

24th July 2015

Law 4/2015: the end of bearer shares

I. Introduction:

On 1st July 2015, came into force Law 4/2015, which introduces two significant changes to the Macau Legal System, with particular impact in the Macau Commercial Code: (i) the elimination of bearer shares and (ii) the definition of regular activity, for the purposes of submitting foreign companies to certain obligations under Macau Law.

The new legislation is justified by the intention of Macau SAR to meet the international standards and recommendations regarding tax transparency and exchange of information proposed by OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (the "Global Forum"), ahead of the evaluation to be conducted by the Global Forum on Macau SAR in 2016.

To address such standards and recommendations, the Bill's outlines are, fundamentally, on one hand, the creation of mechanisms of information and transparency regarding the identity of the shareholders of Macau companies and, on the other hand, to define the material connecting factors of foreign companies to Macau Law, more specifically, by proposing specific criteria to define the concept of regular activity (in Macau).

II. The prohibition of bearer shares:

Under Macau Law, only certain types¹ of companies are allowed to issue shares. So far, those shares could be represented by "nominative" or to "the bearer" share certificates. On the other hand, the law allowed the nominative certificates to be freely converted into bearer certificates and vice-versa, save as in certain situations legally

¹ There are four types of companies (i) public companies ("*sociedades anónimas (S.A.)*") (ii) "*sociedades em comandita, simples e por acções*" (which descend from the german *Kommanditgesellschaft*, hereinafter referred as "Comandita" Companies, which have two sub-types: simple and by shares), (iii) *sociedades por quotas* ("private limited liability partnerships") and (iv) *sociedades em nome colectivo* (unlimited liability partnerships). Only public Companies and Comandita companies by shares may issue shares. In the other types of companies, the shareholdings are recorded in a public record and are not represented by physical or book entry certificates.

foreseen or as otherwise provide by the Articles of Association. From 1st July onwards, it is prohibited to:

- Issue new bearer share certificates;
- Convert nominative share certificates into bearer share certificates;
- To transfer bearer share certificates by an *inter vivos* transaction, save as by court decision or judicial sale;

Duties and obligations

In view of the elimination bearer shares certificates, the new Law establishes a number of duties and obligations, both to shareholders holding bearer share certificates and issuers (the companies).

a) Obligation to convert bearer share certificates

The holders of existing bearer shares, or respective successors, have the obligation to request the issuer, within one year from the entry into force of the Bill (i.e. until 1 July 2016), the conversion of respective certificates into nominative share certificates. In the event court proceedings are in course or are started to replace lost or destroyed share certificates, such period of one year commences from the date the court decision becomes final (*res judicata*) (article 4).

If the share certificates are not converted following the expiration of such period, the shareholder shall have all his/her rights as a shareholder suspended (article 5). One year after the expiration of the deadline to convert the share certificates, the existing bearer share certificates shall be legally considered destroyed. However, in the event court proceedings are running to cancel issued bearer share certificates, we believe that, logically, the share certificates should be only be considered legally cancelled one year after the court decision becomes final in the event that, during that period, such certificates have not been voluntarily cancelled.

b) Obligation to communicate to the Tax Authority

The issuers of the bearer share certificates shall have the following obligations:

- i) in one year from the Law has come into force (i.e. 1 of July 2016), to inform the Tax Authority (the Macau Finance Bureau) of the number of shares represented in the share certificates that may have not been converted;

ii) to inform the Tax Authority of any changes to the situation referred in i).

Non fulfillment of these obligations will expose the issuer to the payment of a fine from MOP 5,000 to MOP 25,000.

III. Foreign companies with "permanent activity" in Macau

Law 4/2015 has also amended article 178 of the Macau Commercial Code, which governs foreign companies with "permanent" activity in Macau. The announced objective of the said amendments was to clarify the concept of "permanent activity", which is again motivated by tax transparency reasons.

According to article 178 of the Macau Commercial Code, companies with permanent activity in Macau have the following obligations: (i) to comply with the legal provisions regarding the Registry; (ii) to appoint a representative with domicile in Macau; (iii) to ascribe a capital to its activity in Macau and (iv) to register respective resolutions. However, the law did not specify what was considered permanent activity.

The new Law has basically added two new paragraphs to article 178:

- the new paragraph 2 says that the permanent activity comprehends a fixed installation, in particular by a place where the management is, or a branch or an office, through which the foreign company carries respective business in Macau;
- paragraph 3 now says that, without prejudice to other legal provisions, the activity exercised in Macau for a consecutive period of over one year, or nonconsecutive periods of over 3 months per year during the past five years, are presumed permanent;

While paragraph 2 refers to the mode or characteristics of the activity, paragraph 3 refers to its duration, in order to qualify it as permanent or not. Although the intention of the law was clear, its contents are not and a number of doubts as to its interpretation will very likely arise along with its implementation. For example, does paragraph 2 of article

178 of the Commercial Code now mean that foreign companies will have to have an office or any place of business in Macau? In our opinion it does not, but the wording used in the law was unnecessarily ambiguous and will very likely give rise to a significant number of disputes, in particular, between private entities and the relevant Government departments.

The implications of these provisions will not be limited to compliance with the Macau Commercial Code and Commercial Registry, but also with tax laws, labor laws and any other laws that remit to or use the definition of the Commercial Code. For example, could a foreign company with business activity that does not have any office or other physical place of business in Macau hire non-resident workers under the provisions of Law 21/2009?

To our view, the specification of “permanent activity” introduced in paragraphs 2 and 3 of article 178 of the Macau Commercial Code does not exhaust the concept of “permanent activity” but simply provides a specific (safer and uniform) criteria to submit foreign companies to Macau Law. Naturally, those who meet the specifications mentioned in both those paragraphs will in principle qualify as foreign companies with permanent activity in Macau, and therefore, will have to comply with article 178, but the fundamental concept is still “permanent activity”, in the sense that it should be found regular, to have a certain stability of its connecting factors to Macau. In that sense, the legal definition should not preclude other factors from being considered to confirm or infirm whether the business carried in Macau is permanent or not for each of the relevant legal purposes.

In any event, it is clear that the law could have been clearer and until further clarification from the legislator, practice (and the Courts) will play an important role to determine the true meaning and scope of the changes to article 178 of the Macau Commercial Code.

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