Morison International

Global Opportunities Bulletin

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Morison International is a fast-growing international association of accounting firms. With over 90 members firms, in 66 countries, our global footprint delivers clients the expertise they need, wherever they are.

From the Editors' Desk

I am pleased to present the 4th edition of Morison International's (MI) *Global Opportunities Bulletin*. I would like to extend a special 'thank you' to all member firms that have contributed. Please consider contributing an article that informs MI member firms about changes in your economies or the regulation of them. There is no easier way to expand business than to help clients and potential clients with changing regulation.

While finalising this newsletter, there continues to be great uncertainty globally. The global economy continues to expand, albeit at much lower levels than predicted and with uneven distribution. The prolonged recovery from the global financial crisis is hampered by a number of challenges, including geopolitical conflicts in various areas of the world, underemployment and the growing income gap. Lower commodity prices and the recent slowdown in growth in Asia and many parts of the West have led to many uncertainties. Such risks lead to opportunities that MI firms are well suited to capture! With this newsletter, I challenge all of you to think of just one opportunity that requires the expertise of another MI firm. Not only should we reach out to MI firms to service our existing clients, but we should also come together to attract new clients that we can service when we combine our expertise with that of another MI member.

Let me share a few examples of what I mean. Marks Paneth was able to partner with 2K Audit, a MI member in Russia. Because Marks Paneth was able to reach out directly to 2K Audit, we were able to acquire a new client we could not have serviced alone. More recently, Marks Paneth was appointed as forensic accountants in one of the largest Foreign Corrupt Practices Act matters the world has ever seen. This was made possible because of our collaboration with MI member M/Legate Contadores, Auditores e Consultores Ltda. In yet another example, a UK accounting firm has been able to keep one of its growing clients because we have been able to serve as its US office. Finally, I would like to share a success that has nothing to do with Marks Paneth. You may recall that in the 3rd edition of *Global Opportunities Bulletin* I wrote of opportunities for new work through the United Nations System. Since that time, two member MI firms have secured separate contracts with the United Nations, worth more than US$ 100,000 each. Please share your own successes prior to the next edition that will be distributed later this year.

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This newsletter presents an interesting blend of articles that may guide you and your clients to the opportunities that are being presented by our contributors. I would like to continue devoting these pages to opportunities for greater collaboration since the global challenges provide a world of opportunity. We have already shown we can meet the need.

Until the next edition, continue to keep a watch on global events and the opportunities they provide for us to help our clients and our business.

For more information on this newsletter and its contents, please contact the authors or me.

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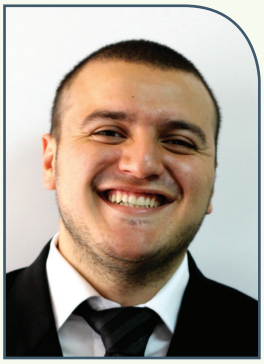

Transfer pricing and international taxation shared service centre of Grupo Camacho

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During the MI Beijing conference last year, several MI members dedicated to international taxation – including our Chair, Carlos Camacho – agreed on the shortage of transfer pricing, and international taxation service provision in general, within the MI conglomerate. As a consequence, and following suggestions from fellow members, Grupo Camacho has started two different initiatives for MI members to increase the growth in international taxation terms, which aims to be a robust, streamlined and reliable resource for MI members regardless of their level of experience in the field.

The first services to be launched in coordination with MI's GEO were related to transfer pricing matters, under the name of Transfer Pricing Shared Services Center (TPSSC) on 6 November. In late February, new services related to international tax in a wider scope were added to the shared service, which was renamed as the **International Taxation Shared Service Center (ITSSC)**.

How does it work?

The working model behind this initiative consists of providing cost-effective international taxation consultancy and/or transfer pricing services for the members' clients in a second-floor working scheme, in case the member firm has little to no experience in the field. Alternatively, if the MI firm already provides this kind of service, then the ITSSC would function as a back-office service provider, which aims to assist firms that have vast experience in international taxation and need support due to regional or work load circumstances.

The services offered through the shared service are summarised below.

1. International taxation services:

a) Tax planning implementation and improvement: For this service, we use our knowledge and expertise about the international taxation to plan the best option for restructuring the company.

b) International taxation common issues in regards to matters such as:

Residency	Capital gains
Permanent establishment	Income from employment
Income from immovable property	Directors' fees
Business profits	Artists and sportspersons
Shipping, inland, waterway and air transportation	Pensions
Associated enterprises	Government service
Dividends	Students
Interests	Other income
Royalties	Capital

c) Advising to get ready for the BEPS (base erosion and profit-shifting project): We guide companies/clients to be ready for BEPS application in conjunction with The Multilateral Convention on Mutual Administrative Assistance in tax matters.

