



# VECO TAX *News*

Periodical review of the latest international tax news published by Verga Group  
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## UNITED ARAB EMIRATES

*Dubai, financial centre and gateway to the Asian markets*

The United Arab Emirates (UAE) - with the financial capital Dubai - has always been seen as a gateway to the rich Asian markets and in recent years it has become a global hub for finance and trading activities.

Notwithstanding the recent financial crisis, Dubai in particular has become a major financial centre capable of satisfying even the most complex requirements of individuals and businesses.

### *Political system and economy*

From a political point of view, the UAE is a federation of seven emirates.

The UAE is a member of the Non-Aligned Movement and enjoys excellent relations with the USA, Russia and the other Middle East states. It has an extremely stable political system and the government has always been committed to creating a favourable business climate (for instance, by introducing laws to protect and encourage foreign investments).

Special conditions for foreigners and significant public investments in sectors such as property and infrastructure have led to a diversification of the economy and

a reduction in its dependency on oil production and exports (although these are still an important source of state income).

### *Legal system and types of company*

The UAE has a modern legal system with many laws, especially in the field of business law, that draw on the concepts and notions of "European" law.

There are seven types of company, the most widespread being the limited liability company. At least 51 percent of the capital must be owned by a UAE national.

### *Free zones*

The free zones are geographically delimited areas in which specific business entities can be established, taking advantage of dedicated services and tax reliefs (no taxation of corporate profits, exemption from customs duty on imports).

Companies in which all of the shareholders are foreigners can be established in the free zones.

The Dubai International Financial Centre, Dubai Airport Free Zone, Jebel Ali Free Zone and Ras Al Khaimah Free Trade Zone are some of the many free zones that have been set up.

### *Business opportunities*

The UAE offers numerous business opportunities. Many multinational corporations have

## IN THIS EDITION:

### UNITED ARAB EMIRATES

*Dubai, financial centre and gateway to the Asian markets*

1

### ITALY

*Tax Amnesty-  
Doubts and incertainties*

2

### BRAZIL

*Withholding tax on  
payments for technical services  
supplied to non-residents*

3

### CANADA

*Meaning of beneficial ownership -  
the Prevost Car case applied to  
non-residents*

4

outsourced certain functions to the region, with some even moving their headquarters here.

Its geographical location makes the UAE an ideal hub for business, especially with the major Asian markets.

### *Wealth protection*

Regulations are in place in the UAE to ensure confidentiality. While certain serious offences (such as drug trafficking and terrorism) are strictly not tolerated, the law is extremely respectful of the integrity and protection of individual wealth and confidentiality in general.

By virtue of this approach, the UAE presents ideal opportunities for the development of wealth protection solutions.

### *The expertise of Verga Group*

The branch office in Dubai is part of the Verga Group's strategy to grant a presence in one of the most rapidly developing areas closest to the major Asian markets, so that clients can seize the business opportunities in these regions.

Thanks to a clear set of regulations and respect for the importance of confidentiality, the UAE can also be used as a platform providing wealth and financial planning services.

## **ITALY**

### *Tax amnesty - Doubts and uncertainties*

The final version of Italian Law Decree No. 78/2009, as amended by Law Decree No. 103/2009, mitigates some aspects of the tax amnesty that could have made it less attractive, but without introducing any form of amnesty for resident companies. Circular letter No. 43/E issued on 10 October 2009 has only partially clarified the doubts of operators. The reservations expressed in trade publications and uncertainties, mainly concerned with the aftermaths of the tax amnesty

(which expires on 15 December), remain.

### *Extension of the subjective scope of application*

Article 13-bis, paragraph 7-bis of Legislative Decree 78/2009 extends the amnesty to controlled and affiliated companies classified as controlled foreign companies (CFCs) under articles 167 and 168 of the Italian Tax Code. Under the law, foreign companies resident in tax havens will be able to repatriate their funds and assets, but the effects in terms of the tax amnesty are produced in the hands of the shareholders in respect of the amounts disclosed.

The amnesty guarantees immunity from tax audits for income not attributed for transparency by the CFC to the hands of the shareholders up to 31 December 2008.

There are numerous theoretical aspects that need to be clarified and the practical implications are not at all straightforward.

