

**52nd AIJA Annual Congress**

**Prague, 26-30 August 2014**

**Questionnaire for National Reporters**

**Private Client and Immigration Working Session**

**Movement of High Net Worth Individuals  
Localisation et Délocalisation des Clients Privés Fortunés**

General Reporters/Rapporteurs généraux: Michael Wells-Greco (Speechly Bircham) and Firuza Ahmed (Kingsley Napley)

**Background**

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realities and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

**1. PRELIMINARY MATTERS**

We would ask that you return completed the Questionnaire and your answers to the case studies below by **Friday, 28 February 2014** (earlier if possible please).

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

If you are a delegate responding as part of the Immigration Commission, please respond **only** to sections 1.1 and 2.1.

## 1.1 Immigration and Nationality [for Immigration Commission only]

### 1.1.1 Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).

The Department of Immigration and Emigration of Sri Lanka grants Resident Guest Scheme visas to foreign nationals.<sup>1</sup>

There are two sub-categories under this scheme.

- a) Any foreign investor or professional who can contribute to the economic and socio-cultural enrichment of Sri Lanka is eligible to apply for the grant of a visa under this scheme.
- b) If the person intends to make an investment in Sri Lanka during his or her stay in Sri Lanka, and the investment falls within the permitted categories, he or she could apply for the grant of a residence visa by registering under the investor category of the Resident Guest Scheme Visa program.

The Resident Guest Scheme visa is valid for a period of 5 years. This can be extended on the proof of contribution to the socio-cultural enrichment of the country, or, as the case may be, satisfactory performance of the project investment. Bank statements etc. would have to be furnished to prove compliance with any inward remittance requirements.

A qualified professional or investor could bring to Sri Lanka his or her spouse, dependent children and his or her parents or<sup>2</sup> the parents of his or her spouse.

A resident guest can apply for citizenship upon completion of three years of residence under and in terms of the Citizenship Act No. 18 of 1948. However grant of citizenship would only be considered on the basis of the applicant's contribution to the economic development/socio cultural enrichment of the country during the period of residence.

The following remittance requirements are applicable in this regard.

- a) If the applicant is a potential investor such investor should remit a minimum of US\$ 250,000/-, or an equivalent amount in any convertible foreign currency, and deposit the funds in a special account in any commercial bank approved by the Central Bank of Sri Lanka.

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<sup>1</sup> The information which follows about the Resident Guest Scheme is taken from the website of the Department of Immigration and Emigration of Sri Lanka.

<sup>2</sup> The word or is used in the website.

If the investor intends to commence any investment project jointly with another foreign partner or partners, each such person should invest a minimum of US\$ 250,000, or an equivalent amount in any convertible foreign currency.

A further sum of US\$ 35,000 should be deposited for each dependent accompanying the investor. Interest will be paid on any unutilized balance held in deposit at such rates as are determined by the Central Bank of Sri Lanka from time to time. Documentary evidence to confirm the remittances to Sri Lanka should be furnished. In addition to the initial deposits, an investor should regularly remit sufficient funds for the upkeep of himself and his dependents.

- b) If the applicant is a professional intending to reside in Sri Lanka under the scheme, he or she is required to remit a minimum of US\$ 2,000/- per month for him/herself and US\$ 1,000/- per month for each of his/her dependants, including a spouse.

The Government of Sri Lanka also has in place the My Dream Home Program which is open to all persons interested in retiring in Sri Lanka subject to the fulfilment of certain criteria.

If granted, the visa allows a retiree, subject to renewal every two years, to live in Sri Lanka on a long term basis and the residence visa is initially issued and thereafter renewed for periods of two years respectively.

Foreign nationals over 55 years may apply for the My Dream Home visa for themselves, their spouses and unmarried children under the age of 18.

The requirements for an applicant to be eligible for the grant of a My Dream Home visa are.

1. The applicant must be over the age of 55.
2. The applicant must remit a minimum of US\$ 15,000 or its equivalent in other convertible foreign currency and deposit the said sum in a fixed deposit foreign currency account and this amount should remain in the account as long as the applicant stays in Sri Lanka on the residence visa.
3. A monthly remittance of US\$ 1,500 for the principal applicant and US\$ 750 for accompanying spouse and each dependent child for their upkeep in Sri Lanka must be deposited in Sri Lanka Rupees savings or current accounts.

1.1.2 Are there any proposed changes to the programmes outlined in 1.1.1

No.

- 1.1.3 Is there a dichotomy between your Government's wish to attract HNWIs as against public perception of immigration?

It is not possible for us to comment on the public perception of immigration as this would be a matter of extremely subjective opinion. It should be noted that apart from the My Dream Home visa program and the Resident Guest Scheme visa, currently the general policy in regard to visas for foreigners is very restrictive. For example, it is now not easy to obtain letters of recommendations from the Board of Investment of Sri Lanka and/or the relevant Line Ministry for the grant of visas, and the current Government policy appears to be to make it more and more difficult for persons seeking the grant of letters of recommendation, particularly so when a letter of recommendation is sought from the Board of Investment of Sri Lanka. It should also be kept in mind that recent policy decisions to ban the acquisition of ownership of property by foreigners might well discourage many applicants under either of the Resident Guest Scheme or the My Dream Home program.

