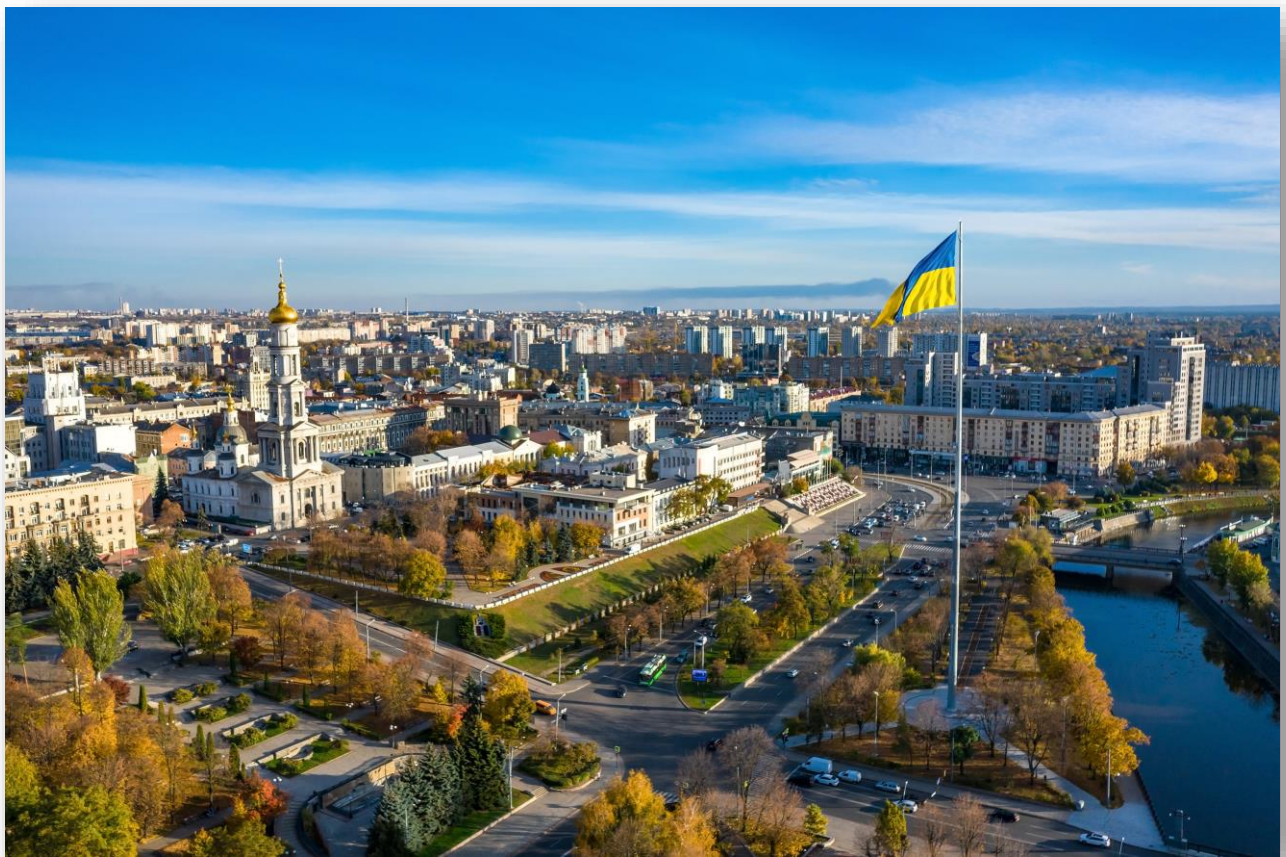




Fall | 23



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ESTABLISHING A BUSINESS ENTITY IN UKRAINE

ILN CORPORATE GROUP



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ESTABLISHING A BUSINESS ENTITY IN UKRAINE

1. Types of business entities

In order to start business activities involving Ukraine, foreign investors have to choose one of the business forms proposed by Ukrainian legislation. The most popular form of legal presence in Ukraine is the **limited liability company** (“**LLC**”). Sometimes, foreign investors may also choose to open a **branch** (subdivision) (“**branch**”) in Ukraine. Other business forms are less popular both among foreign investors and local entrepreneurs, such as (the list below is not exhaustive):

- Joint-stock company
- Additional liability company
- General partnership
- Limited partnership, etc.

