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Global Tax Alert

The Latest on BEPS – 12 February 2018

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OECD

On 8 February 2018, the OECD released additional guidance to give greater certainty to tax administrations and multinational enterprise (MNE) groups on the implementation and operation of BEPS Action 13 on Country-by-Country (CbC) Reporting (CbCR). Accordingly, the existing guidance on the implementation of CbCR has been updated to address two specific issues: (i) the definition of total consolidated group revenue, relevant to determine whether a filing obligation exists; and (ii) whether non-compliance with the confidentiality, appropriate use and consistency conditions constitutes a Systemic Failure, which could trigger an obligation for local filing of the CbC report.

Additionally, the OECD released a compilation off the approaches adopted by 24 member jurisdictions of the Inclusive Framework on BEPS with respect to some of the issues where the Guidance allows for alternative approaches.

See EY Global Tax Alert, *OECD releases country approaches to Country-by-Country Reporting Guidance and adds additional questions*, dated 9 February 2018.

European Union

On 30 January 2018, the current Bulgarian Presidency of the Council of the European Union (EU) presented an EU-BEPS Roadmap (the Roadmap) outlining its plans for work in the field of BEPS. During its term, the Presidency will give high priority to the Proposal for a Council Directive amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, published on 21 June 2017, with a view to achieving an early agreement on this file. The Roadmap also addresses other items, such as an agreement on key elements

Building a better working world

in the proposal presented by the European Commission on the "Good Governance in Tax Matters" clause in the EU agreements with third countries, an agreement on a guidance note on the interpretation of the third criterion of the Code of Conduct (business taxation), as well as a revision of the mandate of the Code.

The Roadmap outlines work items that the Member States have expressed a willingness to undertake in the medium term, including a technical examination of the legislative proposals on the digital economy, follow-up work on the EU list of non-cooperative jurisdictions for tax purposes, and continued work on the past proposals for Interest and Royalties Directive and for a renewed Common (Consolidated) Corporate Tax Base.

Colombia–UAE

On 12 November 2017, the Government of Colombia and the United Arab Emirates (UAE) signed a Treaty to Avoid Double Taxation (DTT). The DTT follows many of the recommendations included in the OECD's BEPS Action Plan, and contains some new provisions not previously included in treaties signed by Colombia.

With respect to Action 6 recommendations on treaty abuse, the DTT's preamble expressly provides that the purpose of the DTT is to avoid double taxation without creating opportunities for no taxation or reduced taxation through treaty shopping. The DTT also includes a limitation of benefits clause under which the residents of the UAE qualified to ask for the benefits established by Articles 8, 10, 11 12 and 13 of the DTT are determined. In addition, the DTT includes a principal purpose test clause.

In line with Action 7, the permanent establishment (PE) definition of the signed treaty between Colombia and UAE includes an anti-fragmentation clause and the new language on agency PE. Furthermore, each of the exceptions included in the list of activity exemptions needs to meet the "preparatory or auxiliary" threshold.

Finland

The Finnish Ministry of Finance has issued a draft bill and a request for comments by 26 February 2018 on the new interest deduction limitation rules stemming from the EU Anti-Tax Avoidance Directive (the Directive). The new interest deduction limitation rules are scheduled to be applied as of 2019.

According to the draft bill, the new interest deduction limitation would expand and significantly tighten the current regulation. The most significant changes to the limitation rules would be:

- Net interest expense accrued on loans from unrelated parties would fall within the scope of the rules
- The equity ratio based exemption would be abolished
- Real estate companies (and other entities taxed in accordance with the *Finnish Income Tax Act*) would be included in the scope of the rules
- All financial institutions and other companies operating within financing would become subject to the rules

In addition, the definition of related parties would be extended as a result of the Directive, and a holding of 25% of capital or voting rights would be deemed to constitute related party status, but only for the purpose of the interest deduction limitation rules. According to the Directive, the definition of interest and financial expenses (term "borrowing costs") would include interest expense on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of funds.

According to the draft bill, net interest expense would continue to be deductible to the amount of 25% of the tax earnings before interest, taxes, depreciation and amortization (EBITDA), or if the net interest expense does not exceed €500,000. Net interest expense other than related party net interest expense would be deductible up to €3 million, and would be deducted primarily as part of the 25% tax EBITDA quota. The non-deductible net interest expense could be carried forward without time limitation similar to the current regulation.

See EY Global Tax Alert, *Finland proposes new interest deduction limitation rules for public comment*, dated 25 January 2018.

