TRONCONI SEGARRA & ASSOCIATES LLP

Certified Public Accountants
Business Consultants

SOLUTIONS BEYOND THE OBVIOUS

Exporting to the US 101

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Business Consultants

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Providing ***Solutions Beyond the Obvious*** since 2007

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AREAS OF EXPERTISE:
- Identification and delivery of strategic business and tax solutions for international clients entering or expanding into the United States through start-up or acquisition.
- Addressing U.S. federal, state and local corporate tax implications, international tax structuring and finance opportunities.
- State and local tax strategic business and tax solutions.
- Compliance for U.S. citizens living abroad (FBAR & FATCA).

EDUCATION
- Canisius College, Buffalo, New York
  - Dual Bachelor of Science Degree, Accounting, and Accounting Information Systems

LICENSES/PROFESSIONAL AFFILIATIONS
- Certified Public Accountant (CPA) Licensed in New York State
- American Institute of Certified Public Accountants (AICPA)
- New York State Society of Certified Public Accountants (NYSSCPA)
- Internal Revenue Service (IRS) Certified Acceptance Agent (CAA)

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AREAS OF EXPERTISE:
- State and local tax (SALT)
  - Determining state and local tax nexus and filing requirements for multistate businesses
  - Assistance with all aspects of sales & use tax compliance, from registration to assessing taxability of products and services to filing sales tax returns and responding to state inquiries
  - Coordinating sales tax audit defense for businesses being audited by state taxing authorities
  - Other sales tax services including research, refund and utility studies, and transaction services.

EDUCATION
- State University of New York at Buffalo
  - Bachelor of Science Degree, Cum Laude, Business Administration-Accounting, 1998

LICENSES/PROFESSIONAL AFFILIATIONS
- Certified Public Accountant (CPA) licensed in New York State
- American Institute of Certified Public Accountants (AICPA)
- Planner and Instructor, annual NYSSCPA/University at Buffalo Tax Institute

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Expanding Internationally – U.S.

- “Testing the Waters” – operating as a U.S. branch
- Creating a U.S. based subsidiary entity
- Acquire an existing U.S. based business
- Develop business/export plan
- Get local professional advice

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Federal Tax

- Foreign persons doing business in the U.S. are subject to federal tax on income that is effectively connected with the conduct of a trade or business within the U.S.
- However, the U.S. - Canada Tax Treaty provides that a Canadian company's business profits only are subject to U.S. federal income tax if it creates a Permanent Establishment (PE) in the United States

Permanent Establishment (PE)

- A PE, as defined under most tax treaties, includes:
  - A fixed place of business (i.e., branch, office, factory, workshop, place of management, a building site or construction or installation project if it lasts more than 12 months
  - A dependent agent in the U.S. with the authority to sign contracts on behalf of the business
  - Providing services to U.S. customers for 183 days or more in a 12-month period by an individual who was physically present in the U.S. <u>and</u> during that period, more than 50% of business revenues were derived from services performed in U.S.

Permanent Establishment (PE) (cont'd)

- A PE does not include a fixed place of business used solely for one or more of the following activities:
  - The use of facilities for the purpose of storage, display or delivery of goods or merchandise
  - The maintenance of a stock of goods or merchandise for the purpose of storage, display or delivery
  - The maintenance of a stock of goods or merchandise for the purpose of processing by another person
  - The purchase of goods or merchandise, or the collection of information
  - Advertising, the supply of information, scientific research or similar activities that have a preparatory or auxiliary character

Treaty-Based Returns

- A Canadian company conducting business in the U.S. that does not create a PE will not owe Federal income tax
  - File treaty-based Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation* (only the information section); and
  - Form 8833, *Treaty-Based Return Position Disclosure* to report the treaty position that is being relied upon
    - Generally, file Form 1120-F - 5 ½ months after the end of its fiscal tax year (June 15)
    - Requires a U.S. tax identification number (EIN)
    - Statute of limitations clock starts ticking
    - Avoid future penalties and interest on non-filed returns

Treaty-Based Returns (cont'd)

- When a Canadian company has a PE, it should file Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation,* complete all sections of the form and pay the amount of income tax due
  - A Canadian company with a place of business in the U.S. must generally file Form 1120-F - 3 ½ months after the end of its fiscal tax year (April 15)

Other Federal Issues

- Other questions may arise as a business expands into the U.S.:
  - Should the company create a U.S. business entity for its U.S. sales and activities?
  - How should U.S.-based business subsidiaries be structured and how will profits be repatriated to Canada?
  - Will Canadian employees be subject to U.S. federal income tax?

