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# Bermuda

## Country Reporter

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# Bermuda

## I. RECIPIENTS OF CHARITABLE GIFTS

### A. Establishment of the recipient entity

#### 1. Creation of the organization

##### *Form of organization*

A Bermuda charity may take the form of a charitable trust, a purpose trust, an unincorporated association, a company limited by guarantee, or a company established by Private Act legislation.

A *charitable trust* is a trust that is established for exclusively charitable purposes. Typically, such a trust is created by a deed which is not subject to any public registration or disclosure to the general public. Under Bermuda law, exclusively charitable purposes are, broadly, the advancement of education, the relief of poverty, the advancement of religion and other purposes beneficial to the community.

The Attorney General of Bermuda has power to ensure that the property held under the charitable trust is administered and applied properly for the benefit of charity. However, as a matter of course, he does not review the activities of charities established in Bermuda but can intervene if notice of wrongdoing comes to his attention.

A *purpose trust* is a novel form of trust. It is established under the provisions of The Trusts (Special Provisions) Act 1989 ('the 1989 Act') as amended by the Trusts (Special Provisions) Act 1998 (the '1998 Act'). Most importantly, it can be established for specific purposes stipulated in the trust deed that need not conform to the accepted heads of charity under Bermuda law. The purposes may, therefore, be quasi-charitable. For example, a trust for the promotion of a political party would be a proper purpose trust but not, technically, a charitable trust. A purpose trust may include purely charitable purposes as well. The 1998 Act now permits perpetual purpose trusts.

- (i) However the rule against remoteness of vesting still applies.
- (ii) Further the amendments to the 1989 Act provide more flexibility by more clearly defining the term 'purpose trust', and by removing certain require-

ments including, inter alia, the appointment of a 'designated person' to act as a trustee. The 1998 Act also removed the requirement that an enforcer be nominated to enforce the trust. The new provisions recognize that enforcement really belongs in the realm of the Courts and therefore gives the Court the right to make an order on the application of persons including, inter alia, the trustee of the trust.

The most important requirement of the 1989 Act is that the purposes must be certain, lawful, possible and not contrary to public policy or unlawful.

An *unincorporated association* exists where two or more persons are bound together for one or more common purposes by mutual undertakings, each having mutual duties and obligations, in an organization that has rules identifying in whom control of the organization and its funds are vested. If the purposes of the association are exclusively charitable, then the association may be considered charitable.

The assets of an unincorporated association may be held by its officers or by a group of trustees upon charitable trusts. For example, a society for the relief of suffering among the poor would be a charitable unincorporated association.

In the case of a *company limited by guarantee*, there are no shareholders but rather members who are obligated to pay the debts of the company up to a maximum amount depending on their commitment. Membership can be nontransferable and terminable on death. There must be at least one member at any given time. This is a generic type of company that can be used in other circumstances where it is not desirable to have shareholders and where it is not necessary to raise money through an issue of capital. Companies are created in Bermuda by application to the Bermuda Monetary Authority and must be approved by the Ministry of Finance. Charitable companies limited by guarantee may only be formed if and so long as their purposes are 'to promote art, science, religion, sport, education or any other social or useful purpose' to the satisfaction of the Minister of Finance (Companies Act 1981, Section 9).

In certain special cases, a charitable company can also be incorporated by *Private Act* legislation. Private Act legislation will often include special provisions, such as clarifying that the Attorney General has certain powers over the charity and/or expressly excluding certain company law requirements in the legislation.

#### *Content of organizational documents*

The general rule is that there are no requirements as to maximum or minimum numbers on governing boards of charitable organizations. However, a charitable company limited by guarantee or shares must comply with one of the following requirements as set out in Section 130(1) of the Companies Act 1981:

- (i) a minimum of two Bermuda resident directors (other than alternate directors);
- (ii) a resident Bermuda secretary and a resident Bermuda director (other than alternate director);
- (iii) a resident Bermuda secretary and a resident representative.

To be established by a Private Act of Parliament, a charitable company must obtain the official recognition of both the House of Assembly and the Senate of the Bermuda Legislature, and is arranged through a Private Bills Committee on which members of both Houses sit.

A purpose trust is established by a trust deed, which is subject to inspection and later general oversight by the Attorney General, as described below, but the Attorney General is not notified of the creation of the purpose trust.

A very important aspect of Bermuda law is the registration requirement of Section 4 of the Charities Act 1978. A charity that relies substantially upon contributions from local Bermuda sources must be registered, and no other charities are permitted to register.