On 29 January 2018, the tax administration published new Guidance No. A129/200/2017 on transfer pricing documentation, replacing the Guidance of 2007. The documentation obligation is divided into a master file and a local file. Taxpayers are required to prepare annual documentation and to provide additional explanatory notes.

The main changes in relation to the previous guidance from 2007 concern integration of the transfer pricing-related recommendations and guidance from the BEPS project into the Finnish transfer pricing guidance. Most importantly, the

new guidance provides comments on preparation of the BEPS Action 13 master file and local file. Separate guidance has been issued regarding the Finnish CbC reporting obligations.

The documentation must be submitted within 60 days upon request from the tax administration. However, the first time the tax authorities can require the taxpayer to provide the transfer pricing documentation is six months after the end of the financial year.

Generally, documentation must be provided on all related transactions with foreign associated enterprises and on transactions between a foreign company and a Finnish PE if certain conditions, mentioned below, are fulfilled. There is no transfer pricing documentation obligation for domestic transactions but the arm's-length principle should be nevertheless applied also in domestic transactions.

No documentation requirements apply for small and medium enterprises (SMEs). An SME exists if the following cumulative criteria are met:

- The company has less than 250 employees
- The turnover does not exceed €50 million or the balance sheet total does not exceed €43 million
- The SME characteristics of Commission Recommendation 2003/361/EC are met

The obligation to prepare master file documentation applies if the company cannot be considered an SME and if the total value of intercompany transactions between the two parties during the fiscal year in question exceeds €500,000. Local File documentation needs to be prepared although the total value of intercompany transactions between two parties would be below €500,000 but in this case, less extensive documentation is allowed.

If a company belongs to an international group, the figures used in calculating whether the abovementioned thresholds are fulfilled are the figures for the whole group which means the documentation obligation can be triggered although if the company operating in Finland has a small turnover, balance sheet or staff.

In the case that documentation or relevant supplementary documentation is not submitted, or is submitted late, or the document in incorrect, a tax penalty may be imposed varying between €1,000 and €25,000.

France

On 17 January 2018, the French Government presented to the French Senate a bill to ratify the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS under BEPS Action 15 (MLI) where it is waiting to be further approved.

Hong Kong

On 2 February 2018, the Hong Kong Government gazetted the new law which empowers the Chief Executive in Council to give effect to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and other tax agreements that apply to Hong Kong. It provides the legal framework for more effective implementation of automatic exchange of financial account information in tax matters, automatic exchange of CbC reports and spontaneous exchange of information on tax rulings. The provisions are effective as of 2 February 2018.

India

On 1 February 2018, the Finance Minister of India presented the Union Budget (Budget) for the tax year 2018-19. The following summarizes the key proposals relevant from an OECD BEPS perspective.

The Budget proposes an amendment to the definition of the term "business connection." A business connection is equivalent to a PE rule under the Indian domestic tax law and is used to evaluate if a nonresident (NR) taxpayer has a taxable presence in India. The scope of the term business connection is now expanded to cover the following:

- Activities carried out through a person who habitually plays the principal role leading to conclusion of certain contracts. This provision is largely aligned with recommendations of Action 7 of the OECD BEPS project.
- "Significant Economic Presence," which is defined as: (i) systematic and continuous soliciting of business activities or engaging in interaction with users in India through digital means, subject to certain thresholds to be prescribed; or (ii) transaction in goods, services or property carried out by an NR in India including provision of download of data or software in India, subject to certain thresholds to be prescribed.

Additionally, the following clarifying provisions were introduced from a CbCR perspective:

- The Indian constituent entity (with an NR parent) would be required to furnish CbCR in India if the parent entity has no obligation to file such report in the home jurisdiction.
- The due date for filing a CbC report is revised to 12 months from the end of reporting accounting year of the ultimate parent entity (UPE), if the UPE is resident in India or an Indian constituent entity is subject to CbCR in India.

The Budget needs to be approved by both Houses of the Indian Parliament and assented by the President of India to be enacted.

See EY Global tax alert, *India releases 2018-19 Union Budget*, dated 6 February 2018.

Indonesia

On 29 December 2017, Indonesia's Director General of Taxation (the DGT) issued DGT Regulation No. 29/PJ/2017 (PER-29) which sets forth implementing regulations on Indonesian CbCR requirements. PER-29 provides some clarity on a number of issues which were previously uncertain. The first year of operation is Fiscal Year 2016, which is generally the year to 31 December 2016.

