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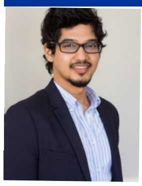

COVID-19 AND THE TAX RESIDENCY IMPLICATIONS OF RUNNING A BUSINESS

Miguel Vasquez

The COVID-19 pandemic has forced the implementation of unprecedented governmental measures which are aimed at preserving the health and safety of the public. One of the more significant and prolonged measures has been a restriction on international travel. This restriction has left employees stranded in countries other than their normal country of work, while triggering increased reliance on virtual meetings and remote work, as operations shift to innovative methods of conducting business. These shifts may indirectly have unforeseen implications on both individuals and companies from a tax residency perspective. This Article aims at addressing three (3) of these tax residency implications, namely:

1. The creation of tax liabilities, obligations and compliance requirements on companies in new countries;
2. Similar implications for individuals; and
3. The creation of permanent establishments.

For companies involved in cross-border transactions, travel restrictions may have indirect implications as directors and other senior managers may be constrained to meet and execute decisions from countries in which they do not ordinarily do so. This change has the potential to shift the tax residence of the companies.

From a domestic tax law perspective, the tax legislation of many countries, including T&T, subject resident companies to corporation tax on its world-wide profits; this refers to income that is generated from sources accrued in or derived from any country of the world. A company is considered to be resident in T&T where it is controlled (that is, that the "mind and management" of the company is ordinarily situated in T&T) whether or not it is legally incorporated in, or engaged in trade or business in T&T.

One of the crucial factors that determines where the "mind and management" of a company is ordinarily situated, is the place where the majority of its board of directors meetings and management decisions are executed. If these are conducted in a jurisdiction in which the company was not previously or ordinarily resident, this could blur the lines as it relates to the company's tax residency status.

This may result in the creation of tax liabilities, filing obligations and other compliance requirements in the new country but as the company still conducts business in T&T, it continues to have corporation tax liabilities to T&T on the income generated here. Moreover, in computing its corporation tax, the company may not be afforded certain relief that is afforded only to residents, such as group loss relief. Furthermore, expenses incurred by a subsidiary for services performed by the company may be recharacterised as management charges by the Board of Inland Revenue ('BIR'), restricting the amount that can be deducted as an expense, while dividends remitted and paid by the subsidiary may be subject to withholding tax.

For companies engaged in cross-border transactions, the tax residence of the company is critical to determining whether the company may be afforded relief pursuant to a double taxation treaty.

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C O N T E N T S

CONTRACTUAL NOTICE REQUIREMENTS: IT'S IN THE DETAILS...

Melissa Inglefield

The recent English case of Dodika v United Luck [2020] EWHC 2101 (Comm) highlights the importance of closely adhering to contractual notice requirements. Dodika and the other claimants in the matter were the sellers of the shares in Oufit Investments Limited (the 'Target') to United Luck pursuant to a share sale agreement, in which warranties were made by the claimants in respect of the business and affairs of the Target. The share sale agreement required that a certain portion of the purchase price be set aside and held in escrow for a prescribed period of time for the purposes of meeting any costs incurred by United Luck in respect of the warranties given by the Claimants during such period.

Shortly before the date on which the escrowed funds were to be released to the Claimants, United Luck submitted a claim notice to the Claimants in respect of certain tax warranties included in the share sale agreement and therefore requiring that the escrowed funds not be released until such matter was settled. The Claimants applied to the Court for a declaration that United Luck's notice failed to satisfy the requirements of the share sale agreement and that the escrowed funds should accordingly be released.

The Judgment

In determining that United Luck's notice was indeed insufficient, the Court noted that the notice ought to have provided "sufficient or reasonable detail of the circumstances" on which United Luck wished to rely in support of, or to make good, its claim.

In coming to its conclusion, the Court took note of notice requirements that have developed from the authorities, including:

1) That the recipient of the notification would want to know the three fundamental elements required for any enforceable contractual claim: (a) the facts, events or circumstances giving rise to the claim; (b) the contractual provisions which are alleged to be breached; and (c) the amount of the claim.

2) The requirement that the notice include "the matter which gives rise to" means that United Luck should have indicated the basis of its claim in the notice (that is, the factual basis for how the warranty claim had accrued).

3) The notice must indicate what facts are relied on in support of United Luck's claim, including its claim that the recipients of the notice are liable for the purported breach.

4) The information in the notification must also allow the receiving party to determine, with the benefit of legal or tax advice, at least in general terms whether the facts as alleged in fact give rise to or might contingently give rise to liability for breach of the warranty. In particular, the receiving party will need to be in a position to assess, even if only on a preliminary basis, if it is or may well be liable for the breach.

5) The purpose of the notification is to enable the recipient party to deal with the Claim, whether it is by undertaking further investigations, seeking clarifications, participating or participating further in the matter which gave rise to the claim, notifying third parties (such as insurers, accountants or witnesses), accessing archived documents, obtaining legal or tax advice, and/or making an assessment of the Claim and inquiring into potential defences.

6) The requirement that the notice provide "reasonable detail" amounts to an obligation of the notifying party to provide sufficient information so that the receiving party, acting reasonably, knows what matter (facts, events or circumstances) gives rise to the Claim being made (as well as the nature of the Claim and, if reasonably practical, the amount of the Claim).

