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INTERNATIONAL

AUTOMATIC EXCHANGE OF CBCR TO START WITH 31 COUNTRIES

On 27 January 2016, 31 countries signed a Multilateral Competent Authority Agreement (MCAA) that will require them to automatically exchange country-by-country reports (CbCR) that they collect from parent entities of multinational companies. Data must be exchanged with other signatory jurisdictions in which the relevant entity has a presence within 18 months of the end of the relevant year. The first relevant year is 2016, so the first reports must be made by 30 June 2018.

The majority of the countries that have signed the MCAA are EU Member States, although not all EU Member States are taking part at this stage. However, the European Commission's recent anti-tax avoidance package (see below) contains proposals to make all Member States exchange CbCR data automatically. Jurisdictions as diverse as Australia, Liechtenstein and Nigeria have also signed the MCAA.

It seems likely that the number of countries signing up to the MCAA will increase considerably in the future in the same way that signatories to the OECD's Convention on Mutual Administrative Assistance in Tax Matters has risen to over 90 countries.

It should also be remembered that CbCR data can be being exchanged on a reciprocal basis or provided on request between signatories to the Convention.

At present, whichever jurisdictions exchange CbCR data, the MCAA says it must remain confidential to the tax authorities in each relevant jurisdiction. However, it is known that the European Commission is to publish plans in April 2016 to introduce public reporting of profits made and taxes paid in all EU Member States using the CbCR data.

BDO will be hosting a webinar on international tax structuring on Tuesday 1 March 2016, which will be of interest to all those involved with multinational companies. Read full details and register here.

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EDITOR'S LETTER

Welcome to this issue of *BDO World Wide Tax News*. This newsletter summarises recent tax developments of international interest across the world. If you would like more information on any of the items featured, or would like to discuss their implications for you or your business, please contact the person named under the item(s). The material discussed in this newsletter is meant to provide general information only and should not be acted upon without first obtaining professional advice tailored to your particular needs. *BDO World Wide Tax News* is published quarterly by Brussels Worldwide Services BVBA. If you have any comments or suggestions concerning *BDO World Wide Tax News*, please contact the Editor via the BDO Global Office by e-mail at mireille.derouane@bdo.global or by telephone on +32 2 778 0130.

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EUROPEAN UNION

CORPORATE TAX ANTI-AVOIDANCE PACKAGE

On 28 January 2016 the European Commission (EC) published its Anti-Tax Avoidance Package, which aims to achieve "fair and efficient corporate taxation" within the European Union (EU).

Why is this package needed?

The EC believes that the Base Erosion and Profit Shifting (BEPS) action plan put forward by the Organisation for Economic Development and Co-operation (OECD) is "not sufficient", as there is a risk that Member States will implement it "in divergent ways, or have varying interpretations of the OECD BEPS measures. In the EU, action in the form of anti-avoidance measures must be taken in a clear and coherent way, to strengthen Member States' collective stance against tax avoidance, while upholding the Treaty freedoms and EU competitiveness."

What are the main proposals?

The EC sees the Anti-Tax Avoidance Package as a step towards its goal of a Common Consolidated Corporate Tax Base. It considers that the package "presents a pragmatic approach, bringing together key initiatives needed to enhance effective taxation and transparency in the Single Market. It will add momentum to the current reform process, keep up the pressure on Member States to act, and will help convert high level commitments into legislative action where possible."

The package consists of the following initiatives:

- **Proposal for an Anti-Tax Avoidance Directive** – this sets out six legally binding rules for the implementation of corporate tax anti-avoidance measures by Member States:
  - An interest limitation rule;
  - An EU-wide exit tax on the market value of the transferred assets;
  - A 'switchover' charge on low tax profits earned outside the EU that are brought back;
  - An overriding general anti-abuse rule across the EU;
  - Standardised controlled foreign companies (CFC) rules in all Member States;
  - Prevention of tax avoidance through hybrid mismatches and hybrid entities.
- **Recommendation on Tax Treaty issues** – this recommends ways in which Member States can help to prevent abuse of tax treaties.
- **Proposal for a Directive implementing the G20/OECD Country-by-country Reporting** – this focuses on reporting by Member States on tax information on multi-national enterprises (MNEs) operating in the EU.
- **Communication on an External Strategy** – this outlines the need for a common external strategy for effective taxation.
- **A Staff Working Document** – this provides further analysis and supports these initiatives.

The proposals will have to be endorsed by the European Parliament and adopted by the Council.

Implications for MNEs

MNEs operating in the EU will need to monitor these developments, and take them (as well as the OECD's BEPS action plan) into account when planning or revising their structures and arrangements.

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HONG KONG

WOOING MULTINATIONALS – TAX INITIATIVES BOLSTER HONG KONG'S POSITION AS A FINANCIAL SERVICES CENTRE

Introduction

The Hong Kong Special Administrative Region (HKSAR) Government wants more multinational enterprises (MNEs) to call Hong Kong home. Recent financial budgets have contained important tax initiatives to encourage MNEs (including Chinese enterprises) to establish their asset management businesses, corporate treasury centres and intellectual property holding hubs in Hong Kong. The idea is to promote Hong Kong as the premier financial service centre in the region and preferred investment management platform for MNEs.

Asset management centre

On 17 July 2015, the Inland Revenue (Amendment) (No. 2) Ordinance 2015 (New Offshore Fund Law) was gazetted, exempting non-resident private equity (PE) funds from profits tax. The legislation became effective on 17 July 2015 and applies retroactively to transactions carried out from 1 April 2015.

This new legislation is an extension of the existing offshore fund law[1] which was introduced in March 2006 and exempts non-resident funds from Hong Kong profits tax on "specified transactions" carried out through or arranged by "specified persons"[2]. "Specified transactions" are broadly defined to include transactions in securities, futures, foreign exchange contracts, foreign currencies and exchange traded commodities and the making of certain deposits. However, they exclude transactions in shares in private companies. This explains why under the older offshore fund law, PE funds were not exempt from profits tax.

Some key features of the New Offshore Fund Law

The new law has extended the exemption to transactions in an "excepted private company" which is defined to mean:

- A private company incorporated outside Hong Kong; and
- Which at all times within the three years prior to the transaction taking place, did not carry on any business through or from a permanent establishment in Hong Kong; and
- Of which not more than 10% of the aggregate value of its assets comprises:
  - Share capital in private company(ies) carrying on a business through or from a permanent establishment in Hong Kong; or
  - Immovable property in Hong Kong, or share capital in private company(ies) directly or indirectly holding immovable property in Hong Kong.

A "qualifying fund" that is not managed by a person licensed under the Securities and Futures Ordinance can now be exempted from profits tax if it meets the following criteria:

- At all times after the fund's final closing, the number of investors in the fund exceeds four;
- The capital commitments made by investors exceed 90% of the fund's aggregate capital commitment; and
- The net proceeds to be received by the originators of the fund and their associates, after deduction of capital contributions, do not exceed 30% of the net proceeds of the fund.

Profits tax exemption is now granted to special purpose vehicles[3] (SPVs), which are commonly used by PE funds to hold their investments, in respect of profits derived from certain transactions, including profits from disposal of an excepted private company or an SPV that owns an excepted private company.

A new anti-avoidance provision taxes a Hong Kong resident person's share of an SPV's tax exempt profits.

The New Offshore Fund Law provides tax certainty for PE funds which satisfy all the prescribed conditions. Hong Kong will attract non-resident PE funds which are currently managed by asset managers located in jurisdictions where income tax exemption to the funds is not available (e.g. mainland China). This will enhance Hong Kong's competitiveness and strengthen its position as an international asset management centre.

Corporate treasury centre

Under existing Hong Kong tax law, income earned by a group treasury company from its ordinary course of corporate treasury management and money lending activities carried out in Hong Kong is subject to profits tax at the rate of 16.5%. However, any interest payment made by such a group treasury company to its overseas group companies is not tax deductible because such interest is not chargeable to Hong Kong profits tax in the hands of the overseas recipients. This asymmetrical tax treatment has resulted in Hong Kong being a less attractive location for corporate treasury operations.