In rare cases, Ukrainian legislation requires a business to be performed under specific types of business entities, e.g., banks or certain financial institutions can be established according to the law only in limited business forms, in particular, in the form of a joint-stock company.

Below, we provide a short overview of the limited liability company and the branch, and in the subsequent sections, we will focus on details related to the limited liability company as the most popular type of legal presence in Ukraine.

Limited Liability Company

A limited liability company is the most popular form of set-up among both local and foreign investors, in particular, due to its numerous advantages for business:

- first and foremost, an LLC acts as an independent legal entity (on its own behalf) with full business capacity in relations with third parties

- an LLC may conduct any business activities in Ukraine (except for some directly forbidden by law)
- an LLC may be incorporated by either local or foreign individuals/legal entities
- in contrast to a branch (where a foreign company is fully liable for the actions of a branch), an LLC is solely liable for its obligations with its own property
- participants in the LLC are not liable for the LLC’s obligations, and the LLC is not liable for the participant’s obligations; participants in the LLC are liable for the LLC’s obligations only in the amount of their contributions to the statutory capital
- an LLC enjoys a comparatively (with regard to, e.g., joint-stock companies) simple regulatory environment

Branch

In accordance with Ukrainian legislation, foreign legal entities have the right to open branches in Ukraine. Basically, the branch is a separate subdivision of a foreign company without the status of a legal entity. It carries out activities in the name and on behalf of its headquarters (foreign company).

The main function of the branch is usually to represent the interests of the foreign company in Ukraine with the aim of preparing the background for entering the Ukrainian market. Thus, branches are usually used upon entry onto the new market or for support in foreign economic activities – for market and social opinion studies and alike.

Depending upon the types and extent of such activities (preparatory/auxiliary nature or actual trading operations similar to the main business



of the headquarters), the branch may qualify either as a representative office (not being a corporate profit taxpayer in Ukraine) or as a permanent establishment (corporate profit taxpayer in Ukraine).

Taking into account that the branch does not have the status of a legal entity and cannot independently perform full-scale commercial activities in Ukraine, it is quite limited in its possibilities for doing business, e.g., it can enter into relationships with third parties only on behalf of the foreign company.

2. Steps and Timing for Establishing an LLC

An LLC has to be registered in the Ukrainian Unified State Register of Legal Entities, Individual Entrepreneurs and Non-Governmental Organizations (“**State Register**”). From the moment the LLC is registered in the State Register, it is deemed established.

Generally, two steps are performed for the establishment of an LLC:

1. Preparatory step (preparation and collection of documents/information needed for state registration);
2. Registration of the LLC in the State Register.

The state registration may be carried out by a notary or another state registrar. The standard term of registration is 24 hours upon submission of documents for the registration. The registration with the tax office, social fund, pension fund, and statistics committee is performed automatically with the registration in the State Register.

Prior to LLC establishment, if the LLC is to be established by several founders, such founders may enter into a written agreement on the establishment of an LLC in order to determine, if needed, the relationships between them upon the establishment of the LLC (e.g., to establish

the procedure for founding the LLC, the conditions for joint activities to establish the LLC, the amount of statutory capital, participatory interest in the statutory capital of each participant, terms and procedure for making contributions, and other conditions). Such agreement shall be valid until the date of state registration of the LLC unless otherwise prescribed by the agreement or if it follows from the substance of the obligation.

After registration of the LLC, the new company shall usually deal with a number of other standard matters to fully start its operation in Ukraine, such as obtaining an e-signature for the head of the LLC for tax reporting, opening bank account(s), entering into the lease agreements for the lease of a legal seat, etc.

3. Governance, Regulation and Ongoing Maintenance of the LLC

3.1. Brief summary of regulation and ongoing maintenance

Corporate governance of the LLC is performed by the company’s bodies, among which the General Participants Meeting (or Sole Participant) and executive body are obligatory to be created. Establishment of other bodies (in particular, a supervisory board) is optional.

