

Establishment of Bermuda's Corporate Income Tax Agency

Briefing Summary: Following the enactment of Bermuda's Corporate Income Tax Act 2023 (the "**CIT Act**") in December 2023, in July 2024, the Government of Bermuda passed the Corporate Income Tax Agency Act 2024 (the "**Agency Act**") which, among other things, (i) establishes the Bermuda Corporate Income Tax Agency (the "**Agency**"); (ii) sets out the functions and powers of the Agency with respect to administration of the CIT Act, the collection of tax monies, issuing determinations and settling disputes with taxpayers, requiring persons to furnish the Agency with information, and assisting foreign tax authorities; and (iii) sets out certain offences and liabilities with respect to the failure to comply with a request for information by the Agency.

Service Area: Corporate, Taxation and Economic Substance Requirements

Location: Bermuda

Created Date: 01 October 2024

The Agency

The Agency is responsible for the administration of the CIT Act and the collection of tax receipts (i.e. any monies collected or paid in respect of a tax liability including a prospective or estimated tax liability). This responsibility includes without limitation:

- aiding and providing support to taxpayers (including by way of determinations pursuant to Part III of the Agency Act as discussed below);
- administering the processes and procedures for the filing of tax returns and the calculation of taxes owed (for further information on this topic [click here](#));
- reviewing and where appropriate auditing tax returns and ensuring compliance more generally with the CIT Act and any regulations made under that act; and
- prosecuting any enforcement action in connection with or under the CIT Act or regulations (including concluding such enforcement action pursuant to a settlement agreement made in accordance with Part III of the Agency Act as discussed below).

Determinations by the Agency

The Agency's powers and functions include making determinations on the application of the CIT Act (or any regulations made under the CIT Act) to a specific transaction or event.

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The Agency is only empowered by the Agency Act to exercise its power to issue a determination where there is a demonstrable material uncertainty about the tax consequences of a proposed transaction or event. In addition, the Agency is only to provide such determination where it has been supplied with the information set out in the Act as follow:

- the full facts and context of the transaction or event including details of when the transaction or event occurred or is intended to occur and the parties involved;
- the commercial background relevant to the requested determination including the significance of the tax result and the consequences of any alternative legal interpretation;
- the legislative uncertainty in question; and
- payment of such fee as may be prescribed by the Minister from time to time.

The Agency is not permitted to issue any determination if in the Agency's reasonable opinion:

- the questions posed for determination are equivalent to tax planning advice;
- there is not any material uncertainty; or
- the questions do not involve the interpretation of tax laws or its application to particular circumstances.

A determination made by the Agency must be in writing and may be adapted and published by the Agency in accordance with the Agency Act.

Settlement and compromises

If a dispute arises between the Agency and a taxpayer on a specific issue or liability under the CIT Act or regulations made under the CIT Act, the Agency has the power to conduct and conclude settlement negotiations in respect of such issue or liability including entering into an agreement with the taxpayer.

The Agency can only settle a dispute if the Agency determines that it is proper and appropriate to do so. In determining whether it is proper and appropriate, the Agency must take into account which outcome secures the right tax most efficiently including:

- securing the best practicable return for the Crown having regard to the future as well as immediate revenue flows, costs, and the deterrent effect on non-compliance;
- the potential for other prospective disputes as well as the impact which settling the dispute could have in releasing Agency resources to work on other matters;
- the Agency's likelihood of success if the disputed matters are litigated and the costs involved in any such litigation (including the likelihood of recovery of such costs); and
- how the terms on which disputes are resolved will likely impact taxpayer behaviours both generally and in respect of the specific taxpayer concerned, including any question of avoidance, evasion or a failure to take reasonable care.

Notwithstanding the above, where there is a range of possible figures for tax due, the Agency shall not settle by agreement for an amount which is less than that which is reasonably likely to be obtained through litigation.

A concluded settlement agreement is a final agreement that conclusively determines, settles, and compromises the liabilities which are the subject of such agreement (provided there is no fraud, malfeasance, or any misrepresentations of material facts or circumstances).

Appeal to the Supreme Court

A person who is aggrieved by a decision of the Agency (including any determination issued pursuant to the Agency Act as discussed above) is permitted to appeal to the Supreme Court against the decision.