## 1.2 Cross-border succession

- 1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(A) Yes (national law).

- 1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?

(C) Not relevant to Sri Lanka.

If so, please briefly set out the options.

There is no reserved portion concept as a matter of Sri Lankan Law, but it should be noted that Sri Lankan law does contain rules, (for example, in the Matrimonial Rights and Inheritance Ordinance), governing intestate (*ab intestato*) succession which would be applicable when there is no last will.

In the case of non-Muslims, in the absence of a last will, immovable property would devolve in the manner specified in Part III of the Matrimonial Rights & Inheritance Ordinance.

The Matrimonial Rights and Inheritance Ordinance provides (in regard to intestate succession) that the surviving spouse inherits one half of the estate. Children, grandchildren and remoter descendants are preferred to all others. All children take equally *per capita*, but their children, or remoter issue of a deceased child, take *per stirpes* or by representation.

If there are no intestate heirs falling within the specified categories, then the estate defaults to the State. If, however, any heirs can be found,

even beyond the tenth degree, they take the inheritance and the Ordinance contains detailed provisions in this regard.

With respect to movable property, inheritance *ab intestato* is governed and regulated by the law of the country in which the deceased was domiciled at the time of his/her death.

- 1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.

No.

If yes, is this election limited to the law of the deceased's:

(A) Nationality (B) Habitual Residence (C) Other

Not applicable.

The general principle concerning which law is applicable to succession to immovable property, (real estate), in Sri Lanka is that succession to immovable property in Sri Lanka is governed by Sri Lankan law.

The national law of a foreigner is not applicable to inheritance of immovable property located in Sri Lanka.

The Matrimonial Rights and Inheritance Ordinance clearly provides in section 21 thereof that inheritance *ab intestato* to the immovable property in Sri Lanka of a person deceased shall be governed and regulated by the provisions of the Ordinance wherever such person may have or have had his or her actual or matrimonial domicile.

Inheritance with respect to movable property is governed by the law of the country where the deceased owner was domiciled at the time of death.

With respect to Muslim foreigners owning immovable property in Sri Lanka, the Muslim Intestate Succession Ordinance provides that the law applicable to the intestate succession in respect of the estate of any deceased Muslim who at the time of his death was domiciled in Sri Lanka or was the owner of any immovable property in Sri Lanka, is the Muslim law governing the sect to which such deceased Muslim belonged.

When citizens of Sri Lanka own immovable property abroad, the law of the country where the property is situated has been recognized by Sri Lankan courts as being the applicable law governing inheritance.

With respect to movable property, as already noted, Sri Lankan statute law has recognized the law of the place of domicile as being the applicable law.

### 1.3 Personal taxation and compliance

- 1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

Persons may fall to be considered as resident in Sri Lanka for the purposes of the Inland Revenue Act, or fall to be considered as non-residents for the purposes of the Inland Revenue Act.

The physical presence of an individual in Sri Lanka for 183 days or more within one year of assessment year results in him or her falling to be considered as being resident in Sri Lanka by virtue of section 79 of the Inland Revenue Act No. 10 of 2006.

Taxation status is based on residency as defined in the Inland Revenue Act and the concepts of citizenship and domicile are not relevant for this purpose.

A person resident in Sri Lanka for two consecutive years or for a greater duration than such period is deemed to be a Sri Lankan resident for the purposes of the Inland Revenue Act unless he/she leaves the country for a period of at least 12 consecutive months.

Income tax is charged in terms of the provisions of the Inland Revenue Act no. 10 of 2006 as amended by the Inland Revenue (Amendment) Act no. 10 of 2007, Act no. 9 of 2008, Act no. 19 of 2009, Act no. 22 of 2011, Act no. 8 of 2012 and Act no. 18 of 2013.

A person who is resident in Sri Lanka for the purposes of the Inland Revenue Act is chargeable with income tax in respect of his or her profits and income wherever arising. The liability to income tax therefore extends to his or her global income.

A person who is non-resident in Sri Lanka for the purposes of the Inland Revenue Act is chargeable with income tax in respect of only the profits and income arising in or derived from Sri Lanka. "Profits and income arising in or derived from Sri Lanka" includes all profits and income derived from services rendered in Sri Lanka or from property in Sri Lanka, or from business transacted in Sri Lanka, whether directly or through an agent.

The Resident Guest (Tax Exemption) Act no. 6 of 1979 was enacted to exempt certain categories of residence visa holders from certain taxes.

A Resident Guest, in terms of the said Act no. 6 of 1979, means a person to whom a residence visa has been granted under the Immigrants and Emigrants Act by the Controller with the approval of the Minister in charge of the subject of Defence, on the Minister being satisfied that such person is a person of eminence in the field of culture or science or that such person intends to reside in Sri Lanka during his retirement.

The said Act no. 6 of 1979 exempts such resident guests from income tax in respect of income tax in respect of such profits and incomes as do not arise in Sri Lanka.

