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Global Tax Alert

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Colombia issues regulations on indirect transfer regime

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The Colombian Government issued Decree 1103, which regulates the indirect transfer regime. The decree contains certain definitions, rules and procedures applicable to this regime.

Indirect transfer regime

The indirect transfer regime was re-established when Law 2010 of 2019 reenacted most of the provisions of Law 1943 of 2019, which was declared unconstitutional due to procedural flaws. Under this regime, the indirect disposal of assets located in Colombia, through the transfer, by any means, of shares, participations or rights in foreign entities, is taxed in Colombia, as if the Colombian underlying assets were directly transferred (some exceptions could apply).

Decree 1103

Scope of the indirect transfer

Decree 1103 sets forth that an indirect transfer "by any means" under this regime includes any form of ownership transfer, contributions to foreign entities, the liquidation of foreign entities, payments in-kind made with the shares of foreign entities, and the reduction of foreign entities' capital with

the reimbursement of contributions. For purposes of this regime, the term “foreign entities” includes any type of investment vehicle, such as companies, trusts, collective investment funds, other trust businesses and private interest foundations, regardless of whether they have legal personality, or whether they are considered disregarded for tax purposes.

Selling price and exchange rate

The transfer/sale value should be the fair market value of the underlying Colombian asset. The applicable exchange rate for disposals in foreign currency will be determined under the rules of the Colombian Tax Code. As a general rule, sellers should use the official exchange rate on the transfer date.

Tax basis of the indirect transfer

Per Decree 1103, the relevant tax basis in the indirect transfer will be the one held in the underlying Colombian asset, which should be calculated based on the Colombian Tax Code rules. If the foreign entity owns the underlying asset or the underlying asset is partially transferred, the following calculation should be used to determine the tax basis: Total cost of the underlying asset indirectly transferred multiplied by (the percentage of the entity transferred multiplied by the percentage of total ownership of the underlying asset).

If the assets subject to indirect transfer are owned by a Colombian branch of a foreign company, the seller will take into consideration the respective amortization/depreciation of the assets registered by the branch, in accordance with Colombian regulations, when determining the tax basis. Hence, the profit that results at the time of the indirect transfer of amortized/depreciated assets must first be attributed as recapture (subject to ordinary income taxation); the balance, if any, will be treated as taxable income or as capital gain under Colombian tax rules.

When a subsequent indirect transfer is made, the tax basis of the underlying Colombian assets will correspond to the purchase price allocated to the underlying Colombian assets (indirectly transferred through the transfer of the foreign entity). However, Decree 1103 clarifies that the tax basis of the entity owning the underlying asset in Colombia is not stepped up.

Interaction of the indirect transfer regime with other regulations

When the transferor/seller of the foreign company is a controlled foreign corporation (CFC), Decree 1103 states that the indirect transfer regime will take precedence over the Colombian CFC regime.

When an indirect transfer is conducted through mergers or spin-offs (or demergers) between foreign entities, the exceptions provided for these processes in the Colombian tax rules will take precedence.

Finally, provisions in the tax treaties (including the Andean tax treaty) will take precedence in determining the eventual tax liability derived from the indirect transfer.

Tax returns and withholding tax

The foreign indirect seller must file the Colombian income tax return within a month of the transfer date (Form 150). If there are payments subject to conditions, and those are met, the return must be filed within a month of the fulfillment of the conditions. However, these rules do not apply if the transferor is a Colombian tax resident, which should declare these transactions and pay any taxes due when they file their routine returns (annually).

For foreign indirect sellers, tax payments may be made by wire transfer to the Colombian Treasury's international account.

When the acquirer is a Colombian tax resident, the acquirer should withhold any tax at the time of payment or when the payment is registered for accounting purposes. The withholding tax should be applied over the purchase price allocated to the Colombian underlying assets. If the transferor and acquirer enter into an installment agreement or the transfer is subject to payment conditions, however, the withholding tax should be applied to each payment when it occurs in accordance with any conditions to which the parties have agreed.

For additional information with respect to this Alert, please contact the following:

Ernst & Young S.A.S., Bogotá

- ▶ Luis Orlando Sánchez luis.sanchez.n@co.ey.com
- ▶ Juan Torres Richoux juan.s.torres@co.ey.com
- ▶ Andres Millan Pineda andres.millan.pineda@co.ey.com

Ernst & Young LLP (United States), Latin American Business Center, New York

- ▶ Zulay Andrea Arevalo zulay.a.arevalo.garcia1@ey.com
- ▶ Ana Mingramm ana.mingramm@ey.com
- ▶ Enrique Perez Grovas enrique.perezgrovas@ey.com
- ▶ Pablo Wejcman pablo.wejcman@ey.com

Ernst & Young Abogados, Latin America Business Center, Madrid

- ▶ Jaime Vargas jaime.vargas.c@es.ey.com

Ernst & Young LLP (United Kingdom), Latin American Business Center, London

- ▶ Lourdes Libreros lourdes.libreros@uk.ey.com

Ernst & Young Tax Co., Latin American Business Center, Japan & Asia Pacific

- ▶ Raul Moreno, *Tokyo* raul.moreno@jp.ey.com
- ▶ Luis Coronado, *Singapore* luis.coronado@sg.ey.com

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