In order to attract MNEs to establish corporate treasury centres (CTCs) in Hong Kong to perform treasury activities for their group companies, the Financial Secretary proposed in his 2015/16 Budget the introduction of a CTC regime in Hong Kong. After conducting industry consultations, the HKSAR Government published in the Gazette a legislative amendment bill on 4 December 2015 which aims to enhance the existing interest deduction rules for the intra-group financing business of corporations and introduce a concessionary profits tax rate for qualifying CTCs. Among other measures, the bill introduces the following amendments to the Inland Revenue Ordinance (IRO):

i. Adding Section 16(2)(g) to the IRO to allow deduction of interest expenses paid by a corporation in the ordinary course of carrying on in Hong Kong an intra-group financing business to associated corporations outside Hong Kong – provided that the corresponding interest received by the lender is subject to tax of substantially the same nature of profits tax in a territory outside Hong Kong, and the tax has been/will be paid thereon at a rate not lower than Hong Kong's profits tax rate (i.e. the prevailing 16.5% or 8.25% as the case may be), and the lender is the beneficial owner of the interest income.

ii. Adding new deeming provisions, Sections 15(1)(ia) and (la) to the IRO to make it clear that the interest income and specified disposal profits – earned by a CTC in respect of the business of the borrowing from and lending of money to associated corporations in or outside Hong Kong – are deemed trading receipts chargeable to profits tax.

iii. An 8.25% (i.e. current profits tax rate of 16.5% × 50%) concessionary tax rate will apply to qualifying profits of a qualifying CTC in relation to its qualifying corporate treasury activities, including:
   - Borrowing of money from and lending of money to non-HK associated corporations;
   - Qualifying corporate treasury services provided to non-HK associated corporations; and
   - Qualifying corporate treasury transactions undertaken on its own account and related to the business of non-HK associated corporations.

[1] The existing offshore fund law is contained in Section 20AC of the Inland Revenue Ordinance.
[2] "Specified person" means a corporation licensed under the Securities and Futures Ordinance to carry on a business in any regulated activity.
[3] An SPV is a corporation, partnership, trustee of a trust, estate or any other entity that is incorporated, registered or appointed in or outside Hong Kong and must be wholly or partially owned by a non-resident person and does not carry on any trade or business except solely for the purpose of holding, directly or indirectly, and administering one or more excepted private companies.

Under the bill, the half-rate tax regime will apply to a qualifying CTC as a whole, rather than to each qualifying corporate treasury activity. A corporation is a qualifying CTC if it has only carried out in Hong Kong corporate treasury activities and no other income generating activities. There is a safe harbour rule that allows CTCs to engage in a certain level of income-generating activities other than qualifying corporate treasury activities but still qualify for the concessionary 8.25% profits tax rate on qualifying profits. Alternatively, a CTC could obtain a determination from the Commissioner of Inland Revenue that it is a qualifying CTC. In any event, the central management and control of a qualifying CTC must be exercised in Hong Kong and the activities that produce its qualifying profits are carried out/arranged by it to be carried out in Hong Kong.

The bill also includes anti-avoidance provisions to ensure that the proposals are consistent with the latest international standards to combat base erosion and profit shifting ("BEPS"). Once enacted, the new interest deduction rule and the concessionary tax rate applicable to CTCs will apply to sums payable, received or accrued on or after 1 April 2016, and the new deeming provisions will apply to sums received or accrued on or after the Amendment Ordinance comes into operation.

The introduction of the CTC regime will help remove the asymmetrical tax treatment that may arise from intergroup company money lending and borrowing transactions. Nonetheless, based on the Bill, the half-rate concessionary tax treatment is limited to certain loans and corporate treasury services provided by a qualifying CTC to its overseas associated corporations, and certain qualifying corporate treasury transactions undertaken by a qualifying CTC.

In other words, a qualifying CTC would still be subject to profits tax at the full rate of 16.5% in respect of its loan interest income and corporate treasury services income received from associated corporations in Hong Kong. MNEs should evaluate the effectiveness of this CTC regime to their corporate structure once the new legislation is enacted.

Intellectual property hub

In the 2015/16 Budget, the Financial Secretary also sought to provide a more commercially friendly environment for operating an intellectual property (IP) hub in Hong Kong, with a view to attracting MNEs to hold their IP in Hong Kong. In particular, the scope of the tax deduction for capital expenditure incurred on the purchase of IP rights would be extended to cover more types of IP rights as appropriate.

Under existing Hong Kong tax law, any capital expenditure incurred by a person carrying on a trade, profession or business on (i) the purchase of patent rights or rights to any know-how for use in Hong Kong and/or (ii) specified intellectual property rights[4] for use in the trade, profession or business in the production of profits in respect of which the person is chargeable to profits tax shall be deductible in accordance with the relevant provisions of the IRO. However, no deduction is allowable under Section 16E or 16EA in respect of any relevant right purchased by a person wholly or partly from an associate. Unless this restriction is relaxed or removed in the new legislation, MNEs may not be able to avail themselves of the tax benefits by transferring any qualifying IP rights owned by existing group entities to their IP hubs in Hong Kong. However, a tax deduction may be available for the purchase of certain IP rights from third parties, provided certain conditions are satisfied.

Conclusion

Hong Kong has long been renowned for its low rate taxation system, with a simple, territorial basis. Therefore, Hong Kong is commonly used by MNEs for investment holdings and as the principal location for parking profits. Nevertheless, with the rapid expansion of Hong Kong's tax treaty network and the finalisation in early October 2015 by the Organisation for Economic Cooperation and Development of its BEPS plans to tackle the negative effect on national tax bases of MNE tax avoidance strategies, it is expected that MNEs may no longer be able to establish a pure investment holding company or "cash-box" entity in Hong Kong without being challenged by tax authorities across the globe.

The above proposals/new legislation initiated by the HKSAR Government aim to enhance the tax effectiveness of using a Hong Kong company either as a regional CTC or as an IP holding company with real economic and business substance. MNEs – including those Chinese enterprises taking advantage of the state strategy of "Going Global" – may therefore want to revisit their group structures and consider how Hong Kong can play a role in their international tax planning.

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[4] Specified intellectual property right means copyright, registered design or registered trademark.

INDIA

START-UP INDIA: ACTION PLAN

We summarise below some developments in three areas:

– The 'Start-up India' action plan

– Report of committee for income tax simplification

– Place of effective management.

START-UP INDIA: ACTION PLAN

The 'Start-up India, Stand-up India' initiative was announced by the Indian Government last year with the aim of boosting entrepreneurship, encouraging innovation and creating jobs. In January 2016, the Government formally launched the action plan for this initiative. The plan is a broad based agenda focused on handholding, funding support, and incubation for start-ups in India. It also aims to encourage industry-academia partnership.

An eligible start-up would include an entity[5] incorporated or registered in India for less than 5 years, with annual turnover not exceeding INR 250 mn in any preceding fiscal year. The entity should be working towards innovation, development or commercialisation of new products, processes or services driven by technology or intellectual property. The action plan also provides some additional eligibility criteria.

The plan recommends tax incentives for eligible start-ups:

Tax holiday for 3 years

Profits of eligible start-up entities would be exempted from income tax for a period of three years. The exemption is available subject to the condition that the eligible start-up entity does not distribute dividends.

Tax exempt capital gains

Capital gains during the year, if invested in funds recognised by the government, would be tax free. Furthermore, the exemption from capital gains tax available to investments in newly formed manufacturing MSMEs[6] is extended to all start-ups.

No tax on investment above fair market value

At present, the Indian tax law provides for taxing investments in excess of fair market value of shares in the hands of the company issuing the shares. Similar to investments by venture capital funds in start-ups, the action plan recommends exemption from the said provisions to investments made by incubators in eligible start-ups.

A start-up will be eligible for tax benefits only after it has obtained certification from the Inter-ministerial Board[7] set up for this purpose.

