

Thinking about your
business is a big
part of ours.

BOTSWANA TRUSTS – WHAT? & WHY?

**Close your eyes and think of the future.
You may need a Trust right now.**

THE POWER OF BEING UNDERSTOOD
AUDIT | TAX | CONSULTING



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What is a Trust?


A trust is not a company. A trust is an arrangement that stands independent of trustees. The owner of a property settles or transfers the property, as part of an arrangement whose only purpose is to benefit the beneficiaries for which trustees take responsibility. Property gets transferred to the trustee who holds the property not in his name exclusively but in his name as a trustee because he takes the responsibility to abide by the arrangement. Obviously the settlor has to have trust and confidence in the trustees.

Therefore, a trust does not have shares or shareholders or directors. A trust thus can't be bought or sold because a trust does not have an owner, although trust, as an independent arrangement, is the owner of the properties settled in its favor. The trustee is not a director to benefit the settlor but the beneficiary, even long after the settlor's death. A settlor can't be the only beneficiary. In the same way the settlor can't be the only trustee.

Why should you form a trust?

There can be many reasons.

You may have a property whose rent may be to finance the maintenance of one of your children who may be physically challenged or to finance maintenance of pet animals that you may have or to distribute equally between your family members. You can appoint a trustee and create a trust with a view to take care of such beneficiaries. Well, you may yourself do the job of a trustee without having to form a trust, but then you may not have time for it or like doing it or you may live in some other country or you may be very old.



You may have a business in a foreign country that needs to be managed by the directors. Unfortunately directors' interests are different from shareholders' interests. You may think of transferring the shares in a trust obligating a trustee to ensure that the business is managed well by the directors, that all foreign laws are complied with and to allocate the dividends in the manner you desire. Trust is a way of caring for (holding or maintaining or managing) an asset and of distributing the income of an asset amidst beneficiaries through trustees.

People normally think that trusts are formed to avoid death duty or capital transfer tax. This is not entirely true because transfer duties are paid when properties are transferred to trust. People also think that certain properties are put in the trust so that they are not exposed to creditors. This is also not entirely true because an insolvent person or a company can't transfer assets to a trust to disadvantage creditors and it is illegal. A solvent person can however do it, but again, it will be unlawful for him to ask the trustee to direct all the income to him or to ask the trustee to sell the property for his exclusive benefit.

Interest of beneficiaries is the most important element of trust. Trustees should be professional in their conduct to accept the responsibility to protect the interests of beneficiaries.

You set up a Trust and appoint professional trustees to manage your assets or possessions or investments or even a business. Trust gives you a peace of mind and you can then attend to your other priorities. Trustees accept responsibility on a long term basis to act according to the arrangement which is in writing in a document called Trust Deed.

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Why should you form a Botswana Trust?

In mid-2018 Botswana Government enacted Trust Property Control Act. <https://www.rsm.global/botswana/insights/company-law-updates/botswana-trust-property-control-act-2018> has further details. Briefly, Master of the High Court has pervasive powers not only to register the trust but even to remove the trustees who don't act in the best in interests of beneficiaries or to amend the Trust Deed to ensure that beneficiaries interests are well protected.

Botswana is a great destination for your investment and there are very many good reasons for this. <https://www.rsm.global/botswana/insights/doing-business-botswana/general> outlines many reasons for it. You can choose to live outside of Botswana and yet be assured that your assets or investments or businesses in Botswana are administered by the Trust to your satisfaction, meaning as stipulated in the Trust Deed. Botswana Trust can hold foreign assets and can have foreign trustees who, of course, come under the purview of the Trust Property Control Act.

Sometimes, Trusts are Better than Companies

Each trust is regulated by a custom-made document called Trust Deed, whereas Botswana Companies Act regulates companies. Yet Trust has perpetual existence like a company. Meetings, accounts, audit, voting, trustees, duties and powers, beneficiaries, etc. are all matters that can be flexibly designed in the Trust Deed specific to the requirements of the Settlor and beneficiaries.

Trusts can be used for business especially for passive income earning. In Botswana with no exchange controls, there are international possibilities, too.



No audit is required in trusts but settlors may choose to carry out audit.

Deemed income provisions that apply to a company, can't equally apply to Trusts. Where however trusts are formed without substance only to evade tax, Commissioner General has powers to disregard any arrangement or scheme and Trust is an arrangement basically. For other aspects of Botswana taxation, please see <https://www.rsm.global/botswana/news/trusts-and-botswana-tax>.


A trust can be used for business assets (usually paid-for assets), thus keeping these assets safe from creditors. Donors and settlors should be solvent and the intention should never be to disadvantage creditors.

Management trusts can be used to manage business interests. Long-term investments can grow without interruption when they are divested in professionally administered Trusts. Life assurance, if the spouses are not financially astute, may be held in trust and the funds administered by qualified trustees

Expatriates that return to home country will not own the investment and the growth will thus not accrue to them.

Are Directors different from Trustees?

