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Treasury and IRS news

Treasury Secretary confirms DST deal with France; all major TCJA guidance expected by October 2020

US Treasury Secretary Steven Mnuchin confirmed during a 12 February 2020 Senate Finance Committee hearing on the FY 2021 budget that the United States and France had, in fact, reached agreement to de-escalate tensions over France's enactment of a digital services tax (DST).

According to press reports in January, France agreed to suspend collection of the 3% DST and, in turn, the US agreed not to impose retaliatory tariffs of up to 100% on approximately US\$2.4 billion of French goods. No action reportedly would be taken by either side through the end of 2020 in the hopes of reaching a multilateral digital tax agreement. (In February, France announced that it will suspend 2020 collection of the DST until December 2020, but 2019 DST remains due in April 2020.)

Secretary Mnuchin further was quoted as saying that reaching a multilateral digital solution is a "priority for us for the balance of this year."

Later in the month, a senior US Treasury official was quoted as saying the Government is "fairly confident" that it will release all major *Tax Cuts and Jobs Act* (TCJA) guidance by 1 October 2020. The official also offered an unofficial timeline of coming international tax projects. Final Section 901(m) regulations will be out "any day now," he said, and final and proposed hybrid regulations are expected for release in the next few weeks. (As we go to press, the government has not released the final Section 901(m) regulations.)

According to the official, eagerly anticipated final and proposed Section 163(j) regulations should be out in March 2020, with Foreign Derived Intangible Income (FDII) and Global Intangible Low-taxed Income (GILTI) regulations expected to be released this summer; foreign tax credit regulations and other international guidance would follow.

The official also addressed the three pending US tax treaties with Chile, Hungary and Poland that remain stalled over the TCJA enactment of the Base Erosion and Anti-abuse Tax (BEAT). The official specifically pointed to the suggestion that BEAT violates the US Model Treaty's relief from double taxation and nondiscrimination provisions.

The official offered that the most direct solution may be to simply reopen negotiations with those three countries to address BEAT in the context of the treaties.

IRS officials elaborate on limited relief for Section 965 transition tax, BEAT PLR option

A senior IRS official in early February provided further details on the recent announcement by the Service offering limited relief from double taxation in regard to the Section 965 transition tax.

The official was quoted as saying that taxpayers should not interpret the announcement as meaning that the IRS plans to issue more guidance in this area or planning to revisit positions already taken by the government in released guidance. The official also said the limited relief being offered should not be seen as an "alternative forum where relief is provided elsewhere," pointing to situations where competent authority relief is appropriate and available. Finally, the official said taxpayers should view the process as an informal inquiry, and not a formal process akin to a private letter ruling.

On that latter point, another IRS official was quoted as saying the Service will accept taxpayer requests for private letter rulings on determining the base erosion payment due under the Section 59A Base Erosion and Anti-Abuse Tax (BEAT). The official added there is no timeline for the release of "informal" BEAT guidance such as chief counsel advice or a revenue ruling, something that had earlier been floated by the IRS as a possibility.

Final and proposed BEAT regulations were published in the Federal Register on 6 December 2019.

Transfer pricing

Altera Corporation files petition for writ of certiorari with US Supreme Court

On 10 February 2020, Altera Corporation (Altera) filed a [petition](#) for a writ of certiorari asking the US Supreme Court to review the Ninth Circuit Court of Appeals' decision upholding a 2003 IRS regulation. The regulation required participants in a cost-sharing arrangement to treat stock-based compensation (SBC) costs as compensable under Section 482.

Following the issuance of the Ninth Circuit opinion on 7 June 2019, Altera sought, but was denied, a rehearing *en banc* by the entire Ninth Circuit on 12 November 2019.

In its petition to the Supreme Court, Altera contends that the government employed an indefensible “bait-and-switch,” attempting to justify the 2003 regulation using arguments that it advanced for the first time in the Ninth Circuit after the Tax Court held the regulation invalid.