REPORT OF COMMITTEE FOR INCOME TAX SIMPLIFICATION

The Government constituted a committee to recommend changes to tax laws, resulting in ease of doing business, reduction in tax litigation, simplification and certainty in tax laws. The committee has issued its first report, seeking comments from stakeholders. This report has recommended measures addressing issues requiring immediate action, while more complex issues will be dealt with in the next report.

Key recommendations of the first report include:

Exempt Non-residents from quoting PAN

Currently, the Income tax law mandates withholding at higher rates where the recipient of income does not furnish a Permanent Account Number (PAN[8]). The recommendation is to exempt non-residents from this requirement, if the non-resident recipient furnishes his tax identification number (or any such unique identification number) issued by the government of the country of residence.

Defer implementation of ICDS

With effect from fiscal year 2015-16, every taxpayer following the mercantile system of accounting is required to compute its taxable income in line with Income Computation and Disclosure Standards (ICDS) – a set of accounting standards specifically prescribed to compute taxable income. The committee noted that taxpayers are already grappling with multiple regulatory changes like new Company law, Indian Accounting Standards, proposed Goods and Services Tax, etc. It also observed the challenges with regard to clarity, interpretation, multiplicity of records, and the resulting compliance burden. The committee has thus recommended that implementation of ICDS be deferred.

Use technology in tax administration

The committee recommends putting in place electronic technology for filing appeals, communications to and from the tax department, selection of cases for assessment, issue of notices, responses by taxpayers, etc.

Allow taxpayers to make fresh claim during assessment by revenue

It is recommended that taxpayer be allowed to make a fresh claim for exemption, deduction, set-off or any other relief during the course of assessment by the Revenue, if made in the specified time frame.

No reopening merely on account of audit objections

The committee recommends that no re-opening or re-assessment be permitted merely on the ground of objections by the Revenue during its internal audit.

No disallowance of expenditure in certain cases

At present, the Income tax law provides for disallowance of expenditure incurred in relation to income not forming part of total income (i.e. exempt income). Recognising the principle of economic taxation, the committee recommends that an appropriate amendment be made to carve out cases where dividend income is subject to dividend distribution tax, share of profit from partnership firm where tax is paid by partnership firm, etc.

Exempt small taxpayers from certain compliance burdens

The committee recommends increasing the exemption threshold for maintaining books of accounts and tax audit as below:

– Business Income: Total sales/turnover exceeding INR 20 mn;

– Professional Income: Gross receipts limit exceeding INR 10 mn.

[5] Private limited company/partnership firm/limited liability partnership.

[6] Micro Small and Medium Enterprises.

[7] Set up by Department of Industrial Policy and Promotion to validate innovative nature of business for granting tax benefits.

[8] Tax Identification Number in India.

PLACE OF EFFECTIVE MANAGEMENT (PoEM)

The Union Budget of 2015 amended the residency rules of a company. Under the amendment, a foreign company would be treated as resident in India if its place of effective management (PoEM) is in India. During his Budget speech the Finance Minister had indicated that a set of guiding principles would be issued for assistance in determination of PoEM. In Central Board of Direct Taxes[9] in December 2015 released draft guidelines for public comments.

The key guiding principles in the draft include:

For companies engaged in active business outside India

PoEM is presumed to be outside India, if majority of board meetings are held outside India. A company is said to be engaged in active business outside India if:

- Passive income[10] is less than 50% of total income; and
- Total assets in India, number of employees situated/resident in India and payroll expenses on such employees are less than 50% of total assets, employees and payroll cost respectively.

For other companies

A two stage process[11] is to be followed for determining a PoEM:

- Identification or ascertaining person(s) who actually make key management and commercial decision for conduct of company's business as a whole;
- Determination of place where these decisions are in fact being made.

Other general guiding principles

- Emphasis on substance over form;
- No snapshot approach – activities performed over a period of time ought to be considered;
- In a situation where the PoEM is situated in India as well outside India, the PoEM will be presumed to be in India if it has been mainly/ predominantly in India;
- Tax officers must prove that the PoEM of a foreign company is in India. An adverse finding could be effected after seeking approval of the Principal Commissioner/ Commissioner of Income tax and only after giving the taxpayer an opportunity to prove otherwise.

Final guidelines will be released after considering comments from stakeholders.

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[9] Government agency responsible for implementation and administration of Direct Taxes.
[10] Income from royalty, dividend, capital gains, interest, rental income or transactions involving both purchase and sale of goods from associated enterprises.
[11] Factors such as location of board meeting, delegated committees, head office.

SINGAPORE

E-COMMERCE – SINGAPORE'S APPROACH

The digital economy presents challenges for tax collection, particularly where goods and services are acquired by consumers from overseas suppliers. Despite this, many countries have already taken steps to collect Goods and Services Tax ("GST") or Value Added Tax on the digital economy. As noted by the Organisation for Economic Co-operation and Development ("OECD"), the "digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes."

The retail sector is a major contributor to Singapore's economy, and the rise of E-Commerce ("EC"), which is dominated by overseas merchants, has resulted in a significant loss of tax revenue. Of the estimated SGD 4.5 billion generated in EC revenue in Singapore in 2013, about 55% involved cross-border transactions, according to data from Spire Research and Consulting.

In line with the OECD's call for governments around the world to step up efforts to collect tax revenue from cross-border EC transactions, the Inland Revenue Authority of Singapore ("IRAS") issued two e-tax guides i.e. "Income Tax Guide on E-Commerce" and "Goods and Services Tax Guide for E-Commerce (second edition)" to address this issue.

Income tax

In Singapore, tax is imposed on income accruing in or derived from Singapore; and income received in Singapore from outside Singapore.

There are no separate provisions within the Singapore income tax laws that deal only with EC. Therefore, where relevant, current tax laws and interpretations would be applied to EC transactions.

For business income, the broad principle of an 'operations test' is used to determine whether the income is derived from Singapore, so as to be liable to tax in Singapore. If the business operations underpinning the EC transactions are carried out in Singapore, the income so derived is considered as sourced in Singapore and taxable in Singapore. Conversely, if the business operations are carried on outside Singapore, the income is considered as foreign-sourced, and thus taxable when remitted back to Singapore. Whether business operations are carried out in Singapore is largely a question of fact and degree.

In the case of EC, especially if the company is involved mainly in digitised goods, there may be a need to look into its business model, the extent of its operations and their locality in order to ascertain whether the income from EC is derived from Singapore.

Goods & Services Tax (GST)

GST is a tax on domestic consumption. It is charged on any supply of goods or services made in Singapore by a taxable person in the course or furtherance of any business carried on by him. The prevailing GST rate is 7%.

Taxability of physical supply made over the internet

The medium through which the transaction occurs does not alter the taxability of a sale of goods. All physical goods supplied over the Internet attract GST if the supplier is a GST-registered person and the supply is made in Singapore.

Taxability of purchases from an overseas supplier

There is a requirement to pay GST to the Singapore Customs when goods are imported into Singapore by post or by air, if the value of the goods exceeds SGD 400.

However, for digitised goods, there is no requirement to pay GST when these are downloaded, regardless of the value of the goods.

For services that are provided by someone not belonging in Singapore, there is no requirement to pay GST.

Taxability of sales of services/digitised goods supplied over the Internet

A sale of digitised goods over the Internet to an individual consumer or a business entity is a supply of services for GST purposes. The relevant GST rules for services will apply.

If the business is registered for GST in Singapore, it must charge its customers 7% GST unless the services are zero-rated under section 21(3) of the GST Act. Some examples of these zero-rated services are:

(a) Supplies of international transport (e.g. sales of air tickets); and

(b) Services performed for a person who **does not belong in Singapore** at the time the service is performed, and the services are not supplied directly in connection with land or goods situated inside Singapore.

Specific rules apply in the determination of "belonging in Singapore", depending on whether the customer is a business or individual.

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BELGIUM

BELGIUM FULLY COMMITTED TO IMPLEMENTING BEPS ACTION PLAN

In its policy note on the combat of tax fraud of 3 December 2015, the Belgian Finance Minister sheds light on the implementation of the BEPS action plan in Belgian legislation.

