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商法词汇：特权

Lexicon: Privilege

留意盲点 保持纳税居民身份

How to avoid the blind spots of tax residency



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塞浦路斯公司，无论是处于顶层的控股公司，还是镶嵌在更大的跨多个法域公司架构中的特殊目的公司，其理想的纳税待遇，现在已经不仅仅是为纳税目的在塞浦路斯被认作居民。

实践表明，如塞浦路斯公司的最终受益人位于塞浦路斯境外，其目的则是向他们各自国家的税务机构证明，塞浦路斯公司在除了塞浦路斯之外的任何地域都不会应纳税目的而被视作居民。

管理和控制

原则上，在塞浦路斯设立的公司，只有在塞浦路斯被管理和控制，才会在当地为纳税目的被视作居民。“管理和控制”在成文法中没有界定，但在判例法中得以解释。总体上说来，可以主张的是，“管理和控制”可指高层次的战略性的决策制定，而非公司的日常业务管理。至于管理和控制在哪里进行，只是一个事实问题。

为取得和维持公司的塞浦路斯纳税居民身份和待遇，塞浦路斯公司必须采用一种运营结构，从而能保证公司事务的管理和控制任何时候都发生在塞浦路斯境内，而且可清楚地加以证明，这是一项强制性要求。总之，这就意味着，要保证塞浦路斯公司的所有高层战略和政策决定实际上是在塞浦路斯作出的，并且可以清晰而容易地证明事实确实如此。

“**除非有特殊情形，否则所有的董事会会议都应在塞浦路斯举行**”

根据规范塞浦路斯公司运行的宪法性文件，塞浦路斯公司的董事会必须对公司业务的管理和控制负责，该等管理和控制权必须在董事会会议上行使。

董事会会议应定期在塞浦路斯召开，最好按季度进行。如在董事会按计划召开的季度性会议间隔期内发生了需要由董事会决定的情况，必须召开全体董事会会议，以对问题进行处理。

董事会书面决议的采用即使不能全部避免，也应该降到最低。在特殊情形下，如果需要董事会作出书面决议，则各董事在签署决议时，应选在其计划规避的纳税住所地（如果不位于塞浦路斯）以外的地域，这是一项强制性的要求。书面决议签署时的董事所在地应清晰地记录在书面决议上。

除非有特殊情形，否则所有的董事会会议都应在塞浦路斯举行。如无可能，会议可选在计划规避的纳税住所地（如果不位于塞浦路斯）以外的另一管辖地举行，且该塞浦路斯公司不会仅仅因为会议在该地举行就被课以赋税。

如董事会会议在塞浦路斯以外举行，则此次会议所作的决议应在塞浦路斯举行的下一次董事会会议上通过。

如有可能，所有董事须亲自参加董事会会议。如实际上不可行，董事可以通过电话或视频会议参加，前提是他位于计划规避的纳税住所地以外。

董事出席会议

无论如何，必须有大多数的董事亲自参加董事会会议。如董事身处计划规避的纳税住所地，我们建议其不参加会议——无论是采用电话、视频会议或其他方式。因此，

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LEADING. EVOLVING. ACHIEVING.

未来的董事会会议日期应提前确定，并记录于各董事的日记，以减少董事后来发现不能参加会议的风险。

为保证董事会能在充分知情的基础上达成决议，董事会会议议程，连同含有相关报告和其他信息的董事会文件包，如有可能，应在董事会召开之前分发给各位董事。任命轮值董事的方法不太可取，但在特殊情形下，如有必要指派轮值董事，该轮值董事应该和其轮换的董事具有至少同等水平的经验和专业知识，且不应是计划规避的纳税住所地的居民。

各董事会会议必须有详尽的会议记录，且保存在位于塞浦路斯的公司注册办公室。该会议记录必须含有董事会会议上董事间的讨论和争论的全面记载。

会议纲要或提前准备的会议记录，仅陈述董事会会议决议的概要，因为不能够见证会议上真实的讨论和实际的争论，因而可能不会令人满意，无法被接受，因此不建议采用。

实践角度

从实践的角度来看，塞浦路斯公司亦应保存其董事差旅和住宿安排的证据。如计划规避的纳税住所地的财务和海关部门对塞浦路斯公司的住所地进行询问，他们很可能核查这些记录，以确认董事们在董事会会议期间身处何地。

以宽泛的用语起草授权书，为律师提供代表塞浦路斯公司和 / 或董事会行事和进行交易的众多授权，应加以避免。

如果是为了完成具体交易而有绝对必要，可以授予谨慎起草且目的明确具体的特别授权书。■

The desired tax treatment of a Cyprus company, whether it be a top-tier holding company or a special purpose vehicle fitted in a greater multi-jurisdictional corporate structure, nowadays goes beyond being considered resident for tax purposes in Cyprus.

