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The Exempt Company – A Dutch and British Version in the Caribbean Tax Landscape

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Abstract—**The aim of this paper is to present a comparative analysis between the Exempt type of company that can be found in the commercial legislations of the Dutch overseas countries: Aruba, Curaçao, and Sint Maarten and the one presented by the legislations of the British overseas territories: Bermuda, Cayman Islands, and Turks and Caicos Islands. The analysis of the Exempt company structure is performed at the level of incorporation conditions, capital requirements, management, taxation in relation to the company`s activities, and accounting and reporting requirements, all in the context of the fiscal systems of these overseas countries and territories. The purpose of this research is to determine if this corporate structure follows the same patterns when it is incorporated under a civil law based commercial code, which is specific to the three Dutch overseas countries as compared to a common law based commercial code, specific to the three British overseas territories under analysis. The results of this research have shown that even though the Exempt type of company can be found in all six countries and territories under analysis, it presents significant differences in approach when constructed under the Dutch legislation, compared to the British legislation.**

Index Terms—**British overseas territories, Dutch overseas countries, exempt company, tax haven.**

I. Introduction

The listing of the world`s tax havens of the Organization for Economic Cooperation and Development (OECD) from 2000 brought to the public`s attention a number of countries and territories whose fiscal policies were considered to lead to a harmful tax competition. The listing included the Dutch overseas countries: Aruba, Curaçao, and Sint Maarten as well as the British overseas territories: Bermuda, Cayman Islands, and Turks and Caicos Islands [1]. The main areas of concern were the lack of effective exchange of information and transparency in the tax area and therefore an internationally agreed tax standard was required to be issued in this respect. While, Bermuda and Cayman Islands made advanced commitments to implement the standard [1], Aruba, Curaçao, and Sint Maarten committed to cooperate with this OECD initiative in 2001 [2]-[4] followed by Turks and Caicos Islands in 2002 [5]. The key principles of transparency and exchange of information for tax purposes referred to the implementation of a mechanism for the exchange of information upon request between countries; the strict confidentiality of the information exchanged and the availability of reliable information (bank, ownership, identity, and accounting information) and power to obtain and provide such information upon request [6].

In order to create better tax coordination at the level of the Community and a level playing field in the area of taxation, the European Union (EU) also introduced a Code of Conduct for Business Taxation which aimed to eliminate any harmful tax measures that could provoke distortions in the single market. Both the Member States and their associated overseas countries and territories had to revise their commercial laws and fiscal policies in order to become Code compliant. Once again the British overseas territories and the Dutch overseas countries had to make profound amendments to their legislations. The main problems being addressed were concerning the tax advantages granted only to nonresidents with the associated *ring fencing tax effects*, the granting of these tax advantages even without real economic activity being carried out, and the lack of transparency of the operations conducted [7].

The adherence of both the Dutch overseas countries: Aruba, Curaçao, and Sint Maarten as well as the British overseas territories: Bermuda, Cayman Islands, and Turks and Caicos Islands to the OECD`s internationally agreed tax standard and their compliance to the EU`s Code of Conduct for Business Taxation came with major tax and commercial reforms. Their *offshore* sectors had been targeted first. Under the Dutch legislation, an *offshore company* was defined as a legal entity that was engaged in activities outside the territory of incorporation and whose shareholders were all nonresidents. These companies in particular were subject to a special tax regime (taxes between 2.4% and 3%) which fell under the provisions of the EU`s Code and had to be eliminated. Also the lack of taxation on the Aruban Exempt company had to be cancelled as a *ring fencing effect* was considered to be produced. In the case of the British overseas territories where there were no corporate taxes, the Exempt company was given a tax exemption guarantee for any future taxes that might have been introduced. This exemption guarantee was considered non compliant to the EU`s Code [8].

The aim of this paper is to present a comparative analysis between the Exempt company that can be found in the commercial legislations of the Dutch overseas countries: Aruba, Curaçao, and Sint Maarten and that of the British overseas territories: Bermuda, Cayman Islands, and Turks and Caicos Islands. Although the structure has been created to serve the *offshore sectors* of these islands and to present significant tax advantages, the adherence of these territories

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to the OECD`s internationally agreed tax standard as well as to the EU`s Code of Conduct for Business taxation has changed significantly the characteristics of this juridical entity. The differences that exist today between the Dutch Exempt company and the British Exempt company are significant and this is mainly due to the tax systems in place: The lack of corporate tax rates in the British territories as compared to a 27.5% to 34.5% tax rates in the Dutch territories. The analysis of the Exempt structure is performed at the level of incorporation conditions, capital requirements, management, taxation in relation to the company`s activities, and accounting and reporting requirements, all in the context of the fiscal systems of these overseas countries and territories.

