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Treaty news

Treasury announces entry-into-force dates for tax treaty protocols with Japan, Spain, Luxembourg and Switzerland

The US Treasury Department announced that four long-delayed protocols amending tax treaties with Japan, Spain, Luxembourg and Switzerland have entered into force. All four tax agreements, which had been stalled in the US Senate for many years, were approved by the full Senate on 16 and 17 July 2019.

Treasury on 30 August 2019, [announced](#) the entry-into-force dates for protocols to the US tax treaties with Japan and Spain. The 2013 protocol with Japan entered into force on 30 August 2019, and the 2013 protocol with Spain will enter into force on 27 November 2019.

On 20 September 2019, Treasury [announced](#) the entry into force of tax protocols with Luxembourg and Switzerland. The 2009 Luxembourg protocol entered into force on 9 September 2019 and the 2009 Swiss protocol entered into force on 20 September.

Japanese protocol

Key provisions of the Japanese protocol include:

- ▶ A revised dividend withholding tax exemption
- ▶ A general withholding tax exemption on cross-border interest payments
- ▶ A new definition of indirect interest in real property
- ▶ Mandatory binding arbitration procedures
- ▶ Revised exchange of information provisions
- ▶ Expanded and strengthened provisions regarding assistance in the collection of taxes

The Japanese protocol will have effect for withholding taxes (e.g., related to dividends and interest) for amounts paid or credited on or after the first day of the third month following the date on which the protocol enters into force – that is, 1 November 2019. For all other taxes, the Japanese Protocol will apply to tax years beginning on or after 1 January 2020.

The provisions regarding mandatory arbitration have effect for cases that are under consideration by the Competent Authorities as of 30 August 2019, as well as cases that

come under consideration after that date. The provisions of the new Exchange of Information Article have effect as of 30 August 2019.

Spanish protocol

Key provisions of the Spanish protocol include:

- ▶ A revised dividend withholding tax exemption
- ▶ New fiscally transparent entity rules
- ▶ General exemption from source-country withholding tax on cross-border interest, royalty and capital gains
- ▶ A new limitation on benefits article
- ▶ Mandatory binding arbitration procedures
- ▶ Revised exchange of information provisions

For withholding taxes, the Spanish protocol generally will apply to amounts paid or credited on or after 27 November 2019, the date on which the protocol enters into force. For taxes determined by reference to a tax period, the protocol will apply for tax years beginning on or after 27 November 2019 (e.g., 1 January 2020, for calendar-year taxpayers). In all other cases, the protocol will apply on or after 27 November 2019.

Luxembourg protocol

The Luxembourg protocol introduces a new information exchange article that incorporates the standard in both the 2008 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 it has effect for requests for information made, on or after the entry into force, for tax years beginning on or after 1 January 2009.

Swiss protocol

The Swiss protocol 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.

Senate lawmakers talking tax extenders

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 (R-IA) in late September 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.

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 has 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 has effect for information requests that relate to tax periods beginning on or after 1 January 2010. Finally, the mandatory arbitration provision has 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.

Treasury and IRS news

Proposed Section 382(h) regulations would eliminate 338 safe harbor and modify built-in gain or loss calculations

The IRS issued proposed regulations ([REG-125710-18](#)) on 10 September 2019, on the items of income and deductions that are included in calculating built-in gains and losses under Section 382(h), and reflecting changes made to the Code by the *Tax Cuts and Jobs Act* (TCJA).

The proposed regulations would eliminate the so-called “338 approach,” a safe harbor method as set forth in IRS Notice 2003-65. The proposed regulations would adopt as mandatory another safe harbor method in Notice 2003-65, the “1374 approach,” with certain modifications, particularly for cancellation of indebtedness (COD) income and deductions for the payment of contingent liabilities. Other significant changes in the package include the rules related to consolidated groups and the rules related to some international tax provisions, including Sections 951A and 1248.

If finalized in their current form, these proposed regulations would significantly change current practice for utilizing built-in gains or losses that are subject to the Section 382 limitation. The proposed approach would generally offer less taxpayer-favorable determinations of recognized built-in gain (RBIG), because the 338 approach – proposed to be eliminated – is favored by corporations with built-in gains, given their ability to treat “forgone” depreciation and amortization as RBIG, notwithstanding the lack of an actual item of income or gain.

