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Trends & Developments

INTERNATIONAL TAX PLANNING

Shake-Up in Multinational Supply-Chain Planning via Ireland

By David Macall, CPA

A shake-up in multinational tax and supply-chain planning may be headed our way, as Ireland's government has just announced that it will phase out the once-famous "double-Irish" structures that have been a principal feature of some companies' European tax planning.

In recent years, Ireland has had one of the more favorable variants of a "territorial" tax system, allowing Irish legal entities not managed or controlled in Ireland not to have taxable residency there. Such exemption from tax for some Irish-chartered entities, managed and controlled outside of Ireland, generally tended to limit Irish income taxation to in-country activities. Ireland's territorial tax system allowed other countries' multinational enterprises not to be subject to Irish income taxation in respect of supply-chain activities and intellectual property located in other countries.

Such territorial tax system actually encouraged U.S.-based and other multinational enterprises to locate substantial operating subsidiaries and activities in Ireland, thereby benefitting from the country's 12.5% corporate tax rate for active business income. Moreover, the availability of double-Irish legal-entity structures helped U.S.-based multinationals manage the sometimes over-inclusive reach of the U.S. subpart F rules for taxing certain income of controlled foreign corporations (CFCs) held by U.S. shareholders.

The Irish government has announced that it will require newly chartered entities in Ireland to be tax-resident there, effective January 1, 2015. For existing companies, there is a proposed transition period until the end of 2020. Considering the recent pace of proposals to clamp down on international tax policy, it remains to be seen whether the Irish government's proposed transition period will be shortened. Thus, it will be important for multinationals with connections to Ireland to review their current structures to evaluate the impact of proposed changes in Irish tax law.

Nevertheless, any transition of supply-chain planning away from Ireland may be gradual, since the country's tax system shares many other features of well-known holding company jurisdictions, including an absence of CFC and thin-cap rules, extensive exemptions from withholding tax on interest and dividend payments, foreign tax credits, and an extensive network of tax treaties.

The proposed change in Irish tax law is in response to widespread criticism of perceived aggressive tax planning by multinationals. Other countries recently have proposed changing their tax rules to prevent or limit the use of structures in their countries similar to the double-Irish structure.

Going forward, some multinationals may want to consider different approaches to designing their supply chains and redeploying their intellectual property to avoid cross-border tax inefficiencies. ■

This content also appears in EisnerAmper's newest blog, devoted to International Taxation. (http://www.eisneramper.com/international_tax_blog.aspx).

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EMPLOYEE BENEFITS

Department of Labor Revises Guidance on Missing Plan Participants

By Peter Alwardt, CPA

The U.S. Department of Labor (DOL) recently updated its guidance concerning plan sponsors' and fiduciaries' responsibilities in locating missing defined contribution retirement plan participants when the plan has been terminated and plan assets must be distributed. In Field Assistance Bulletin 2014-01, DOL updated its guidance from 2004 to reflect the availability and improvement of internet search technologies, as well as the discontinuance of both the Internal Revenue Service's and Social Security Administration's letter forwarding services, which were previously used by retirement plan fiduciaries to help locate missing plan participants.

REQUIRED SEARCH STEPS

If a former plan participant or beneficiary does not respond to regular first class mail or electronic contact, the DOL has outlined four required search steps that a plan fiduciary must undertake before they (the fiduciary) can abandon the search for a missing participant and pursue an alternative method of distributing the participant's account from the plan. It is imperative that a plan fiduciary document each of these steps to demonstrate to both DOL (in case of an investigation) and to former participants/beneficiaries (who may resurface after many years) that they have taken all reasonable steps to locate the missing participant. The require steps are as follows:

- Use certified mail
- Check related plan and employer records
- Check with the participant's designated plan beneficiary
- Use free electronic search tools, including internet search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, and social media.

ADDITIONAL SEARCH STEPS

The DOL states that if the plan sponsor does not find the missing participant using the required search steps above, their duties of prudence and loyalty require that they consider whether additional search steps are appropriate. In determining whether additional search steps are appropriate, the plan sponsor may consider the size of the participant's account balance and related costs of the additional search steps. Possible additional search steps that could be used include the use of internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases, and analogous services that may involve charges.

If any of the search steps require the plan sponsor to incur charges, the DOL states that the fiduciary may charge reasonable expenses related to the search to the missing participant's account provided such allocation is reasonable and consistent with the terms of the plan document.

