CADWALADER

May Is for Flowers and Cautious Optimism

May 31, 2024

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An Update to the New York LLC Transparency Act

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New York recently Amended the New York LLC Transparency Act.[1] The original version of the law was enacted December, 2023 and mandated disclosure of beneficial ownership of limited liability companies. Please see our previous article for an overview of the Act and the disclosure requirements **here**.

The Amended Legislation is introduced to make technical changes, add details, compile and share information and change the effective date of the Act. The law is amended by adding in section 1106, which defines relevant terms, 1107, which details the filing requirements, and 1108, which describes the violations and penalties associated with not complying.

Who must file and When:

The Acts' effective date was pushed back a year from January 1, 2025 to January 1, 2026. All previously formed or authorized reporting companies must file a beneficial ownership disclosure within one year of the effective date.[2] Similarly, any previously formed or authorized exempt companies must file an attestation of exemption within one year of the effective date.[3]

For entities formed after the effective date, a beneficial ownership disclosure must be filed by all reporting companies within 30 days of the filing of the company's articles of organization or application for authority.[4] For any exempt company, an attestation of exemption must be filed within 30 days of the filing of the articles of organization or application for authority.[5]

Once the initial beneficial disclosure has been filled all reporting companies must file an annual statement confirming or updating their beneficial ownership disclosure information.[6]

What will be done with the Information:

Previously, all the information was to be stored on a database open to the public. However, the amendment now requires that all information relating to natural persons as beneficial owners be collected by the department of state and maintained in a secure database.[7] The information will be considered confidential unless (1) the beneficial owner consents or requests the information be released; (2) a court order mandates the information be released; (3) officers or employees of another federal, state or local government agency require the information to perform their official duties; or (4) for valid law enforcement purposes.[8] Any disclosure of information may not be further disclosed unless authorized by law or necessary in the performance of statutory duties.[9]

Violations and Penalties:

The Amendment has also added a new and potentially substantial monetary fine to the Act. The attorney general may now assess a fine of up to $500 dollars for each day the reporting company is late to file.[10] Any past due or delinquent status must include verification from the attorney general that any penalties imposed have been paid.[11]

Further, the Amendment clarifies how false or fraudulent information will be treated. The updated act states that it is unlawful for a person to knowingly provide or attempt to provide false or fraudulent information to the department of state.[12] However, if a person submits false information, they will not be in violation of the Act, if they voluntarily and promptly provide corrected information, unless the previously misleading information was used for the purpose of evading the requirements of the Act.[13]

Should an LLC fail to timely file or provide false information the New York State Attorney General may open an investigation.[14] The New York State Attorney General may choose to bring an action to dissolve or cancel any entity which fails to file or provides false or fraudulent information.[15] In such instances, the court will have discretion to dissolve and cancel the limited liability company or annul a foreign limited liability company's authority to do business in the state.[16]

Lastly, any reporting company or exempt company that fails to file in accordance with the Act will be suspended after 30 days' notice.[17] If suspended, any reporting or exempt company must not conduct business in New York state until the beneficial ownership disclosure or attestation of exemption has been filed.[18] Once filed, the suspension will be void and all corporate powers, rights, privileges, immunities, duties and liabilities will be restored retroactively.[19]

[1] S.B. 8059, enacted January 5, 2024.

[2] *See* New York Limited Liability Company Law § 1107(e).

[3] *Id*.

[4] *See* New York Limited Liability Company Law § 1107(d).

[5] *Id*.

[6] *See* New York Limited Liability Company Law § 1107(e).

[7] *See* New York Limited Liability Company Law § 1107(f).

[8] *Id.* The department of state will establish provisions for sharing information with agencies permitted to access the information relating to beneficial owners. *Id.*

[9] *Id*.

[10] *See* New York Limited Liability Company Law § 1108(a)(2) and (b)(2).

[11] *See* New York Limited Liability Company Law § 1108(a)(3) and (b)(3).

[12] *See* New York Limited Liability Company Law § 1108(c).

[13] *Id*.

