to disclose the existence of the trust to the tax authorities in the country in which they are resident. In that case it is likely that a professional person (be it a lawyer or accountant) will be involved in preparing the settlors' tax return. In that case the accountant or lawyer will have to think what the new trust legislation means.

It is important to stress that no comment here can be emphatic; Jersey is but one of more than 200 tax administrations in the world, each with its own law. However, many assume that trusts (when they recognise their existence) are modelled on UK law, which as is noted above is now very different from Jersey law; so different in fact that a Jersey trust will in future bear almost no relationship to a UK trust. This is important. For example, when a UK accountant prepares a tax return for a UK resident (and, possibly domiciled) taxpayer they rely on the statement that the trust precludes the settlor from benefit from the trust when preparing that return. If the settlor can secure a benefit from the trust then they remain taxable in full upon all income and gains arising within it. So, the exclusion of income from the return requires this statement to be both true, and most importantly, irrevocable.

But this statement is no longer the case. The statement is not true because:

1. A Jersey trust is now revocable, in which case the settlor can reclaim all the trust property, including accumulated income and gains at any time, meaning that no settlor can now say they do not have an interest in the trust; Jersey statute has given them that interest;

2. Even if the trust deed says the trust is irrevocable that is not true; statute says that the trust may now be amended, and in that case any trust is potentially revocable;
3. If the trust deed can be amended by the settlor, as statute allows, the fact that the trust deed precludes the settlor from benefit is meaningless, this can be amended at any time so that they can enjoy a benefit;
4. No one can rely on the trustees to stop such an act on behalf of the beneficiaries; the trustees can be sacked at the whim of the settlor: the beneficiaries no longer enjoy that protection.

How then can any UK accountant now complete a tax return for a person who has settled a Jersey trust without including all that trusts income and gains for the year on the settlors tax return? How too could any accountant do that in any territory in the world where the completion of the tax return relies upon that same assertion? They cannot honestly do so, whatever their client says.

The reason is simple: if the client changes their mind (and such things are known to happen) the statement is no longer true. The simple possibility of this means that any tax return prepared on the basis that the trust assets have been disposed of by the settlor irrevocably is wrong. That irrevocability can be revoked: in other words, it is meaningless. The fact that they might never revoke does not matter, the mere possibility is enough.

Because you cannot exclude the possibility that the settlor will benefit under the new Jersey trust laws because the law says that the trust may be revoked or amended to favour the settlor, any Jersey trust can only be considered a bare trust in UK law now , meaning whilst the settlor is alive they should be taxed on all its income and gains.

In this case the accountant or lawyer preparing the tax return must require that a Jersey trust be accounted for in this way to the UK (and other) tax authorities now. To allow anything else puts the accountant or lawyer at risk of being a party to tax evasion, a situation no professional person should seek. This may now prevent the further use of Jersey trusts, and one purpose of this paper is to warn professional advisers in the UK and elsewhere of the risk they take in preparing the tax returns of the settlors of Jersey trusts if they do not take this issue into account when doing so.

7. The implication for ‘special purpose vehicles’

There is another odd twist to this. There is in Jersey another part of the financial services sector that is critically dependent upon Jersey trust law

for its success. This is the ‘special purpose vehicle’ (SPV) market. This market offers a variety of products but in almost all cases the SPV does not wish to be associated with the company that promotes it. That is because in very many cases it is repackaging the debt of the company promoting it so that debt is moved off that company’s balance sheet, so enhancing the appearance of its accounts. To ensure that there is legal separation of control between the promoting company and the SPV the promoter ensures that ownership of the SPV is by a Jersey resident charitable trust, which will be tax free under Jersey law.

This arrangement has worked to date (although it is riddled with incongruities which only the absurdities of Jersey law can resolve) but will almost certainly fail in the future. The reason is simple. There can be neither certainty that a trust has been created in the future because it will be possible at any time for that Jersey trust to be revoked. And there will be no guarantee that a trust will be charitable, because the beneficiaries may be changed, so that tax free status could not be guaranteed.

