Law 22 attracting millionaire investors to Puerto Rico

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Could create badly needed capital for local businesses

Law 22:
Tax incentives for economic development

About a dozen individuals have taken advantage of the incentives offered by Law 22, and an additional 60 applications for Law 22 benefits are in process, Economic Development & Commerce Department (DDEC by its Spanish initials) Secretary Alberto Bacó Bagué told CARIBBEAN BUSINESS.

A POWERFUL LURE

On Jan. 17, 2012, Puerto Rico enacted Law No. 22 of 2012, also known as the "Individual Investors Incentives Act" (Law 22). The law provides tax exemptions to eligible individuals residing in Puerto Rico, and may have profound implications for the continued economic recovery of the island. To avail themselves of such benefits, individual investors need to become residents of Puerto Rico and apply for a tax-exemption decree, which has generated interest from many investors as well as criticism from detractors.

Law 22 is designed to primarily attract to Puerto Rico high-net-worth individuals, empty nesters, retirees who currently relocate to other states and individual investors from the U.S. and other countries, by eliminating all taxes on passive income that accrues after they relocate to the island. While dividends and interest income earned by Puerto Rico residents on U.S. securities are generally taxed by the federal government, capital gains taxes on their sales are based on residence.

"Although Puerto Rico is a U.S. territory, pursuant to Section 933 of the U.S. Internal Revenue Code of 1986, bona-fide residents of Puerto Rico aren't subject to federal taxes on income derived from sources within Puerto Rico. Therefore, U.S. citizens that are bona-fide residents of Puerto Rico benefiting from Law 22will only be subject to federal taxation on income derived from sources outside of Puerto Rico. The law provide the following benefits to new Puerto Rico bona-fide residents on qualified investments: (i) 100% tax exemption from Puerto Rico income taxes on all dividends; (ii) 100% tax exemption from Puerto Rico income taxes on all interest; and (iii) 100%tax exemption from Puerto Rico income taxes on all short-term and long-term capital gains accrued after the individual becomes a bona-fide resident of Puerto Rico," said José R.Pérez-Riera, former DDEC secretary under the administration of former-Gov. Luis Fortuño. Pérez-Riera is widely credited as the intellectual father of Laws 20 and 22 of 2012.

Both of these laws were signed by Fortuño in early 2012, but hadn't yet been aggressively marketed and promoted until the new administration of Gov. Alejandro García Padilla and DDEC Secretary Bacó started doing so after taking office in January. This is a refreshing thing to see in Puerto Rico politics and a sign that both main political parties recognize the great potential that these two laws have for the island's economic development.

Puerto Rico's unique political status—under the jurisdiction of the U.S. but with a separate tax system—makes this pitch particularly attractive to wealthy investors residing stateside. U.S.-based millionaires and billionaires who move to the island would avoid taxation on the sale of securities, which are normally taxed federally at a 23.8% rate.

The Puerto Rico program has an advantage over foreign jurisdictions because investors don't have to renounce their citizenship to take advantage of the tax-shelter offer. Wealthy taxpayers who opt to re-establish overseas to a foreign country have to surrender their U.S. passports and pay an exit tax of 23.8% on unrealized capital gains.

Pérez-Riera said one of the benefits of Law 22 is that besides being able to retain their U.S. citizenship, new residents of Puerto Rico under Law 22 wouldn't be obligated to pay the 23.8% existing tax on unrealized capital gains when moving to the island. "If you consider recent trends showing that high-profile individuals, such as Facebook co-founder Eduardo Saverin, are moving to foreign jurisdictions and renouncing their citizenship, some would argue that it is in the best interest of the U.S. to keep these individuals in a U.S. jurisdiction such as Puerto Rico rather than losing them to a foreign country," Pérez-Riera said.

While these attributes make the deal particularly appealing to U.S. residents, Puerto Rico's laws have resonance with worldwide investors as well. One particular appealing aspect of the law is not only the tax breaks it provides, but also that it includes a Puerto Rico tax decree to protect investors who move here, guaranteeing the incentives through 2035 from any subsequent changes in local legislation.

