

Private Client

Contributing editors

Anthony Thompson and Nicole Aubin-Parvu



2016

GETTING THE
DEAL THROUGH 

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Bermuda

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Tax

1 How does an individual become taxable in your jurisdiction?

There is no income or capital gains tax levied in Bermuda. Domicile and residence are only relevant to taxation with respect to Bermudian dollar-denominated or Bermuda-situate assets. Tax liability can arise as a result of employment (payroll tax) or land ownership in Bermuda (land tax and stamp duty).

2 What, if any, taxes apply to an individual's income?

Bermuda does not impose income tax. The Payroll Tax Act 1995 and the Payroll Tax Rates Act 1995 stipulate that payroll tax is charged quarterly on remuneration paid, given or assessed to every employee and deemed employee by every employer and self-employed person in Bermuda, and includes cash and any benefit (including pension contributions, stock options, housing allowance and profit-sharing). The maximum bracket is 14.5 per cent, which applies to taxpayers with an annual payroll greater than 1 million Bermudian dollars and exempt undertakings. The employer is permitted to withhold no more than 5.5 per cent from the remuneration paid to the employee.

3 What, if any, taxes apply to an individual's capital gains?

There is no capital gains tax in Bermuda.

4 What, if any, taxes apply if an individual makes lifetime gifts?

The form of tax applicable to lifetime gifts of real estate is an ad valorem stamp duty on the deed of conveyance. It is payable within a prescribed period of time from the date of the document of transfer (customarily 30 days).

Similarly, lifetime transfers of shares in privately held local companies (other than those trading on the Bermuda Stock Exchange) are also assessed to stamp duty based on the value of the interest being transferred.

5 What, if any, taxes apply to an individual's transfers on death and to his or her estate following death?

In Bermuda, there is no direct tax on inheritance. However, stamp duty is assessable in respect of the value of the deceased's property in Bermuda (that is, the Bermuda estate), irrespective of the deceased's nationality, residence or domicile, if it is necessary to file for grant of probate or letters of administration in the deceased's estate. On any application for a grant of probate or letters of administration to the Supreme Court of Bermuda (as defined in the Stamp Duties Act 1976), the value of the estate must be disclosed on oath, and is then liable to be assessed for stamp duty.

The stamp duty rates applicable in a deceased's estate are as follows (Head 2, Schedule to the Stamp Duties Act 1976):

- up to 100,000 Bermudian dollars: nil;
- over 100,000 to 200,000 Bermudian dollars: 5 per cent;
- over 200,000 to 1 million Bermudian dollars: 10 per cent;
- over 1 million to 2 million Bermudian dollars: 15 per cent; and
- over 2 million Bermudian dollars: 20 per cent.

Stamp duty is not assessed on the value of the following classes of assets passing on death:

- bequests to surviving spouses;
- bequests to registered charities (registered as charities under the Charities Act 2014) or to such other bodies or organisations that the Minister of Finance determine to be charitable;

- the value of a deceased's interest in Bermuda real estate that was designated exempt from stamp duty under section 47A of the Stamp Duties Act 1976 (the 'family homestead' designation); and
- assets comprised within a deceased's estate that are not 'Bermuda property' as defined in the Stamp Duties Act 1976.

Stamp duty can be avoided if:

- the estate comprises assets that are entirely exempt from stamp duty; or
- an application for a grant of probate or letters of administration can be avoided (for example, by holding assets in joint tenancy with others with the intention that those assets remain in the ownership of the surviving joint tenant owners (see question 15)).

6 What, if any, taxes apply to an individual's real property?

There are no taxes assessed on capital gains on real estate or other assets owned by individuals. However, there is a land tax which is assessed on Bermuda real estate twice a year. The notional annual rental value (ARV) of each property dictates the applicable tax payable by a real property owner in Bermuda.

Land tax rates are:

- up to ARV of 11,000 Bermudian dollars: 0.6 per cent;
- over ARV of 11,000 to 22,000 Bermudian dollars: 1.2 per cent;
- over ARV of 22,000 to 33,000 Bermudian dollars: 2.4 per cent;
- over ARV of 33,000 to 44,000 Bermudian dollars: 4.8 per cent;
- over ARV of 44,000 to 90,000 Bermudian dollars: 9.6 per cent;
- over ARV of 90,000 to 120,000 Bermudian dollars: 19.2 per cent; and
- over ARV of 120,000 Bermudian dollars: 23 per cent.

7 What, if any, taxes apply on the import or export, for personal use and enjoyment, of assets other than cash by an individual to your jurisdiction?

