Advance No Objection Letter (NOL) for Foreign Lenders

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The advance No Objection Letter (NOL) has been an available option for businesses that consider they are not subject to tax in Kuwait, typically due to arrangements of pure supply of goods/material or services being rendered entirely outside Kuwait. An advance NOL is not issued for types of income which are specifically stated as taxable under the Kuwait tax regulations[1] , such as license/royalty fees.

Recently, there has been a development in the practices of the Kuwait tax authority (KTA) with respect to lending transactions by foreign banks, which may have an impact on a foreign lender's tax compliance obligations.

In the past, the KTA had reviewed multiple lending transactions and considered that foreign lenders should fulfill Kuwait tax compliance obligations, including registration, annual tax filing and presenting information during the mandatory tax inspection process.

However, it appears the KTA is now able to issue an advance NOL to foreign lenders with no physical presence in Kuwait, subject to determining that under the applicable treaty between Kuwait and lender's jurisdiction that interest income should only be taxed in the lender's home country.

Although not explicitly stated on the NOL, this implies that the foreign lenders on such transactions, do not need to register with the KTA or complete further tax compliance formalities (tax filing and mandatory tax inspections) having obtained their NOL. The NOL would be issued for each facility agreement (separate NOL related to each bank where it is a syndicate loan arrangement) and not year specific, effectively for the full term of the facility.

It appears the KTA has changed its practice with respect to requiring full tax compliance by foreign lenders with no physical presence in Kuwait, subject to determining that under the applicable treaty between Kuwait and lender's jurisdiction that interest income should only be taxed in the lender's home country.

While this is the correct treatment under most tax treaties Kuwait has with other jurisdictions, Article 13 of the Executive Bylaws to Law No.2 of 2008, states companies that consider themselves exempt from taxes in Kuwait under treaty provisions should still file a tax return and claim the relevant exemptions.

Issuance of the advance NOL is subject to a review on a case by case basis. There is no formal guidance on this issue but rather based on internal practices of the KTA.

Note 1: Kuwait tax regulations covered by Decree No.3 of 1955 amended by Law No. 2 of 2008 and its Executive Bylaws.

It is still not clear how the KTA would respond if such an application was submitted by a lender from a jurisdiction which does not have a tax treaty with Kuwait, the US for example. If the above practice is only applicable to lenders from treaty jurisdictions, the KTA would potentially continue to require lenders from non-treaty countries to continue the traditional full tax compliance route for lending income that is of Kuwait source.

Financial institutions that are currently registered and filing tax declarations may now be able to de-register and apply for the same blanket NOL that covers the full term of the facility agree rather than continuing annual tax compliance process.

This assumes that applicable treaty provision have been accepted by the KTA and NIL assessments have in the past been issued. Tax registered lenders submitting annual tax declarations should formally approach the Department of Inspection and Tax claims (DIT) through their authorized tax advisor to reconsider the need for on-going tax filings. The matter should then be internally referred to the Department of Submission and Tax Planning (DSTP) for review.

In the context for foreign lenders with no physical presence in Kuwait, this now establishes a path that could potentially mitigate the need for registration and annual compliance on basic lending transactions, provided a NOL is applied for and obtained.

We understand from our discussions with multiple foreign lenders that the requirement to register and ensuing compliance burden was a challenge. This advance NOL route now provides a potential solution.

Contacts

Zubair Patel
Partner
Tax & Corporate Services
zpatel@kpmg.com

Fahim Bashir
Partner
Tax & Corporate Services
fbashir@Kpmg.com