Even if Jersey is willing to overlook these anomalies (and no doubt it will) it is by no means clear that anyone else will. According to evidence submitted to the States of Jersey shadow Scrutiny Committee that I advised in 2005 such SPVs had been created for the following companies, at least, for the purposes noted:

- (a) Barclays Bank - credit card securitisation.
- (b) Lloyds TSB - commercial paper conduit (securitisation).
- (c) Capital One Bank - credit card securitisation.
- (d) DZ Bank - all manner of capital market activity - securitisation, synthetic securitisation, capital raising etc.
- (e) Commerzbank - commercial paper conduit (securitisation).
- (f) HSBC - securitisation.
- (g) Bank of America - securitisation.

One has to ask why the auditors of these companies should now accept that the SPVs in question are indeed independent and therefore off balance sheet when under Jersey trust law the trust deeds that make them so are revocable? In that case, who will ever put an SPV in Jersey again?

8. The implications for Jersey trustees

Numerous professional people in Jersey act as trustees. The activity underpins the Jersey financial services sector. Without trusts Jersey has little to offer.

No doubt many of these people will, as the preamble to the 2006 law says is expected, warmly welcome the changes that the new law introduces. Most will also, no doubt, expect that it will have little or no impact upon their work. After all, as John Harris said in his mail of 14 September:

The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out.

Of course, as he notes subsequently:

if the discretion of the trustee is fettered [at present], there is a risk that the trust could subsequently be attacked as a sham.

In other words, existing common practice is of doubtful legality, but that has clearly not stopped trustees accepting fettered powers to date.

Now, the new law does rather boldly state that the only law which is now considered relevant with regard to Jersey trusts when they are to be subject to legal opinion is the law of Jersey, and no doubt this provides considerable comfort to Jersey lawyers and accountants who are acting as trustees. But it may not provide such comfort to the international clients John Harris is seeking to attract from amongst the ‘*expert/sophisticated/ultra-high net worth end of the market*’ because they will, of course, be subject to the laws of their own states.

As already noted though, under those laws, where trusts are recognised, Jersey trusts are now likely to be seen as ‘bare trusts’. But this will give a real problem to Jersey trustees. Perhaps the best illustration of this comes when considering the consequence of Jersey trusts having bare trust status for the purposes of the EU Savings Tax Directive. As Wikipedia³ notes with regard to this directive:

The EU withholding tax is levied only on individuals and not on companies, discretionary trusts, foundations, stiftungs, anstalts, investment funds, etc., except in very special circumstances, e.g. a "bare trust".

Which means that the trustees of all Jersey trusts where the settlor comes from within the EU will now have to declare all interest and other declarable income of the trust as being subject to the EU Savings Tax Directive and as such declaration of this income will have to be made by the settlor if EU resident or tax withholding will have to take place. There appears no other legal option since the trustees are only nominees.

This is just one issue which the new law gives rise to for Jersey trustees. But what is clear is that whilst within Jersey the position of these trustees might have been eased, they have not been anywhere else and technical, taxation

³ http://en.wikipedia.org/wiki/European_Union_withholding_tax accessed 2-10-06

and (perhaps as importantly) ethical issues arise elsewhere which are of significance.

The doubts that these issues raise will almost certainly lead to the very clients that Jersey has sought to attract thinking that another jurisdiction which has proper trust law, run in accordance with normally accepted international standards and which might stand up to the scrutiny of other territories might be a better place to put their assets. As a result it would appear that Jersey has indeed shot itself in the foot by changing its trust laws to legitimise its slack trust management practice. In doing so it has shown itself to think itself beyond the laws of the world, not least by explicitly stating that those laws do not apply to its trusts. But they do, and they will, and Jersey is likely to pay a high price for this error of judgement.

Conclusions

Please see the executive summary.

