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Legal Alert – Foreign Individuals' Taxation and Their Registration as Ukrainian Tax Residents

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On 18 December 2009, the Ukrainian Tax Administration cancelled its 2004 clarifications regarding foreign individuals' taxation and their registration as Ukrainian tax residents and issued new clarifications on 23 December 2009. The new clarifications elaborate on current practices in applying the legislation regarding non-residents' tax payments and their registration as Ukrainian tax residents. As a general rule, the provisions of the clarifications are based on current practices, but certain provisions are new:

a) Ukrainian tax resident status is granted to a foreigner starting with the tax period (month) in which the tax authority issued a Ukrainian tax resident certificate. *This means, taking into account the facts stated in clause h) below, that all income a foreigner received from a Ukrainian company prior to such a period may be taxed at 30%, which is twice the usual tax rate applied to Ukrainian residents. Previously, all of a foreigner's income received from a Ukrainian company was taxable at the rate of 15%.*

b) Ukrainian tax resident status is granted only after a foreigner has stayed in Ukraine for an amount of 183 days during a given calendar year.

c) A Ukrainian tax resident certificate must be obtained each year, unless:

- a foreigner is registered as a Ukrainian individual-entrepreneur or
- a foreigner has a permanent Ukrainian residency certificate.

In these cases, the certificate must be obtained once. Once a foreigner loses the special status, he is no longer treated as a Ukrainian tax resident.

d) Foreigners who arrived in Ukraine based on visas S-3, B, O, K, T, OP or TR are not allowed to register as independent professionals or entrepreneurs, and do not have the right to be employed. Another section of the clarifications, however, states that foreign employees of representative offices, who arrive in Ukraine based on B visas and are allowed by the Ministry of Economy to be employees of representative offices, can be employed in Ukraine in such representative offices.

e) The registration of foreigners who are Ukrainian tax residents is done by the State Tax Inspectorates at the places of the foreigners' permanent residence (**please note that "permanent residence" must be registered by a local GIRFO office of the Ministry of Internal Affairs**), and for those who do not have such a residence, according to the place where they receive their income (e.g. *the location of Ukrainian company where they are employed, place where they are registered as individual-entrepreneurs*) or based on the place of another taxation object (e.g. *the place where they own real estate*). *Previously, foreigners had to register at the place of their location in Ukraine (not permanent residence or income source) or based on the place of another taxation object (e.g. the place where they own real estate).*

f) The form of the Ukrainian tax residency certificate is prescribed by Tax Administration Order No. 581 dated 5 October 2004, and tax authorities can issue the certificate either to the Ukrainian company where the foreigner is employed or to the foreigner personally. Tax authorities may not fill out irrelevant fields in the certificates. *Previously, the foreigner could not, as a general rule, obtain such a certificate personally.*

g) Foreigners who are registered as tax residents of Ukraine must submit their tax returns to their tax inspectorates at least 60 days before they leave Ukraine. *In our experience, such a provision was not applied by tax authorities to foreigners who were Ukrainian tax residents.*

h) Non-residents must pay their income tax at the following rates:

- a) 30% for all Ukrainian income, except for:
- b) dividends, royalties – 15%
- c) prizes, awards, except state lottery monetary awards – 30%

d) bank account interest, including interest on deposit certificates and card accounts – 5% starting 1 January 2013;

e) income derived from diplomatic activities of a person with diplomatic immunity – not taxable.

f) foreign income – not taxable.

We note that following the provisions of these clarifications, if a foreigner is not registered as a Ukrainian tax resident yet he obtains income from a Ukrainian company, such company has to withhold 30% income tax from his salary.

The presence of all required documents does not in and of itself provide the tax authority with grounds to register a foreigner as a resident. It appears that the criterium of 183 days must be met each time, thus from January to June of each calendar year (i.e. until the time such a foreigner is entitled to obtain a residency certificate), the income from the foreigner's Ukrainian salary is taxed at 30%. However, it should not be difficult to obtain such Certificates for foreign individuals who hold permanent residency permits for Ukraine in any period.

The legal validity of these clarifications remains questionable. However, to mitigate potential tax risks, it is advisable to obtain Certificates for 2010 as soon as possible for all foreign nationals who work for your organization in Ukraine and expect to be tax residents in Ukraine in 2010.

We note that if a foreigner becomes a Ukrainian resident for taxation purposes (receives a Ukrainian tax resident certificate) it is required that he declare his global income, including income from foreign sources, and pay income tax on the amount thereof in Ukraine.