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d) Litigation services on an international taxation focus: Oriented for companies dealing with international tax assessment and/or simultaneous tax audits. In this service we also prepare the documents to be submitted to tax courts, test of the case and grounds of comparative law in soft law cases. Similarly, we prepare the specific inquiries of the director lawyer responsible for the case.

e) Analysis of the risk: We perform the analysis of the prospective risk for companies on international tax matters. With this analysis the company can be prepared for different factors relating to international taxation that apply to international business, so as to avoid tax contingencies.

f) Third-party independent opinion on group structure: We provide expert opinion about the group structure, for best tax cost-effective options. The analysis consists of a specific review about the group structure to highlight any inefficiencies when paying taxes, using our expertise to demonstrate different possible structures to make more economical payments.

2. Transfer pricing services:

a) Transfer pricing advice: Professional advice regarding transfer pricing, starting from the interpretation of a country's specific transfer pricing legislation, such as defining compliance requirements, determination of related parties or structuring to optimise transfer pricing issues to more advanced inquiries regarding BEPS implication in the company's transfer pricing policies and evaluation of specific cases and advices on non-recurring situations.

b) Transfer pricing technical studies: Fulfilment of regional transfer pricing documentation requirements such as complete transfer pricing technical studies and masterfiles, whether it is a full study or just a section (e.g. comparability analysis only).

c) Transfer pricing litigation services: Legal services for transfer pricing cases, such as case analysis, preparation of required documentation to be submitted to tax tribunals/courts, or specific inquiries from the director lawyer responsible for the case.

d) Transfer pricing consultation: This service is oriented towards companies that want to establish their own transfer pricing department, determining the client's potential needs depending on the region, structuring the department according to the present organisational structure of the company, and establishing transfer pricing guidelines to comply with Organisation for Economic Co-operation and Development (OECD) standards and local legislation.

Great opportunities exclusive to MI members

The ITSSC is a resource for MI members to expand their service base, enabling them to offer general international tax and transfer pricing services to their clients at cost-effective rates, without incurring in fixed expenditures, such as personnel, equipment or training, and most importantly transferring the risk associated with those fixed expenditures to a third party and enjoying the benefits of the service provision.

Our goal with such initiatives is to demonstrate our commitment as a strategic ally in a growing international tax-regulated environment, working side by side with member firms to expand their client base, facilitated with technological solutions, such as online meetings and encrypted file depositories. We look forward to establishing great new business relations with the growing MI conglomerate, expanding the client base of fellow members and broadening the scope of the services they offer.

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Automatic exchange of information

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On 19 November 2014 the Federal Council decided that Switzerland will join the multilateral agreement about the automatic exchange of information regarding tax matters. This agreement, developed by the OECD and modelled after the American Foreign Account Tax Compliance Act (FATCA) model 1 in order to prevent tax evasion across borders, will be crucial for the future introduction of the cross-border automatic exchange of information. However, Switzerland still has to create the legal basis and negotiate further agreements with partnering nations. Should parliament (and, if required, the voters) pass this, 2017 would see the start of the collection of data, and the first data exchange could then take place in 2018. This ambitious timetable of the Federal Council is due to the pressure of the G20 member states and the EU's introduction of first data transfers in 2017 (with exemption of Austria, to follow in 2018).

As far as financial information to be exchanged is concerned, the standard should be all-encompassing (including trusts). The criteria for registering any person subject to tax should be the national anti-money-laundering regulations, to identify contractual parties and to identify beneficial owners. The model contract is based on mutuality and provides that the information exchanged may be used solely for those purposes agreed by both parties. Confidentiality and data protection are equally included. Uniformity is to be achieved and ensured via a joint reporting standard, a model agreement between two nations, an accompanying commentary on interpretation, and basic data of an IT solution to assist the authorities. A review by the Global Forum, an authority designed and created by the G20 member states, is meant to ensure an efficient implementation of those standards.

