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# Documenting tax issues in domestic and cross-border corporate and banking transactions

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# Course outline

- Why is Tax important for a corporate or finance lawyer?
- Current global landscape for taxation
- Tax issues in cross-border transactions
- Tax in domestic transactions
- The future of the tax framework in Mauritius

# Why should lawyers care about Tax?

- Client wants a "one-stop" shop.
- Tax is often closely linked with structure and implementation of a transaction.
- Tax legislation (even in Mauritius) is becoming increasingly complex, influenced by changes occurring on a global scale.
- You are best placed to deal with tax issues in deal documentation.

# Global tax landscape and implications for Mauritius

- Global fight against tax evasion and tax avoidance schemes
- Automatic exchange of information – FATCA/CRS
- Base erosion profit shifting (BEPS)
  - Avoidance of treaty-shopping
  - Harmful tax regime
- Impact on Mauritius
  - Implementation of FATCA/CRS
  - Signature of MLI and automatic amendment of double tax treaties
  - Commitment of Government to abolish deemed foreign tax credit in 2018

# Summary of tax regime in Mauritius for companies

→ Corporate tax

- Domestic companies – 15% (subject to tax credit on underlying foreign tax suffered)
- Global business category 1 – effective maximum rate : 3% (deemed foreign tax credit)
- Global business category 2 – exempt and non-resident for treaty purposes
- Freeport companies

→Withholding tax

- Interest – 15% unless exemptions apply
- Dividends – generally exempt
- Royalties – 10% or 15%

→No capital gains tax

→VAT

→No inheritance tax

→Registration duties and transfer taxes on immoveable properties

# Cross-border transactions

- <u>Tax structuring: choice of jurisdiction</u>

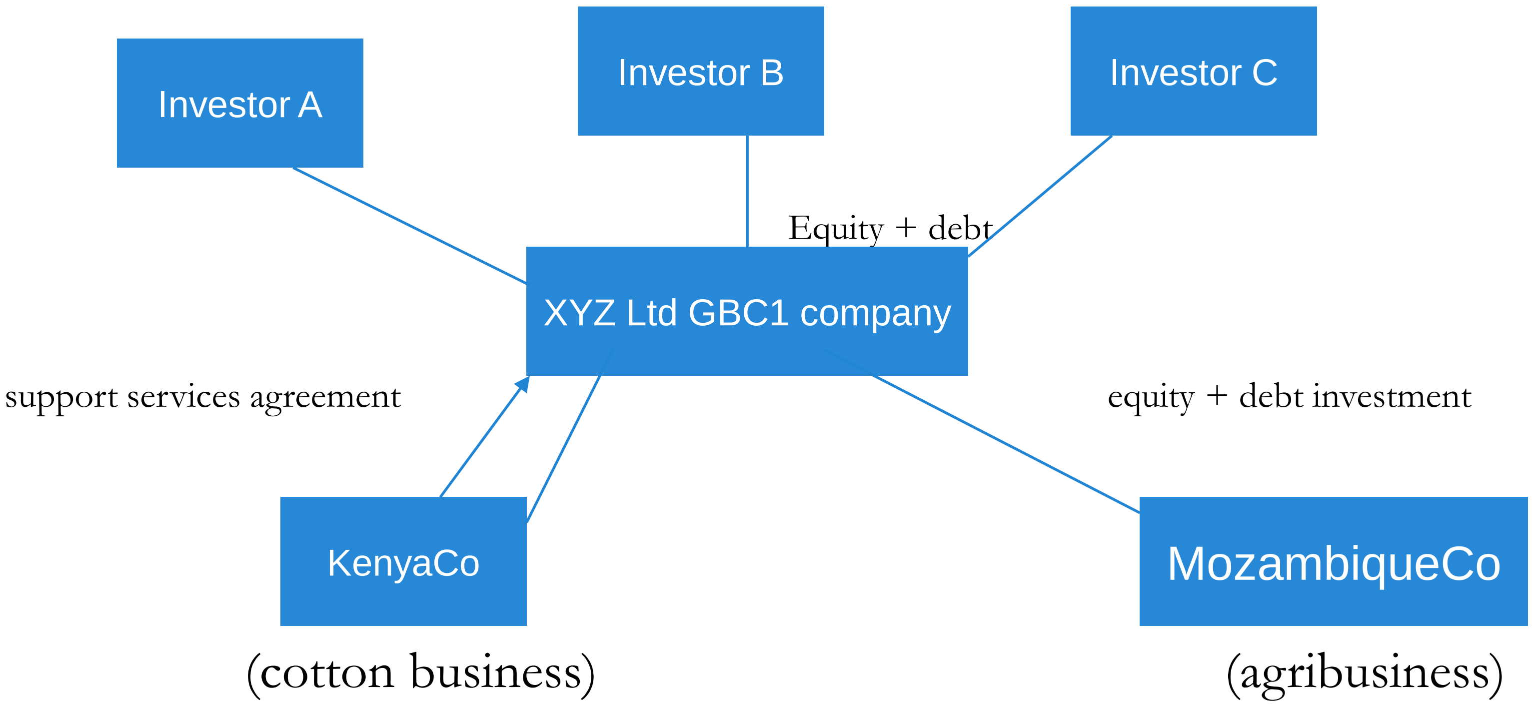
→Why Mauritius?

