HARNEYS

- BVI Business Companies
- Partnerships
- Trusts
- Other organisations

Record Keeping Obligations for BVI Companies, Partnerships, Trusts and Other Organisations

The record keeping obligations applicable to BVI companies and partnerships were amended in November 2012 and again in September 2014. The changes have been introduced following OECD Peer Reviews of the Territory. The Reviews recommended some changes to meet the evolving global standards. This Guide outlines how these changes affect BVI undertakings and the scope of financial record-keeping obligations more generally.

"

The BVI aims to meet evolving global standards in the area of tax transparency and exchange of information.

BVI Business Companies

A1. What is the law on keeping and retaining records?

Section 98 of the BVI Business Companies Act 2004 (***BCA***) has always provided that a BVI business company must keep records that:

- are sufficient to show and explain the company's transactions; and
- will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

The obligation above applies to BVI business companies but does not apply to foreign companies, ie companies incorporated outside the BVI which have an establishment in the BVI and are registered as foreign companies under the BCA.

A new round of amendments to Mutual Legal Assistance (Tax Matters) Act 2003 (***MLAT***) became effective on 16 September 2014. No amendments have been made to the BCA itself.

Section 5A(1) of MLAT applies to all companies registered under the BCA (including foreign companies registered under Part XI). Section 5A(1) provides that:

- every company shall keep "records and underlying documentation".

- such records and underlying documentation may be kept at the office of its registered agent or at such other place or places, within or outside the Virgin Islands but if not kept at the office of the registered agent, a record of the location where they are kept must be given to the registered agent.

- every company shall retain the records and underlying documentation for a period of at least five years from the date of completion of the transaction to which the records and underlying documentation relate; or the company terminates the business relationship to which the records and underlying documentation relate.

Under section 5A(4) of MLAT, records and underlying documentation of the company should be in such form as would be sufficient to show and explain the company's transactions; and will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

Section 5A(5), as most recently amended, provides that records and underlying documentation, for the purposes of that section only, be construed to include:

accounts in relation to:

- *all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*

- *all sales and purchases of goods by the company; and*

- *the assets and liabilities of the company.*

Consistent with the Terms of Reference, the reference to "accounts" in the amended section 5A of MLAT, is restricted to accounting records. It does not amount to a requirement for any company to produce financial statements.

A2. What is the context for the amendments?

The amendments were made in response to the OECD's Peer Review Reports of the BVI. The BVI is subject to periodic monitoring and review in the area of tax transparency and exchange of information. This process is carried out by The Global Forum on Transparency and Exchange of Information for Tax Purposes (the ***Global Forum***). The Global Forum evaluates each legislative framework against its "Terms of Reference", which amount to best practice requirements for international finance centres.

The Terms of Reference require that jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. The 2012 and 2014 amendments provide guidance and clarification as to what records and documentation must be maintained.

A3. What records and documents must be kept by companies and what is the minimum standard? To what extent has that standard changed?

The nature of records and documents to be kept depends on the business undertaken by the company. A holding company with very few transactions must keep the underlying documentation of those transactions (contracts, invoices, receipts etc) but provided that the financial position of the company could promptly be determined from those documents would not generally have to do much more than that. A trading company, on the other hand, which enters into many transactions would need to keep both the underlying documentation and accounting records which would enable it to determine the financial position of the company. There is no

prescribed form for those accounting records but typically would include general ledger entries and a cash book as a minimum. What is clear, is that there is no statutory or regulatory requirement to produce financial statements although, of course, many companies will choose to do so in the interests of their stakeholders.

A4. What are the consequences of a breach of the record keeping obligations?

Under Section 98 of the BCA, a company that contravenes its record keeping obligation commits an offence and is liable to a fine of US$10,000.

No offence is committed for a breach of section 5A of MLAT. However, a company would be required to comply with any requests for information made by the International Tax Authority (being the authority delegated the power to make such requests by the Financial Secretary) under section 5 of MLAT. Such requests are made in response to request for information from foreign authorities under Tax Information Exchange Agreements (***TIEAs***). A person who, without lawful or reasonable excuse, fails to comply with such a request commits an offence and is liable to a fine not exceeding US$100,000 or to imprisonment for a term not exceeding five years or both. A lawful or reasonable excuse to failing to respond to such a request would be that the company has never had or no longer has the information or documents requested but to the extent that the company is required to keep or retain the documents under the provisions of the BCA or MLAT then such defence may not be available.

