Report on recent US international tax developments - 27 September 2019

The United States (US) Treasury announced on 20 September the entry into force of long-delayed tax protocols with Luxembourg and Switzerland. The 2009 Luxembourg protocol, in force on 9 September 2019, introduces a new information exchange article that incorporates the standard in both the 2008 Organisation for Economic Co-operation and Development (OECD) Model Tax Treaty and the 2006 US Model Treaty. It generally provides for full exchange of information upon request for all types of federal taxes in both civil and criminal matters, without regard to the domestic tax interest requirement or domestic bank secrecy laws. The Luxembourg protocol provides that, once in force, it shall have effect for requests for information made, on or after the entry into force, for tax years beginning on or after 1 January 2009.

The 2009 Swiss protocol entered into force on 20 September 2019. It updates the exchange of information provision, addresses the taxation of dividends received by pensions and similar funds, and provides for mandatory arbitration procedures in regard to certain unresolved cases. The effective dates of the various provisions within the protocol differ.

The Swiss protocol becomes effective with respect to withholding taxes, for amounts paid or credited on or after 1 January 2020. For exchange of information held by a bank or other financial institution, the protocol will have effect for requests made after 20 September 2019 for information that relates to any date beginning on or after 23 September 2009 (the date the protocol was signed). For all other cases of information exchange, the protocol will have effect for information requests that relate to tax periods beginning on or after 1 January 2010. Finally, the mandatory arbitration provision will have effect for both cases that are under consideration by the competent authorities as of 20 September 2019, and for cases that come under consideration after this date.

A bipartisan group of Senate lawmakers reportedly are in early discussions to hammer out some form of tax extenders legislation that could be enacted before the end of the year. Senate Finance Committee Chairman Chuck Grassley this week was quoted as saying Senate Democrats and Republicans are discussing an agreement that would extend temporary tax provisions that expired in 2017 and 2018, and several that will expire at the end of this year. The House Ways and Means Committee in June approved a bill (H.R. 3301) to extend through 2020, tax provisions that expired at the end of 2017 and 2018, and that will expire at the end of 2019. Among the provisions expiring at the end of 2019 is the controlled foreign corporation (CFC) look-through rule. That provision would be extended through 2020 under the Ways and Means bill.

On 24 September, the European General Court annulled the decision of the European Commission that the Netherlands granted illegal State aid to Starbucks. This implies that – according to the General Court – the Dutch Government did not give Starbucks an advantage as compared to other Dutch taxpayers which operated under similar facts and circumstances, by concluding an Advance Pricing Agreement (APA). The General Court ruled that the European Commission did not demonstrate the existence of a selective advantage giving rise to illegal State aid within the meaning of the Treaty on the Functioning of the European Union. Therefore, the General Court annulled the final State aid decision by the European Commission against Starbucks.

The European Commission in October 2015 had rendered its final decision in the State aid investigation regarding an APA that had been concluded by Starbucks Manufacturing EMEA BV with the Dutch tax authorities in 2008. The APA confirmed the arm's-length remuneration of Starbucks Manufacturing EMEA BV's intragroup production and distribution activities, as well as the determination of the royalty payment to its parent company for the use of Starbucks' roasting Intellectual property.

The European Commission may now appeal the decision of the General Court with the European Court of Justice. Such an appeal must be filed within two months and 10 days after the notification of the General Court's decision.[1]

The OECD held its first OECD Tax Certainty Day at their headquarters in Paris on 16 September. The event was organized by the OECD Forum on Tax Administration, and over 200 tax policymakers, tax administration officials, business representatives (including EY professionals) and other stakeholders from over 50 jurisdictions participated. During the event, the OECD published a report on 2018 Mutual Agreement Procedure (MAP) statistics. For 2018, the report found that the number of new MAP cases continues to increase, with a 14.9% growth rate in 2018.[2]

Endnotes

1. See EY Global Tax Alert, *The European General Court rules that the Netherlands did not grant illegal State aid to Starbucks*, dated 25 September 2019.
2. See EY Global Tax Alert, *OECD holds first Tax Certainty Day and releases 2018 Mutual Agreement Procedure statistics*, dated 20 September 2019.

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

Ernst & Young LLP, International Tax and Transaction Services, Washington, DC

- Arlene Fitzpatrick arlene.fitzpatrick@ey.com
- Joshua Ruland joshua.ruland@ey.com

EY | Assurance | Tax | Transactions | Advisory

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

EYG no. 004328-19Gbl

1508-1600216 NY
ED None

ey.com