This exemption is repeated in the Inland Revenue Act no. 10 of 2006, the profits and income of any resident guest:

- a) not being profits and income arising in or, derived from Sri Lanka; and
- b) accruing from moneys lying to his credit in any account opened by him in a commercial bank, for the deposit of sums remitted to him in foreign currency from any country outside Sri Lanka,

shall be exempt from income tax.

For the purpose of this section "resident guest" means a person to whom a tax exemption has been granted under the Resident Guest (Tax Exemption) Act, No. 6 of 1979.

1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?

Yes.

If yes, please briefly summarise the changes.

The definition of a "non-resident" has been amended by the Inland Revenue Act No. 18 of 2013. The amending section provides that "an individual who has been deemed resident for two or more consecutive years of assessment shall be deemed to be resident until such time as he is continuously absent from Sri Lanka for an unbroken period of three hundred and sixty five days. When such person is so absent, he shall notwithstanding the provisions of subsection (2), (the provision in the Inland Revenue Act providing that an individual who is physically present in Sri Lanka for one hundred and eighty three days or more during any

year of assessment shall be deemed to be resident in Sri Lanka throughout that year of assessment), be deemed to be non resident from the commencement of the year of assessment in which such absence commences being a year of assessment prior to April 1, 2013”.

- 1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?

If yes, please briefly set out the key provisions.

There have not been any amendments to section 106 of the Inland Revenue Act (which provides for returns and information to be furnished) in the last 24 months which provide for the introduction of any new reporting requirements.

- 1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?

(A) Yes in so far as non-citizens are concerned.

If yes, please briefly set out the key provisions.

The President in his Budget Speech delivered in November 2013 stated that foreigners can have access to state and private land only through long-term lease arrangements.

With regard to leasing of private property by foreigners, the legal position is that this is possible although there is every likelihood that, pursuant to the proposal in the President’s budget speech, a 15% tax would be payable by the foreigner in the event that he/she leases property in Sri Lanka.

In his budget speech of 21st November 2013, the President had this say on the issue:

Quote:

*"I firmly believe that state enterprises should have their presence in the economy for there to be a fair balance between the public sector and the private sector to ensure economic and social progress in our country. Similarly, we have formulated laws to protect our land resources from outright transfers to foreign ownership. From this year, foreigners can have access to state and private land only through long-term lease arrangements. As infrastructure development has improved the value of all lands, it is necessary to implement a land lease tax structure to protect long-term value of lands. Hence a 15 percent upfront tax will be imposed in the event of lease of state or private lands to foreigners".*

Unquote.



Although this proposal has been made, implementing legislation has not yet been enacted to give statutory effect to the proposal and as a matter of pure law, therefore, the existing legal regime would continue to apply – namely that there is no restriction on the acquisition by foreigners of ownership of private land in Sri Lanka; and, as per the provisions of the Finance Act No.11 of 1963, as amended and re-enacted, a hundred percent tax would be payable on a transfer of ownership of land in Sri Lanka to a person who is not a citizen of Sri Lanka.

As already mentioned, implementing legislation will have to be passed and the difficulty which arises is whether or not any such implementing legislation would be enacted with retrospective effect.

In practice, it is reported that a land lease tax is being imposed administratively even though there does not appear to be any legal basis for it.

- 1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?

(B) No

If yes, please briefly set out the key measures.

Sri Lanka has entered into Double Tax Treaties with certain jurisdictions to eliminate or mitigate the incidence of juridical double taxation and avoidance of fiscal evasion in international trade (or transactions). Sri Lanka has entered into double taxation treaties with 38 other jurisdictions and entered into the SAARC Multinational treaty as well. However, in direct answer to the question, Sri Lanka has not entered into any Double Tax Treaty agreements within the last 24 months.

- 1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or “beneficiaries” located in your country?

(B) No

If yes, please briefly set out the key measures.

Though our answer is no, from the perspective of applicable law, it should be kept in mind that in the event of there being any obligation to file accounts in respect of income arising in or derived from Sri Lanka, there may be disclosure obligations as per the provisions of applicable accounting standards (IFRS and the Sri Lankan accounting standards) when such accounts are being prepared.

With regard to reporting requirements, the most recent reporting requirements are to be found in the Financial Transactions Reporting Act, No. 6 of 2006, and regulations gazetted and circulars issued thereunder.

The Financial Transactions Reporting Act is an Act to provide directions and guidelines for the collection of data relating to suspicious financial transactions to facilitate the prevention, detection, investigation, and prosecution of offences of money laundering and the financing of terrorism. It requires certain institutions to undertake due diligence measures and provides for the establishment of an authority responsible for monitoring the activities of institutions to which the provisions of the Financial Transactions Reporting Act apply. As per regulations gazetted in June 2008, it was provided that every institution within the meaning of the Act must in terms of the provisions of the Act report to the Financial Intelligence Unit every electronic fund transfer made at the request of a customer, where the amount of such transfer exceeds Rupees One Million (Rs. 1,000,000) or its equivalent in any foreign currency.

An institution under the said Act is defined as any person or body of persons engaged in or carrying out any finance business or designated non-finance business within the meaning of the Act.