DISTRIBUTION OPTIONS

If after using the required search steps and any additional search steps the missing participant cannot be located, the DOL has outlined distribution options that may be used by the plan sponsor to distribute the participant's account balance. The DOL made clear in this guidance that the 100% federal tax withholding used by some plan sponsors, which effectively transfers the participant's benefits to the IRS, is not in the best interest of participants and beneficiaries and would violate ERISA's fiduciary requirements. The permissible distributions methods are as follows:

- *Individual Retirement Plan Rollovers* — A direct rollover to an individual retirement account or individual retirement annuity is the preferred method for distributing a participant's account balance according to the DOL. Such a distribution results in the continued deferral of income tax, avoids the 20% mandatory withholding tax, and the 10% additional tax on early distributions.
- *Federally Insured Bank Accounts* — Plan fiduciaries may consider establishing an interest-bearing federally insured bank account for the missing participant giving appropriate consideration to the bank's quality, the interest rate (with or without a guarantee), and any charges levied by the bank. The participant must have the unconditional right to withdraw the funds from the account.

- *State Unclaimed Property Funds* — Plan fiduciaries may consider transferring/escheating the missing participant's account balance to a state's unclaimed property funds in the state of the participant's last known residence or work location. Any transfers to such a fund must comply with state law requirements.

CONCLUSION

Even if plan sponsors have procedures in place for maintaining current addresses for terminated participants, it is almost inevitable that at some point some participants will not be able to be located. When this occurs, it is imperative that plan sponsors and fiduciaries follow the DOL's guidance in order to protect themselves from both DOL and participant law suits. ■

This content first appeared as an EisnerAmper Benefits Alert.

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NOT-FOR-PROFIT UPDATE

New York's New Law for Not-for-Profit Entities

By Candice Meth, CPA

In an effort to reduce many of the outdated regulatory burdens on New York not-for-profit entities (NPOs), as well as to enhance corporate governance, accountability and oversight of NPOs, in December 2013, Governor Andrew Cuomo signed into law the New York Non-Profit Revitalization Act of 2013 (the Act). The law's provisions, which require a variety of actions by NPOs — many of which had previously been considered simply to be optional "best practices" — went into effect on July 1, 2014.

The Act has many far-reaching elements, including significant amendments to the New York Not-for-Profit Corporation Law, as well as applications to the New York Estate Powers and Trust Law (which brings charitable trusts under the Act's jurisdiction as well). The law's many operational provisions are expected to be beneficial to NPOs and include such modernizations as (i) meetings and communications of the governing board and committees may now take place through e-mails and telefaxes; (ii) meetings of the board and committees may now be conducted through videoconferencing; and (iii) the distinction between an NPO's standing committees and special committees has been eliminated.

Because of the significance of the Act's various changes, many NPOs may wish to consult legal counsel to be certain that their governance structures, by-laws, and various policies and procedures are in accordance with the new law. As a starting point, some of the more important "do's and don't's" that an NPO's governing board and management should consider about the Act are that it:

- Eliminates a governing-board approval requirement for ordinary leasing transactions;

- Permits a majority-of-committee approval (rather than that of the full governing board) for non-substantial property transactions;

- Prohibits an employee from serving as chair of the governing board (delayed until January 1, 2016);

- Mandates a requirement for conflict-of-interests policies (to be affirmed annually);

- Requires a determination by the governing board that related-party transactions are reasonable (with enhanced procedures and documentation required in certain circumstances), and likewise prohibits a related party from being present during governing-board deliberations regarding potential transactions with that party;

- Requires that parties for whom compensation is being discussed not be present during the deliberations for such compensation arrangements; and

- Mandates a whistleblower policy for entities with 20 or more employees and annual revenue in excess of $1,000,000 (though the applicability of this provision to all entities has been open to some differences in interpretation among knowledgeable parties).

With regard to the Act's extensive requirements for mandatory audit oversight, for those not-for-profit entities (or "charities," as described in the law) that are required to register to conduct charitable solicitations from the public — and submit annual reports and financial statements with the New York Attorney General — there are the following obligations:

- Entities must have an audit of financial statements if annual revenues exceed $500,000 (with a phase-in to $1,000,000 by 2021);

- An audit committee has to be established, the voting members of which must consist solely of "independent" governing-board members (or the independent directors/trustees of the full governing board may instead function as the audit committee), with the following responsibilities:

  - Overseeing the audit process,

  - Communicating with the independent auditors,

  - Determining the retention of the independent auditors, and

  - Implementing and overseeing governance policies; and

- For organizations with greater than $1,000,000 in annual revenue, the audit committee is also responsible for:

  - Reviewing the scope and planning of the audit with the independent auditors,

  - Discussing the audit findings, including internal-control matters, with the independent auditors, and

  - On an annual basis, assessing the performance and independence of the auditors.

However, it is important to note that those entities that are not required to register under Section 7-A of the New York Executive Law, which governs the solicitation and collection of funds for charitable purposes, are also exempted from the above audit-related requirements of the Act. This category of exempt organizations includes, among others, (i) most types of religious organizations, (ii) educational institutions that confine their contribution-solicitations to their student bodies and their families, alumni, faculty and trustees; and (iii) various membership organizations that confine their requests for funds to only their members.

