



Alicia Hussey

COMPLIANCE IS ALSO CHARITABLE

Philanthropy

Extensive giving, intended to make an indelible impact on society and improve a nation generally, is often better achieved through formalized structures with express charitable objects.

It is often with these commendable intentions that what is loosely referred to as “Foundations” or “Charities” are formed. When the decision to give back to society is taken by a person, the vehicle most frequently used in Jamaica to legitimize the intended charitable activities is a Company Limited by Guarantee, without a share capital (“CLG”). Other vehicles may be used but due to the advantages provided by the use of CLGs, this is the most popular choice.

Structure and Registration

A CLG allows the liability of its members to be limited to an amount stated in the Articles of Incorporation (referred to as Articles of Association under the repealed Companies Act). The limit represents the extent to which the members undertake to contribute to the assets of the company in the event of a winding up. Under the Companies Act, 2004 (the “2004 Act”) a CLG may be formed with one member, who may also be the sole director. However, the sole director cannot also be the Company Secretary.

Formal registration requires the preparation of various legal documents including the outline of the objects of the company and provisions which will govern its internal management. Registration fees of J\$16,000.00 are payable to the Companies Office of Jamaica (“COJ”) to incorporate a CLG and stamp duty of J\$550.00 is payable to the Taxpayer Audit and Assessment Department (“TAAD”).

Rights and Articles

Section 4 of the 2004 Act, declares that a company has the rights, powers and privileges of an individual. So, a company is authorized to perform any legal act which a natural person can, except to the extent that it is restrained by the provisions of its Articles. Therefore, a company may not carry on any business or exercise any power that it is restrained by its Articles to the general law from carrying on. It must be noted that a CLG which was formed under the repealed Companies Act would be required to amend its Articles in order to take advantage of section 4 of the 2004 Act.

Benefits of Charitable Status

A CLG may be eligible for certain licences and exemptions due to the philanthropic activities it engages in.

Assets Tax Exemption

Under section 16 of the 2004 Act, where it is proven to the satisfaction of the responsible Minister that the company is formed or to be formed *“...for promoting commerce, art, science, religion, charity or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members...”* the Minister may grant a Licence to dispense with the word “Limited” at the end of its name. A CLG which holds this Licence is exempt from the payment of Assets Tax under the Assets Tax (Specified Bodies) Act.

Income Tax Exemption

The Commissioner of Taxes must be convinced, upon a review of the Articles, that the objects are exclusively charitable. An exemption from income tax under section 12(h) is available where *“...the income of any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes...”*. In order to avail itself of this benefit, the CLG’s Articles must include purposes such as the relief of poverty or the advancement of religion or the advancement of education or such other purposes beneficial to the community. Accordingly, it is vital that the objects of the CLG be crafted with great care and skill in order to improve the chances of a successful application.

Income Tax Deduction for Donors

A CLG is often designed to obtain funding and financing from individuals, agencies, organizations, firms and others entities in order to carry out its charitable purposes.

Section 13 (1) (q) of the Income Tax Act, allows a donor a deduction from his taxable income of:

“...the amount of any donations (not exceeding one-twentieth of the statutory income) to any institution or organization established and operated exclusively for charitable or educational purposes and approved by the Minister responsible.”

Donors often experience a greater inclination to give where this incentive exists.

Obligations

It is important that CLGs adopt corporate best practices and governance policies which exemplify ethics and accountability, particularly where they enjoy the foregoing benefits. Ensuring transparency and facilitating public interest and involvement are essential to the effective operation of CLGs and the fulfillment of their stated purposes.

A critical legal requirement is that an entity which enjoys or seeks to enjoy the foregoing privileges must maintain that *“no part of the net earnings enure to the benefit of, or be distributable to its members, directors or officers, or other private persons...”* except that reasonable compensation may be paid for services rendered.

The foregoing approvals are generally granted on condition that copies of the audited accounts of the operations of the company are submitted to the TAAD annually and, that where the amendments to the articles are proposed, copies of the proposed amendments are submitted to the TAAD and the responsible Minister for approval.

As with other registered companies, a CLG is required to maintain a compliant status with respect to its obligations under the applicable laws. Therefore, all annual returns, notices of changes of directors, company secretary and registered office must be filed in accordance with the 2004 Act and, in the absence of a Licence obtained under section 16 of the 2004 Act, declarations of assets must be prepared and the relevant assets tax paid annually.

In the context of a heightened regulatory environment and increasing scrutiny of charities internationally, corporate compliance in its widest sense must be achieved. Its reputation, credibility and the income-generating capacity are but a few of the core assets of a CLG. Benevolent organizations have a critical social and humanitarian role but also have, by virtue of their very existence, a corresponding legal obligation. Therefore, in the wake of the significant emphasis placed on corporate governance and best practices; compliance with the applicable laws, insistence on suitable board membership and proper fiscal oversight are crucial to ensuring the longevity and purposeful existence of CLGs.

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