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Everything You and Your Clients Need to Know About Doing Business in the U.S.

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Forms of Doing Business in the U.S.

- Type of entity to choose for tax purposes
 - Most foreign entities chose either:
 - Corporation
 - LLC and elect to be taxed like a corporation
 - Other choices rarely used:
 - Partnership
 - Trust
 - 'S' Corporation

Forms of Doing Business in the U.S.

- All entities are formed at the State level. In addition to the legal rights of shareholders and corporate obligations, we have to take into consideration the tax rules in the State of formation and where the entity is going to do business
 - Corporation
 - Foreign entities typically set up a 100% owned subsidiary
 - It can be partially owned
 - Dividends paid by the Corporation to the shareholders
 - Ordinary dividend
 - The US entity will have to withhold income tax on the dividend paid to the foreign entity. The foreign entity will usually get credit in their home country for the taxes paid on the dividend
 - Liquidation dividend
 - In many cases a liquidating dividend is tax free to the recipient

Forms of Doing Business in the U.S.

- LLC
 - If there is only one member then it is a disregarded entity for tax purposes
 - If there are two or more members, then it is taxed as a Partnership unless it elects to be taxed as a corporation
 - Whether there is one member or multiple members the LLC can make an election to be taxed as a corporation.
 - The election must be made within 75 days of the start of the tax year
- Partnership
 - The income or loss flows through to the owners and the owners file a US tax return and pay the tax whether the cash is distributed to the Partners or not
 - Partnership must withhold tax on distributions of profits to foreign partners

Forms of Doing Business in the U.S.

- Branch of a foreign corporation
 - Non-resident foreign entity selling goods and services into the US.
 - If the foreign entity has “effectively connected” income to the US and it has a permanent establishment, defined as a fixed place of business or employees in the US for more than 180 days, then it:
 - Must file a tax return in the US and pay taxes on its US income
 - If the “effectively connected” income is greater than 25% of the foreign corporation’s Gross Income then the dividends paid to a US non-resident will be subject to US withholding
 - There is also a “Branch Profits” tax of 30% that may be eliminated by a tax treaty.

U.S. Corporations Doing Business Outside of the U.S.

- Subject to Sub-part F income and may have to pay taxes on the income that is not repatriated back to the US

U.S. Income Taxes

- Corporation
 - Federal
 - Maximum Federal tax rate is 21%
 - The current administration has plans to try to raise it to 28%
 - State
 - Must file tax returns in:
 - State formed
 - State(s) that your US entity does business in
 - The tax rates vary by State. They can be from 1% to 12%
 - Some States have a zero Income Tax rate for individuals
 - Some States have a City income tax as well (i.e. New York City)
 - Some States have certain tax benefits for bringing jobs to that state. That is determined on a case-by-case basis. If it is available, it is usually reserved for an economically disadvantaged area.

U.S. Income Taxes

- Individuals
 - Must file a tax return in the US for income earned in the US
 - In the US, the government does not prepare a tax return for you.
 - A non-resident non-US citizen does not have to file a US Income Tax Return if the money is earned outside of the US even if it is paid to them by a US entity
 - If a non-US citizen has to file a tax return in the US and pay tax in the US they usually will get a credit in their country of citizenship for taxes paid in the US so that they will not be taxed on the same income twice
- Federal
 - Maximum Federal tax rate is 37%
 - The current administration wants to raise that to 39.6%
- State
 - Must file tax returns in the State(s)
 - Where the individual is domiciled
 - Where the Income is earned
 - Tax Rates vary by State
 - Some States have a local income tax (i.e. New York City)

Strategy for a Foreign Corporation or Individual to Avoid Direct Income or Estate Taxation by the U.S.

- Blocker entities
 - Typically set up as a corporation
 - Can be an LLC that elects to be taxed as a corporation
 - Can be a Trust – more complicated to set up
 - Eliminate, for an Individual (but not corporation):
 - Estate tax issues
 - Income tax issues
 - Eligibility for certain federal or state programs
 - PPP
 - EIDL
 - ERC
 - Domestic Production credit

Employer Identification Number

- Why do I need one?
 - All tax returns need one
 - You need one to open a bank account
- What do I have to do to get one?
 - The easy way – if you have a responsible person with a Social Security number
 - The long way – If you don't, then you have to file a W-7 and submit it with numerous original other documents
- How long will it take to get one?
 - The easy way – 10 minutes
 - The hard way – 2 to 6 months

Nexus

- Defining Nexus for income taxes
 - Federal level
 - If the foreign entity has “effectively connected” income to the US and it has a permanent establishment, defined as a fixed place of business or employees in the US for more than 180 days
 - State level
 - Completely different definition than the Federal definition
 - Income taxes
 - Physical presence – any one of the three following examples gives you Nexus
 - Inventory
 - Fixed Assets
 - Employees
 - Sales taxes
 - Wayfair decision
 - Even without the usual Nexus definition, an entity can be subject to collecting Sales Taxes if it sells or ships a certain amount of sales taxable goods into a State
 - This topic is addressed in more detail further on in the presentation