- Extensive treaty network
- Good corporate tax regime: domestic/GBC1/GBC2
- Non-tax reasons
- Advantages over competing jurisdictions e.g: Singapore, UAE

→Legal form of entity: company/LP/Société/Trust

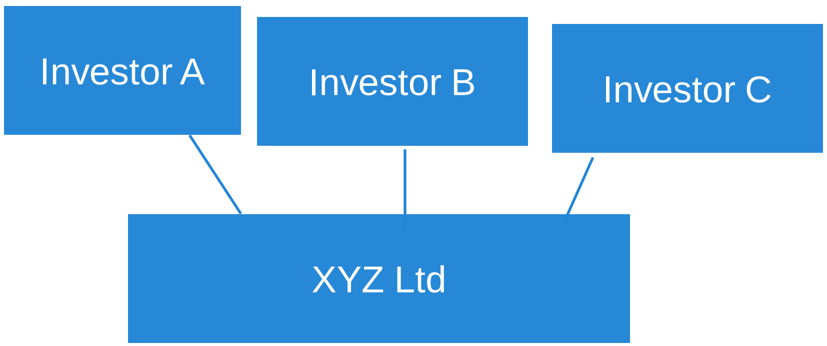
# Tax structuring: GBC1 company XYZ Ltd

**Scenario: Client has chosen to establish an investment holding in Mauritius for investment in a number of African jurisdictions**



# Tax structuring

## 1) Investor tax issues




- Equity investment – generally no withholding tax on dividends (ordinary and preference shares)
  - investor may be taxed in country of residence

- Debt investment – withholding tax on interest?
  - investor will generally be taxed in country of residence

# Tax structuring

## 2) **XYZ Ltd issues**

- Deductibility of loan interest expense/s18 & 26 ITA 1995
- No thin cap legislation in Mauritius but possibly transfer pricing issues (s75 ITA 1995 – arm's length principle)
- Tax treatment: GBC1 licence = max tax rate 3% (foreign dividends + foreign interests)
- Tax residence: managed and controlled from Mauritius
- Care should be taken when reviewing constitution and SHA
- Permanent establishment issues: KenyaCo?
- Reverse charge VAT under support services agreement?
- Transfer pricing issues on interest receivable and deductibility under support services agreement

# Tax structuring

## 3) Downstream investment

- WHT on dividends and interest
- Effect of multilateral instrument (MLI) on availability of treaty benefits

# Tax structuring

## (4) Investor exit

- Transfer of shares
- Share buyback/redemption
- Distributions (cash v/s in specie)
- Potential taxability of return; importance of accounting treatment.

# Incorporating tax points in legal documentation

1) Constitution & Shareholders' Agreement
   - Tax residence/permanent establishment
   - Documenting 'purpose' of structure

3) Employment agreement
   - Permanent establishment issues

4) Shareholder loan agreement
   - Transfer pricing issues

5) Share subscription agreement

6) Services/consultancy agreement: TP/VAT

# Tax structuring: other forms of entities

- Use of GBC2s
- Trading entities
- Highlight tax risks: tax residence

- Use of tax transparent entities e.g LPs
- Common for investment funds
- Option to be taxed as an entity if holds GBC1 licence

- Use of trusts and foundations
- Family office and wealth planning
- Taxed at 15% unless submits yearly declaration of non-residence (provided certain conditions are satisfied)
- Can apply for GBC1 licence

# Domestic transactions

## 1) M&A transactions

º Importance of tax due diligence

º Share sale v/s asset sale
- Tax is an important consideration

º Documenting tax issues in M&A transactions
- Share purchase agreement/asset sale management
- Tax warranties
- Tax indemnity

º Structuring the transaction
- Any transfer duties? Can the transaction be structured differently?

# Domestic transactions

## 2) Financing transactions

(A) Vanilla loan agreement

- Simple gross up clause
- VAT clause
- Borrower v/s lender concerns
- FATCA clauses

(B) Bond issue

- Tax disclosures
- Tax gross-up clause
- Issuer v/s noteholder concerns

# Domestic transactions

**3) Commercial agreements**

- VAT
- VAT exclusive clause
- Getting the wording night if an exemption applies

# Other tax considerations

1) Important tax changes coming up in 2018

- Towards one type of taxation (no ring fencing)
- Substance for global business companies
- Access to treaty relief & the MLI

2) Automatic exchange of information: FATCA/CRS
   - Setting up of trusts and foundations
   - Having global business clients

3) Domestic GAAR – section 90 of Income Tax Act 1995 – "sole or dominant purpose" of obtaining a tax benefit

Thank you.

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