

**WRITTEN QUESTION TO THE MINISTER FOR TREASURY AND RESOURCES  
BY DEPUTY G.P. SOUTHERN OF ST. HELIER**

**ANSWER TO BE TABLED ON TUESDAY, 10th OCTOBER 2006**

**Question 1**

Further to his written and oral answers on 26th September 2006, would the Minister inform members whether –

- (a) the practice outlined in part (a) of his written answer ‘not to declare such interests and sources of foreign income’ (such as foreign trusts) on a Jersey Income Tax Return constitutes tax evasion and would render a Jersey resident liable to prosecution?
- (b) the additional clause concerning Settlor Reserved Powers in the Trust Law, even if it creates no ‘new motives’ for avoidance or evasion in the Minister’s view, gives greater certainty to both the settlor and the trustee that such reservations are acceptable practice in Jersey in terms of tax avoidance?
- (c) the introduction of reserved settlor powers is designed so that Jersey can better compete for the ultra high net worth end of the market for international tax avoidance through trusts?
- (d) Jersey Trust Law can now be used by Jersey residents to avoid tax by setting up trusts with reserved powers using, say, Guernsey trustees?

**Answer**

- (a) It would constitute tax evasion in the case of a life interest or a bare trust but not in the case of a discretionary trust as in the latter the beneficiary would have no automatic entitlement to income whereas in the former the beneficiary would be entitled to both income and capital unhindered. The Comptroller of Income Tax has prepared prosecution files in 8 tax evasion cases in the last 13 years in respect of fraud, all of which were successfully prosecuted in the Royal Court by Her Majesty’s Attorney General. The facts and circumstances of each case are carefully considered before a decision is made to prepare a prosecution in any particular case. However, in tax avoidance cases the Comptroller does not need to prepare a prosecution file as he invariably settles such cases under Article 134A.
- (b) The Deputy fails to appreciate that the Trusts Law is not a law relating to taxation. The Trusts Law simply provides that if a settlor reserves certain powers that will not invalidate the trust. It brings greater certainty of legal outcome in disputes to the settlor and trustee in relation to the Trusts Law, but makes no reference to taxation legislation and has no bearing on such legislation. The Comptroller will consider the facts and motives in all cases where he is suspicious that a transaction – including the creation of a trust - may be primarily motivated by the desire to avoid tax, in the same manner as he does for all the other cases he currently counteracts under Article 134A, the general anti-avoidance provision in the Income Tax Law.
- (c) The introduction of settlor reserved powers has nothing to do with tax avoidance –international or otherwise. Indeed, if a settlor does reserve certain powers – such as the power to revoke a trust or to add himself as a beneficiary – this could give rise to a tax liability for the settlor. So tax avoidance in this context not the relevant issue.

The aim of the powers is to bring certainty – in statute - to the practice of reserving powers in the same way that many other jurisdictions have already done. In particular, the powers are aimed at settlors who may have earned significant wealth in specialised areas – for example hedge fund management – and who wish to continue managing the assets that are placed in the trust, rather than pay trustees or another specialist investment manager for a service they wish to carry out themselves. That selection will also give protection to the Trustees in the event of any later claims by beneficiaries for non-performance in the relevant field (in

this example investment management) as the Trustees would not have had responsibility for this activity in relation to the trust assets from the outset of the relationship.

- (d) It is not as simple a matter as the Deputy outlines. In some cases the tax avoidance achieved through using a trust structure is quite legitimate, in the same way that tax avoidance is legitimate when one takes out a mortgage that qualifies for tax relief, or when one joins an approved occupational pension scheme and the contributions into that scheme qualify for tax relief. So if the settlor is a Jersey resident and forms a trust for the benefit of his grandchildren out of natural concern for their well-being, then that may very well be a legitimate means of avoiding tax, despite the fact that the invested assets, which were previously in his own name, have now been settled on trust for the benefit of his grandchildren, whether or not the trust is one set up in Jersey, Guernsey or any other jurisdiction.

## **Question 2**

Will the Minister inform members whether under the Trusts (Jersey) Law 1984, as amended –

- (a) a Jersey trust is now revocable even when the trust deed states that it is not?
- (b) a Jersey trust deed can be amended by the settlor, to the extent that the settlor may become the beneficiary by a residency clause or similar?
- (c) a trustee can now be dismissed by the settlor thus removing protection from the beneficiary?

## **Answer**

- (a) No. If a trust deed says it is irrevocable it is irrevocable.
- (b) If the settlor of a Jersey trust retains an unlimited power to add or remove beneficiaries, he may add or remove himself as a beneficiary. This is the existing position and is possible under the existing trust law. The Trust law amendment only changes this to the extent that it is recognised by statute rather than a matter of practice. This in turn makes court adjudication in the event of beneficiary claims more straightforward.
- (c) If a settlor reserves the power to change trustees he may exercise that power. It is not clear how such a power removes protection from the beneficiary: it should be remembered that before a settlor creates a trust the beneficiary has no rights to the assets that are being placed in a trust at all. The power to change Trustees is also possible under the existing trust law.

These three questions could have been answered by a simple cursory reading of the Law, and I am surprised that they are being raised some six months after the Law was overwhelmingly approved by the States.

## **Question 3**

In an e-mail dated 14th September 2006 the Director – International Finance wrote that ‘if the discretion of the trustee is fettered (at present) there is a risk that the trust could subsequently [be] attacked as a sham. For an international client, these are reasons not to use a Jersey trust’. Would the Minister state whether he concurs with this statement and, if not, why not? Will he estimate for members the scale, if any, of such risk?

## **Answer**

The questioner fails to appreciate that international clients want certainty. They do not want to place their assets into a vehicle in the knowledge that those assets may be spent fighting legal battles. For example, a wealthy settlor wishes to put most of his assets in trust for two of his three children. For whatever reason, he does not want the third child to be a beneficiary. When the settlor dies, the third child will, in general, take every action he can to attack the trust. The reason for this is not because there is something wrong with the trust, but because the spurned child has nothing to lose. He will use every argument to attack the trust and one of those arguments will often be that the trust is a sham, because the discretion of the trustees has in some way been fettered. In fact,

because settlor reserved powers clarify the relative responsibilities and duties more clearly from the outset, the grounds on which the trust can be attacked as a sham are diminished rather than augmented.

The general view is that, under existing Jersey Law, a settlor can already retain certain powers without a trust being a sham. To re-emphasise the point, the purpose of the amendment is simply to bring greater certainty to this area by recognising it in statute rather than relying on the court to adjudicate it as a matter of practice, case law etc.

So, to directly address the question, there is always a risk that a Jersey trust will be attacked by a disgruntled person, and one of the traditional grounds for attack is that it is a sham. It was this situation that was recognised by the e-mail referred to dated 14th September 2006. If the trust has been prudently drafted and correctly operated, these attacks will very rarely be successful. However, even unsuccessful attacks must be defended, and settlors prefer not to establish structures if there is a risk that the assets placed in those structures will be spent on lawyers fees defending the structures from attack. The fact that the defence is likely to be successful is little comfort.

Accordingly, investors prefer to go to one of the many jurisdictions – both onshore and offshore - that have given statutory certainty to settlor reserved powers. Jersey is thus following the increasingly common international practice in this area rather than, as the question seems to seek to imply, breaking new ground on its own. A key purpose of the amendment is to discourage speculative and groundless attacks on Jersey trusts and thus increase confidence that settled assets will not be spent defending nuisance litigation.