It should be noted that the Financial Intelligence Unit of Sri Lanka, (the "FIU") the administration of which is vested with the Central Bank of Sri Lanka, is responsible for the collection and receipt of information on financial transactions for the purpose of detecting possible links to money laundering, terrorist financing and other unlawful activities defined in the Financial Transactions Reporting Act No. 6 of 2006. It conducts investigations into suspicious financial transactions, and disseminates information to relevant regulatory and law enforcement authorities to institute appropriate enforcement/legal actions and issues directives/regulations in respect of customer identification, know your customer/customer due diligence requirements.

As far as we are aware, the rules governing the filing of STRs have not been amended in the last 24 months.<sup>3</sup>

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<sup>3</sup> The most recent Annual Report of the FIU published on its website is the 2012 Annual Report.

## 1.4 Mental capacity of adults

- 1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

The Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 was enacted to provide for the establishment of a National Council for Persons with Disabilities, for the Promotion, Advancement and Protection of Rights of Persons with Disabilities in Sri Lanka.

Under the said Act a "*person with disability*" means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life.

Section 23 prohibits discrimination on the ground of age but the Act itself does not contain any mechanisms in regard to the administration of the affairs and estates of persons who are *non compos mentis*.

- 1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult's personal welfare and/or property and affairs?

(C) Both personal welfare and property and affairs

Provisions under Sri Lankan law in regard to the guardianship of the insane are found in the Judicature Act, the Civil Procedure Code and the Mental Disease Ordinance of Sri Lanka.<sup>4</sup>

Section 20 of the Judicature Act no. 2 of 1978 provides that "every District Court shall have the care and custody of the persons and estates of all idiots and persons of unsound mind and others who by reason of their mental or physical infirmities, or both such infirmities, are incapable of looking after or managing their persons or their affairs as the case may be and are resident within its district with full power to make them wards of the court and to appoint guardians and curators of all such persons and their estates, and to make order for the maintenance of such persons and the proper management of their estates, and to take proper securities for such management from such guardians and curators, and to call them to account, and to charge them with any balance which may be due to any such persons as aforesaid, or to their estates, and to enforce the payment thereof and to take order for the secure investment of any such balance; and such guardians and curators from time to time remove and replace as occasion may require".

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<sup>4</sup> Weeramantry, Law of Contracts, pg 473

Subsection (3) of section 20 of the Judicature Act provides that “the jurisdiction and powers of the District Courts under this section as regards the charge of the property of persons of unsound mind and mentally deficient persons shall extend to the charge of the property in Sri Lanka of persons of unsound mind and mentally deficient persons who are not resident in Sri Lanka and may be exercised by any District Court within whose territorial limits any such property is situated”.

The Act specifically defines a “mentally deficient person” as a person mentally ill or feeble and incapable of managing his own affairs though not adjudicated a person of unsound mind in accordance with the law for the time being in force.

Chapter XXXIX of the Civil Procedure Code of Sri Lanka contains provisions in respect of actions relating to persons of unsound mind. In terms of the Civil Procedure Code, the expression “person of unsound mind” means every person found by due course of law to be of unsound mind and incapable of managing his or her affairs.

Section 570 of the Civil Procedure Code of Sri Lanka states “the person appointed to be guardian of the person of a person of unsound mind, shall have the care of *his person and maintenance...*” (emphasis added).

If a person is thus found incapable of managing his or her own affairs and to be of unsound mind, a manager would have to be appointed to take charge of his/her property and enter into contracts on his/her behalf.

The Civil Procedure Code contains provisions in regard to the powers of such a manager and the limitations on the powers of an appointed manager. Section 571 of the Code states that no manager has the power to sell or mortgage the estate of a lunatic or any part thereof or to grant a lease of any immovable property for any period exceeding five years without an order of the District Court previously obtained.

The general powers of the Court are laid down in the succeeding sections. It should be noted that the Court is entitled, where the circumstances warrant it, to appoint some person other than the spouse as the manager of the estate of a spouse of unsound mind, if necessary.

The Mental Diseases Ordinance also contains provisions in respect of the maintenance of persons of unsound mind who are possessed of property sufficient in value and capable of being applied for their maintenance; and contains provision in terms of which managers may be appointed in respect of the estates of such persons as provided for in sections 567 and 577 of the Civil Procedure Code.

- 1.4.3 Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?

At common law, the death of the principal of a Power of Attorney terminates the powers of his agent: the rule being that a power should always be exercised during the life of the donor. It has been held in case law that lunacy of the donor produced the like effect. A Power of Attorney would therefore cease to have effect as from the onset of mental incapacity.

It should be noted that the laws of Sri Lanka have been influenced by two legal traditions, namely the civil and common law legal systems. Roman Dutch law is the residuary law in Sri Lanka and is applied in all situations in which there was no relevant statute and in case of those subject to the special laws, where those laws are inapplicable or silent. However statute law supersedes the Roman Dutch law on some matters. Agency for example is based on English principles or statutes since the law of England has been declared to be the applicable law by express statutory provision.