Although applications for registration are submitted to the Registrar General of Bermuda and it is he who registers the charity, the applications are in fact placed before the Charity Commissioners of Bermuda for their consideration and approval. In considering any application for registration submitted by a charitable organization, the Charity Commissioners will consider the declared purposes of the organization, the character and reputation of the person connected with such organization and any other matter that the Commissioners may consider relevant. If the Commissioners are satisfied that any applicant for registration is a fit and proper charitable organization, they will direct the Registrar to enter in the Register of Charities its name and address and any other prescribed particulars. The Commissioners may direct either that the registration of a charitable organization will have effect immediately or that it will have effect for a period of twelve months at a time.

A Bermuda charity that primarily seeks its financing internationally cannot be registered under the Charities Act 1978. A charitable organization registered under the Charities Act 1978 can seek donations or financiers from overseas sources, and conduct activities overseas, but it still must rely substantially on contributions from local sources and members of the public of Bermuda. There are, however, ongoing formal committee discussions between the business sector and the government that may result in legislative action to allow Bermuda charities with global reach to be registered.

## **2. Obtaining exemption from taxation for the organization**

Bermuda has no income tax, sales tax or value added tax. Real property owned in Bermuda is subject to a property tax assessed on a sliding scale based on the annual rental value of the property with 1.56 per cent representing the lowest rate and 22 per cent the highest. Transfers of real or personal property situated in Bermuda are subject to a stamp duty at rates ranging from between 2.5 per cent and 5 per cent of the value of the property, depending upon the amount or value of the consideration on the day of the date of the instrument of conveyance or transfer. There are also significant customs duties on imports, including works of art.

Registration under the Charities Act 1978 does not automatically confer exemption from Bermuda taxation. A registered charity, however, is not subject to the stamp duty imposed on conveyances of Bermuda property. Also, charitable companies or trusts that are not registered are also exempt from the stamp duty on conveyances if, in the opinion of the Minister of Finance, the organization is charitable.

Registered charities may also seek exemption from the customs duty levied on nearly all goods imported into Bermuda. Charities may receive such exemptions on specified goods such as works of art for public display.

### **3. Obtaining status as an organization to which tax deductible gifts can be made**

As noted above, there are no income taxes in Bermuda. Local donors are not concerned with the status of the organization in this regard.

However, because donations are frequently made from estates of United States citizens, it is important for purposes of deductibility under the American federal tax regulations that the recipient charity is fully qualified as a charitable organization. In this regard it is advisable that the organization be registered under the Charities Act 1978. Alternatively, the charity can be established by a Private Act, thereby obtaining official recognition of the Bermuda Legislature.

### **4. Obtaining permission to solicit charitable gifts**

With a few exceptions for churches and schools, only registered charities are permitted to solicit funds from the Bermuda public. There is no formal procedure for obtaining permission. Once the charity is registered in Bermuda, it can then solicit funds.

This rule does not prevent a valid Bermuda charitable trust, company, or purpose trust, from soliciting funds from sources outside Bermuda.

### **5. Cost involved in the organizational steps**

There are no costs charged by the Charity Commissioners for establishing and registering a charity.

However, as described below, if the charitable organization is created as a company, there is a minimum annual government fee of \$550 for local companies, and an annual fee of \$1,695 for exempted companies (which by definition are those owned by non-Bermudans that generally conduct their business outside Bermuda).

There are, of course, legal fees related to the incorporation and organization of the entity. These expenses typically range between \$2200 and \$3000. If the company is created by Private Act, the cost is generally between \$8000 and \$10000. If the charity is created by a trust, the minimum cost is between \$1500 and \$3500.

### **6. Difficulty of obtaining official approval**

It is not difficult to obtain the approval of the Ministry of Finance for the creation of a charitable company if its purposes are exclusively charitable.

A charitable trust and a purpose trust do not require official approval for establishment or for recognition of status as charitable.

## **B. Permissible activities by the entity**

Charities must maintain an element of benefit to the public to ensure their continued charitable status. Therefore, a company's scholarship fund for which eligibility is restricted to its own employees would not be considered charitable.

Charities that are not registered may not solicit funds from the Bermuda public. Lobbying activities and assistance to specific political parties are restricted to the extent described below. Otherwise, Bermuda charitable organizations are not

restricted in their activities in any way as long as their activities serve charitable and legal purposes.

