Substance: what the law requires in fact

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

Substance is the condition of legitimate arbitrage. It has three layers that a client should distinguish: regulatory, tax and corporate.

Regulatory substance is the presence that the licensing statute requires. In Switzerland that means a management body that takes decisions in Switzerland, an organisation that performs the licensed activity from Switzerland, compliance and risk functions in Switzerland and records kept in Switzerland. The requirement does not demand that every employee be Swiss. It demands that the Swiss entity be where the business is run. In Singapore it means the resident executive director, the permanent place of business and the local compliance officer that MAS expects for an MPI. It also means the technology and data arrangements that the Technology Risk Management Guidelines require to be under the licensee's control, together with Singapore-held customer assets. Both regulators test substance at the application stage through interviews with the proposed management and after licensing through inspections. Both accept outsourcing of functions within the group under written agreements if the licensee retains control and responsibility, which is the mechanism by which a dual-hub group can share technology without sharing substance.[1]

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Tax substance is the presence that the tax authorities require to accept the entity as resident and to grant treaty benefits. Switzerland looks to the place of effective management under Art. 50 DFTA and the cantonal laws, and cantonal tax authorities refuse to treat a company as Swiss-resident if its board meets abroad and its decisions are taken abroad. Singapore applies the same test under s. 2 of the Income Tax Act through the "control and management" concept and, since 2024, imposes the economic-substance requirement of s. 10L on foreign-asset disposal gains. The OECD's BEPS work and the Pillar Two global minimum tax add a group-level floor of 15 per cent for large groups. Switzerland has applied it through the qualified domestic minimum top-up tax since 1 January 2024 and Singapore since 1 January 2025, which has removed the incentive to book digital-asset profits in a zero-tax entity within such a group.[2]

Corporate substance is the presence that company law requires. A Swiss AG needs at least one director with sole or two with joint signing authority resident in Switzerland under Art. 718 para. 4 CO. A Singapore company needs at least one director ordinarily resident in Singapore under s. 145 of the Companies Act 1967. These are minimum requirements that nominee services satisfy. They are the floor of substance and never its proof. A regulator that finds a nominee director with no knowledge of the business treats the finding as evidence of a letter-box, whatever the company register shows.[3]

Checklist

Before claiming that a Swiss or Singapore entity is the real home of the business, confirm: - the board meets in the jurisdiction, keeps minutes there and takes the decisions the licence covers; - the chief executive or at least one executive director lives there with a permit that allows the role; - the compliance officer and the AML officer sit there and report to the local board; - customer agreements are with the local entity and customer assets are controlled by it; - the systems that run the licensed activity are either operated locally or outsourced under a written agreement that the regulator has seen; - the tax return is filed on the basis of effective

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management there and the transfer-pricing file shows what the entity does for the group; - the website and marketing describe the entity's licence accurately and do not borrow the other jurisdiction's reputation.

Notes

1. FINMA Circular 2018/3 "Outsourcing – banks, securities firms and insurers", as amended, and its application to FinIA institutions through Art. 14 FinIA. MAS, Guidelines on Outsourcing, October 2018 as amended, and MAS Notice on Outsourcing for payment-service licensees. See Part P, Chapter IV, on the operating model. ↩
2. Art. 50 DFTA. Income Tax Act 1947, s. 2(1) definition of "resident in Singapore" and s. 10L. Ordinance on the Minimum Taxation of Large Corporate Groups (MindStV, SR 642.161), in force 1 January 2024 (QDMTT) with the income inclusion rule from 1 January 2025. Multinational Enterprise (Minimum Tax) Act 2024 (Singapore), in force for financial years beginning on or after 1 January 2025. See Part G, Chapter IX, and Part M, Chapter IX. ↩
3. Art. 718 para. 4 CO. Companies Act 1967 (Singapore), s. 145(1). On nominee directors in Singapore and the 2024 ACRA reforms requiring nominee status to be disclosed see Part P, Chapter III. ↩

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

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