Policy recommendations

Some clear policy implications arise as a result of the findings in this report:

1. Governments and tax authorities around the world need to reconsider the status they grant to Jersey trusts, and from now on should tax them as bare trusts;
2. The European Union should make clear that the EU Savings Tax Directive now applies to all relevant property held in Jersey trusts;
3. Auditors worldwide need to reappraise the status of ‘orphan’ special purpose vehicles in Jersey used to securitise the off balance sheet debts of their client companies and should require that this debt now be brought back onto the balance sheet;
4. Professional institutes of accountants and lawyers need to issue urgent guidance to their members acting outside Jersey for the settlors of Jersey trusts to ensure that they do not become unwitting parties to tax evasion;
5. Those same professional institutes may need to advise their members in Jersey to act with care so that they do not misrepresent the true status of the activity they are pursuing when holding office as a trustee of a Jersey trust. They are now simple bare trustees as far as the rest of the world is concerned, whatever Jersey law might say;
6. Those who use Jersey for financial planning purposes might wish to reconsider that choice. What they should not do is relocate their

activities to either Delaware or New Zealand, which Jersey claims has trust arrangements similar to those it is now offering, as they are as likely to be unacceptable.

Appendix 1 - The legal basis for forming the opinion that Jersey trusts are always revocable

Jersey clearly intends that new trusts formed after the passing of its new trust laws should be capable of being revoked. The law makes this clear. Those responsible for drafting the legislation make clear that this was their intent in the email correspondence reproduced in Appendix 2 to this report.

This report does, however, note that the power of revocation goes further than that. This report argues that even if a new trust says it is irrevocable that statement cannot be relied upon and it is also argued that all existing trusts are now revocable even though that would not have been the case when they were created and this is so even if their trust deeds include statements to the contrary. The reasoning that supports these conclusions is included in this appendix. We are confident that we are right for one simple reason. It is clear that the power to revoke is the outcome that those who drafted the legislation desired.

The new reserved powers for settlors are included in the new section 9a of the Trusts (Jersey) Law 1984 inserted by the new 2006 legislation. In this context it is important to note that the new section 9a says:

- (1) *The reservation or grant by a settlor of a trust of -*
 - (a) *any beneficial interest in the trust property; or*
 - (b) *any of the powers mentioned in paragraph (2), shall not affect the validity of the trust nor delay the trust taking effect.*
- (2) *The powers are -*
 - (a) *to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it;*
 - (b) *to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application;*
 - (c) *to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;*
 - (d) *to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;*
 - (e) *to appoint or remove any trustee, enforcer, protector or beneficiary;*
 - (f) *to appoint or remove an investment manager or investment adviser;*
 - (g) *to change the proper law of the trust;*
 - (h) *to restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with*

- the consent of the settlor or any other person specified in the terms of the trust.*
- (3) *Where a power mentioned in paragraph (2) has been reserved or granted by the settlor, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust.*
 - (4) *The States may make Regulations amending paragraph (2).*

It could be argued that this section does not apply to existing trusts because these powers could not have been reserved when existing trusts were written because such powers were illegal before the amendment to the law was made in 2006. This, however, is not true. First of all note that the law that is being amended in 2006 is the general 1984 trust law of Jersey, under which those trusts were written, meaning that it does now apply to them. And secondly note that under the 1984 law as it will now be amended the following can be argued:

1. Article 33 says:

- (1) *The terms of a trust may be varied in any manner provided by its terms.*
- (2) *This Article is in addition to Article 43 (which provides for the variation of the terms of a Jersey trust by the court).*

In other words, all trusts can be amended either if this is permitted by the trust deed or with permission of a court in Jersey.

2. Even if the trust deed would not allow variation under Article 33 to let the settlor amend the terms of the trust Article 43 says:

Variation of terms of a Jersey trust by the court and approval of particular transactions

- (1) *Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of -*
 - (a) *a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust; or*
 - (b) *any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; or*
 - (c) *any person unborn; or*

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined, any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.

(2) The court shall not approve an arrangement on behalf of any person coming within sub-paragraph (a), (b) or (c) of paragraph (1) unless the carrying out thereof appears to be for the benefit of that person.

(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law the court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the court thinks fit and may direct in what manner and from what property any money authorised to be expended and the costs of any transaction are to be paid or borne.

(4) An application to the court under this Article may be made by any person referred to in paragraph (3) of Article 47.

Under section 47 (1)(d) the trust may be revoked irrespective of the interests of the beneficiaries.

