



REDOMICILIATION:

Why move a Delaware Company to Portugal

Offshore has become a “four-letter word”

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For many years, Offshore Property Companies have been a popular solution, although sometimes practices could be a bit “grey” in nature. Due to repeated problems with tax evasion, Portuguese legislation eventually changed, penalising these structures. Offshore Companies began to suffer an array of punitive measures that turned them untenable. Other than direct ownership, property buyers are faced with a choice between *Non-Resident Companies*, registered in a foreign jurisdiction not on Portugal’s “black-list”, or *Resident Companies*, domiciled in Portugal.

However, the legislative landscape continues in flux. EU initiatives are instigating further change. Yesterday’s solution can become tomorrow’s problem, leading many owners to consider redomiciling their Delaware companies to Portugal.

I. The Demise of Company Confidentiality

Portugal has applied the recent EU directive, implementing the Beneficial Ownership Register Regime. This new legislation requires the declaration of a company’s beneficial ownership data which is to be shared with other jurisdictions as part of the Common Reporting Standard. The new regime is far-reaching and will include offshore companies holding Portuguese property in jurisdictions such as Delaware.



Declarations include the entity subject to registration, information on all shareholders, the identification of managers, directors, and officers responsible for the running of the company, Beneficial Owners' information as well as the declaring entity or individual. Information must be kept up to date. Any rectifications must be reported within 15 days.

Failure to comply with this new legislation is punishable by fines between €1,000.00 and €50,000.00. In addition, any person making false statements in the Beneficial Owner Declaration will be held criminally and civilly liable for damages.

II. Offshore Companies and CGT

Offshore Companies from Delaware, Malta and elsewhere face numerous Capital Gains Tax pitfalls in Portugal. The first is new, springing from the State Budget for 2018. Capital Gains arising from the transfer of an offshore company's shares shall be considered as taxable income from a Portuguese source when, at any time during the previous 365 days, the value of these shares, directly or indirectly, derives from 50% or more from immovable property located in Portugal. In other words, the fiscal authorities have the judicial means to look through an offshore company structure to tax directly any underlying capital gains on property sales.

This is only the latest CGT problem to arise. To begin with, the vast majority of Offshore Companies have only a token share value. These symbolic evaluations avoid local Stamp Duty (or similar levies) upon inception of share capital that otherwise would have made the use of these entities prohibitively expensive and uninviting. However, at the point of sale of company shares, there is the potential for a considerable Capital Gains Tax liability.

In the past, the former mantle of confidentiality could often mask such transactions. Current international norms of transparency make it increasingly difficult for beneficial owners to hide these obligations.



Alternatively, if the Offshore Company were sell off its asset, other complications loom. Past real estate purchase prices were often understated, exaggerating historical increases in price differentials. Regardless of the veracity of the acquisition base, Capital Gains reporting by the company leads inevitably to corporate assessment (“IRC”). Subsequently, when the Company’s net profits are distributed to the shareholders, an additional levy can take place, this time in the form of *dividends* to the owners.

III. Redomiciliation Rewards

In contrast, when a company redomiciles to Portugal, there is no asset transfer: no crystallisation of Capital Gains, no “*IMT*”, no Stamp Duty on Real Property. No chargeable event takes place; only the headquarters and effective management move to Portugal. The assets remain safely within the Company. Thus the alternative term for Redomiciliation: *Continuance*. Continuance opens an attractive opportunity for legitimate tax mitigation.

Updated Basis for Capital Gains Tax

Following Company registration in Portugal, a Balance of Accounts needs to be presented to mark the starting point as a Portuguese resident corporate entity. This Balance Sheet must be based on *current* rather than *historical* values. Thus, the Company’s assets reflect either their book value or the present market value of the property. Any shareholders’ loans to the Company show as “Liabilities” as well as any mortgage (if one exists). “Capital” is the paid-up share capital as well as Reserves, reflecting any appreciation in the value of the property. As such, there is a fresh start, and many historical problems, such as under-declared deed values or lack of bonafide invoices for capital improvements can be mitigated.

Reduced CGT following Redomiciliation

Following the move to a Portuguese domiciled entity, Capital Gains Tax on the eventual sale of Company shares reduces to 14%, as compared to 28% that otherwise would be the norm. Further Capital Gains Tax mitigation can take one of two forms. With the uplift in the nominal price



of the shares upon registration of the now Portuguese entity, the stock can be sold at full value with little or no gain. Alternatively, the company can be wound up (liquidation) and the assets distributed to the shareholders. As in the previous instance, with similar values, there is often little or no tax to pay.

