LEXOLOGY
Real Estate Investment Structure Taxation

PRO In-Depth

Real Estate Investment Structure Taxation: Bahamas

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Introduction

The Bahamas has a strong real estate and investment market and a robust economy with a long and well-documented history of touting itself as a jurisdiction welcoming of foreign direct investment. The Bahamas government's investment policy is, generally, investor-friendly and is primarily structured to attract international investors to the country's pristine shores. While The Bahamas is most widely known for its prominence in the tourism and international finance sectors, its real estate product offerings have become an equally attractive prospect for international investors seeking to capitalise on the jurisdiction's proximity to the United States and its status as a regional hub for international air travel. International investors are consequently able to take advantage of the benefits of diversifying their investment portfolio while simultaneously enjoying the high quality of life and natural beauty offered by the jurisdiction.

The Bahamas has a reputation as one of the world's leading tax havens; although, the term is not used with much regularity in The Bahamas. This is due in large part to the negative connotation associated with the term, which is not representative of the robust regulatory regime that exists in the jurisdiction. Even so, the term 'tax haven' is inexplicably tied to the jurisdiction's standing as one of the world's foremost international financial centres, which dates back to the 1930s. On account of its standing as an international financial centre, the legal and regulatory environment in The Bahamas has produced an assortment of vehicles, typically employed in the jurisdiction's private wealth management structures, but also readily available to real estate investors.

In The Bahamas, international investors seeking to participate in real estate investments more often than not incorporate Bahamian international business companies, commonly referred to as IBCs, as the vehicle of choice. There are, however, other options that may be employed for this purpose with similar results. For example, real estate investments in The Bahamas may similarly be held through limited liability companies incorporated under the Companies Act 1992, foreign companies registered under the Companies Act 1992, trusts, exempted limited partnerships and foundations.

Regarding the structuring of real estate purchases or investments, The Bahamas as a jurisdiction does not levy withholding, gift or inheritance taxes. Accordingly, these considerations are not of paramount importance when considering which of the aforementioned options is best suited for the proposed investment. As will be discussed below, there are taxes associated with the acquisitions, holding and sale of real estate in The Bahamas, but those taxes will apply notwithstanding the vehicle used. As a result, the Bahamian legal and tax analysis associated with real estate purchases and investment is not as complex as in other jurisdictions with more multifaceted tax regimes.

Further, The Bahamas maintains a foreign currency exchange control environment, which is governed by the Exchange Control Regulations 1956. Pursuant to the Exchange Control Regulations, a person in The Bahamas (legal or natural) may be designated as either resident or non-resident for exchange control purposes. Generally, persons deemed resident for exchange control purposes are Bahamian citizens residing in The Bahamas, permanent residents of The Bahamas with no restrictions on employment, naturalised citizens of The Bahamas, persons otherwise conducting business in The Bahamas and generating income in Bahamian dollars or persons designated as resident by the Central Bank of The Bahamas and legal entities owned and controlled by it. Non-resident persons are persons that do not meet the requirements above.

Pursuant to the foreign currency exchange control regime that operates in The Bahamas, persons and entities within The Bahamas that are deemed non-resident for exchange control purposes are not able to deal in Bahamian dollars or Bahamian dollar denominated securities. The specific elements of and procedure for obtaining the requisite Central Bank (and other required) approvals required by foreign persons purchasing Bahamian real estate will be discussed with more specificity below.

Asset deals versus share deals

The Bahamas has an unregistered land system, and the legal framework for the acquisition of real estate entities and real estate assets is predominantly found in the Conveyancing and Law of Property Act 1909, the Law of Property and Conveyancing (Condominium) Act 1965, the International Persons Landholding Act 1993, the Value Added Tax Act 2014, the Stamp Act 1925 and the Real Property Tax Act 1969 (all as amended). Real estate statutes are based on the conveyancing laws of England and Wales prior to 1925 and the English common law system.

Acquisition or sale of real estate assets or real property

Legal Framework

In the case of an acquisition of real property, an agreement for sale is executed by the seller and purchaser detailing the terms of the transaction. Once the agreement for sale has been executed, the seller must prove that the title has a 'good root', which means that the title:

a. is good and marketable for a period of at least 30 years; or
b. commences with a crown grant or lease or a certificate of title granted by the court pursuant to the Quieting Titles Act, whichever is shorter.[1]

The title deeds with a good root must be in an unbroken chain from the root title deed to the seller's title deed. There are other nuances to consider when confirming whether a title is good and marketable, including whether the property in the chain of title was held by a non-Bahamian individual or company. From 1 November 1983, pursuant to the International Persons Landholding Act 1993, where property is purchased by a non-Bahamian, an investment board permit or a certificate of registration must be annexed to the conveyance to confirm that the non-Bahamian individual has received the requisite regulatory approval to acquire the property. In the absence of a permit or certificate of registration, an affidavit of Bahamian citizenship must be annexed to the deed to confirm that the owner of the property is a Bahamian and does not require regulatory approval to acquire the property. A requisition on title should be raised by the purchaser's attorney if either of these documents is missing from the title deed.

Due to the unregistered land system in The Bahamas, title deeds must be physically reviewed and the cause list and company searches need to be conducted in person at the relevant registries. The purchaser's attorney must conduct these searches and review the title deeds to ensure that title is good and marketable prior to the completion of the sale. The purchaser's attorney may raise requisitions or queries on the title with the seller's

attorney where any ambiguity arises as a result of the searches and reviews. The seller's attorney is required to answer these requisitions to the satisfaction of the purchaser's attorney and in accordance with legislation or common law to allow the sale to proceed.

Once the purchaser's attorney has reviewed the title, cause list and company searches and is satisfied that there are no issues, the attorney will provide the purchaser with an opinion confirming that the title is good and marketable or may otherwise advise of any deficiencies, liens or encumbrances that exist with respect to the title. The firm's opinion on the title is usually limited to the purchase price of the property or the firm's professional indemnity insurance, whichever is less.