The Introduction of the Laws of England Ordinance 1852 provided that the law of England is to be observed in matters of all contracts and contains provision that the law of England shall be applicable in respect of principal and agents as well. Therefore, the law of England that was introduced was the law applicable at the that time and at that time English law did not contain provision for enduring powers of attorney and registration of powers of attorney with the Court of Protection as it does now. No special legislation has been enacted in Sri Lanka providing for enduring powers of attorney or powers of attorney which remain in force notwithstanding the mental incapacity of the grantor.

- 1.4.4 Are there proposals for legislative change in the field of mental capacity?

(A) Yes

If yes, what are the proposals?

In 2007 a draft Mental Health Act was under consideration by the Ministry of Health. However this draft has not been enacted into law as at March 2014 and there is considerable doubt as to whether it will be passed within the course of this year.

- 1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?

(B) No

1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?

(A) Yes

## QUESTIONS FOR CASE STUDIES

### 2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

#### 2.1 Immigration law [for Immigration Commission only]

2.1.1 Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWIs such as Roberta and Paul to:

- (a) move firstly to the US (please omit this if you do not advise on US immigration law);
- (b) and then secondly to your country?

Since the question specifically refers to investor type programs, this answer assumes that Roberta and Paul are investing in a company/business in Sri Lanka.

The Department of Immigration and Emigration is the authority in Sri Lanka which is responsible for the granting of residence visas to those who wish to work in Sri Lanka.

In order to obtain a residence visa with the right to work in Sri Lanka, the couple could cause to be incorporated a company which is approved by the Board of Investment of Sri Lanka ("BOI") in terms of section 17 or 16 of the BOI Law.

The BOI would usually grant approval for an entry visa (which would have to be converted to a residence visa within 30 days of arrival). It should be noted that Ministry of Internal Security clearance is required to be obtained prior to the residence visa application papers being lodged with the Department of Immigration & Emigration.

A minimum of US\$ 250,000 would have to be invested by each investor.

If the BOI route is not used, then approval from a relevant Line Ministry would be necessary. Roberta and Paul (or their advisors) would have to identify the relevant Line Ministry and this would depend on the nature of the business proposed to be carried on in Sri Lanka.

As per the wording of the Department of Immigration's web site, a residence visa is a permit for a non-Sri Lankan to obtain long term facilities for special purposes such as working, studying, and living with Sri Lankan spouse, engaging in volunteer services, etc. It is issued to foreign nationals to whom it has been decided to extend residence facilities for the purpose of investment or otherwise, in circumstances where the prescribed authority is satisfied that their stay in Sri Lanka and the pursuit of their vocations are not prejudicial to the best interests of the Sri Lankan population.

To obtain a Residence Visa, it is necessary to arrive in Sri Lanka on an Entry Visa issued by a Sri Lankan Mission abroad with the concurrence of the Controller General of Immigration and Emigration. The fact that Roberta and Paul wish to apply for a Sri Lankan Residence Visa would have to be mentioned when obtaining the entry visa and necessary supporting documents would have to be submitted.

Investors and their dependents can apply for a residence visa.

If Roberta does not intend to work in Sri Lanka she may be granted a spouse visa. If she obtains a spouse visa she would not be permitted to work in Sri Lanka.

Residence visas are valid for one year and are renewable. In certain situations the Department may grant a residence visa for two years.

If your advice would change if Paul was not a Dutch national, please explain.

No change.

2.1.2 What immigration options does Gloria have to move to your country on a long term basis?

As Gloria is above the age of 55 she may apply to obtain a My Dream Home visa, details of which have been set out previously. The My Dream Home visa is valid for two years and is renewable.

2.1.3 What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?

According to the information on the Department of Immigration and Emigration's website, if Paul is a qualified investor or professional he could bring in his spouse, dependent children and his parents or the parents of his spouse. However it should be noted that Government policy appears to be becoming more and more restrictive and the reality may be that it is no longer be possible for the parents to obtain a residence visa.

A resident guest can apply for citizenship upon completion of three years of residence under and in terms of the Citizenship Act No. 18 of 1948. However such an application would only be considered on the basis of applicant's contribution to the economic development and socio cultural enrichment of the country during the period of residence.

Because of the difficulties for Sri Lankans to obtain visas for travel to many countries, applying for Sri Lankan citizenship would not be advisable unless the right to keep the existing nationality of the applicant were granted to the applicant.

2.1.4 Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?

The following remittance requirements under the Resident Guest Scheme, if applicable follow.

a) If the applicant is a potential investor, such investor should remit a minimum of US\$ 250,000/- or an equivalent amount in any convertible foreign currency, and deposit the funds in a special account in any commercial bank approved by the Central Bank of Sri Lanka.

If the investor intends to commence any investment project jointly with another foreign partner or partners, each such persons should invest a minimum of US\$ 250,000 or an equivalent amount in any convertible foreign currency.

A further sum of US\$ 35,000 should be deposited for each dependent accompanying the investor. Interest will be paid on any unutilized balance held in deposit at such rates as are determined by the Central Bank of Sri Lanka from time to time. Documentary evidence to confirm the remittances to Sri Lanka should be furnished. In addition to the initial deposits, an investor should remit regularly sufficient funds for the upkeep of himself and his dependents.

b) If the applicant is a professional intending to reside in Sri Lanka under the scheme he or she is required to remit a minimum of US\$ 2,000/- per month for him/herself and US\$ 1,000/- per month for each of his/her dependants, including spouse.



