Tax benefits under the CARICOM Agreement for Nevis international companies

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Nevis is an internationally recognisable offshore jurisdiction which offers a number of financial services such as the formation of International Business Corporations (IBCs) and Limited Liability Companies (LLCs). Such companies enjoy tax free benefits provided no business is conducted in Nevis itself. This acts as an incentive for numerous investors and businessmen to incorporate such companies in the jurisdiction. In turn, these companies then conduct business with many countries worldwide including member states of the Caribbean Community (CARICOM).

In 1994, the government of St Kitts and Nevis entered into an Agreement among the governments of the Member States of the CARICOM for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income, profits or gains and capital gains (the CARICOM Agreement), to encourage regional trade and investment.

The CARICOM Agreement is similar in form and object to the 1963 Organisation for Economic Co-operation and Development (OECD) Model Convention, the main objectives of the CARICOM Agreement being to (i) reduce or eliminate double taxation of income or dividends earned by residents of member countries; and (ii) prevent avoidance or evasion of income taxes of the member countries.

The CARICOM Agreement allows for certain tax benefits for its member states (such as St Kitts and Nevis) including a zero tax rate for withholding tax if a company which is resident in one of the CARICOM member states pays dividends to another company which is resident of another member state. In this regard, some taxing authorities and other tax advocates are of the view that international companies such as a Nevis LLC or IBC do not qualify as a "resident" of a member state and cannot qualify for these tax benefits under the CARICOM Agreement and/or that entities such as the Nevis LLC or IBC which enjoy tax free benefits in their country of incorporation [which is also a member state of CARICOM] cannot be deemed to be "liable to tax" in that country. Therefore, the issue and ongoing debate which has surfaced is in determining whether international companies such as a Nevis LLCs and IBCs are to be regarded as "resident" within the context of the CARICOM Agreement.

What is the meaning of "resident" under the CARICOM Agreement?

Article 4(1) of the CARICOM Agreement defines "resident" as:

> "For the purposes of this Agreement, the term resident of a member state means any person who under the law of that state is liable to tax therein by reason of that person's domicile, residence, place of management or any other similar criterion of a similar nature"

As it stands, for a Nevis LLC/IBC to enjoy any tax benefit under the CARICOM Agreement, it has to be a "resident".

Upon a cursory glance of the definition, it appears that the meaning of "resident" is straightforward as it provides a list of circumstances or formulation for which a company can be deemed a "resident" under the CARICOM Agreement. However, upon a closer examination of this checklist/formula, in order for a company to fall within the realm of the CARICOM Agreement as being a resident of a member state (for example Nevis) the company must either be domiciled in Nevis, have residence in Nevis; have Nevis as its effective place of management etc. Moreover, the said

company must be "liable to tax" in [St Kitts &] Nevis.

This article will therefore explore the definition of "resident" with regard to the "resident" checklist and will provide an analysis of whether a Nevis LLC/IBC is to be regarded as "liable to tax" to determine whether such companies are able to enjoy tax benefits under the CARICOM Agreement.

Exploration of the "resident" checklist

A. Domicile

Domicile of a company/corporation is defined in the 4th Edition of the Halsbury's Law of England[1] as:

> "A corporation is domiciled in the country under the law of which it is incorporated."

This definition was applied and approved in the cases of: *Gasque v IRC*[2]; and *Carl Zeis Stiftung v Rayner et al*[3].

Whereas local/regional decisions do not provide a definite explanation of the term "domicile", the local/regional cases referring to the domicile of a corporation/ company appear to use the term interchangeably with incorporation. See for instance the cases: *Equity Trustee Limited v Yang Husueh Chi Serend*[4]; *Imran Saeed Chaudhry v SAT Star Distribution Limited*[5]; *IManagement Services Limited v Cukorova Holdings A.S.*[6], wherein the domicile of a corporation is referenced as the corporation's place of incorporation.