For groups with an Indonesian UPE, the Indonesian UPE will be required to file the CbC report with the DGT if its annual group turnover exceeds 11 trillion rupiah (US$820m). The rules for Indonesian UPEs are more onerous than for foreign parented groups and require the filing of a "working paper" providing entity-by-entity financial data.

An Indonesian subsidiary with a non-Indonesian UPE must file a CbC report in Indonesia if the nonresident UPE's jurisdiction does not require CbCR, or the jurisdiction in which the nonresident UPE is tax resident does not have a Qualifying Competent Authority Agreement (QCAA) with the Indonesian Government, or there is an agreement with the Indonesian Government, but the CbC report could not be obtained from the respective country or jurisdiction. The nonresident UPE can appoint a surrogate parent entity (SPE or surrogate) in another jurisdiction to file the CbC report. In that case, the Indonesian subsidiary will be relieved of a local filing obligation provided there is a QCAA in place with the surrogate's jurisdiction and some other requirements are met. The turnover threshold for non-Indonesian parented groups will follow the turnover threshold in the UPE jurisdiction, or failing that, €750m.

A Notification requirement has also been introduced for Indonesian entities and branches to identify the UPE of the group and the entity filing the CbC report.

The Notification and CbC reports for Fiscal Year 2016 are due 16 months after year-end, i.e., 30 April 2018 for a calendar year filer. However, for Fiscal Year 2017 and thereafter, filing for both documents will be due 12 months after year-end.

See EY Global Tax Alert, *Indonesia releases implementing regulations on Country-by Country Reporting*, dated 24 January 2018.

It has been reported that the DGT is in the process of formulating a regulation to implement Mandatory Disclosure Rules (MDR), in accordance with BEPS Action 12, in Indonesia. The proposed regulation is intended to achieve transparency in relation to tax planning. It has been suggested that taxpayers, consultants, lawyers, banks and others may be required to disclose tax planning to the tax authority for review by the DGT. At this stage, no regulations have been released for review but the DGT has indicated there may be further discussion with the relevant stakeholders prior to the issuance of the MDR regulation.

The Indonesian Customs Authority (DJBC) and the Ministry of Finance are considering the imposition of import duty on digital goods such as e-books, music, movies and software. Although the 11th WTO Ministerial Conference has decided to continue the moratorium for not imposing duties on digital goods, the Indonesian Government continues to explore a plan to tax digital goods through the imposition of import duty. The Ministry of Finance has expressed a view that the current Indonesian Customs Law would accommodate this idea. It appears that a number of options are being explored in this area to collect revenue from cross-border digital supplies, with value added tax (VAT) rules also being considered. Authorities have noted the current national revenue constraints and the desire to create a level playing field between online and conventional players.

Japan

On 2 February 2018, the 2018 Japanese tax reform bill was submitted to the Diet (Japanese Legislature). The bill contains a modification to the domestic PE definition. The modification in general follows the OECD's recommendations in the BEPS Action 7 final report.

The tax reform bill is expected to be passed by the Diet by the end of the March and become effective on 1 April 2018. The revision to the PE definition will apply to fiscal years beginning on or after 1 January 2019.

See EY Global Tax Alert, *Japan releases 2018 tax reform outline*, dated 19 December 2017.

Malaysia

On 22 December 2017, Malaysia issued the Labuan Business Activity Tax (CbCR) Regulations 2017 (the Regulations) which requires certain Labuan entities to make the relevant CbCR notifications to the Malaysian Inland Revenue Board. Labuan is a Federal Territory of Malaysia which maintains its own independent corporate laws and taxation regime from the rest of Malaysia.

Under the new rules, Labuan-based MNE groups with annual consolidated group revenue equal to or exceeding RM3 billion (€750 million) in the preceding year would be subject to the Malaysian CbCR requirement. Under the final rules, it is mandatory for every prescribed Labuan entities to report the information from 1 January 2017. The CbC report has to be filed with the competent tax office within 12 months after the end of the respective reporting financial year of the MNE group. CbCR is not required for a Labuan constituent entity of foreign MNE groups although the Malaysian Government may request the CbC report from the tax authorities of the jurisdictions where the UPE or SPE filed a CbC report.

Furthermore, every Labuan constituent entity, UPE or SPE, as the case may be, will need to submit a notification to the tax authority about the identity and country of residence of the reporting entity. The notification must be submitted on or before the last day of the reporting financial year. The Malaysian Inland Revenue Board shall transmit and exchange CbC reports within 18 months after the end of the tax year of a group of companies.

