18 December 2017

Global Tax Alert

The Latest on BEPS - 18 December 2017

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OECD

On 18 December 2017, the OECD released the 2017 OECD Model Tax Convention which incorporates significant changes developed under the OECD/G20 project to address base erosion and profit shifting. The publication is a condensed version as it contains the articles and commentaries as they read on 21 November 2017, and without the historical notes and the background reports that are included in the full version. The 2017 edition reflects a consolidation of the treaty-related measures resulting from the work on the BEPS Project under Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*), Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*), Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment Status*) and Action 14 (*Making Dispute Resolution More Effective*).

On 15 December 2017, the OECD released the second batch of peer review reports relating to the implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden of the BEPS Minimum Standards on Action 14 on improving tax dispute resolution mechanisms. Austria, Liechtenstein, Luxembourg and Sweden also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has also released four accompanying best practices reports.

Overall the reports conclude that these jurisdictions meet most of the elements of the Action 14 Minimum Standards. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases second batch of peer review report on Action 14*, dated on 15 December 2017.

Building a better working world

On 14 December 2017, Bahamas and Zambia joined the BEPS Inclusive Framework bringing to 110 the total Members in the framework. As new BEPS Members, they have committed to comply with the BEPS Minimum Standards, which are contained in Action 5 (countering harmful tax practices), Action 6 (preventing treaty abuse), Action 13 (transfer pricing documentation) and Action 14 (enhancing dispute resolution). Bahamas and Zambia will also participate on an equal footing with the rest of BEPS members on the remaining standard setting under the BEPS project, as well as the review and monitoring of the implementation of the BEPS package.

The OECD has announced that it is now gathering input on the implementation of the BEPS Action 14 Minimum Standards in the fourth batch of jurisdictions (Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal) and invites taxpayers to submit their input related to their experiences in these jurisdictions, via an electronic questionnaire, by 22 December 2017.

The exercise is part of the process of the mutual agreement procedure (MAP) peer review and monitoring process that the OECD launched in December 2016 under BEPS Action 14 in relation to more effective dispute resolution mechanisms.

Business taxpayers are encouraged to take this opportunity to submit their views. The OECD will continue to launch peer reviews of other batches of jurisdictions and publish peer review reports in accordance with the assessment schedule of peer reviews published by the OECD in October 2016.

See EY Global Tax Alert, *OECD invites taxpayer input on fourth batch of peer reviews of Dispute Resolution under BEPS Action 14*, dated 11 December 2017.

On 4 December 2017, the OECD released the first annual peer review report relating to the compliance by members of the Inclusive Framework on BEPS of the Minimum Standards on Action 5 for compulsory spontaneous exchange on certain tax rulings (the transparency framework). The report covers the jurisdictions which participated in the BEPS project prior to the creation of the Inclusive Framework, and it assesses the 2016 calendar-year period. This report will be followed by annual reviews performed at least through 2020 (the end of the current agreed review period). With respect to jurisdictions that joined the BEPS inclusive framework in 2016, the next annual peer review process will be their first review.

Overall, the report concludes that all the assessed jurisdictions either had or have undertaken steps to implement the necessary legal framework for the spontaneous exchange of information on rulings for the year in review.

In next year's peer review process, each assessed jurisdiction's efforts to address any shortcomings identified in the 2016 peer review report will be monitored, and more jurisdictions will be included into the assessment.

See EY Global Tax Alert, *OECD releases first annual peer review report on Action 5*, dated on 5 December 2017.

European Union

On 5 December 2017, the Council of the European Union (the Council) published a listing of "Uncooperative jurisdictions for tax purposes" (the listing), comprising 17 jurisdictions which were deemed to have failed to meet relevant criteria established by the European Commission (The Commission).

The Council also published their conclusions titled *Responding to the challenges of taxation of profits of the digital economy*, noting that it (the Council) "Looks forward to appropriate Commission proposals by early 2018" and "Takes the view that an appropriate nexus in the form of a virtual permanent establishment, together with any necessary corresponding amendments to the rules of transfer pricing and profit attribution, which would take into account where value is created in the different business models of the digital economy, should be explored." Some of the outcomes of the Council are in line with the recommendations set out under BEPS project.

Additionally, the Council agreed on a series of new measures to support the digital economy in the area of value added tax (VAT) compliance.

See EY Global Tax Alert, *Council of the European Union publishes list of uncooperative jurisdictions for tax purposes*, dated 6 December 2017.