"When I tell my clients they will get a contract guaranteeing their tax benefits for more than 20 years, it is very attractive," said Gabriel Hernández, who heads the tax division of BDO Puerto Rico. He said this rock-solid guarantee is very important given the increased tax levied on the wealthy by nations going through economic challenges, including the U.S. and several others in Europe and Asia.

"Another attribute that makes Law 22 particularly appealing to worldwide investors is that non-U.S. residents who become new residents of Puerto Rico and become naturalized U.S. citizens in Puerto Rico, are exempt from federal estate taxes that would be applicable if they became naturalized U.S. citizens in any of the 50 states," Pérez-Riera said.

"Clients can't believe the benefits. There is a tremendous amount of interest," added attorney Fernando Goyco-Covas, of the law firm Adsuar Muñiz Goyco Seda & Pérez-Ochoa, who said he is being invited to give seminars on the subject stateside.

The unique interplay between the U.S. and Puerto Rico tax systems is creating this powerful tax lure, offering a way to avoid federal taxes on unrealized capital gains that even foreign jurisdictions don't offer investors. However, it is the interaction between those two systems that have many predicting a backlash will occur.

BRACING FOR THE BACKLASH

"If you have billionaires who go to Puerto Rico and sell a lot of stock, they will avoid paying millions or billions of dollars in federal taxes. There would be some benefit in Puerto Rico and some local economic activity would be generated, but the federal treasury would lose a lot more than what Puerto Rico would gain," said former Clinton administration official Jeffrey Farrow, a veteran observer of the relationship between Washington, D.C., and U.S. territories. "It sounds like some people are exploiting a loophole to avoid a lot of federal taxes. When these things occur, Congress closes the loophole."

Farrow isn't alone. John Buckley, a former tax counsel for Democrats on the House Ways & Means Committee, told Bloomberg News that Puerto Rico is "walking a fine line. This would be the first time that Puerto Rico would kind of deliberately erode the U.S. tax base for individuals."

Buckley said a Congressional attempt to curtail the Puerto Rico program could generate cash for the U.S. Treasury and there would be little public opposition to shutting the program down. "You could get a score here," Buckley told the news outlet.

Meanwhile, one member of the Joint Committee on Taxation, Sen. Chuck Grassley (R., Iowa), told Fortune magazine that the new Puerto Rico tax break will prompt Congress to look at how territories are treated under U.S. tax laws, and an effort may be made to "harmonize" the treatment or ensure the territories accept "certain rules to prevent tax evasion."

U.S. Senate Finance Committee Chairman Max Baucus (D., Mont) will reportedly look at the issue as part of his efforts toward comprehensive tax reform.

Toby Roth, a former Republican congressman and lobbyist who has worked for decades on Puerto Rico issues, also said the Law 22 program is being questioned in Congress. "One of the congressmen said to me, 'why are they bringing the hedge fund managers down there? They have to keep the bright young Puerto Ricans on the island. That's where their future lies,'" Roth told CARIBBEAN BUSINESS. "If Puerto Rico doesn't create the jobs to keep their talented young people on the island, the hedge fund managers won't mean a thing."

Puerto Rico officials have been wary of fallout over the program since it was first conceived. However, supporters of Law 22 insist that the law is fair and doesn't affect the amount of taxes Puerto Rico residents pay the federal government. "Law 22 simply reduces the amount of money that the Puerto Rico Treasury will receive on certain passive investments to make Puerto Rico a more attractive jurisdiction to live in, much in the same way all 50 states use whatever assets they have to attract people to come visit, work or live in their state," Pérez-Riera said. "The amount of money that the federal government receives on qualified investments under Law 22 remains the same as it was before, as has been the case for decades. It is the amount paid in Puerto Rico taxes that has been modified under the law."

