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Tax Structuring: Corporate Substance Requirements

Australia-Africa Mining Industry Group

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Australian Tax Residency

1. When is a company an Australian tax resident?

Under Australian domestic income tax law, a company is a tax resident of Australia if any of the following tests are satisfied:

a) "The company is incorporated in Australia; or

b) The company carries on business in Australia and has either:

I. its central management and control in Australia; or

II. its voting power controlled by shareholders who are residents of Australia.

2. What does this mean for foreign holding companies?

- Foreign holding companies (i.e. passive investment vehicles) are commonly used for the sole purpose of the management and administration of shares in active foreign subsidiaries.

- The ATO may consider these passive companies to be Australian tax residents

What is corporate substance?

1. 'Ideal' substance requirements

Ideally, to ensure central management and control is located in the foreign jurisdiction, and to mitigate risk of Australian tax residency, the following commercial arrangements would need to be implemented:

a) *The majority of Board of Directors should be foreign tax residents;*

b) *Board of Directors meetings should be located in the foreign country;*

c) *An in-country foreign tax resident should be employed on a casual basis as the Company Secretary;*

d) *The Company Secretary may be a member of the Board of Directors;*

e) *A foreign tax resident should be employed on a casual basis for bookkeeping services and to take minutes at the Board of Director meetings;*

f) *An office or service desk should be located in the foreign jurisdiction. The office or service desk should be noted as the head office on all documentation for the foreign company; and*

g) *Any board papers, contracts, legal agreements and minutes presented to the Board of Directors should be drafted and signed (if required) in the foreign country.*

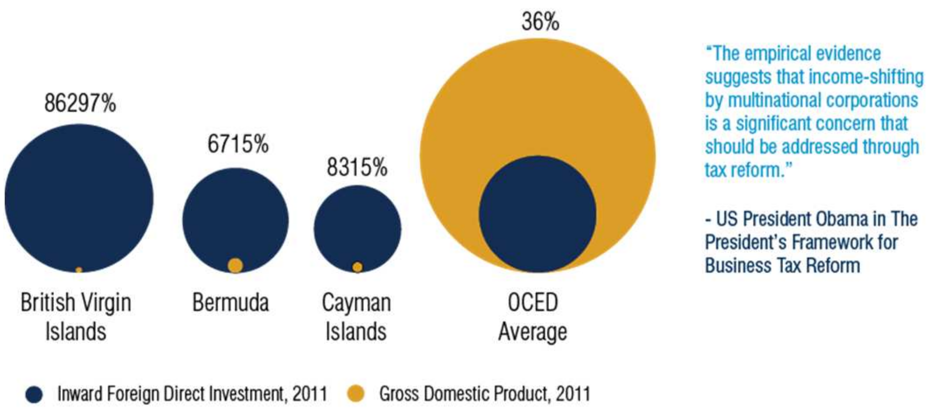
Treaty Shopping & Base Erosion Profit shifting (BEPS)

Treaty Shopping & BEPS

Treaties are principally designed to remove the barrier of double taxation, in order to promote cross border trade and investment. These agreements are bilateral arrangements entered into by countries to deliver the agreed allocation of taxing rights.

Multinational corporations have traditionally structured foreign investments to take advantage of favourable tax treaties and in certain instances abused treaties to maximise returns on investment.

The Australian Government and its foreign counterparts are at the forefront of addressing the impact of treaty shopping through its proposed BEPS measures.



Source: http://www.budget.gov.au/2013-14/content/overview/html/overview_34.htm

The new 23AJ exemption

Existing Rules

A non-portfolio dividend paid by a foreign tax resident company to an Australian tax resident company is treated as non-assessable non-exempt income.

Two Key Proposed Amendments

1. 23AJ exemptions should only apply to 'equity' interests defined under Australia's debt-equity rules.

   - *Opportunity re: financing arrangements (i.e. loans) which are equity for tax purposes*

2. 23AJ exemptions should apply where a non-portfolio dividend is received via an interposed partnership or trust.

   Note: *Current ATO guidance suggests dividends received via a partnership, custodian or bare trust should not qualify for the exemption.*

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