Bermuda Partnership Amendment Act gives a new lease of life to the traditional partnership structure.

The enactment of the Partnership Amendment Act 2006, which came into effect on 28 August 2006 in Bermuda, enables Bermuda partnerships to elect to have separate legal personality under Bermuda law, drawing on Guernsey legislation as a precedent for such "opt-in" arrangements.

Bermuda exempted partnerships are widely used in international holding structures, as they are usually regarded as fiscally transparent. Since the implementation of the Partnership Amendment Act 2006, and in light of cases such as Memec Plc v Inland Revenue Commissioners (1998), questions commonly arise as to whether Bermuda partnerships that have elected to have separate personality ("SLPPs") maintain characteristics which would mean that they are still considered to be fiscally transparent.

Statutory framework

The principal statutes governing Bermuda partnerships are: the Partnership Act, 1902, as amended (including by the Partnership Amendment Act 2006); the Limited Partnership Act, 1883, as amended (the "LPA"); and the Exempted Partnership Act, 1992, as amended (the "EPA").

Types of Bermuda partnerships

There are two types of partnership under Bermuda law; general partnerships, where all of the partners have unlimited liability for the debts and obligations of the partnership; and limited partnerships, which meet the conditions laid down in the LPA (including having at least one general partner) and where the limited partners will normally have limited liability for the partnership's debts and obligations provided they take no part in the management of the partnership.

Exempted partnerships

Both general partnerships and limited partnerships can be registered as exempted partnerships under the EPA provided one or more of the partners do not possess Bermudian status. An application for a partnership to be registered as an exempted partnership requires the consent of the Minister of Finance in Bermuda, via the Bermuda Monetary Authority, which normally takes between three and five working days to obtain.

Exempted partnerships may be resident in Bermuda and carry on business there in connection with activities outside Bermuda. There is no income tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable in Bermuda by an exempted partnership or its non-resident partners, or on payments made by or to such partnerships.

An exempted partnership may also apply to the Minister of Finance in Bermuda for, and is likely to receive, an assurance under the Exempted Undertakings Protection Act, 1966 that, in the event that legislation is imposed in Bermuda which would introduce tax computed on profits or income, or computed on capital assets, gains or appreciation, or any tax in the nature of estate duty or inheritance tax, such tax shall not apply to the partnership or to its operations until 28t March 2016.

In addition, under Bermuda exchange control legislation, such partnerships are designated with "non-resident" status and may therefore open and maintain foreign bank accounts and operate free of exchange control restrictions with regard to distributions and the acquisition, holding or sale, of any currency or foreign securities.

The Act and the partnership agreement

Bermuda partnership law largely follows English law principles. The Act codifies and preserves the common law provisions relating to partnership, except to the extent that a contrary intention is agreed (expressly or impliedly) between the partners. The Act does not attempt to regulate the affairs of a partnership, leaving this to be agreed between the partners.

However, to the extent that the partnership agreement does not contain provisions concerning the relations between partners, and persons dealing with them, the provisions of the Act will apply. The Act defines

a partnership as "the relationship which subsists between persons carrying on business with a view to a profit". If these essential characteristics do not exist the business will not be considered to be a partnership under Bermuda law. Investment holding, for instance, is considered to be sufficient business activity to fall within this definition.

Separate legal personality

Under Bermuda law, the general position is that a Bermuda partnership is not a separate legal entity distinct from its partners. Notwithstanding this general position, the Act has always permitted a Bermuda partnership to function in some respects as an entity, as pursuant to the Act, a partnership may carry on business, and sue and be sued, in its partnership name.

With effect from 28 August 2006, a Bermuda partnership may make an irrevocable election to become an SLPP under section 4A of the Act. Exempted partnerships normally make this election at the same time as submitting the certificates of exempted partnership or limited partnership which are require to be filed for the purposes of registering the partnership.

An SLPP shall be a legal person separate from its partners and shall have the power to own and deal with its separate property in accordance with the agreement of its partners. It shall have unlimited capacity (removing ultra vires concerns). In addition, an SLPP is not (subject to contrary agreement between the partners) dissolved by a change in the constitution of the partnership under section 4D of the Act. This resolved, for Bermuda law purposes, a previous difficulty highlighted by Scottish case law under the UK Partnership Act, 1890.

Liability of partners

The partners of a general partnership have unlimited liability, jointly with the other partners, and also on a several basis, for all of the debts and obligations of the partnership. In a limited partnership, the liability of a limited partner is limited (broadly) to the value of money and of any property that it contributes, or agrees to contribute, to the limited partnership. The position of a limited partner is therefore analogous to a shareholder in a company.

However, if a limited partner takes part in the management of the limited partnership, it will be liable as if it were a general partner. General partners of a limited partnership are jointly and severally liable for the debts and obligations of the partnership as with partners of a general partnership.

Where a partnership is an SLPP, it is anticipated that contracts will be entered into by the partnership itself and therefore contractual claims will be made against the partnership, rather than the individual partners. However, general partners in an SLPP remain jointly and severally liable for its debts and obligations. Accordingly, where a judgment is obtained against an SLPP for a debt of the partnership it may be enforced in full against an individual partner. Section 4E of the Act provides that, on payment of the judgment debt, the partner is entitled to relief pro rata from the partnership and its other partners.

Easing the way

When a partnership makes an election to be an SLPP it does not fundamentally affect the relationship between its partners, which remain governed by the provisions of the partnership agreement and, where the agreement is silent, by the Act.

However, the ability for a partnership to exist as a separate legal entity facilitates the continuity of contractual relationships with third parties and makes it easier to tie in new partners to existing contractual relationships.

The ability of a partnership to hold property in the partnership name (rather than in the name of its individual partners) is of particular advantage to certain holding structures.

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