THE LAW IS MISUNDERSTOOD

"An individual can't simply move to Puerto Rico to avoid carried interest on capital gains that were accrued while he was a resident of any state in the U.S. If he moves to [the island] and sells his assets after becoming a Puerto Rico resident, he will still have his fair share of federal taxes on the capital gains accrued while prior to becoming a resident of [the island]. It is on gains accrued while he is a Puerto Rico resident that he would benefit under Law 22, and for those gains, Puerto Rico residents haven't paid federal taxes for generations, so nothing has changed in that regard under Law 22," Pérez- Riera said.

"Congressional backlash was extensively considered prior to the filing of Law 22. In fact, the bill wasn't filed for many months after it was ready to minimize any connection or adverse effect on the IRS [Internal Revenue Service] opinion regarding Law 154 [on excise taxes for manufacturers]," said Edward Calvesbert, former deputy DDEC secretary under the Fortuño administration.

"Marketing efforts were initially targeted through service providers—financial advisers, accountants, tax attorneys, etc.—to offer their high-net-worth clients the means and confidence to make the move to the island," he added. "Once we had dozens or hundreds of success stories, the marketing efforts would be taken more mainstream, directly to individuals."

Congress can and has reacted against programs that some believe are similar to Law 22. In the 1980s, Congress acted against a similar program in the Northern Mariana Islands, where a number of wealthy businessmen sought to avoid taxes on profits from the sale of successful businesses, which included Computerland and DHL, according to Farrow.

More recently, the federal government placed restrictions on a similar program in the U.S. Virgin Islands to cut down on abuse by requiring that residents of that territory are physically present for at least 183 days a year. The Puerto Rico law carries this requirement and additional tests to prove residency and that the investor is a member of the island community, precisely to ensure that individuals taking advantage of the law are people who have legitimately moved here and have committed to becoming a part of the local community.

However, not everyone agrees that a backlash is inevitable. Hernández of BDO Puerto Rico said while particular Congressmen may criticize the program, he noted that the official policy of the federal government has been to support Puerto Rico's efforts through taxation aimed at the island's economic development and ensure that federal tax laws don't blunt their effectiveness. This position was reiterated in a white paper last May by the Congressional Joint Committee on Taxation, he said.

Hernández said Law 22 is just the latest in a long line of economic development initiatives launched by the commonwealth. "If you look at the history of Puerto Rico tax incentives, it is full of backlash, both locally and in the federal government," he said, saying much of it is fueled by politics.

The tax expert also said the federal government couldn't suddenly treat the capital gains of Puerto Rico residents differently than those of residents elsewhere in the U.S. without running into problems of discriminatory treatment.

In the end, it will be a matter of public policy to decide if Congress takes action to eliminate Law 22, most likely by changing U.S. tax law or regulations, Goyco-Covas said. "This is a public policy issue for Congress. We have had our bond ratings degraded. Whether Congress will see it as a loophole or as what it really is, a tool for economic development, remains to be seen."

TOOLS FOR A GLOBAL ECONOMIC FIGHT

DDEC chief Bacó affirmed that Law 22 is an economic development tool that will bring "social and economic justice" to Puerto Rico residents brutalized by a six-year recession. He attributed much of the criticism of the program to "politics" and "envy."

Noting that Law 22 was passed under the Fortuño administration, he said it was a bipartisan effort and he has committed to promoting it because he sees its job-creating potential. The fact that the García Padilla administration considers Law 22 one of the cornerstones of its economic development strategy presents a change in policy by the leadership of the Popular Democratic Party— including the governor, San Juan Mayor Carmen Yulín Cruz, Senate President Eduardo Bhatia, House Speaker Jaime Perelló, Rep. Luis Vega Ramos and La Fortaleza Chief of Staff Jorge Colberg Toro—all of whom voted against the bill when it was approved by the Legislature during the previous administration.

"This isn't a tax loophole. This is the reality of our relationship with the U.S., and this relationship has aspects that restrict us and aspects which help us develop ourselves," Bacó said. "Puerto Rico has been losing many of its important economic development tools such as Section 936. If every time we try to develop ourselves they are going to restrict us and leave us 100% with the aspects of our relationship that restrict us, this is akin to taking a boxer, tying up his arms and his legs, and then throwing him in the ring to compete against the global economy."