Failure to furnish a CbC report is subject to a fine up to RM1 million (US$260,000), imprisonment of up to two years, or both.

In the event that the UPE or SPE has companies in Malaysia and Labuan, the Malaysian and Labuan companies can have one notification letter to the Malaysian Inland Revenue Board about the identity and country of residence of the reporting entity.

Poland

On 23 January 2018, Poland became the fourth country to deposit its instrument of ratification for the MLI. The domestic ratification process of the MLI was already completed on 14 November 2017. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Poland has confirmed its preliminary MLI positions without any change. The MLI will enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the fifth instrument of ratification, acceptance or approval.

Taiwan

On 2 January 2018, Taiwan's Ministry of Finance issued a new tax ruling, No. 10604704390 (the Tax Ruling) announcing the relevant income tax regulations on the income tax implications to foreign enterprises, institutions, groups or organizations without a fixed place of business in Taiwan that provide e-commerce services to domestic purchasers.

The Tax Ruling defines e-commerce services as: (i) services that are rendered via internet download or transfer to computer equipment or other electronic devices; (ii) services that do not need to be downloaded and can be used online; and (iii) services rendered via internet or other electronic means. The Tax Ruling also sets forth the various e-commerce operating models, including e-commerce services conducted with or without digital platform intermediation. Whether the income generated is deemed as Taiwan source income depends on the services' economic nexus to Taiwan. The services rendered will be deemed as Taiwan source income if one of the criteria set out in the Tax Ruling is met.

See EY Global Tax Alert, *Taiwan issues income tax guidelines on cross-border e-commerce transactions*, dated 18 January 2018.

Thailand

On 17 January 2018, the Thai Revenue Department (RD) released a draft VAT bill to amend the current VAT rules related to VAT collection from foreign e-commerce business operators for public consultation. This VAT-specific development follows

the draft tax proposal on foreign e-business activities which was introduced and open for a public consultation last year. Under the draft VAT bill: (i) foreign operators who provide services through an electronic media or through foreign-based digital platform (Foreign E-business Operator) to non-VAT registrants in Thailand for use in Thailand; and (ii) with conditions attached, foreign-based digital platform operators whose platform (e.g., website, application or online marketplace) is used by Foreign E-business Operator to provide the services to non-VAT registrants in Thailand for a use in Thailand will be required to register for VAT in Thailand and pay the VAT to the RD if service income exceeding THB1.8 million (US$56,000) per year is derived from non-VAT registrants in Thailand. The key proposal of the draft legislation was open for public consultation until 9 February 2018.

See EY Global Tax Alert, *Thailand proposes new VAT bill on foreign e-business*, dated 7 February 2018.

Ukraine

On 9 January 2018, the Ukraine State Fiscal Service (SFS) published Letter No. 82/6/99-99-15-02-02-15 (the Letter), where the SFS set forth its approach in relation to tax treatment of the supply of cloud services by a nonresident to a Ukrainian resident for Ukrainian withholding tax and VAT purposes.

To note, the Letter is issued as an individual tax consultation at the request of the taxpayer, and it represents the tax authority's opinion on tax treatment of the specific transaction based on review of documents disclosed by the taxpayer.

In the Letter, SFS first mentions that under Ukrainian tax laws payments made to a nonresident for the lease of the cloud server qualify as "rental income" which is subject to withholding tax at the 15% rate. Despite domestic law treatment, the SFS further refers to the definition of royalties in Paragraph 3 of Article 12 (Royalties) of the Latvia–Ukraine tax treaty and concludes that payments for the lease of a cloud server fall into the treaty definition of "royalties." On this basis, SFS states that in the transaction concerned, the payments that the Ukrainian company makes in favor of the company resident in Latvia are taxed as royalties in Ukraine under Article 12 of the tax treaty.

Considering that payments for the use of a cloud server do not fall into the domestic definition of royalties under the Tax Code of Ukraine, SFS opines, that for VAT purposes, the transaction can be treated as the supply of rental services taxable at the location where the service recipient is registered. If a nonresident provides cloud services to a person resident in Ukraine, the payments are subject to 20% VAT for the local recipient under the reverse-charge rules.

The Letter demonstrates that e-commerce transactions are coming into focus of Ukrainian tax authorities.

Tax advice should be sought in each case to confirm the tax consequences of cloud computing and other e-commerce services provided by nonresidents to Ukrainian companies.

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