

Global Tax Alert

News from EY Americas Tax

Colombian Tax Authority addresses application of most-favored nation clause of double tax treaties signed by Colombia

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By Official Opinion No. 3283 issued on 17 February 2020, the Colombian Tax Authority (DIAN per its acronym in Spanish) addresses the application of the most-favored nation clause (MFN) included in each of the double tax treaties (DTTs) signed by Colombia.

Background

The DTT between Colombia and the United Kingdom (UK) recently entered into force and changed the income tax treatment applicable to certain services. Through the DTT, Colombia no longer includes technical assistance, technical services and consultancy services under the definition of royalties (Article 12), which may be taxed by the source State (usually limited to a 10% rate by the DTT).

Because of the removal of those services from the definition of royalties, income derived from the provision of those services may be treated as business profit (Article 7). As a result, income from those services will not be taxed in Colombia to the extent that they are not attributable to a permanent establishment in Colombia.

The change introduced by this DTT may modify the application of other DTTs with an MFN clause related to such services. Under an MFN clause, when a better tax treatment or relief is established in a subsequent DTT for the same item of income (e.g., income derived from technical services, technical assistance services and consultancy services), that treatment is extended to previously signed DTTs.

Opinion

Because the wording of the MFN clause applicable to technical services, technical assistance and consultancy services is different in each DTT, the DIAN issued an official opinion clarifying in which cases the DTT signed with the UK triggers the application of the MFN clause included in the relevant DTT. If the MFN clause is triggered, income derived from the provision of those services will not be subject to taxation in Colombia to the extent the services are not attributable to a permanent establishment in Colombia. The following table shows the DIAN's position on the MFN clause in the DTTs signed by Colombia:

DTT	DIAN position of MFN clause application	DIAN comment
Canada	Yes	MFN clause is applicable for technical services, technical assistance and consultancy services.
Chile	No	MFN clause may apply if there is a lower tax rate, which is not in the Colombia-UK DTT.
Spain	No	MFN clause proceeds when there is a lower tax rate or exemption, which is not in the Colombia-UK DTT.
Mexico	Yes (limited)	MFN clause only applies for technical assistance and technical services (not for consultancy services).
Portugal	Yes	MFN clause is applicable for technical services, technical assistance and consultancy services.
Czech Republic	Yes	MFN clause is applicable for technical services, technical assistance and consultancy services.
Switzerland	No	MFN clause may apply if there is a lower tax rate, which is not in the Colombia-UK DTT.

Note: DTT with Korea and India do not have an MFN clause, as well as Decision 578 of the Andean Community.

The DIAN clarifies that if the MFN clause applies, its application is from 1 January 2020.

The DIAN's position may be unclear in some cases and, as a result, a mutual agreement procedure may be needed to address certain situations.

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EYG no. 001047-20Gbl

1508-1600216 NY
ED None

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