The Takeaway

Contractual notice provisions require close adherence to ensure that the rights, claims and powers of parties to the contract are preserved. Failure to do so may have severe unforeseen consequences for the notifying party.

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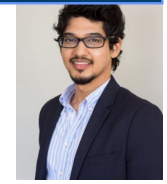
COVID-19 AND THE TAX RESIDENCY IMPLICATIONS OF RUNNING A BUSINESS (CONT'D)

Miguel Vasquez



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For example, if the company is resident in T&T and engages in transactions with companies that are resident in Switzerland, the company may be afforded relief under the T&T-Switzerland double taxation treaty. However, if the company's tax residence is shifted to a different country, it may no longer be entitled to access relief under the T&T-Switzerland double tax treaty.

T&T is a party to seventeen (17) double tax treaties with varying relief afforded based on provisions of the particular treaty. The existence of a double taxation treaty in force with the other country can be a critical factor in determining whether to enter into cross-border transactions with residents of that country. A change in residence may therefore have significant ramifications to the company's entire business model.

As it relates to individuals, restrictions on travel have impacted the entire population to some extent, but for some individuals, it has forced them to work in countries where they either do not ordinarily work, or where they do not ordinarily reside. This shift may trigger income tax implications in accordance with the domestic tax laws of the new country, such as the payment of taxes, tax filing obligations, and other compliance requirements. Notwithstanding paying taxes to the new country, the individual may still have income tax obligations to the country that they previously worked or resided in. Unless there is a double taxation treaty between both countries within which the individual may be afforded relief, the individual may be taxed in both jurisdictions on the same income.

Lastly, the relief granted by certain double taxation treaties may be to abstain from taxing income generated by a company in the other country party to the said treaty, unless the income is attributable to a "permanent establishment". The term "permanent establishment" is interpreted in accordance with the tax treaty in issue, but generally refers to a "fixed place of business" and may include a place where the company has an agent who habitually exercises an authority to conclude contracts in the name of the company.

Companies do not ordinarily have a fixed place of business in every country but due to individuals performing their employment duties or concluding contracts in countries in which that they do not ordinarily do so, there is a risk that a permanent establishment may be created in the new country. As a result, the company may be precluded from relief

under double taxation treaty that will ordinarily be available to it since income may now be allocated to the permanent establishment.

Thus far, the T&T government has not yet addressed these potential implications from a legislative perspective, while the current prevailing climate seems to be of an understanding that exceptional circumstances warrant exceptional measures. However, companies and individuals who have been affected by travel restrictions should not be lulled into a false sense of comfort or hope that the BIR may be understanding when the time for an audit or assessment arises.

In fact, the T&T tax legislation allows the BIR to raise an assessment for additional corporation and income tax up to six (6) years after the income year in issue. When an assessment is raised, the taxpayer has a right to object to the assessment which must be determined within two (2) years, in circumstances where the full period is usually utilized by the BIR. If the BIR is of the view that the assessment is justifiable and thus determines the objection against the taxpayer, the taxpayer can appeal the decision to the Tax Appeal Board. Due to the nature of the process, up to eight (8) years may elapse before the matter attracts the attention of the Tax Appeal Board. By this time, the prevailing climate may experience a monumental shift from one of understanding, to that of tax collection.

The governments of countries such as Ireland and Australia, and international organisations such as the Organisation for Economic Co-operation and Development ('OECD'), have been proactive in ensuring that taxpayers are not plagued with the consequential uncertainty and risk prompted by travel restrictions.

In particular, the tax authority of Ireland has issued recommendations that include disregarding the presence of an individual in certain jurisdictions for corporate income tax purposes in relation to a company to which the individual is an employee, director, service provider or agent, if the presence is shown to result from travel restrictions related to COVID-19. Australia has guided that the board of a foreign-incorporated company that is not an Australian tax resident but temporarily makes arrangements for board meetings in Australia,

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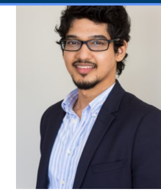

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is not required to comply with residence obligations, while individuals forced to stay in Australia will not become Australian resident for tax purposes.

Furthermore, the OECD has issued recommendations with the underlying theme that COVID-19 restrictions are exceptional and temporary. Thus, questions as to the tax residence of a company should be determined based on the usual and ordinary facts and circumstances that are to be considered, while the restrictions are not of a sufficient degree of permanence to create a permanent establishment.

As T&T taxpayers adapt to the new normal, it is critical that they consider the potential tax implications of COVID-19 restrictions and consider measures such as the following to mitigate the potential risks:

- At minimum, maintain detailed and contemporaneous records of the facts and circumstances caused by COVID-19 restrictions;
- Host virtual board meetings so that no meetings are held in other countries;
- Board meeting minutes should expressly reflect the extraordinary circumstances;
- Reconstitution of the board of directors by removing non-country based members from the board;
- Non-participation in meetings of non-country based members of the board;
- Engagement of local representatives by way of powers of attorney;
- Granting proxies to local representatives; and
- Consider what kind of decisions can be taken outside of a board level.

Notwithstanding the foregoing, it may be difficult to base decision making and policy implementation on documentation and safeguards to mitigate risks and as a result, the ideal solution will be by way of legislative certainty.

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