The **General Participants Meeting** is the supreme body of the LLC. Each participant has the right to be present at the General Participants Meeting, to participate in the discussion of the agenda and to vote on the agenda of the General Participants Meeting. As a general rule, each participant at the General Participants Meeting has the number of votes proportional to the size of its participatory interest in the statutory capital, if otherwise is not specified in the Articles of Association (“**AoA**”) of the LLC.

The General Participants Meeting usually has the right to adopt decisions on any matters



related to the LLC's activity. As a general rule, decisions on most matters are adopted by a majority of votes of all participants of the LLC who have a right to vote on such matters. However, certain decisions shall be adopted by more votes – 3/4 of votes or unanimously by all participants of the LLC.

Under the common rule, a General Participants Meeting shall be convened at least once a year to decide on approval of financial results, distribution of the LLC's net profit, payment of dividends and their amount. Such annual General Participants Meeting shall be convened within six months of the year following the reporting year (i.e., until June 30 each year).

In an LLC with a sole participant, decisions on issues within the competence of the General Participants Meeting shall be made solely by such participant and fixed in a written decision of such participant.

The **executive body** of the LLC manages its day-to-day activity. The competence of the executive body includes making decisions on all issues related to the management of the day-to-day activities of the LLC, except for the issues that fall within the exclusive competence of the General Participants Meeting and the supervisory board (if it is established). The competence (including limitations, if needed) of the executive body is usually set out in the AoA of the LLC. The executive body shall report to the General Participants Meeting and the supervisory board (if it is established) and arrange the implementation of their decisions.

The executive body can be sole (a director) or collective (a board of directors) with a general director as its chairperson (other names of a sole/collective executive body and its chairperson may be established by the AoA). There are no limitations regarding the number of members of the collective executive body.

An individual who is a member of a collective executive body or acts as a sole executive body of the LLC cannot be a member of the supervisory board of such LLC (if it is established). Only one director (usually the head of the board) can be recorded as the head of the LLC in the State Register.

The Ukrainian legislation also provides for the possibility to appoint a non-executive member of the collective executive body of an LLC, who carries out the functions of supervision, risk management and control over the activities of the company and executive directors.

The LLC can create other bodies in the company, such as a **supervisory board**. The supervisory board, within the competence defined by the AoA, shall control and regulate the activities of the LLC's executive body. In practice, certain competences (except for exclusive ones) of the General Participants Meeting may be delegated to the supervisory board (e.g., provision of consent to the executive body for the conclusion of certain transactions on behalf of the LLC, appointment and termination of powers of members of the executive body). Establishment of a supervisory board in an LLC is not obligatory under Ukrainian laws.

3.2. Disclosure of ownership structure and UBO(s)

Under Ukrainian legislation, an LLC is obliged to disclose its full ownership structure (meaning all entities, individuals, etc. in the structure) and ultimate beneficiary owner(s) ("**UBO(s)**").

The ownership structure of the LLC and the UBO(s) shall be disclosed upon incorporation of the LLC. Also, the LLC is obliged to keep information on its ownership structure and UBO(s) updated in the State Register, notify the state registrar of changes within 30 working days from the date of their occurrence and



provide documents confirming the relevant changes.

Under Ukrainian legislation, the UBO for a legal entity is defined as any individual exercising decisive influence over the activities of the legal entity (including through the chain of control/ownership), which is:

- in the case of direct decisive influence – an individual’s direct ownership of at least 25 per cent of the legal entity’s statutory (share) capital or voting rights;
- in the case of indirect decisive influence:
 - at least, an individual’s ownership of at least 25 per cent of the legal entity’s statutory (share) capital or voting rights through related persons (both individuals and/or legal entities), trusts or other similar legal forms, or
 - exercising decisive influence through exercising the right of control, possession, usage or disposal of all assets or a share thereof; the right to receive income from the activities of a legal entity, trust or other similar legal form; the right of decisive influence on the formation of composition, voting results of governing bodies, and entering into agreements which enable the determination of the essential conditions of the economic activity of a legal entity, trust or other similar legal form; the right to issue mandatory instructions having a decisive influence on the activities of a legal entity, trust or other similar legal form, irrespective of formal ownership.

