

The Latest on BEPS - 6 May 2019

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United Nations

On 23-26 April 2019, the eighteenth session of the United Nations (UN) Committee of Experts on International Cooperation in Tax Matters took place in the United States (US) in New York. According to the agenda, among the substantive issues that were discussed during the session, the topics included: (i) the next update of the UN Model Double Taxation Convention between developed and developing countries; (ii) the update of the UN Transfer Pricing Manual; (iii) the treatment of collective investment vehicles; (iv) dispute avoidance and resolution; and (v) tax consequences of the digitalized economy. In the context of this latter item, the Subcommittee on *Tax Challenges related to the Digitalization of the Economy* prepared a [paper](#) to discuss during the session. The Subcommittee noted that its work is independent of ongoing work in other forums, most notably the OECD. The paper includes however comments on the approaches under consideration by the OECD's Inclusive Framework group of countries, outlining arguments in favor of and against each approach.

Aruba

On 8 April 2019, legislation introducing economic substance requirements for transparent entities was published in the *Official Gazette of Aruba*. The adopted law introduces certain requirements of real economic presence for companies with geographically mobile activities. The type and extent of the activities will determine the substance requirements (the so called "core income generating activities"). The substance requirements are regulated in a separate State Decree. Aforementioned (new) substance requirements apply for newly incorporated transparent companies established as of 1 January 2019. For existing (pre-1 January 2019) fiscal transparent companies, the substance requirements apply as of 1 January 2022. In the case of real economic presence in Aruba, the foreign shareholder will be deemed to have a Permanent

Establishment in Aruba, which means that the foreign shareholder should file a profit tax return in Aruba for the taxable results of the transparent entity. The latter profit tax return will be expanded with a number of questions that involve a self-assessment with regard to the transparent entity. The new rules related to transparent entities aim to align the Aruban domestic rules with the OECD and European Union (EU) recommendations on substance requirements.

Fiscal transparent companies are required to annually report their financial statements and the identity of their shareholder(s) to the tax authorities within six months after the close of their financial year. Non-compliance with the aforementioned requirement may result in a maximum penalty of Afl. 10,000, incarceration of six months or loss of the fiscal transparent status. Fiscal transparent companies which existed as of 31 December 2018 will have until 1 January 2022 to comply with the new real economic presence (substance) requirements.

Australia

On 5 April 2019, the Australian Taxation Office (ATO) released for comment a draft Taxation Ruling [TR 2019/D2](#) on the "arm's-length debt test" (ALDT) in Australia's thin capitalization rules. The draft ruling provides useful guidance on the existing law and aims to create a more uniform application of the rules in practice. Specifically, the draft ruling sets out two tests for determining the "arm's-length debt amount" of an entity, namely the lower of: (i) the notional debt capital the entity would have reasonably been expected to have borrowed throughout the income year (the borrower test); and (ii) the notional amount that unrelated commercial lending institutions would reasonably be expected to have loaned the entity (the notional lender test). The draft ruling also addresses the relevant record-keeping requirements. The draft ruling proposes that the guidance is to apply both before and after its date of issue, despite there being no change to the law concerning the ALDT. The final ruling, along with a planned draft Practical Compliance Guideline (currently under development), will replace an existing taxation ruling. Comments on the draft ruling (and Practical Compliance Guideline) are due by 31 May 2019.

See EY Global Tax Alert, [Australian Tax Office issues draft ruling on thin capitalization arm's-length debt test](#), dated 10 April 2019.

Also on 5 April, the ATO released for comment a draft Taxation Determination [TD 2019/D3](#) in relation to the definition of a "financial intermediary business." In applying the active income test under the controlled foreign companies (CFC) rules, Australian financial institution (AFI) subsidiaries are able to exclude their "tainted interest income" from their "passive income" if their sole or principal business is a financial intermediary business. A financial intermediary business is defined in subsection 317(1) as, inter alia, a business whose income is principally derived from the lending of money at the time the tainted interest income is derived. According to the draft determination, this definition should be interpreted as a composite phrase that is seeking to define the character of the business, and that it is not appropriate to focus on the words "business" and "income is principally derived from the lending of money" as separate and unrelated requirements. In determining whether an AFI subsidiary's sole or principal business is a business whose income is principally derived from the lending of money, the draft determination sets out that it is necessary to have regard to the following indicators: i) the level of activity of the subsidiary; and ii) the assets and activities that are principally related to the derivation of interest income.