No oral statements by Agency

According to the Agency Act, the Agency is prohibited from issuing oral determinations and is not permitted to respond to oral requests for the same. The Agency Act further provides that any oral statement made by the Agency cannot be relied upon.

Request for assistance by foreign tax authority

The Agency may exercise its powers under the Agency Act for the purposes of assisting a foreign tax authority which has requested assistance in connection with inquiries being carried out by it or on its behalf, provided, however, that the Minister is satisfied that the request from the foreign tax authority has been made in compliance with the International Cooperation (Tax Information Exchange Agreements) Act 2005 and, in the case of the United States, the USA Bermuda Tax Convention Act 1986.

Furnishing information and penalties for non-compliance

The Agency may require any person (at such time or times or at such intervals or in respect of such period or periods) to furnish it with such information as the Agency may reasonably require to discharge its functions under the Agency Act or the CIT Act. In considering the reasonableness of its request, the Agency must act proportionately and with due regard to any matters of privilege or data protection.

If a person fails to comply with such a request by the Agency without reasonable excuse such person is guilty of an offence and is liable:

- on summary conviction to a fine of \$25,000 or to imprisonment for six months or both; or
- on conviction on indictment to a fine of \$100,000 or to imprisonment for two years or both.

Liability of directors, officers, secretaries, members, and partners

Where such an offence (i.e. failure to furnish information upon reasonable request by the Agency in accordance with the Agency Act) is committed by a body corporate and such offence is proven to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary, or other officer of the body corporate, such individual, as well as the body corporate, will be deemed to be guilty of an offence and is liable to be proceeded against and punished accordingly.

Where the affairs of a body corporate are managed by its members, the above paragraph applies in relation to the acts and defaults of a member in connection with such person's functions of management as if such person were a director of the body corporate.

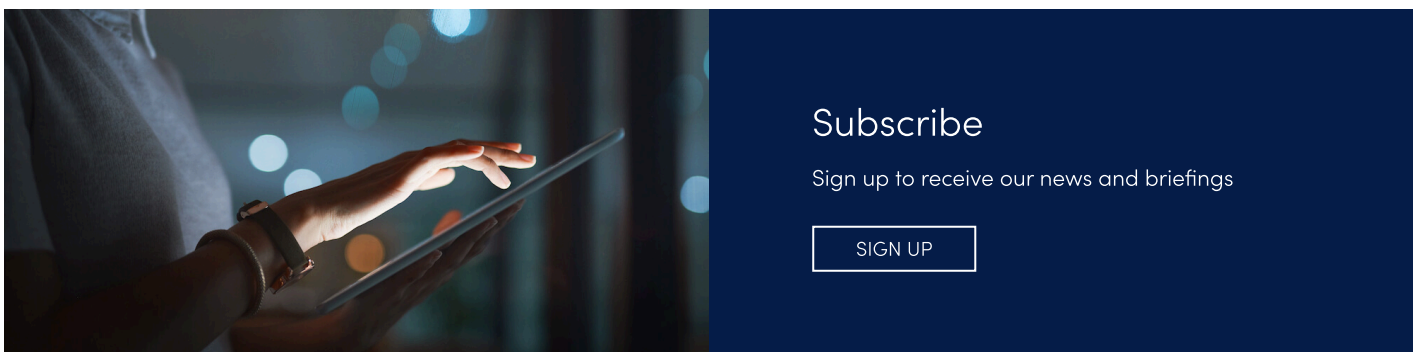
With respect to partnerships, where a partnership is guilty of an offence, every partner (other than a partner who is proved to have been ignorant or to have attempted to prevent the commission of the offence) is also guilty of the offence and is liable to be proceeded against and punished accordingly.

Where any other association, incorporated or not, is guilty of such an offence, (a) every officer of the association who is bound to fulfil any duty of which the breach is the offence or (b) if there is no such officer, every member of the governing body (other than a member who is proved to have been ignorant of or to have attempted to prevent the commission of the offence) is also guilty of the offence and is liable to be proceeded against and punished accordingly.

For further information or for assistance with Bermuda corporate income tax matters, please speak to your usual Carey Olsen lawyer or contact our team listed.

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