The 5 Basics Of What You Need To Know About Offshore Structures

We interviewed Tax Specialist, Alexa Muller, from PKF Capital Markets (Seychelles) Limited to discuss five basic questions that every investor should know about international tax and structures when investing in offshore projects.

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1. **When is a company regarded as a South African tax resident?**

A company will be regarded as a tax resident of South Africa if it was incorporated in South Africa or if it has its Place of Effective Management (POEM) is in South Africa.

In certain limited circumstances where a Double Tax Agreement (DTA) concluded by South Africa provides for the exclusive tax residence of a company to be another jurisdiction, the company will not be regarded as a tax resident in terms of the South African domestic law.

2. **What are the tax implications that arise when a company is regarded as a South African tax resident?**

The company will be subject to South African income tax on its worldwide income. In addition, various South African tax implications may arise in respect of transactions entered by such company, for example, dividends tax in respect of dividends paid or payable by such company and donations tax in respect of any donations made by such company.

3. **What is a Controlled Foreign Company (CFC)?**

Simplistically stated, where *inter alia* more than 50% of the equity shares of a foreign tax resident company are held directly or indirectly by one or more South African tax resident persons, such foreign company will be regarded as a CFC in relation to those South African tax resident persons.

There are several exceptions to this general rule – for example, minor interests held by South African tax residents in foreign listed companies are in certain circumstances ignored when determining whether such foreign company constitutes a CFC.

4. **What South African tax implications arise by a foreign entity constituting a CFC?**

Subject to various exemptions which may be applicable, the “net income” (a defined concept in relation to CFCs) of the CFC may be attributable to the South African tax resident shareholders of the CFC in proportion to their effective interests in the CFC. Accordingly, in the absence of an applicable exemption, significant South African tax implications may arise for the South African tax resident shareholders of a CFC.

The consideration of whether an exemption to CFC attribution may be applicable is a complex matter. In certain circumstances, an exemption will apply to income derived by a CFC if such income is attributable to a “foreign business establishment” (FBE) of the CFC. Broadly speaking, an FBE may exist where the CFC has a fixed place of business located offshore that is used on a long-term basis for the carrying on the business of the CFC where, for example, the business is conducted through an office which is suitably staffed, suitably equipped and has suitable facilities for conducting the primary operations of the company.

5. **Place of effective management – when is this relevant?**

When a company is incorporated in an offshore jurisdiction, but the key strategic decisions of the company are made in South Africa, the company may be regarded as having its place of effective management in South Africa. As a result, subject to the application of a DTA, such company may be regarded as a tax resident of South Africa.

There is a great deal of commentary and case law on the meaning of “place of effective management” which is not expanded upon here. It should be noted however that it is not enough for the key strategic decisions of a foreign company to essentially be made in South Africa and merely “rubber stamped” offshore at, for example, board meetings. In such circumstances, South Africa would be regarded as the place of effective management of the foreign company.

In an ever-changing global landscape, multinational companies are increasingly affected by legislative, regulatory and tax developments throughout the world. Investors need to understand the effect of these developments on business operations. It is important for companies to engage with professional tax structuring teams like PKF Capital in addressing these.

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Alexa joined PKF Cape Town on 1 March 2018, with more than a decade of experience in a tax advisory role. She obtained her B Comm and LLB degrees as well as a Higher Diploma in Taxation from the University of Stellenbosch, where after she obtained a vast amount of expertise in the field of taxation at Price Waterhouse Coopers and Edward Nathan Sonnenbergs Inc. Contact: Email: alexa.muller@pkf.co.za Direct: +27 21 914 8880

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