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Global Tax Alert

The Latest on BEPS – 24 September 2018

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OECD

On 18 September 2018, the OECD announced that Saudi Arabia signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). At the time of signature, Saudi Arabia submitted a list of its tax treaties in force that they would like to designate as Covered Tax Agreements (CTAs), i.e., treaties to be amended through the MLI. Together with the list of CTAs, Saudi Arabia also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for Saudi Arabia will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Saudi Arabia did not opt in for mandatory binding arbitration.

On 14 September 2018, the OECD published, on its website, the comments received on the request for input on the discussion draft on financial transactions, which deals with follow-up work in relation to Actions 8-10 ("Assure that transfer pricing outcomes are in line with value creation") of the BEPS Action Plan. Interested parties had been invited to provide comments on this request by 3 July 2018. EY comments can be accessed here.

On 13 September 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 Country-by-Country (CbC) Reporting (CbCR). Accordingly, the existing guidance on the implementation of CbCR has been updated (the Guidance) to address the following issues: (i) the treatment of dividends for purposes of "Profit (loss) before Income Tax,"

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"Income Tax accrued (current year)" and "Income Tax paid (on cash basis)"; (ii) the use of shortened amounts in Table 1 of CbC reports; and (iii) the number of employees to be reported where the financial data of a Constituent Entity is reported on a pro-rata basis. The Guidance also includes a summary table of the existing interpretative guidance on cases of mergers, demergers and acquisitions.

Moreover, the OECD also published additional exchange relationships that have been activated under the Multilateral Competent Authority Agreement on the exchange of CbC reports (CbC MCAA) with respect to Bermuda, Curaçao, Hong Kong and Liechtenstein.

See EY Global Tax Alert, *OECD releases additional guidance on Country-by-Country Reporting and updated exchange relationships*, dated 14 September 2018.

Also on 13 September, the OECD announced that Israel and Lithuania have deposited their instrument of ratification, acceptance or approval of the MLI – bringing the total number to 11. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Israel confirmed its MLI positions but it removed its tax treaties with Germany, Switzerland and the United Kingdom from its list of CTAs. Israel also added a reservation pursuant to Article 8(3)(b)(iii) of the MLI. More specifically, Israel reserved the right for the entirety of Article 8 (Dividend Transfer Transactions) not to apply to its CTAs to the extent that the provisions described in Article 8(1) already include a minimum holding period longer than a 365 day period. Furthermore, Israel updated some of its notifications. Lithuania has confirmed its preliminary MLI positions without any change. The MLI will enter into force for Israel and Lithuania on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Israel and Lithuania of their instrument of ratification, acceptance or approval, i.e., on 1 January 2019.

On 5 September 2018, the OECD released a report named Tax Policy Reforms 2018 (the report) which describes the latest tax reforms across 35 OECD members and selected partner economies (i.e., Argentina, Indonesia and South Africa). The report identifies major tax policy trends and highlights the progress of the implementation of the BEPS measures. According to the report, peer review processes on the four minimum standards have started and progress has been achieved, among others on the implementation of BEPS Actions 4, 6 and 13. In the context of Action 1 and the challenges arising from the digital economy, the report notes that many countries have already taken action through indirect tax measures. Furthermore, the report underlines that for the implementation of the BEPS measures, the important role that the MLI plays, which will amend a significant amount of tax treaties.

European Union

On 7-8 September 2018, the informal meeting of the Economic and Financial Affairs Council (ECOFIN or the Council) took place in Vienna, Austria. During the second day of the meeting, part of the agenda was the taxation of the digital economy, based on the proposals of the European Commission from March 2018. The finance and economic affairs Ministers of the European Union (EU) Member States discussed the short-term solution of a temporary tax on digital turnover and a long-term solution involving the introduction of new rules for corporation tax.

At the meeting, the Council supported the implementation of the short-term solution of the digital services tax (DST) as soon as possible. According to the announcement of the Austrian Minister of Finance Hartwig Löger, the prospect of reaching agreement by the end of this year is realistic.

The Ministers also agreed that there is a need to prepare further measures against no-tax and low-tax systems and to develop in the OECD, an EU position with regard to this taxing digitalized activity that is as united as possible. This also underlines the position held by France and Germany, which have suggested a "sunset clause" making the DST a temporary levy valid until an agreement has been reached at an international level.

See EY Global Tax Alert, *ECOFIN discusses the Commission's proposals for taxation of digitalized activity*, dated 11 September 2018.

Australia

On 30 August 2018, the OECD released the fourth batch of peer review reports relating to the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Australia was among the assessed jurisdictions in the fourth batch. Australia requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying best practices report.

Overall the report concludes that Australia meets most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Australia's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases Australia peer review report on implementation of Action 14 minimum standard*, dated 17 September 2018.