Altera argues that, by accepting the government’s new rationale, and giving it “Chevron Deference,” the Ninth Circuit failed to follow settled rules of administrative law established by the Supreme Court. Specifically, Altera notes that those rules require agencies to give notice and opportunity to comment on proposed rules and to acknowledge and explain in rulemaking any changes to long-standing positions.

The Altera petition asserts that the Ninth Circuit opinion would allow the government to impose billions of dollars in taxes based on a position not advanced prior to litigation. Moreover, Altera states that the significant departure from a long-standing approach to cost sharing would upend “many companies’ research-and-development agreements.” In addition, Altera argues that the Ninth Circuit’s broad interpretation of *Chevron* would enable agencies to evade meaningful judicial review.

A brief in opposition to a petition to a writ of certiorari may be filed by the respondent within 30 days after the case is placed on the docket unless the time is extended. A reply brief by the petitioner may then be filed 14 days following. Four of the nine Justices must vote to grant the writ in order for the case to be heard by the Supreme Court.

OECD news

OECD announces preliminary impact assessment and economic analysis of BEPS 2.0 project proposals

On 13 February 2020, the OECD Secretariat hosted a webcast to provide a summary of the preliminary results of its analysis of the impact on countries’ tax revenues of the proposals being developed under the BEPS 2.0 project. These preliminary results were presented to the participating jurisdictions at the Inclusive Framework meeting on 29-30 January 2020.

For purposes of the analysis, the Secretariat grouped countries into “high-income,” “middle-income,” “low-income” and “investment hubs” - by reference of gross domestic product per capita of each country - and provided results at the level of such country groups. No results at a country-specific level were provided on the webcast.

OECD on track to complete BEPS 2.0 core principles in 2020; official says US Pillar 1 safe harbor proposal ‘could raise major difficulties’

Pascal Saint Amans, Director of the OECD Centre for Tax Policy and Administration, in February was quoted as saying that the organization is on track to reach agreement on the core principles of the BEPS 2.0 Pillars One and Two project by the end of 2020. Saint Amans said that the focus through the end of this year will be to reach consensus on the main aspects of a digital taxation system, with more detailed guidance possibly spilling into 2021 through work by the Inclusive Framework on BEPS.

In the meantime, OECD Secretary General Angel Gurría released a report to the G20 Finance Ministers and Central Bank Governors on 14 February warning that the US proposal to implement the BEPS 2.0 Pillar 1 proposal on a safe harbor basis “could raise major difficulties, increase uncertainty and fail to meet all of the policy objectives of the overall process.”

The Secretary General confirmed that “a final decision on the matter will be taken only after the other elements of the consensus-based solution have been agreed upon.” The OECD [report](#) was released ahead of a G20 Finance Ministers meeting later in the month.

Overall, the OECD Secretariat expects the combined effect of Pillars One and Two to be a significant increase in global tax revenues. Depending on the specific design choices that are made, the Secretariat's analysis estimated that the global net revenue gain may be up to 4% of global corporate income tax revenues, or US\$100 billion annually. As a share of corporate tax revenues, the Secretariat's estimates of the revenue gains are broadly similar across the groups of high, middle and low-income countries. The Secretariat did not provide any information on the estimated impact on the revenue impacts for investment hubs.

With regard to Amount A of Pillar One, the analysis shows that, on average, low and middle-income economies would gain relatively more revenue than advanced economies. Moreover, the analysis shows that more than half of the profit that would be reallocated would come from 100 multinational enterprise (MNE) groups.

The OECD Secretariat modeled four different scenarios for Pillar Two, using 12.5% as the assumed minimum tax rate and based on the income inclusion approach and a country-by-country measurement (i.e., jurisdiction blending).

- ▶ A minimum tax assuming no interaction with Pillar One
- ▶ A minimum tax with interaction with Pillar One but no profit shifting behavior change by MNEs
- ▶ A minimum tax with interaction with Pillar One and a change in profit shifting behavior by MNEs
- ▶ A minimum tax with interaction with Pillar One, a change in profit shifting behavior and countries raising tax rates

Based on the OECD Secretariat's analysis, the outcome of all four scenarios would be similar overall increases in tax revenues - however, the cause of the increase in tax revenue was different across the scenarios. The OECD Secretariat concluded that Pillar 2 would raise significant tax revenues, reduce tax rate differentials between jurisdictions and reduce the incentives for MNEs to shift profit.

