

## **EXPORT INFORMATION SESSION**

Alberta Economic Development  
Rocky Mountain Trade Corridor  
October 5, 1999  
Lethbridge, Alberta

### **Presentation**

#### I. Introductions

- A.GSJW
- B.Speakers
- C.Outline

- 1.General (business federal filings, immigration)
- 2.Analyses: (a) business - LLC
  - (b)federal reporting - AFIDA
  - (c)immigration - L-1

#### II. GENERAL BUSINESS IN THE UNITED STATES AND MONTANA

A.Federal Republic - Common law jurisdiction 50 states and the District of Columbia

- 1.Each state is a separate political subdivision & each sets laws governing conduct of business within its jurisdiction.
- 2.No single government agency determines all laws and regulations applicable to all businesses as in most other countries.
- 3.No federal company laws.

B.Business Entity Options

- 1.Sole Proprietorship
- 2.Partnerships
- 3.Joint Ventures
- 4.Corporations
- 5.Branches
- 6.Limited Liability Companies
- 7.Acquisition of Existing Companies

- a. A purchase of assets or shares of target corporation
- b. Tax-free exchange of voting shares of the acquiring corporation for shares or assets of U.S. target corporation
- c. Formation process in Montana - Title 35 Montana Codes Annotated

1. Determine Business Structure
2. Reserve Name (optional)
3. Registered Agent
4. File Assumed Business Name, trademark, LLC, Articles of Incorporation, or Articles of Organization
5. Apply for Tax Identification Number
6. Apply for Professional Licenses as Necessary
7. Apply for Local Licenses as Necessary
8. Apply for Workers' Compensation as Necessary
9. Other

- (a) Annual Reports
- (b) Changes
- (c) Dissolution
- (d) State Tax Clearance--on winding up business

#### 10. Analysis--LLCs

- (a) Structure
- (b) Articles of Organization
- (c) Operating Agreement
- (d) Management
- (e) Income tax treatment (4 issues)
- (f) State tax/withholding - member vs. manager

### III. FEDERAL REPORTING REQUIREMENTS - FOREIGN INTERESTS/OPERATIONS IN U.S.

#### A. "AFIDA"

1. Agricultural Foreign Investment Disclosure Act of 1978
2. Purpose of Act

(a) Information gathering as to extent of foreign ownership of agricultural lands in the U.S.

### 3. Highlights of Act

(a) Requires report from any "foreign person" who acquires or transfers an interest in "agricultural land" (other than a security interest)

(b) Report also required if land becomes "agricultural land" subsequent to acquisition by "foreign person" or person becomes a "foreign person" subsequent to acquiring "agricultural land"

(c) "Agricultural Land" means land used for agricultural, forestry or timber production. Specific regulations govern what are or are not agricultural, forestry or timber production uses

(i) reports not required if land at issue does not exceed 10 acres and income from use does not exceed \$1,000

(d) "Foreign person" means any individual who is not a citizen or national of the U.S. or its territories; any individual who is not a resident alien of the U.S.; any corporation, etc., that has its principal place of business outside of the U.S.; any foreign government; or any domestic corporation in which significant interest is held by any of the foregoing individuals or entities

(e) Reports generally require disclosure of name and address of "foreign person"; whether "foreign person" is an individual, corporation, etc.; legal description of property; nature of property use; etc.

(f) Filing deadline is 90 days after the event creating the reporting obligation

(g) Reports generally filed in the Farm Service Agency (FSA) office of the county in which the property is located

(h) Report made on Form FSA-153

### 4. Penalties for violation of Act

(a) Late filed reports are subject to penalty of 1/10 of 1% of fair market value (FMV) of interest held for each week

- report is late. Maximum penalty is 25% of FMV
- (b) Failure to file or filing incomplete or inaccurate reports results in penalty of 25% of FMV
  - (c) Penalties may be reduced if extenuating circumstances exist
  - (d) FMV is determined at date penalty is assessed

## B. Foreign Direct Investment

### 1. International Investment and Trade in Services Survey Act

#### 2. Purpose

- (a) Information gathering as to the nature and extent of foreign direct investment in the U.S., U.S. investment and trade in services

#### 3. Highlights of Act

- (a) Requires the reporting of various investment and trade information to the Bureau of Economic Analysis of the U.S. Department of Commerce
- (b) Reports required of "foreign persons"

- (i) Form BE-13 is required for new investment where a "foreign person" or U.S. affiliate of a "foreign person" acquires at least a 10% ownership interest in a U.S. business; if cost of investment is at least \$1,000,000; or if the transaction involves acquisition of at least 200 acres of land in the U.S.

- (1) exemption applies if the property acquired is a personal residence. Limited exemption applies in other limited circumstances
    - (2) form is due 45 days after investment transaction occurs

- (c) "Foreign person" means any individual, business entity, trust, estate, organization or government whose residence is outside the United States or subject to the jurisdiction of a country other than the United States. United States includes all possessions and territories
  - (d) Other forms (quarterly, annual and quinquennially

(every 5 years)) are due from the U.S. company (affiliate) in which a foreign person holds at least a 10% interest  
(e) Internal Revenue Service (IRS) informational return also required of foreign persons holding direct investments in U.S. real property interests. Penalties apply for failure to file IRS return

## 5. Penalties

(a) Suit may be brought in federal court to compel production of appropriate reporting form. Court may assess penalty of between \$2,500 and \$25,000 for failure to file required report(s)

(b) Criminal penalties of up to one year in prison and up to \$10,000 fine may apply for willful (intentional) failure to file report(s)

## C. Tax Statutes (various)

1. No specific act names

2. Purposes

(a) Imposition of taxes or information gathering

3. Operation of statutes in general

(a) Impose/withhold tax on income derived from operations in the U.S.