3. In case of doubt as to the settlor's ability to apply for such a change, paragraph (3) of Article 47 says:

(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee [, the enforcer] or a beneficiary or, with leave of the court, by any other person.

The settlor could, of course, be that 'any other person' but given that the trustees will be in their pay it is unlikely that they would need to go this far; no doubt the trustees would make the application for them.

4. And finally, it is also appropriate to note that the 2006 amendment adds the following new clause 47A:

Trusts for charitable or non-charitable purposes

(1) *Where trust property is held for a charitable or non-charitable purpose and any of the circumstances mentioned in paragraph (2) apply, the court may, on the application of a trustee or the Attorney General, declare that the property or the remainder of the property, as the case may be, shall be held for such other charitable or non-charitable purpose, as the case may be, as the court considers to be consistent with the original intention of the settlor.*

(2) *The circumstances are that -*

(a) *the purpose has, as far as is reasonably possible, been fulfilled, has ceased to exist or is no longer applicable;*

(b) *the purpose cannot be carried out having regard to the directions given by the settlor or the spirit of the gift;*

(c) *the purpose provides a use for only part of the trust property;*

(d) *the property, and any other property applicable for a similar purpose, can more effectively be applied to a common purpose, regard being had to the spirit of the gift;*

(e) *the purpose was laid down by reference to an area that is no longer a unit for that purpose, or by reference to a class of persons or to an area that is no longer appropriate, regard being had to the spirit of the gift or the practicality of administering the gift;*

(f) *the purpose has been adequately provided for by other means;*

(g) *in the case of a trust for charitable purposes, the purpose has ceased for what ever reason to be charitable; or*

(h) *the purpose has ceased in any other way to provide a suitable and effective method of using the property, regard being had to the spirit of the gift.*

(3) *Where trust property is held for a charitable or non-charitable purpose the court may, on the application of a trustee or the Attorney General, approve any arrangement that varies or revokes the purposes of the trust or enlarges or modifies the powers of management or administration of the trustees, if it is satisfied that the arrangement -*

(a) *is suitable and expedient; and*

(b) *is consistent with the original intention of the settlor and the spirit of the gift.*

(4) *The court shall not approve an arrangement under paragraph (3) unless it is satisfied that any person with a*

material interest in the trust has had an opportunity to be heard.”

Under article 47A (3)(a) the trust can be revoked if it is expedient to do so.

Taking all these factors into account it is clear that:

1. Article 33 does not stop a trust deed being amended;
2. Article 43 (4) in combination with Article 47(3) clearly allows the Settlor to make application for an amendment to the provisions of the trust, including insertion of the powers afforded by the new Article 9A;
3. Article 47A applies to all existing trusts and allows any trustee to apply to the Court to allow modification of the powers of the trustees to include the powers in Article 9A or to revoke the trust under the powers of that section.

Of course, it has to be asked if such an application is likely to succeed and there are several reasons for suggesting this to be very likely. They are:

1. As John Harris has made clear, it is the intention of Jersey to provide such powers, including of revocation, to attract international clients; it is unlikely that its courts are going to stand in the way of that policy decision;
2. The Act makes clear that these powers are acceptable in Jersey, irrespective of law elsewhere (which shall now be ignored for these purposes);
3. If the original trust deed was written both very broadly as to the class of persons who might benefit from the trust, and at the same time very vaguely as to how they might benefit (and this is almost always the case) almost any arrangement that suggested a specific person known to the settlor (including themselves) could benefit is almost bound to be '*consistent with the original intention of the settlor and the spirit of the gift*' (Article 47A (3) (b)) if the settlor says it is and as such any such arrangement should therefore be approved by the Court.

It is therefore impossible to argue that revocation cannot take place, irrespective of whether it will, or not. As such by definition all Jersey trusts are now revocable whether the trust deed provides that power or not and all the consequences that follow noted in this report must arise.

