FAQS: TRUST, ESTATE AND FAMILY

Q. What does the term US Person encompass?

A. When considering beneficiaries of a non-US trust, the term US person generally consists of a:

- US citizen
- US Green Card holder
- US physical resident
- US domestic trust, corporation, partnership or estate

Q. Can an individual born outside the US be a US Citizen?

A. Yes. There are circumstances in which an individual born outside the US may automatically be considered a US citizen, be it either:

- Birth outside the US to two US citizen parents, or
- Birth outside the US to one US citizen parent

The length of time the US citizen parent(s) has spent living in the US will be a determining factor.

THERE ARE CIRCUMSTANCES IN WHICH AN INDIVIDUAL BORN OUTSIDE THE US MAY AUTOMATICALLY BE CONSIDERED A US CITIZEN...

Q. If a Green Card has expired for immigration purposes, does that impact the individual's tax position?

A. No. Although a Green Card may have expired for immigration purposes it is still considered live for US tax purposes until a positive act for its removal takes place.

Q. What triggers a US reporting requirement in respect of a US person's interest in a non-US trust?

A. Generally speaking, the following will give rise to a US reporting requirement:

- A US person makes a contribution to a non-US trust (reporting required at individual and trustee level)
- A US person receives a benefit from a non-US trust

The term benefit encompasses, but is not limited to, the following;

- Physical distribution of cash
- Distribution of trust assets
- Uncompensated use of trust property (or compensation paid for less than fair market value)
- Receipt of a non-qualifying loan
- Absolute entitlement to trust income (or a portion thereof)

A US person may also have to report their interest in a non-US trust on Form 8938, Statement of Specified Foreign Financial Assets, regardless of whether any benefit has been received, or whether the US person has knowledge of the trust or their status as a beneficiary of that trust. status as a beneficiary of that trust.

Dependant on the specific facts and circumstances, a US person may also be required to disclose details of the trusts' non-US bank and financial accounts on FinCEN Form 114, Report of Foreign Bank and Financial Accounts.

Q. Can the trustees make a loan to a US person without US tax implications?

A. If a loan to a US person does not meet certain qualifying criteria, the full loan amount will be regarded as a distribution to the US person. Specific criteria must be met which is not simply based upon the loan being on commercial terms.

Q. Are there any US tax implications of a US person living in non-US trust owned property rent free?

A. Yes. From 18 March 2010 the use of trust property for a below-market value rent is deemed to be a distribution from the non-US trust to the US person, and subject to the relevant reporting requirements.

Q. If distribution received by a US person is considered to be tax free, should the US person still disclose this benefit?

A. Yes. There are many ways in which benefit received by a US person from a foreign trust can be considered tax-free for US tax purposes. However, that does not remove the requirement to report that benefit to the IRS as there is potential for significant penalties for non-compliance.

Q. Are there any reporting requirements for the US grantor if a US person has made a transfer to a non-US trust?

A. Generally, if the settlor has retained administrative powers or beneficial interests in the trust, the trust will then be considered a Foreign Grantor Trust with all income and gains attributed to the settlor.

The trustees will have an annual requirement to file Form 3520-A, Annual Information Return of a Foreign Trust with a US Owner, although the obligation for ensuring this form is filed will fall on the US grantor.

The US grantor will have an initial requirement to file Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, to report contributions to the trust, and an annual requirement to file Form 3520 to report his ownership of the trust.

US beneficiaries will be required to report any benefit received on a timely filed Form 3520, although this should not create a US income tax charge to the extent the trust remains a grantor trust.

Q. Are there any UK reporting requirements for the non-UK domiciled settlor where a non-UK domiciled individual has made a transfer to a non-UK trust?

THERE ARE MANY WAYS IN WHICH BENEFIT RECEIVED BY A US PERSON FROM A FOREIGN TRUST CAN BE CONSIDERED TAX-FREE FOR US TAX PURPOSES.

US BENEFICIARIES WILL BE REQUIRED TO REPORT ANY BENEFIT RECEIVED ON A TIMELY FILED FORM 3520...

A. Specific facts and circumstances need to be taken into consideration. Broadly, if the settlor or certain members of their family can (or may) benefit from the trust, it is likely the individual would have a requirement to file a self-assessment tax return, Form SA100. Where the settlor is considered to be resident outside of the UK for tax purposes, a filing requirement would only arise in limited circumstances but cannot be ruled out. It is necessary to review the residence and domicile position of the individual, together with the assets held by the trust.

Q. Are there any UK reporting requirements for the trust where a non-UK domiciled individual has made a transfer to a non-UK trust?

A. Non-UK resident trustees have an obligation to notify HM Revenue & Customs (HMRC) if they have a liability to UK income tax. This can be the case if the trust holds assets that generate UK source income, although some types of income are tax exempt in the hands of the trustees. Where the trust has a UK reporting obligation, the trustees should file a Form 41G (Trust) with HMRC notifying them of the existence of the trust. Once HMRC are aware of a non-UK trust, they often issue Form 50(FS) to gather the information needed to consider whether the trust beneficiaries are reporting capital gains correctly. The filing of this form is not compulsory, but it can reduce the likelihood of HMRC opening enquiries into the self-assessment tax returns of the beneficiaries.

A TRUST IS CONSIDERED RESIDENT OUTSIDE OF THE UK IF ALL THE TRUSTEES ARE RESIDENT OUTSIDE OF THE UK.

Q. Can a non-UK trust make a loan to a UK resident individual without any UK income tax implications?

A. In the UK, there is no direct equivalent to the US concept of a qualified obligation (i.e. a loan which is not regarded as a distribution). Instead, the emphasis is wholly on whether the loan provides the recipient with a benefit, and is generally the case unless the loan is made on commercial terms. HMRC publish an Official Rate of Interest (ORI), and unless the trustees charge interest at a rate equal to or greater than the ORI a benefit will arise. In some circumstances, income and capital gains received by the trustees can be deemed to match such a benefit, thereby giving rise to a reporting requirement and a tax charge in the hands of the beneficiary. The position needs to be considered carefully. The UK domicile status of the beneficiary will also be a factor to consider.

Q. When is a trust considered to be non-UK resident?

A. A trust is considered resident outside of the UK if all the trustees are resident outside of the UK. Where there is a mixture of resident and non-resident trustees, the residence and domicile of the settlor at the time of the creation of the trust (and at the time of any subsequent additions of assets) must be considered. If the settlor was not resident (or ordinarily resident), nor domiciled in the UK when the trust was set up, then the trust would also be non-UK resident. The rules were different prior to 6 April 2007.