The European Union (EU) has agreed on new rules to simplify VAT compliance obligations for e-commerce in goods to support the digital economy by accelerating growth for online businesses, in particular start-ups and small and medium enterprises.

The changes will progressively come into force by 2021. Key measures include a single point of VAT registration for online sales, removal of the current exemption from VAT for imports of small consignments worth not more than €22 from outside the EU, and simplified rules for businesses with cross-border sales of less than €100,000. In addition, large online marketplaces will be responsible for ensuring VAT is collected on sales on their platforms.

The new rules are in line with recommendations set out under Action 1 on *Addressing the tax challenges of the digital economy*.

See EY Indirect Tax Alert, *EU agrees on new VAT rules for online trading*, dated on 6 December 2017.

Belgium

On 28 November 2017, the Belgian authorities announced that they would extend the filing deadline to 31 March 2018 for the three transfer pricing reporting obligations – the Master File, the Country-by-Country (CbC) Reporting (CbCR) and the CbCR notification – which were initially due by the Belgian entities of a multinational enterprise (MNE) by 31 December 2017. This means that for Belgian affiliates or permanent establishments of an MNE group with a financial year ending on or after 31 December 2016 and before 30 March 2017, the first deadline for filing the 2016 CbC report (275.CBC) and/or 2016 master file (275.MF) will now be 31 March 2018 (provided that the applicable thresholds are met). In addition, for affiliates or permanent establishments of an MNE group with a financial year ending on or after 31 December 2017 and before 30 March 2018, the deadline to file the 2017 CbCR notification form (275.CBCNOT) is now 31 March 2018. These documents need to be filed in an XML-format on the platform of the Belgian tax authorities, MyMinfinPro.

See EY Global Tax Alert, *Belgium postpones year-end transfer pricing filing deadline until 31 March 2018*, dated 29 November 2017.

Chile

On 7 December 2017, Chile's Internal Revenue Service (Chilean IRS) published a Circular Letter with instructions regarding the concept of "permanent establishment" (PE). This is the first time that the tax authorities dealt directly with the concept of PE in a general Circular Letter. The Chilean IRS has covered the concept of PE mostly through rulings, based on the general examples contained in the Income Tax Law. Although the new Circular Letter is generally in line with what has been expressed by the tax authorities through certain rulings, it provides a series of interesting BEPS-oriented statements that provide new elements (e.g., playing the principal role leading to the conclusion of contracts) on the discussion of the PE concept in Chile.

Denmark

On 7 December 2017, the Danish Parliament enacted Bill No. L 13 establishing a deadline for the preparation of Danish transfer pricing documentation. Danish taxpayers are required to prepare transfer pricing documentation in line with the OECD's concept of a local file, a master file, and CbC report under Action 13 of the BEPS Action Plan. The documentation must be submitted to the tax authorities within 60 days of a request. However, the law did not specify any deadline for the preparation of the documentation.

It has now been codified that transfer pricing documentation must be prepared by the deadline for the tax return. The documentation need not be filed together with the tax return. Noncompliance with the deadline may mean that: (1) the burden of proof shifts from the tax authorities to the taxpayer; (2) taxable income may be determined on an estimated basis; and (3) transfer pricing penalties are imposed. These consequences may arise even if a taxpayer submits proper documentation within the 60-day deadline, provided the documentation was not prepared in due time. The deadline is quite tight and may cause practical issues with respect to compliance for multinational enterprises.

The new law is applicable from 1 January 2019. This means that the law normally will be effective with respect to transfer pricing documentation that must be prepared for income year 2018. However, for companies with a 2018 income year ending in the period 2 April–30 June 2018, the new law is applicable for income year 2019, i.e., the income year ending in the period 2 April–30 June 2019.

See EY Global Tax Alert, *Denmark enacts deadline for preparation of transfer pricing documentation*, dated 7 December 2017.

France

Although the French Government, in this most recent publication, aims to provide additional comfort that no CbC Reporting-related penalties would apply if certain conditions are met, its 4 December announcement still leaves room for interpretation and fails to provide the legal certainty sought after by French entities and their parent companies.

See EY Global Tax Alert, *French Country-by-Country Reporting requirements may impact US multinational groups*, dated 12 December 2017.

Greece

On 4 December 2017, the Greek Public Revenue Authority published Decision No. 1184 which includes clarifications on the completion and the process of filing CbC reports and notifications submission. Decision No. 1184 references the OECD guidance for the implementation of CbC reporting (where applicable).