In this respect, a person who has formal ownership of 25 or more per cent of statutory capital or voting rights but who is merely a commercial agent, a nominal owner, or a nominal holder, or an intermediary in respect of such rights is not considered to be a UBO.

If the LLC does not have a UBO(s), a justified reason for such absence shall be provided.

Along with the submission of the ownership structure, it is also required to submit related confirmatory documents, such as extracts on legal entities included to the ownership structure, passports of UBOs, other documents confirming corporate rights of legal entities/persons/trusts/other formations in the ownership structure of the LLC, etc.

The founders/participants of a legal entity and/or individuals exercising decisive influence over activities of such legal entity are obliged to provide, upon request of the legal entity, the information needed by the legal entity to submit or update the UBO and ownership structure information in the State Register and also independently notify legal entities of a change of UBO and/or ownership structure of a legal entity within 5 working days from the date of such change.

The Ukrainian law also establishes fines for a number of violations related to disclosure of information on UBOs in the amount of up to UAH 340 000 (approximately EUR 8500), e.g. for indicating knowingly false information on the UBO or its absence by persons authorized to perform actions aimed at establishing legal entity or change of legal entity’s participants in documents submitted for respective state registration, failure to provide or untimely provision to the state registrar of information regarding the UBO or its absence by persons authorized to act on behalf of the legal entity, etc. For certain violations, there may also be administrative or criminal liability.



The data on the UBO (in particular, full name, country of citizenship, place of residence, full name and ID number (for residents) of the founder of the legal entity of which the person is the UBO and the extent of beneficial ownership or information on the absence of the UBO of a legal entity, including the UBO of its founder) is publicly available at the website of the State Register.

3.3. Accounting and reporting requirements

In general, LLCs are subject to standard reporting rules, such as periodic submission of financial statements to the tax authorities. Also, under Ukrainian legislation, financial statements of companies are not considered as commercial secret, confidential information or information with limited access. Therefore, the companies must provide copies of financial statements (including consolidated ones) at the request of legal entities and individuals.

In general, there is no requirement for the LLC to publicly disclose information or reporting. However, in cases established by laws, certain companies (e.g., big or middle companies as determined according to financial and other criteria envisaged by the legislation) are required to publish on their website (webpage) their reporting, e.g., annual financial statements, audit reports, management reports, reports on payments in favour of the state, consolidated reporting.

The audit of financial statements is also not generally obligatory in the LLC, except for cases established by laws (e.g., for the companies obliged under the law to publish their financial reporting along with audit report). The audit shall also be performed upon request of the participant(s) of the LLC.

An LLC is obliged to store documents related to the activities of an LLC, such as corporate documents (e.g., decisions of participants, AoA), annual financial reporting, auditors' reports,

documents confirming the rights of the LLC to the property, accounting documents, etc. The LLC shall ensure access of the participants to the stored documents.

3.4. Requirements for local shareholding/directors

An LLC shall be incorporated by at least 1 founder (participant). There are no limitations as to the quantity of founders (participants). The LLC may be incorporated by individuals and/or legal entities (both Ukrainian or foreign). Prior to the incorporation of an LLC, foreign individuals who are founders need to obtain Ukrainian tax identification codes.

An executive body of the LLC may be composed of both Ukrainian and/or foreign individuals. Prior to appointment, foreign individuals who are directors need to obtain Ukrainian tax identification codes. A member of the executive body may perform its functions either based on a services agreement or employment agreement. In the case of employment of a foreign individual, prior to it, the LLC needs to obtain a work permit for such individual.

There is no obligation for foreign participants/members of the executive body to reside in Ukraine. However, if there is a need for frequent visits to Ukraine or a long stay in Ukraine, a foreigner may obtain a temporary residence permit in Ukraine under certain conditions (e.g., availability of a work permit).

