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MOORE STEPHENS
MONACO

Mediterranean briefing

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Monaco developments and the SARL

In line with one of the long-term goals set out in Prince Albert II's inaugural speech in 2005, the Principality is developing new tools to make Monaco a world-class financial pole. By introducing a new form of corporate vehicle in the Principality known as the S.A.R.L. (société à responsabilité limitée) Monaco has started a process of modernising its business environment with the intention to stimulate new activity.

Although the S.A.R.L. was originally introduced by neighbouring France as far back as 1925 (and in 1892 in Germany) Monaco had delayed its introduction until the new law was voted by the Conseil Nationale on 21 December 2006. Prior to this there were only three business forms. The SNC, and the SCS are effectively partnerships with unlimited liability for the partners. The S.A.M. is a limited liability company, but with fairly rigid operational constraints including a minimum share capital of €150,000. The new legislation modifies the Civil Code, the Commercial Code, and various Sovereign Ordinances and Laws, some dating as far back as 1895. The new S.A.R.L is intended to provide a limited liability vehicle to enable smaller entrepreneurs based in the Principality to operate with more flexibility and at a lower cost. The minimum share capital fixed by sovereign order is €15,000. Flexibility is provided by an easier method of registration of corporate documents (cutting out the requirement for expensive notarial deeds), and by allowing only one director (non-corporate). The audit requirement which exists for the SAM will be extended to all corporate forms, but now depends upon turnover, net assets, and number of employees, hence providing further regulatory control of the existing business forms. Following publication of the Sovereign Ordinance in February, 2007 there will be a requirement for one "commissaire aux comptes" to be appointed when the capital of the entity reaches more than €150,000, or when 2 out of the 3 following conditions are met during two consecutive years:
I) total balance sheet: €1.5m,
II) turnover greater than €2.5m, and
III) more than 20 employees.

With a view to simplifying the restructuring of businesses the law specifically sets out the possibility for a business to change form or to merge, and clarifies that this does not create a new business entity, only a continuation of the old entity/ies.

The S.A.R.L. will only be able to be used for commercial activities (to the frustration of certain professionals).

The new legislation also allowed one further important concession to new businesses. It installed a maximum delay of 3 months (subject to some reasonable conditions) within which the government must respond to a request for authorisation for a new business. Once this delay is passed authorisation will be considered automatic. This brings the legislation into line with what has become custom over the last few years (currently 70% of requests are dealt with within less than 2 months).

New laws are programmed shortly for the financial services sector, including two important pieces of legislation concerning investment funds and regulation.

Monaco is currently undertaking a strategy review to determine areas where it may be appropriate to develop new activities and to identify new possibilities for economic development. It is also expected to modernise its commercial code, competition code, work code, consumer code, and may introduce a "uni-personal" company, along the lines of an EURL. Serious consideration is also being given to the ratification of the Hague Convention on the Law applicable to Trusts and their Recognition.

Monaco is confident as it looks forward to continued steady development. The Principality certainly has faith in its own future, as shown by the 5 to 10 billion euro building project to reclaim a further 15 hectares of precious land by expanding seawards. This development project over the sea will accommodate 275,000 square metres of surface area which will include housing, offices, shops, public amenities and port infrastructures, as well as a "beacon building" of 15 to 20,000 square metres.

Tax matters

Luxembourg / French tax treaty amendments: not necessarily bad news

One of the main tax planning opportunities for structuring French real estate ownership appears to have been closed further to the signature of the second amendment of the French / Luxembourg tax convention in November 2006. The new article 3 of the treaty provides that the income or the disposal of French real estate would be taxable in France even if it is owned by a Luxembourg commercial company or used as a professional asset. This article also mentions that the same tax regime applies should the property be owned through a company without a tax personality separated from its members.

Are there any tax planning opportunities available under the new amended treaty? How should we re-structure the ownership? One thing is certain: Most of the Luxembourg companies owning a French real estate need quick and efficient restructuring.

