

# THE BRITISH VIRGIN ISLANDS: AN UPDATE

Noel Barton FCA<sup>1</sup>

Although the British Virgin Islands were discovered by Christopher Columbus in 1493, it was not until the early 1970s that they started to become known as a tax haven. He named them "The Virgin Islands" and over the years they have been Spanish, Dutch, French and British. The word "British" came into the name to distinguish them from the neighbouring Danish West Indies which the United States purchased for US\$25 million in 1917 and promptly renamed "The Virgin Islands of the United States".

The British Virgin Islands are a group of approximately 40 islands and islets, of which about 12 have permanent residents, situated in the Eastern Caribbean, 60 miles east of Puerto Rico, and 180 miles north-west of Antigua. The islands have a population of approximately 17,000, of whom some 12,500 live on the main island of Tortola.

The British Virgin Islands are a British Crown Colony and are the responsibility of the United Kingdom Government in London. However, they enjoy a measure of self-government under the 1967 Constitution which gives executive and legislative power to the Governor, the Executive Council and the Legislative Council.

The Governor is Her Majesty's representative and, under the 1967 Constitution, is responsible for external affairs, defence, the judicial and legal departments of government, internal security and the civil service. On other matters, the Governor is normally bound to act in accordance with the advice of the Executive Council, which comprises the Governor as Chairman, the Chief Minister, three other ministers appointed on the advice of the Chief Minister, and the Attorney-General as an ex-officio member.

The Legislative Council consists of nine elected members, one from each of nine electoral districts, the Attorney-General as an ex-officio member and a Speaker chosen from outside the Council.

The Islands enjoy a stable government - although there are political parties, there is little difference between their policies. Independence does not seem to be a major issue and although over the years links with the United States, especially the United States Virgin Islands, have become closer, the centuries-old association with the United Kingdom still continues.

The start of the tax haven business was in the late 1960s when it was found that there

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<sup>1</sup> Noel Barton FCA, Chairman of Havelet Trust Company (BVI) Limited, PO Box 3186, Abbott Building, Main Street, Road Town, Tortola, British Virgin Islands.  
Tel: 0101 809 49 45471 Fax: 0101 809 49 45477.

was a double taxation relief agreement with the United Kingdom which entitled residents of the BVI to reclaim United Kingdom income tax deducted from dividends, then at 40%, and to pay BVI income tax at 12% on the gross dividend, less expenses. However, when various companies had been set up in the BVI to utilise this advantageous arrangement, the agreement was terminated by the United Kingdom in 1972.

At this time there was only a handful of professionals in the BVI and it was very much a territory undiscovered by tax advisors in other jurisdictions. Bermuda, Bahamas and Cayman were all well-established as zero-tax areas but the BVI had something new to offer in treaty-shopping. Over a period of years, the United Kingdom had extended some of its double taxation relief agreements to include the BVI - notably the United States, Denmark, Norway, Sweden, Japan and Switzerland. The agreements with Japan and Switzerland are the only ones now in force.

With the termination of the agreement with the United Kingdom, consideration was given to utilising other agreements and the agreement with the United States offered distinct advantages as regards portfolio investments as the withholding tax on dividends was reduced to 15% and there was no withholding tax on recording and publishing royalties.

In the mid 1970s, professional advisors became aware of this agreement - it provided a steady source of business for the BVI and proved to be the foundation of the future financial centre business. As a result the BVI was able to finance its recurrent budget from 1980 - prior to then, the United Kingdom had contributed annual grants-in-aid.

In about 1979, the United States gave notice that it would be terminating the agreement and after several meetings between representatives of the United States Treasury and the BVI Government, a new agreement was signed in Washington in February 1981 and was ratified by the BVI Government shortly afterwards. However, when it came up for ratification by the United States Congress, the Treasury - by that time a new Government was in office - would not support it. There were then further negotiations but the restrictions required by the United States were not acceptable to the BVI and so the United States terminated the original agreement as from 31st December 1982.

The BVI was now left with only very limited use as a financial centre based on the Companies Act of 1885, although there had been various amendments in recent years. It was accordingly decided to produce an entirely new Act, the International Business Companies Act which became law in 1984.

This Act drew on the established legislation of various other jurisdictions and the BVI soon had the reputation of having the most up-to-date International Business Companies Act, providing for, *inter alia* -

1. Exemption from income tax and stamp duties.
2. Bearer shares.
3. Single shareholder companies.
4. Ability to amend the Memorandum and Articles of Association by resolution of the members or the directors.
5. Annual general meetings of members not required.
6. Details of shareholders and directors not available to the general public except with the approval of the directors.
7. Not necessary for a director or officer to be resident in the BVI.
8. Not necessary to prepare financial statements nor to appoint an auditor.

There have since been three amending Acts each of which were designed to improve or facilitate operations under the Act. The basic fees payable to the BVI Government, upon incorporation and the annual licence fee, have remained unchanged since the Act was introduced.

There had been a Banking Act since 1972 which provided for the issue of general and restricted bank licences. This was not used to any great extent and, excluding the four commercial banks which operate in the Territory, at no time were there more than twelve or so licences in issue.