It should be noted that title insurance is also offered in The Bahamas by title insurance agents who offer policies on behalf of international title insurance underwriters. In these cases, the attorneys will review the title and confirm to the agent that the title to the property is good and marketable, and the underwriter will issue a title insurance policy in favour of the purchaser insuring the property from any defects not excepted in the title insurance policy up to the purchase price.

Once the title, cause list and company searches have been reviewed and the title has been deemed good and marketable by the purchaser's attorney, the seller's attorney will prepare a draft deed of conveyance to be reviewed and approved by the purchaser's attorney. Once the draft is approved by the purchaser's attorney, the seller's attorney will have the conveyance duly executed by the seller, and the original duly executed deed in favour of the purchaser – together with the back title deeds and documents proving the title goes back to a good root – will be delivered to the purchaser's attorney either in escrow pending receipt by the seller's attorney of the sales proceeds or in person at the seller's chambers to be exchanged simultaneously with the closing proceeds either initiated by wire transfer or delivered by cheque.

Once the transaction is closed and any escrow is released, the purchaser's attorney will submit the deed of conveyance to the Department of Inland Revenue together with the applicable payment of VAT (as discussed in detail below) levied on the transaction for stamping. Once the payment has been accepted by the Department of Inland Revenue, the conveyance will be duly stamped and the original returned to the purchaser's attorney. Once returned (and when the relevant investments board certificate of registration or permit has been obtained as it relates to non-Bahamian purchasers), the purchaser's attorney will lodge the conveyance in the Registry of Records for recording. Presently, the cost for recording is $4.50 (in Bahamian or US dollars) per page. Once the deed is recorded in the Registry of Records, the original is returned to the purchaser's attorney, which may either be retained by the law firm in a fireproof safe or delivered to the purchaser.

The main taxes as it relates to the ownership, transfer and investment in real property in The Bahamas are VAT, real property taxes, condo-hotel taxes and business licence fees.

VAT

VAT is payable on all transfer of real property, whether direct or indirect, except in situations outlined in the VAT Act 2014 (as amended) and VAT Rules for Real Estate 2019 and 2023, where the transaction is either exempt or zero-rated for VAT purposes. VAT is usually shared equally between the seller and purchaser; however, some transactions may be structured as a net deal where the purchaser pays the entire VAT (and other costs) on the acquisition or transfer of real property.

Where a purchaser company is owned by a Bahamian and the property is being acquired for owner-occupied, non-commercial purposes, VAT is charged at the rate of:

a. 2.5 per cent where the value does not exceed B$100,000;
b. 4 per cent where the value is between B$100,000 and B$300,000;
c. 6 per cent where the value exceeds B$300,000 but does not exceed B$500,000;
d. 8 per cent where the value exceeds B$500,000 but does not exceed B$700,000;
e. 9 per cent where the value exceeds B$700,000 but does not exceed B$1,000,000; and
f. 10 per cent where the value exceeds B$1 million.

VAT is charged at the rate of 4 per cent for the acquisition of a first home by a Bahamian where the value is between B$300,000 and B$500,000, and it is exempt where the value is under B$300,000.

For transfers of land to Bahamian companies for commercial purposes, VAT is charged at the rate of 2.5 per cent where the value does not exceed B$100,000, and 10 per cent where the value exceeds B$100,000.

For transfers of land to non-Bahamian individuals or companies, VAT is charged at the rate of 10 per cent.

With respect to debentures or mortgages over real property, VAT is charged at the rate of 1 per cent of the loan amount secured by the property. However, in certain circumstances, the transfer of residential mortgages from a recognised financial institution to another is zero-rated.[2]

Transfers of real property are zero-rated where the transfer of real property relate to a transfer from:

a. an individual to a company all of whose shares are beneficially owned by the transferor or the transferor's spouse, children or grandchildren;
b. an individual to a trustee where the terms of the trust instrument permanent excludes every person, except for the transferor, transfer's spouse, parents, children or grandchildren;
c. an individual to another individual who is their spouse, parents, children or grandchildren;

d. an individual to a foundation where the only beneficiaries are the transferor, or the transferor's spouse, children or grandchildren;
e. a company to a trust or foundation where the only beneficiaries are the beneficial owner of all of the equity in the company, or the spouse, children or grandchildren of the beneficial owner; or
f. a trustee to another trustee where the terms of the trust, the beneficiaries and the trust assets remain the same and the change in trustee is purely for administrative purposes.

These zero-rated transactions are for estate planning purposes; therefore, the VAT on these transfers can retroactively become payable in the event of a transfer of the property to a third party within seven years from the date of the above-mentioned transfer.[3]

Transfers of real property are also zero-rated in the following circumstances:

a. conveyance or deed by way of assent;
b. transfers made pursuant to a consent order under a non-contentious divorce settlement;
c. deeds of rectification, confirmatory conveyances or affidavit of loss;
d. instruments relating to the vesting of real property pursuant to a statutory or common law entitlement;
e. the renunciation or release of dower;
f. an application relating to a transfer of a home mortgage, inter vivos gift of real property to a qualifying transferee (as mentioned above) or the acquisition of a first dwelling by a Bahamian citizen valued up to B$300,000 (subject to the provisions of relevant VAT rules);
g. a supply of real property between members of a VAT group of two or more companies that are members of the same group of companies (in accordance with certain provisions);
h. a gift or voluntary disposition of property from one company to another where a minimum of 95 per cent of the shares of every class of both the transferor and transferee companies are beneficially owned by the same person and no other person owns of acquires any right title or interest concerning the shares or interest in the property of either the transferor or transferee company held by the 95 per cent beneficial owner;
i. an instrument relating to the vesting of real property to a vested beneficiary under a trust;
j. grants, leases, writs or other instruments issued by and on behalf of the Crown and The Bahamas in relation to a supply of real property other than a crown lease;
k. subject to the provisions of these rules, a supply of real property involving no change in beneficial ownership;
l. a charge or encumbrance on real property created by statute or arising from an order of the court; and
m. where approved by the Minister, a deed of conveyance of property to an entity registered under the Non-profit Organisations Act or a government educational institution (subject to certain qualifications).[4]

Acquisition or sale of a real estate entity

In the case of the acquisition of a real estate entity, the parties will execute a letter of intent, term sheet or share purchase agreement outlining the terms and conditions of the acquisition of shares. An attorney representing a purchaser who chooses to acquire property by way of a share transfer would need to conduct proper due

diligence and review the corporate documents to avoid any potential liabilities that may be known, unknown, pending or contemplated with respect to the corporate entity. This will entail searches not only of the title to the real property owned by the company to ensure the company has good and marketable title to the property (as discussed above), but also a search of the companies registry and the company's registered office to confirm that the company is in good standing and confirmation as to the directors, shareholders and officers on record. A search at the Supreme Court Registry and the Deeds and Documents Department of the Registry of Records will also be necessary to confirm there are no liens, encumbrances or mortgages on the record as it relates to the property or any pledge of the shares of the company.