We do not know when this amendment will come into force but it will be at the earliest on 1 January 2008. We have already considered and analysed several alternatives such as: the transformation of the Luxembourg company into a European company and its re-localisation into another more favourable EU country, the transfer of the real estate to a Danish holding company, the interposition of a company between the real estate and the Luxembourg holding, the use of the French internal tax exempted regime, etc. The appropriate structuring needs to be tailor made for each situation and will depend for example on: the value of the property, its private or commercial use, the tax residency of the beneficial owner, for how long it has been owned by the Luxembourg company, the objective of the client in terms of inheritance tax and capital gains tax optimisation, etc.

While Denmark is becoming a popular alternative to Luxembourg and could provide interesting advantages, careful planning is needed to avoid various pitfalls and optimise the tax situation of the client.

We tend to consider that, contrary to other professionals, the new amendment is not "bad news" as it creates a higher degree of certainty and allows long-term tax planning solutions to be developed with clients wishing to purchase French properties.

Gains-Cooper UK residence issues

An important part of planning for individuals wishing to avoid UK taxation based on residence has been the perceived allowance of travelling days in the calculation of days spent in the UK.

Following the decision of the Special Commissioners in Robert Gaines-Cooper v HMRC, the Inland Revenue has made a statement explaining why they believe that this decision does not mean that they have changed the basis on which they calculate the '91-day test' and the travelling days rule which is set out in the booklet IR20: Residents and non-residents.

They confirm that the guidance remains valid in that the '91-day test' applies only to individuals who have either left the UK and live elsewhere or who visit the UK on a regular basis. Where an individual has lived in the UK, the question of whether he has left the UK has to be decided first. Individuals who have left the UK will continue to be regarded as UK-resident if their visits to the UK average 91 days or more a tax year, taken over a maximum of up to 4 tax years. HMRC's normal practice, as set out in booklet IR20, is to disregard days of arrival and departure in calculating days under the '91-day test'.

In considering the issues of residence, ordinary residence and domicile in the Gaines-Cooper case, the Commissioners built up a full picture of Mr Gaines-Cooper's life and the pattern of his presence in the UK compared to the pattern of his presence overseas. The Commissioners decided that it would be misleading to wholly disregard days of arrival and departure. The Commissioners found that he had been continuously resident in the UK. From HMRC's perspective, therefore, the '91-day test' was not relevant to the Gaines-Cooper case since Mr Gaines-Cooper did not leave the UK.

At the time of writing we are unaware whether any changes will be made to the residence and domicile tests in the March UK budget.

Yacht schemes

The UK VAT authorities have issued a briefing addressing serious concerns about the validity of the VAT treatment of certain VAT schemes for luxury yachts. Under the "schemes" highlighted the user acquires a new vessel which purportedly has "VAT paid" status while in reality, paying no (or low) VAT. This warning fits well into the current atmosphere within EU Customs authorities, and is a sign of growing concern. Structuring of VAT affairs should be carefully planned, founded on a good understanding of VAT law and practice.

EU issues

We highlight below some interesting EU developments which indicate the importance of the EU in current national tax issues.

EU-coordinated approach on exit taxation

Further to EU case law where The European Court of Justice already ruled that immediate taxation of latent capital gains on assets transferred to another Member State infringes the principle of freedom of establishment, the Commission has proposed a framework for an EU-coordinated approach in direct taxation and invites Member States to better coordinate their national exit tax rules. Exit taxes are levied by many Member States on accrued capital gains when taxpayers move their residence or transfer individual assets to another Member State.

The guidance states that immediate taxation of latent capital gains on assets transferred to another Member State is wrong in principle in that there should be no taxation on capital gains not yet realised if no such taxation occurs in similar domestic situations.

The Communication examines how Member States' exit tax rules on individuals and companies can be made compatible with the requirements of EC

law, implying that in many cases they are not currently compliant.

Legislation should be expected at the national level to implement these recommendations.

Thin Capitalisation

In March 2006 The European Court of Justice (ECJ) ruled that UK legislation enacted to prevent foreign companies making loans to their UK subsidiaries as a means of reducing tax is acceptable under EU law.

The court said the onus was on those companies claiming unfair treatment to demonstrate that their financing decisions were based on "economic reality" rather than "purely artificial" tax-avoidance motives and that this was a matter for the UK courts to decide.