(b) Forms used

(1) Form 1042-S [Foreign Person's U.S. Source Income Subject to Withholding]

(2) Form 1040NR [U.S. Non-Resident Alien Income Tax Return]

(3) Form 1120F [U.S. Income Tax Return of a Foreign Corporation]

4. Information gathering

(a) Information as to extent of foreign investment in U.S. corporations (or foreign corporation activity in U.S.) and extent of transactions between "reporting corporations" and

"related parties"

(b)"Reporting corporations" are U.S. corporations that are at least 25% foreign owned or are foreign corporations operating within the U.S.

(c)"Related parties" are 25% foreign shareholders of a "reporting corporation" or any person holding at least 50% interest in the foreign shareholder or in the "reporting corporation"

(d)Reportable transactions include sales of inventory, other tangible property, rents and royalties, professional fees, commissions, amounts loaned, interest charges, etc., between the related entities

(e)Report using Form 5472

(f)Penalties

(1)\$10,000 penalty for each related party/reporting corporation that fails to file report

(2)Additional \$10,000 penalty for each successive 30-day period if failure continues more than 90 days after IRS notification

(3)Criminal penalties also apply

#### D."FIRPTA"

1.Foreign Investment in Real Property Tax Act of 1980

2.Purpose of Act

(a)Imposition of tax on disposition of a real property interest in property located in the U.S.

3.Highlights of Act

(a)Requires transferee (buyer) of a U.S. "real property interest" acquired from a "foreign person" to deduct, withhold, and pay to the U.S. 10% of the sale price of the interest (sale price = cash + other valuable assets + amount of liabilities on the property assumed by the buyer)

(b)"Foreign person" means a non-resident alien, a foreign corporation not electing treatment as a domestic corporation; other foreign business entities and foreign estates

(c)"U.S. real property interest" means any interest, other

than as a creditor, in real property located in the U.S. or the Virgin Islands, or in a domestic corporation that is a U.S. real property holding corporation. A U.S. real property holding corporation is a corporation whose U.S. real property holdings equals or exceeds 50% of the FMV of its U.S. plus non-U.S. real property interests plus its assets used in trade or business

(d)Exception to withholding - generally

- (1)transferor (seller) supplies affidavit stating that seller is not a "foreign person"
- (2)interest sold is not a "U.S. real property interest"
- (3)interest acquired by buyer is used as a residence and amount realized on sale does not exceed \$300,000
- (4)interest sold is stock regularly traded on an established securities market

(e)Limitations on FIRPTA tax

- (1)FIRPTA tax is zero if amount realized on sale is zero
- (2)FIRPTA tax cannot exceed seller's maximum tax liability for the transaction. *See* also discussion at (g)(2), below
- (3)buyer or seller may under certain circumstances request a withholding certificate that allows the withholding and payment of a reduced amount

(f)FIRPTA tax due 20 days after date of transfer

(g)Forms used

- (1)transferee (buyer) withholds and reports FIRPTA tax on Forms 8288 and 8288-A
- (2)transferor (seller) must still file tax return on sale (either Form 1040NR, 1041 or 1120F). Seller may use FIRPTA tax as a credit against its own tax due

#### 4. Penalties

(a)Buyer or buyer's corporate officers, etc., shall be liable for the entire tax due. Interest shall also be assessed on the

amount of tax due from due date until date tax paid  
(b)IRS may utilize other civil and criminal penalties as well

E.Illustration - "AFIDA"

#### **IV. Immigration**

A.Governing Laws:

1.Immigration and Nationality Act (1990)

(a)Administered by DOJ (INS) and DOS  
(b)"Aliens" seeking admission to U.S.

2.Generally an "alien" must apply to U.S. consul for visa

(a)"Alien"  
(b)"Nonimmigrants"  
(c)Business visa classifications:

i.B Visas - business visitors  
ii.E-1 Visas - treaty traders and investors  
iii.H Visas - H1-B visas to temporary workers  
iv.L Visas (intra-company transfers  
v.TN Visas - professionals (NAFTA = TN)

B.NAFTA Issues - Temporary Entry

1.Purpose - NAFTA (Annex 1603) - clarifies categories of business persons/entrants. Still can qualify under for entry under each country's immigration laws

2.No labor certifications or quotas.

3.Categories of Entrants

(a)Business Visitors:

i.Qualifications

(b)Professionals

- i.NAFTA - Schedule 2
- ii.Credentials
- iii.No pre-clearance requirement (CFTA)

- (c)Intra-company Transferee
- (d)Traders and Investors - visa stamp

C.Permanent Residency - immigrant visas (green card holder)

- 1.Not affected by NAFTA, U.S. resident for tax purposes
- 2.Labor Certification
- 3.Apply for immigrant visa or file for adjustment of status

D.Practical Considerations

- 1."Admissible" (public health, safety, national security)
  - i.Criminal record
  - ii.DUI (problem entering Canada)
  - iii.Waiver available
  - iv.Interview at entry (common sense), identification, where, what, dollars to do it, criminal record
  - v.Pre-approvals available at Sweetgrass
- 2. **Consular and Immigration Officers - considerable discretion regarding visa applications and their decisions as to questions of fact and intent are final**

E.Naturalization

F.Analysis: L-1 Visas

- 1.Purpose
- 2.Requirements
- 3.Issues
- 4.Filing