To effectuate a share purchase, there would need to be share transfer documents from the shareholders of the company to the purchaser, resignations of the officers and directors of the company and appointment of the new directors who will control the real estate holding entity.

As mentioned previously, generally, there is no tax benefit as it relates to the amount of VAT payable on the transfer of the shares in a real property holding entity or a direct asset transfer, except as mentioned below:[5]

a. a supply of real property between members of a VAT group or two or more companies that are constituent members of the same group of companies is only zero rated where:
    - the supplier and recipient are 95 per cent beneficially owned by the same person;
    - no person, other than the recipient and preexisting members of the same group, owns or has agreed to any right, power, title option or other interest in, over or concerning the shares or property of either the supplier or recipient;
    - no part of the consideration for the supply is payable to any person that is not a member of the VAT group or a constituent member of the same group of companies; and
    - there is no change in the beneficial ownership of the companies;
b. the gift or voluntary disposition of real property by one company to another company that are not members of a VAT group or constituent members of the same group of companies is only zero rated where:
    - a minimum of 95 per cent of the shares of every class of both the transferor and transferee companies are beneficially owned by the same person; and
    - no other person owns or has agreed to acquire any right, power, title option or other interest in, over or concerning the shares or interest held by the 95 per cent beneficial owner in the property of either the transferor or transferee company;
c. the shares of two companies is only determined to be 95 per cent beneficially owned by the same person where:
    - 95 per cent of the shares of each company are beneficially owned by the same persons; and
    - each of those persons have the same proportionate interest in both companies; and
d. supply of real property under this rule, where the conditions in items (a) and (b):
    - are satisfied, is subject to VAT at the applicable rate to the extent of the difference in beneficial ownership between the supplier and recipient companies; or

- are not satisfied, is subject to VAT at the applicable rate on the total value of the supply.

Taxes associated with the holding of real property

Additional taxes payable on real property include real property taxes, condo-hotel taxes and business licence fees.

Real property tax

Concerning real property taxes, unless otherwise exempted, every owner of real property is obligated to pay real property taxes on an annual basis. Real property taxes are calculated based on the market value of the property, the use of the property and the nature of the owner. It should be noted that mortgagees may be held responsible for outstanding real property taxes.[6]

The payment of real property taxes is calculated on the market value or assessed value of the property. For owner-occupied properties, the first B$300,000 of the value of the property is exempt, then real property taxes are calculated at the rate of 5/8 per cent of the assessed value of the home that exceeds B$300,000 but does not exceed B$500,000, and then property taxes are calculated at 1 per cent on the part of the market value that exceeds 500,000 Bahamian dollars up to a maximum of B$150,000.

For commercial or rental properties, the first B$500,000 is calculated at the rate of 3/4 per cent of the market value of the property and the balance is calculated at the rate of 1 per cent of the market value of the property.

For vacant land, the first B$7,000 is taxed B$100, and the balance is calculated at the rate of 2 per cent of the market value of the property.

There are certain exemptions that exist in the legislation. Bahamians who own vacant land or own land situated on a ‘family Island’, that is, outside of the country’s capital in Nassau, New Providence, are exempt from the payment of property taxes on these properties.[7]

Condo-hotel tax

With respect to condo-hotel taxes, all units within a condo-hotel or other properties that are rented in a hotel rental pool are subject to the payment of a condo-hotel tax.[8] The condo-hotel tax applicable to any unit is calculated at 75 per cent of the rate of tax applicable to residential property under the Real Property Tax Act (currently 5/8 of 1 per cent that equates to 0.625 per cent) on the market value of the unit, up to a maximum of B$150,000 per unit. The condo-hotel tax is applicable to units that do not report net VAT in excess of the condo-hotel tax. That is to say, if the net VAT received from the rental of the condo-hotel unit exceeds the condo-hotel

tax applicable to that unit, the condo-hotel tax is not payable. If the net VAT received from the rental of that unit over the year is less than the amount of the condo-hotel tax due, the difference between the condo-hotel tax amount and the net VAT is payable. The hotel administrator has joint responsibility for payment.

Business licence fees

No person may carry on a business within The Bahamas without the grant of a licence.[9] Under the laws of The Bahamas, the rental of units is considered a business.[10]

A tax for all businesses for which no special provision has been made applies as follows:

a. a 0.5 per cent tax for a turnover of B$100,000 to B$500,000;
b. a 0.75 per cent tax for a turnover of B$500,000 Bahamian dollars to B$5 million; and
c. a 1.25 per cent tax for a turnover greater than B$5 million.[11]

However, no annual business licence tax is payable in respect of a business carried on in or from within The Bahamas where the business is in its first year of operation; or the business had a turnover no greater than B$100,000 in the previous year.[12]

Regardless of the registration threshold, a business licence is required for the rental of residential property where the property is owned by a foreign person, whether solely or jointly with Bahamians, or the property is owned by a Bahamian corporation, other than a holding company, whether solely or jointly with other persons.[13]

Regulated real estate investment vehicles

As noted above, The Bahamas does not levy withholding, gift or inheritance taxes. Therefore, there is no need for these tax considerations to be discussed in the context of the vehicles that may be used to purchase or invest in real estate in the jurisdiction. The tax treatment in relation to the holding or sale of the real estate is uniform in each case, with minor differences as will be seen below.