If an entity is established for the benefit of a particular political party, it will not qualify as a charity. The same comment applies to a trust that is established for 'philanthropic purposes'. However, as noted earlier, under Section 12A of the 1989 Act, as amended, a purpose trust may be created for certain specific purposes, including support of a political party, as long as the purposes are certain, lawful, possible and not contrary to public policy.

There is no requirement in Bermuda law that a charity distribute specified amounts of its income or assets in pursuit of charitable activities. However, the Charities Act 1978 provides for the cancellation of charitable registration by the Charity Commissioners if it appears to the Registrar General that the organization is no longer a 'fit and proper' organization.

Should the Attorney General be aware of misapplication of the funds of an unregistered charitable trust, he has the authority to bring the issue before the court.

There are no charity law restrictions on the transfer of assets to charitable recipients outside Bermuda except that any charity that is resident for exchange control purposes would need permission from the Bermuda Monetary Authority under the Exchange Control Act 1972 in order to make gifts to nonresidents. Further, Bermuda charities that are resident for exchange control purposes may, with the permission of the Bermuda Monetary Authority, establish charitable companies in the United States and in Canada for fund raising purposes. Furthermore, Bermuda charities that operate and raise funds substantially in Bermuda locally may, with permission of the Controller of Foreign Exchange at the Bermuda Monetary Authority, establish charitable companies in the United States and Canada for fund raising purposes.

### **C. Governmental regulation after initial registration**

If a charity is registered under the Charities Act 1978, the Bermuda Charity Commissioners have general authority over the organization. The Commissioners are appointed by the Minister of Health and Social Services under the provisions of the Charities Act. The Charity Commissioners regulate the activities of registered charities. This includes review of financial accounts and fund raising techniques. This does not imply supervision of daily operation of these charities. But, if a registered charity does not continue to pursue exclusively charitable ends, the Charity Commissioners may cancel the organization's registration.

If the activities of an unregistered organization are questioned, the Attorney General may petition the Supreme Court of Bermuda for an appropriate order. The Attorney General, although not actively involved in the oversight of charities, has the responsibility of bringing an action to court if notified of improper use or administration of the assets of a charitable trust or company. The Supreme Court of Bermuda maintains jurisdiction over charities that are either registered in Bermuda or unregistered but operating in Bermuda.

Registered charities must maintain accounts of funds received and spent for charitable purposes. Financial statements must be submitted to the Registrar General within six months of a charity's fiscal year end. The Charity Commissioners may

require audited accounts to be filed. The directors of a charitable company incorporated in Bermuda must submit financial statements to the shareholders at the annual general meeting. (See Sections 84 and 90 of the Companies Act 1981.) There is no requirement that financial records of registered charities or charitable companies be made available for public inspection.

The authority over a purpose trust is vested in the Attorney General (pursuant to the 1989 Act, as amended, at Section 12B). The Attorney General may apply to the Supreme Court to appoint a trustee for the trust. There is no longer a requirement to keep a Register of purpose trusts in Bermuda.

#### **D. Taxation of charitable organizations**

There is no Bermuda income tax, profits tax, withholding tax, capital gains tax or capital transfer tax applicable to charitable organizations. As noted earlier, however, charitable organizations are subject to customs duties if they import goods into Bermuda, and the Minister of Finance may grant exemptions from this tax.

Charitable companies are subject to annual government fees. Although it is unusual for a local charity to be structured as a local private company, a local company incurs a minimum fee of BM550, depending on the size of its capital. The maximum company fee is BM15 675. Tax exempt companies limited by guarantee incur a fixed annual fee of BM1 695.

Tax exempt foreign companies are assessed according to a scale in relation to their share capital. The minimum of BM1 2000 share capital results in a BM1 695 annual fee. Capital in excess of BM12 000 incurs an annual fee of between BM9 000 and BM26 500.

#### **E. Differences at different levels of government**

There are no relevant levels of government in Bermuda. The Charity Commissioners oversee registered charities; the Minister of Finance is responsible for charitable companies.

The Attorney General is empowered by the common law to represent the Crown in all matters involving charitable organizations. His principal duty in this regard is to intervene in the administration of a charity if a problem arises, or to seek court assistance if the trustees of a charitable trust fail to perform their duties. The Attorney General may also be requested by the court to oversee the implementation of the purposes of a charitable trust.

As a practical matter, the Attorney General serves as the officer of the court who informs the court of a breach of trust or neglect of duty by responsible persons in the administration of charities. The Attorney General does not have the power to inspect the documents of an unregistered charity unless legal proceedings are pending. The same duties and powers apply in cases involving charitable companies.