Pursuant to the Customs Tariff Act 1970, customs duties are levied on the importation of goods. Goods brought into Bermuda by air and sea travellers are subject to duty at a rate of 25 per cent (with limited duty-free allowances). There is no export tax.

8 What, if any, other taxes may be particularly relevant to an individual?

There is no VAT, wealth or sales tax in Bermuda.

9 What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed?

Pursuant to the Stamp Duties Act 1976, an ad valorem tax is applicable on settlements of Bermuda real and personal property. The first 50,000 Bermudian dollars of value is exempt from duty, the next 150,000 Bermudian dollars of value is charged at 5 per cent, the next 800,000 Bermudian dollars at 10 per cent, and any value in excess thereof at 15 per cent. 'Instruments of addition' are also subject to stamp duty, up to the point at which the total amount of any duty paid on Bermuda property by way of instrument of addition equals 7,750 Bermudian dollars in total, at the rate of 5 per cent. The next 500,000 Bermudian dollars is charged at the rate of 10 per cent and any value in excess at 15 per cent. There is a charge of 0.1 per cent of the value of non-Bermuda property added and a nominal charge on supplemental trust documents, subject to certain exemptions for instruments to which a local trustee or an international

business (as defined by the Stamp Duties (International Businesses Relief) Act 1990) is a party.

In Bermuda, there are no taxes on income, profits, dividends, gifts or capital gains earned, received or derived by trusts.

There are no corporate taxes in Bermuda other than annual government fees which apply to all companies based on their level of 'assessable capital'.

An 'exempted undertaking' (being any one of an exempted company, permit company, exempted partnership or exempted unit trust scheme, as defined by the Exempted Undertaking Tax Protection Act 1966) may apply to the Minister of Finance for an assurance that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income, any capital asset, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, that the imposition of any such tax will not be applicable to the exempted undertaking, or to any of its operations or the shares, debentures or other obligations of the undertaking. However, such an assurance will not prevent the application of any such tax to persons ordinarily resident in Bermuda or in respect of land leased to the relevant undertaking. At the present time, a tax assurance certificate is effective until 31 March 2035.

10 How are charities taxed in your jurisdiction?

Charities are not taxed in Bermuda. Additionally, gifts of property to charities do not attract any tax liability.

Trusts and foundations

11 Does your jurisdiction recognise trusts?

Trusts are recognised in Bermuda. The governing legislation is the Trustee Act 1975, which is largely based on English law, the Trusts (Special Provisions) Act 1989, the Trusts (Special Provisions) Amendment Act 2014 and the Trustee Amendment Act 2014. Further to the UK Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, trusts from other common law jurisdictions and certain types of similar concepts that apply in civil law jurisdictions are recognised in Bermuda.

The term 'trust' is defined in the Trusts Special Provisions Act 1989 as the legal relationship created inter vivos or on death, by a 'settlor' when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. The Act stipulates that a trust has the following characteristics, namely, the assets constitute a separate fund and are not a part of the trustee's own estate; title to the trust stands in the name of the trustee or in the name of another person on behalf of the trustee; and the trustee has the power and the duty in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The 1989 Act allows for the creation of non-charitable purpose trusts, where the purposes for which the trust are created are sufficiently certain to allow the trust to be carried out, lawful and not contrary to public policy.

The Trusts (Special Provisions) Amendment Act 2014 provides that the reservation by the settlor for himself or herself, or the grant to any other person in a trust, instrument of any limited beneficial interest in trust property or any of the powers listed in the Act (which include, but are not limited to, the power to: revoke, vary or amend the trust; direct the appointment of trust property; give directions; restrict the exercise of powers by the trustee; appoint trustees, a protector or enforcer; and add or remove from the class of beneficiaries) will not invalidate the trust, prevent the trust taking effect according to its terms or cause any or all of the trust property to form part of the estate of the settlor for probate purposes. The Act further sanctions that a trustee who has acted, or refrained from acting, in compliance with, or as a result of, an exercise of such powers shall not be in breach of such compliance commit a breach of trust, equitable or fiduciary duty. The Act pertains to trusts created before or after its commencement date.

The Trustee Amendment Act 2014 has established that where the court is satisfied in relation to the exercise of a fiduciary power that certain conditions are met, the court may set aside the exercise of the power and make such consequential orders as it sees fit. The requisite conditions are that the person who holds the power did not take into account one or more considerations (whether of fact or law or both) that were relevant to the exercise of the power, or took into account considerations that were irrelevant to the exercise of the power and but for that, would not have exercised the power, or would have exercised the power on a different occasion, or in a different manner. The Act thereby preserves the rule in *Re Hastings-Bass* as it was applied before the 2013 decision of the UK Supreme Court in *Pitt v Holt and Futter v Futter* [2013] UKSC 26.

