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Going Out of America

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With the growth in global technology, easy accessibility of data and information flow, [and] increased international trading, we can appreciate that cross-border business activity is greatly on the rise. So much so, that it influenced the creation of new laws under [the] Tax Cuts and Jobs Act ("TCJA") of 2017, which took effect in the 2018 tax year. While part of the impetus under these recent law changes was to bring businesses back to the U.S., the law has also encouraged U.S. businesses to expand outside of the U.S.

The initial step when a U.S. business is looking to expand abroad is to review the available entity types in the country where business operations are expected to be conducted. In most jurisdictions the available entity types include: corporation, partnership, and Limited Liability Company.

Similar to the U.S., in most jurisdictions a corporation is typically a taxpaying entity, while a partnership is a pass-thru entity. The limited liability company characteristics may vary across countries, and the U.S. taxpayer should be careful in presuming that the U.S. concept of an LLC is the same as in a foreign jurisdiction. Furthermore, the liability protection offered by each of these entities, the number of shareholders required (one versus multiple), and permitted shareholder type (individual, trust, another corporation, another partnership, etc.) vary from country to country. A U.S. business must review the available entity type with a professional adviser in the country where the business operation will be set up, to ensure that country-specific formalities to establish an entity are met while clearly understanding how the foreign country will tax the chosen entity.

Once an initial choice of entity type in a foreign country is decided, the U.S. taxpayer must look at following additional factors:

- Will the U.S. tax authorities honor the foreign country's entity classification in applying the U.S. tax principles?
- Will income from this foreign entity be taxable in the U.S.?
- If yes, will this income be subject to Subpart F rules, or GILTI income inclusion rules, or PFIC rules or other tax rules under the U.S. tax laws – federal and/or state?

- Will the U.S. allow credit for the taxes paid in the foreign jurisdiction?
- Will an applicable tax treaty help avoid double taxation?
- What are the tax-related foreign information reporting requirements in the U.S., pertaining to the foreign business operation?

The 2017 U.S. tax reform with transition tax, GILTI income inclusions, BEAT provisions, limitation on interest expense deduction and similar such provisions has added another layer of complexity to these questions. A very detailed analysis with an advisor knowledgeable in U.S. international tax issues is imperative for a business wanting to operate outside the U.S.

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