

REFERENCE: T23.JFM.11507.03.0567
TO: Red Chime Private Foundation
Ms. E.M. Behr
FROM: MMO Dutch Caribbean
Jasper Muns and Johnathan Montesant
DATE: 18 July 2023
SUBJECT: Ultimate beneficiary of Red Chime Private Foundation

Dear Ms. Behr,

We refer to our previous correspondence regarding the identification of the ultimate beneficiary or beneficiaries of Red Chime Private Foundation ('Red Chime'). After a short description of the facts and circumstances, we will provide our analysis.

FACTS AND CIRCUMSTANCES

- Red Chime is a private foundation incorporated under the laws of Curacao on 17 April 2019, having its office at Zuikertuintjeweg z/n, Zuikertuin Tower, Unit 2B, Willemstad, Curacao, registered with the Curacao Chamber of Commerce under number 149960;
- On 6 April 2020, Ms. Elaine M. Behr was appointed as the successor of the founder powers;
- Ms. Elaine M. Behr was appointed to the Board of Directors on 5 Augustus 2020;
- Mr. James Meloche, who deceased on 7 February 2020, was the settlor of Red Chime;
- The contribution Mr. James Meloche made to Red Chime was limited to funds to enable the initial incorporation of Red Chime. Based on the information we have on file, no additional contributions were made by Mr. James Meloche;
- According to declarations made by Ms. Elaine Behr and Red Chime, no beneficiaries have been appointed since incorporation until today;
- According to article 8, paragraph 2 of the articles of incorporation, a beneficiary is not entitled to claim any distribution from Red Chime;
- There are no further legal documents – by laws, letter of wishes, etc. – arranging the internal and/or external affairs of Red Chime.

GENERAL STATE ORDINANCE ON TAXES

Article 45, paragraph 10 of the General State Ordinance on Taxes ('GSOT') states the following:

"In case of a foundation, the following individual persons are considered the ultimate beneficiaries:

- a. The founders;
- b. The board of directors;
- c. To the extent applicable, the beneficiaries, in case the individual person cannot be determined separately, the group of individual persons for whose main benefit the foundation was incorporated or for who the foundation is active;
- d. Each individual who – through separate means – can control the foundation.

This paragraph applies to private foundations, church organizations and other legal entities similar to a foundation, including similar foreign legal entities.”

This definition was introduced in 2018, we are not familiar with any court case relating to the interpretation of article 45, paragraph 10 of the GSOT. Furthermore, the Curacao legislator did not provide an extensive explanatory statement during the legislative process providing more guidance.

Based on article 45, paragraph 10 of the GSOT, an ultimate beneficiary can be determined, also in the case no beneficiaries have been appointed.

Capital of the Foundation

In accordance with article 3 of the articles of incorporation of Red Chime, the capital of Red Chime consists of assets contributed by the founder and such other capital as may have been obtained from other parties (such as the settlor), by its income derived from the management of its assets and all means legally obtained by Red Chime.

Ms. Elaine Behr confirmed that the initial founder did not contribute capital to Red Chime. Furthermore, Ms. Elaine Behr confirmed that the initial capital was contributed by the settlor to incorporate Red Chime.

The founder of Red Chime

In accordance with article 8, paragraph 1 of the articles of incorporation of Red Chime, the founder may express his wishes to the board of directors in writing. However, the wishes expressed in writing as referred to in the first paragraph, shall at no account be binding and the wishes cannot be legally enforced by the founder or any other person. The board of directors decides if and when any distribution will take place; a beneficiary is not entitled in any way to claim any distribution from Red Chime. Ms. Elaine Behr confirmed that there are no letters of wishes.

In accordance with article 8, the powers of the founder are personal and cannot be exercised by any other person and shall not be passed on to his heirs. The powers of the founder shall be suspended during his/her bankruptcy. In case the powers of the founder are terminated or in case they cannot be exercised temporarily, said powers shall be vested in the supervisory board, and in case there is no supervisory board, in the board of directors.

However, the founder may appoint one or more successors, who may be (a) natural or legal person(s), who shall take the place and assume the position of the original founder effective from the date on which the appointment is approved by the board of directors. After said appointment, the successor shall have all the powers of the original founder, including the power to appoint a successor.

An appointment as referred to in the preceding paragraph can be made dependent on the fulfilment of the condition that the appointment shall be cancelled, in case of the occurrence of certain events or the lapse of a certain time span and that the powers of the successor return to the predecessor.

As mentioned previously, Ms. Elaine Behr was appointed as successor of the founder powers on 6 April 2020.

Beneficiaries

Pursuant to the objectives of Red Chime as laid down in article 2 of the articles of incorporation, the beneficiaries may be family members of those who contributed the assets to it, the founder or others.

Furthermore, the articles of incorporation stipulate in article 2 that the purpose of the foundation is to make distributions out of its assets to such persons or others, as indicated in the preceding paragraph, as the board of directors in its sole discretion may determine and to provide financial assistance to such institutions and persons by means of loans, guarantees, annuity contracts and the like.

According to the declarations made by Ms. Elaine Behr, no beneficiaries have been appointed as of incorporation until today.

Analysis based on article 45, paragraph 10 of the GSOT

According to the resolution of 6 April 2020, Ms. Elaine Behr was appointed as the successor of the original founder. In accordance with article 8, paragraph 4 of the articles of incorporation of Red Chime, the successor of the original founder shall have all the powers of the original founder. As a result, Ms. Elaine Behr obtained all the powers of the original founder.

Although the articles of incorporation do not explicitly mention that a 'successor' of the initial should be addressed as 'founder', we conclude that Ms. Elaine Behr should qualify as the founder of Red Chime under article 45, paragraph 10 of the GSOT, considering that all founder powers are now with her. As a result, we conclude that Ms. Elaine Behr should qualify as an ultimate beneficiary of Red Chime under article 45, paragraph 10 of the GSOT. Furthermore, Ms. Elaine Behr was appointed to the Board of Directors on 6 April 2020. Also in this capacity, we conclude that Ms. Elaine Behr should qualify as an ultimate beneficiary of Red Chime as board member.

We trust to have informed you sufficiently. Should you have any questions and/or remarks regarding the above, please do not hesitate to contact us.

Kind regards,
MMO Dutch Caribbean

A handwritten signature in black ink, appearing to be 'J. Muns', written over a horizontal line.

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