Bermuda trusts may be discretionary, fixed, charitable or established for non-charitable purposes and resulting, implied and constructive trusts

are recognised. Trusts are not registered in Bermuda. All information passing between settlor and trustee is confidential, subject to any intervention of the court. With respect to trusts created after 1 August 2009, the rule against perpetuities has been abolished by the Perpetuities and Accumulations Act 2009, except in respect of interests in Bermuda land.

Bermuda also recognises trusts that are governed by another jurisdiction's laws.

12 Does your jurisdiction recognise private foundations?

There is no foundations law in Bermuda. However, the concept of a foundation, in the wide context of a charitable or philanthropic entity backed by endowments, is recognised but dealt with through the use of trusts and companies limited by guarantee.

Same-sex marriages and civil unions

13 Does your jurisdiction have any form of legally recognised same-sex relationship?

Same-sex relationships are not recognised by Bermuda law.

14 Does your jurisdiction recognise any form of legal relationship for heterosexual couples other than marriage?

Civil law relationships are not recognised under Bermuda law.

Succession

15 What property constitutes an individual's estate for succession purposes?

A deceased's estate encompasses all real and personal property belonging to the deceased. Assets held in trust do not form part of the deceased's estate.

When one joint tenant owner of a property dies leaving a surviving joint owner or owners, the title (both legal and beneficial) of the deceased's joint interest passes automatically to the survivor or survivors, without the need to obtain a grant of probate or letters of administration. If, however, the deceased joint tenant owner leaves other assets within his or her estate requiring a grant of probate or letters of administration in order to pass title to the beneficiaries, the extent of any property owned in joint tenancy with others must be disclosed in the application for the grant. The value of the property for stamp duty purposes is taken to be the market value of the property at the date of the deceased joint owner's death, divided by the number of joint owners of the property at that time. That value falls to be included as part of the deceased's dutiable estate (provided that it is Bermuda property) even though it passes automatically to the surviving joint owners and does not devolve in accordance with the deceased's will or the intestacy trusts.

16 To what extent do individuals have freedom of disposition over their estate during their lifetime?

There are no restrictions on lifetime giving. Bermuda does not have any community property (marital property) regime or similar which might restrict an individual's lifetime dispositions.

17 To what extent do individuals have freedom of disposition over their estate on death?

There are no forced heirship rules in Bermuda. Individuals are free to dispense of their real and personal property by will as they see fit, although there is no requirement to have a will. In the absence of a will, the Succession Act 1974 will apply (see questions 18 and 25).

18 If an individual dies in your jurisdiction without leaving valid instructions for the disposition of the estate, to whom does the estate pass and in what shares?

Matters of succession on intestacy (or partial intestacy) are governed by the Succession Act 1974. One or more persons interested in the residuary estate may be appointed to carry out the administration of the intestate's estate. If the intestate leaves only a spouse, the spouse takes the residuary estate absolutely. If the deceased leaves only issue, the issue will take per stirpes. If the intestate leaves a spouse and issue, the spouse will take the personal chattels absolutely, and in addition, a sum equal to 50 per cent of the value of the residuary estate or 100,000 Bermudian dollars (whichever is greater) and the balance of the residuary estate will be held for the deceased's issue per stirpes. Thereafter the order of priority is: parents, siblings, grandparents, uncles and aunts, and failing which, the crown.

19 In relation to the disposition of an individual's estate, are adopted or illegitimate children treated the same as natural legitimate children and, if not, how may they inherit?

Yes. Pursuant to the Children Act 1998 (as amended), a child is considered legitimate whether or not he or she was born in wedlock, and an adopted child is treated as if he or she was the natural child of his or her adopted parents.

20 What law governs the distribution of an individual's estate and does this depend on the type of property within it?

Where there is a valid will in existence, it will be governed by the Wills Act 1988. In the absence of a will, assets located in Bermuda will pass according to the provisions of the Succession Act 1974 (see questions 18 and 25).

21 What formalities are required for an individual to make a valid will in your jurisdiction?

In Bermuda, the formalities for making a will are:

- the testator must be aged 18 or older;
- the testator must be of sound disposing mind, that is, have the requisite testamentary capacity, which is the ability to:
 - identify those persons he or she should consider when disposing of his or her estate;
 - understand the nature of his or her act (when executing the will); and
 - understand the extent of his or her estate.
- the will must be in writing;
- the testator must sign his or her will (or make his or her mark on the will, if he or she is illiterate) in the presence of two independent witnesses;
- the independent witnesses must be 18 or older and be of sound mind; and
- the independent witnesses must see the testator sign and then sign the will themselves in the presence of the testator.