Directors have duties and responsibilities under the Botswana Companies Act. They are also expected to conduct themselves according to Code of Conduct recommended by the Botswana Institute of Directors and in terms of the Companies Act. .



When companies are unable to pay creditors and when they have to be liquidated, then conduct of directors comes into question and circumstances may exist when they are held personally responsible. Directors are expected to be honest and at the same time to possess sound business acumen. In terms of the Laws of Botswana, directors don't have to be qualified except that they should be adults, should not have been declared insolvent and they should be persons of sound mind.

In contrast to the credentials of a Company Director, for one to be a professional trustee he should be a professional person whose profession is regulated by a Professional Body such as Law Society of Botswana or Botswana Institute of Chartered Accountants. Professional Trustees generally represent investors and thus appoint directors.

Generally professional trustees appoint directors to manage businesses and experts to manage assets and investments. It is however not common for professional trustees to be the directors also particularly in case of small and simple businesses.

Are Employees different from Professional Trustees?

An employee is often qualified in and/or trained on the job. He or she is governed by employment contract. He or she needs to appear for work each and every day and is expected to give his undivided attention to his work. Botswana Labor Laws protect his or her position as employee in terms of payment of salaries,



leave, severance benefit, hours of work, overtime, etc.

Guided by professional qualifications, experience and ethical values, professional trustees provide due care, keep confidentiality, exhibit professional behavior and remain objective, since reputational risk is the greatest risk they manage in their professional life.

Responsibilities of Professional Trustees


Professional trustees are not liable for the engagement under the Companies Act of Botswana nor Botswana Labor laws. They are liable contractually to perform their duties in accordance with the Trust Deed. Their conduct is regulated by the professional bodies that they belong to.

Tax is not the main consideration

There is a general belief that trusts are formed to reduce or avoid or postpone tax. This is seldom true. This is a wrong belief. If such a thing has to happen for some reason or the other, Commissioner General has powers to disregard the so called trust and tax income. In fact he has an obligation to charge penalties! Therefore, the basic reason for forming a trust does not have much to do with tax. Rather, the basic reason is to make an arrangement to obligate the trustee to confer defined benefits to the beneficiaries.

Conduit or "See Through"

Generally, Tax law sees the trust as a conduit or "see through". Based on this conduit principle, a trust would pay the tax that beneficiaries would have paid had the trust not existed. The conduit principle also applies to the source of



income from a trust. For example, dividends, which are tax-free, remain tax-free as they pass through a trust to a beneficiary or rent held by a trust that passes through a beneficiary is taxed as rent in the hands of trust because it would rent for the beneficiary had the trust not existed. It is therefore legally possible to split the income horizontally beneficiary-wise and vertically nature of income-wise.

Conduit principle can never be used to evade tax. Conduit principle cannot be used when it will be impossible to tax the beneficiaries. Also conduit principle does not apply to beneficiaries who are minor children.

Botswana Tax Laws on Trusts

Botswana Tax Act defines a “trust” to include a will or other testamentary disposition; and a deed of donation, settlement or other disposition. If an amount accrues to a trust for the benefit of the beneficiary, it shall be included in the gross income of the Trust which shall pay tax in the same sum as would have been charged if such amount had been included in the gross income of the beneficiary.

Sometimes a beneficiary’s income will accrue to the Trust but cannot be passed on to the beneficiary until the happening of an event. In this case, Trust has to pay the tax in the name of the trustee (for the income that it is unable to pass to beneficiary because the stipulated event has not happened). This is why when any amount accrues to a minor child, the Trust is liable to pay tax on it.

Generally and as a matter of rule, when a settlor or donor settles or donates assets to a trust, capital transfer tax or donation tax is payable because trust is an arrangement independent of trustees.



An Illustration

Let us explain this with a simple example.

Assume you have a property of P 2.5 million. Assume it fetching you an income of P 250,000 giving rise to a profit of P 200,000 after expenses of P 50,000. There two beneficiaries getting P 100,000 each. In this case, if you form a trust, then generally speaking, Trust pays capital transfer tax on P 2.5 million. Transfer duty is also paid. Trust also pays tax on P 200,000 that accrues to beneficiaries at amounts that those beneficiaries would pay.

If you formed a company then it would pay tax on P 200,000 at 22% and then would pay dividends on the balance profit after deducting 7.5% withholding tax.

If you held it in your own name without forming a company or trust, then you pay personal income tax on P 200,000 and then you will donate the balance to the two beneficiaries who may be liable for capital transfer tax.

Deemed Income

Deemed income provisions that apply to a company, can't equally apply to Trusts. Where however trusts are formed without substance only to evade tax, Commissioner General has powers to disregard any arrangement or scheme and Trust is an arrangement basically.

For general information on Botswana Taxation, please read <https://www.rsm.global/botswana/insights/doing-business-botswana/taxation>.

[Note: This is for general information and contents may not exactly apply in your particular situation. Seek specific advice before making decisions.]

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