India

On 27 November 2017, the Indian tax administration body issued a press release stating that MAP for transfer pricing disputes and the bilateral Advance Pricing Agreement (APA) process would be available to taxpayers even where Article 9(2) or the equivalent is not present in the Double Taxation Avoidance Agreement (DTAA) with the taxpayer's jurisdiction. Article 9(2) of the OECD Model Tax Convention provides for correlative adjustments to mitigate double taxation arising from income adjustments on account of transfer pricing provisions in a particular country. The Indian Government had, in the past, adopted a position that MAP for transfer pricing disputes and bilateral APAs could not be permitted where Article 9(2) or an equivalent article was not present in the DTAA with the relevant country.

See EY Global Tax Alert, *Indian Tax Administration relaxes norms for MAP and bilateral APAs*, dated 5 December 2017.

Italy

On 28 November 2017 the Italian tax Authorities (ITA) published operational instructions (provvedimento n. 275956) for preparation and transmission of CBC reports. The provisions are in line with the OECD and EU directive 2016/881. The deadline for submitting a CBC report has been set at 12 months after the end of the relevant period. CBC reports sent after the deadline will be in any case received by ITA and exchanged with the other countries involved. Transmission must be done via electronic exchange of an XML schema through the informatics network of ITA. Upon receiving the CBC report, ITA will send a receipt that will confirm whether transmission has been done successfully. The instructions provide the possibility of amending the CBC report either spontaneously by the taxpayer or upon request of ITA (in which case the deadline is 60 days after the request). Information included in the CBC report will have to be provided in both the Italian and English language. A new office responsible for CBCR will be established in order to guarantee the appropriate use of CBCR, as indicated by the OECD. The instructions also contain a technical appendix for preparing the XML schema. Specific clarifications are provided for banks and financial institutions in relation to the determination of certain financial data to be included in table 1 of the CBC report.

On 11 December 2017, the ITA issued additional operational instructions (provvedimento n. 288555) which provide for the extension of the deadline for filing the CBC report for the first year of reporting for companies with financial year ending on 31 December 2016 or before. The submission will be deemed to be properly made if done by 9 February 2018 (instead of the original deadline of 31 December 2017).

Jersey

On 7 December 2017, Jersey and the United States signed the Competent Authority Arrangement on the Exchange of CbC reports which entered into force on the same date. The Director of International Tax of Jersey also confirmed that CAAs would be signed with the United Kingdom (UK), Guernsey, Isle of Man and Hong Kong by 31 December 2017 although these have not yet been signed.

On 24 November 2017, the Director of International Tax of Jersey published an extension of the deadline to submit the CbC reports to 31 January 2018 (instead of 31 December 2017) for resident entities in Jersey. CbC reports must be submitted using the CbC reporting XML schema developed by the OECD.

New Zealand

On 6 December 2017, the New Zealand Government introduced the legislative details on previously announced international tax reform package. The Taxation (Neutralising Base Erosion and Profit Shifting) Bill includes comprehensive tax law covering the headline concepts originally announced in March 2017. The Bill details both new initiatives and significant amendments to existing law in respect New Zealand taxing international business. The Bill includes introduction of a new PE avoidance rule (together with a corresponding deemed source rule for income attributable to PEs); new interest limitation rules for inbound related party debt; changes to transfer pricing rules to align with OECD guidelines (and more consistent with Australia's equivalent), including an extension of the "time bar" period to seven years in transfer pricing matters; new and detailed rules to counter hybrid mismatch arrangements; more restrictive amendments to the thin capitalization rules; enhancement of tax authority's administrative powers in respect of multinational corporations; and specific changes to certain life insurance policies.

In addition, MNE groups with worldwide revenues exceeding €750 million with an ultimate parent under subpart FE of the *Income Tax Act 2017* that is a New Zealand resident must provide to the Commissioner a CbC report, for each period set by the Commissioner, that includes the information described in the OECD transfer pricing guidelines, Chapter V, Annex III; and other information that is required by the Commissioner. The CbC report for a period must be provided to the Commissioner by the date that is 12 months after the end of the period.

The effective date for introduction is 1 July 2018, meaning taxpayers with income years commencing on or after this date will be impacted. The government budgets estimate an additional annual revenue of NZD190 million. The upshot is that the Government sees these rules as having wide import considering that many taxpayers will undertake remedial Action to eliminate the risk of these changes producing punitive economic impacts. The headline rules in the Bill have been well sign-posted and were expected. However, this is the first release of comprehensive supporting legislation and there will inevitably be details and quirks that were not immediately obvious.