In certain cases, and under the conditions provided for by the law, the powers of an executive body may be performed by a legal entity registered according to Ukrainian legislation (e.g., this option is available for LLCs – residents of Diia City, which are mostly IT companies).

3.5. The conclusion of a corporate agreement

A corporate agreement under Ukrainian law is defined as an agreement under which the



participants of an LLC undertake to exercise their rights and powers in a certain way or refrain from exercising them. The corporate agreement can be payable or free of charge and shall be concluded in writing. The LLC itself and third parties may also be a party to the corporate agreement.

The corporate agreement may provide for the conditions or procedure for determining the conditions under which the participant has a right or an obligation to buy or sell the participatory interest in the statutory capital (its part), as well as determine cases when such right or obligation arises. The content of the corporate agreement is not subject to disclosure and is considered confidential unless otherwise is established by the law or by the agreement.

The corporate agreement may be governed by other than Ukrainian law upon the parties' choice should the LLC have a foreign participant(s).

In order to secure the participants' obligations under the corporate agreement, the subject of which, in particular, relates to the rights to a participatory interest in the LLC or powers of the LLC's participants, the respective party may issue an irrevocable power of attorney to the other party.

3.6. Minority participants' rights and protection

Ukrainian legislation related to LLCs does not specifically divide participants into majority and minority ones and does not provide for special protection rules for minority participants.

Basically, all participants in an LLC have the same rights, in particular:

- to participate in the management of the LLC (e.g., to participate in the General Participants Meetings, to vote for decisions, etc.)

- to receive information about the business activity of the LLC
- to participate in the distribution of the LLC's net profit
- to receive the remaining part of the property after settlements with creditors or its value in case of liquidation of the LLC, etc.

However, the legislation of Ukraine provides participants with small participatory interests with opportunities to influence the management processes and activities of the LLC, in particular:

- certain decisions of General Participants Meetings need 3/4 of the votes of participants of the LLC to be adopted (e.g., making changes to the AoA of the LLC, amending the size of the statutory capital of the LLC, etc.) or have to be adopted unanimously by all participants (e.g., approving the monetary value of the participant's in-kind contribution)
- a participant(s), who (collectively) owns 10% or more of the statutory capital of the LLC may request to convene a General Participants Meeting and/or to perform an audit of the financial statements of the LLC with the involvement of an independent auditor (auditing firm)
- proposals of a participant(s), who (collectively) owns 5% or more of the statutory capital of the LLC shall mandatorily be included to the agenda of the General Participants Meeting, etc.

Also, a participant in the LLC whose participatory interest in the statutory capital of the LLC is less than 50% may withdraw from the LLC at any time without the consent of other participants.



4. Foreign Investment, Capitalization Obligations, Residency and Material Visa Restrictions, Tax Issues

4.1. Any significant barriers to entry for a foreign party

In general, there are no barriers for a foreign party to be a participant in an LLC (except for certain particular cases, e.g., limitations in this respect of residents of the Russian Federation (both legal entities and individuals) due to imposed restrictions as a result of the military aggression of the Russian Federation against Ukraine). Still, some restrictions related to further business activities of the company with foreign investments may apply (e.g., related to certain activities with plots of land).

4.2. Any capitalization obligations

There are no requirements regarding the minimum amount of the LLC's statutory capital, however, it should be more than 0 (zero) UAH. Usually, it is advisable for the founder(s) to consider initially forming the statutory capital in an amount that covers at least first-time expenses of LLC (e.g., salaries, lease of the premises, accounting/HR or other services, office/production appliances, etc.).

The information on the statutory capital is registered in the State Register only in Ukrainian currency (UAH) upon the registration of the LLC. The statutory capital is formed by the contributions of the participants in monetary (including in foreign currency) or in-kind forms within six months from the date of the registration of the LLC unless another deadline is established in the AoA. The contributions made in foreign currency shall have the equivalent in Ukrainian currency (UAH) in a decision of the General Participants Meeting (Sole Participant). The contributions made in kind should have the monetary valuation approved by the unanimous decision

of the General Participants Meeting (Sole Participant).

