

NOBLE INVESTMENTS LIMITED (BERMUDA)

SWISS TAX ISSUES

Background

- Noble Investments Ltd (Bermuda) is engaged in the business of selling hedge funds to investors.
- Noble Investments SA (Switzerland) provides advisory services to NIL and bills on a cost-plus basis. NIL concludes contracts and also shoulders all of the risks.
- Noble Investments structures hedge funds by picking advisers for the portfolio and then assists with the marketing of the funds. Sales personnel employed by NISA based in Zurich perform the marketing, structuring, operational accounting and intermediaries' liaison including the calculation of commissions.
- This structure has been disclosed to the Swiss tax authorities and they have ruled that NIL is not subject to Swiss federal or cantonal taxation. NISA is taxed on the higher of cost+5% or cost+20% of the profit generated by NIL.
- In the disclosure to the Swiss tax authorities we have not advised that personnel working in Switzerland conclude NIL's contracts for fees for product structure and portfolio performance; and NIL's intermediary agreements.

Issues

- There is concern that if the Swiss tax authorities learn that Swiss personnel are concluding NIL contracts that NIL will be deemed to have a permanent establishment in Switzerland or that NIL will even be treated as a Swiss resident company (place of effective management and control within Switzerland). This could have the following consequences:
 - NIL would be exposed to Swiss tax on a portion or all of its profits;
 - Any (open or disclosed) dividend distributions made by NIL to its shareholders would be deemed to have been made from a Swiss company and be subject to 35% withholding tax. This withholding tax would only be fully or partially refunded by the Swiss tax authorities to shareholders who are (i) Swiss resident persons (full refund) or (ii) who are entitled to benefit from a tax treaty with Switzerland (full or partial refund depending upon the applicable treaty).
 - The service charges from NISA could be subject to VAT because they are being made to a Swiss permanent establishment. In this case, it would have to be investigated whether (i) NIL as a Bermudan company would be able to register (or would even have to register) for Swiss VAT and (ii) what the VAT implications of such a registration would be.

Discussion

- A tax presence (either through a permanent establishment or through tax residency) may be formed in Switzerland if it can be demonstrated that management and control is exercised there. The concluding of NIL contracts by Swiss staff is very unhelpful evidence when reviewing the facts and circumstances.
- Various measures should be taken in order to improve foreign substance of NIL for example:
 - Enhancing the Bermudan substance of NIL, for example by having a physical presence to conclude contracts. NIL is a Bermudan exempt company with paid-up capital of US\$12,000. Exempt companies are exempt from the 60% Bermudan ownership requirement. Exempt companies commonly transact international business from Bermuda and may operate there in furtherance of their business outside Bermuda. This would necessitate opening an office in Bermuda and having sufficiently senior personnel to provide the substance that contracts were being concluded there. We would need to get comfortable that this would not undermine the exempt company status;
 - The board of directors being composed of non-Swiss resident persons. The directors must not simply follow the orders of the Swiss operational personnel. I understand the directors are currently non-Swiss residents;
 - The meetings of the board of directors should be held outside Switzerland. I understand this is current practice;
 - The company AGM should be held outside Switzerland. I understand this is current practice;
 - The company has its own local staff who are capable and sufficiently skilled for managing and administering the company;
 - The company has its own offices, telephone lines, telefax, e-mail, website etc;
 - Books, records and other business papers of the company are kept outside Switzerland;
 - The persons entrusted with the managing and decision making functions are non-Swiss resident persons and are not working in Switzerland;
 - The persons with signatory powers are non-Swiss resident and are not working in Switzerland. The company's contracts and other documents are not signed in Switzerland;
 - The bank accounts of the company are with foreign banks;
 - There are good business reasons for choosing the location of the company;
 - The financial statements of the company are kept in foreign currency and not in Swiss francs. I understand we maintain US Dollar accounts.