The Financial Services Commission also has powers in certain situations to request information from companies under section 32 of the Financial Services Commission Act 2001 (the ***FSC Act***). Very much depending on the circumstances, the information required to be kept and retained under section 98 of the BCA and section 5A of MLAT may fall within the scope of a request under section 32. Under section 54 of the FSC Act, failure to comply with a section 32 notice is a criminal offence. A person who commits an offence is liable (on indictment) to a fine not exceeding US$25,000 or to imprisonment for a term not exceeding five years, or both.

In addition, the Commission has power to impose a financial penalty on a person without resorting to court action in respect of a breach of the section 98 requirements in the BCA under the administrative penalty regime or failure to comply with a request under section 32 of the FSC Act. However the Commission does not have authority to impose such penalties in respect of a breach of MLAT.

A5. What document retention policies should be adopted by BVI companies?

The directors of a company will need to ensure that the company complies with its obligations under both the BCA and MLAT. Most notably, companies are now subject to a requirement to retain records for at least five years. In practice, of course, since the limitation period for most actions under contract law is six years it has always made sense to retain records despite the previous absence of any express requirement.

A6. Where are documents located?

Pursuant to Section 5A(2) of MLAT, where the records and underlying documentation of a company are kept at a place other than at the office of the company's registered agent, the company shall provide the registered agent with a written record of the physical address of the place or places at which the records and underlying documentation are kept.

It is for the directors of the company to determine where documents are kept as a matter of fact. However where documents are stored electronically it may be most appropriate to list the location of the server as the relevant location for these purposes. The growing use of cloud based technology solutions and multiple back up copies of documents can admittedly make determining the location of records somewhat difficult. The legislation makes no allowance for such issues. In the absence of any factors which indicate otherwise, the

pragmatic solution for companies may be to treat the primary location at which the company can access such records as being the location at which the records are kept.

Under section 99 of the BCA the records of the company may be kept either wholly or partly as electronic records complying with the requirements of the Electronic Transactions Act 2001. The requirements for electronic record keeping have remained unaffected.

A7. What do registered agents need to do?

A registered agent is not under any obligation to require that companies for which they act comply with section 5A of MLAT or section 98 of the BCA although clearly it would be best practice to encourage client companies to do so. Registered agents should, in addition, put in place systems to record the location of where records and underlying documentation of each client company are kept. In addition, recently incorporated companies would be well advised to adopt resolutions as part of their initial organisation as to where records and underlying documentation will be kept and to provide a formal notice to the registered agent.

A8. Is a registered agent required to notify anybody in the event it is aware of a company it acts for being in breach of the record keeping requirements?

No, not in respect of an unregulated company.

However a registered agent of a company regulated by the Financial Services Commission is required to notify the Commission under section 54A of the FSC Act if it becomes aware that such regulated company for which it acts as agent commits a breach or an offence under the FSC Act or other financial services legislation. As MLAT is not financial services legislation (as defined in the FSC Act), the section 54A duty to notify does not arise. In contrast, a breach of section 98 of the BCA by a regulated company that the registered agent is aware of does give rise to an obligation on the registered agent to notify the Commission under section 54A of the FSC Act.

Partnerships

B1. What is the law on keeping and retaining records?

Section 30 of the Partnership Act 1996, states that partners "are bound to render true accounts and full information of all things affecting the partnership to any partner, his agents and representatives".

Section 81 provides that limited partnerships should keep and maintain records and underlying documentation (including accounts) for a period of at least five years from the date of completion of the transaction to which the records and underlying documentation relate; or the company terminates the business relationship to which the records and underlying documentation relate. Section 81 of the Partnership Act was also recently amended in similar terms to section 5A(5) of MLAT (see A1 above).

B2. What is the context for the amendments?

See further A2 above which applies equally to partnerships.

B3. What records and documents must be kept by partnerships and what is the minimum standard? To what extent has that standard changed?

See further A3 above, however it should be noted that the requirement on partnerships to keep accounts predates the most recent change of law.

B4. What are the consequences of a breach of the record keeping obligations?

Pursuant to Section 113 of the Partnership Act, a partnership that contravenes any provision of the act commits an offence and is liable to a fine of up to US$5,000. The Financial Services Commission may impose an administrative penalty on a partnership for breaches of the record keeping requirements of the Partnership Act.

B5. What document retention policies should be adopted by BVI partnerships?

Limited partnerships are subject to a requirement to retain records for at least five years. In practice, of course, since the limitation period for most actions under contract law is six years it has always made sense to retain records despite the previous absence of any express requirement.