If the value of the LLC's net assets has decreased by more than 50 per cent compared to this indicator at the end of the previous year, the LLC's executive body convenes a General Participants Meeting, which must make a decision on the measures to be taken to improve the financial condition of the LLC, on reducing the statutory capital of the LLC or on liquidating the LLC.

4.3. Any special business or investment visa issues

As a general rule, in the case of a visa-free regime (applicable, in particular, for EU citizens), foreigners can stay on the territory of Ukraine for not more than 90 days during a 180-day period. A longer stay requires obtaining other grounds for stay, e.g., a temporary residence permit.

In Ukraine, there are no specific business or investment visas. However, foreign investors may obtain a temporary residence permit if they comply with the following requirements:

- a foreigner/stateless person is a founder/participant/UBO of a Ukrainian legal entity;
- the amount of participatory interest of a foreigner/stateless person or foreign legal entity where such foreigner/stateless person is a UBO in the statutory capital of a Ukrainian legal entity is not less than 100,000 Euro.

In addition to mentioned above, Ukrainian legislation also contains other grounds for obtaining a temporary residence permit by a foreigner (e.g., if a foreigner is employed with the LLC and has a Ukrainian work permit).

A foreign investment in Ukraine's economy in an amount of not less than 100,000 USD is also a



ground for obtaining a permit for immigration to Ukraine.

4.4. Tax issues to consider when entering the Ukrainian market

What are key taxes payable by a Ukrainian company?

The most common taxes payable by Ukrainian companies are corporate profit tax (the standard rate is 18%), VAT (the standard rate is 20%), and employment-related taxes (to be discussed below).

If the company owns or rents some property, there are also property taxes to consider, such as land tax and real estate tax.

Land tax is imposed on owners and users of land. The exact rate of tax on plots of land is determined by the local municipal authorities within the maximum limits established by the Tax Code. Depending upon the type of land, the rate varies from 0.1% to 12% of the normative evaluation of a plot of land.

Real estate tax is paid by owners of real estate. The tax base is the area of the real estate. The exact tax rate is established by local municipal authorities depending upon the types and location of real estate objects within the maximum limit of 1.5% of the monthly minimum wage (annually established by the state budget law) per 1 square metre.

Are there any tax incentives for foreign investors available?

Ukrainian tax incentives are typically focused on specific areas of business or operations which the state wants to support or promote. For example:

- Companies operating in the processing industry, R&D, collection, treatment, and disposal of waste, and material recovery can become **members of industrial parks** and therefore enjoy exemption

from corporate profit tax and other tax benefits.

- Companies engaged in the processing industry, waste management, transportation, extraction of minerals, education, logistics, tourism, warehousing, and some other industries and planning **significant investments in Ukraine** (i.e., exceeding EUR 20 million) can also apply for corporate profit tax exemption and certain other tax and customs exemptions.
- IT companies meeting certain qualifying requirements can enjoy the tax benefits of a special tax regime for this industry called “**Diia City**”.
- Importation of goods to be further contributed into the charter capital of a Ukrainian subsidiary is exempt from customs duties provided that it will not be alienated for 3 subsequent years.

What is the tax burden for the salary of the employees of a Ukrainian company?

The employer pays the following taxes as the tax agent of its employees (tax base – gross salary accrued to the employee; the salary actually paid out to the employee is decreased by the amount of the below taxes so that they are actually paid at the employee’s expense):

- personal income tax at the rate of 18%;
- defence contribution at the rate of 1.5%.

Also, the company as an employer at its own cost pays 22% of social contribution applicable to a gross salary and accrued on top of it. The maximum tax base applies, which results in maximum absolute social contribution amount in 2023 being EUR 550 per month.

Notably, when negotiating salaries, Ukrainian employees always imply a net figure, and not the company cost.



Are there any tax risks stemming from subcontracting individuals vs employing them?

This question is typical when a foreign company investigates options for minimizing employment costs. Individual subcontractors in Ukraine are usually individuals registered as private entrepreneurs using a simplified system of taxation (implying only 5% of unified tax applicable to an individual's gross income). However, this option is available only provided that the subcontract does not formally replace actual employment.