Trust companies had always been able to operate without the control of any relevant legislation unless they acted as an executor of a deceased's estate. In 1990, when Rodney Gallagher produced his report on the financial centre activities of the British islands in the Caribbean, the BVI Government decided to replace the Banking Act with a Bank and Trust Companies Act and, at the same time, introduced a Companies Management Act - the provisions of the latter Act do not apply to companies licensed under the Bank and Trust Companies Act.

Although the two Acts were passed in September 1990, they did not come into law until June 1991 as no person had been appointed to fill the post of Inspector of Banks and Trust Companies as was required by the Act. The Financial Secretary was appointed acting Inspector and those companies who wished to operate under the Act had to submit somewhat lengthy applications. It was only in December 1991 that someone was appointed from the United Kingdom, for three months, to process the applications and the acting Financial Secretary has recently announced that it is expected that the appointment will be filled later this year. Only very few licences have, as yet, been issued.

A company may apply for either a general trust licence or a restricted trust licence. The general licence permits the company to carry on trust business without any restrictions but a restricted licence limits the licensee to transacting trust business only for those persons listed in the undertaking accompanying the application for the licence.

For the general trust licence, the applicant must have a paid-up capital of not less than US\$ 250,000 or the equivalent in foreign currency or such greater sum as the Governor may, by order, determine. In addition, prior to the issue of the licence, the company must deposit or invest a sum of money as may be specified by the Governor in such manner as the Governor may, by order, prescribe. This amount shall not exceed US\$100,000. The Banks and Trust Companies (Deposit/Investment) Directions 1992 were gazetted in May 1992 and these provide for the following investments by companies holding general trust licences:-

- |      |   |            |
|------|---|------------|
| i)   | When it does not provide registered agent services                        | US\$20,000 |
| ii)  | Which provides registered agent services for not more than 1500 companies | US\$20,000 |
| iii) | Which provides registered agent services for more than 1500 companies     | US\$40,000 |

These investments take the form of "non-negotiable certificates of indebtedness" issued by the government for a period not exceeding 20 years, bearing interest at such rate as shall be determined from time to time by the Governor in council. The present rate is 3% per annum.

There are no requirements regarding the minimum paid-up share capital or investment for holders of restricted trust licences.

A trust company which is formed on behalf of and owned by one or more members of a family to be the trustee of one or more trusts of which one or more members of the family are the principal beneficiaries, and which does not have a physical presence in the BVI and does not receive any remuneration, shall not be regarded as carrying on "trust business" for the purposes of the Act and accordingly does not require a licence. It need apply only for consent should it wish to use "trust" or a similar word in its name.

Until 1989, there was no control over insurance companies incorporated in or operating within the BVI except for those writing motor vehicle insurance in the Territory. The Government has appointed a Supervisor of Insurance Business but, although there are regulations and guide-lines regarding insurance companies, there is no insurance company legislation. Before an insurance company can be incorporated, it is necessary to apply for approval in principle that a licence will be

granted by the Insurance Supervisor.

The International Business Companies Act specifically exempts companies incorporated under the Act from BVI taxation but, nevertheless, the Territory is a tax-paying jurisdiction. The corporate rate of income tax is 15% but this is reduced to 10% or 1% in respect of certain classes of income and the maximum rate for individuals is 20%, which applies to taxable income in excess of US\$ 25,000.

Companies incorporated under the Companies Act 1885 are subject to income tax as follows:-

- i) resident companies - on world-wide income, whether remitted to the BVI or not, with credit allowed for any foreign taxes suffered on the income; and
- ii) non-resident and non-domiciled companies - on income arising within or remitted to the BVI.

A resident company is defined as a company the majority of whose directors are resident in the BVI or the meetings of whose directors are held in the BVI. For instance, should a non-domiciled company wish to make use of one of the Territory's double taxation relief agreements, meetings of the directors can be held in the BVI and the relevant income remitted so that it is taxable and any relief to foreign taxation under the agreement may be claimed.

The corporate rate of income tax is 15% but this is reduced to:-

- i) 1% on income arising outside the BVI unless it is subject to relief in terms of a double taxation relief agreement, and
- ii) 10%, when
  - a) the chargeable income of a company exceeds \$100,000 and not less than 90% of that income consists of profits or gains arising within the BVI from contracts of exchange of currencies; and
  - b) an amount representing not less than 8% of those profits or gains is paid
    - i) without demand therefor, and
    - ii) as an advance of tax by the company on or before the 31st January in the year of assessment.

Trust law in the BVI follows very closely that of the United Kingdom except that there must be a definite perpetuity period - generally the classic twenty-one years after the death of the last descendant of King George V. The trust law is in the process of being updated to bring it into line with legislation in other jurisdictions and it is hoped that it may be on the statute books by the end of 1992.

Since 1984, when the International Business Companies legislation was introduced in the BVI, some 60,000 companies have been incorporated. The Act was designed to facilitate the operating and management of companies, e.g., a sole shareholder and a sole director are permitted, and yet at the same time to enable them to be utilised as publicly quoted companies and for open-ended investment funds. The situations in Panama and Liberia gave the BVI a considerable boost as practitioners who had

been using those territories sought an alternative jurisdiction with updated and suitable legislation and, most important of all, political stability which has been proved over the years.