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TAX RESIDENCY

Efficient tax planning should be the key focus for corporations, individuals and any recognized legal entity such as partnerships or trusts. In recent times, case law has specifically demonstrated the adverse tax consequences which can occur when relevant tax experts are not consulted, prior to the decision to “go global”. This is the case since tax liability is generally based on factors such as residency, domicile and/or nationality, and the complexity of the laws pervades from jurisdiction to jurisdiction.

The determinant for residency of any legal entity or individual varies from one jurisdiction to the next. In the case of corporations, for example, some jurisdictions such as the United States of America, focus on the incorporation or the organization of the corporation in their jurisdiction to determine whether the corporation is resident for tax purposes in that jurisdiction. In other jurisdictions, like Barbados and to some extent Canada (which uses a combination approach) the test for residency is determined by the *situs* of the central management and control of the corporation. The latter position is the accepted common law position, and in the recent Canadian case of *St. Michael Trust Corp. v. The Queen (The Garron case)*, the central management and control test was deemed to also be applicable to trusts.

Tax advisers sometimes differ in their advice on the steps to be taken to satisfy the central management and control test, however, the following are some of the primary determinants:

- the majority of the directors and key officers of the corporation or trustee should be resident in the desired jurisdiction of residence;
- key decisions are to be made in the jurisdiction where the entity desires to be resident;
- a head office with contact information should be established in the desired jurisdiction of residence. The corporation should have employees or engage a management company to conduct its day to day operations;
- anyone with signing (including on bank accounts), contracting and decision-making authority should be resident in the desired jurisdiction of residence;
- the legal entity should comply with all statutory requirements of the desired jurisdiction of residence, including incorporating, licensing, tax filing and other regulatory requirements;
- material contracts for the business should be negotiated, drafted, and executed preferably at the entities head office, in the registered name of the corporation. The contracts should also be subject to the laws of the desired of jurisdiction of residence, with no condition for overriding approval from foreign residents;
- all suppliers, creditors and customers of the entity should be aware that they are dealing with the entity in the desired of jurisdiction of residence;

- local management of the entity should make all decisions on the day-to-day running of the business without any direction from non-residents; and/or
- all communication between the entity and non-residents shareholders and/or affiliates should be kept to a minimum confined to the exchange of information as opposed to the giving of instructions or directions.

The above list is not exhaustive and revenue authorities will determine residency on a case by case basis.

As it relates to individuals, citizenship, residency and/or domicile are the determinants for tax liability. In Barbados, for example, an individual is deemed resident for tax purposes where they have been present in the island for more than 182 days. However, domicile is also an important determinant for the level of tax liability in Barbados as:

- A resident and domiciled individual is taxed on worldwide income whether or not remitted to Barbados;
- A resident but not domiciled individual is taxed on income derived from within Barbados, and worldwide income remitted to Barbados;
- A non-resident is taxed on income derived from within Barbados.

Another matter for consideration is double taxation treaties wherein residency is usually defined and which will in most instances override the domestic tax laws of the parties to the treaties.

Understanding the complexities and intricacies of tax residency and the corresponding implications are key when doing business globally.