### *Which infringements and offences are covered by the amnesty and which are not?*

It should immediately be made clear that the amnesty does not cover all infringements and tax offences. It does not cover the issuance of invoices or other documents for non-existent transactions (also including transactions that are partially non-existent), non-payment of VAT in excess of € 50,000, hiding payment means with respect to income tax and VAT for more than € 51,646, simulated sale or other fraudulent acts regarding the taxpayer's own or others' assets so as to render revenue collection ineffective.

Under the amnesty, criminal

offences such as making false statements and others governed by the Civil Code, such as false accounting, cannot be punished.

Information derived from the tax amnesty cannot be used against the taxpayer in any civil, administrative or fiscal proceedings. This does not apply to criminal proceedings.

The tax amnesty does not apply to laundering of proceeds derived from unlawful activity (article 648bis of the Criminal Code) or the use of such proceeds or those derived from tax offences (article 648ter of the Criminal Code).

### *The consequences of the amnesty (for individuals)*

The tax amnesty protects individuals against any tax and social security audits and extinguishes administrative, tax and social security penalties in connection with the assets disclosed. The disclosed assets will not be subject to any tax or social security audits for tax periods up until 31 December 2008.

The scope of protection is significantly reduced in the case of taxpayers who apply to benefit from the amnesty at the start of a tax assessment or following receipt of notification of audit (consider, for instance, the case of an assessment based on statistical parameters according to which the taxable income attributable to the individual disclosing the assets exceeds the relevant disclosed value).

Another issue regards confidentiality, which is by no means "absolute". There are several circumstances in which confidentiality is not assured (e.g. in case of bank transfers to purchase property, or upon receiving income subject to taxation to be included

in tax returns, such as dividends and capital gains from qualifying holdings).

### *The consequences of the tax amnesty (for corporations)*

The amnesty does not "cover" corporations nor can it be used as proof of evasion of companies when the individual participating in the amnesty is the director and/or shareholder.

However, there is a possibility that the Italian tax authorities regards the assets disclosed by the shareholder as income attributable to the company that has not been taxed. In that case, the amnesty, though not constituting a legal assumption of evasion, could be used as grounds to audit the company which, as mentioned previously, would not be covered in any way by the amnesty.

### *Amnesty and anti-money laundering*

Disclosure of assets does not automatically result in the duty to report a suspicious transaction under article 41 of Legislative Decree No. 231/2007 (anti-money laundering law). However, in the Note of 12 October 2009, the Ministry of Finance clarified that all the provisions of Legislative Decree No. 231/2007 regarding anti-money laundering rules are applicable to the amnesty.

Financial intermediaries through which the disclosure application form is form and people who are legally bound under the aforesaid law therefore have the duty to verify the client's identity, keep records and report any suspicious transactions if they know, suspect or have reasonable grounds to suspect that the disclosed assets are the result of offences not "covered" by the amnesty.

This means that the intermediary appointed to collect the confidential declaration, must exercise due diligence in evaluating the presence of any suspicious elements covered by the obligation to report to the Bank of Italy (in the event of non-compliance the intermediary would be liable to a fine of up to 40 percent of the undeclared assets, in addition to the applicable criminal sanctions).

### *What will happen after the amnesty?*

Although the tax amnesty presents interesting opportunities, it is also important to consider all the potential "side-effects" very carefully indeed.

In the first place, previous experience has shown that the possibility of the information obtained at the time of disclosing funds and assets being used, albeit indirectly, in future audits, cannot be ruled out (although the original law specifically established the confidentiality of such declarations, Circular letter No. 18/E of 2007 required intermediaries to report the amounts repatriated and regularised under previous amnesties to the National Tax Archive).

The repatriation of certain assets (shareholdings) could entail the realization of latent capital gains by virtue of the application of some anti-tax avoidance measures (for instance, CFC regulations). This could add to the indirect costs associated with asset disclosure.

From a more general perspective, the advantages associated with the disclosure of funds and assets (e.g. freedom to use the assets that are declared) could be outweighed in future by the risk of increased

litigation with the tax authorities and the costs in connection with the increased tax burden on income derived from the declared assets and funds.

Other asset protection solutions (such as trusts) could be a valid means of legalising assets held abroad with a view to planning future disinvestment strategies.