The action plan in this policy note focuses on the root causes of tax fraud to link them with specific action points. Here is a brief overview of the highlights:

Transfer pricing

Documentation requirements under the BEPS report

With a view to transparency, the BEPS report introduces a three-tiered standardised approach to document transfer prices:

1. A "**master file**" providing tax administrations with high-level information regarding their global business operations and transfer pricing policies.
2. A "**local file**" specific to each country, documenting on transactions related to intragroup transactions.
3. A **country-by-country report** containing information on the global allocation of income, the taxes paid in countries where the company group is established, a brief description of the professional activities of each of the group companies and other relevant economic indications.

The purpose is to present to the local tax authorities a full and correct picture of the activities in order to allow them to make a thorough risk analysis of the transfer pricing activities.

Incorporating documentation requirements into Belgian tax legislation

At present, the Belgian tax legislation does not provide for documentation requirements regarding transfer pricing activities, in contrast with many other countries that already make use of master and local files. In addition, there is a general consensus within the OECD/G20 to make the country-by-country report compulsory.

Belgium now intends to integrate at least two of the three-tiered documentation requirements into the Belgian tax legislation in the following manner:

- The country-by-country report will be required where consolidated turnover in the hands of the parent company is at least EUR 750 million;
- The threshold for reporting cross-border intragroup transactions would be EUR 500,000 in the previous financial year.

These thresholds aim to limit the administrative burden on companies. Companies that exceed the threshold will have to fulfil the additional reporting requirements by including a separate annex to the corporate income tax return. Entry into force will likely be in financial year 2016.

Other highlights

The policy note also includes a number of other highlights with a view to incorporating the BEPS action plan in the Belgian tax legislation, with a focus on a fair tax system:

- Belgium is fully supporting measures on the international exchange of information and exchange of tax rulings. In this respect, the Finance Minister points out that Belgium is already spontaneously exchanging information with other countries in its unilateral cross-border rulings;
- The revised OECD transfer pricing guidelines resulting from BEPS Action Points 8, 9 and 10 will be applied in future transfer pricing audits, focusing on transactions involving intangibles, contractual arrangements which are not supported by the activities actually carried out, etc.;
- The Belgian tax administration intends to further strengthen its team of transfer pricing inspectors. For tax audits, files will be selected based on data-mining techniques and risk-profiling. In this respect, the tax administration will invest further in software tools and training in order to evolve to a central data-warehouse that can be used by all departments to perform risk assessments;
- The Minister emphasises the importance of an efficient dispute resolution mechanism, and puts forward a 24-month timeframe for resolving Mutual Agreement Procedures and EU Arbitration Convention Procedures, as prescribed by BEPS Action Point 14;
- Controlled foreign company (CFC) legislation is not yet foreseen, but Belgium has been monitoring transactions with non or low taxed countries, and will investigate whether additional legislation is required for this purpose;
- A new interest deduction limitation based on the earnings before interest, taxes, depreciation and amortisation (EBITDA)/interest ratio will likely be introduced, based on the BEPS Action Point 4, to limit the deductibility of excessive interest payments. This ratio will exist simultaneously with the existing thin cap regulation (5:1 debt/equity ratio);
- In view of the outcome of BEPS Action Point 7, a new circular letter will widen the application scope of "dependent agent". Action Point 7 tends to modify the definition of permanent establishment to avoid the artificial avoidance of permanent establishments.

Proactive health check

The policy note clearly indicates that Belgium fully endorses the BEPS Action Plan and will undertake the required action based on the three BEPS mainstays: substance, coherence and transparency. Internationally active companies are therefore advised to perform a proactive health check of their business and to map out their tax and transfer pricing position.

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FRANCE

The Corrective Finance Law for 2015 dated 29 December 2015 (*loi de finances rectificative pour 2015*) and the Finance Law for 2016, definitively adopted on 29 December 2015, (the "Finance Laws") have not introduced any significant changes in terms of the taxation of companies. The most important measures are described below.

ADJUSTMENTS OF THE FAVOURABLE REGIME FOR DISTRIBUTIONS RECEIVED BY PARENT COMPANIES

1. The withholding tax exemption provided under Article 119 *ter* of the French tax code is extended in the following circumstances:
   - Dividends paid to a parent company owner of shares held in bare ownership;
   - Dividends paid to a parent company whose effective management is located in the European Economic Area (EEA), thus including Iceland, Norway and Liechtenstein.

   A list of excluded products is specified to avoid illegitimate schemes.

2. Exemption of withholding tax is provided for dividends distributed by companies in a loss-making position and in liquidation (introduction of a new Article 119 *quinquies* of the French tax code).

   The exemption is provided to the extent that the beneficiary of the distribution is notably, in a loss-making position and is subject, at the time of the distribution, to a judicial liquidation procedure or a comparable procedure.

   This measure applies to income received from 1 January 2016.

CHANGES TO THE DIVIDEND DISTRIBUTION REGIME UNDER THE FRENCH CONSOLIDATED REGIME

Following the European Court's "Steria" decision dated 2 September 2015, the French tax consolidation regime is amended.

The neutralisation mechanism of the portion of costs and expenses on distributions eligible for the parent exemption regime paid within a consolidated group is eliminated, from tax years starting on 1 January 2016.

In return, the portion of costs and expenses is fixed at 1% (instead of the 5% previously) in the following situations:

- For dividend distributions within a tax consolidated group or;
- For dividend distributions to a member of an integrated group through shareholdings in a company established in an EU member State or a State in the (EEA) which has concluded an agreement with France, which is subject to a similar corporate income tax, provided that the company meets the conditions which would enable it to be a member of the tax consolidated group if the company were located in France.

The portion of costs and expenses will remain at 5% in all other cases.

ADOPTION OF A COUNTRY-BY-COUNTRY TRANSFER PRICING REPORTING (CBCR) REQUIREMENT

Pursuant to Action 13 of the Base Erosion Profit Shifting (BEPS) action plan adopted by the OECD, the finance law of 2016 introduces CbCR for fiscal years beginning on or after 1 January 2016.

The scope of the CbCR requirement covers companies:

- With an annual consolidated turnover of over EUR 750 million;
- Which own or control, directly or indirectly, one or several legal entities established out of France or have branches abroad; and
- Which are not owned by one or several legal entities situated in France and subject to such CbCR requirement, or established outside France and subject to a similar CbCR requirement pursuant to foreign legislation must declare the breakdown of the group's profits for each country in which the group operates, within the 12 months following the closing of the tax year.

Failure to produce this declaration will incur a fine of EUR 100,000.

The declaration will be exchanged automatically between States, subject to reciprocity, on the basis of a multilateral agreement that must be signed in 2018.

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IRELAND

FINANCE ACT 2015 AND BUDGET 2016

Ireland's budgetary cycle concluded in December 2015 with the signing into law of Finance Act 2015 ("the Act"). Below is an overview of a number of matters which are relevant to international business.

Ireland's 12.5% rate unaffected by the OECD's BEPS project

As part of the 2016 budget the Department of Finance released an "Update on Ireland's International Tax Strategy" which notes that the 12.5% tax rate on trading profits is not affected by any of the BEPS reports. It also discusses Ireland's commitment to the BEPS process as well as the approach to the EU tax agenda and engaging with developing countries.

Knowledge Development Box – 6.25% rate

An attractive tax regime for IP-related activities has been a key feature of Ireland's tax offering for some time. A 25% refundable tax credit for research and development (R&D) and tax depreciation for acquired intellectual property (IP) are both already available. This suite of IP incentives is now enhanced and extended through the introduction of the world's first OECD compliant "box" type regime (known as the Knowledge Development Box ("KDB")).

The KDB legislation incorporates the OECD's "modified nexus" approach which effectively means that in order for a company to maximise its relief in respect of income from qualifying IP, it must have incurred the underlying R&D expenditure in Ireland.