The first part of the paper introduces a literature review in the area of *tax havens*. In the second part there are presented legal, economic and fiscal aspects of the Dutch and British territories followed by the comparative analysis of the Dutch versus British Exempt Company. The conclusions come to stress the main findings of this research.

II. Literature Underpinning

For the purpose of addressing the need to eliminate harmful tax competition, the OECD presents a *tax haven* as having the following characteristics: no or only nominal tax rates; lack of effective exchange of information; lack of transparency; and no substantial activities [9]. Yet, the rapid implementation by the nominated tax havens of the internationally agreed tax standard has made this definition being applicable today only to two territories: Nauru and Niue which have not succeeded in the implementation of the standard [10].

Hines presents *tax havens* as locations with very low tax rates and numerous tax incentives meant to attract investors [11]. Dharmapala and Hines give *tax haven* jurisdictions the following characteristics: Small countries, predominantly islands, with a population below 1 million; Good communication infrastructure; Few natural resources; British legal origins with English as an official language; Parliamentary systems; Proximity to the large capital-exporter countries; More affluent than other countries as they attract significant foreign investment due to the low tax rates and opportunities for tax avoidance; and High-quality governance institutions that can be translated in political stability, government effectiveness, rule of law and control of corruption [12]. All these aspects are important factors in the investment decisions and they all contribute to the development of these territories.

Tax havens are used especially by larger companies and those with extensive intergroup trade and high R and D activities [13]. These territories also provide multinationals with increased tax planning opportunities [14]. Low taxes represent an important factor in the corporate decisions and there is also an increasing worldwide trend for the managerial actions to be designed to minimize corporate taxes through aggressive tax planning activities [15].

Hence, it can be concluded that taxes have the potential to influence corporate behavior, as there is also evidence that many taxpayers prefer to pay fees to tax advisors rather than taxes to the government [16].

III. Overview of the Dutch Overseas Countries and British Overseas Territories

A. Legal Systems

Aruba, Curaçao, and Sint Maarten are autonomous countries within the Kingdom of the Netherlands, following the dissolution of the Netherlands Antilles on the 10th of October 2010 when Curaçao and Sint Maarten became constituent jurisdictions of the Kingdom. They are self-governing to a large degree, exception being made in the areas of defence, foreign relations, nationality and extradition, which are handled by the Netherlands. The Queen of the Kingdom of the Netherlands is the head of State, who is represented in each of the three jurisdictions by a Governor. Their legal system is based on the Dutch civil law.

On the other hand, Bermuda, Cayman Islands, and Turks and Caicos Islands are self-governed overseas territories of the United Kingdom. The Queen of England is the Head of State, retaining responsibility in the areas of internal security, civil service, defence, external affairs and international financial services. She is represented in each of the three territories by a Governor. Their legal system is based on the English Common law.

B. Economies

While the economies of Bermuda, Cayman Islands, and Turks and Caicos Islands are mainly sustained by their financial services sectors, the tourism sector and oil refining activities are the major economic drivers of Aruba, Curaçao, and Sint Maarten.

C. Tax Policies

In terms of taxation policies, both the Dutch overseas countries and the British overseas territories retain autonomy in constructing their fiscal systems in order to respond to their economic needs, yet with the condition that they are in line with both the OECD`s internationally agreed tax standard and the EU`s Code of Conduct for Business Taxation.

Aruba, Curaçao, and Sint Maarten present a fiscal system based on both direct and indirect taxation. At the level of corporate taxation, Aruba imposes a 28% tax rate, Curaçao a 27.5% tax rate and Sint Maarten 34.5% tax rate, applicable on the worldwide profits generated by all the companies incorporated or effectively managed and controlled in these islands [17]-[19].

Aruba does not impose withholding tax on interests and royalties, but on dividends, as it follows:

1) 10% tax on the dividend distribution, as a general rule;
2) 5% tax on the dividend distribution if at least 50% of shares of the distributing company or the receiving company are listed at a qualified stock exchange;
3) 0% tax if the participation exemption rule is applied [2].

Curaçao and Sint Maarten, on the other hand, does not impose an withholding tax neither on dividends nor on royalties, yet, a withholding tax rate of 35% applies on interests, according to the EU savings taxation directive [18], [19].

Bermuda, Cayman Islands, and Turks and Caicos Islands have in place a consumption-based tax system. There are no direct taxes neither on corporate nor personal income as well as no withholding taxes [20]-[22].