As with any new legislation, there are varying interpretations of certain parts of the Act, which are expected to be clarified as the Act's requirements are implemented and assessed. ■

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[1] Akin to the related-party provision described below, the Act requires that all NPOs adopt a conflict-of-interests policy. For those NPOs that already had such policies, their versions will be acceptable as long as they are substantially consistent with the Act's requirements, which include: (i) a definition of a conflict-of-interests; (ii) procedures to disclose conflicts to the audit committee or governing board; (iii) a requirement that the conflicted party not participate in, or otherwise influence, the NPO's deliberations regarding the interested-party's action or transactions; and (iv) a requirement that the conflict be documented in the NPO's records.

Moreover, the policy must be created (or affirmed) by the audit committee or by the governing board, and each trustee/director and officer of the NPO must disclose, on an annual basis, his or her status with regard to conflicts.

[2] A "related party" to the NPO may be defined as (i) any of the NPO's trustees/directors, officers, or key employees (e.g., those employees who exercise "substantial influence" over the NPO's affairs, regardless of professional title or job description); (ii) relatives of such individuals; (iii) any corporation in which that person has a 35% or more ownership, or (iv) any partnership or professional corporation in which that person has a 5% or greater interest. Such related party must (i) disclose in good faith to the NPO his or her material interest in any interested action or transaction with the NPO that provides benefit to the related party, and (ii) be ineligible to participate in the NPO's deliberations regarding the interested action or transaction.

Likewise, the governing board of the NPO, when considering the action or transaction, must (i) consider alternative transactions, (ii) approve the action or transaction with a majority vote of those present at the board meeting, and (iii) document the basis for its approval of the related-party action or transaction.

[3] NPOs that meet the Act's size criteria are required to maintain or adopt a whistleblower policy, thus protecting from retaliation any officer or employee who reports an action with the NPO that he or she, in good faith, believes to be illegal, fraudulent, or in conflict with any NPO policy. The audit committee or the governing board must adopt and implement the policy, which must include the following elements: (i) a mechanism for reporting violations while maintaining employee confidentiality; (ii) the appointment of an individual to investigate the allegation; and (iii) a requirement that the policy be distributed to all of the NPO's trustees/directors, officers, employees, and volunteers.

FORENSIC CONCERNS

Recognizing Vendor Fraud

By Hubert Klein, CPA

Vendor fraud covers a broad spectrum of schemes. To catch the perpetrators and limit financial damage, attorneys and their clients need to understand how vendor fraud perpetrators operate and when to consult a fraud expert.

BASIC SCHEMES

Vendor fraud schemes can be divided into two groups:

1. Fraud committed by vendors acting alone; and
2. Fraud that involves collusion between vendors and the defrauded organization's employees.

They can be simple, such as when employees invent fictitious vendors and submit bills from the "vendor" to their employer for payment; or they can be complex. For example, a long-time supplier might pad its invoices and submit other unwarranted charges over a period of many years — sometimes operating with the help of an insider who is accepting kickbacks.

Common vendor fraud schemes include:

Overbilling. Vendors submit inflated invoices for their goods and services. In some instances, the invoice might reflect charges for a greater number of goods than the customer actually received.

Bid rigging. Vendors and employees conspire to steer a company's purchase of goods or services to a bidder offering a higher price.

Price fixing. This is an agreement among competitors to set the same price for goods or services by either jointly establishing a price range or minimum price.

Kickbacks. Here, employees accept misappropriated funds from vendors for facilitating fraud.

TRACKING FRAUD TRENDS

Surveys show that fraud continues to increase — both in dollar amounts and frequency in this country and globally. According to the Association of Certified Fraud Examiners' (ACFE's) 2014 Report to the Nations on Occupational Fraud and Abuse, the typical organization loses 5% of its annual revenue to fraud. Applied to the estimated Gross World Product, this figure translates to a potential total worldwide fraud loss of more than $3.7 trillion annually, with the reported median fraud loss of $145,000.

Nearly one-quarter of the frauds in the report involved losses of at least $1 million and more than 77% of the frauds were committed by individuals in one of six departments: accounting, operations, sales, executive/upper management, customer service or purchasing. Even more troubling is the fact that the typical fraud scheme lasted a median of 18 months before being detected. What is important to note is, the study shows that the longer a fraud goes undetected the more financial damage it can result in.

The ACFE also found that organizations tend to over-rely on audits as a fraud prevention tool. The report revealed that surveyed victims most commonly used the external audits control mechanism. However, audits ranked comparatively poorly in both detecting fraud and limiting losses due to fraud. Clearly, while audits are important, organizations shouldn't rely on them exclusively.

ARMING EMPLOYEES AND OTHER TACTICS

The study shows that fraud continues to be a large problem for business. If undetected over a long period of time, the result can be significant financial losses for a business. Studies show that the best way to combat the threat of fraud is for an organization to be proactive rather than reactive.