As certain larger multinational corporations (MNCs) undertake their R&D across numerous locations, the percentage of overall R&D expenditure on a specific piece of IP may not be significant in any single location, including Ireland. Such a commercial model will impact on the amount of profit which can qualify for the 6.25% rate, due to the mechanics of the modified nexus formula.

Qualifying IP includes patents and copyright software, so it is of interest to the likes of the pharma, life science, biotech, medical devices and software sectors.

For companies that can locate all or a significant proportion of overall R&D expenditure and any resulting qualifying IP in a single location, the cost/benefits of using the KDB should be considered.

The KDB applies for periods beginning on or after 1 January 2016. BDO Ireland's KDB leaflet provides further information in respect of the regime.

Country-by-Country Reporting

Country-by-Country Reporting ("CbCR"), as recommended by the OECD, has been adopted into Irish domestic law for fiscal years commencing on or after 1 January 2016.

Irish CbCR applies to multinational groups where the ultimate parent entity is tax resident in Ireland and the group's turnover is in excess of EUR 750 million. Where applicable, the CbCR report must be submitted no later than 12 months after the end of the fiscal year. Failure to file a report carries a penalty of EUR 19,045, with a further EUR 2,535 for each day the report remains outstanding.

Regulations in relation to CbCR also cover situations where the ultimate parent company of an Irish tax resident subsidiary is not itself required to file a CbC report.

Film relief

Ireland's film relief scheme provides for a 32% tax credit in respect of the cost of production of certain films.

The Act has increased the cap per film to EUR 70 million from EUR 50 million. Given the high profile currently being enjoyed by the Irish film industry on the back of Oscar nominations for the likes of "Room" and "Brooklyn", as well as key scenes in the latest Star Wars movie having been shot on the striking Skellig Michael Island off the coast of Kerry, this announcement is particularly timely.

Common Reporting Standard and DAC II

The OECD's Common Reporting Standard ("CRS") requirements have been adopted by Ireland with effect from 1 January 2016, with the first set of returns in relation to non-Irish and non-US financial account holders due by 30 June 2017. The Irish legislation adopts the "wider approach", meaning information on all account holders, regardless of country of tax residence, will be reported by Irish financial institutions to the Revenue Commissioners.

The EU's directive on administrative co-operation (DAC) II also deals with the reporting of account information between European countries. The Act provides for the implementation of this regime.

Foreign directors of Irish companies – travel and subsistence

Following a period of uncertainty in relation to the tax treatment of certain travel and subsistence expenses for non-Irish resident, non-executive directors ("NEDs"), the Act exempts from Irish tax the reimbursement of vouched travel and subsistence incurred in attending certain meetings.

The vouched expenses must be incurred solely for the purpose of attending a meeting which is, firstly, attended by a NED in his or her capacity as a director and, secondly, attended for the purposes of the conduct of the affairs of the company. The exemption does not apply unless these two criteria are met.

Irish Collective Asset Management Vehicle (ICAV)

The definition of a "Collective Investment Vehicle" has been amended to include an ICAV. This amendment removes any uncertainty as to the application of the Irish/US double tax agreement to an ICAV.

Double tax agreements

The Act ratifies a new treaty with Ethiopia and replacement treaties with Zambia and Pakistan. A new protocol to the treaty with Germany is also ratified.

New information exchange agreements with Argentina, Nevis, the Bahamas and St Kitts are now ratified.

The EU Parent/Subsidiary directive

The Act legislates for the implementation of the recent Council Directive in relation to the Parent/Subsidiary directive. The changes are aimed at eliminating situations where there may be double non-taxation under the parent/subsidiary provisions.

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ITALY

CHANGES TO RULES ON TAXATION OF CROSS-BORDER RELATIONSHIPS AND LATEST UPDATES

The Italian Government recently approved the "International Tax Decree" (D.lgs. n. 147/2015) and Financial Law for 2016 (Law n. 208 of 28 December 2015) which introduced important rules aimed at supporting and improving the international competitiveness of Italian companies. The highlights are as follows:

Foreign branch exemption

This is an optional regime that allows, in the case of ownership of a permanent establishment (PE) in a foreign country, the exemption of income via a branch from Italian taxation. Therefore, the income of the PE will be taxed only in the foreign country and, in this way, the branch will benefit from the lower tax rate of the host country, and it could avoid requesting the foreign tax credit from the Italian Tax Authority.

However, there are some restrictions:

- This exemption applies to all PEs of the parent company ("all in - all out" principle);
- The option has to be exercised immediately (in the year of branch incorporation or in the following two years);
- The branch exemption regime applies either to income or losses;
- There is a claw-back rule applicable to branches that generate losses during the five years preceding the exemption.

Problems may arise over the interaction with Controlled Foreign Company (CFC) rules if the PE were placed in a black list country.

Rationalisation of CFC rules

The "International Tax Decree" repeals the mandatory ruling procedure required to obtain exemption from the CFC rules to foreign subsidiaries (the ruling remains, but as an option).

The exemption ("business" test or "subject to substantial tax" test) may be so documented in the case of tax audit.

The decree has also:

- Amended the taxation of dividends and capital gains derived from black-listed subsidiaries that were not subject to CFC rules because they carry out an actual industrial or commercial activity: now, an indirect foreign tax credit is available in respect of these;
- Repealed the applicability of the CFC rules to affiliated companies (i.e. owned at least 20%, or 10% for listed companies).

Repeal of black list cost rules

The "International tax Decree" introduced new rules for deducting expenses incurred with entities resident or domiciled in black list countries. Specifically, expenses relating to transactions with black list suppliers are allowed up to "arm's length" level, and the excess will be allowed only if the Italian resident can prove that there are genuine business reasons for the transaction.

This rule is applicable only for transactions carried out in the tax period 2015, as in December 2015 the Italian Government enacted the Financial Law 2016, in force since 1 January 2016, which has completely repealed the black list expenses rule.

Thus no restrictions will be applicable to black list expenses (except under general principles of Italian tax law) and there is no longer any need to provide proof to the Tax Authority.

Profit attribution to Italian permanent establishment

The rules regarding the profit attribution to an Italian PE and its income calculation have been amended. The International Tax Decree repealed the "force of attraction rule" from Income Tax Consolidation Act (D.p.r. 917/1986) as contrary to the art. 7, par. 2, of the OECD Model.

The renewed article 152 D.p.r. 917/1986 introduced the "*functionally separate entity approach*", in accordance with Action 7 of the OECD's *Base Erosion and Profit Shifting* project. In particular, the new article 152 establishes that the income of a PE is calculated taking into account income and losses directly related to the PE and determined in accordance with the CIT rules.

Furthermore, it is necessary, only for tax purposes, to draw up a financial statement in accordance with accounting principles adopted by the domestic entities with the same characteristics of the PE.

Finally the Decree has codified the so called "*intracompany operations*" between a PE and its own foreign headquarters, which must be at arm's length.

Patent box

In conformity with other EU States, and in line with Action 5 of the OECD's BEPS project, the Finance law 2015 (Law n. 190 of 23 December 2014) introduced a new tax facility that consists of an optional regime through which taxpayers, resident or not in Italy, can benefit from a partial taxation of intellectual property (IP) income.

Specifically, the facility provides an exemption of 30% of income from licensing or direct exploitation of qualifying intangible assets, with the percentage increasing to 40% in 2016 and 50% as from 2017.

Furthermore, the part of IP income, to which the above percentages apply, is calculated by a ratio of R&D expenses incurred for maintenance, growth and development of intangible assets, and overall costs for realised intangible assets.

This benefit is applicable both in the case of direct and indirect exploitation. In the case of direct exploitation it will be necessary for the tax ruling to define the IP income (recently, the Italian Tax Authority has admitted that the incorporation of an IP company is not considered an elusive operation); whilst indirect exploitation does not request a tax ruling because the IP income is equal to the amount of royalties.

Additional tax depreciation

The Financial Law 2016 has introduced a tax facility which provides that the cost incurred for the purchase of material goods from 15 October 2015 until 31 December 2016 is increased by 40%, only for tax depreciation purposes.