Furthermore, the following vehicles provided for under Bahamian law are the typical options available for carrying out real estate investments in The Bahamas:

a. international business companies (IBCs);
b. limited liability companies incorporated under the Companies Act 1992;
c. foreign companies registered under the Companies Act 1992;
d. trusts;
e. exempted limited partnerships; and

f. foundations.

The characteristics and features of each is discussed below.

IBCs

IBCs are limited liability companies that are incorporated under the International Business Companies Act 2000 (as amended, the IBC Act). IBCs are traditionally deemed non-resident for exchange control purposes and are typically used by foreign persons seeking to conduct business outside of the local Bahamian economy. Notwithstanding this historical use case for IBCs, they are by far the most popular vehicle through which foreign persons hold real estate investments in The Bahamas. The reason for this is obvious and well documented.

IBCs, like all corporations, offer shareholders the benefit of limited liability and separate legal personality. The Bahamian IBC is known for its flexibility. In this regard, under Section 10 of the IBC Act, it is expressly stated that subject to any limitations in its memorandum of association and articles of association, the IBC Act or any other law for the time being in force in The Bahamas, a company incorporated under the IBC Act has the power, irrespective of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company. Further, in the case of IBCs, the company is not required to have more than one shareholder or more than one director. There is similarly no residency requirement for directors.

IBCs are relatively easy to incorporate by filing the entity's intended memorandum of association and articles of association with the Registrar of Companies. With this flexibility and ease of incorporation, the IBC has become the most popular vehicle to be used by international investors for the purpose of Bahamian real estate investment.

An IBC may operate in foreign currency and, upon approval of the Exchange Control Department of the Central Bank of The Bahamas, may also be designated resident for exchange control purposes to allow it to operate a Bahamian dollar account and hold Bahamian real estate.

Companies incorporated under the Companies Act 1992

Companies incorporated pursuant to the regime promulgated under the Companies Act 1992 (referred to as domestic companies), like IBCs, offer limited liability and separate legal personality. These entities are traditionally used by Bahamians in domestic business dealings in the local economy and as such are generally

designated resident for exchange control purposes. For this reason, foreign persons typically do not use these vehicles for local real estate investments, opting instead for the IBC. Real estate purchases by Bahamian citizens wishing to secure the benefit of limited liability would be carried out using a domestic company.

These companies are able to operate Bahamian dollar accounts, but require approval from the Exchange Control Department of the Central Bank of The Bahamas to operate in foreign currency. Additionally, shares in the capital of domestic companies are generally denominated in Bahamian dollars. As a consequence, a foreign person holding title to these shares would be required to obtain exchange control approval from the Central Bank. Such approval is unnecessary in the case of the IBC. Further, domestic companies are statutorily required to have not less than two shareholders[14] and not less than two directors.[15] These are all requirements that are not present in the case of the IBC.

Domestic companies are similarly easy to incorporate, by filing the entity's memorandum of association with the Registrar of Companies, together with certain other statutorily prescribed documents.[16]

Foreign companies registered under the Companies Act 1992

In addition to the incorporation of new entities under the IBC Act or the Companies Act, foreign investors similarly have the option of registering an existing foreign company under the Companies Act 1992. This foreign entity may be incorporated under the laws of the investor's jurisdiction of domicile or any other jurisdiction outside of The Bahamas. Under the Companies Act 1992, a foreign company is defined as any incorporated or unincorporated body formed under the laws of a country other than The Bahamas. According to Section 171 of the Companies Act, a foreign company carries on an undertaking[17] in The Bahamas if:

a. it maintains a warehouse or place of business in The Bahamas;
b. it is licensed or registered or required to be licensed or registered under the laws of The Bahamas whereby it is entitled to do business or to sell shares or debentures of its own issue; or
c. in any other manner, it carries on any undertaking in The Bahamas.

Purchasing real estate is generally considered as carrying on an undertaking in The Bahamas. Consequently, if a foreign company is to be used for this purpose, it would be necessary for the company to be registered under the Companies Act 1992 as discussed above.

The effect of registering a foreign company under the Companies Act 1992 is not to create a separate legal personality. From a Bahamian corporate law perspective, the registered foreign company is one and the same legal entity as the entity originally incorporated outside of the jurisdiction. The effect of the registration under the Companies Act is to enable the foreign company to carry on its undertaking in The Bahamas and to exercise

its corporate powers within the jurisdiction.[18] It is also important to note, however, that Section 176 of the Companies Act states further that the foreign company registered under the Companies Act will have the same capacity as a company incorporated under the Companies Act, and the provisions of the Companies Act, except those relating to incorporation, apply to the foreign company.

A foreign investor may seek to use an existing company for the purpose of real estate investment in The Bahamas for a number of reasons rather than incorporating a new entity in the jurisdiction. This may be due to the fact that the existing entity is already engaged in commercial activity and has a financial or taxation track record with the authorities in the investor's home jurisdiction. There may be tax, succession planning or asset protection considerations that are relevant in their home jurisdiction as well. From a Bahamian perspective, the relevant point is that investors have the flexibility to utilise an existing entity for this purpose if the circumstances justify doing so. The foreign entity would generally be treated no differently from a new company incorporated under the Companies Act.

A foreign company may be registered under the Companies Act by filing certain statutorily prescribed documents with the Registrar of Companies. Following the requisite filings being made to the satisfaction of the Registrar of Companies,[19] the Registrar will issue to the foreign company a Certificate of Registration, which will be conclusive proof of the registration of the foreign company under Bahamian law and its ability to carry on its undertakings and exercise its corporate powers in The Bahamas.[20]

Trusts

Trusts may be established under a person's will or by a stand-alone instrument. The trust agreement will dictate the terms upon which a trustee will hold the trust property on behalf of the beneficiaries. To properly establish and structure a trust under Bahamian law, it is necessary for the legal title to any property to be held by the trustee subject to the terms of the trust. It is not unusual for persons unfamiliar with the trust concept to be unsettled by the idea of a third party holding the title to their real estate investment. However, trusts have a long established history in this jurisdiction with a built up line of case law that recognises their validity and viability as a tool for investment.