Of prime importance for the implementation in Switzerland are the EU and its member states, as well as the USA. Next to this, countries with close economic and political ties will receive priority treatment. The Federal Council has emphasised that regularisation of the past (e.g. voluntary declaration to avoid punishment, final withholding tax) and market entry should be requested and strived for. Negotiations with the EU referring to this will probably supplement the current negotiations about the extension of the bilateral agreement on the taxation of savings income, or even make them redundant. As the USA is relying on the finalised FATCA agreement and therefore sees no necessity for new agreements, Switzerland's only option is to change to FATCA model 1; however, in the case of companies and trusts, the full view of the beneficial owner is not possible, due to the restrictions on reporting about a 'settlor' and for professionally managed trusts. Thus the USA will strengthen its position as a reliable and secure haven for tax evaders the world over. In this realm there are lively discussions in the UK about how to organise trusts in the future so they still provide protection in line with these OECD standards. This must be avoided with more precise definitions. Equally, the minimum levels set for reporting obligations open the doors for abuse through account splitting.

Apart from banks and other credit institutions, financial institutions subject to reporting include asset managers, trustees (custodians), stockbrokers, funds/investment companies and specific insurance companies that offer redeemable insurance policies or annuity contracts. Whether a financial institution is actually subject to reporting needs to be determined by a multitude of criteria, as the authors of the regulations are applying a circular reasoning: 'financial institutions subject to reporting are all those who are not financial institutions not subject to reporting'. This casuistic approach makes the regulations as complicated as the FATCA model.

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In principle, financial institutions not subject to reporting (with the exception of payments connected to commercial financial activities) are national entities, international organisations and central banks, listed companies, pension funds, other legal entities with reduced risks of abuse leading to tax evasion and all those that are explicitly exempt from the duty to report, exempt organisms for the joint investment of securities. When determining the financial institutions or the accounts that are not subject to reporting, the national legislators have some leeway; added to which there is a catalogue listing criteria for exemption (provisions up to a limit of annual contributions of US$ 50,000, tax reliefs, reporting requirements to tax authorities, withdrawals attached to certain conditions, accounts are subject to supervision for other purposes than retirement plans, rental deposit accounts, etc.). In these cases, the question arises as to which national tax law should be adhered to.

The following data will be reported by financial institutions subject to reporting to the Federal Tax Administration, who passes the data on automatically to the equivalent authority abroad (as opposed to the present exchange of information on request):

- Name, address, country of residence, tax identification number, date of birth and birthplace
- Where a legal entity is the account holder: name, address, tax identification number of the legal entity, plus data of all persons subject to reporting
- Account number, name and, if applicable, identification number of reporting financial institution
- Account balance or account value (including cash or surrender value) in case of redeemable insurance policies or pension insurances at the end of the calendar year or at the time of the closing of the account
- Total gross earnings of interests, dividends and other revenue
- Total gross earnings of divesting or redemption of tangible or intangible assets.

After proclaiming the white-money strategy, Switzerland, via a constructive and active cooperation to develop a global standard, tried to ensure that its financial centre would not suffer a competitive disadvantage. Thus, it is crucial that financial centres like Singapore, Dubai or the USA adhere to these standards, just as Switzerland adheres to them, and do not circumvent them via fund management structures like trusts. Strong international pressure, particularly towards the USA, is needed to achieve this. It also seems difficult to reach a painless settlement for past tax obligations. For forgetful persons a voluntary disclosure as quickly as possible seems inevitable, as regulations for voluntary disclosure will be tightened in most countries as the introduction of automatic exchange of information approaches. Any concession in this matter towards one partner will also be sending a signal to all other future contract partners. National regulations regarding money laundering differ so much with regard to quality and quantity that it will affect the quality of data exchanged.

Not only does this new OECD standard represent the end of banking secrecy, but the financial institutions have also been made vicarious agents of the tax authorities. The Swiss Bankers Association (SBA) estimates the costs for the implementation of this bureaucratic monstrosity between CHF 500 and 800 million, and reckons the implementation will take 2 years. Whether the OECD standard really becomes a global standard remains to be seen. At the joint declaration to accept the standard, the USA and other Asian and Latin American countries were conspicuous by their absence. The main interested parties are mostly highly indebted, industrialised, high-tax countries trying to rebalance the national budget. To attain an effective global standard, emerging and developing nations must also be integrated, otherwise assets will be transferred to non-participating countries or beneficial owners will seek residence in such countries. Additionally, there are no sanctions provided, which means there is a risk that all these assets will simply be diverted to other channels.

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The freelancer: Tip of the iceberg?

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During our audit work, we sometimes encounter situations in which a businessperson has paid someone for having done certain work, but has not paid any social contributions. In reply to our enquiries, we are often told that 'everything is just fine as it involves a freelancer'. Unfortunately, there are many hidden legal and financial risks involved in using a freelancer. Here, we look at the most important aspects to consider.

What is a freelancer?