For example, an expense of 100 can be increased for tax purposes to 140 (100 +(0.4 x 100)); thus, in this way, it will be possible to benefit from an extra tax deduction.

The tax increase is not relevant for capital gains or capital losses achieved through the sale of material goods (i.e. the benchmark value will be 100, not 140). Therefore, the benefit will be greater the longer the goodwill remains in the company.

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KAZAKHSTAN

SPECIAL ECONOMIC ZONES

Changes in the Tax Code, effective as from 1 January 2016, include amendments providing stability of tax privileges for Special Economic Zone (SEZ) participants.

Currently the following SEZs operate in Kazakhstan:

1. Astana-New City SEZ (Astana);
2. Aktau Seaport SEZ (Mangistau Oblast);
3. Information Technologies Park SEZ (Almaty);
4. Ontustik SEZ (South Kazakhstan Oblast);
5. National Industrial Petrochemical Technology Park SEZ (Atyrau Oblast);
6. Burabai SEZ (Akmola Oblast);
7. Pavlodar SEZ (Pavlodar);
8. Saryarķa SEZ (Karaganda Oblast);
9. Khorgos-Eastern Gates SEZ (Almaty Oblast); and
10. Taraz Chemical Park SEZ (Taraz).

Some regulations of the Kazakh tax law have been changed, but the stability of tax privileges for SEZ participants are preserved during the period of their contract as a SEZ participant, for the duration of the action limitation period, which is 5 years.

Besides simplifying the conditions for organising a business in SEZ, the amendments also provide for the establishment of the Single Coordination Centre (SCC), primarily focused on rendering comprehensive assistance to the SEZ governing bodies on operational issues, which aims to enhance their effectiveness.

Overall, the functions of the SCC comprise building a system for monitoring and assessing the effectiveness of SEZ activities, optimising business processes and internal corporate documents, organising and conducting marketing activities, preparing analyses of projects and identifying bad-faith participants, etc.

Another expected legislative innovation is the extension of the preferential use of land for the period of establishment of the Special Economic Zone.

Besides this, the list of non-SEZ organisations has been supplemented with another category, i.e. organisations that sell (sold) an investment priority project and a strategic investment project in accordance with the Law of the Republic of Kazakhstan on Investments.

Requirements for receiving benefits

– Registration as a taxpayer in the SEZ;

– Registration as a participant of the SEZ;

– Absence of structural subdivisions outside the SEZ;

– The revenues from sales of own-produced goods on priority types of SEZ activities should be not less than 90% of the total annual income (for the Information Technologies Park (IT) SEZ - 70%).

Who cannot be a participant of SEZ

– Subsoil users;

– Organisations manufacturing excisable goods, except for organisations engaged in the manufacture, assembly (batching) of the excisable goods referred to in Sub-Paragraph 6) Article 279 of the *Code of the Republic of Kazakhstan on Taxes and Other Obligatory Payments to the Budget* (Tax Code);

– Organisations that apply special tax regimes;

– Organisations that apply (applied) investment tax preferences;

– Organisations that sell (sold) an investment priority project and a strategic investment project in accordance with the law of the Republic of Kazakhstan on investments;

– Organisers of gambling businesses.

Tax incentives for SEZ participants	Corporate income tax (CIT)	Land tax	Property tax	Value added tax (VAT)
Taxation in Kazakhstan	10-30%	Basic land tax rates	0.5-1.5%	12%
Taxation in SEZ	0%	0%	0%	0-12%*

* For the SEZ sales of goods fully consumed in the activities compliant with the SEZ creation objectives – as per the list of goods identified by the Government of the Republic of Kazakhstan – Value Added Tax is charged at zero rate.

Other SEZ benefits

- Simplified procedure for employment of foreign labour
- Exemption from customs duties on goods imported into the SEZ territory
- Free land plot

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KOSOVO

CHANGES IN KOSOVO TAX LEGISLATION

New laws entered into force on 1 September 2015. These do not constitute a radical change in the existing tax legislation, but are rather a recast of various amendments made throughout the years.

Corporate Income Tax

The applicable corporate income tax (CIT) rate remains 10%. However, certain changes are set out, especially in relation to the applicable terms and percentages, as follows:

- Job related training expenses paid by an employer for an employee are deductible for the year when such training expenses are incurred;
- Contributions made by a taxpayer in the form of donations or sponsorships in accordance with this law are considered contributions given in the public interest, and are allowed as a deduction up to a maximum of 10% of taxable income (previously 5%), computed before the contributions are deducted;
- Under the new CIT law, representation costs are limited to 1% of gross annual revenue (previously 2%), while advertising and promotion costs, which are made in different forms, are fully deductible expenses for tax purposes;
- The amount of tax losses determined under the new law can be carried forward for up to six successive tax years (previously seven) and will be available as a deduction against any income in those years;
- Under the new law, if an advance tax payment is not made in time by a taxpayer with annual gross income of over EUR 50,000, or in an amount lower than is required, the tax authorities can impose a penalty equal to the rate of interest in effect at the time the advance payment was due.

Value Added Tax

The Value Added Tax (VAT) law has changed the percentages of the standard and reduced VAT rates. The most important amendments are:

- The new standard VAT rate is 18% (16% under the previous VAT law). A reduced VAT rate of 8% will apply to the supply/import of certain goods and services such as water, utilities, certain food products, etc.;
- In addition, every person is required to register for VAT if their turnover exceeds EUR 30,000 within a calendar year (previously, EUR 50,000 in the previous 12 months);
- A taxable person can claim a VAT refund if the VAT results for 3 consecutive months are in a credit position and if at the end of the third month the VAT credit exceeds EUR 3,000 (previously EUR 5,000);
- Where the whole or part of the payment for a taxable supply is not received by a supplier and is considered uncollectible following the initiation of court procedures, the respective VAT deduction will be allowed. In addition, even if no court proceedings are initiated, amounts of EUR 500 or less may still be treated as bad debts.

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POLAND

CHANGES IN THE POLISH TAX ENVIRONMENT

In January 2016, the Polish Parliament approved the introduction into Polish tax law of a new levy to be imposed on certain institutions including banks, insurance companies and loan-granting entities. Based on new regulations, as of 1 February 2016, the underlying entities will be obliged to pay tax on the value of their assets which will amount to 0.0366% per month. At the moment, the consequences of imposing such a tax burden are not known, but there are concerns that the levy will impact the entire banking system (including costs of credit and loans).

The above regulations are only an example of the thorough changes taking place in the Polish tax environment. Another important development is a tax anti-abuse clause which is now being discussed in the Parliament and is expected to be approved soon, starting a difficult era for entities applying aggressive tax optimisation schemes.

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SERBIA

AMENDMENTS TO THE VAT LAW

Appointment of a tax proxy

Under amendments to the VAT law, foreign entities making supplies of goods or services in the Republic of Serbia as of 15 October 2015 have an option of registering for VAT by appointing a tax proxy.

Pursuant to the VAT Law, a tax proxy of a foreign legal entity may be an entity, including an entrepreneur or a legal entity who has a residence or head office in the Republic, who has been a registered VAT payer for at least 12 months before applying for approval of the tax representation, and fulfils certain prescribed conditions.

It is important to note that a tax proxy of a foreign legal entity cannot be the permanent establishment (i.e. representative or branch office) of that entity.

A tax proxy will be jointly and severally liable for all obligations of the foreign legal entity as a VAT payer, including liabilities arising from deletion from the VAT register, and in particular for the payment of VAT, penalties and interest in respect of VAT debts.

If the foreign legal entity does not appoint a tax proxy for supplies of goods or services made in the territory of the Republic of Serbia, the person responsible for accounting for VAT will be the recipient of the goods or services.

Construction work and the VAT reverse charge mechanism

In connection with the recent amendments of the VAT Law, as of 15 October 2015 the application of the VAT reverse charge mechanism is expanded to all supplies of goods and services made within the construction industry.

On the basis of performed activities (supplies of goods or services) within the construction industry, the person responsible for accounting for VAT will be the entity which is the recipient of goods or services, provided that both entities are registered for VAT.

