British Virgin Islands –
Private Trust Companies

Introduction

The Financial Services (Exemptions) Regulations, 2007 (as amended from time to time, the “Regulations”) came into effect in August 2007. They enable unlicensed private trust companies (“PTCs”) to be established in the British Virgin Islands (“BVI”) if specified conditions are satisfied: these conditions are summarised below.

Background - the increasing popularity of PTCs

As a consequence of recent statutory changes, a PTC can be a trustee of a VISTA trust and purpose trusts which has increased their popularity. A PTC may be defined as a company which is incorporated with its main function being to act as the trustee of a specific trust or a number of related trusts. It should be contrasted with a professional corporate trustee, bank or financial institution which offers its services to the general public for a fee.

PTCs operate within the framework of general company law and trust law, but they will also generally be subject to at least some regulatory requirements.

PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:

1. The principal advantage of a PTC is that, like the BVI’s VISTA legislation, the establishment of a PTC generally enables settlors or settlors’ family members or their appointees to exercise a significant degree of control over trustees’ decisions by being directors of PTCs; this enables them to respond quickly to issues which arise and to make decisions on the basis of their own personal knowledge and changing circumstances.

2. The corporate structure will be readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure.

3. Confidentiality can be preserved and this is an issue which is of increasing importance to those from jurisdictions where concerns over financial privacy are driven by issues of personal safety.

4. A PTC enables the trustee’s charges to be kept in check.

5. PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise of speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee.

Many of these advantages will of course also be available if a VISTA trust is set up since in many cases VISTA offers a viable alternative to a PTC. For further information on VISTA trusts, see Walkers’ website at www.walkersglobal.com.
Conditions which an exempt PTC must satisfy

In order to qualify as an exempt PTC under the Regulations the following conditions must be satisfied (unless the company merely acts as a bare trustee in which case these conditions need not be satisfied and the company will qualify for an automatic exemption from trust licensing):

1. The company must be a company that is on the Register of Companies maintained under the BVI Business Companies Act, 2004 (as amended) ("BCA") and which is not struck off or dissolved.

2. The company's memorandum must state that it is a private trust company.

3. The company must be a limited company (whether limited by shares or by guarantee) and its name must include the designation '(PTC)'. This must be placed before one of the permitted endings of the name of a BVI company (such as Limited, Ltd or Inc).

4. The company's registered agent must hold a class 1 trust licence under the BVI's Banks and Trust Companies Act, 1990 (as amended). All BVI companies which are incorporated or re-registered under the BCA are required by law to have registered agents, and many of these have class 1 trust licences.

5. The company must not solicit trust business from members of the public.

6. The company must carry on no business other than that of being the trustee, protector or administrator of a trust (or managing or administering trusts). However, activities which are incidental or ancillary to trusteeship and trust administration should not disqualify the PTC from falling within the exemption.

7. All of the company's trust business must be 'unremunerated trust business' or 'related trust business'. Although the term is defined widely to prevent potential abuse, in most cases a company will be carrying on 'unremunerated trust business' where no remuneration is paid to the company or anyone associated with it in respect of the provision by the company of its trustee services. However it is permissible for professional directors who are not otherwise associated with the company to be remunerated and payments to the company to cover its legitimate expenses (such as the Government's incorporation and renewal fees, the fees of otherwise unconnected professional advisers, and the fees of the registered agent) will not in general be regarded as remuneration for these purposes.

A company will be regarded as carrying on 'related trust business' where all the beneficiaries of the trust (or trusts) of which it is trustee are related (as defined in the Regulations) to the settlor (and, in the case of multiple trusts, the settlors are the same or related to each other). The trust's beneficiaries may also include charities or its settlor.

Fees

The Government's fees are very modest. The fee which applies to change the name of an existing BVI company so that it becomes an exempt PTC is $425 and that which is payable on incorporating a new exempt PTC which is authorised to issue no more than 50,000 shares is $1,250. The annual renewal fee thereafter is also $1,250. BVI service providers which provide registered agent services for exempt PTCs are likely to charge fees in excess of their usual fees to reflect the additional work which needs to be done and the added responsibility which the Regulations impose on them (see below). However in most cases it is probable that these additional charges will be relatively modest depending on the particular circumstances that prevail.
The registered agent’s obligations and confidentiality

The Regulations impose on the registered agent of the exempt PTC the obligation to satisfy itself that the conditions which the PTC needs to comply with in order to be eligible for the exemption are met and it is required to do this both at the outset and on a continuing basis thereafter. It is also obliged to take all reasonable steps to ensure that up to date copies of documents such as the trust deed and any document varying its terms (in relation to each PTC for which it acts as registered agent) are kept at its office in the BVI. These documents do not need to be filed with the Financial Services Commission or the BVI authorities and are not available for public inspection. However, the Financial Services Commission does have power to require documents and information to be produced in order to enable it to discharge its statutory functions, eg to prevent money laundering and to assist in the prosecution of criminal investigations: these provisions are unlikely to be invoked except in cases involving actual or suspected illegality. In order to protect the BVI’s reputation, there are also other provisions in the Regulations which are designed to prevent abuse.