B6. Where are documents located?

See further A6 above, save that the provisions in relation to partnerships are set out in section 83 of the Partnership Act rather than section 5A of MLAT. Under section 83 it is the obligation of the general partner of a limited partnership to inform the registered agent as to the whereabouts of documentation.

B7. What do registered agents need to do?

All limited partnerships must appoint a registered agent. BVI general partnerships are not subject to this obligation. Registered agents are not under any obligation to require that limited partnerships for which they act comply with sections 81 and 83 of the Partnership Act. Registered agents would, nonetheless, be advised to put in place systems to record the location of where records and underlying documentation are kept. In addition, the general partners of recently organised limited partnerships would be well advised to adopt measures as part of their initial organisation documents as to where records and underlying documentation will be kept and to provide a formal notice to the registered agent.

B8. Is a registered agent required to notify anybody in the event it is aware of a limited partnership it acts for being in breach of the record keeping requirements?

No, not in respect of an unregulated limited partnership.

However a registered agent of a limited partnership regulated by the Financial Services Commission may be subject to an obligation to notify the Commission under section 54A of the FSC Act in certain circumstances, as outlined in A9 above. For these purposes the Partnership Act (including the new amendments) does constitute financial services legislation under the FSC Act.

Trusts

C1. What is the law on keeping and retaining records?

Acknowledged by the Peer Review, under rules of equity all trustees resident in the BVI are subject to a fiduciary duty to keep proper records and accounts of their trusteeship. Additionally, the Trustee Act 1961 imposes an obligation to keeping accounts of the trust within the BVI in the case of a non-charitable purpose trust (sections 84 and 84A).

No amendments have been made to the record keeping requirements in the Trustee Act or any other legislation affecting trusts.

C2. What records and documents must be kept by BVI trusts and what is the minimum standard? To what extent has that standard changed?

See further A3 above. However all trustees are also under a general fiduciary duty to maintain proper accounts with respect to the trust fund. *Lewin on Trusts* (18th ed, at para 23-22) describes the duty: "It is the bounden duty of a trustee to keep clear and distinct accounts of the property he administers, and to be constantly ready with accounts … The failure to keep proper records appears itself to be a breach of trust." However there is no obligation for such records to be maintained in the BVI (except in the case of non-charitable purpose trusts). No change to this standard has recently been made.

Other organisations

D1. Are there any other general record keeping obligations in relation to BVI undertakings?

If any undertaking is a non-profit organisation which operates for the benefit of the public or substantial part of the public principally in the British Virgin Islands then it will be under additional obligations under the Non-Profit Organisations Act 2012 to maintain records which show and explain the organisation's transactions, within and outside the BVI and that are sufficiently detailed to establish that the organisation's funds have been used in a manner consistent with its purposes, objectives and activities and to show the sources of its gross annual income. In addition a non-profit organisation must prepare and submit annually to the Non-Profit Organisation Registration Board, financial statements of the organisations' revenue and expenditure, and if the organisations annual revenues exceed US$250,000 these must be certified by an accountant.

In addition, although relatively uncommon, organisations which are registered under the Friendly Societies Act 1928 or the Cooperative Societies Act 1979 are subject to specific further obligations. Friendly societies are required to file an annual return showing the audited receipts, expenditure and funds of the society. Cooperative societies are required to maintain true and proper records and accounts with respect to all transactions and sums of money received or expended by the society and the assets and liabilities of the society, and these accounts must be audited annually by "a competent authority appointed after consultation with the Registrar". However there is no requirement for a cooperative society to file these audited accounts.

D2. To what extent has that standard changed?

The obligations on non-profit organisations to maintain financial records were introduced only in 2012, but otherwise there have been no recent changes in this area.

D3. What about regulated companies?

This Guide does not deal with statutory record keeping obligations applicable to undertakings licensed by the Financial Services Commission or those that carry on "relevant business" for the purposes of the Anti-money Laundering Regulations, 2008. The focus here is on simple BVI companies and partnerships, including holding companies and asset protection vehicles.

For more information please contact:

Colin Riegels
+65 3152 1934
colin.riegels@harneys.com
Singapore

Ross Munro
+44 207 842 6089
ross.munro@harneys.com
London

Aki Corsoni-Husain
+357 25 820020
aki.corsoni-husain@harneys.com
Cyprus

Philip Graham
+1 284 852 2551
philip.graham@harneys.com
British Virgin Islands

www.harneys.com