Therefore, any recipient of goods or services made as part of construction activities is obliged to calculate and pay VAT (through the application of the reverse charge mechanism), despite its status (investor, contractor or subcontractor of construction works).

The reverse charge mechanism will apply, regardless of whether the VAT payer that makes the supplies of goods or services is registered for performing activities within the construction industry. It is important to note that the supply of goods or services is considered as the activity within the construction industry in accordance with the NACE codes industry classification: sector F Construction (except: 41.10 – Development of building projects; 43.13 – Test drilling and boring and 43.39 – Other building completion and finishing).

A taxpayer which, as a tax debtor, is obliged to calculate and pay VAT on received goods or services, will be able to treat such calculated VAT as input tax, if the goods or services are acquired for the purpose of conducting the activity subject to VAT.

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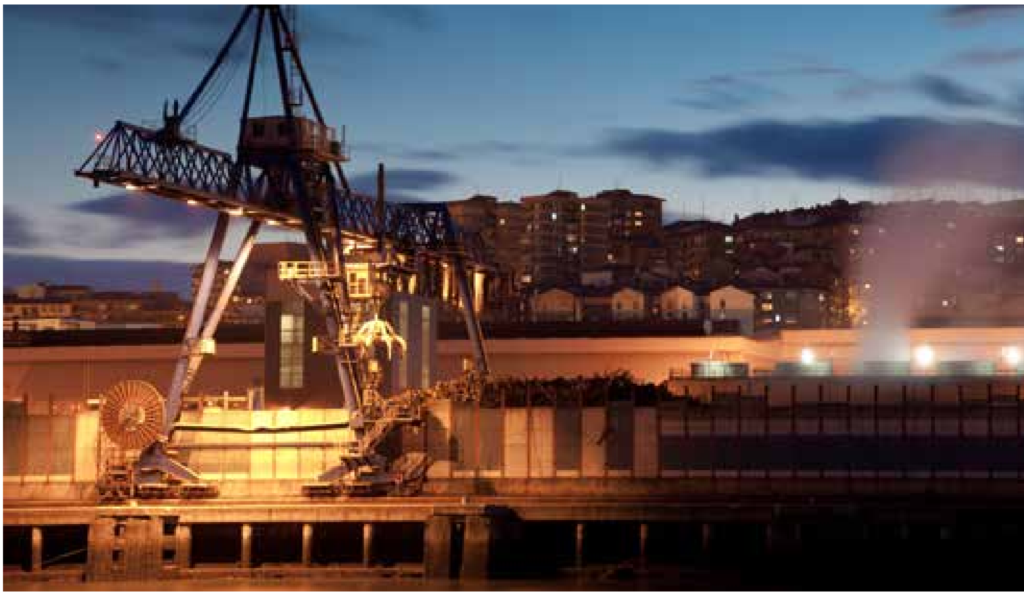
SPAIN

FATCA AGREEMENT BETWEEN SPAIN AND UNITED STATES – COMPETENT AUTHORITY ARRANGEMENT – ENTERS INTO FORCE

On 15 January 2016, the Spanish tax administration announced that the Competent Authority Arrangement (CAA) with the United States), signed on 11 November 2015 by Spain and on 30 November 2015 by the United States in accordance with the Spain – US FATCA Model 1A Agreement (2013), had entered into force on 30 November 2015.



SPAIN AND MEXICO – AMENDED TAX TREATY

On 17 December 2015, Spain and Mexico signed a new tax protocol (Protocol) amending the current tax treaty which was signed on 24 July 1992. The ratification process will now follow.

Reduced rates for dividends, interest and royalty payments

The Protocol provides for a general 10% dividend withholding tax, reduced to 0% for dividends derived from "qualifying participations" (i.e. more than 10% direct participation in the share capital of the paying entity) and pension funds, provided that the recipient of the income is the beneficial owner.

The withholding tax on interest payments is reduced from 15% to 10%. A reduced 4.9% and 0% withholding tax rate is established for financial institutions and pension funds, respectively.

No changes are introduced in relation to royalty payments. However, the Protocol does clarify that income derived from technical assistance should be characterised as either business profits (article 7) or professional service fees (article 14).

The Protocol introduces a most-favoured nation clause whereby if Mexico in future enters into a tax treaty with an Organisation for Economic Co-operation and Development Member State or European Union Member State with lower interest and royalty withholding tax rates (including 0% rates) than those currently foreseen in the Protocol, those rates will automatically apply.

Capital gains

Under the Protocol, the tax rate applicable to capital gains derived by a resident of a Contracting State from the transfer of shares of an entity resident of the other Contracting State is reduced from 25% to 10%.

The Protocol also establishes that capital gains derived from the transfer of shares of an entity of which 50% or more of the value derives directly or indirectly from real estate assets located in one Contracting State may be taxed in that Contracting State.

No capital gains tax will apply to the disposal of shares by financial institutions, insurance institutions and pension funds. Furthermore, the transfer of shares that are regularly traded on a stock exchange will not be subject to tax unless it derives from the transfer of shares of a Spanish real estate investment trust (the so-called SOCIMI).

Anti-abuse clause

The Protocol clarifies that the tax treaty will not be interpreted to mean that a Contracting State is prevented from applying its domestic legal provisions on the prevention of tax evasion or tax avoidance. Furthermore, the benefits of the treaty will not apply to a person that is not the beneficial owner of the items of income derived from the other Contracting State.

The provisions of the treaty will not apply to transactions where the main intention of the parties is to benefit from the same.

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SWITZERLAND

CALCULATION OF HIDDEN EQUITY – FUNCTIONAL CURRENCY

On 30 September 2015, the Swiss Federal Supreme Court (FSC) decided in a case aimed at clarifying the calculation of hidden equity and hidden profit distribution. In past years, several cases have been fought in the field of hidden equity. Nevertheless, this new decision focuses on the rules of hidden equity if the books are kept in a functional currency.

In this case, the books were kept in USD and had to be translated into CHF for tax purposes. The court of lower instance stipulated that the hidden equity has to be calculated by using the figures of the annual financial statements which were translated into CHF. As a consequence, the tax authorities determined a hidden equity and a significant hidden profit distribution (interest exceeded the safe haven interest rates). Such a hidden profit distribution qualified as a hidden distribution, and thus 35% withholding taxes are levied on the gross distribution.

The FSC examined the wording of the hidden equity rule which states that debt from affiliates qualifies as hidden equity if its economic importance corresponds more to equity capital.

Consequently, they concluded that a comprehensive view is required and all economic aspects have to be taken into account. As a result, figures which are converted from a functional currency by using different exchange rates cannot be the basis for an assessment in accordance with the arm's length principle. Furthermore, the financial statements kept in the functional currency are decisive for banks, creditors and shareholders. Even if the translation into CHF is required due to tax rules, these translated financial statements gain no economic relevance. In addition, resulting exchange gains or losses are not to be income-statement related as they are not attributable to operating activities and the company does not have to bear the currency risk.

Moreover, the taxpayer's good faith has to be protected, as the development of exchange rates is not foreseeable and cannot be influenced by the taxpayer. The right of equality must not be violated by treating equal situations as unequal without being justified by objective reasons. Thus the calculation of the hidden equity and the hidden profit distribution must not violate the principle of being taxed according to economic capacity.

In conclusion, the FSC followed the taxpayer's arguments, and hence there was no hidden profit distribution.

Taking this ruling into consideration, if the books of a Swiss domiciled company or branch are kept in a functional currency, the hidden equity as well as the interest on the hidden equity have to be calculated based on the functional currency.

This clarification by the court ensures the proper application of the hidden equity rules in Switzerland and avoids any unequal treatment due to a functional currency.