Appendix 2 - the email correspondence on which this report is based

> -----Original Message-----

> From: Malcolm Campbell
> Sent: 14 September 2006 10:36
> To: Paul De Gruchy; John Harris; Terry Le Sueur
> Cc: Julian Morris; Ian Black
> Subject: RE: 0 / 10 law drafting
> Sensitivity: Confidential

>

> Paul,

>

> Thanks.....you have confirmed my fears! and I am concerned about your view in para. 4 re 0 / 10 implementation.....as it need not necessarily be wealthy people who might do this but also the middle classes.....because if this does happen there could be significant tax leakage.

>

> Terry / John - I think we need to talk about this in case it is brought up by others, perhaps some States Members, so that we ensure we have a proper response....and which 'tick the box' option, or whatever, we need to try and counteract.

>

> Regards,

>

> Malcolm

>

> Malcolm Campbell BA., FTII., FCMI
> Comptroller of Income Tax
> Tel : 00 44 0 1534 440307
> Fax : 00 44 0 1534 789142
> Mobile : 07797 752702
> E-mail : m.campbell1@gov.je
> Website : www.gov.je/taxmoney

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> -----Original Message-----

> From: Paul De Gruchy
> Sent: 14 September 2006 10:20
> To: Malcolm Campbell; John Harris; Terry Le Sueur
> Cc: Julian Morris; Ian Black
> Subject: RE: 0 / 10 law drafting
> Sensitivity: Confidential

>

> Malcolm,

>

> The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out. Currently, it is common for assets such as shares in a family company to be placed in trust, but for the settlor to wish to retain control over how the company is operated. Or an investment portfolio may be placed in trust, but the settlor may wish to manage the investments. In such circumstances, the settlor has two choices.

>

> The first is to use a Jersey trust and through very careful drafting, define precisely the limitations of the trustees' responsibilities. The power of the trustees to replace a director or investment advisor could be limited, for example. The problem with this is that it

requires careful drafting and it is uncertain whether the trustee has an overriding duty to protect trust assets. In other words, if the company or assets start performing badly, is the trustee bound to apply to court for an Order to preserve trust assets? Also, if the discretion of the trustee is fettered, there is a risk that the trust could subsequently be attacked as a sham. For an international client, these are reasons to not use a Jersey trust.

>

> The second alternative is to simply establish a trust in one of the many jurisdictions that allow a settlor to retain stated powers. To use your example, if a Jersey person wishes to retain significant control of his assets, he could simply place them in a Cayman or BVI law governed trust. This need not have Cayman or BVI trustees - a Guernsey trustee could easily do the job.

>

> I imagine that a large number of wealthy people all over the world (including Jersey) do just the thing you fear in your e-mail - place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled-up income tax free. If 0/10 is implemented with look-through provisions, for example, I would expect many wealthy people who might own a private Jersey investment company to simply move the assets to a company in another jurisdiction, place the shares of that company in a trust, and let the assets roll up.

>

> So practically, the changes will not make it any easier to avoid tax. What they will do is allow Jersey to compete more effectively for international work, where wealthy families will often wish to place assets in a trust structure and yet retain certain control over the management of the trust assets. The driving reason for doing this will not usually be tax planning: a settlor may live in a jurisdiction that is politically unstable, or where there are forced heirship restrictions, or may simply wish to place his or her assets in a vehicle that would benefit his or her family in the event of any subsequent personal bankruptcy. Most often, it will be because the settlor is self-made and thinks he can manage his assets better than any professional.

>

> The key issue remains, as always, that while it is easy to tax people when they spend, and fairly straightforward to tax people on what they earn, any attempt to tax people on unearned income or capital gains is likely to lead to those who can afford it seeking expert advice on how to structure their wealth in order to minimise their tax liability. The tax burden, as with inheritance tax in the UK, will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time: if you have £10million you can afford to lock £9m away for a rainy day, whereas if you have £1m you can't.

>

> As Jersey is squarely pitching itself at the expert/sophisticated/ultra-high net worth end of the market, we need settlor reserved powers in order to offer an attractive product to international clients. However, other jurisdictions have been offering this product for years and I imagine that any wealthy Jersey resident minded to do so has been taking advantage of these products for years.

>

> Hope that assists.