The will should not be witnessed by persons named in a will as beneficiaries, or the spouses of those persons. If this occurs, the will, in the absence of any other defect in execution, will remain valid but the gift to the beneficiary who witnessed the will, or whose spouse witnessed the will, will be held void.

A holographic will, namely one written entirely in the testator's own handwriting (to be proved on oath by at least two persons well acquainted with his or her handwriting) and signed by him or her at the end, is valid under Bermuda law, if there is compliance with the relevant provisions of the Wills Act. However, such wills are not advisable as the complexities of drafting a comprehensive and effective will and ensuring its proper execution are not appreciated by most laypeople.

22 Are foreign wills recognised in your jurisdiction and how is this achieved?

The Wills Act 1988 provides that a will is to be treated as properly executed in Bermuda if it has been executed in accordance with the laws of the jurisdiction where either:

- it was executed; or
- at the time of its execution or of the testator's death, the testator was either:
 - domiciled or had his or her habitual residence in that jurisdiction; or
 - was a national of that jurisdiction.

Additionally, the Wills Act provides that the will is validly executed:

- if executed on board a vessel or aircraft and the will conforms to the laws of the territory of registration or close connection of that vessel or aircraft;
- to the extent that it disposes of immoveable property, its execution complies with the laws where the immoveable property is situated; or
- so far as a will exercises a power of appointment, if the execution of the will conforms to the law governing the essential validity of the power of appointment.

23 Who has the right to administer an estate?

The estate representatives. If there is a valid will in existence, then where the executors are named in a will and any one or more of them obtains a grant of probate, the executors named in the grant will be the estate representatives. The rules contained in the Non-Contentious Probate Rules

1974 will determine, in order of priority, who may apply for a grant of letters of administration (with or without will annexed) if:

- there is no valid will; or
- if a will exists but no executors are named; or
- the named executors fail or refuse to act.

24 How does title to a deceased's assets pass to the heirs and successors? What are the rules for administration of the estate?

In Bermuda, the deceased's estate vests automatically in his or her executors (if any). They are able to pass good title to certain estate assets but not others (for example, not real estate) until their authority is validated by the issue of a grant of probate.

For intestate estates, the estate vests in the Registrar of the Supreme Court of Bermuda and on the issuance of a grant of letters of administration it automatically transfers to and vests in the estate representatives.

The procedure and documents required to obtain a grant of probate or letters of administration are set out in the Non-Contentious Probate Rules 1974.

The Administration of Estates Act 1974 is the governing law of the administration of the estate.

25 Is there a procedure for disappointed heirs and beneficiaries to make a claim against an estate?

Yes, the beneficiaries of an estate can challenge the estate representatives on their administration of an estate. Additionally, they can challenge the interpretation of a clause or clauses in a will where they are ambiguous and open to interpretation, or on the basis of want of due execution of the will, want of sound disposing mind or want of knowledge and approval on the part of the testator. Claims of fraud and undue influence can also be raised.

The dispositive provisions of a will (or the intestacy trusts) can also be challenged by the following individuals on the grounds that the will or intestacy trusts do not provide reasonable financial provision for the beneficiary bringing the challenge (Succession Act 1974):

- a spouse;
- a former spouse who has not remarried;
- children; and
- grandchildren, provided they were being maintained by the deceased.

Applications pursuant to the Succession Act for reasonable financial provision need to be commenced in the Supreme Court within six months from when a grant of representation is first taken out. Leave of the Court can be sought for an application to be commenced out of time.

If an appropriately drafted and enforceable forfeiture provision is contained in a will, then challenging a will may be subject to forfeiture of a gift made under the will. A recent (2014) Bermuda Supreme Court decision upheld the long-standing legal rule against the 'in terrorem' use of a forfeiture condition. In that case, the forfeiture provision included in the will under review by the Bermuda court was held to be invalid in the absence of a gift over provision.

Capacity and power of attorney

26 What are the rules for holding and managing the property of a minor in your jurisdiction?

Title to real estate in Bermuda cannot legally be held by a minor. Therefore, property may be held in trust for a minor and applied for his or her benefit, may be paid to his parent or guardian, or to the minor directly once he or she has reached the age of 16. The trustee is sufficiently discharged by the receipt of the parent or guardian of the minor and is not required to attend to the further application of the relevant property.