[14] *See* New York Limited Liability Company Law § 1108(c-d).

[15] *Id*.

[16] *Id*.

[17] *See* New York Limited Liability Company Law § 1108(g).

[18] *Id*.

[19] *Id*.

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An option to dispose of property does not necessarily give rise to a taxable disposal

In the appeal case of Krishnamohan v HMRC [2024] UKFTT 346, the UK's First-Tier Tribunal ("FTT") determined that an agreement titled "Option Agreement" that was entered into to dispose of certain properties, does not, for capital gains tax purposes, constitute the grant of an option to dispose until the grantee's right to exercise the option is no longer contingent on events within the taxpayers control.

The case involved the financing of a property acquisition, with the future option to sell certain other existing properties serving as security for the loan.

Background

The appellant in the case (the "Borrower") owned a property portfolio, and sought to acquire another property that required funding. To secure the funding for the new property, the Borrower entered into an agreement titled "Option Agreement" with a finance provider (the "Lender"). This agreement granted the Lender with the option to purchase certain other properties (the "Properties") from the Borrower's portfolio if the Borrower failed to repay the loan amount, together with additional fees, within a twelve-month period.

The Borrower repaid the loan amount plus the additional fees within the specified period, and the option to purchase the Properties was not exercised.

The issue

HMRC argued that the agreement resulted in the grant of an option over the Properties, thus constituting disposals that should be subject to capital gains tax under section 144 of the Taxation of Chargeable Gains Act 1992 ("TCGA").

The Borrower appealed against this, arguing that no option had been granted, given that the Lender was never in a position to act under the agreement. The Borrower maintained that if the person granting the option could revoke it at will before it could be exercised, then there is no binding option existing until the time for which exercise arose.

HMRC argued that, notwithstanding the fact that it was revocable by the Borrower, an option had been granted. They emphasised that the Borrower's ability to "unbind" themselves from the agreement was immaterial.

The Borrower appealed against HMRC's decision.

FTT Decision

The FTT allowed the appeal. It was determined that, despite the misleading title of the agreement, the Lender would ultimately only have the right to buy the Properties if the Borrower did not repay the loan amount and the additional fees within twelve months. As such, the agreement was to only grant an option if the twelve-month period had passed, at which point such option would still then be further subject to certain other conditionalities. The FTT therefore concluded that the control retained by the Borrower was crucial.

While the FTT agreed with HMRC that an option need not be immediately exercisable to result in a disposal, they highlighted the importance to consider whether the grantor of an option can control the events that must occur for the grantee to exercise the option. In this case, since the Borrower had control over these events, no option was granted when the agreement was made. If the option period had ended without the repayment of the necessary funds, the option would have been granted at that point. Since this did not occur, no option was granted.

It is worth noting that the Borrower also argued that the option should be conveyed as security rather than a disposition, thus not constituting a chargeable disposal under the TCGA. The FTT did not, however, address this argument, as it was unnecessary for the determination of the appeal.

Closing thoughts

This decision from FTT is a worthy reminder of the significance of substance over title in agreements, not just to the contracting parties but to all interested parties. HMRC's own guidance manuals state that an option is "*an offer which is irrevocable during the option period*" and "*gives rise to a binding contract to keep the offer open*" (HMRC Manual

CG14275). The misleading title of the “Option Agreement” may have prompted HMRC to examine the situation, but it is the revocable nature and conditionality of the option that ultimately led to the FTT’s decision.

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Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of clients:

- Represented Wells Fargo and facilitated $1.55 billion financing for nine U.S. resorts, enabling continued investment and improvements. Participating lenders included JPMorgan Chase, Goldman Sachs, and Citi Real Estate.
- Represented Wells Fargo in the $525 million refinancing of a major Florida hotel, anticipating increased demand due to nearby theme park expansion. Co-lender was JPMorgan Chase.
- Represented Wells Fargo in the $735 million financing for a large resort complex near Disney World, covering debt repayment and future expenditures. Other lenders included Bank of America and Goldman Sachs.