A trust is also easy to establish. The property owner would need to identify a trustee and memorialise the terms upon which the real estate property is to be held in the trust deed or agreement. The trust deed or agreement is typically executed by the proposed trustee and the party conveying the real estate asset to the trustee (the settlor).

Exempted limited partnerships

An exempted limited partnership established under the Exempted Limited Partnership Act (the ELP Act) may be formed for any legal purpose or purposes to be carried out in The Bahamas or elsewhere in the world; provided, however, that the ELP Act stipulates that a partnership formed pursuant to its terms may not undertake business with the public in The Bahamas.[21] However, under applicable local law, the purchase or sale of real estate in the jurisdiction would not constitute doing business with the public in The Bahamas and as such the limited partnership may be used for this purpose.

Pursuant to the ELP Act, an exempted limited partnership consists of one or more general partners and one or more limited partners. The ELP Act states that any one or more of the limited partners and general partners of an exempted limited partnership may be resident, domiciled, established, incorporated or registered pursuant to the laws of The Bahamas or outside The Bahamas provided that at least one general partner is:

a. if an individual, resident in The Bahamas; or
b. if a company, incorporated under the IBC Act or under the Companies Act, or registered as a foreign company pursuant to the Companies Act.[22]

An exempted limited partnership does not have legal personality. The partnership conducts its business, contracts with third parties and its assets are held by the general partner. The general partner is the decision making authority of the exempted limited partnership and in the event that the assets of the exempted limited partnership are inadequate, the general partner will be liable for all debts and obligations of the exempted limited partnership.[23]

Conversely, limited partners do not take part in the conduct of the business of an exempted limited partnership and will not be liable for the debts or obligations of the exempted limited partnership. Under the ELP Act, where a limited partner does take part in the conduct of the business of an exempted limited partnership, that limited partner could be rendered liable in the event of the insolvency of the exempted limited partnership for all debts and obligations of that exempted limited partnership incurred during the period that the limited partner participates in the conduct of the business of the partnership as though the limiter partner were for such period a general partner.[24]

The registration of an exempted limited partnership under the ELP Act is effected by filing with the Registrar a statement containing the statutorily prescribed particulars signed by or on behalf of a general partner.[25]

Notwithstanding the foregoing, this structure is generally not used by foreign investors for local real estate investments.

Foundations

Foundations under Bahamian law are established pursuant to the Foundations Act. A foundation is a legal entity established by a foundation charter, which is registered under the Foundations Act.[26] A foundation has a separate legal personality and is able to sue and be sued in its own name. The foundation holds asset having a value of not less than 10,000 Bahamian dollars, and any such assets transferred to the foundation are the property of the foundation and not of any founder or beneficiary. A foundation is competent under local law to hold assets of any kind. The main purpose or objects of a foundation includes the management of its assets or any other purpose or object that is not unlawful, immoral or contrary to any public policy in The Bahamas.[27] Furthermore, in the course of the management of its assets or pursuance of its lawful purpose, a foundation may do such things and exercise such powers as are necessary for their proper administration, including but not limited to buying and selling assets and engaging in any other acts or activities that are not prohibited under any law for the time being in force in The Bahamas.

On the basis of the foregoing, a foundation may purchase, sell or otherwise invest in local real estate assets. However, as is the case with exempted limited partnerships, the use of foundations by foreign investors for the acquisition and holding of local real estate, though possible, is not common.

A foundation may be established by the filing of the statutorily prescribed documents in the prescribed form with the Registrar, which will retain such documents. Upon the filing of such documents and the payment of the prescribed fee, the Registrar will certify that the foundation is registered and specify the registration number of the foundation.[28] The Registrar will issue a certificate of registration, which will evidence that the foundation is a legal entity with separate legal personality capable of exercising all functions in its own name.[29]

Real estate investment trusts and similar structures

Regulatory framework

By way of background, under Bahamian law, a real estate investment trust is not specifically regulated as a separate category of regulated real estate investment vehicles. Accordingly, there is no established legal or regulatory regime dedicated to the establishment, regulation, administration and oversight of real estate investment trusts. There is similarly no separate and dedicated tax regime applicable to these structures that requires any direct analysis or comment. The tax implications otherwise dictated by applicable Bahamian law for the purchase, holding and sale of real estate in The Bahamas, and as discussed herein, would generally apply in the case of real estate investment trusts.

Notwithstanding the foregoing, however, a real estate investment trust by its very nature of being an entity that offers equity interests to investors in exchange for cash payments, which is then aggregated for the purpose of purchasing, maintaining and realising the value of real estate assets would need to be regulated. Under Bahamian law, a real estate investment trust properly structured would, in our opinion, qualify as carrying on investment fund business pursuant to the terms of the Investment Funds Act 2019 (as amended, the IFA).

Under the IFA, an investment fund[30] shall not carry on or attempt to carry on business in or from The Bahamas[31] unless it is licensed by the Securities Commission of The Bahamas (the Securities Commission) as one the categories of investment funds provided for in the legislation.[32] On the basis of the foregoing, a real estate investment trust that carries on business in or from The Bahamas shall be deemed as engaged in a regulated activity and accordingly subject to regulation under the IFA.

An application for an investment fund license shall be made to the Securities Commission[33] in the prescribed form accompanied by the statutorily prescribed documents. The application process involves the completion of an application form and the submission of certain supporting documents in relation to the fund, its service providers and its operators. The following categories of investment funds are available for licensing under the legislation. Theoretically, a real estate investment trust under Bahamian law may be structured as any one of the following categories of investment funds provided for under the IFA:

a. professional fund;[34]
b. standard fund;[35]
c. SMART fund;[36] or
d. master fund.[37]

Generally, any real estate investment, purchase and sale carried out by an investment fund will be for the account of the fund itself. Accordingly, any tax liability associated with the purchase and sale of the underlying real estate shall similarly be for the account of the fund itself. Individual investors will not be subject to any additional tax liability imposed by the Bahamian government on account of the real estate purchases and sales engaged in by an investment fund licensed under the IFA and operating in accordance with applicable Bahamian law.