>

> Paul

>

>

>

> -----Original Message-----

> From: Malcolm Campbell
> Sent: 14 September 2006 09:29
> To: John Harris; Terry Le Sueur
> Cc: Julian Morris; Ian Black; Paul De Gruchy
> Subject: RE: 0 / 10 law drafting

> Sensitivity: Confidential

>

> John,

>

> On the first two points I think we need to meet to formulate drafting instructions and show them to Terry to make sure he is happy with them, and, if so, we can then send to the Law Draftsman.....the tick the box regime should be accepted by all and sundry but I am very aware how sensitive this matter is for some professionals so we have to be considered and careful in what we propose.

>

> On the Trusts Law change I would not want the AG to be blamed for this at all.....he just brought it to my attention and on the face of it, if the settlor has a new power to instruct the trustees of a trust he has settled - rather than having a 'letter of wishes' as in the past - on the assets / property in the trust, then, is it not possible for a Jersey resident to settle assets / property in such a Jersey trust then appoint, say, Guernsey resident trustees, thereby achieving a 'no tax' situation in both jurisdictions and, after several years, he - the settlor - becomes non resident in Jersey and then instructs the Guernsey trustees as he wishes re the disposition of the assets in the trust, ie, he gets the assets and income diverted for his own use?? Or some similar structure? Or am I worrying without cause about this?

>

> Regards,

>

> Malcolm

>

> Malcolm Campbell BA., FTII., FCMI

> Comptroller of Income Tax

> Tel : 00 44 0 1534 440307

> Fax : 00 44 0 1534 789142

> Mobile : 07797 752702

> E-mail : m.campbell1@gov.je

> Website : <www.gov.je/taxmoney>

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> -----Original Message-----

> From: John Harris

> Sent: 14 September 2006 09:10

> To: Malcolm Campbell; Terry Le Sueur

> Cc: Julian Morris; Ian Black; Paul De Gruchy

> Subject: RE: 0 / 10 law drafting

> Sensitivity: Confidential

>

> Malcolm,

>

> Thanks for trying to phone me in London yesterday. Sorry you missed me twice - I did the same in return.

>

> I am "anxious" (perhaps unnecessarily) on 2 points - one absolutely fundamental to how 0/10 is intended to work, the other a matter of commercial value which we would be foolish in my view to ignore if we have no good reason to do so. Both go to the matter of the detail of drafting.>

>

> On the first point, how we describe qualification with the 10% rate is critical. If we simply lump all regulated businesses in a general definition we will sweep up vital zero tax vehicles such as SPVs, Funds etc into the 10% rate and the resulting reaction from industry

and external advisers will not be pretty. I am therefore keen to see the draft now that there is one and to see for myself how the interface with the various regulatory laws is expressed. There needs to be a schedular approach - which in turn is mirrored by the FSC laws. I will explain what I mean by this when I see you.

>

> The second point is to ensure as far as we can that we accommodate the drafting point made by Richard Thomas and forwarded to you in my e-mail dated 8th August and which I mentioned at our meeting last week. This would allow to Island to make an easy transition from JPUT business - a mainstay of fund activity in the past 2 years - to allow Jersey vehicles to be used as vehicles for the increasingly popular UK REITS which look set to replace JPUTS in the coming months on condition that the dual residence company definition can be changed as Ogiers have suggested - or at least in a way which achieves the same effect.

>

> These are the points concerning me on the forthcoming draft. On the other two points you raise I am generally neutral on which tick the box scenario works best because fundamentally this should be accepted by "honest" taxpayers whatever it says. However, people are sensitive to disclosure requirements which go beyond the existing admittedly minimal obligation and some compromise is probably the most practical. For the record, I have said to industry representatives in a number of different forums that they need to consider that a reasonable quid pro quo for a less forceful look through regime must be an increase in anti-avoidance provisions and we should continue to press this notion on them.