With regard to this definition and the supporting case law for domicile, a company would be deemed as being domiciled in Nevis if, for instance, it is duly incorporated under the laws of the Nevis International Companies Ordinances (the Nevis Limited Liability Companies Ordinance or the Nevis Business Corporation Ordinance) and has maintained its incorporation/ registration in Nevis. Of note is that both Ordinances provide for the transfer of domicile from Nevis which involves filing relevant documentation with the Registrar, and upon permission being granted for the departure of the company out of Nevis, at the effective date of transfer the company shall be deemed to have ceased to be domiciled in Nevis. Therefore, if a company has not transferred its domicile from Nevis to another jurisdiction it remains domiciled in Nevis and essentially could be regarded as a resident there.

B. Residence

A definition of a company's "residence" is not detailed in any of the Nevis Ordinances, nor is it to be found in any regional cases. Therefore, one can apply the common law position in this context. In the *locus classicus* decision of *De Beers Consolidated Mines Ltd v Howe (Inspector of Taxes)*[7] Lord Loreburn L.C. states that:

> "A company resides for the purposes of income tax, where its real business is carried on … I regard that as the true rule and the real business is carried on where the central management and control actually abides"

This decision has been applied in House of Lord decisions such as *Unit Construction Co. Ltd v Bullock*[8] and the very recent *Laerstate BV v Revenue and Customs Comrs*[9].

Therefore, if for instance, the seat of management of a Nevis LLC/IBC is in Nevis; major decisions and resolutions passed take place in Nevis then it could be considered as having residence in Nevis.

C. Place of management

The place of management and control of a company appears to be tied in with the domicile and residence of the company and as discussed above, the place where the management and control of a company abides determines the residence of a company.

Notwithstanding that a Nevis LLC/IBC could easily fall within any of the above checklists, it must also be "liable to tax" in the Federation for it to be a "resident" under the CARICOM Agreement.

"Liable to tax"

Pursuant to Article 4(1) of the CARICOM Agreement, a "resident" is determined by virtue of the fact that a person of a member state in accordance with the law of that state is liable to tax by reason of his residence, domicile etc. [Emphasis added].

Case law on the meaning of "liable to tax"[10] is limited and the interpretation of this phrase may be viewed as unsettled in the sense that there are varying and competing views and opinions over its precise meaning. Whereas local/regional cases have not been found on this issue, reference is made to the decision of the Canadian Supreme Court (on appeal from the Federal Court of Appeal) *Her Majesty the Queen v Crown Forest Industries Limited and The Government of the United States of America* (Crown Forest Industries) which is quite persuasive and instructive on the issue. In sum, the court took a rather restrictive (yet convincing) approach to the interpretation of "liable to tax" in the sense that it held that persons must actually be liable to tax on the full amount of their income (worldwide income) in order to be treated as a treaty resident. In coming to its conclusion, the court in Crown Forest Industries examined the intention of the drafters of the Convention and opined that the intent of the Convention was that a person who was resident in one of the contracting states and liable to tax on his (entire) worldwide income in one of the contracting states was to be considered "resident" for the purpose of the Convention. Additionally, it was stated that if Norsk (the subject company in contention) was "to benefit from the Convention it would actually lead to avoidance of tax on the rental income because the liability for tax asserted by the Canadian authorities would be reduced notwithstanding that the United States chooses not to impose any tax thereon or does not even have the jurisdiction therefor."

The consequence of this decision is that taxable entities in Canada that are exempt from tax in the United States under certain prescribed conditions and/or are subjectively tax exempt would not be able to claim entitlement to treaty benefits as they are not actually "liable to tax". Additionally, commentaries to the OECD Model Convention (on which other treaties and conventions of a similar nature are based) seem to proffer that generally the domestic laws of the contracting states employ residence to apply on "full tax liability" and that full tax liability is not satisfied in a case where an entity is liable to tax in a jurisdiction only on part of its income.