The ATO published, on 5 April 2019, the synthesized text of the Australia - Slovak Republic Income Tax Treaty, as impacted by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI). The synthesized text also reflects the options and reservations chosen by both Australia and the Slovak Republic. The MLI entered into force for both countries on 1 January 2019.

Austria

In March 2019, the Austrian Ministry of Finance published the synthesized texts of the Austria - Malta Income and Capital Tax Treaty, displaying the modifications made to the treaty by the MLI on their website. The synthesized texts reflect the agreement reached between the relevant authorities of Austria and Malta on how the treaties should be impacted by the MLI. The MLI entered into force for Austria on 1 July 2018 and for Malta on 1 April 2019.

Canada

On 8 April 2019, the Canadian House of Commons (lower house of Parliament) approved the Bill No. C-82, ratifying the MLI. The bill has now been sent to the Senate (the upper house of Parliament) for further approval. Once the ratification process is completed, Canada will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Canada on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of such instrument with the OECD.

Czech Republic

On 30 April 2019, the Ministry of Finance (MF) announced a plan to introduce a digital services tax (DST). The MF intends to present a draft law by the end of May with expected entry into force in mid-2020. Based on the MF's press release, the DST - a new tax - is expected to apply on selected internet services provided in the Czech Republic by companies with global revenues exceeding €750m while at the same time having revenues from the Czech Republic exceeding a certain threshold (local minimum threshold not known yet). The DST is expected to be set at 7% and apply to revenues from: (i) the placing on a digital interface of targeted advertising; (ii) the making available to users of a multi-sided digital interface - enabling users to find (and interact with) other users - that may facilitate the supply of goods or provision of services between the users; and (iii) the sale of data collected about users and generated from users' activities on digital interfaces.

France

On 9 April 2019, the National Assembly adopted, without substantial changes, the bill introducing a digital services tax presented by the Government on 6 March 2019 (for more details, see the [Latest on BEPS](#), dated 11 March 2019). The bill is now sent to the Senate where it will be discussed publicly on 21 and 22 May 2019. As a reminder, according to the draft bill, the tax will apply with retroactive effect, from 1 January 2019.

Gabon

On 20 February 2019, the Ministry of Finance of Gabon issued a note announcing that the obligation to submit a Country-by-Country Reporting notification in Gabon is suspended. According to the note, no penalty for failure to file such notification will be imposed.

Guernsey

On 5 April 2019, the States of Guernsey Revenue Service issued a Guide to using the Mutual Agreement Procedure (MAP) in Guernsey's Double Taxation Agreements (the [Guide](#)). On 30 April, a more detailed [document](#) was also published. Among others, the Guide provides clarifications on the circumstances under which a taxpayer is eligible for initiating a MAP, and it describes the procedure of making a MAP request and the information required to support such request.

India

On 18 April 2019, a committee formed by the Indian Central Board of Direct Taxes (CBDT) published a report on "profit attribution to a permanent establishment (PE) in India" for public consultation. After considering various options, the Committee has recommended a mixed or balanced approach that allocates profits between the jurisdiction where sales take place and the jurisdiction where supply is undertaken, with necessary safeguards to prevent excessive attribution on one hand and protect the interests of Indian revenue on the other. The report therefore concludes that the option of "fractional apportionment" based on apportionment of profits derived from India would be acceptable under the tax treaties as well as the Indian income tax code. The Committee found considerable merit in the three-factor method based on equal weight accorded to sales and manpower and assets. Further, in the case of attribution of profits to a "significant economic presence" (Indian domestic tax law PE definition for digital business) the Committee has recommended that user contribution can be a substitute

to either assets or employees and considered the option of following the approach of the EU in its Common Consolidated Corporate Tax Base. Public comments on the report can be sent electronically by 18 May 2019 to the CBDT at the email address usfttr-1@gov.in.

See EY Global Tax Alert, [*Indian Tax Administration invites public comments on proposal to amend rules on profit attribution to permanent establishment*](#), dated 1 May 2019.

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