In addition, the proposed changes with respect to COD income would likely change the status of many loss corporations from a net unrealized built-in gain (NUBIG) to a net unrealized built-in loss (NUBIL) position. Unlike the approach taken by Notice 2003-65, built-in COD income on recourse debt would now only be reflected NUBIG/NUBIL to the extent income from the cancellation of debt is ultimately recognized. In addition, the treatment of contingent liabilities as recognized built-in loss (RBIL) would also significantly expand the treatment of items that constitute RBIL.

For multinational US groups, the proposed regulations would deny RBIG treatment for all dividends from a controlled foreign corporation (CFC), regardless of whether a dividend received deduction is claimed for such dividend under Section 245A (the proposed rule would apply to all dividends under Section 61(a)(7), not just to dividends from CFCs). But the proposed regulations do not address other issues relating to the ownership of CFCs, in which built-in income inside a CFC owned by the loss corporation is not reflected in NUBIG or RBIG, because the asset of the loss corporation is the CFC stock, not the CFC’s assets.

Consolidated return groups should keep in mind that Treasury is considering changes to the end-of-day rule and next-day rule of Reg. Section 1.1502-76(b). Taxpayers will need to evaluate such changes, when published, in

conjunction with these proposed regulations to evaluate the treatment of loss corporations. Treasury had issued proposed changes to the end-of-day rule and next-day rule of Reg. Section 1.1502-76(b) in part to address a perceived abuse – taxpayers applying the next-day rule purportedly to avoid Section 382. The proposed Section 382(h) regulations appear to address Treasury's concern in this regard by treating the items to which the next-day rule applies as RBIG/RBIL.

US government expected to deliver international TCJA guidance this fall

Numerous international tax-related TCJA guidance projects – in both final and proposed form – are anticipated for release this fall, including:

- ▶ Final and proposed regulations providing guidance under Section 59A on the application of the Base Erosion and Anti-Abuse Tax (BEAT) are listed as under review by the Office of Management and Budget Office of Information and Regulatory Affairs (OIRA). Treasury sent the regulatory package to OIRA on 16 September 2019.
- ▶ Final regulations on the business interest expense limitation under Section 163(j); issues under consideration include whether 163(j) can be turned off for CFCs, and how exceptions from Section 163(j) operate.

- ▶ New proposed regulations for Global Low-taxed Income (GILTI) under Section 951A, published in conjunction with final GILTI regulations in June 2019, would provide for a GILTI “high-taxed exclusion.” Comments on those proposed regulations were due 19 September, and it is possible they could be finalized by the end of this year or early in 2020.
- ▶ Final foreign tax credit regulations are expected in the fall. Treasury sent the regulatory package to OIRA on 3 October 2019.
- ▶ Anti-hybrid and Foreign-Derived Intangible Income (FDII) final regulations are expected later in the year or early next year.

IRS reconsidering Form 1120-F nonfilers compliance campaign

The IRS reportedly is considering ending its compliance campaign on nonfilers of Form 1120-F, “U.S. Income Tax Return of a Foreign Corporation.” The campaign, one of the first compliance campaigns to be promulgated by the agency in 2017, has come under criticism by the Treasury Inspector General for Tax Administration (TIGTA). The TIGTA found “low examination referral and proposed assessment rates” resulting from the campaign. According to a TIGTA report released on 16 September 2019, the IRS will evaluate whether the campaign should be amended or suspended entirely.

European General Court rules Netherlands did not grant illegal State aid to Starbucks

On 24 September 2019, 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.

OECD news

OECD releases outcomes of second phase of peer reviews on BEPS Action 13, announces public consultation

On 3 September 2019, the OECD released a compilation of outcomes of the second phase of peer reviews (the Compilation) of the minimum standard on Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) of the BEPS project.

According to the Compilation, over 80 jurisdictions have already introduced legislation to impose a filing obligation for Country-by-Country (CbC) Reporting on multinational enterprise (MNE) groups, covering almost all MNE groups with consolidated group revenue equal to or exceeding €750 million. Where legislation is in place, the implementation of CbC Reporting has been found to be largely consistent with the Action 13 minimum standard. However, 41 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework, and 17 jurisdictions received one or more recommendations to make improvements to specific areas of their framework.

