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Scrutiny Office
FAO: Corporate Services Panel (the "Panel")
Morier House
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By email only to: scrutiny@gov.je

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Dear Panel Members

Draft Taxation (Enveloped Property Transactions) (Jersey) Law 202- (the "Draft EPTT Law") ([Link](#))

1. Introduction

I am writing in response to the Panel's call for evidence concerning the Draft EPTT Law ([Link](#)).

I am a Jersey advocate and a partner in the corporate department at Carey Olsen. My day-to-day practice is concerned with corporate law, mergers & acquisitions and the creation and reorganisation of investment holding structures utilising Jersey vehicles – most commonly, Jersey private companies incorporated under the Companies (Jersey) Law 1991 (as amended) (the "Companies Law").

The purpose of this letter is to address one specific aspect of the proposed Draft EPTT Law, being the proposed changes to the Companies Law which, in my view, will, if adopted, create uncertainty and complexity around the transfer of shares in a Jersey company. This uncertainty and complexity is for no real benefit and increases the risk of, and administrative burden attached to, using a Jersey company in investment holding structures. This creates a risk that the Jersey company (and therefore Jersey as a jurisdiction) will become less attractive to international investors which will, in turn, may have a negative effect on Jersey's economy.

2. Proposed changes to the Companies Law

Aside from the introduction of the new tax itself, adoption of the Draft EPTT Law will also effect a consequential amendment to the Companies Law. Specifically, Article 42 (*Transfer and Registration*) of the Companies Law will be amended (as per Schedule 3 of the Draft EPTT Law) so as to provide that a Jersey company may not register a transfer of shares which is a "relevant transaction" (in summary, a transaction which is within the scope of the new taxation regime) unless a receipt for payment of the relevant tax as issued by the Tax Office is produced.

Carey Olsen Jersey LLP is registered as a limited liability partnership in Jersey with registered number 80.

In my view, this proposal is concerning and unwelcome as it creates uncertainty and complexity around such a transfer of shares for no real benefit.

By way of further detail:

- a) In the event that a transfer of Jersey shares is recorded in breach (even innocent or mistaken breach) of the Companies Law then the status of that transfer and, accordingly, the title to the shares of the relevant transferee is uncertain. It may be void (in summary, invalid and unenforceable as if it had never happened) or voidable (in summary, potentially invalid at the option of an interested party) – the Draft EPTT Law is not clear on this important issue.
- b) A practical example where such a breach situation could arise is a transaction which involves the transfer of shares in a Jersey holding company of a group which happens to have relevant Jersey real estate held further down the corporate structure. Such real estate may not be material to the group as a whole and/or the overall transaction which could lead to a risk that the liability to the EPTT tax may not be identified in time for completion of the transfer. In that event, the purported transfer of shares at completion would be in breach of the Companies Law. In most cases, if the transaction parties are properly advised, it should be that the issue would be identified and resolved in time but the risk remains. Given the prevalence of Jersey companies in corporate holding structures, including those international groups which hold indirect interests in Jersey real estate, this is, in my view, a real concern.
- c) Creating this uncertainty around title to shares brings no real benefit. In fact, it prejudices investors using a Jersey company as compared to companies from other jurisdictions. In the above example, were a company from any other jurisdiction to be transferred then a failure to pay the tax would not invalidate that transfer (since the Companies Law amendment above would not apply to companies incorporated outside Jersey). The tax remains payable in both scenarios but, in the case of a Jersey company, there is also the added complexity and uncertainty of a defective transfer and/or questions around title.
- d) Another practical issue could arise in the context of certain secured lending transactions, in particular where, as is commonly the case, debt is used to fund the acquisition of a Jersey company and, in that connection, the Jersey company shares are to be pledged/secured by the new owner as collateral for that debt. Customarily, that security takes effect at completion of the transaction. While there are various methods to create such security under the Security Interest (Jersey) Law 2012 (as amended) ("**Security Interests Law**"), the usual approach is for secured parties to take possession of the share certificate and thereby constitute "**control**" security under the Security Interests Law. Post-adoption of the Draft EPTT Law, this approach will not be possible in respect of Jersey companies with an interest in Jersey real estate since the share certificate will not be available until the register of members is updated following payment of the tax. It is not clear whether this issue (and any consequent amendments to the Security Interests Law) were considered when the Draft EPTT Law was drafted. While I expect practice will adapt reasonably quickly to account for this change, the result, given most secured parties will still likely require the security to be constituted on such terms, is an increased administrative and costs burden on transaction parties as there will then be a post-closing series of events to deal with. In my experience, this extra burden will be very unwelcome to practitioners and transaction parties.
- e) A final practical issue relates to the Tax Office itself. The Tax Office presumably will be properly resourced to deal with the additional workload which will result from these changes. However, if that is not the case, or the Tax Office otherwise suffers unexpected capacity or process issues, then the result could be a material delay between the effective completion of a sale transaction and that being recorded legally in the records of the Jersey company. This is very likely to cause further uncertainty in the context of a sale transaction which will be very unwelcome. The Tax Office staff are already under pressure to assist with a number of tasks ancillary to corporate transactions (for example, clearances in the event of demergers, mergers or migrations of Jersey companies) and this could add to its workload materially.

3. Conclusion

Overall, the effect of all of the above, in my view, may be to discourage investors from using Jersey companies as their investment vehicles – either at all, or at least to structure capital and sale transactions to occur at a level other than the Jersey company. Investors in the international capital markets now typically and routinely analyse in granular detail the risks and benefits of using one corporate form or jurisdiction over another. In my view, the above factors make the use of a Jersey company less attractive. This may, in turn, have a negative effect on Jersey's economy.

I would be pleased to discuss any of the above in further detail should the Panel consider that to be of assistance.

Yours faithfully



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