Curaçao

On 15 June 2018, Curaçao published CbCR legislation in line with BEPS Action 13. According to the legislation, all Curaçao tax resident constituent entities that are ultimate parent entities (UPEs) of an MNE group with annual consolidated group revenue equal to or exceeding ANG1.5 billion (approximately €750 million) have to prepare a CbC report for financial years starting on or after 1 January 2019. The CbC report should be submitted within 12 months after the end of the reporting fiscal year. Failure to submit the CbC report will be regarded as an offense. Non-compliance by reason of intent or gross negligence may lead to a monetary fine ranging between ANG100,000 and ANG250,000 (approximately €50,000 and €125,000 respectively). In addition, any other constituent entity of the MNE group that is tax resident in Curaçao will have to prepare and submit the CbC report if the UPE is not resident in Curaçao and any of the following conditions are met: (i) it is not obliged to file a CbC report in its country of residence; (ii) there is not a sufficient and qualifying exchange of information instrument between Curaçao and that jurisdiction in place; or (iii) the jurisdiction has been notified regarding a systematic failure to exchange the information. Notwithstanding the above, a constituent entity tax resident in Curaçao will not be required to locally file a CbC report if a Surrogate Parent Entity (SPE) is appointed in Curaçao and further conditions are met. Moreover, a Curaçao constituent entity will need to notify the tax authorities whether it is the UPE or SPE by the last day of the reporting fiscal year. If it is neither a UPE nor an SPE, it will have to inform the tax authorities of the identity of the UPE or SPE along with its tax residency within the same deadline. There are no penalties for late notification or failure to submit the notification.

Additionally, the adopted legislation also provides that a group entity taxable in Curaçao and part of a qualifying MNE group should include, within the term set for submitting its corporate income tax return, a master file and a local file regarding the year to which the tax return applies in the records of the taxpayer. This requirement will only apply to Curaçao tax resident entities of an MNE group that has a consolidated group turnover exceeding ANG100 million (approximately €50 million) in the fiscal year preceding the year to which the tax return applies.

Czech Republic

On 29 August 2018, the Ministry of Finance of the Czech Republic submitted a motion to the Czech Parliament regarding approval of the ratification of the MLI.

Compared to the provisional positions submitted at the time of signing of the MLI, the number of CTAs was reduced. The Czech Republic intends to apply a minimalistic approach, i.e., basically only the preamble, principal purpose test (with a possibility to grant benefits upon discretion under article 7/4) and dispute resolution clauses are to be implemented. The timeframe of the ratification process is unknown at this point. Once MLI is ratified, the Czech Republic will need to deposit its instrument of ratification, approval or acceptance of the MLI with the OECD and confirm its MLI positions. The MLI will enter into force for the Czech Republic on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of such instrument.

Denmark

On 5 September 2018, the Danish tax authorities published a ruling which provides further clarifications on the tax treatment of virtual currencies which are bought for speculative purposes. More specifically, the ruling explicitly considers losses incurred upon the sale of virtual currencies to be deductible for income tax purposes.

Ireland

On 7 September 2018, the Irish Department of Finance published a Feedback Statement regarding the implementation of controlled foreign company (CFC) regulations as required by the EU Anti-Tax Avoidance Directive (ATAD I). The Feedback Statement is part of the ongoing process of consultation on the implementation of the ATAD I into Irish law. Ireland is adopting the "Option B" approach within the ATAD I. The Feedback Statement sets out possible approaches to some of the key technical aspects of CFC rules. The issues discussed in the document remain under active consideration by the Department of Finance.

Stakeholders are encouraged to provide comments through 28 September 2018. EY is actively engaged in dialogue with the Department and will be submitting a written response. Input from EY and other stakeholders will be considered for the purposes of the draft legislation for inclusion in Finance Bill 2018 which is expected to be published in October.

On 5 September 2018, Ireland's Minister for Finance and Public Expenditure and Reform published Ireland's Corporation Tax Roadmap. The Roadmap outlines the actions Ireland has taken to date and lays out the next steps and envisaged timing on Ireland's implementation of the various commitments made in EU Directives, the OECD BEPS reports and recommendations from the Coffey Review.