Bacó said Law 22 should be looked at in tandem with Law 20, which aims to promote the export of services from the island, while also attracting professionals to Puerto Rico, by reducing the corporate tax rate to 4% on service export revenue.

"Laws 20 and 22 are the spearhead of a social and economic justice program for U.S. citizens living in Puerto Rico," Bacó said, who spoke to CARIBBEAN BUSINESS during a job fair in San Juan last week that drew some 10,000 applicants for 300 available posts. "Look at these young people waiting hours in line for a chance to work. This is a clear example of the sad state that Puerto Rico is living [now]."

Indeed, it now seems that almost everyone in Puerto Rico agrees about the potential that these new laws have for Puerto Rico's economic development, which is a rare occurrence in recent history.

"If Laws 20 and 22 are to fulfill their transformative potential, we need to look at their implementation as a long-distance relay rather than a sprint. I give much credit to Puerto Rico's DDEC Secretary Alberto Bacó, for picking up the baton in this relay and becoming Puerto Rico's champion for Laws 20 and 22 by aggressively promoting them as he has been doing, which is exactly what Puerto Rico needs at this time," Pérez-Riera said.

Bacó said the purpose of the program is for wealthy investors not just to come live in Puerto Rico, but also to bring a portion of their professional services businesses to the island, which would then provide services to the exterior. He said the success of the program wouldn't be measured by whether the John Paulson billionaires of the world come here to live, but whether those who do come here establish businesses on the island.

"Law 22 will bring people who will buy properties, which will help construction. They will also buy cars and spend money in stores and restaurants, and Law 20 will bring economic development. It will create jobs and, slowly but surely, a new source of revenue for the government," Bacó said.

Legendary hedge fund manager John Paulson, who thought of taking advantage of Law 22, isn't moving to Puerto Rico after all, but dozens of other high-net-worth individuals are still considering making the island their home to take advantage of the powerful tax incentives.

Hato Rey attorneys and accountants interviewed by CARIBBEAN BUSINESS are reporting fielding six calls daily from rich investors inquiring about the incentives, while another cites a 400% increase in inquiries since the Paulson stories broke.

Proponents said that bodes well for the success of the program, which aims to turn Puerto Rico into the Singapore of the Americas, a center of high finance and trade, and a magnet for expert professional services such as legal advice and accounting.

Critics, however, fear such success may be short-lived. Many are bracing for a Congressional backlash that would shut the program down and provoke other actions that could have a bigger detrimental impact on

Puerto Rico's economy. They also said this is just another example of the Puerto Rico government relying on "gimmicks" for its economic development program, which can be taken away by Congress.

"You have a good product. The issue is if you have a product that is too good for your own good," said economist Vicente Feliciano, president of Advantage Business Consulting. "The concern is: Would this create a backlash from Congress?"

There are billions of reasons to worry about a Congressional backlash, according to critics, who point to the roughly $20 billion net annually Puerto Rico gets from the U.S. government, and the relative ease that Congress would have in curtailing transfer payments.

Other sectors of the federal government could also become involved. One major concern is that the IRS has yet to render a final determination on the creditability of excise taxes collected under Law 154. In April 2011, the IRS issued a preliminary ruling that allowed U.S.-based parent companies of Puerto Rico manufacturers subject to Law 154's excise tax to claim a federal tax credit against the levy (CB April 7, 2011). The decision, issued as IRS Notice 2011-29, said the IRS and the U.S. Treasury Department were still "evaluating" the temporary excise tax.

With growing concerns in the U.S. regarding runaway federal deficits and ballooning levels of long-term debt, as well as growing inequality between the wealthy and the middle class, a program allowing millionaires and billionaires to skirt federal tax obligations isn't likely to find much public support.