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State and Local Tax

- Inbound businesses are often advised they have “treaty protection” for their business activities in the United States
  - Treaty applies to U.S. Federal income taxes only
  - The 50 states are not bound by U.S. tax treaties or permanent establishment rules and may tax foreign companies doing business within their borders
  - A foreign company may have state and/or local gross receipts, income, sales & use, property and payroll tax filing obligations depending on their U.S. business activities

Nexus

- Nexus describes the amount and degree of a taxpayer's business activity that must be present in a state before the taxpayer becomes subject to the State's taxing jurisdiction or power
  - Some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax
  - States impose differing nexus standards for different types of taxes:
    - Physical presence
    - Economic presence
    - Factor presence

Sales and Use Tax

- There has been a titanic shift from physical presence nexus to economic presence in a state to create nexus
  - South Dakota v. Wayfair Inc.
    - On June 21, 2018, the U.S. Supreme Court overturned the physical presence standard, finding it “unsound and incorrect”
    - Effectively created new sales & use tax filing requirements (i.e., sales dollar and transaction thresholds) for remote sellers
      - A remote seller is generally any business that sells tangible personal property or services for delivery into a state, using the Internet, mail order, or telephone, without having physical presence in that state

Sales and Use Tax (cont'd)

- Unfortunately, the states do not impose uniform sales thresholds, effective dates, lookback periods, or types of transactions included in the sales/transaction threshold counts
  - Wayfair Thresholds
  - Different rules for businesses selling on online marketplaces like Amazon, Walmart, eBay, Etsy
- Each state imposes its own rules and regulations defining the taxability of goods and services
  - Over 13,000 sales tax jurisdictions in the U.S.
  - Some states allow localities to administer their own sales tax
  - Need to document sales for resale and other exempt sales

Income Tax

- Physical Presence Nexus
  - Having a physical presence in a state typically creates nexus, however it is not needed
- Economic Nexus
  - Some state courts and taxing authorities have applied a test based on an economic connection to the state, while other states have expressly adopted by statute an economic presence standard for income tax purposes

Income Tax (cont'd)

- Factor Presence Nexus
  - Under this standard, a company would be considered to be doing business in a state if it had property, payroll or sales that exceeded certain thresholds during the tax period
    - Property of $50,000; or
    - Payroll of $50,000; or
    - Sales of $500,000, or
    - 25% of total, property, total payroll or sales

Income Tax (cont'd)

- Federal Nexus Limitations
  - The Federal Interstate Income Tax Law (P.L. 86-272) prohibits any state from imposing a "net income tax" on income derived within that state from interstate commerce if in-state activity is limited to:
    - Enacted by U.S. Congress in 1959 to provide multistate corporations with a limited safe harbor from imposition of state income taxes
    - "Mere solicitation" of orders for tangible personal property (does not include services or digital property);
    - Provided that the orders are sent outside the state for approval; and
    - Fulfilled by shipment or delivery from a point outside the state
    - Protection may not be afforded to foreign sellers

Income Tax (cont'd)

- P.L. 86-272 traps
  - Business can still be subject to minimum taxes or alternative base taxes
    - Ohio Commercial Activities Tax (CAT)
    - Texas Margin Tax
    - Washington Business & Occupations Tax (B&O)
    - California $800 Fixed Minimum Tax
  - Though these liabilities are minimal, they can add up over the years, especially after you add interest and penalties

Other SALT Issues

- Other issues may arise as a business expands into the U.S.:
  - Business registration and license fees (legal and tax)
  - Gross receipts taxes
  - Payroll taxes including employee income tax withholding and unemployment taxes
  - Taxes on real and personal property
  - Taxes and fees imposed by local governments

Expanding Internationally – Other Countries

- Develop business/export plan
- Get local professional advice
- Canada has tax treaties with 84 countries
    - (OECD) Organisation for Economic Co-operation and Development https://www.oecd.org/

? Questions

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