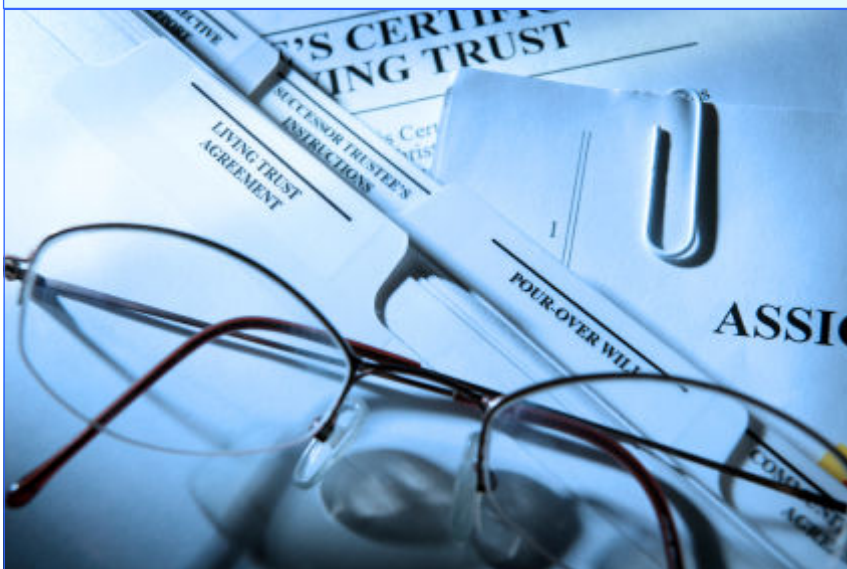


General Concept on Family Trust

BY ANNIE K.Y. CHEUNG

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Trust can be a useful and valuation tool for tax administration and on disposition of one's wealth. Trust is in fact a legal arrangement whereby a person (the trustee) owns property in his name but holds and manages it for the benefit of someone else (the beneficiary). A family trust is one formed for the benefit of a family group. Typically, the creation of a trust involves three parties:

- (a) Settlor (also Grantor or Donor): The party (e.g. the parents) forms the trust and transfers assets to the trust by way of gift or for value.
- (b) Trustee: One (an individual or a company) controls, administers and manages the trust according to the trust deed.
- (c) Beneficiaries: They (e.g. the spouse or children) are entitled to all the income and principal of the trust but have no right or claim to any of the trust property until it is distributed or vested as directed by the trustee.

Trust is not a separate legal entity and does not need to be

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registered like a company in law. Though a trust can exist without documentation, in most cases trust is created by agreement (trust deed) between the settlor and the trustee.

Family trust may be in the form of discretionary trust where the trustee has discretion on distribution and to choose which beneficiaries to receive income or capital. The settlor may leave a letter of wishes for the trustee to guide him in the exercise of discretion. Family trusts are now becoming more popular because:

- Business or investment income may be distributed to family members in an effective manner.
- Wealth may be preserved and pass down to later generations of family members, and offer protection for minors, spendthrifts, and disabled persons.
- Provide independent income to a beneficiary and enable him/her in pursuit of career or personal objective which may not be particularly remunerative.
- Avoid the probate application process and protection against claims against the estate of deceased family members.
- Provide certain tax savings and offer asset protection against business risks and claims.

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Product Liability: US Framework

BY CURTIS H.L. WONG CPA, LLB, PCLL

US law imposes a strict liability on sellers, and commercial suppliers at all levels of the distribution chain (i.e. manufacturer, distributor, retailer, commercial lessor and etc.) on defective products

Product liability in US used to cause great concern to foreign suppliers and manufacturers. In fact, product liability claims in US are generally based on a type of legal liability called "strict liability" rather than negligence.

Strict liability only requires a plaintiff to demonstrate that a product caused an injury because of its defectiveness. It does not depend on the degree of carefulness by the defendant. Therefore, it is irrelevant for the supplier or manufacturer to show that (a) he has exercised all possible care in the preparation and sale of the concerned product, or (b) the user or consumer has not bought the product from or has never entered into any contractual relation with the supplier.

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All parties along the commercial supply chain including the manufacturer of component parts (at the top of the chain), the assembling manufacturer, the wholesaler, and the retail store owner (at the bottom of the chain) could be sued. Therefore, manufacturers could be liable for defective components which are already assembled into the products they sold (but they may claim indemnification).

There are three types of defects: (i) manufacturing flaw; (ii) design defect; and (iii) absence of warning (usually applied to drugs and pharmaceutical products).

Available defences to strict liability are rather narrow. Contributory negligence on the plaintiff's failure to discover defect is never a defence. Voluntarily and unreasonably assumption of risk by the plaintiff is construed narrowly by the court.

Besides strict liability, sellers and suppliers may be liable:

- (a) Under negligence for failing to exercise reasonable care in the inspection or sale of a product that caused harm to the plaintiff.
- (b) Under breach of express or implied warranty that the products supplied are not in conformity with the express warranty, or implied warranty of merchantability/fitness for a particular purpose.

It is worth to note that:

- (1) There is no defence of misuse of a product if the misuse is foreseeable.
- (2) Even if a product is not defective, failure to warn or give adequate directions for an unreasonably dangerous product may provide grounds for liability.
- (3) Use of warnings does not prevent a product from being unreasonably dangerous.
- (4) Use of disclaimers may be valid against a warranty claim but not as to personal injury and does not avert strict liability or negligence action.



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China Labour Update: How to calculate the average annual working hours and wages for staff

According to the Ministry of Labour and Social Security "Notice on the Problems for Calculating the Average Annual Working Hours and Wages for Staff" (Circular [2008]3) issued on 3 January 2008, the calculation of average annual working hours and wages for staff are as follows:

(1) Calculation of working hours

Annual working days: 365 days - 104 days (rest days) - 11 days (statutory holidays) = 250 days

Working days per quarter: 250 days ÷ 4 = 62.5 days / quarter

Working days per month: 250 days ÷ 12 month = 20.83 days / month

Calculation of working hours: Working days per month, quarter, and annum respectively multiplied by 8 working hours per day.

(2) Calculation of daily and hourly wages

The 11 days statutory holidays cannot be deducted in calculating the daily and hourly wages.

Daily wages: monthly wages ÷ paid days per month

Hourly wage: monthly wages ÷ (paid days per month × 8 hours)

Paid days per month = (365 days - 104 days) ÷ 12 month = 21.75 days

Hong Kong Labour Case : "Tips and Service Charges" - Lam Pik Shan v. Hong Kong Wing On Travel Service Ltd (CACV394/2007, 9 May 2008)

The Employment Ordinance defines "wages" including "tips and service charges", and that "tips and service charges" in relation to wages, means "sums of money received, directly or indirectly, by an employee in the course of and in connection with his employment which are

- (a) paid or derived from payments made by persons other than the employer; and
- (b) recognized by the employer as part of the employee's wages".

The court held that: (1) Tips received from tour participants would fall squarely within the statutory definition of "wages". (2) The discretionary nature (that of the tour participants and not employer) of tips is not a bar to their forming part of an employee's wages. (3) The defendant company recognized the tour guides to accept tips. Therefore, the reality is that the income of the tour guides comprised not only the basic salary but also the net tips earned through performing their duties for the defendant company.

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