IV. The Exempt Company

In the case of the three Dutch countries under analysis, the Exempt type of company can be found as a distinct legal entity only in the commercial legislation of Aruba, under the name "The Aruban Exempt Company" or "A.V.V." [23]. In Curaçao and Sint Maarten the Exempt company is the nomination given to a limited liability company or "B.V." which benefits from a tax exempt status as long as certain criteria is met [24]. Despite this difference between Aruba and the other two islands, in terms of the official nomination given to the Aruban exempt company, this corporate structure meets many of the characteristics of a limited liability entity.

On the other hand the commercial legislations of Bermuda, Cayman Islands, and Turks and Caicos Islands present "The Exempted companies" as distinct legal entities from the local companies and their setting up and functioning conditions are described under a separate part in the Companies Acts [25]-[27].

A. *Incorporation*

The Dutch Exempted company is incorporated as a limited liability entity, having at least one founder, either an individual or a legal person. Nonresidents can establish this type of company by proxy [28].

On the other hand the British Exempted company may be formed with or without limited liability, as it follows:

1) A company limited by shares, where the liability of its members is limited by the memorandum to the amount, if any, unpaid on the shares held by them;
2) A company limited by guarantee, where the liability of its members is limited by the memorandum to such an amount as the members may undertake to contribute to the assets of the company in the event of it being wound up; or
3) An unlimited liability company where there is no limit on the liability of its members [25].

"Any one or more persons", natural or juridical, residents or non residents may incorporate an Exempted company in Bermuda, Cayman Islands, and Turks and Caicos Islands [25]-[27].

In Aruba, Curaçao, and Sint Maarten the Exempt Company is incorporated by a notarial deed which contains the articles of incorporation and it is required by law to be registered in the Trade Register kept by the Chamber of Commerce and Industry of the island where it is set up [2]-[4], [28].

The memorandum of association of a British exempted company must be delivered by a local registered agent that holds a relevant license in this respect to the Registrar of Companies. The latter will issue the company`s certificate of incorporation [25].

B. *Capital Requirements*

In terms of capital requirements, the Dutch exempt company has to issue at least one share with any nominal value. There is no minimum amount of shares that must be issued, the same being available in the case of the British Exempt company [25]-[28].

C. *Management*

From a Dutch perspective, the exempt company must have one or more managing directors, who can be either individuals or legal entities. One main condition is that at least one of the managing directors must be a resident of the island where the company is incorporated [23], [28]. Also, the affairs of a British Exempt company must be managed by at least one director, who can be either a natural or legal person, resident or nonresident .

The Aruban exempt company must have a legal representative that can only be a limited liability company incorporated and established in Aruba and which holds a relevant license in this respect [2]. Also, when a company incorporated in Curaçao or Sint Maarten is owned by nonresidents and it operates offshore, a corporate service provider is required to act as a local representative or managing director for the offshore company [3], [4].

The British exempt company must have a licensed registered agent in the island of incorporation. Bermuda`s Companies Act offers some alternatives to the exempt company which should have either:

1) A minimum of one director, who is ordinarily resident in Bermuda; or
2) A secretary that is an individual or a company having the status of an ordinarily resident in Bermuda; or
3) A resident representative that is an individual or a company having the status of an ordinarily resident in Bermuda [25].

On the other hand the exempt companies of the Cayman Islands and Turks and Caicos Islands must have a secretary, which is also provided by a local service provider [26], [27].

D. *Taxation in Relation to the Company's Activities*

All companies incorporated or effectively managed in Aruba, Curaçao, and Sint Maarten are subject to corporate income tax on their worldwide income [2]-[4]. Yet, different special tax regimes may apply if certain conditions are met.

An Aruban Exempted company is not subject to profit taxation and dividend withholding tax if it performs the following activities:

1) Holding of shares and other participation certificates;
2) Financing of other companies, whether or not intergroup;
3) Investment activities, except in real estate;
4) Licensing of intellectual and industrial property rights [28].

The Curaçao and Sint Maarten exempted companies may enjoy the same tax free position if the following conditions are met:

1) The company`s object of activity must be entirely in the area of financing activities and investments in shares and deposits;
2) The management must only consist of one or more resident individuals (natural or legal persons);
3) The management must maintain a register with the names and addresses of the ultimate beneficiaries of the

company;
4) The annual accounts must be prepared by the management and audited by an independent expert [28].