## **BRAZIL**

### *Withholding tax on payments for technical services supplied to non-residents*

A Brazilian Federal Court issued an important decision on 26 June 2009, regarding the taxation of payments made by a Brazilian taxpayer for technical services provided by companies resident in Germany and Canada. In particular, the Court concluded that payments for technical services that do not involve a transfer of technology constitute business profits under Brazil's tax treaties and, therefore, should be taxed only in the country of residence of the party receiving the payment.

The decision follows the OECD's interpretation of article 7 of its model treaty, even though Brazil is not a member of the OECD.

This ruling is very different to that previously adopted by the Brazilian tax authorities (COSIT ruling 1/2000). According to this ruling, income related to technical services that do not involve a transfer of technology should be deemed "other income" rather than business profits and, therefore, taxed in Brazil according to current domestic law (i.e. subject to a 15 percent withholding tax).

The decision may be appealed to

the Brazilian Supreme Court.

The importance of this ruling lies in the fact that the Court applied the OECD Commentary for the interpretation of Brazil's tax treaties. Moreover, the Court has established that the provisions of a tax treaty prevail over domestic legislation.

## CANADA

### *Meaning of beneficial ownership - the Prevost Car case*

In the Prevost Car case Canada's Federal Court of Appeal has upheld the decision of the Tax Court, which had concluded that the parent company resident in the Netherlands was the beneficial owner for the purpose of the reduced rate of taxation under the tax treaty between the two countries, even though its shareholders were corporations resident in Sweden (51 percent) and the UK (49 percent).

#### *The facts*

The Canadian tax authority claimed that tax on dividends paid by a company resident in Canada to a non-resident company should not be withheld at the reduced rate of 5 percent but levied at the normal domestic rate of 25 percent.

Under the Canada-Netherlands tax treaty, the lower rate of withholding tax (5 percent) is only applicable if the receiving party, resident for tax purposes in the country that is the other party to the treaty, is the beneficial owner of the dividends.

The objection raised by the Canadian tax authority was based on its analysis of the corporate

structure and other documentation from which, the authority argued, it was apparent that the Dutch sub-holding was not the beneficial owner of the dividends.

The shareholders of the Dutch sub-holding company are two corporations, one resident in Sweden and the other in the UK. Among the documents examined by the tax authority was an agreement between the Swedish and UK shareholders in which they specified, inter alia, that not less than 80 percent of the profits of the Dutch holding company and its Canadian subsidiary were to be distributed from time to time.

The tax authority also held that since the Dutch holding company was domiciled at the offices of a trust company, it had no physical office or employees of its own.

It argued that, under anti-money laundering laws, the Swedish and UK shareholders had been named as the beneficial owners of the shares.

#### *The Tax Court's decision*

The beneficial owner of a dividend is the person who receives the dividend for his or her own use and enjoyment and assumes the risk and control of the dividend that he or she receives.

This principle also applies to dividends paid to a corporation, unless that corporation is a mere conduit for another person and has "absolutely" no discretion as to the use or application of its funds or has agreed to act on someone's behalf pursuant to the person's instructions, without any right to do other than as instructed by that person.

For these reasons, the Court held

that the Dutch sub-holding company was the beneficial owner of the dividends, considering the fact that it had no office or employees in the Netherlands as not relevant.

#### *The decision of the Court of Appeal*

The Court of Appeal upheld the decision of the Tax Court. In particular, the Court of Appeal confirmed the Tax Court's previous interpretation of beneficial ownership.

It also held that the Tax Court judge's formulation captured the essence of the concept of beneficial owner and was in accordance with the OECD Commentaries and with the OECD report on Conduit Companies.

The Court of Appeal rejected the principle that the beneficial owner is the person who ultimately benefits from the dividend.

This interpretation was dismissed as lacking support in either Canadian domestic law or the international community.

#### *Comments*

The Court of Appeal reaffirmed the important conclusions reached by the Tax Court. If a dividend is paid to a holding company, the mere fact that the latter, taking into account its business activity (ownership of shares), has no physical office or employees, does not mean the company is not the beneficial owner.

Moreover, the holding company is the beneficial owner even if its shareholders are the people who will ultimately benefit from the dividend, unless it has been set up to act as a mere conduit without any discretion as to the use of the funds put through it.