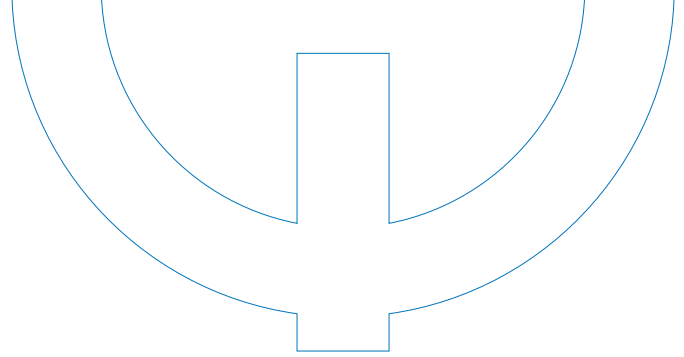


unique

The newsletter of aQUIVER



"Diamonds are forever"



I am young enough to not have been around when Zsa Zsa Gabor was at the peak of her notoriety but old enough to have heard of her; and especially of her famous quip that she: "...never hated a man enough to give him his diamonds back". I guess that shows a certain type of mindset, especially when one has married nine times.

Speaking of diamonds then, one could not help by noticing that the prices for the raw, unpolished stones (that is, rough diamonds) are at their lowest point for over a year. This reflects the post-pandemic shift in the consumers' preference towards experiences such as travelling and eating out as opposed to luxury goods. That is, a shift towards the things that the pandemic deprived us of for two years.

The plummeting rough diamond prices come off the back of two consecutive years (2021 and 2022) that have seen the demand for natural diamond jewellery reaching unprecedented heights. This drop is not dissimilar to what the second hand luxury watch market has suffered, with prices nearing a two-year low, falling more than 30% since their peak in March 2022. I guess we can call this a "market correction".

Sadly, for the consumers, the decline in the prices of rough diamonds will not be matched by a reduction in the retail prices of the sparkly end products. This is because retailers will not adjust (a euphemism for "reduce") their prices based on the rough diamond market in the short term, regardless of whether the products become cheaper. In actual fact, a one-carat round diamond is around 3% more expensive now than it was in January 2020. I guess we can call this "market inefficiency".

With Christmas just round the corner and Valentine's Day not much further down the line, retail sales of diamonds are expected to increase and this could possibly be reflected in the prices. If you are planning to get engaged, perhaps it does make sense to buy your diamonds now. And hope that your better half will not hate you enough in order to return back to you the diamond you so meticulously chose for her.

Incidentally – unlike the title of this article and unlike the 1971 James Bond movie (which was terribly average for my liking), diamonds are not for ever; any decent chemistry student can corroborate this. But that's a discussion for another day.

Have a pleasant reading

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Portugal – possible termination of beneficial tax regime?

One of the most popular tax residency schemes has been that of Portugal – the “non-habitual tax resident regime”. And it may not be around for much longer.

This program is designed at attracting private individuals such as professionals from a wide range of backgrounds (doctors, engineers, dentists, artists, authors – the list is practically endless), qualifying entrepreneurs, affluent retirees and high net worth individuals. The scheme is open to both European and third country nationals.

Eligible individuals are then afforded lucrative tax benefits for a period of 10 years which include a full exemption on certain types of income sourced from abroad such as employment income, rental income and dividend income; on the proviso that such income can be taxed in the source state under a double tax treaty or that it has been effectively taxed in a jurisdiction which is not a “low-tax” one. The tax program also allows Portuguese-source employment and self-employment income to be taxed at 20% and foreign pensions, since 2020, to be taxed at 10%. These benefits, along with the country’s appeal as a safe, affordable and appealing destination for people from diverse backgrounds and ethnic origins, have made the program very attractive to foreign nationals.

A recent announcement by government sources however has warned that the honey-moon period may be shortly coming to an end; and this could be happening as early as 2024. The rationale for abolishing such a popular program is its perceived contribution (along with the latest tourist boom) to the overheated Portuguese residential property market which has led to a shortage of residential properties



and has priced the locals out of the market. By way of an example, in Lisbon, a 75m² apartment would be rented at €1,200 a month, that being the average salary in the capital; still though, a very affordable rent for a nomad who enjoys substantial tax benefits.

If indeed the program is abolished, it is expected that (a) those who already subject to the regime and (b) applicants admitted to it before the end of the year will be grandfathered into the regime. So – perhaps it’s high time you submitted your application today rather than tomorrow.