Potential Transfer Tax Exemption

If the Company assets include Portuguese immovable property, the sale of the shares may be exempt from “*IMT*” depending on the circumstances of the eventual buyer of the Company. Under Portuguese law, when one does not exceed a concentration of more than 75% of shares to a shareholder, no Property Transfer Tax (“*IMT*”) is due on the underlying assets. If eligible, the buyers may potentially save many thousands of Euros, thus making such an acquisition more appealing than a purchase in one’s own name.

Reduced Bureaucracy

When a property changes hands, many organs of government get into the act. *Finanças* records the change of ownership and updates the Ratable Value (“*VPT*”) in a somewhat cumbersome and labourious process. The local Council checks to see that current architectural drawings match the building(s) on site. The Land Registry verifies that boundaries and areas are correctly recorded. In short, a sea of bureaucracy that can be both slow and expensive. The transfer of ownership of Portuguese shares is normally a simple notarial process. While there is some paperwork involved in amending records to reflect the changes of Company domicile or ownership, the process is straightforward and does not trigger reevaluations of the underlying property nor latent licensing problems inherent with many older properties.

IV. Delaware classified as “opaque”

According to financial standards of opaqueness, Delaware has the dubious honour of being categorised amongst the least transparent tax havens as determined by the Tax Justice Network. Tax authorities around the world lose hundreds of billions of Euros each year in tax revenues due by



corporations as well as high net worth individuals hiding their assets in offshore structures. Compounding the problem are added links to money laundering, financing of terrorism and global drug trafficking networks.

Misleading stereotypes

In identifying the most prominent providers of international financial confidentiality, the Tax Justice Network also reveals that traditional stereotypes of tax havens are often misguided. The world's most preeminent suppliers of financial secrecy are not quaint tropical islands in the Caribbean as is customarily construed, but rather some of the world's largest and richest countries. In reality, wealthy OECD member states and their offshore satellites are the primary benefactors of, or channels for, these illicit flows of capital.

American double standard

The United States and its second smallest state, Delaware, are glaring examples of these duplicitous practices. One illustration is the *Delaware LLP* (Limited Liability Partnership), commonly used to hold property in Portugal. These "offshore companies" pay no US tax in their own right as their non-resident shareholders have no US-sourced income. Subsequently, money from around the world can be moved to and from these structures tax-free, often going unreported.

The United States, after instigating dramatic international changes in fiscal transparency with the introduction of "FATCA" (*Foreign Account Tax Compliance Act*), now refuses to be part of the OECD's worldwide *Common Reporting Standard*, leaving Delaware high in the ranking of Least Transparent Offshore Jurisdictions.

"Although the United States has been a pioneer in defending itself from foreign secrecy jurisdictions, it provides little information in return to other countries, making it a formidable, harmful and irresponsible secrecy jurisdiction."

- Tax Justice Network



This example of “*America First*” dates back to policies under former President Barak Obama. It seems highly unlikely that this “*go-it-alone*” approach on the part of the US will change anytime soon under the current Trump administration.

The implications for global power politics are enormous and help explain why international efforts to crack down on tax havens and financial secrecy have been so ineffective over the years. In reality, it is the recipients of these “huge” inflows of capital who write the rules of the game.

V: EU criteria for Tax Haven Blacklist

In early 2017, the European Council resolved that it would determine a common EU registry of non-cooperative jurisdictions by the end of the year. To be considered compliant for tax transparency, a country needs to commit to implementing the *Common Reporting Standard* (CRS). It must also have agreements in place for the automatic exchange of tax information with all EU member states as well as achieve an OECD rating of “largely compliant”. By the end of the year, this EU-wide classification will replace the country-by-country “black-lists” that currently abound throughout the European Union.

VI. Imminent Danger: *punitive rates*

Unless the US makes an unexpected reversal in its current uncooperative policies, Delaware may finally find itself in the foreseeable future amongst the EU classification of tainted black-listed jurisdictions. The United States already appeared on a provisional list of 92 countries earlier this year designated as probable tax havens by the European Union, as reported by France-Presse and Radio France Internationale. One of the sources says that the EU Commission has sent requests for clarification on activities considered to be “risky” prior to the publication of the definitive blacklist scheduled on 05 December 2017.



Properties held in Delaware Companies, once a popular solution with the expatriate community in Portugal, could soon become a scourge. Portuguese properties held in Delaware companies could face a ± 20 fold increase in their normal rates bill plus similar amounts again due under the new “*AIMI*” levy. Rather than normal Rates of 0.4%, these structures may face highly punitive annual taxation of 7.5%. For example, a property with a ratable value of €300,000 could pay an annual property tax of €22,500 rather than €1,200. Coupled with the new Additional IMI levy, the annual assessment could double, reaching €45,000.

While several “dominos” have as yet to fall before reaching such a worst-case scenario, Delaware Company owners should be mindful of the storm clouds gathering on the horizon and study strategies – such as redomiciliation to Portugal – before panic stampedes the marketplace.

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