COMPANY FORMATION IN THE USA

MAIN FORMS OF COMPANY/BUSINESS IN THE UNITED STATES OF AMERICA

- The principal forms of doing business in the U.S. are the corporation, limited liability company (LLC), partnership, limited partnership, and branch.
- The LLC, partnership, and branch are tax transparent, although the LLC is eligible to elect it's entity status under the "check the box" rules. The corporate structure is treated as a separate entity for legal and tax purposes and is the most common for foreign investors.
- The "check the box" election is an entity classification election made for tax purposes only; to elect corporation, partnership, or disregarded entity status for eligible entities. There are default rules if an election is not made.
- The LLC is a relatively new state structure which provides limited liability for owners and provides flexibility in electing its tax treatment and can be used by foreign investors.

SPECIFIC TAX CONCERNS RELATED TO ESTABLISHING A COMPANY

- Determine if level of activities give rise to a permanent establishment. Non-residents are only subject to business income tax on income effectively connected with a U.S. trade or business. Residents are taxed on their worldwide income.
- Non-residents are always subject to non-business income tax on U.S. source payments ("FDAP") such as interest, dividends, rents, and royalties, at a rate of 30% and is reduced or eliminated by the related treaty.
- A foreign partner in a U.S. partnership is considered engaged in a U.S. trade or business and is subject to withholding on the partner's share of effectively connected income at the highest corporate rate of 35%.
- There is generally no tax advantage for a foreign corporation to operate thru a U.S. partnership or branch due to the branch profits tax which imposes a 30% tax on adjusted current earnings and profits (or "dividend equivalent amount").
- Thin capitalization rules apply to limit interest deduction on payments to non-U.S. related entities and may re-characterize such payments as dividends. These rules apply if the debt to equity ratio exceeds 1:5 and separate calculations are required to determine deductible interest amounts. Disallowed interest may be deductible in future years.
- There are no federal tax incentives for locating in a given location. However, the U.S. does have a number of federal tax credits and deductions meant to operate as incentives such as Research and Development (R&D credits) and Energy credits, manufacturing deductions and accelerated depreciation. State incentives and credits can be negotiated separately at the state and local level.
- Taxes in the U.S. are levied by all levels of government; federal, state, and local. There are no federal sales taxes or value added tax although the federal government does access excise tax at the wholesale level on certain commodities. Most states and local governments generally levy sales tax on the final consumer purchase. Graduated rates of federal business income tax range from 15% to 35% of net taxable income. State tax rates vary widely from 3%-11% of taxable income.

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LEGAL ISSUES RELATED TO ESTABLISHING A COMPANY

- Many companies are formed in Delaware which has a history of favorable corporate statues.
- A firm may organize under the laws of any one of the states and would be deemed domestic in that state. To qualify to do business outside the state of incorporation may require additional incorporation or registration steps. It is very common for companies to operate in multiple states.
- There is no minimum capital or management nationality requirement although specifics are governed by state law.
- Business licenses may be required by local or state authorities.

CULTURAL CONCERNS RELATED TO ESTABLISHING A COMPANY

In considering establishing a business in the U.S. there are large diverse cultural differences between states and cities.

OTHER COUNTRY-SPECIFIC ISSUES RELATED TO ESTABLISHING A COMPANY

There are no requirements for statutory audits in the U.S.