The ACFE report concluded that employee education is the foundation of preventing and detecting vendor fraud. Most fraud schemes are discovered via employee tips. In addition, organizations that provide antifraud training for employees experience fewer fraud losses. Organizations should ensure that their employees understand what constitutes fraud, how it hurts the entire organization and how they can report questionable activity.

In addition to educating employees, organizations can help prevent and detect vendor fraud if they:

- Establish an anonymous fraud hotline for employees and other stakeholders to report irregularities,
- Establish and review internal controls duties and functions regularly,
- Perform background screens on all new hires,
- Enforce appropriate segregation of duties and review procedures periodically,
- Establish a dual review process for master vendor file management, and
- Perform a vendor validation process that reviews and verifies each vendor's business name, W-9, Tax Identification Number, phone number, P.O. Box and street address, bank account, and internal contact or salesperson name.

Because dishonest employees often set up fake vendors using their own personal information, organizations should cross-check vendor and employee addresses and Tax ID numbers. They also need to perform regular vendor file maintenance by removing duplicate files and the files of vendors that have gone out of business.

TIME WELL SPENT

Vendor fraud can cost an organization thousands of dollars. Time spent reviewing, revising, and updating policies and procedures now is well spent if it prevents a single fraud scheme.

If you or your client suspect vendor fraud or another scheme, a fraud expert's involvement is critical. Forensic accountants can confirm suspicions and help you build a case to recover the perpetrator's ill-gotten gains. They can also help organizations prevent fraud from happening again in the future. ■

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PROFESSIONAL DEVELOPMENT

Balancing Your Personal and Professional Social Media

By Alicja Patela

There's no denying it — we are surrounded by social media, and for most of us it has become a part of our daily routine. With over 255 million active users on Twitter, 50 million Facebook pages, and 187 million monthly users logging onto LinkedIn, social media is an easy, convenient, and interactive way to connect with family, friends, colleagues, favorite brands, and not-for-profit causes you care about. It has also revolutionized how we access news and information, share content and connect with people both professionally and personally.

When integrating your professional and personal interests into one online persona, it's critical to always maintain a level of professionalism. This doesn't mean you need to censor yourself or limit your online engagement, but it's something to be mindful when presenting yourself through social media.

Here are a few things to keep in mind to help you balance your personal and professional brand on social media:

DO

Be Authentic. Your social media profile should be an honest reflection of who you are in real life. Listing interests, joining professional groups, connecting with your alma mater and supporting not-for-profit causes are great ways to connect and engage with others while showcasing your personality.

Upload a Profile Picture! This may seem silly but there are a lot of profiles out there without a picture. If you won't take the time to upload a photo, you're probably going to be taken less seriously by potential employers or clients. When choosing a profile picture, keep in mind that almost all profile pictures are public and will show up in Google searches.

Manage Your Online Reputation. Conduct a Google search on yourself and see what shows up. You may come across pictures, old profiles and blog mentions that you didn't even know existed. Performing your due diligence can go a long way in managing your online presence.

Fill out Your Profile. If you want to grow your professional network and connect with colleagues, clients, vendors and niche groups, it's crucial to take the time to fill out your bio page. Avoid only listing basic information and try to identify industry keywords that can help.

Be Respectful. Sometimes it's easy to get carried away on social media but it's important to always maintain a level of professionalism when posting, making comments or sharing others' content. There is a lot of room for misinterpretation on social media and you don't want to post or share anything that can make you look unprofessional.

DON'T

Get Too Personal. At some point your professional and personal social media will overlap so it's in your best interest to think twice about oversharing, complaining or posting pictures that may lead to professional consequences. Don't use social media as a sounding board or a place for negativity, instead share content and experiences that can help others or add value to your followers.

Post Questionable Photos. Not all photos are for sharing, especially on social media. The pictures you share with/are tagged in by others can potentially be seen by employers, future employers and colleagues. Ask permission before tagging your friends; set up privacy settings that require your approval beforehand. You can also group your Facebook friends and restrict posts to those lists.

Assume Anything Is Private. Even if your account settings are set to private, once you put something out on social media (this includes pictures) it's out there forever. Stay abreast of new and updated privacy settings for all the social media platforms that you actively use. If you don't want colleagues and employers to see certain posts and pictures, make sure you maintain the appropriate settings.

Give out Private Information. There is no shortage of spammers, identity thieves and salespeople on social media. Avoid giving out your personal phone number and always be mindful of what you use your work email for. Most applications and game apps can access your private information so read through the privacy settings before downloading any kind of app on social media.

Social media can be a useful professional tool, if leveraged properly, but it can also damage your personal or professional reputation in seconds. Always use your best judgment before posting or sharing content on your social media accounts. ■

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