In other words, if relations between the company and subcontractor contain key features of labour relations (such as fixed working schedule, vacations, fixed monthly remuneration, place of work in the office, etc.), such relations will be re-qualified as employment ones. As a result, additional payroll taxes will be accrued with other related adverse consequences for the employer.

Is VAT payer registration necessary?

VAT payer registration is required when within 12 subsequent calendar months the company supplies VAT-able goods/services (inclusive via the internet) for an amount exceeding UAH 1 million (around 25,000 EUR in 2023). However, a company may also register as VAT payer voluntarily, in particular, along with registration of an LLC.

In 2022, Ukraine introduced a "Google Tax". This means that foreign companies not having a legal presence in Ukraine still have to register as VAT payers in the country and pay VAT provided that they sell e-services (e-books, streaming and cloud services, applications for mobile phones, etc.) to Ukrainian end-user individuals.

How does a Ukrainian VAT refund operate?

Ukraine uses a quite complicated system for electronic administration of VAT, of which a VAT

refund is a part. In simple words, the conditions and procedure can be described as follows.

A Ukrainian company being registered as a VAT payer in Ukraine and having no tax debts can apply for a VAT refund with regard to the negative difference between VAT obligations and VAT credit available as a result of the reporting month.

Only those VAT amounts that had been actually paid to suppliers (and which are confirmed by the respective duly registered VAT invoice issued by them) or to the state budget (e.g., upon importation of goods into Ukraine) can be refunded. A VAT refund is granted upon a special application from the taxpayer in chronological order (according to the sequence of submitted refund applications registered in the national VAT refund register).

Importantly, Ukrainian companies cannot refund VAT paid to foreign state budgets or to foreign suppliers not registered as VAT payers in Ukraine.

What is the tax treatment of passive income distributions to a foreign affiliated company?

Passive income distributions (such as dividends, interest, royalties) are subject to a 15% domestic withholding tax. However, this rate can be significantly decreased (in some cases up to 0%) should the recipient be residing in a country which has a double tax treaty with Ukraine. Ukraine has a wide network of such treaties in effect.

The key conditions for applying reduced rates under the treaty are: (i) the recipient being the beneficiary owner of respective income, and (ii) such recipient having provided the Ukrainian company with a certificate confirming its tax residency of the treaty country.

Most treaties envisage that the amount of tax withheld in Ukraine can be further credited



against the corporate profit tax in the country of the recipient's tax residence.

Will a foreign national director become a tax resident of Ukraine due to the fact of holding a position in the company?

The mere fact of a person holding a position in a Ukrainian company does not automatically lead to that person being qualified as a Ukrainian tax resident. To qualify a person as a Ukrainian tax resident, a system of tax residency criteria has to be applied to this person. This system includes not only those criteria used in domestic tax law, but also in respective double tax treaty applicable.

It should be noted that identifying Ukraine as the centre of a person's vital interests is one of the most decisive criteria resulting in a person being qualified as a Ukrainian tax resident. Usually, the centre of vital interests exists in Ukraine if a person owns shares in Ukrainian companies, owns immovable property (especially, residential) in Ukraine, is employed with Ukrainian companies, has family ties here, especially when his/her family lives in Ukraine and his/her children go to educational institutions here.

The above information is provided for general understanding and informational purposes only.

In general, information is provided according to the standard legislation of Ukraine and does not focus on specific regulations that may, from time to time, be introduced into the legislation of Ukraine due to the martial law introduced in Ukraine since February 24, 2022 in response to the military aggression of the Russian Federation against Ukraine.

On no account can the provided information be considered as either a legal opinion or advice on how to proceed in particular cases or on how to assess them.

Legal entity establishment may also involve other legal and tax aspects. We strongly advise that legal and tax advisors be involved in order to ensure that each specific case is dealt with comprehensively. If you need any further information on the issues covered by this overview, please contact Mr. Taras Utiralov (utiralov@peterkapartners.ua) or Ms. Halyna Melnyk (melnyk@peterkapartners.ua).

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