Among others, the following items are raised: (i) Ireland's commitment to the key 12.5% tax rate as a cornerstone of the overall regime; (ii) updates to Ireland's transfer pricing rules to be legislated for by 1 January 2020 (and which are expected to include the adoption of the 2017 OECD Transfer Pricing Guidelines); (iii) the implementation of the EU ATAD I and ATAD II); (iv) considerations regarding the alternative options of moving to a territorial regime or conducting a substantial review and simplification of the existing foreign tax credit regime; (v) the ratification of the OECD MLI, which Ireland intends to complete before the end of this year; (vi) changes to Ireland's mandatory disclosure regime to bring it in line with DAC 6; (vii) the implementation of the Dispute Resolution Mechanism Directive; and (viii) Ireland's ongoing EU and International tax agenda (including digital taxation, the EU black list, Common Consolidated Corporate Tax Base). Additionally, the Minister signaled further consultations in relation to CFC rules and Ireland's adoption of Option B as outlined in the ATAD I, the interest limitation and anti-hybrid rules, transfer pricing and the possibility of moving to a territorial regime or simplifying the foreign tax credit regime.

See EY Global Tax Alert, *Ireland publishes Corporation Tax Roadmap*, dated 5 September 2018.

On 30 August 2018, the OECD released the fourth batch of peer review reports relating to the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Ireland was among the assessed jurisdictions in the fourth batch.

Overall the report concludes that Ireland meets almost all of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Ireland's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases Ireland peer review report on implementation of Action 14 minimum standard*, dated 21 September 2018.

Israel

On 5 September 2018, the Israeli Tax Authority (ITA) released two circulars on transfer pricing (TP): (i) the circular on TP methodology and (ii) the circular on profitability ranges. In the circular on TP methodology, the ITA describes its position regarding the means to identify and analyze the TP methods most appropriate for distribution, marketing and sales (including pre-sales) activities in Israel. The circular on profitability ranges focuses on specific profitability ranges for certain transactions. Among others, the ITA adopts Chapter 7 of the OECD Guidelines on low value-added services as revised by the BEPS Actions 8-10, which establishes a markup of 5% on total operating expenses, including expenses that should be recorded according to Generally Accepted Accounting Principles (GAAP), such as stock options.

See EY Global Tax alert, *Israel's Tax Authority releases circulars on transfer pricing methods and profitability ranges in certain local transactions*, dated 13 September 2018.

On 30 August 2018, the OECD released the fourth batch of peer review reports relating to the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Israel was among the assessed jurisdictions in the fourth batch.

Overall the report concludes that Israel meets most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Israel's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases Israel peer review report on implementation of Action 14 minimum standard*, dated 21 September 2018.

The ITA recently published a Tax Circular (the Tax Circular) explaining its position with respect to the tax implications of "digital tokens" issued for the provision of services or products under development (Utility Tokens) as part of Initial Coin Offerings (ICOs)/Token Generation Events (TGEs). Under the Tax Circular, the ITA generally determines the revenue recognition method for funds received as part of such ICO, and allow the deferral of such recognition, according to the relevant and applicable accounting rules, up until the occurrence of particular events. For example, the actual provision of the services or products developed. Furthermore, the Tax Circular allows for companies that carry out such ICOs to potentially enjoy the tax incentives available, *inter alia*, under the new Israeli Innovation Box regime. This Innovation Box Regime follows the BEPS Action 5 and it offers a corporate income tax (CIT) rate of 12% for Technological Preferred Income of qualifying companies with global consolidated revenue below ILS10b (approximately US$2.5 billion), or of 7.5% if located in Jerusalem or in certain northern or southern parts of Israel; or a CIT rate of 6% for Technological Preferred Income of qualifying companies with global consolidated revenue below ILS10b.

See EY Global Tax Alert, *Israeli Tax Authorities address issues regarding issuance of Utility Tokens, blockchain technologies and cryptocurrencies, including related tax benefits*, dated 14 September 2018.

Italy

On 8 August 2018, the Italian Government issued a draft Legislative Decree (the Decree) for the transposition of the EU ATAD I and ATAD II (jointly the ATAD) into domestic law. Among others, the Decree proposed the following: (i) the replacement of the existing rule regarding interest expense deduction rules with a new proposed language that rephrases the existing 30% earnings before interest, taxes, depreciation and amortization (EBITDA) limitation rule with some changes; (ii) the introduction of a new CFC rule which mainly restates the existing CFC rule by confirming that the income generated by CFCs residing in low tax jurisdictions is taxed at the level of the Italian parent, unless certain exceptions apply; (iii) the introduction of a new exit rule which reiterates the current exit tax provision with some exceptions; and (iv) the introduction of hybrid and reverse hybrid rules for the implementation of the ATAD. The Decree does not introduce any changes with reference to the General Anti-Avoidance Rule (GAAR) as Italy's current legislation is already in line with the ATAD. The Italian Government will officially release the new set of provisions by the end of 2018. Once released, the new rules should enter into force for calendar year companies as of 1 January 2019, with the exception of hybrid mismatch rules that should apply from 1 January 2020, and with specific reference to reverse hybrids from 1 January 2022.

See EY Global Tax Alert, *Italy issues draft legislative decree for ATAD implementation*, dated 21 September 2018.