The requirements for an applicant/holder of a My Dream Home visa follow.

1. Must be over the age of 55
2. Applicant must remit minimum of USD 15,000 or its equivalent in other convertible foreign currency and deposit the said sum in a fixed deposit foreign currency account and this amount should remain in the account as long as the applicant stays in Sri Lanka under the residence visa.
3. A monthly remittance of USD 1,500 for the principal applicant and USD 750 for the accompanying spouse and each dependent child for their upkeep in Sri Lanka must be deposited in Sri Lanka Rupees savings or current accounts.

2.1.5 Will any of the members of the family be able to acquire citizenship of your country?

In Sri Lanka citizenship is governed by the Citizenship Act No. 18 of 1948 in terms of which a person shall be or become entitled to the status of a citizen of Sri Lanka only in one of the following ways:

- a) by right of descent
- b) by virtue of registration

It is therefore not possible for any of the family members to obtain citizenship by right of descent.

When it come to citizenship by registration such persons needs to fulfil the following requirements,

- a) the applicant should be of full age and of sound mind.
- b) The applicant
  - a. Is a person, either of whose parents was a citizen of Sri Lanka, and who would have been a citizen of Ceylon or Sri Lanka if his birth had been registered in accordance with the provisions of that subsection, or
  - b. Is a person either of whose parents, having been a citizen of Sri Lanka whether at or before the time of the birth of that person, caused under section 20 to be a citizen of Ceylon or Sri Lanka; and
- c) The applicant is, and intends to continue to be, ordinarily resident in Sri Lanka.

Apart from the above, a spouse, or the widow or widower, of a citizen Ceylon or Sri Lanka by descent or registration, shall be registered as a citizen of Sri Lanka under this Act.

However under and in terms of the said Act, a person to whom the above provision does not apply can, on his making application in that behalf to the Minister get registered as a citizen of Sri Lanka if the Minister is satisfied

- a) that he is a person who has rendered distinguished public service or is eminent in professional, commercial, industrial or agricultural life, and
- b) that he is, and intends to continue to be, ordinarily resident in Sri Lanka.

However it should be noted in this regard that it is rather difficult to acquire citizenship under this provision of law since the number of persons registered as citizens of Sri Lanka under this section must not exceed 25 per year. Moreover the Minister's refusal under this section to allow the application of any person for registration as a citizen of Sri Lanka is final and cannot even be contested in any court of law.

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US\$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (**the Inheritance**).
- Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.

## 2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

The existing legal regime is that there is technically no restriction on the acquisition by foreigners of ownership of private land in Sri Lanka, (private land would include condominium property), and, as per the provisions of the Finance Act No.11 of 1963, as amended and re-enacted, a hundred percent tax would be payable on a transfer of land/property to a person who is not a citizen of Sri Lanka. There are

many ways to avoid the 100% taxation. An alternative to purchase is to lease the land. There are certain exceptions to the applicability of the 100% tax which have been gazetted and the relevant exception on the basis of the facts provided is that the 100% tax is not payable upon a transfer of ownership of a condominium property above the fourth floor to a non-citizen. So, Paul and Roberta should purchase a condominium apartment above the fourth floor.

However, it should be noted that the Government intends passing legislation in Parliament in the near future for the purpose of prohibiting the acquisition of land in Sri Lanka by foreigners, subsequent to the 2013 and 2014 budget speeches of the President of Sri Lanka.

The President in his most recent 2014 Budget Speech delivered on November 21, 2013, stated that foreigners would only be able to have access to state and private land through long-term lease arrangements where a 15 percent upfront tax will be imposed in the event of lease of state or private lands to foreigners.

Subsequent to the President's 2013 Budget Speech Circular No. PP/06/23/01/03 was circulated amongst the governmental institutions including the Registrar General's Department.

According to the said circular, the prohibition on transferring of land to foreigners, does not apply to a transfer of a Condominium Parcel situated on the fourth floor (excluding the ground floor) or above of a building coming under the provisions of the Apartment Ownership Law No. 11 of 1973.

It should be noted that although these proposals were made in the Budget Speeches, implementing legislation has not yet been enacted to give statutory effect to the proposal and as a matter of pure law. Therefore the existing legal regime would continue to apply.

#### Succession law and mental capacity

##### 2.2.1 What would you advise with respect to the Inheritance?

All persons, including foreigners, are governed by the provisions of statute law enacted in Sri Lanka. The principal laws which apply to inheritance are the Matrimonial Rights and Inheritance Ordinance, the Wills Ordinance, the Prevention of Frauds Ordinance and the Roman Dutch Law.

Roberta and Paul, as stated, wish to ensure that the family assets of Gloria pass on to the grandchildren and do not fall to be considered as matrimonial assets. In Sri Lanka there is no community of property of spouses as a matter of the generally applicable law.

The best manner in which Gloria could ensure that her assets are passed onto her grandchildren is by executing a Last Will which

complies with the provisions of the Prevention of Frauds Ordinance (in the absence of her having already made a Last Will elsewhere).