>

> Finally I am very concerned by the apparent retrospective attack - inspired it seems by the AG - on a major feature of the recent trust law change on the ground that it ostensibly facilitates greater tax avoidance. I would take a lot of convincing on that one as the Reserved Powers clause has no such intention but actually aims to 'limit' in a prescribed fashion intervention by settlors to deter rather than augment the risk of trustees being used to front a sham arrangement, to permit active involvement in investment management activities which is an essential feature to limit trustees potential long term liability in an increasingly litigious world and improve trust management in a number of other ways. I can produce a more detailed version of that argument if you wish and ask Paul de Gruchy who project managed the changes to explain the legal intention of the change and the market circumstances which lie behind it as to why we have made these changes and modernised legislation which was increasingly out of line with the market. In turn, I would be grateful if you could explain to me how the recent changes facilitate tax avoidance.

>

> Many thanks

>

> John

>

>

>

> -----Original Message-----

> From: Malcolm Campbell
> Sent: 13 September 2006 12:26
> To: Terry Le Sueur
> Cc: Julian Morris; Ian Black; John Harris
> Subject: 0 / 10 law drafting
> Sensitivity: Confidential

>

>

> Terry,

>

> I have just come back from a 2 hour meeting on the above with the Law Draftsman and am meeting her again on Monday afternoon. Our provisional 0 / 10 timetable is as follows, which I hope is agreeable:

>

- > States debate - 30th January, 2007
- > Latest lodging debate - 19th December, 2006
- > Law drafting complete - mid-October, 2006
- > Law draft to you - mid-October, 2006
- > Law draft to Scrutiny and selected professionals once you give approval - 3rd / 4th week October, 2006
- > 'Fallout' from consultation on law draft and subsequent iteration with Law Draftsman - 2nd / 3rd week of November, 2006>
- > Finalise law draft - end November, 2006
- >
- > Julian - I'm not sure if Scrutiny know when they are going to receive the draft 0 / 10 law draft so if Terry agrees it might be as well to give them some indication as above.
- >
- > We are on track with 0 / 10 and I anticipate only two real areas of potential difficulty. The first is the 'tick the box' regime on which please see the attached alternative scenarios for you consideration. The second is the Trusts (Amendment No. 4) (Jersey) Law 200- and in particular para 9A. on powers reserved by settlor. This could be problematic for tax purposes and needs to be considered carefully as it seems to me that there could be tax avoidance through this mechanism.
- >
- > Perhaps we could discuss both these issues in due course.
- >
- > << File: TICK THE BOX.doc >>
- >
- > Regards,
- >
- > Malcolm
- >
- > Malcolm Campbell BA., FTII., FCMI
- > Comptroller of Income Tax
- > Tel : 00 44 0 1534 440307
- > Fax : 00 44 0 1534 789142
- > Mobile : 07797 752702
- > E-mail : m.campbell1@gov.je
- > Website : <<www.gov.je/taxmoney>>
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Appendix 3 - Malcolm Campbell's statement to the Observer

This statement was issued to the Observer by Malcolm Campbell, head of tax in Jersey, and also circulated with appendix 3.

OBSERVER RESPONSE

Thank you for your e-mail. You seem to have misunderstood the nature of the matter being discussed in the e-mail exchanges. I would regard it as a minor and technical matter which certainly does not lead to the conclusion you have inferred.

Jersey has embarked upon corporate tax changes to ensure that we meet our international commitment to the United Kingdom and to the EU Code of Conduct on Business Taxation. In conjunction with these corporate tax changes, we are strengthening domestic anti avoidance powers. As Comptroller of Income tax in Jersey, my involvement in these e-mail exchanges was to gain comfort that there was no mismatch between the planned corporate tax changes and para. 9a of the recently revised Jersey trust law to reassure myself that the overall effect of the the new arrangements would not be to create a risk of greater tax avoidance by Jersey residents. Any such deterrent powers, to the extent needed, would be either through a strengthened Article 134A which is the general anti-avoidance provision of the Jersey Income Tax Law or by a 'tick the box' regime for full disclosure of assets.

I am now content that I will have such powers to attack any tax avoidance of any sort arising on the domestic tax front and consider that these powers mirror those found as a matter of practice generally in most countries worldwide. It is a matter for other jurisdictions world-wide to take powers to themselves in their own domestic tax laws if they feel that their citizens are avoiding or evading their own domestic taxes.