Notwithstanding this, however, the IFA clearly defines the activities of a real estate investment trust in offering equity interests for sale with the proceeds employed in real estate investment as the business of an investment fund. What is equally clear in this case is that the tax regime applicable to real estate holding entities in The Bahamas is such that a real estate investment trust could not operate in practice in The Bahamas where it intended to purchase and hold real estate in The Bahamas. The reason for this is that a real estate investment

trust would most certainly satisfy the definition of a real property holding entity. Under the Value Added Tax (Supply of Real Property) (General) Rules 2023, the allotment or issuance, as well as the repurchase or redemption, of shares in the capital of a real property holding entity where entered into for the purpose of effecting a change in the beneficial ownership of any real property in The Bahamas would attract VAT. The VAT would be attracted in the same manner as if a direct transfer of the underlying real property had occurred.[38]

Further, the third schedule of the VAT Act, as amended by the Value Added Tax (Amendment) Act 2023, states that VAT is be payable in connection with a transaction or instrument that by virtue of the provisions of this Act is a supply of real property and that (1) has the effect of transferring any interest in a real property holding entity and (2) which would have a similar effect on the legal or beneficial interest in any real property in The Bahamas that is legally or beneficially owned by the entity had the legal or beneficial ownership of such entity represented the proportionate parts into which that legal or beneficial interest in that real property were divided.[39]

On the basis of the foregoing, the subscription and redemption of equity interests in the capital of an investment fund that is also a real property holding entity would constitute a supply of real property and would attract VAT as described above.

Each subscription into and redemption out of the fund would represent a change in the beneficial interest that each investor in the fund has in the underlying real estate portfolio. Under the current VAT regime, the changes in the beneficial interests in the investment fund brought about by the subscriptions and redemptions of its equity interests will be treated as effecting changes to the legal and beneficial interests in the underlying property itself. As a result, the transaction will attract VAT in a like manner. For this reason, a real estate investment trust in the case of local real estate in The Bahamas has no specific benefit as it relates to the tax implications.

For the avoidance of doubt, however, the discussion above related to the application of VAT applies only in the case of real property located in The Bahamas. The extent to which a real estate investment trust licensed as an investment fund owns, operates and exploits real property outside of The Bahamas, subscriptions and redemptions into and out of the fund would not attract any VAT as described above.

International and cross-border tax aspects

Tax treaties

The Bahamian government has since the early 2000s consistently voiced its intention to cooperate with the international community for the implementation of internationally recognised best practices in the area of tax transparency and cooperation. With this stated goal at the forefront of its discussions with international organisations and partner jurisdictions, The Bahamas has, to date, managed to cultivate a network of over 30 tax information exchange agreements. The first of these were executed in early the 2000s.

These agreements formulated the bedrock of the jurisdiction's efforts to signal to the international community the country's ability and willingness to share information within the framework provided for in the agreements. The approach to international cooperation on tax matters for The Bahamas continues.

Additionally, as is well known, The Bahamas itself does not levy direct income taxes on its citizens. Accordingly, the jurisdiction has not to date agreed to any double taxation treaties. The flow of information in relation to such matters has been facilitated through the mechanisms provided for the tax information exchange agreements, with The Bahamas sharing information with its treaty partners rather than receiving. This is the logical and unavoidable byproduct of the jurisdiction's tax environment existing in its current iteration.

Furthermore, The Bahamas has passed into domestic law the Automatic Exchange of Financial Account Information Act 2016, which came into force in January 2017, pursuant to which the Common Reporting Standard established by the Organisation for Economic Co-operation and Development (OECD) was implemented. Additionally, the government of The Bahamas formally advised the OECD of its intention to accede to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in May 2017.

The agreements and treaties mentioned above provide the framework pursuant to which financial and other information in relation to the investment holdings of foreign persons with dealings in The Bahamas may be spontaneously disclosed or otherwise disclosed to tax officials in their home jurisdictions upon request. However, it is generally the case that these agreements do not specifically contemplate real estate holdings, focusing instead on financial accounts and assets maintained in the jurisdiction. Therefore, it is unlikely that real estate holdings in The Bahamas, on their own, would trigger any obligations for foreign persons under those agreements. Generally, persons holding real estate in The Bahamas either directly or through entities owned by them will not trigger any reporting obligations under the aforementioned agreements solely as a result of their purchase, sale or holding of real property in The Bahamas.

However, where these persons maintain accounts with financial institutions in The Bahamas, and given the nature of the relationship maintained with such financial institutions, their financial dealings may trigger a requirement on the part of the financial institution to collect and report certain information in relation the foreign account holders. The specifics of the due diligence requirements and the reporting obligations imposed upon Bahamian financial institutions under the OECD's CRS framework is beyond the scope of this article.

Cross-border considerations

As noted above, The Bahamas as a jurisdiction is inviting of, and encourages investment by, foreign persons into Bahamas based assets and structures. Accordingly, while foreign persons seeking to purchase and hold real estate in The Bahamas would require certain administrative approvals from relevant Bahamian government institutions, doing so is by no means prohibited. The investment climate for foreign investors in The Bahamas is generally warm and receptive, and real estate investment is no exception. Of course, it is encouraged that foreign persons seeking to own real estate in The Bahamas or to otherwise invest in the jurisdiction seek professional tax advice in their home jurisdictions. This is to ensure that their investment holding vehicles in The Bahamas and elsewhere are structured properly and in the most tax efficient manner, having regard to the prevailing obligations in their home jurisdictions.

Locally domiciled vehicles investing abroad

The Bahamas as a jurisdiction offers its international investors a collection of vehicles through which investments outside of The Bahamas may be made. As discussed earlier, Bahamian IBCs have traditionally been the vehicles of choice in The Bahamas through which foreign persons have conducted their investment activities. Until recently, the activities of IBCs conducted outside of The Bahamas were immune from taxation largely on account of the cross-border nature of their activities and the fact that no economic activity was being conducted in the local Bahamian economy. However, there has been a dramatic reversal of this approach.

