Intellectual property and the treasury

Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland and Germany),
Solicitor (England & Wales and Hong Kong)
Of Counsel, KGP Legal LLC
alexander.ressos@kgplegal.com.sg
www.ressos.com.sg

Where the code lives

A protocol's code is usually open source, so the question of intellectual property is about the things that are not open: trademarks, domain names, proprietary tooling, front-end code, data and the brand. These assets should be owned by the entity that created them or that paid for their creation at arm's length. Both tax administrations apply the DEMPE analysis of the OECD Transfer Pricing Guidelines to intangibles, asking which entity performs the development, enhancement, maintenance, protection and exploitation functions.[1] A Swiss GmbH that employs the developers and owns the intellectual property is defensible. A Singapore holding company that owns the intellectual property while the developers sit in Zürich is defensible only if it funds the development, bears the risk and has people who control that risk. In practice that means a development agreement, a budget and a Singapore-based manager who approves the work.

The foundation route complicates this. Protocol foundations often hold the trademarks and the domain names as part of their stewardship of the protocol, while funding development through grants to the operating company. The grant is no

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purchase of intellectual property, because the output is released as open source and the foundation acquires the trademarks separately. A foundation that pays an operating company for development and receives nothing but open-source code has made a payment that the Zug tax administration may treat as a grant in furtherance of the purpose, which is unobjectionable for a tax-exempt foundation. For a taxed foundation the same payment is a deductible expense only if it serves the foundation's business. The operating company recognises it as revenue in either case. Part G, Chapter IV, covers the accounting.

Where the treasury sits

The treasury is the group's largest asset and its largest risk. Four considerations determine its location. The first is insolvency remoteness: tokens held by a foundation without owners are not reachable by creditors of the operating company or by the founders' creditors, which is the main argument for the Zug foundation. The second is the tax on realisation. A Swiss foundation realises a taxable profit on the sale of treasury tokens unless exempt, at a Zug rate just under 12 per cent. A Singapore CLG realises a capital gain that is untaxed if the tokens were held as investments and taxed at 17 per cent if the sale is a trading transaction.[2] The third is control: the board that signs for the treasury must be where the entity is, so a Zug foundation's keys should be held by or under the control of its Swiss board and a Singapore entity's keys by its Singapore directors. The fourth is banking. The treasury must be able to convert tokens to fiat when the group needs to pay salaries, and on that point Chapter IX shows Swiss banks to be more willing than Singapore banks to accept large inflows from a treasury wallet.

Practice note

A group that holds its treasury in a Zug foundation and its operating team in Singapore should document who controls the keys and under what authority. A multisignature arrangement in which three of five signers are Swiss board members, with the two others being Singapore executives, keeps control in Switzerland while allowing operational access. The foundation's treasury policy should set the quorum,

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the limits per transaction and per month, the exchanges and custodians approved for conversion and the reporting to the board. Auditors, the supervisory authority and the banks will each ask for that policy.

Notes

1. OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2022), Chapter VI, paras 6.32 to 6.72 (DEMPE functions); IRAS e-Tax Guide, "Transfer Pricing Guidelines", 7th edition, 14 June 2024, section 13 (intangibles). ↩
2. DFTA, SR 642.11, Art. 57 and Art. 58 (taxable net profit of legal entities); Income Tax Act 1947, s. 10(1)(a) and s. 43; IRAS e-Tax Guide, "Income Tax Treatment of Digital Tokens", section 8 (tokens held as capital assets by companies). Part G, Chapter IV, and Part M, Chapter I. ↩

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Author contact: Dr Alexander Ressos, TEP · contact@ressos.com

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