

Management and Control, Effective Management and Permanent Establishment



Cannon Asset Management Limited (Cannon) operates in a highly regulated environment which is monitored and controlled by the Guernsey Financial Services Commission. The Commission has over the years issued various regulations and statutes which Cannon are obliged to observe.

We have in fact recently had a review from the Commission which entailed a detailed analysis of our business with emphasis on Risk and Management with particular attention to Compliance Procedures and the Prevention of Money Laundering. We are regulated to have ongoing Compliance and Regulatory Reviews.

Listed immediately below are SOME of the legislation and Codes of Practice relevant to the services we provide to you and we invite you to review the documents on www.gfsc.gg to obtain a further insight into the requirements under which we operate.

- *The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000, as amended (The "Fiduciary Law")*
- *Code of Practice – Corporate Service Providers, August 2009*
- *The Protection of Investors (Bailiwick of Guernsey) Law, 1987*
- *Code of Practice – Trust Service Providers, August 2009*
- *The Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007*
- *The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended*
- *The Drug trafficking (Bailiwick of Guernsey) Law, 2000, as amended*
- *The Terrorism (United Nations Measures) (Channel Islands) Order 2001*
- *The Al-Qa'ida and Taliban (United Nations Measures) (Channel Islands) Order 2002*
- *The Terrorism and Crime (Bailiwick of Guernsey) Law, 2002, as amended*
- *The Terrorism and Crime (Bailiwick of Guernsey) Regulations, 2007, as amended*
- *The Disclosure (Bailiwick of Guernsey) Law, 2007, as amended*
- *The Terrorist Asset-Freezing Bailiwick of Guernsey) Law 2011*
- *Included in the above "Fiduciary Law" is the ("GFSC") Finance Sector Code of Corporate Governance.*

For Cannon to adhere to current regulations and legislation cognisance of the basic concepts of **"Management and Control"**, **"Effective Management"** and **"Permanent Establishment"** is required. These concepts are all well defined in tax treaties and case law. These are the three essential concepts which are also importantly at the root of a company acquiring an actual or deemed tax jurisdiction.

Non-adherence to the requirements of the above three concepts in respect of services being offered to a specific client not only puts that client at risk, but also Cannon's other clients as well as Cannon's Fiduciary and Investor Licences.

Notwithstanding where a company is incorporated or where the directors sit, a company can be deemed to be resident for tax purposes in a specific jurisdiction if it can be shown that it is effectively being **"Managed and Controlled"** in that jurisdiction. It must be ensured that central management and control is exercised in the jurisdiction where it is intended that the company be resident for tax purposes. The onus in determining management and control lies with the appointed directors of the company. It is their responsibility to ensure that all management decisions are properly carried out by the directors in a manner and in a place that meets these criteria.

Management and Control aspects of doing business across jurisdictions is a complicated subject. Where no tax treaty exists between two jurisdictions it is not easy to argue that Management and Control is not being correctly observed when aspects of these functions

are being carried out in both jurisdictions. The quality of evidence will be key and if matters are enquired into by a tax authority and subsequently considered by a court then it will be all the ancillary documents, emails and correspondence that will be scrutinised carefully.

For the purpose of Corporation Tax Acts a company has a **Permanent Establishment** and **Effective Management** in a territory if:

- It has a fixed place of business there through which the business of the company is wholly or partly carried on, defined as any place of management where actions and activity are initiated and where a decision is taken, or
- An agent or a person acting on behalf of the company has and habitually exercises their authority to do business or take decisions on behalf of the company.

The following guidelines should be considered to avoid a company having an unintended creation of a Permanent Establishment and the location of Effective Management brought into question when an agent is appointed to assist the company:

- The service agreement between the agent and the company clearly stipulates that the services of the agent are limited to providing advice and support in relation to the activities of the company and in soliciting and negotiating contracts and that the agent has no power to represent or bind the principal in conducting negotiations. The agent makes it clear that he has no authority to bind the principal and the client;
- The company officials are involved in discussions at the outset of the negotiations with third parties, have a say in the negotiation tactics etc. and are being kept abreast of developments in negotiations and are given the opportunity to provide input;
- At the stage of actually signing the contract, officers of the company actually sign the contract in the chosen place of effective management of the company. It may be possible however, that very occasionally, the company grants a specific power of attorney to the agent to sign the contract in question on its behalf;
- Officers of the company are given sufficient time to consider the implications of the contract and take advice where necessary;
- The officers of the company who are signing the contract have sufficient expertise to do so;
- Officers and directors of the company are not also officers/staff of the agent;
- Order confirmations and invoices are prepared by the company and monies are paid directly into the company's bank account;
- The daily business activities of the company are carried on, and the people who manage those business activities are situated, in the jurisdiction of the chosen permanent establishment.

Basically it is essential that the structure does not fall foul of these concepts. It is not good enough to only have the directors (management and control) sitting in Guernsey but it is essential that the day to day (effective control) activities are also conducted by Cannon from a "permanent establishment" in that jurisdiction.

This therefore goes to the root of the fact that service providers such as Cannon cannot and will not hold "nominee" positions or roles. Therefore should management and control and effective management of the structure be split Cannon cannot be held responsible should the tax base of the structure move from a favourable tax jurisdiction and be subject to the tax laws of the country from where these other activities are being conducted.

These rules apply to the administration of Trusts and Companies in all other fiduciary services providing countries which are all obliged to operate under the same "Management and Control", "Permanent Establishment" and "Effective Management" legislation. For this adherence there is obviously a cost to the client. This is a short commentary on a very complicated subject and should you require any further explanation please do not hesitate to contact me.