For international clients using Jersey trusts, the introduction of clauses in the Trusts (Jersey) Law confirming the efficacy of "settlor reserved powers" simplify codify what many practitioners believe to be the current position. There is nothing novel in the proposed changes, which for example can also be found in the Trust Laws of other jurisdictions such as New Zealand and Delaware plus a number of other US States. Nor do they do anything to make tax avoidance or evasion any more likely than would be the case under the present statute - as a proper reading of the full e-mail exchanges will make clear. The intention behind the changes is to clarify and formally codify the responsibilities and obligations of the parties to the trust. We believe that a trust should be a transparent vehicle, with the declaration of trust setting out unambiguously the extent of the powers of both the settlor and trustee. The effect of the proposed changes will be to enhance transparency and accountability, something that can only be of benefit to those who establish trusts; those who administer them and, indeed, those who seek to challenge

them. In actual effect, they will limit the possibility of sham trusts rather than increase it and enhance rather than reduce transparency of the overall trust settlement in the case of subsequent disputes between the parties.

As far as I am concerned this e-mail exchange was part of the usual technical and consultative processes that occur when a new law is being formulated and I cannot understand why you have jumped to the conclusion that you have in your e-mail.

Appendix 4 - Bill Ogley's email for Terry le Sueur

From: Bill Ogley
Sent: 16 September 2006
To:
Subject: FW: Possible observer article
Sensitivity: Confidential

I am sending you all a copy of a statement that has been made to an observer reporter. The context is that as part of the preparation of law drafting for the implementation of the 0/10 tax changes there is a great deal of work being devoted to ensuring that appropriate anti -avoidance measures are included.

As part of that there has been some consideration given to the interaction of the Trust Law and the new tax measures. In order to determine what is appropriate officers were considering how someone might seek to use these provisions and they were exchanging e mails explaining the interaction. Unfortunately the e mail was passed in error to someone in the Observer newspaper. The controller of Income Tax has been contacted and has made a statement clarifying that the exchange was devoted to anti avoidance rather than facilitation of avoidance, as alleged by the reporter. We do not know whether the newspaper will run with the story, but Senator Le Suer has asked me to send a copy of the statement to ensure that you are not surprised should it appear tomorrow.

Bill Ogley

Appendix 5 - Observer article of 17 September 2006 regarding appendices 2 and 3

Revealed: how Jersey woos tax avoiders

Nick Mathiason
Sunday September 17, 2006

Observer

Internal correspondence between the highest-ranking tax officials in Jersey, seen by The Observer, expose for the first time how the tax haven is actively helping the world's super-rich to avoid tax.

A series of emails, dated from last week, and whose participants include Jersey's head of tax and its Treasury minister, reveal how trust reform will 'allow Jersey to compete more effectively for international work, where wealthy families will often wish to place assets in a trust structure and yet retain certain control over the management of the trust assets'.

In the emails, the Jersey Treasury minister, Paul de Gruchy, writes to his colleagues: 'The tax burden, as with inheritance tax in the UK, will be borne by those who are moderately wealthy but not so wealthy as to be able to afford to place significant assets out of reach for a reasonable period of time.'

When shown the emails, Richard Murphy of the Tax Justice Network, a campaign group highlighting tax evasion, said: 'This proves that Jersey is rotten to the core. We now have evidence that its government knowingly facilitates tax evasion by creating legislation that allows it to happen. The government of Jersey has allowed the creation of sham trusts. Trustees are UK-trained and UK-regulated solicitors and accountants. The UK's professional bodies should make it clear that this is unacceptable. It's clear that the Jersey government's aim is to help the rich evade the tax that they should be paying to other governments, including the UK's.'

Vince Cable, the Lib Dem Treasury spokesman, said: 'The UK government should blow the whistle and not sanction this.' The world's richest individuals have placed \$11.5 trillion of assets in offshore havens. Chancellor Gordon Brown has come under attack this month for failing to clamp down on havens.

Malcolm Campbell, Jersey controller of income tax, said: 'There's nothing novel in the proposed changes, which can also be found in the trust laws of other jurisdictions such as New Zealand and Delaware plus a number of other US States. Nor do they do anything to make tax avoidance or evasion more likely than under the present statute.'

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