The OECD Secretariat noted that the proposals under consideration are expected to lead to a significant reduction in profit shifting. They also expressed the view that a failure to reach a consensus-based solution would lead to further unilateral measures and greater tax uncertainty.

OECD releases consultation document on review of Country-by-Country Reporting

On 6 February 2020, the OECD released a public [consultation document](#) on the review of Country-by-Country (CbC) Reporting. The Consultation Document is based on the mandate set out in the 2015 BEPS Action 13 final report (*Transfer Pricing Documentation and Country-by-Country Reporting*) for a 2020 review of CbC reporting.

The Consultation Document contains topics concerning the implementation and operation of BEPS Action 13, the scope of CbC reporting, the content of a CbC report, and other aspects of BEPS Action 13 (the master file and local file). The topics discussed in the Consultation Document reflect issues where interpretative guidance has not resulted in a consistent approach to be applied by all jurisdictions and issues that can only be addressed through a change to the minimum standard. This would require agreement by the Inclusive Framework, the group of 137 interested countries and jurisdictions participating on an equal footing in the development of standards on BEPS-related issues.

Interested parties are invited to submit their comments on the questions raised within the Consultation Document and on all aspects of the BEPS Action 13 report by 6 March 2020. The [public consultation meeting](#) on the 2020 review of BEPS Action 13 will be held on 17 March 2020.

OECD releases final transfer pricing guidance on financial transactions

On 11 February 2020, the OECD released its final report with transfer pricing guidance on financial transactions (the [Report](#)). The Report was published as follow-up guidance in relation to BEPS Action 4 and Actions 8-10.

It aims to clarify the application of the principles included in the 2017 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPG); in particular the accurate delineation analysis under Chapter I, to financial transactions. The Report represents the first time that guidance on financial transactions is included in the OECD TPG, which should contribute to consistency in the application of transfer pricing and help reduce transfer pricing disputes and double taxation.

As noted, the Report covers the accurate delineation of financial transactions, in particular with respect to multinational enterprises' (MNEs) capital structures. The Report also addresses specific issues related to the pricing of financial transactions such as treasury functions, intra-group loans, cash pooling, hedging, guarantees, and captive insurance. It also provides guidance on the determination of risk-free rates of return and risk-adjusted rates of return where an associated enterprise is entitled to such return under the guidance in Chapter I and Chapter VI of the OECD TPG. The Report includes a number of examples to illustrate the principles discussed.

Key items discussed in the Report include:

- ▶ Intra-group lenders without functional substance
- ▶ Actual delineation of guaranteed loans
- ▶ Actual delineation of the terms of funding
- ▶ Cash pools
- ▶ Credit rating

The new guidance on financial transactions represents a significant step in the development of the OECD TPG, as it is the first time that guidance on such transactions will be included. The Report has been approved by the 137 members of the Inclusive Framework, and therefore its importance stretches beyond the OECD member countries.

OECD issues draft rules on platform operators for sellers in sharing and gig economy

The OECD on 19 February 2020, issued a consultation document on [Draft Model Rules for Reporting for Platform Operators with respect to Sellers in the Sharing and Gig Economy](#). According to the OECD, the consultation is meant to address the fact that the "sharing" and "gig" economies are rapidly expanding.

This presents major opportunities for tax administrations to adopt compliance strategies to target what, up until now, has been part of the informal cash economy and is increasingly taking place on digital platforms. The consultation runs through 20 March 2020.

OECD releases eighth batch of peer review reports on BEPS Action 14

The OECD on 24 February 2020 released the eighth batch of peer review reports relating to the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia of the BEPS minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*). Guernsey and the Isle of Man had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD therefore also released two accompanying best practices reports.

Overall, the reports concluded that all eight assessed jurisdictions met almost all or most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in this Stage 1 peer review report will be monitored.

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