

Tax File

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In my last article I wrote about the need to plan against inheritance taxes.

One way of doing this is to transfer assets into trust. Once there, the assets no longer belong to you, they belong to the trustees, so generally would not attract any tax charge on your death because the legal owner does not change. And if you get into financial problems they are better protected, and may still be enjoyed by your family rather than being swept up by your creditors.

An additional advantage is that on your death, the need for a probate – the process that allows the assets to be released to your family – is avoided.

A grant of probate takes time to obtain. Even if your estate is as straightforward as possible, it is highly unlikely that a grant of probate in Hong Kong could be obtained in under nine months. Heavy charges and long delays are something that can be avoided with the use of trusts.

So trusts are fantastic, right? Well, yes they are, but there are disadvantages, too. The setting up of a trust involves the transfer of assets to trustees, and you have to trust them. They will take possession of your assets during your lifetime, and then administer them according to the terms of the legally binding trust deed and any further wishes expressed from time to time by you to them.

Many potential settlors (people who put their assets into trusts) love the advantages but are wary of losing control of the assets and being at the mercy of the trustees.

But look at it this way: you can't really avoid this element of trust. The alternative way of transferring assets is through a will that takes effect on your death. That involves the appointment of executors who take possession of your assets after your death and then distribute them to the heirs according to the terms of the will. So the executors are like the trustees and the trust's beneficiaries are like the heirs.

One way or another you must trust somebody, but it's a lot easier to get assets transferred while you are around to supervise and to oversee the work of your chosen trustee.

advantage of allowing the membership to expire upon the death of the owner, leaving the remaining members to carry on the work. Most clubs in Hong Kong are based on companies limited by guarantee, and members do not have a transferable interest – the membership expires on death and can't be transferred.

Ditto with a membership of a PTC structured as a company limited by guarantee.

It is important to ensure that the trust company has sufficient substance so that it and the trust it administers cannot be attacked as a sham. One of the fundamental principles of correctly setting up a trust is that there must be a movement of assets away from yourself to a third party.

A company is a third party, but it is not advisable for the settlor to be the sole member and director. It's better that there are directors who have expertise in administering trusts and who can assist with running the PTC and the trust that it administers.

The members of the PTC can be

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given different voting rights so, for example, the settlor could hold a Class A membership that carries 100 votes.

The spouse could hold a Class B membership with 10 votes and the three children could have a Class C membership with one vote each. During the settlor's lifetime, he has 100 votes out of 113, so has control.

On death, the membership disappears, leaving the spouse with 10 votes out of 13, and on the death of the spouse, the children are left holding one vote each.

Another arrangement might involve giving the Class B membership to a professional trust company that could then make sure the spouse enjoys the income during his or her lifetime – but



You know where the assets are and can sign them over to the trustees rather than leaving executors to try to find the assets.

Leaving everything to devolve under your will does give you the comfort of having all assets in your name during your lifetime, but does leave your family with the problems on your death.

The assets are blocked until probate can be granted, and the family is left to correspond with the executors at a time when they are most vulnerable and emotional. Far better, then, to have it all sorted out before you go.

So, is there a solution to having to trust the trustees? Yes: private trust companies.

Under the usual trust scenario, assets are transferred to XYZ Trustees Ltd, a professional trust company. The alternative is to set up your own private trust company (PTC). Many offshore jurisdictions have recently enacted specific legislation covering PTCs, but such legislation is really a distraction. You don't need any specific legislation. Just form a company, transfer the assets to it and then have it declare that it is holding all those assets as trustee.

It is beneficial to incorporate the PTC as a company limited by guarantee with a cascading chain of ownership through memberships rather than shareholdings. This allows for continuity of ownership, and therefore administration.

A guarantee company has the

ensures the capital is protected and saved for the children or later generations.

The possibilities are endless. Whoever controls the PTC would still be obligated to follow the terms of the trust, which dictate how the assets are administered or distributed, and who may benefit.

As you are not employing a professional trustee, you save on professional trustee fees – although any knowledgeable director may well require a similar fee.

The board of directors can consist of yourself and your spouse or a trusted friend alongside the professional director.

So you have control at the board level along with the voting control at the membership level – which would give you the ability to restructure the board at any time. In short, while you lose ownership of the assets, you retain the control of the company that owns them, and can be involved in the day-to-day administration of those assets.

It would be wrong to oversimplify the various legal and practical considerations involved in setting up your own PTC, but it does present another possibility which might appeal to those who have been put off by trusts previously, and lets you eat that cake.



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