

Client Alert.

September 7, 2010

Relief from UK Withholding Tax and the New Passport Scheme

By Trevor James and Sonia Girgis

On 1 September 2010, the new Double Taxation Treaty Passport (“DTTP”) scheme became operative. According to Her Majesty’s Revenue & Customs (“HMRC”) the new scheme will result in expedited treaty clearances and will provide a simpler and more efficient method of paying interest to overseas lenders, which has been sought after by businesses as an alternative to the present certified claim procedure for some time. This Alert outlines the main features of the new DTTP scheme and its implications for the UK borrower, overseas lender and the drafting of loan documents.

Under the DTTP scheme, an overseas corporate (or fiscally opaque) lender may go through a process of applying and becoming recognised by HMRC as resident of a country with which the UK has a double tax treaty arrangement and thereby be given a “passport” by HMRC. Each passported entity will be placed on an online publicly available register with a unique DTTP number. The register can be consulted by a prospective UK borrower to confirm the passported entity’s status.

The new scheme should result in the UK borrower being able to more easily and efficiently make UK loan interest payments in accordance with treaty rates as it will no longer need to wait for the overseas lender to obtain fiscal residency from its tax authority and for the fiscal residency to subsequently be supplied to HMRC. This will reduce the administrative burden for businesses.

Both parties have notification obligations under the DTTP scheme and it will be necessary for the parties to comply with these obligations. When a loan arrangement has been entered into, the passported entity must, within 30 days of making a passported loan, tell the UK borrower of the need to send the relevant form notifying HMRC. The UK borrower in turn must send that notification to HMRC so that the DTTP scheme will apply. In any case where the notification procedure or other requirements are not adhered to, the DTTP scheme will not apply to the loan and full withholding tax obligations will be applicable for any interest payments made under the loan arrangement, unless the certified claim procedure is used.

It should also be noted that following the issue of a direction, HMRC may request a lender, or borrower on the lender’s behalf, to supply any loan documentation or responses to specific requests for information. This means co-operation of the parties to the loan must be sought in the relevant documentation for the period following the direction.

HMRC’s stated intention is that such expedited clearance ought to be granted in about three weeks. This contrasts significantly with the certified claim procedure which takes several months to process. The certified claim process, however, still applies to loans outside of the DTTP scheme and also for instances where the parties choose not to use the new scheme. Also, HMRC has stated that it will seek to improve the DTTP scheme in light of experience.

Overall, the DTTP scheme is good news as it means that the overseas lender will not have to make a separate treaty application to HMRC in respect of every agreement that the lender enters into with a UK borrower thereby delaying the

Client Alert.

process. However, it is still necessary for the UK borrower to obtain a direction on a loan by loan basis. The DTTP scheme and the default certified claim process means that UK borrowers and overseas lenders must ensure that the loan documents provide the appropriate framework and procedure for the use of both treaty relief methods.

Contact:

Trevor James

44 20 7920 4087

tjames@mofo.com

Sonia Girgis

44 20 7920 4118

sgirgis@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for seven straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.