

# Indofoods and withholding tax

An extract from Rain or Shine? January 2009

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The imposition of withholding tax is not the only threat and as, in the current economic climate, tax revenues fall, tax authorities in the UK and elsewhere will become more demanding on when they will waive withholding tax obligations under a tax treaty.

In the UK it is already clear, following the case of “Indofoods” in 2006, that HMRC is taking a much tougher line on when it will grant tax treaty clearance for a non-UK resident to receive interest gross and a number of funds that have structured UK investments through companies resident in Luxembourg and elsewhere have been challenged by HMRC and some have been refused clearance.

In addition, substance, corporate residence and transfer pricing are now much higher on HMRC's agenda than has been the case in the past and HMRC has set up a new transfer pricing team.

So how can the risk of an HMRC enquiry challenge be reduced? It is important to ensure that treaty applications are correctly and fully completed. The offshore concern should have its own directors or employees and “back to back” arrangements (say with a fund) should be avoided. A lack of substance will attract HMRC attention and this may lead to a residence challenge. Being able to demonstrate that effective operating guidelines and governance arrangements are in place between the offshore company and its non-resident fund parent or UK resident Investment Manager is important. Such arrangements must be realistic if a successful challenge by HMRC is to be avoided.

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