INTERNATIONAL TAX STRUCTURING FOR INVESTING ABROAD

CANADA

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CANADA – BASIC FACTS

- Federal system
- 34 million people
- Economic facts
  - 9th largest economy in the World
  - 7th largest FDI inflows in the world over the 2000-2009 period
  - 3rd largest exporter of automotive products
  - 4th largest exporter of agricultural products
  - 5th largest aerospace producer
  - Natural resources represent just over 10% of GDP (less than manufacturing and services)
  - 2nd or 3rd largest oil reserves in the world and largest supplier of oil to the US
  - Canada-US cross-border trade is $1.7 billion per day

CANADA – BASIC TAX FACTS

- Federal Income Taxation
  - *Income Tax Act* – comprehensive taxation of income and gains
  - Residents – worldwide taxation
  - Non-residents – income from carrying on business in Canada
    – withholding taxes on investment income
    – gains from dispositions of "taxable Canadian property"
  - No group tax consolidation or loss transfer regime

- Provincial Income Taxation
  - Parallel to federal system
  - Federal collection agreements
  - Land transfer taxes

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CANADA – BASIC TAX FACTS

- Stamp Taxes
  - None
- GST, HST, QST, PST
- Tax Treaties
  - 89 DTCs in force
  - TIEAs
  - QECD Model
- NAFTA

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CANADA – INBOUND INVESTMENT STRUCTURES

- Organizational Structures
  - Canadian corporation – federal or provincial
  - Branch / permanent establishment
  - Partnerships
    - General
    - Limited
  - Trusts

- Decision Factors
  - Market acceptance / business practice / regulatory
  - Tax consequences
  - Financing considerations
  - Limitation of liability

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CANADA – INBOUND INVESTMENT STRUCTURING

- General Structuring Considerations
  - Start-up losses
  - Anticipated income
  - Tax-efficient financing designed to ensure utilization of available deductions
  - Qualifying for the asset basis "bump" after a share acquisition
  - Exit strategy – anticipated gains
  - Home country vs Canadian tax rates / FTCs

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CANADA – INBOUND INVESTMENT STRUCTURING

- Specific Structuring Considerations
  - 2012 Corporate tax rates—15% federal, 10%-12% Provincial (generally)
  - Deductibility of interest
  - Corporate thin capitalization
    - 2:1 debt / equity ratio
    - based on debts owing to "specified non-resident persons"
  - Withholding tax
    - Interest – arm's length lender (not participating interest) – 0%
      - – US lender – 0% (subject to LOB qualification)
      - – other cases – 25% reduced to 15% by Canada-India DTC
    - Management fees – 25%, reduced generally to 0% under DTCs
    - Dividends – 15% in respect of 10% voting corporate shareholders

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CANADA – ACCESSING THE "88(1)(d) BUMP"

- Objective, Implementation and Limitations
  - Following a share acquisition, increase tax cost of non-depreciable capital property up to fair market value as at the time of a share acquisition – e.g. shares, land, partnership interests
  - Achieved by winding-up or vertically amalgamating the corporation into its 100% parent
  - Overall "bump room" is the excess of the tax cost of a corporation's shares over the tax cost of the corporation's assets (i.e. "outside basis" in excess of "inside basis")
  - Can facilitate removal of subsidiaries from under a target corporation and can reduce exposure to taxes in the target itself on future transactions
  - Commonly used, but very complex and full of traps
  - Often combined with amalgamations with special purpose acquisition vehicles to achieve tax-efficient post-acquisition financing

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CANADA - TAX PLANNING WITHOUT TAX CONSOLIDATION

- Entity –Focussed Tax Planning
  - Extensive use of tax-deferred corporate transactions
    - Tax deferred asset transfers to corporations and partnerships
    - Tax deferred share reorganizations
    - Tax deferred winding-up and amalgamations
  - Extensive history dealing with intragroup loss utilization techniques
  - Generous tax authority attitude to intragroup loss preservation and use
  - Creative use of intragroup debt and equity financing to manage income and expense
  - Reliance on loss carryover rules to preserve "stranded" losses for future use
  - Tax authorities seek to limit loss trading and transfer of other tax benefits beyond a related group – specific anti-avoidance measures, and GAAR

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CANADA – EXIT CONSIDERATIONS

- Taxable Canadian Property ("TCP")
  - ITA s. 116 (plus Quebec in some cases)
  - Dispositions of Canadian real property, resource properties and entities that derive their value principally from them
  - Notification / clearance / 25% tax payment
  - Treaty-exempt property
    - Canada–India DTC – NO RELIEF
  - Purchaser risk

CANADA – EXIT CONSIDERATIONS

- Upstream Holding Companies
  - TCP issues – in some cases mitigated by Luxembourg DTC
    – Sale of non-Canadian holding company
  - Withholding tax planning
  - Treaty shopping – LOB
    – beneficial ownership
    – GAAR

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