



International news and analysis to help you with your international tax strategy.



### Focus on: INDIA

#### Circular concerning taxability of foreign companies (power projects) withdrawn

Indian Central Board of Direct Taxes (CBDT) issued instruction No. 5 dated 20 July 2009, which withdrew previous instruction No. 1829 dated 21 September 1989 (Circular), which dealt with the taxability of income of foreign companies from execution of power projects in India.

The Circular had provided the following:

- foreign companies forming part of a consortium do not qualify for an Association of Person under Income Tax Act;
- profits arising out of supply of equipment outside India will not be deemed to accrue or arise in India, and hence the same would not be liable to tax in India even if the supplier's employees take part in the final erection or commissioning of the equipment supplied;
- profits of civil works contracts and contracts for erection, testing and commissioning of the machineries would be taxable on a presumptive basis for a sum equal to 10% of the gross amount payable for the work; and
- payments made for planning, designing and engineering services would be technical services, and would not be taxable as "royalty income".

The reasons why the Circular was withdrawn are:

- the Circular was misused by taxpayers other than those involved in the power sector;
- the taxpayers intentionally resorted to splitting a single contract into various components such as offshore, onshore supply and services;
- the profit was being shifted to the offshore supply (which would not be taxable in India), and the payments made for the contracts which would be taxable in India barely met the expenses resulting either in very low profit or losses; and
- the taxpayers were relying on the Circular to avoid payment of taxes in India.

### US

#### Final transfer pricing regulations issued on controlled services transactions and related issues

The US Treasury Department and the Internal Revenue Service (IRS) have issued final regulations on the tax treatment of services provided between commonly controlled taxpayers. The regulations, which were issued under Section 482 of the US Internal Revenue Code (IRC), also address the allocation of income derived from intangible property. Additional regulations were issued under Section 861 of the IRC to address the treatment of stewardship expenses. The final regulations replace temporary regulations issued on these topics on 4 August 2006.

The final regulations adopt the transfer pricing methods for controlled services transactions that were specified in the 2006 temporary regulations, including the services cost method (SCM), the comparable uncontrolled services price (CUSP) method, the gross services margin method, the cost of services plus method, the comparable profits method, and the profit split method. Unspecified methods may also be used as described in the regulations.

The final regulations also provide guidance for services provided in exchange for contingent payment arrangements, and for the allocation and apportionment of costs where benefits are provided to more than one recipient. Key definitions of the terms used in the regulations are given, including the term "controlled services transaction", which is the operative term for application of the regulations.

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The preamble to the final regulations notes that a number of public comments were received regarding the 2006 temporary regulations and that the final regulations contain modifications in response to these comments, but that both the format and substance of the final regulations are generally consistent with the 2006 temporary regulations.

The final controlled services regulations are designated as Section 1.482-9. Amendments were also made to related provisions of the Section 482 regulations. The current regulations under Section 861 of the IRC were amended concerning stewardship expenses to be consistent with the changes made to the regulations under Section 482.

The final regulations generally apply to taxable years beginning after 31 July 2009. Taxpayers may elect to apply the regulations to any taxable year beginning after 10 September 2003, in which case the regulations will apply to the taxable year to which the election relates and all subsequent taxable years.

As part of the US Internal Revenue Service's (IRS) plan to encourage voluntary disclosure of offshore bank accounts, the IRS has released a form, available to taxpayers, through which they may apply for the voluntary disclosure program.

The form consists of a questionnaire concerning the source of the disclosed funds, any related owners/beneficiaries of the accounts, current law enforcement investigation, and various other questions relating to the set up and ownership of the account. The form additionally contains a certification statement under penalty of perjury. The voluntary disclosure program took effect 23 March 2009 and ends 23 September 2009.

## ITALY

### Anti-crisis Decree approves tax amnesty and embitters CFC legislation

On 3 August 2009, the Anti-crisis Decree was converted into Law Decree No. 103. The main measures introduced by Italian Government regard the introduction of a tax amnesty and a stricter CFC legislation.

As from 15 September 2009, Italian individuals who are fiscally resident in Italy are allowed to regularise funds and assets that are held abroad as of 31 December 2008 and that have not been declared to the Italian Tax Authorities, by filling a specific return and by paying a 5% extraordinary tax on the value of the assets held abroad object of regularization.

