

Substance over form: The only way to survive

By

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Age of transparency

- Secrecy is dead
- At some point, especially for British Overseas Territories, automatic exchange of information will be the norm
- There may even be a register of ultimate beneficial ownership details similar to what exists for domestic companies; would not wish to see it but it is a distinct possibility
- Can no longer depend on confidentiality as a selling point

What is meant by form? 1

- IBCs have traditionally been criticised because despite being corporate legal entities, they do not function in same way as the traditional company
- Lack of shareholder and director details publicly available
- Thin or no capitalisation
- No requirement for local directors or directors domiciled in jurisdiction of situs

What is meant by form? 2

- Mind and management not in jurisdiction of domicile
- All activity conducted abroad usually in jurisdiction where director and or shareholder is usually domiciled
- No tax reporting and no audited accounts
- Only link to domicile is existence of the entity and registered office/registered agent

What is meant by form? 3

- Nominee shareholders and directors: no independent management
- Use of general or specific powers of attorney giving ultimate beneficial owner authority to execute director's duties
- Phone/fax forwarding lines
- Mailing addresses in jurisdiction
- All designed to give impression that company operates from offshore jurisdiction

Downside of form

- Allows extensive criticism of offshore companies
- Derisively called “shell companies” with no substance
- No different from Delaware and Nevada companies but with added stigma of being offshore, negative traits such as tax evasion, money laundering, financial crime are attached to them
- Allows statements such as Uglund House in Cayman is either the “biggest building or the biggest tax scam on record.” Pres. Obama

Automatic exchange of information

- In age of transparency, if and when automatic exchange becomes the standard, form is dead
- It will add no benefit to clients since exchange of information will destroy confidentiality
- Negatively impact industry but opportunities exist
- Offshore jurisdictions are low or no tax, light corporate regulation, flexibility
- Time to take advantage of this in the right way

Substance

- To take advantage of low tax jurisdictions and be fully compliant with onshore tax rules, time to develop substance in the jurisdiction of domicile
- Establishment of physical presence
- Mind and management offshore to the extent possible even if US citizen
- Secrecy no longer possible anyway, why not come out of shadows and come offshore

Substance: examples 1

- If Anguilla company to be used for gold-mining in Southern Africa: why not establish back office in Anguilla, use of local directors with management meetings taking place here in same way for some captive insurance companies?
- Shareholder domiciled outside of areas of activities; CEO and some senior management contracted as workers
- Company pays tax only based on concession agreement since it is a foreign company
- Shareholder/director taxed only on income received based on laws of their domicile; ideally domiciled in a low or no tax jurisdiction if not Anguilla
- This scenario can be replicated for many other types of activities
- Tax authorities may not be able to claim that the company has no substance in its domicile if done properly

Substance: examples 2

- Knowledge workers do not need physical office; as a result, do not need to live in a high tax jurisdiction
- Workers ideally suited to live offshore and use offshore companies to conduct their business
- What if Facebook had been developed not in the US but in an offshore jurisdiction?
- Did being in the US contribute to Zuckerberg's success or could that have been replicated with his team outside of it? Even if it did depend on his being in the US, is it still the case now for other social media or technology developments?
- Imagine tax savings if it had been developed abroad

Substance: examples 3

- Chile gives incentives to develop its version of Silicon Valley to harness power of knowledge workers
- Critical mass is important since workers feed off of each others' ideas
- Cayman Islands, Cayman Enterprise City: physical location, office space, local workers, economic incentive zone designed to attract from all over the world knowledge workers who will use Cayman companies and develop activity offshore taking advantage of tax benefits
- Does not have to be government driven although it helps; service providers can make the argument individually
- We in Anguilla can individually or collectively replicate this

Substance: other issues

- Use of work permits, economic residency, relaxed immigration rules to attract persons onshore
- Will likely result in demographic changes; political will may be needed but even without, can be done on a smaller scale by individual service providers
- Can no longer separate the entity from the shareholder/director
- Persons wanting benefits of low taxes have to make a decision as to where they wish to be domiciled
- Cannot have their cake of life in the lights of a high tax jurisdiction while enjoying the tax benefits of using a corporate entity in a low tax one
- Likewise Anguilla cannot want offshore business which can only become more onshore to us without paying the price of demographic change in order to deepen our skills-sets

The Test: in my opinion

- The ultimate test that a client will have to face is this: can he stand before his tax authorities and answer truthfully that the trust of which he is a settlor or beneficiary is not controlled by him? Is the company of which he is the UBO not managed and controlled by him but is indeed controlled in the offshore jurisdiction by the registered agent or company administrator?
- If the client cannot answer these questions truthfully, then he is likely to be in trouble with his revenue authorities and the service provider would have done the client a disservice

Further considerations

- Attracting persons onshore must avoid ring-fencing issues; benefits cannot be special to them but applicable to everyone
- Might be best in long run to abolish IBC and fold it into domestic companies legislation
- Both are tax exempt and even if there is no beneficial ownership register, automatic exchange of information will mean confidentiality of IBC information no longer exists

Current opportunities

- Avinash Persaud argues that IFCs must find niches to exploit including in area of regulation of products and services that might be best done within their borders
- Offshore Forex trading comes to mind
- Cayman is a center of excellence for hedge funds; Bermuda, center of excellence for reinsurance, why can't Anguilla, with proper and strong regulators become a center of excellence for Forex trading?
- Outside of the major financial centres, Uruguay is only option for smaller traders to secure licensing given the costs
- Smaller traders cannot access banking system because banks require companies doing Forex trading to be licensed
- Why can't Anguilla, through a proper regime, provide another option with a requirement for substance on the ground with employees doing back office work etc?

Other opportunities

- Center of excellence for companies, persons wanting to prove residency for their intellectual property
- Same applies using certificate of economic purpose – used to show substance
- Perhaps image rights – again, a bid to establish substance outside of mere shell companies
- Tax benefits available to any citizen whether domiciled in US, Canada or elsewhere as long as income is active as opposed to passive
- Other opportunities unknown, unexplored at this time but with a deeper intellectual bench, these could be developed
- Can't succeed alone; can't develop industry only using local talent as much as we would wish
- Must become part of global village and that requires new, fresh and innovative talent locally grown as much as possible but welcoming to others willing to establish substance here

The End

- Thank you for listening
- Open discussion