27 At what age does an individual attain legal capacity for the purposes of holding and managing property in your jurisdiction?

An individual attains legal capacity at 18.

28 If someone loses capacity to manage their affairs in your jurisdiction, what is the procedure for managing them on their behalf?

Individuals can grant powers of attorney (POA) but must have the requisite capacity to do so for the POA to be valid. POAs can be limited in scope (for example, signing a conveyance on behalf of a party who will be abroad and unable to sign it when required) or extensive in scope, authorising the

attorney to do almost anything and everything on behalf of the donor of the POA.

Following the subsequent loss of 'legal capacity' (as defined in the Mental Health Act 1986) of the donor of the POA, a regular POA ceases to be valid. If the POA is granted to endure throughout the subsequent loss of legal capacity by the donor (enduring power of attorney (EPOA)) it will not be invalidated by the onset of such incapacity.

When there is no EPOA in place, an interested person may apply to the Supreme Court of Bermuda for an order under the Mental Health Act 1986 to be made the receiver (receiver) for a person who has lost legal capacity (patient), so as to manage the patient's property and affairs. Once appointed, the receiver must file annual accounts with the court setting out the income and expenses of the patient and the extent of the patient's remaining property. Significant actions proposed to be taken in relation to the patient's property or affairs (for example, the sale of real estate) are subject to the approval of the Supreme Court of Bermuda.

An EPOA is generally preferable to receivership (provided a suitable party is available to act as attorney), as the process to obtain receivership can be cumbersome and expensive, albeit a route that can carry a higher level of accountability.

Immigration

29 Do foreign nationals require a visa to visit your jurisdiction?

Foreign nationals do not require a visa if they hold a valid passport and proof of right of abode in the United States, Canada or the United Kingdom, or any other country specifically identified by the Bermuda government. Tourists can visit Bermuda with a return or onward ticket for up to 90 days. This period can be extended for a further 90 days.

A foreign national may reside and work in Bermuda provided they hold a valid work permit. Due to 2015 policy changes, several new categories of work permit have been introduced, including:

- the global work permit, whereby an employee of a global company transferring to Bermuda may be granted permission to work in Bermuda; and
- the new business work permit, whereby a newly established business may be granted automatic approval for a limited number of permits within the first six months of operation.

Both of these categories of permit may be granted for periods of one to five years.

There is also a category of global entrepreneur work permit, which may be issued for a period of one year for someone seeking to carry out feasibility studies related to establishing an exempted business in Bermuda.

A standard work permit may be issued for a period of one to five years and may be applied for on exhaustion of the period of any of the foregoing permit types.

There is also a short-term permit available for certain categories of persons, such as athletes and entertainers, and a periodic permit may be applied for in the case of persons conducting repeat business visits to Bermuda, for example travelling salespersons or service providers.

Update and trends

A comprehensive review of Bermuda's trust laws, with the aim of enhancing and improving those areas where it is felt necessary, is being carried out through the joint efforts of the Society of Trust and Exchange Practitioners (STEP) Bermuda, the Bermuda Business Development Corporation and the Bermuda Association of Licensed Trustees. Amendments to the Trustee Act 1975, the Children Act 1998 (as amended) and the Perpetuities and Accumulations Act 1989 are expected in the near future, as well as the possible introduction of some hybrid form of company akin to a foundation, although it is still being debated whether offering a Bermuda form of foundation will make Bermuda more attractive as an offshore trust jurisdiction and financial centre.

Additionally, a Law Reform Commission has been formed and has made recommendations to the Ministry of Health, Seniors and Environment for legislative amendments that would better protect seniors from financial abuse. In particular, the Powers of Attorney Act 1944, the Senior Abuse Register Act 2008 and the Domestic Violence (Protection Orders) Act 1977 need to be addressed in order to offer better protection to Bermuda's ageing population.

A foreign national may apply for a residence certificate provided he or she is over 50 years of age, retired, is able to provide evidence of sufficient financial means and has either been employed for at least five years in Bermuda prior to the application, or is a property owner in Bermuda.

30 How long can a foreign national spend in your jurisdiction on a visitors' visa?

See question 29.

31 Is there a visa programme targeted specifically at high net worth individuals?

There is no programme targeted at high net worth individuals. See question 29.

32 If so, does this programme entitle individuals to bring their family members with them? Give details.

Not applicable.

33 Does such a programme give an individual a right to reside permanently or indefinitely in your jurisdiction and, if so, how?

Not applicable.

34 Does such a programme enable an individual to obtain citizenship or nationality in your jurisdiction and, if so, how?

Not applicable.



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