What is commonly known as freelancer is a free agent, who, being officially self-employed, works in a company and is, *de facto*, taking on the role of an employee. This free agent receives a fee instead of a salary. One of the alleged advantages is a high level of flexibility: employment laws regarding protection from unfair dismissal and sick pay do not apply, and no social contributions are paid as these become the freelancer's concern. These are the visible benefits of using a freelancer; but what potential hazards lie below the surface?

How are freelancers actually regulated?

In a legal sense, freelancers do not exist. There is only a distinction between being employed and self-employed.

Being employed means working under an employment contract, i.e. in a company and under the authority and the responsibility of an employer. In exchange, the employer pays a salary, takes care of all social contributions and employee insurance contributions and issues a salary statement.

Someone who is self-employed, on the other hand, has their own company, bears all business risks and personally deals with social contributions. A financial statement replaces the salary statement and determines any profit.

Where is the boundary between self-employed and employed?

Legislation covering Old Age and Survivors' Insurance (OASI) supplies the distinction between those two categories and is supervised by the OASI authorities. Self-employed persons enter the market under their own name and can freely choose the organisational structure of their company; they work with their own resources, and for multiple clients. Often, they have employees of their own. Anyone not fulfilling the criteria of being self-employed is by definition employed.

In many cases, the criteria are met in such an evident way that further clarification is unnecessary; for example, in the case of the purchase, at a fixed price, of a table manufactured by a carpenter in his own workshop, with his own tools and with his own employees. These criteria are also met, for example, when a gardening company does my garden twice a year, even if that is on my own premises and pay is on an hourly basis.

The distinction is not so easy in cases where individual activities are performed at a customer's company over a long period, which do not require specific operating resources, or which require the work being performed using the customer's infrastructure. Thus, we enter the field of computer science, professional services in all variations and sales services on commission basis – all industries in which one frequently encounters freelancers.

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In such situations, the OASI authorities examine each case individually, according to the actual facts, and use the number of customer relationships as a basis. The principle applied here is 'the more the better', with a minimum of three clients required, and where less than half the turnover is made with the largest client. Otherwise there is too much dependency on one particular client, and some form of employment is assumed. When someone officially becomes self-employed while *de facto* being in employment, it is treated as a case of 'disguised employment'.

While in employment – even *de facto* – an employee is regarded as the weaker party, and thus enjoys particular legal protection. This means the employer bears the risk for any infringements against work regulations or social insurance requirements. Passing on, via contractual agreement, special obligations to clarify mandatory social insurance contributions is just not possible.

Where are the hidden risks?

In some OASI employer audits we have noticed that the authorities are specifically looking for such arrangements, and you as an entrepreneur are at risk of having to pay the missing OASI contributions (both employer and employee contributions) as far as 5 years back. As a consequence, all accident insurance premiums also need to be paid for that period, and the employee integrated into a pension scheme. As private pension funds do not allow this retrospectively, only the expensive option of the Contingency Pension Fund remains.

In cases where the freelancer has made their own OASI contributions, it could be argued that some OASI regulations have been followed and that only the difference between the lower premiums for someone self-employed and the regular contributions needs to be paid in retrospect. Should a freelancer neither be registered under OASI nor have paid any contributions, you could find yourself accused of illegal employment and face heavy penalties. It gets even worse; should a freelancer become disabled after an accident that should have been covered by your accident insurance, then your business will be directly liable.

Labour hire as additional complication

In particular, the computer science industry frequently uses staff to be seconded to customers on a long-term basis, and to be integrated into the administration of the customer's company. This 'labour hire' is subject to a licence, for which staff-leasing companies are required to provide a deposit of at least CHF 50,000 (this also applies in cases when the staff-leasing companies are only seconding their own regular employees).

In principle, self-employment and staff leasing rule each other out. Where freelancers are employed and then seconded elsewhere, you face not only the above-mentioned risks but also those of breaches of the regulations covering labour hire. These risks go from withdrawal of authorisation to fines (for your client) for employing seconded staff. The only legal solution; the freelancer forms their own limited company, becomes the sole employee and applies for a labour-hire licence. The mandatory deposit seldom makes this feasible, and there is no getting around 'legitimate' employment.

How can I safeguard against risks?

In face of the legal and financial risks mentioned above, it is vitally important to avoid employing anyone in 'disguised employment'. The best approach is to systematically check any problematic situations in your company, and examine each potential case of self-employment individually.

For this purpose, the relevant OASI authorities have forms available for certification of self-employment; it is absolutely necessary to ask your contractor to provide this form before starting the contract. An entry in the commercial register, or VAT registration, though valuable hints of proper self-employment, are inadequate substitutes for certification by OASI.