Transfer Pricing

- Arm's length transactions
- Do I need a Transfer Pricing Study?
 - Failure to maintain a written transfer pricing documentation could result in penalties of as much as 40% of the Transfer Pricing adjustment
 - IRS adjustments could also result in double taxation because the treaty country may not give corrective action to an IRS adjustment.
- Different types of Transfer Pricing Study options
 - Transaction comparable
 - Comparable profits
 - Profit split methods
- Taxpayer has the option of going for an Advanced Pricing Agreement with the IRS

How to Capitalize Your New Entity

- Loans vs. Equity
 - Requirements for loans
 - Minimum interest rates
 - Documentation needed to evidence the loan

Banking and Finance Issues

- How to choose a bank
 - Explaining the Know Your Customer (“KYC”) rules
- If your client wants a line of credit with a US bank then they will need a financial statement prepared using either US GAAP or Income Tax Basis
- Very difficult for a foreign owned entity to get a line of credit in the US (unless the owners have a relationship with the bank)

Sales Taxes

- Sales taxes are different than a Value Added Tax (VAT)
 - Sales Taxes are a consumption tax levied against the ultimate consumer of a product or service
 - It is not levied along the supply chain. It is only collected from the ultimate consumer, whether it is an individual or a business, at the final sale of the product or service
 - Sales Tax liability is based on where the ownership of the goods passes, not the shipping point
 - State Sales Tax rates vary from 2.9% (Colorado) to 9.55% (Tennessee)
 - State and City Sales taxes combined can be over 10% (Seattle, Washington)

Sales Taxes

- Imposed at the state level
 - There is no Federal Sales Tax
 - Each State determines:
 - What is subject to Sales Tax and what is exempt
 - Example: In New York, if you buy a loaf of bread and a pound of sliced ham and a jar of mustard, none of those items are subject to Sales Tax, but, if you buy a ham sandwich with mustard, it is subject to Sales Tax.
 - This can vary from state to state
 - Typically, property purchased for re-sale and intangibles are not subject to Sales Tax
 - What the Sales Tax rate is
 - Most States have a uniform Sales Tax rate for the entire state for all items that are subject to tax. However, some states do not follow that model
 - For example: New York state imposes a sales tax rate depending on which one of the 62 counties you are in when you buy the good or service.

Sales Taxes

- Wayfair decision
 - Supreme Court, the highest court in the US, decided that a vendor does not need a physical presence in a state for it to have nexus for Sales Tax purposes
 - Each state is free to determine their own criteria for when you must register to collect sales tax from your customer
 - Requirements to register with each state.
 - Most states have an economic threshold before you must register to collect the sales tax
 - Usually \$100,000, but it could be as high as \$500,000
 - Some states have a minimum number of transactions test as well, typically around 200 transactions
 - There are software companies that will assist with the registration and the required filings in each state for you
 - Avalara is one company. There are others.
 - Potential problems
 - With the Wayfair decision, States may try to overcome Public Law 86-272 and force companies to register for Income Tax purposes as well. Right now, there is a Federal law prohibiting that from happening.
 - However, if you are taxed on a portion of your income in one state, you usually will get a credit for the taxes paid to the non-resident state by the home state.

Employment Considerations

- When is a person classified as a non-employee?
 - The Internal Revenue Service (IRS) has a 20-part test to see if someone is an employee or an independent contractor.
 - It is getting harder to classify someone as an independent contractor.
 - Failing any one part of the test does not make someone an employee automatically. Instead, it is a preponderance of evidence test. If you start to fail multiple parts than the chances are that the person is an employee
 - If they are an independent contractor then the company does not have to file payroll tax returns or pay any payroll taxes.

Employment Considerations

- Employee payroll taxes and insurance
 - Social Security taxes
 - Certain foreign nationals are exempt from the Social Security tax if they are transferred to the US temporarily, less than 5 years, provided that they are subject to social security tax in their home country
 - However, if a foreign national contributes to Social Security for more than 18 months then they will have earned a benefit payable to them after they attain retirement age.
 - 50% paid by employee.
 - 50% paid by employer.
 - Unemployment insurance, Federal and State
 - Disability Insurance
 - Workmen's compensation insurance
 - Payroll tax returns are filed by the company every quarter and the employees get their payroll information from the company by the end of January of the following year.
 - There are many companies that will pay your employees and prepare your payroll tax returns for you.

Employment Considerations

- Other considerations:
 - Paid time off
 - Length of workweek
 - Overtime considerations
 - Sick days
 - Unions
 - Minimum wages
- Utilizing a payroll service company
 - Form filing
 - Responsibility for penalties
 - HR compliance

Tariffs

- Types of tariffs
 - Fixed dollar amount
 - Fixed percentage
- Certain types of imported goods are subject to tariffs.
 - Not all goods are subject to tariffs.
 - Services are usually not subject to tariffs.

Ownership of Real Property

- Investment property
 - The entity that owns the property will have to pay taxes on the:
 - Annual net income
 - Gain on sale
- Personal use property
 - There is no rental income
 - The gain on the sale is subject to income tax
 - You must be careful how many days you spend in the US per year so that you do not become a US resident for tax purposes.

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THANK YOU!



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