Malaysia

In August 2018, the Malaysian Inland Revenue Board (IRB) published on its website a manual on the CbCR registration process to register an MNE, so that the MNE can proceed with CbCR. The manual provides a step-by-step guide on how to navigate the CbCR registration website.

The registration would be applicable for a UPE or an SPE. If a notification has been made to the IRB stating that the entity is either the UPE or the SPE, the entity would need to input the date of the notification in the CbCR registration form.

Upon completion of the registration, the entity will be able to download the registration details in a PDF file. An e-mail confirmation will be sent to notify that the registration was successful.

For Malaysian companies where the group consolidated revenue exceeds the threshold but they are not the UPE/SPE, these companies would need to submit the notification on an annual basis to the IRB.

New Zealand

On 27 August 2018, New Zealand's Inland Revenue Department (IRD) issued draft guidance material designed to help taxpayers comply with newly-enacted wide-ranging BEPS legislation (the *Taxation (Neutralising Base Erosion and Profit Shifting) Act* enacted in June 2018). Changes in that legislation include: (i) introduction of a new permanent establishment avoidance rule; (ii) new interest limitation rules for inbound related party debt; (iii) changes to TP rules to align with the OECD guidelines; (iv) new and detailed rules to counter hybrid mismatch arrangements; (v) more restrictive amendments to the thin capitalization rules; and (vi) enhancement of the IRD's administrative powers in respect of multinational corporations. The IRD frequently issues legislative guides to provide assistance to taxpayers on the practical implementation of new law. The guidance material is technical in nature and contains no new law.

Peru

On 13 September 2018, Peru's President enacted Legislative Decree 1424 (the Decree) that modifies the Income Tax Law. Among others, the Decree temporarily broadens the scope of the thin capitalization rules (3:1 debt-to-equity ratio) to also cover unrelated parties' debt. Before the Decree, this limitation only applied to interest arising from related parties (intercompany loans). Therefore, from 1 January 2019 to 31 December 2020, the thin capitalization rules will be applicable to interest arising from both related and unrelated parties. The Decree provides a grandfathering rule to debt acquired on or before the date of publication of the Decree in the *Official Gazette* (13 September 2018), to which the thin capitalization rules as before the Decree will continue to apply until 31 December 2020.

Moreover, the Decree introduces a new a fixed ratio rule, inspired by BEPS Action 4, which limits an entity's net interest deductions to 30% of EBITDA. The fixed ratio rule will be effective as of 2021 and will apply to both related and unrelated debt. The amounts of interest disallowed can be carried forward for a period of up to four years. There are some exceptions to the application of the new fixed ratio rule. For example, the rule will not apply to taxpayers with an annual net income equal to or below 2500 Tax Units (approximately US$3 million), financial institutions, and public infrastructure projects.

See EY Global Tax Alert, *Peru amends income tax law to add new thin capitalization rules and indirect foreign tax credit*, dated 17 September 2018.

Slovenia

On 18 July 2018, the Ministry of Finance published a proposal for the changes of the *Corporate Income Tax Act* (CITA-2) based on the ATAD. Among others, the proposal introduces a GAAR to tackle abusive tax practices. According to the proposal, the rule is used only when all other rules set in CITA-2 cannot prevent tax abuse. Furthermore, in the context of CFC rules, the proposal introduces a definition of the foreign company control and a definition of the income of controlled foreign company. The proposal also introduces rules for calculation of income which is included in the tax base as well as rules for preventing and eliminating possible double taxation. The changes are expected to enter into force as of 1 January 2019.

Sweden

On 4 September 2018, the Swedish Government published a proposal regarding new regulations against tax avoidance. The proposal includes changes to the current Swedish CFC rules, in view of implementing the EU ATAD. The proposed changes include a new white list of jurisdictions that are explicitly excluded from the scope of the Swedish CFC rules. The new regulations would enter into force as of 1 January 2019.

Switzerland

On 22 August 2018, the Swiss Federal Council adopted a dispatch on the MLI (for more details, see *The Latest on BEPS*, dated 27 August 2018). Based on the adopted dispatch, Switzerland removed its tax treaties with India, Liechtenstein and Poland from its list of CTAs, and added the tax treaty with Mexico to the said list. Thus, Switzerland has designated 12 tax treaties in total as CTAs. For the rest of the Swiss tax treaties, Switzerland intends to renegotiate them bilaterally to incorporate the BEPS minimum standards. The dispatch mentions that Switzerland has already concluded or is under negotiation with a number of countries, namely, Bahrain, Brazil, Ethiopia, Ireland, Korea, Kosovo, Kuwait, Latvia, Malta, the Netherlands, Norway, Pakistan, Saudi Arabia, Ukraine, the United Kingdom and Zambia.

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