In 2023, the government of The Bahamas enacted the Business Licence Act 2023. With this statutory enactment, for the first time revenue generated by IBCs carrying on economic activity outside of The Bahamas could be subject to taxation in The Bahamas. Where an IBC is conducting business in or from The Bahamas, the IBC will be required to maintain a business licence and pay business licence taxes.

What is considered as carrying on business in or from The Bahamas will vary depending on the prevailing circumstances attributed to the business. However, specifically related to real estate holdings, the general rule is that any IBC holding real estate solely for residential purposes will not trigger a requirement to obtain a business licence or pay any taxes. Conversely, where an IBC owns real property outside of The Bahamas from

which rental income is generated and there is business activity in or from The Bahamas that contributes to generating that income, the IBC will be required to obtain a business licence and pay business licence tax in The Bahamas. It necessarily follows that where any revenue generated by an IBC's holding of foreign real estate is not attributed to operations or activities being carried out in The Bahamas, the requirement to obtain a business licence and pay tax will not be triggered.

For the avoidance of doubt, in the case of income generated by an IBC from business operations outside The Bahamas, but accruing to or derived from activities carried on in or from The Bahamas, the following rates apply:

a. B$2,500 for amounts up to B$1 million; and
b. 0.25 per cent up to a maximum tax of B$100,000 if the amount exceeds B$1 million.

For avoidance of doubt and to provide a background, the Business Licence Act 2023 is not solely responsible for scaling back some of the tax advantages previously afforded to Bahamian IBCs. In 2018, the Removal of Preferential Exemptions Act 2018 amended the IBC Act and in so doing removed certain preferential exemptions that IBCs have enjoyed from time immemorial. Specifically, the Removal of Preferential Exemptions Act 2018 repealed Part XII of the IBC Act inclusive of Section 187(1).[40] Section 187 was at that time the foundational statutory provision from which the IBC sourced the tax exemptions that paved the way for its popularity as an offshore vehicle of choice. Prior to 2018, and in accordance with Section 187 of the IBC Act, IBCs were expressly granted exemptions from any business licence fee, income tax, corporation tax, capital gains tax, any estate, inheritance, succession or gift tax, among others. It is important to note, however, that IBCs were always subject to the payment of stamp tax or VAT, depending on the statutory regime at the time, in connection with domestic real estate purchases and sales.

Notwithstanding the foregoing, even though the express exemption from the aforementioned taxes was removed by the 2018 legislation, because The Bahamas as a jurisdiction generally did not and does not levy any of these taxes in the context of activities occurring outside of the jurisdiction, Bahamian IBCs were largely unaffected. Accordingly, the status quo remained and for the most part commercial activity routed through Bahamian IBCs continued unabated with business as usual. While The Bahamas as a jurisdiction certainly did have business licence legislation in place well before the 2023 Business License Act, it was well established that earlier versions of the legislation were either singularly directed as domestic activity or a policy position was taken not to mandate that business licences must be obtained for economic activity taking place outside the jurisdiction. All this changed in 2023 when the Business Licence Act 2023 was passed.

The Business Licence Act 2023 now specifically contemplates the activities of Bahamian IBCs with Part IV of the Second Schedule to the legislation specifically dedicated to the regime applicable to these entities. Notwithstanding the new regime applicable to IBCs, the vast majority of IBCs with activities exclusively outside of The Bahamas will not be affected by the recently implemented regime. Subsequent guidance issued by the Department of Inland Revenue[41] has more or less confirmed that IBCs not carrying on a regulated activity or any relevant activity,[42] with no physical presence or operational mind and management in The Bahamas, are unlikely to be captured and will not be required to obtain a business licence or pay any tax on account of their economic activity outside of the jurisdiction.

Year in review

As noted above, the Business Licence Act was enacted in 2023 and has served as the catalyst for streamlining the tax regime applicable to Bahamian IBCs engaged in economic activity outside of The Bahamas. Initially, the passage of the legislation gave rise to some uncertainty; however, after some growing pains, it has become clear that the status quo for the vast majority of Bahamian IBCs has not changed. Only IBCs carrying on business in or from within The Bahamas are subject to business licence taxation. The limits of what constitutes doing business in or from within The Bahamas is now well settled with the result that the vast majority of Bahamian IBCs continue to operate outside of the business licence tax net. New companies are being incorporated every day and in many cases to be used as vehicles through which local real estate investments are made. Most of the available data suggests that Bahamian IBCs continue to be a popular vehicle for real estate and other investment options.

Outlook and conclusions

The discussions surrounding the implementation of a corporation tax in The Bahamas continue; however, to date, there remains no concrete pronouncements from the Bahamian government on this issue. With that said, however, most interested onlookers following this issue would likely prognosticate that corporation tax in The Bahamas will be a reality in the short to medium term.

Our expectation is that in the medium to long term, the perception of the Bahamian IBC as the vehicle of choice in The Bahamas for investments within, as well as outside of The Bahamas, will continue to grow in popularity. All indications are that the local real estate market is thriving and the forecast is that it will continue to do so. In

our opinion, the overwhelming popularity of the Bahamian IBC as the vehicle through which these investments are made will continue well into the future.