Another tax efficient option for the owners of these companies is the conversion of the exempt company into a fiscal transparent company also known as partnership. The fiscal transparent company is not subject to corporate income tax, unless it carries on a business on the territory of incorporation of the company. Also, there is no withholding tax on dividends since all the income, assets, and liabilities are attributed to the shareholders. The main requirement for this status is that the company`s shares must be registered and a notification regarding the transition of the entity to this status is filed with the Tax Authorities within one month after the company is set up [28]. The new status comes also with the elimination of the above mentioned qualified activities that would have been otherwise required to be performed by the exempt company. Therefore, the option for a fiscal transparent company provides two important tax incentives, namely the lack of profit tax and withholding tax for the companies that conduct activities outside the territory of incorporation.

The Exempt companies that can be found in the commercial legislations of Bermuda, Cayman Islands, and Turks and Caicos Islands have as a main functioning condition, in order to maintain this status and its afferent tax incentives, the restriction to carry business activities with residents, natural or legal persons of the islands where they are incorporated and neither to hold land or any interest in real property.

Under Bermuda`s Companies Act, an exempted company should not:

1) Acquire or hold land in Bermuda;
2) Acquire any bonds or debentures secured on land in Bermuda;
3) Carry on business of any kind or type in Bermuda, either alone or in partnership [25].

A company in the Cayman Islands or in Turks and Caicos Islands may apply to be incorporated as an exempted company only if the objects of activity are to be carried out mainly outside the Islands [26], [27].

E. Accounting and Reporting Requirements

There are no specific accounting requirements neither for the Dutch exempted companies nor for the British exempted companies.

Under Aruba, Curaçao, and Sint Maarten`s National Ordinance on General National Taxes, companies are required to keep accounting records comprising all relevant circumstances in order to determine with reasonable accuracy the financial position of the taxpayer. These accounting records must be sustained with relevant documents such as contracts and detailed invoices, as they constitute the basis for the company`s financial statements. The commercial codes establish that accounting records are to be kept for a time period of ten years. Also, every exempted company must prepare annual financial statements [2]-[4].

The exempt companies of Bermuda, Cayman Islands, and Turks and Caicos Islands must keep proper records of account with respect to:

1) All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
2) All sales and purchases of goods by the company;
3) The assets and liabilities of the company [25]-[27].

These accounting records must be complemented with underlying documentation such as contracts and invoices and must be kept for a minimum of five years. They must enable the directors to ascertain with reasonable accuracy the financial position of the company. Among the three British territories, only the Bermudian exempted company is required to prepare annual financial statements [25].

V. CONCLUSION

Although the initial scope of an exempt company was to serve the offshore sector, being dedicated only to nonresidents that were conducting activities outside the territory of incorporation, the later adherence of the Dutch overseas countries and the British overseas territories to the OECD`s tax standard as well as to the EU`s Code of Conduct for Business Taxation brought significant changes to this corporate structure. The tax systems of these territories also contributed to the way this juridical entity was shaped.

In the context of a neutral tax system applicable in the British overseas territories the exempt company, although dedicated to nonresidents that conduct activities only outside the islands of incorporation, did not raise the problem of the ring fencing effect harshly judged by the EU, due to the fact that there was no tax differentiation between the local and the exempt companies. On the other hand, in the case of the Dutch overseas countries that had in place corporate tax rates ranging from 27.5% to 34.5%, a special tax regime applicable to the exempt company (with rates between 2,4% to 3%) was considered as provoking a ring fencing effect. Therefore, a uniform taxation on all corporate entities was applicable in the Dutch overseas countries with no tax differentiations being made between the local companies and the exempt companies. At this point, the tax advantage for the exempt company disappeared.

Hence, if an exempt company in the British territory must be used only for the purpose of conducting activities outside the island of incorporation while benefiting for a zero corporate tax rate, an exempt company in the Dutch territory is constrained to conducting activities only in the areas of financing and investment in order to benefit for a tax exempt status, or otherwise a corporate tax rate between 27.5% to 34.5% is applicable. Yet, the request of an exempt company for a transparent status comes with two tax advantages (no profit tax and no withholding tax) and the possibility to conduct any type of activity.

Besides the differences that exist at the level of taxation and types of activities conducted, other aspects may be observed: the Dutch exempt company may be incorporated only as a limited liability company, whereas the British exempt company may be: a company limited by shares or a company limited by guarantee or an unlimited liability company. Also, the Dutch exempt company is incorporated by a notarial deed, whereas the British exempt company is not required to have the memorandum of association signed by a notary. The Dutch exempt company must prepare annual financial statements whereas in the case of the British territories only Bermuda imposes this requirement.

Therefore, the results of this research have shown that the main differences between the Dutch and the British exempt company are in the area of activities being allowed to be performed in connection to the applicable tax regime but also at the level of commercial legislation (civil and common law) that establishes the way in which the company is incorporated and managed.

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