Section 4 of the Prevention of Frauds Ordinance contains the requirements of execution of a valid Last Will in Sri Lanka.

Such requirements include that the Last Will must be in writing, must be signed at the foot or end thereof by the testator or some other person in his presence and by his direction and that such signature must be made or acknowledged by the testator either in the presence of a licensed Notary Public and two or more witnesses, or in the presence of five or more witnesses, the Notary and that the two witnesses, or the five witnesses, as the case may be, must be present at the same time; and that the Notary and the two witnesses must duly attest the execution, or, as the case may be, that the five witnesses must subscribe the Will in the presence of the testator. No Last Will made in Sri Lanka will be valid unless executed in the manner stated above.

If the case is that Gloria has already executed a Last Will in Brazil, (presumably her country of origin), section 5 of the Wills Ordinance would be applicable. Section 5 provides, in regard to foreign wills, that "Every will made beyond the limits of Sri Lanka containing any devise or disposition of immovable property situate within Sri Lanka, which shall have been duly made and executed according to and in conformity with the forms and solemnities prescribed by the law of the country where the same shall have been so made and executed, by any person who by the law of such country or of Sri Lanka if competent to make a will, shall be valid and effectual to alienate and pass the property in any immovable property so devised or disposed of by any such testator; and every will be duly made and executed in manner aforesaid, in any place beyond the limits of Sri Lanka, by any person who shall be competent to make a will by the law of the place where he shall be domiciled at the time of making and executing the same, shall be valid and effectual to alienate and pass the property in any movable property by such will bequeathed or disposed of, anything contained in the Prevention of Frauds Ordinance or any other law or custom to the contrary notwithstanding".

The formalities for a foreign will dealing with property in Sri Lanka to be recognized in Sri Lanka for the purposes of administering the estate in Sri Lanka is that the Last Will must first be proved or declared open by the relevant Court in the foreign country. The relevant court in the country in which had Gloria previously executed a Last Will (presumably Brazil) would have to grant probate (or an equivalent document under Brazilian law) declaring the Will proved. Thereafter an application would have to be made in the relevant Court in Sri Lanka to reseal the document with the seal of the relevant Sri Lankan Court.

Section 554U of the Civil Procedure Code of Sri Lanka states that "Where a Court of Probate or other authority in a foreign country has granted probate or letters of administration in respect of the estate of a deceased person, probate or letters so granted may, on being produced to, and copy thereof deposited with, a competent court, be sealed with the seal of that court and thereupon shall be of like force and effect and have the same operation in Sri Lanka as if granted by that court."

In terms of the Matrimonial Rights and Inheritance Ordinance, as mentioned previously, inheritance to movable property is governed by the law of the country where the deceased owner was domiciled at the time of death.

Sections 22 and section 23 of the Matrimonial Rights and Inheritance Ordinance provide that when any person shall die intestate as to any of his or her property, the surviving spouse shall inherit one half of the property of such person whilst the other half is divided amongst descendants, ascendants and collaterals.

If Gloria dies intestate, resident in Sri Lanka but still domiciled in Brazilian, then Brazilian law would be applicable to intestate succession to the artwork.

If however, Gloria has acquired a Sri Lankan domicile by the date of her death, then the aforesaid provisions of the Matrimonial Rights and Inheritance Ordinance would apply to intestate succession to the artwork.

Question 2.2.1 is specifically in relation to Gloria's artwork. Such artwork which would be considered as a movable.

In the event that Gloria does not have a surviving spouse, (as presumably is the case based on the facts as provided in the question), and is domiciled in Sri Lanka as at the date of her death, the assets of Gloria would be divided amongst her children equally, that is between Roberta and any other sibling Roberta may have. In the event of Roberta's death in Sri Lanka, assuming that she has acquired a Sri Lankan domicile, her assets would be divided according to the provisions of the Matrimonial Rights and Inheritance Ordinance, namely half of her assets would devolve on her husband, Paul and the other half would be divided amongst the children.

It should be noted that section 21(2) of the Matrimonial Rights and Inheritance Ordinance provides that if a person dies leaving movable property in Sri Lanka, in the absence of proof of his or her domicile elsewhere, the inheritance to such movable property will be governed by the provisions in the Matrimonial Rights and Inheritance Ordinance.

Therefore if Gloria wishes her assets to pass to her grandchildren the most advisable option for Gloria would be to execute a Last Will under Sri Lankan Law terminating any previous wills executed by her in or out of Sri Lanka distributing all her assets according to the provisions of the Last Will.

2.2.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?

There are no steps that Paul can take in advance of Paul losing mental capacity. As mentioned previously, it would be possible for Roberta to make an application to Court to have herself appointed as the guardian of Paul and curator of his estate under and in terms of Chapter XXXIX of the Civil Procedure Code. It should be noted that section 567 of the Code provides *inter alia* that "any near relative of the person of unsound mind or any other suitable person may be appointed manager".

2.2.3 More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider?

The Finance Act 11 of 1963 provides that the 100% tax is not payable on a transfer of ownership of property to a non-citizen where such non-citizen is a child of the deceased. It is not known whether a similar type of exemption will be contained in any new law which may be introduced for the purpose of prohibiting the acquisition of ownership of land in Sri Lanka by foreigners. Once the legislation has been passed, appropriate estate planning advice could be provided. It should be noted that there is no estate (death) duty in Sri Lanka.