United States of America introduce a beneficial owner registry

Similar to their European allies, the United States of America have also enacted legislation which introduces a beneficial owner registry.

The Corporate Transparency Act stipulates a new beneficial ownership reporting regime for both US companies and foreign companies carrying out business in the United States of America. The purpose of this legislation is, as always, to prevent the illicit use of corporations to conceal illegal activity, to combat the financing of terrorism, to clamp down on tax evasion and to fight other criminal activities.

Consequently, a US-wide registry of company beneficial ownership information was created. Unlike what was originally envisaged in the European Union (and was subsequently overturned by the European courts), the US registry will only be accessible the usual suspects; a multitude of state and federal agencies, law enforcement and other government officials.

All companies must provide certain identifying information of their beneficial owners to FinCEN, the US Treasury's Financial Crimes Enforcement Network. FinCEN is the agency which will operate and enforce the system which is due to come into operation on 1 January 2024. The rules originally set out by FinCEN specified that entities already in existence by that date would have until 1 January 2025 to file their beneficial ownership reports. Any companies which were set up after 1 January 2024 would have 30 calendar days to comply with their filing requirement. This tight deadline has caused concern around the ability of newly-formed companies to comply with their reporting obligations. As a result, it has now been proposed that companies incorporated into the new year will be allowed 90 days in order to file their initial beneficial ownership reports.

There has also been an amendment in the reporting requirements. It was previously envisaged that companies which had been unable to ascertain the identities of their beneficial owners within the time available, would be



allowed to submit reports stating that the beneficial owner information is not known to them. As this indeed seemed to be a loophole, FinCEN has changed its guidance on the reporting rules so that this will be not allowed any more. It will therefore be impossible for any company to finalise its disclosure unless all the required fields are fully completed. Any field which is not completed, whether intentionally or not, will prevent the entity making the filing from submitting their report.

Trust-flee clauses

Following years of abuse, the set-up of trusts is coming back to the basics. That is, succession planning and asset protection. The latter has traditionally been the stimulus for over-eager trust practitioners, mainly lawyers for that matter, to embellish the trust deeds with every protective clause one can think of. Such innovative clauses normally include provisions for changing the proper law and jurisdiction that governs a deed, provisions that withhold virtually all trustee powers for the settlor, provisions that bestow disproportionate powers to protectors and so on. Unsurprisingly, such a practice normally includes the incorporation of a “flee clause” which is as helpful as a “How to deal with your fear of heights” book in pilot’s briefcase.

Typically, a trust-flee clause triggers (contingent on a certain event) the resignation of the present trustee and the transfer of the trust fund to another trustee in a different jurisdiction. Such events would include civil unrest, war, rebellion, change of legislation and so on.

One of the main predicaments that such a solution fails to resolve is the legal ownership of the trust fund which is bestowed on the incumbent trustee. An automatic resignation may in theory remove the trustee’s power but his input will still be needed in (say) executing an instrument of transfer or completing other formalities for the transfer of assets.

An additional practical consideration is whether the trustee’s removal should be automatically predicated on a specific event or whether there should be discretion – for example, from the protector. If the former, then the risk will be having to foresee and stipulate an extensive and wide range of such triggering events. If the latter, then the parties will unavoidably create the procrastination they have purported to avoid in the first place.

Another item to consider is what should the choice of the new jurisdiction be. Should the flee clause itself specify the jurisdiction which the trust should move to or should the parties at the time choose one? One would see either the Channel Islands or England and Wales specified as the safe



havens in such clauses, but owing to optics, taxation or other factors (call me “Brexit”) any of these choices might prove to be unwise. Simply put, no jurisdiction can remain perpetually conducive and/or appealing for trusts.

An extension of the latter is whether the flee clause itself should specify the new trustee or whether the protector will have the prerogative to select one at the time. Even in the former scenario, the time taken to undertake the administration of the changeover (execution of indemnities and engagement contracts, due diligence and so on) would render the process slow and cumbersome. Not to mention that the latter scenario would be even slower in implementing, as it would involve selecting a new trustee, more suitable than the previous one.

What is the essence of the above and of this article for that matter? That a trust flee clause is a far-less-than-ideal means to counter the uncertainty of friendliness of the jurisdiction and/or the reliability of the trustee. The only way to mitigate risks involved with these two parameters is proper and thorough due diligence at the outset along with the provision of standard powers to change jurisdiction and to remove a trustee.