The use of VISTA trusts in PTC structures

A PTC may now be the trustee of a VISTA trust provided it meets the criteria previously discussed. VISTA trusts are considered to be very attractive in the context of the Regulations for PTCs. There are also advantages in terms of setting up VISTA charitable or non-charitable purpose trusts to hold the shares in exempt PTCs. This is particularly the case since the ‘office of director’ rules in VISTA trust instruments provide a unique and effective succession mechanism for directorships in PTCs and, in the case of PTCs, the succession to directorships is often critical, since it will, in effect, be its director or directors who exercise the PTC’s discretionary trustee powers.

Other advantages of settling VISTA charitable and non-charitable purpose trusts are broadly as follows:

1. Charitable and non-charitable purpose trusts, by their nature, have no beneficial owners and this can have certain advantages over direct ownership of the shares in PTCs by settlors.

2. The shares in the PTC will be incapable of being sold or disposed of without the requisite consents.

3. The trustee of the VISTA trust which holds the shares in the PTC will largely be disengaged from the need to monitor (or intervene in) the management of the PTC’s affairs: as a consequence, the PTC’s discretionary powers can be exercised by the directors free from such supervision or possible intervention by the trustee-shareholder of the PTC. (The advantages referred to in (1) above are that it is sometimes said that holding the shares in PTCs on purpose trusts should serve to assist preventing:

   (a) the trusts of which the PTCs are trustees from being regarded as shams for tax purposes in settlors’ home jurisdictions – ie as a consequence of settlors’ ownership of the shares in PTCs which act as trustees;

   (b) local tax legislation from regarding settlors as continuing to own the trust property as a result of their control; and

   (c) settlors’ entitlements to information, resulting from their ownership of the shares, having the consequence that that information will be capable of being extorted from them in their home jurisdictions).

Why the BVI should be considered as a jurisdiction in which to set up a PTC

Prospective settlors generally ask the following questions when considering which jurisdiction to use to set up a PTC:
1. Is a licence needed and how long does it take to set up the PTC? In the BVI, provided the conditions which are referred to above are met, no licence is needed and a BVI company can now be incorporated very quickly. This assumes that all KYC requirements have been satisfied and is especially pertinent following the recent introduction by the BVI Companies Registry of its ‘VIRRGIN’ system which provides for the electronic filing of documents.

2. Is it necessary to have a local director or authorised representative (or a director with relevant qualifications or experience)? There is no such requirement for an exempt PTC.

3. Are there any capitalisation requirements? There are none in the BVI for exempt PTCs.

4. Must the company establish a physical presence in the jurisdiction? There is no such requirement in the BVI.

5. What are the costs of setting up and running the company? In most cases these fees, which are referred to above, should be extremely competitive.

6. What information must be provided and to whom? Must it be provided to the regulator? In the BVI it is only the company’s registered agent which must be provided with copies of the trust deeds and other documents referred to above.

7. What documents of the private trust company are a matter of public record? In the BVI only the PTC’s memorandum and articles of association will be filed publicly. These are likely in most cases to be fairly standard documents which reveal little more than the company’s name and the fact that it is a private trust company. BVI registered agents are required by section 92 of the BCA to retain registers of directors and shareholders at their offices, although the latter do not have to be filed publicly (and are in fact very seldom filed).

The BVI’s Regulations should therefore answer all or most of the above questions in a manner which is extremely satisfactory to most would-be settlors. The Regulations also make it clear that a company is not required to obtain a trust licence where it acts solely as a bare trustee.

The exemptions are proving to be particularly popular since they create an unparalleled degree of certainty: this certainty is always something that potential settlors find highly attractive. Furthermore the BVI’s Regulations do not include any artificial protectionist features such as a requirement to the effect that at least one director must be a resident of the BVI or that a BVI resident representative of the company must be appointed. Nor do they include the need to list particular trusts in the company’s memorandum. Rather they are tailored to the unique flexibility of the BVI company – and are serving to enhance the ever-increasing popularity of the BVI company and trust.

It has recently been remarked that BVI law now strikes the right balance between proper and proportionate regulation for professional service providers (to which the trust licensing and other requirements of the Banks and Trust Companies Act, 1990 continue to apply with their full vigour) and exemptions for private unremunerated companies which are usually set up specifically to be trustees of particular trusts.

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