Contrary to the above, various taxation advocates/academics and/or authorities have differences in opinion. Amaud de Graaf & Frank Potgens who penned the Article "Worrying Interpretation of "Liable to Tax": OECD Clarification Would be Welcome" state that:

> "In English, a clear distinction is made between "subject to tax" and "liable to tax", with the former not requiring a person actually to be taxed on all or some of his income. The requirement to be "liable to tax" is consequently also met if the person in question is entitled to an objective or subjective exemption from tax on income or profit and as a result, effectively pays no or a reduced amount of tax…In contrast to liable to tax the words "subject to tax" may require an effective liability to tax on a person's income."

The essence of the author's interpretation is that "liable to tax" is not restrictive and has a broader meaning in the sense that it is irrelevant whether an entity is exempt from tax or whether no tax is actually payable and that it is immaterial whether a person is taxed on some or all of his income for that person to be liable to tax thereby falling within the meaning of resident.[11]

The St Christopher and Nevis Income Tax Act (the Act) makes provision for the imposition of taxes regarding income, capital gain and regulates the collection thereof. As to the charge of income tax, section 3 of the Income Tax Act provides that tax is charged "upon the income of any person accruing in or derived from the State or elsewhere and whether received in the state or not…" in respect of various heads of income therein

provided and subject to certain provisos thereto.

For clarity, "person" is defined in section 2 of the said Act as including a "body of persons". "Body of persons" sequentially is defined as "any body politic, corporate or collegiate and any company, fraternity, fellowship or society or persons whether corporate or not corporate". Company is also defined in said Section 2 as "any company incorporated or registered under any law for the time being in force in the State or any company incorporated or registered outside the State".

By virtue of the foregoing provisions the following is noteworthy: Section 3 of the Act allows for any person (company) who is ordinarily resident or domiciled here to be charged on income derived outside of the Federation whether or not the monies are received in the Federation.

It is arguable, therefore, that a company [Nevis LLC/IBC] that is resident or domiciled in the Federation of St Christopher and Nevis by virtue of section 3 of the Act is "liable"[12] to tax within the meaning of Article 4(1) of the CARICOM Agreement.

Notwithstanding the fact that a company incorporated in the Federation may be charged tax on the basis of the company's residence, domicile etc and on income derived outside of the Federation, the relevant Nevis ordinances provide that if the company does no business in Nevis then it shall not be subject to any corporate tax, income tax, withholding tax, stamp tax etc based upon or measured by assets or income originating outside of Nevis or in connection with other activities outside of Nevis or in connection with matters of corporate administration which may occur. The Nevis Ordinances also provide that the company would not be deemed to be doing business if it engages in activities such as maintaining bank accounts in Nevis; purchasing real estate in the Federation; holding meetings of managers or members in Nevis; maintaining company or financial records in Nevis; maintaining an administrative or managerial office in Nevis with respect to assets or activities outside Nevis etc.

As can be seen from the foregoing provisions, a company incorporated under the Nevis Ordinances enjoys tax exemption. Therefore, it is arguable that in spite of the fact that by virtue of a Nevis LLC's/IBC's residence and domicile, it falls within the general charging provision of the Income Tax Act, such a company is granted a tax exemption pursuant to the Nevis Ordinances.

Of importance is that the right to impose taxes on a company's income is predicated on the company's residence and domicile as evidenced by section 3 of the Income Tax Act. Therefore, the argument which arises is whether a Nevis LLC/IBC is liable to taxes. As evident from the Nevis Ordinances, the current position is that no taxes are payable due to the exemption provided and regardless of this, the fact is that by virtue of the Income Tax Act, the Federation has the capacity and power to impose taxes on such companies if it no longer falls within the qualifying exemption of the Nevis Ordinances or if the exemption provision was to be repealed, amended etc.