Footnotes

1. ^ Conveyancing and Law of Property Act, Section 3(4).
2. ^ See VAT Rule #2019-002 Supply of Real Property (Transfer of Home Mortgage).
3. ^ VAT Rule 2019-004 Supply of Real Property (Inter Vivos Gifts), Section 3.
4. ^ Value Added Tax (Supply of Real Property) (General) Rules 2023, Section 9.
5. ^ Value Added Tax (Supply of Real Property) (General) Rules 2023, Section 16.
6. ^ Real Property Tax Act 1969, Section 19.
7. ^ See Real Property Tax Act 1969, as amended.
8. ^ See Hotels (Amendment) Act 2022.
9. ^ Section 9(1) of the Business Licence Act 2023.
10. ^ Section 2 of the Business Licence Act 2023.
11. ^ Second Schedule of the Business Licence Act of 2023.
12. ^ Section 38 of the Business Licence Act of 2023.
13. ^ Section 16 of the Business Licence Act of 2023.
14. ^ Section 186(d) of the Companies Act 1992.
15. ^ Section 80 of the Companies Act 1992.
16. ^ Section 3 of the Companies Act 1992.
17. ^ Undertaking, under the Companies Act 1992, means in relation to a foreign company, any business or undertaking carried on by a foreign company.
18. ^ Section 175 of the Companies Act 1992.
19. ^ Section 173 of the Companies Act 1992.
20. ^ Section 174 of the Companies Act 1992.
21. ^ Section 4(1) of the Exempted Limited Partnership Act.
22. ^ Section 4(5) of the Exempted Limited Partnership Act.
23. ^ Section 4(2) of the Exempted Limited Partnership Act.
24. ^ Section 7(2) of the Exempted Limited Partnership Act.
25. ^ Section 9(1) of the Exempted Limited Partnership Act.
26. ^ Section 3(1) of the Foundations Act.
27. ^ Section 4(4) of the Foundations Act.
28. ^ Section 22(1) of the Foundations Act.
29. ^ Section 23 of the Foundations Act.
30. ^ Investment fund is defined under the Investment Funds Act 2019 (as amended) as ‘a unit trust, company, partnership or investment condominium that issues or has equity interests the purpose of effect of which is the pooling of investor funds with the aim of spreading investment risk and achieving profits or gains arising from the acquisition, holding, management or disposal of investments’.
31. ^ For the avoidance of doubt, under the Investment Funds Act 2019 (as amended), carrying on business in or from The Bahamas, and its derivatives, means: to incorporate, register or establish an investment fund

in The Bahamas; to establish a unit trust where the governing law is the Commonwealth of The Bahamas; to operate as a fund licensed under the Investment Funds Act 2019 (as amended); to make an invitation to a person in The Bahamas who is not an accredited investor to subscribe for equity interests in an investment fund, regardless of where the investment fund is incorporated, registered or established; or to engage in investment funds business in The Bahamas as an investment fund manager, investment fund administrator, investment fund adviser or AIFM.

32. ^ Section 5(1)(a) of the Investment Funds Act 2019 (as amended).
33. ^ The Investment Funds Act 2019 (as amended) makes provision for an unrestricted investment fund administrator licensed under the Act to act as licensor in relation to certain categories of investment funds, which are to be administered by it, namely professional funds, SMART funds and master funds. These categories of investment funds may also be licensed by the Securities Commission.
34. ^ Professional fund means an investment funds that is offered to any person who comes within any of the following categories at the time of issue of the equity interest: '(i) a bank or trust company licensed under the Banks and Trust Companies Regulation Act of The Bahamas or licensed pursuant to the laws of another jurisdiction; whether acting in its individual or fiduciary capacity; (ii) any firm registered under Part VI of the Securities Industry Act, 2011 that maintains minimum regulatory capital of $120,000, or is registered or licensed to carry on equivalent securities activities in a prescribed jurisdiction; (iii) an insurance company licensed under the Insurance Act of The Bahamas or licensed pursuant to the laws of another jurisdiction; (iv) a pension fund where a registered investment manager has been appointed to manage the fund's assets; (v) any professional investor; (vi) a natural person who had individual income in excess of US$200,000 in each of the two most recent years or joint income with his/her spouse in excess of US$300,000 in each of those years and has a reasonable expectation of reaching the same income level for the current year; (vii) a trust with total assets in excess of US$5,000,000 where a licensed trustee or investment manager is responsible for investment decisions; and (viii) an entity with net assets in excess of US$5,000,000, which has appointed a licensed investment manager to make investment decisions on its behalf.'
35. ^ Standard fund means an investment fund that does not satisfy the requirements of a professional fund or a SMART fund.
36. ^ SMART fund means an investment fund established by the Securities Commission as a Specific Mandate Alternative Regulatory Test Fund that satisfies certain prescribed parameters and requirements of a category, class or type of investment fund previously approved by the Securities Commission. At the moment, the Securities Commission has approved seven SMART Fund Models the specific parameters of which are prescribed in rules.
37. ^ Master fund means a company, partnership, unit trust or investment condominium that: 'Has as its investors other investment funds or feeder funds; Holds investment and conducts trading activities for the principal purpose of implementing the overall investment strategy of the feeder funds; or Has as its investors one or more feeder funds either directly or through an intermediary entity established to invest in the master fund, and for the purpose of the Investment Funds Act, 2019 (as amended) such master fund shall be deemed to be an investment fund.'
38. ^ See rule 13 of the Value Added Tax (Supply of Real Property) (General) Rules 2023.
39. ^ The tax rate applicable in this case: where the transferee is a Bahamian, is 2.50 per cent where the value does not exceed B$100,000 and 10 per cent where the value exceeds B$100,000; and where the transferee is a foreign person, the rate of 10 per cent.

40. ^ Notwithstanding any law other than Section 28D(e) or 43 of the Stamp Act to the contrary a company incorporated or continued under this Act or a member or shareholder thereof shall not be subject to: any business licence fee, income tax, corporation tax, capital gains tax or any other tax on income or distributions accruing to or derived from such company or in connection with any transaction to which that company or shareholder, as the case may be, is a party; any estate, inheritance, succession or gift tax, rate, duty, levy or other charge payable in The Bahamas with respect to any shares, debt obligations or other securities of that company or shareholder.
41. ^ Refers to the Guidance Document issued by the Department of Inland Revenue to provide additional information and interpretative guidance on the application of the Business Licence Act 2023 to Financial Services Entities, International Business Companies, Proprietary Traders and Family Offices.
42. ^ Relevant activity in this case refers to those activities under the Commercial Entities (Substance Requirements) Act 2023 carried on by entities that are required to have substantial economic presence in The Bahamas.