The tax amnesty provisions apply for a different treatment, depending on whether:

- foreign assets were held in a EU Member State, Norway or Iceland which can be regularised and still kept abroad;
- foreign assets were held in a State different from those above mentioned, which can be regularised and repatriated.

The extraordinary tax is calculated by applying a 50% rate per annum, inclusive of interest and penalties, on the gross return, which is calculated on a presumptive basis of 2% per annum for the 5 years preceding the repatriation or regularization. The formalities to take advantage of the tax amnesty must be fulfilled from 15 September 2009 to 15 April 2010.

Taxpayers involved in pending (tax enforcement) procedures are not entitled to take advantage of the tax amnesty.

As far as CFC legislation is concerned, the Decree provides for an extension of the anti-abuse provisions at hand to those companies which are not included in a black listed country, but the following two conditions are both met:

- the foreign entity is subject, in its own state, to an effective rate of taxation that is at least 50% lower than it would have been subject to, if it had been resident in Italy; and
- the foreign entity derives more than 50% of its profits from the management of, holding of or investment in securities, shareholding capital, credits or other financial assets, from the disposal or licensing of intellectual property rights, or from the provision of intra-group services (including financial services).

The mentioned rule does not apply whether the resident taxpayer applies for an advance tax ruling and demonstrates that the settlement of the foreign entity is not artificial and does not aim at obtaining any undue tax advantage.

## UNITED KINGDOM

### Offshore accounts and assets – HMRC publish details of New Disclosure Opportunity

HMRC have published details of their New Disclosure Opportunity, which applies to individuals with unpaid taxes in connection with offshore accounts and assets. A disclosure opportunity window will be opened between 1 September 2009 and 12 March 2010.

Individuals who take advantage of it will face a tax penalty of 10% of the unpaid tax. Those who do not do so will face a penalty of at least 30%, plus the risk of criminal prosecution, if subsequently discovered by HMRC.

HMRC have declared that there will be no more of such disclosure opportunities once the NDO comes to an end.

Special provisions apply for certain individuals who did not take advantage of the Offshore Disclosure Facility (the precursor to the New Disclosure Opportunity, which was in place during 2007), despite having been invited to do so by HMRC. Should such individuals now wish to take advantage of the New Disclosure Opportunity, the tax penalty is 20%.

## INTERNATIONAL MODELS

### Nevis Multiform Foundation

The Multiform Foundations Ordinance 2005 introduced a flexible hybrid type of Foundation in Nevis (an independent island situated in the West Indies). Such a legal entity is a useful tool for estate planning, financing structures, special investment holding arrangements and charities, within which a subscriber can self-design the form of Foundation, subject to given rules that define the structure.

Each Nevis Foundation has a Multiform, whereby the constitution of the Foundation states how it is to be treated, either as a trust, a company, a partnership or as an ordinary Foundation. Its flexibility in its use and application can be also appreciated for the possibility to change the constitutional format of the Foundation during its lifetime.

An entity incorporated outside of Nevis can be converted into a Nevis Foundation and an existing Nevis entity can similarly be transformed. It is also possible for two or more entities from outside or within Nevis to be merged into a Nevis Multiform Foundation. Such features serve to make the Nevis Multiform Foundations Ordinance an effective piece of legislation for the provision of asset protection vehicles.

The main advantages of Nevis as a location for the establishment or relocation of a foundation are summarized as follows:

- Foundations domiciled in Nevis pay no tax in Nevis. Foundations can elect to establish themselves as tax resident and pay 1% corporation tax, if this is beneficial to the overall structure. The application for tax residency is relatively simple. The Multiform is subject to corporation tax at a rate of 1% of taxable profit.
- A local corporation tax return needs to be completed each year. Audited accounts are not required to be filed, but accounts and the return must be completed by a qualified accountant.
- The Nevis Multiform Foundations Ordinance provides a balance between privacy and transparency. As with all Nevis entities, privacy is guaranteed by the St Kitts and Nevis Confidentiality Act 1985. Transparency is achieved as the Foundation can elect to have some or all information available on the public record. This is achieved by completing the appropriate form and supplying the Registrar with the information that is required.
- The Nevis Multiform Foundations Ordinance provides a section on forced heirship. This section makes it clear that any Multiform Foundation governed by the laws of Nevis cannot be made void, voidable, liable to be set aside, or defective in any manner, with reference to the laws of a foreign jurisdiction.
- Nevis remains a comparatively inexpensive jurisdiction with the redomiciliation of a Foundation.