Having regard to the foregoing academic and legal discourse on the terminology "liable to tax" and in the context of a Nevis IBC/LLC falling within the definition of "resident" of a member state, if we are to apply the restrictive meaning as applied in the Crown Forest Industries case then a Nevis IBC/LLC may not be deemed a resident of Nevis in the sense that it is not subject to income tax based upon income originating outside of Nevis and therefore Nevis LLC/IBC would not benefit under the CARICOM Agreement. On the other hand, if the alternate approach is applied then the argument that a Nevis IBC/LLC is liable to tax under the Act would be substantiated as notwithstanding a Nevis IBC/LLC being a tax exempt company for which no taxes are payable such a company is a resident of the Federation within the meaning of the CARICOM Agreement.

Notwithstanding the considerable persuasive value of the Crown Forest Industries, the latter approach is preferred in the context of Nevis' position as a premier offshore jurisdiction as well as the underlying objective of incorporating a Nevis LLC/IBC. Nevis markets itself as a tax free jurisdiction which offers tax exemptions to Nevis LLCs and IBCs. Therefore, if entities incorporate here with the intention of being Nevis tax resident and having done acts consistent with being a Nevis tax resident, can these LLCs/IBCs on the other hand and within the context of the CARICOM Agreement be deemed to be non-resident? This appears to be contrary to the purpose setting up entities offshore.

We therefore implore the relevant authorities, advocates and respective governments to examine this issue in great detail and put proper mechanism in place such as (a) issuing tax residence certificates to Nevis LLCs/IBCs as it stands notwithstanding their tax exempt status or (b) imposing a minimal mandatory tax rate of no more than 1% similar to provisions found in the Nevis Multiform Foundations Ordinance, 2004[13] or other regional jurisdictions[14] provided they also meet requirements such as being domiciled here, maintain management activities regarding annual meetings, passing of resolutions and the like.

END NOTES:

1. *Volume 8(1) para. 987.*
2. *[1940] 2 KB 80.*
3. *(No.3) [1969] 3 ALL ER 897 at 914.*
4. *BVIHCV 2005/0011.*
5. *BVIHCV2005/0111.*
6. *HCVAP 2007/025.*
7. *(1906) 5 Tax Cas.*
8. *[1959] 3 ALL ER 831.*
9. *[2009] UKFTT 209 (TC).*
10. *Some cases were found which deal with tax issues/disputes as to the payment/ imposition of taxes generally indicate a situation wherein a person/company is required to pay taxes on the basis of certain criteria as outlined within the relevant tax legislation/law. See for instance the case of Vestey v Inland Revenue Commissioners Nos 1 and 2 [1979] 3 ALL ER 976 the question arose as to whether Vestey was liable to tax and the Court held that:" on the natural and intended meaning of s 412 'such an individual' who was liable to tax under s 412(1) in respect of a power to enjoy any income of a person resident or domiciled abroad or under s 412(2) in respect of the receipt of a capital sum connected with the transfer of assets abroad referred only to an individual ordinarily resident in the United Kingdom who sought to avoid his own or his spouse's liability to tax by the transfer of assets abroad while continuing to reside in the United Kingdom".*
11. *The authors of the article cite cases from other jurisdictions such as Finland, Paris and Munich that are in support of this broader interpretation. They also referenced another article which refers to an Indian Supreme Court decision which rejects the view that "liable to tax" means actual liability and ruled that the term "liable to tax" did not have to mean that a person actually paid tax and that liable to tax is a legal situation while paying tax is a factual situation.*
12. *Liable" is defined in the 8th Edition of the Black's Law Dictionary as "Responsible or answerable in law; legally obligated".*
13. *See section 93(3) which states that: A multiform foundation may apply to the Minister for a tax resident certificate and elect to pay such tax or taxes as the Minister may by regulations made under this Ordinance prescribe at a rate of not greater than one percent, and upon issue of such a certificate the provisions of subsection (1) shall apply, except with respect to any of the prescribed taxes payable, and the multiform foundation shall be tax resident in Nevis for all purposes.*
14. *Such as Barbados & St Lucia which charges mandatory rates of approximately 1%.*

Nevis entertains amendments to its Business Corporations, LLC and Insurance Ordinances
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