Practice suggests that where the ultimate beneficial interests of a Cyprus company are located outside Cyprus, their goal would be to prove to their respective national tax authorities that the Cyprus company is not considered resident for tax purposes in any territory other than Cyprus.

Managed and controlled

In principle, a company which is incorporated in Cyprus will be considered resident for tax purposes in Cyprus only if it is managed and controlled in Cyprus. The concept of “management and control” is not defined by statute but rather draws interpretation from case law. Overall it could be argued that it refers to high-level strategic decision-making rather than day-to-day management of the business of the company. The question of where management and control is exercised is a question of fact.

In order to secure and maintain its Cyprus tax residence and treatment, it is imperative that the Cyprus company adopts an operating structure that will ensure that the management and control of its affairs is being demonstrably and unambiguously exercised in Cyprus at all times.

In a nutshell, this means ensuring that all high-level, strategic and policy decisions of the Cyprus company are actually taken in Cyprus, and further that it is possible to demonstrate clearly and easily that this is in fact the case.

The board of directors of the Cyprus company must, under the constitutional documents governing the operations of the Cyprus company, be responsible for the management and control of the business of the company and must exercise that management and control in board meetings.

Board meetings must be held regularly in Cyprus, ideally on a quarterly basis. Where a matter fails to be considered by the board of directors between the scheduled quarterly meetings, a full board meeting must be convened in order to deal with the matter.

The use of written resolutions of the board of directors should be kept to a minimum if not avoided in their entirety. If, exceptionally, a written resolution of the board is required, it is imperative that each director is located outside of the territory where tax residency is attempted to be avoided (if not located in Cyprus) at the time at which he signs the resolution. The director's location at the time of signing should be clearly noted on the written resolution.

All board of director meetings must be held in Cyprus, other than in exceptional circumstances. Where this is not possible, the meeting may be held in another jurisdiction outside of the territory where tax residency is attempted to be avoided, that would not itself attempt to impose any charge of tax on the Cyprus company solely in consequence of the meetings being held on its territory. If a board meeting is held outside Cyprus then the decisions should be ratified at a subsequent board meeting held in Cyprus for, *inter alia*, that purpose.

Wherever possible, all directors must attend board meetings in person. If this is not feasible, as a practical matter, a director may participate by telephone or video conference, provided that he is located outside of the territory where tax residency is attempted to be avoided.

Presence of directors

In all cases, a majority of directors must be present in person at board meetings. It is advisable that no director participates in a board meeting – whether by telephone, video conference or otherwise – while he is physically located in the territory where tax residency is attempted to be avoided.

To that end, the dates of future meetings of the board of directors should be fixed well in advance and entered into each director's diary, so as to reduce the risk of a director subsequently finding himself unable to attend a meeting.

In order to ensure that the board of directors is able to reach decisions on a fully informed basis, an agenda for the board meeting, together with board packs containing relevant reports and other information, should, where possible, be circulated to the directors in advance of the board meeting.

The appointment of alternate directors is not desirable. However, if, in special

“ *All board of director meetings must be held in Cyprus, other than in exceptional circumstances* ”

circumstances, it is necessary to appoint an alternate director, the alternate director should have at least the same level of experience and expertise as the director he is replacing and should not be a resident of the territory where tax residency is attempted to be avoided.

Detailed minutes must be made of each board meeting and retained at the registered office of the company in Cyprus. Those minutes must contain a full record of the discussion and debate among the directors at the board meeting.

Skeleton or pre-prepared minutes that go no further than setting out a summary of the board's decisions may be considered unsatisfactory and unacceptable due to their lack of evidencing real discussion and actual debate at the meeting, and thus their use is not advisable.

Practical perspective

From a practical perspective, evidence must also be retained by the Cyprus company of directors' travel and accommodation arrangements. If the Revenue & Customs department of the territory where tax residency is attempted to be avoided were to enquire into the residence of the Cyprus company, they would most likely scrutinise these records in order to confirm the physical location of directors at the time of board meetings.

Powers of attorney drafted in broad terms and affording extensive powers to attorneys to act and transact business on behalf of the Cyprus company and/or the board should be avoided.

If absolutely necessary for the completion of any given transaction, a carefully drafted and purposefully issued special power of attorney may be granted. ■

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