"It is creating an image problem for Puerto Rico," said economist Joaquín Villamil. "If it isn't handled correctly, it will appear as if we are inviting people to evade federal taxes by coming to Puerto Rico. At this moment, that isn't a good idea."

The program may also impact Puerto Rico's future lobbying efforts in other areas, such as its pursuit of the Section 933-A tax break, which is being billed as a way to attract business to the island while at the same time serving as conduit for untaxed overseas profits to come back home to the U.S. Treasury.

Puerto Rico government officials, and a broad section of the business community, believe that upcoming talks on federal tax reform slated for this year provides a unique opportunity to win approval for the proposals.

Law 22 could become the focus of Congress during federal tax reform talks while there are other things that Puerto Rico wants from the committees with jurisdiction over taxes and major social programs, according to critics.

Bacó said Paulson's decision not to come to Puerto Rico has just given him more enthusiasm to continue marketing the program. He said while a backlash in Washington, D.C., is possible, he believes reason will prevail and he can make the case that Law 22 isn't only legitimate, but also necessary.

"I am not going to sleep in Washington. I will be talking about how you can't leave Puerto Rico without tools to combat a labor participation rate of 40%, unemployment at 14.6% and a per-capita income level that is less than half of the poorest state, Mississippi," Bacó said. "If they want to restrict us, they should do it after we have achieved the per capita level of the poorest state in the Union. I will tell that to every member of Congress."

CHARTING A RETURN TO GROWTH

Law 22 proponents are euphoric about the interest being shown in the tax break by offshore investors. While a solid portion of those who have expressed interest are in the financial services industry, Hato Rey tax experts said interest has also been shown by individuals in the technology, legal, tourism and other sectors.

While 40% of those who have already established here are hedge fund managers, there are also legal and accounting firms and technology executives, Bacó said.

In most cases, individuals are moving here with their families and businesses, according to "Golden Mile" executives. The incentives could also be attractive for upper-middle-class retirees wanting to live in a place with good weather, modern amenities and great tax breaks, while retaining the security of remaining under the U.S. flag.

Law 22 rules require the investors to move here and become a part of the local community, proponents said. People have to live here at least 183 days a year, and they must pass a series of "closer connection" tests to prove they are bona-fide members of the Puerto Rico community, Goyco- Covas said. That means an investor's spouse must live here as well, and minor children must go to school on the island, among other tests.

"It's not so easy to comply with this. You really have to live here and be a member of the community," he added.

As word of the tax break spreads, it will likely appeal to a growing number of businesspeople, proponents said. The incentives could attract high-net-worth Puerto Ricans who haven't lived on the island for many years, including celebrities, and they could also appeal to the growing legions of tech entrepreneurs who have suddenly become rich.

Puerto Rico is actively pursuing designation as a regional center for the EB-5 (Employment-Based, Fifth-Preference Category) Immigrant Investor Pilot Program, which grants U.S. residency to foreigners who invest at least $1 million and create jobs. If it succeeds, the combination of this program with Law 22 could make it even more attractive for non-U.S. investors to move to Puerto Rico and invest, especially given the estate tax differences between Puerto Rico and the U.S., referenced by Pérez-Riera.

"In the end, what we are looking for is a very diversified group of individuals and businesses that will form a professional services hub in Puerto Rico," Hernández said.

Others, however, question the economic punch the Law 22 incentives have, and wonder if it is worth promoting a measure that could be killed by Congress. That is especially the case when other tools, such as Law 20, will spur economic development without carrying much controversy.

"The export of services is more in line with traditional incentives to attract businesses here, and therefore, the reaction by the U.S. Congress to them wouldn't be as strong," Feliciano said. "The combination of Law 20 and Law 22 makes the incentives more powerful, but that doesn't mean that one can't be effective without the other."

"My concern with the measure is that what we are trying to get in Puerto Rico is strong production-based and knowledge-based economic development. This thing isn't really that important in terms of economic development," Villamil added. "We want to strengthen tourism, manufacturing and other productive sectors of the economy."