The ECJ decision follows a similar line of reasoning to that adopted in an earlier tax case concerning Cadbury Schweppes in which the ECJ had confirmed that the UK's Controlled Foreign Company tax rules contravened EU law in that they were in breach of the European "freedom of establishment" principle as enshrined in the EC Treaty.

HMRC obtains disclosure orders against four more UK banks

In December 2006 the Special Commissioners ruled that the UK tax authorities could gain access to the offshore account details of four banks – thought to be Lloyds TSB, HSBC, HBOS and RBS – in a move expected to yield a total of £275m in unpaid tax. The Notices sought documents about customers with UK addresses with non-UK bank accounts with the Financial Institution in certain named jurisdictions.

This follows disclosure orders in 2006 against Barclays, and against an unnamed stockbroker. The disclosure notice is the result of the work of the Offshore Fraud Project group.

Offshore focus

Qatar

In December 2006 the Qatar Financial Centre Regulatory Authority (QFCRA) released a consultation paper inviting comments on the proposed regime and accompanying draft rules on the regulation of collective investment funds operating in or from the Qatar Financial Centre (QFC). In January 2007 a consultative document was also issued on QFC Trust Regulations. These Regulations set out the draft rules governing the duties and powers of a Trustee, relations among Trustees and the rights and interests of a Beneficiary.

Switzerland

The Swiss Parliament has approved the ratification by Switzerland of the Hague Convention on the Law Applicable to Trusts and on their Recognition of July 1st 1985 (Hague Trust Convention). This follows the unanimous vote of the Upper House, which accepted the ratification in March, 2006.

Subject to the possibility of a referendum the entry into force of the Hague Trust Convention and of the new internal legal provisions can be expected as early as July 2007.

Gibraltar constitution

Gibraltar's new Parliament met for the first time in March 2007, replacing the House of Assembly under the terms of the new constitution, under which it has obtained increased autonomy from the United Kingdom over its own internal affairs. The Chief Minister Peter Caruana welcomed the impact of the new Constitution which brings new rights to self determination.

"Gibraltar now enjoys a modern and mature Constitutional relationship with the UK which is not based on colonialism." "We are thus effectively decolonised" Mr Caruana said.

BVI Companies Act issues

British Virgin Islands International Companies incorporated before 1 January 2005 that were not voluntarily re-registered under the B.V.I. Business Companies Act of 2004 were automatically re-registered, by mandate of law, as so-called "Business Companies" on 1 January 2007.

These companies will be subject to the Transitional Provisions which enable the entities to retain the power to issue bearer shares without having to deposit them with an authorised custodian until the year 2010. Currently they are subject to an annual official licence fee based on the amount of their authorised share capital. They will have to pay higher annual fees as of the year 2008.

In order to avoid an increase in the annual licence fee, theses companies could either restrict the power of the Company to issue bearer shares, exchange bearer shares to registered shares, and expressly adopt the status of a fully compliant B.V.I. Business Company, or restrict the power of the Company to issue bearer shares, exchange the bearer shares to registered shares, and keep or maintain the Grandfathered Company status.

Regulation and compliance

Monaco

Monaco adopted new laws during the second half of 2006:

Law # 1.318 of 29 June 2006 on terrorism giving a definition of terrorism and specifying that a legal entity is penally responsible for terrorist acts committed on its behalf by one of its directors or representatives. This was followed by law # 1.322 of 9 November 2006 amending related articles in the Penal Code and extending the list of predicate offences generating illicit funds.

Sovereign Order # 632 of 10 August 2006 relating to money laundering and the financing of terrorism and amending previous Sovereign orders published on this matter. A risk-based approach has been adopted with the notion of "legal entities" other than companies and trusts is now introduced.

The idea of "controlling interest" is introduced, although no threshold is given as to what is considered as a "controlling interest". Comparatively, the EU third money laundering directive defines a controlling interest as "… a beneficiary of 25% or more of the property of a legal arrangement or entity…"

Monaco has adopted the FATF definition of "Politically Exposed Persons", PEP, who are considered as high risk clients and therefore require more frequent monitoring.