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Attention: confirmation by OASI only shows that the person mentioned is self-employed and personally deals with OASI matters. Yet a specific job could still be regarded as employment as, depending on the amount, duration or administrative integration into your company, too much dependency might be created. In such situations we recommend presenting the specific case to the relevant OASI compensation office and asking for a binding judgement.

This newsletter is only able to supply a general overview of the complex world of social insurances and cannot replace a detailed analysis of any individual case or a particular geographic jurisdiction. Should you perceive the need for action in your company, or have any further questions regarding this matter, our specialists will be pleased to help you.

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New accounting legislation as tax catalyst

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This article analyses the amended Swiss accounting legislation from a tax point of view. The full article about this topic was published in a professional journal in March 2014 (the complete reference is provided at the end of this article).

> *95% of tax decisions are at the expense of the taxpayer, 90% in case of the Federal Supreme Court. This is not due to a formally or materially poor initial position of the taxpayer, it is an inherent failing in the system of tax proceedings and the fiscal court proceedings. All public sector professionals at administrations and courts are public sector employees and thus, basically, have the state's interest at heart. The new accounting legislation will not make great inroads into this basic situation, and despite all noble claims of fiscal neutrality, it will cause all levies to go up.*

According to Code of Obligations 958, accounting should represent the financial situation of a company in such a way that third parties can make a fair judgement. Thus 'fair presentation' becomes the new fundamental standard. As a result, building hidden reserves is no longer possible.

In contrast to past practice, all written guidance stresses that the purpose of the new accounting legislation is to ensure fiscal neutrality.

From a tax perspective, a few preferential rights in tax proceedings exist that reduce profits significantly; hidden reserves on stocks, del credere, and immediate write-offs, to name just the most important. These preferences cannot be reconciled with the principle of 'true and fair view'.

Thus, the starting position for analysis is as follows: As previous accounting legislation was more open, fiscal accounting regulations could be applied to balance sheet and profit-and-loss accounts, with the framework set up by the tax authorities as a matter of course. According to the new Swiss law, however, the very same fiscal accounting regulations, strictly speaking, can no longer be applied even though the tax authorities are still entitled to accept them. At first glance it appears likely that all manifestations of fiscal neutrality will be implemented. However, the extent to which fiscal neutrality is actually implemented is open to debate and depends on the directives from the Swiss authorities.

Consider the example of equity securities. The value of these investments is calculated according to accounting regulations and various methods (first-in, first-out [FIFO], last-in, first-out [LIFO], etc.) Tax authorities allow the taking of one-third of the value as hidden reserves on the investment. Specifically, investments in equity securities with a market value of CHF 9 million can be entered into the balance sheet at CHF 6 million. Cost of goods can be raised by CHF 3 million – a pleasant preferential right of tax practice. Should it not be possible to build up reserves in the first year, these hidden reserves can be established gradually over the years. It is obvious that this considerably reduces tax before profit, but it also means a reduction of profits in the actual balance of trade and thus no longer corresponds with 'fair presentation'.

In practice, tax authorities are granting flat *del credere* on debtors: 5% on (domestic) debtors, 10% on foreign debtors and 15% on foreign debtors with foreign currencies involved, with specific regulations varying from canton to canton. More often than not these flat depreciations are granted on the net amount loaned, after deduction of loans effectively at risk. This

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constitutes another case of building up hidden reserves that does not correspond with a 'true and fair view'.

Another obstacle in tax legislation on the way to 'fair presentation' is the balancing (capitalisation) of services that have not yet been billed. So far, Small and medium-sized enterprises (SMEs) in the services sector have rarely added this provision to the balance sheet. It is, and has been, the custom to add up all debtors that have been billed during the financial year. A balance position for work commenced was unusual. Fiscally neutral entries require individual advice. Artax Fide Consult AG has developed its own approach.

As the dilemma between fiscal neutrality and 'fair presentation' has been demonstrated, the question arises as to how approaches in line with accounting regulations can be applied to achieve the desired fiscal neutrality which has been guaranteed in relevant written material. There are two approaches.

- In the first approach, anyone intending to claim previous preferential rights that deviates from the new accounting legislation needs to show this difference in an appendix to the tax statement. This implicitly allows a profit adjustment in the tax statement, but is a necessary consequence of correctly implementing regulations.

- A second approach lies with dual accounting. In this approach a balance sheet is created according to both tax law regulations and accounting regulations and without any hidden reserves.

You can find the full article 'Das neue Rechnungslegunsrecht als Steuerkatalysator' (in German) by clicking on this link.

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