Norway

On 5 December 2017, the Norwegian Parliament adopted a bill to amend effective dates for the automatic exchange of financial account information under the CbCR. Norway signed the CbC Multilateral Competent Authority Agreement (MCAA) in 27 January 2016, which means that Norway can exchange information with all parties to the convention from the year 2016 onwards.

The provision for automatic exchange of information would only be applicable on or after 1 January of the year following the one in which the amended Convention entered into force in respect of a new Party. The Norwegian Parliament now committed to automatically exchange information in/as of 2017 also with new parties to the CbC MCAA.

Portugal

On 11 December 2017, Portuguese Order number 367/2017 approving form 54 for CbCR Notifications was published in the *Official Gazette*. The form must be submitted by Portuguese resident entities and Portuguese PEs of multinational groups with a turnover of at least €750 million in the preceding tax period, in order to inform the Portuguese tax authorities about the entity of the group that will file the CbC report on behalf of the group. The form must be submitted by electronic means on an annual basis and within five months after the end of the fiscal period concerned (in respect of tax years starting as from 1 January 2016). For fiscal year 2016, the submission deadline was postponed until 31 December 2017.

Slovakia

On 7 December 2017, the final version of the *Amendment to the Income Tax Act* was approved by the National Council of the Slovak Republic. The Amendment now only awaits the approval of the President. The Amendment is anticipated to be effective as of 1 January 2018 (or 1 January 2019 – applicable for controlled foreign company (CFC) rules).

The Amendment transposes a number of the measures set out in the EU Anti-Tax Avoidance Directive, and includes rules on exit taxation, hybrid mismatches and CFC rules.

Furthermore, the Amendment also includes significant changes to the PE concept.

The Amendment introduces a new definition of a digital platform, which represents a hardware or software platform required to create and administer applications. The legislators are pursuing the identification of a modern technological business model. In the context of the digital platform, the amendment also defines performance of activities and a permanent place, which are both basic conditions for the foundation of a PE. In particular, the Amendment extends the current definition of a fixed place creating a PE in Slovakia which would cover also regular mediation of transport and accommodation services provided even through a digital platform. In light of the proposed changes it remains to be clarified whether the tax authorities would stick to the local definition of the fixed place or would apply Commentary when the taxpayer invokes DTAA protection. It should be also noted that based on the general principles incorporated in most of the Slovak DTAAs if a certain term is not defined, the taxpayers should use the definition as per local legislation. Further to the above, the fact that a fixed place is not defined directly in double tax treaties can be used when interpreting a definition of a fixed place according to local legislation (covering also digital platforms). It cannot be ruled out that the Slovak tax authorities would primarily follow the definition of PE as introduced by the new Slovak tax legislation.

Furthermore, conditions for the foundation of a construction PE should also be subject to change. Activities performed by a taxpayer with a limited tax liability, together with their related parties, will be considered as a coherent whole, provided that these activities are linked and complementary. Therefore, when assessing a construction PE, the entire period for completion of the construction, plus construction and assembly projects and the involvement of related parties, will be considered.

On a final note, conditions for the foundation of an agent PE are to be modified. Some taxpayers use various strategies in order to avoid the foundation of a PE, e.g., contracts which have been agreed to a substantial extent in one state are formally concluded by a taxpayer abroad. Upon the amendment to the act, the taxpayer with a limited tax liability may have a PE in the territory of Slovakia even when its agent has the decisive influence in finalizing a contract, subsequently concluded by the taxpayer without fundamental change.

UK

On 1 December 2017, the UK Government published the Winter Finance Bill, being the first Bill in a new legislative timetable that should see it enacted (and become *Finance Act 2018*) before the start of the next tax year in April 2018. The Bill includes a number of changes to the anti-hybrid mismatch rules, in line with the Budget announcements. In addition, the Bill includes some amendments, and clarifications with respect to the corporate interest restriction rules.

See EY Global Tax Alert, *UK publishes Winter Finance Bill and consultations: Business tax measures*, dated 4 December 2017.

On 1 December 2017, the UK Government launched its consultation on extending the royalty withholding tax regime. The extended regime would apply where the UK does not have a suitable tax treaty with the recipient territory, to cover payments made to related parties in connection with UK sales. It is proposed to apply even where the payer does not have a UK taxable presence. The Government intends to introduce the measures from April 2019 subject to consultation.

See EY Global Tax Alert, *UK launches royalty withholding tax consultation*, dated 5 December 2017.

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EYG no. 07140-171Gbl

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