Sovereign Order # 631 of 10 August 2006 relating to transfer of funds whereby cross-border wire transfers must include extensive details of the originator person (whether natural or legal).

Moneyval

Moneyval experts visited Monaco in November 2006 as part of its 2nd evaluation round. The results of the evaluation will be published during the second semester 2007.

FATF publications

The FATF no longer has a list of Non Cooperative Countries and Territories as the last two remaining countries were de-listed in June 2006 (Nigeria) and October 2006 (Myanmar).

FATF published in 2006 a study on "The misuse of Corporate Vehicles, including trust and company service providers". The study examined a series of cases as examples from which a number of frequently occurring risk factors associated with corporate vehicle misuse are identified.

New USA bills

The progress of a bill which has been introduced by the US Senate at the end of February 2007 should be carefully monitored. If passed into law it will amend the Internal Revenue Code to allow the IRS to treat controlled foreign corporations established in tax havens as domestic US companies, meaning they are subject to tax on their passive earnings. The bill "names" 39 jurisdictions amongst which is the Principality of Monaco.

Another USA bill, the "Stop Tax Haven Abuse Act", lists 33 "Offshore Secrecy Jurisdictions" as probable locations for US tax evasion (not including the Principality of Monaco) and includes, among other elements, the presumption that private offshore corporations and trusts are controlled by US taxpayers who formed them or deposited assets in them, unless the taxpayer proves otherwise

Monaco matters

Exams

We are pleased to report further exam successes for Dany Tabury, who in completing Diploma 1: Trust Creation: Law & Practice has now obtained the full STEP Diploma, and for Sylvia Rosso who passed the Foundation Certificate and Diploma 1.

Congratulations are also due to Amanda Lowe who passed ATC Papers T6 and T7, and to Sarah Royer who passed ACCA Papers 1.1 and 1.2.

Moore Stephens France-China desk

Using the resources of the MSIL network, including France, Monaco, and China the Moore Stephens network has launched a French China Desk with the

objective to set up a liaison service to assist:

- French and Monaco clients wishing to invest in China
- Chinese clients wishing to invest in France and Europe generally
- Chinese clients wishing to use Monaco for structuring private vehicles or corporate structures to hold investments outside of China.

It is interesting to note that France is the third biggest European investor in China and the 10th worldwide. The investments reached 590 M euro up to 2005 as per statistics of the Bank of France. To mid June 2006, more than 800 French companies had already set up 1500 businesses in the Chinese Mainland and 570 in Hong Kong, and 14 in Macau. About 120-150 French businesses are set up each year. The turnover of the French business has been estimated at around 13-14 billion euro in 2005.

Meanwhile the Chinese government has issued a "Go abroad policy" strongly supporting Chinese companies (private and public) to invest out of China.

China has listed 48 of its economically vibrant companies abroad including the New York Stock Exchange, London Stock Exchange, Singapore Stock Market and Hong Kong Stock Market, which have raised US$13.8 billion.

For further information please contact Patricia Osborne/Wei Bousquel or see the Doing Business in China brochures in both French and English on the publications section of our website. Wei is a Monaco based manager of Chinese origin who speaks Mandarin, French and English and is a qualified accountant.

Running for the children

At the end of last year staff participated in the No Finish Line event. During the week the Moore Stephens team ran a combined total of more than 300 km for the charity which supports the construction of an orphanage in Rwanda and to finance the intervention of children in need of heart surgery at the Cardio-Thoracic Centre of Monaco.

Presence at Top Marques

From 19 to 22 April Monaco is host to the prestigious Top Marques supercar show. Alongside the exhibition of supercars inside the Grimaldi Forum there will be over 30 of the most exclusive supercars outside which will be available for test drives (by invitation only) on the intricate Grand Prix circuit. Moore Stephens Monaco will be present as an exhibitor throughout the show, and those clients and friends who are interested in a test drive and who have not yet received an invitation are asked to contact us.

We believe the information in Briefing to be correct at the time of going to press, but we cannot accept any responsibility for any loss occasioned to any person as a result of any action or refraining from action as a result of any item herein.

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