The next annual peer review (phase three) was launched in July 2019 and will aim to review all the jurisdictions participating in the OECD's Inclusive Framework, focusing on progress made by jurisdictions to address recommendations in the phase two peer report.

In addition, the OECD has updated its [website](#) on country-specific information on CbC Reporting. The updated website includes an enhanced table providing high-level information on jurisdictions' implementation of CbC Reporting.

Companies should take note that there will be a public consultation in early 2020 with respect to the CbC Reporting minimum standard. Companies may want to participate in this consultation and provide feedback based on their experiences with CbC Reporting.

OECD holds first Tax Certainty Day and releases 2018 Mutual Agreement Procedure statistics

On 16 September 2019, the OECD held its first OECD Tax Certainty Day (the event) at the OECD headquarters in Paris. The event was organized by the OECD Forum on Tax Administration (FTA). Over 200 tax policymakers, tax administration officials, business representatives (including EY professionals) and other stakeholders from over 50 jurisdictions participated. The discussion focused on the state of the tax certainty agenda and ways to make further improvements to both dispute prevention and dispute resolution.

During the event, the OECD published a report on the 2018 Mutual Agreement Procedure (MAP) statistics. For 2018, the report includes statistics from all OECD and G20 members and the members of the OECD Inclusive Framework on BEPS that joined the Inclusive Framework prior to 2019 – for a total of 89 jurisdictions, covering almost all MAP cases worldwide.

For the first time, the 2018 MAP statistics compare the reporting jurisdictions' performance with respect to key indicators for each type of case through an [interactive tool](#).

EY Member Firm US Tax Desks

Australia	Scott Hes, <i>Sydney</i>	scott.hes@au.ey.com
Canada	George Guedikian, <i>Toronto</i>	george.b.guedikian@ca.ey.com
	Emad Zabaneh, <i>Toronto</i>	emad.m.zabaneh@ca.ey.com
	Asif Rajwani, <i>Toronto</i>	asif.rajwani@ca.ey.com
	Rebecca Coke, <i>Toronto</i>	rebecca.coke@ca.ey.com
	Ryan Coupland, <i>Calgary</i>	ryan.coupland@ca.ey.com
	George Tsitouras, <i>Montreal</i>	george.tsitouras@ca.ey.com
	Denis Rousseau, <i>Montreal</i>	denis.rousseau@ca.ey.com
	Richard Felske, <i>Vancouver</i>	richard.e.felske@ca.ey.com
China	Jeremy Litton, <i>Hong Kong</i>	jeremy.litton@hk.ey.com@hk.ey.com
	Lipeng He, <i>Shanghai</i>	lipeng.he@cn.ey.com
Germany	Tom Day, <i>Munich</i>	thomas.day@de.ey.com
	Andrew Brown, <i>Munich</i>	andrew.brown@de.ey.com
	Dmitri Bordeville, <i>Frankfurt</i>	dmitri.bordeville@de.ey.com
Israel	Amir Chenchinski, <i>Tel Aviv</i>	amir.chenchinski@il.ey.com
	Tal Levy, <i>Tel Aviv</i>	tal.levy@il.ey.com
	Itai Ran, <i>Tel Aviv</i>	itai.ran@il.ey.com
Japan	Joe Kledis, <i>Tokyo</i>	joe.kledis@jp.ey.com
Mexico	Alberto Lopez, <i>Mexico City</i>	alberto.r.lopez@mx.ey.com
	Manuel Solano, <i>Mexico City</i>	manuel.solano@ey.com
Singapore	Michael Xiang, <i>Singapore</i>	michael.xiang@sg.ey.com
Switzerland	Michael Parets, <i>Zurich</i>	michael.parets@ch.ey.com
United Kingdom	Anthony Ammirato, <i>London</i>	anthony.ammirato@uk.ey.com
	Joseph Toce, <i>London</i>	jtoce@uk.ey.com
	Sean Trahan, <i>London</i>	sean.trahan@uk.ey.com
	Leif Jorgensen, <i>London</i>	ljorgensen@uk.ey.com

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