### 3. QUESTIONS FOR CASE STUDY B

#### 3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) "domiciled in a state of Australia";
- Single;
- Commodities trader;
- Family wealth from mining opals;

- Bruce has an Aus\$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

## 3.2 Pre-arrival planning

### 3.2.1 What pre-arrival tax planning opportunities would you advise?

Bruce should be advised of the tax residency rules contained in the Inland Revenue Act. Once Bruce is treated as resident for tax purposes in Sri Lanka, he would be liable to pay tax in Sri Lanka on his worldwide profits and income. The applicable rates of taxation in force at the time of or just prior to Bruce becoming resident would have to be explained at the time of or just prior to Bruce becoming resident. The impact of any double tax treaty which Sri Lanka has entered into with Australia and Switzerland would have to be considered.

### 3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

Until Bruce becomes tax resident in Sri Lanka for the purposes of the Inland Revenue Act, he would only be liable to tax on income arising in or derived from Sri Lanka.

Section 106 of the Inland Revenue Act provides that "Every person who is chargeable with income tax under the Inland Revenue Act for any year of assessment shall, on or before the thirteenth day of November immediately succeeding the end of that year of assessment, furnish to an Assessor, either in writing or by electronic means, a return in such form and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child".

Therefore, if Bruce has any income arising in or derived from Sri Lanka, he must file a tax return. However if Bruce's income only consists of one or more of the following sources:

- a) certain categories of employment income
- b) dividend income
- c) Interest income

then a tax return need not be filed by him.

The Inland Revenue Act also provides that any individual who satisfies any four requirements out of the five requirements specified below

during any year of assessment, shall submit a return of income to the Commissioner-General not later than one month after the fulfilment of such requirement.

- (i) paying a monthly residential electricity bill exceeding a net amount of ten thousand rupees,
- (ii) incurring a monthly credit card bill exceeding twenty five thousand rupees,
- (iii) paying a monthly residential telephone bill exceeding a net amount of ten thousand rupees,
- (iv) purchasing an air ticket to travel abroad, and
- (v) owning a motor vehicle which is used for travelling purposes.

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

### 3.3 Lifetime matters

3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

- (a) the most tax efficient way to make the inward investment?

If Bruce is resident in Sri Lanka for the purposes of the Inland Revenue Act, he would be liable to pay tax in respect of all the sources of income set out in section 4 of the Inland Revenue Act no. 10 of 2006 including "(j) income from any other source whatsoever, not including profits of a casual and non-recurring nature."

Bruce could route his investment through a holding company in a jurisdiction which has entered into a double tax agreement with Sri Lanka. The withholding tax payable on dividends remitted out of Sri Lanka from his investment would then be applicable according to the rates provided in the relevant double tax treaty.



- (b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?

See the answer to question (a).

- (c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

There is no capital gains tax in Sri Lanka.

3.3.2 As to the unreported bank account:

- (a) what would you advise Bruce?

If no distributions have been made by the Trustees to the beneficiaries, since there is no income and the ownership of the assets generating the income of the trusts is legally owned by the Trustees, it may not be necessary to declare anything.

The Inland Revenue Act provides that every person chargeable to pay income tax under any provision of this Act shall be required to declare:

- the value of every asset and liability at the last day of any year of assessment; and
- any profits or income exempted from the payment of income under this Act for any year of assessment.

Since the bank account is in the name of the Trustees, Bruce would not need to declare the bank account.

- (b) what are the Trustee's reporting obligations in your country?

None.

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 **Succession law**

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

The facts state that Bruce was looking to live in Sri Lanka for 3 – 5 years. This implies that he had an intention to return to Australia. It may therefore safely be assumed that Bruce did not acquire a Sri Lankan domicile.

With regard to the intestate succession to any immovable property in Sri Lanka, since Bruce was not married to Kylie, the child would be considered to be illegitimate.

Section 33 of the Matrimonial Rights and Inheritance Ordinance provides that illegitimate children inherit the property of their intestate mother but not that of their father. Therefore the parents (or failing them) the brothers and sisters of Bruce would inherit (or failing them the categories of persons mentioned in the Matrimonial Rights and Inheritance Ordinance).

With regard to the movable property, since Bruce had an Australian domicile as at the date of his death, it is arguably the case that section 33 would not fall to be considered, but rather that Australian law would determine the intestate succession to the movable property comprised in Bruce's estate.

**What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?**

No estate duty is payable in Sri Lanka in respect of the estate of a person dying on or after 13 November 1985.

It should be noted that administration of the estate of a deceased person is compulsory if the value of the estate is LKR 4,000,000 or the deceased has left a last will.

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Please return by email to:

Michael Wells-Greco  
[michael.wells-greco@speechlys.com](mailto:michael.wells-greco@speechlys.com)  
[for Private Client Commission Delegates]

Firuza Ahmed  
[fahmed@kingsleynapley.co.uk](mailto:fahmed@kingsleynapley.co.uk)  
[for Immigration Commission Delegates]