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DENIAL OF WITHHOLDING TAX REFUNDS IN CONNECTION WITH DERIVATIVE TRANSACTIONS (TOTAL RETURN SWAPS)

On 28 October 2015, the Swiss Federal Supreme Court (FSC) published its reasoning for the decisions made on 5 May 2015 related to two judgements regarding the refund of Swiss withholding tax in connection with total return swap and futures transactions. The FSC ruled that the Swiss Federal Tax Administration (FTA) had correctly denied a refund of withholding tax to two Danish banks, which entered into total return swaps on equity baskets comprising Swiss equities. In order to hedge the swap positions, the bank acquired the corresponding amount of the underlying Swiss equities.

Both banks requested from the FTA a refund of the withholding tax deducted on the dividend payments received from Swiss equities for the years 2006, 2007 and 2008. In 2010 the FTA rejected the requests due to a lack of beneficial ownership, arguing that both banks were not effectively the beneficial owners of the shares and consequently, they were not entitled to benefit from the double taxation agreement between Denmark and Switzerland.

To be able to exercise the benefits of the double taxation agreement with Denmark (and the same applies basically to the double taxation agreements with other countries), the dividend recipient must be the effective beneficial owner. Legitimate entitlement is to be denied if the dividend recipient is legally or economically required to forward the distributed gains. Bank X entered into SWAP agreements with its counterparties to forward an amount that coincided with the dividend amount. Bank Y on the other hand concluded combined stock/futures transactions which were not financed by the bank itself. The bank notably held the purchased shares only on a short-term basis to then sell them back to the original vendor. As a result of this set-up, most of the collected dividends were transferred outside of Denmark or Switzerland.

It seems that these decisions will not lead to a general denial of beneficial ownership status in all transactions involving derivative instruments, but each case must be decided individually. The FTA will most likely deny a refund of withholding tax on Swiss dividend and interest payments in similar cases. As a consequence, entering into such transactions in the future may be less profitable for the counterparty due to the additional withholding tax burden.

We therefore highly recommend that potentially affected companies discuss in advance possible entitlement to refunds with the FTA. Financial institutions should review their business models on total return swaps and similar arrangements to ensure that the Swiss withholding tax requirements are met.

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UNITED KINGDOM

REQUIREMENT TO PUBLISH TAX STRATEGY DOCUMENTS

It will soon be a legal requirement for qualifying companies to publish their tax strategy document. Media interest in tax means that this document could be subject to intense public scrutiny.

What is a tax strategy document?

A tax strategy document is a high level document which summarises a business' overarching attitude and approach to tax, tax risk and tax governance. The legislation will take effect for periods commencing after Finance Act 2016 gets Royal Assent.

Which entities does the law cover?

- UK companies, groups and partnerships with aggregated turnover exceeding GBP 200m or balance sheet totals exceeding GBP 2bn;
- UK companies, groups and sub-groups belonging to a qualifying multinational enterprise for OECD country-by-country reporting purposes (consolidated group revenue of GBP 586m or more).

What are the legal requirements?

The tax strategy document:

- Must be published on the internet;
- Must be available free of charge for a minimum of one year to the public;
- Need only publish what relates to or affects UK taxation;
- Must include a description of the company's:
  - Approach to risk management and governance arrangements;
  - Attitude towards tax planning;
  - Level of risk that the group is prepared to accept;
  - Approach of the group toward its dealings with HMRC.

Further considerations

HMRC will expect a tax strategy to be:

- Clearly defined;
- Aligned with the general business strategy and operations;
- Embedded in the way the organisation operates;
- Approved by the board.

Penalties, sanctions and risks

Penalties for failing to publish as required under the legislation are:

- GBP 7,500 initial penalty plus;
- A further GBP 7,500 payable for each month of non-compliance from six months after the required publishing date.

HMRC will consider the content of the tax strategy document and how it is applied in practice in determining the businesses risk rating – this rating drives the amount of interactions the business will have with HMRC.

If tax strategy already documented

Businesses that have already created a tax strategy document will still need to consider a wide range of issues. For example, even if the document meets the new legal requirements, it may not been in a form that is appropriate for publication online. It will also be vital to consider a wide range of questions including:

- Has there been a change in ownership, structure or market conditions since the document was last updated?
- Is the tax risk profile the same as when the original document was drafted?
- Is the strategy embedded across the organisation and supported by adequate systems and processes?

How BDO can help

We can help businesses articulate a tax strategy which aligns with commercial and other business objectives, manages their desired risk profile with HMRC, and which is demonstrably embedded in the daily operations.

We run a facilitated workshop with senior personnel to establish attitude to tax risk, planning and governance and desired tax strategy.

Within this workshop, we challenge how realistic and manageable the desired tax strategy is, its potential impact on the HMRC relationship, and how adherence to it throughout the business can be monitored.

We will help draft the strategy itself to ensure it is fully compliant with the legislation and consistent with strategic objectives.

Documenting the tax strategy is far from the end of the matter. HMRC will expect businesses to be able demonstrate that their tax strategy is integral to the way their business operates. We can provide follow up assistance with any projects and training needed to help embed the strategy throughout the business to ensure that there is no mismatch between what the strategy says and what the business does.

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CANADA

NON-RESIDENT EMPLOYER CERTIFICATION PROGRAM

On 12 January 2016, the Canada Revenue Agency (CRA) announced that it was launching the Non-Resident Employer Certification Program, as originally announced in the 2015 Federal Budget.

The program became operative on 1 January 2016 for certification applications received by the CRA by 1 March 2016. This is very welcome news for non-resident employers who send employees to Canada for short periods of time, and these employees are exempt from Canadian tax because of the provisions of a tax treaty. This new program will greatly reduce the administrative burden associated with these short term stays.

Employers must register with the CRA to be part of this program, and the registration form, with instructions on how to apply, are now available on the CRA website. To qualify for the program, a non-resident employer must meet the following conditions:

- Be resident in a country with which Canada has a tax treaty (special rules apply for employers who are partnerships); and
- Be certified by the Minister of National Revenue (which is done through the registration process which is now available).

It is anticipated that the approval process will take about 30 days and will be granted for a two year period.

Under current tax legislation, non-resident employers must obtain employee-specific waivers from the CRA in order to be relieved from their obligation to withhold income tax on wages paid. In addition, the employer would have to comply with reporting requirements such as obtaining Canadian tax numbers and T4 reporting, for all employees who spent time in Canada, even if they ultimately were not subject to Canadian tax. Now, non-resident employers who are certified under this program will get relief from the requirement to obtain a waiver for qualifying non-resident employees, and the obligation to do reporting for these employees if they make less than CAD 10,000 in a year related to their Canadian activities.

A qualifying non-resident employee is defined as one who:

- Is resident in a country with which Canada has a tax treaty at the time of payment;
- Is exempt from Canadian tax in respect of the payment because of a tax treaty; and
- Either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12-month period that includes the time of the payment.

Note that this program only applies to income tax withholdings on employee remuneration, and it may be possible that Canada Pension Plan (CPP) and/or Employment Insurance (EI) premiums will still have to be withheld and remitted. That said, CPP premiums are not required for non-resident employees if they have a certificate of coverage under a Social Security Agreement between Canada and the country of residence of the employer, and EI premiums are not required if the employee is covered under a similar program in his or her country, while working in Canada. For example, most US resident employees would be able to meet these conditions.

A qualifying non-resident employer will have a number of obligations under the program including having a process to track the number of days each qualifying non-resident employee is either working in Canada, or is present in Canada, and the income attributable to these days on a proactive basis. The employer is also required to ensure that employees are resident in a country which has a tax treaty with Canada and also to ensure that the wages attributable to time spent in Canada is, in fact, treaty exempt.

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UNITED STATES

MAJOR REFORMS TO THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT

On 18 December 2015, President Obama signed into law the Protecting Americans from Tax Hikes (PATH) Act of 2015, which includes major reforms to the Foreign Investment in Real Property Tax Act (FIRPTA) of 1980.

Background

Introduced in 1980, FIRPTA subjects foreign persons to United States federal income tax on gain from USRPIs. Subject to certain exceptions, a USRPI includes stock in a United States corporation that holds USRPIs, the value of which equals or exceeds 50% of the value of the corporation's total real property holdings (foreign and U.S.) plus other assets which are used or held for use in a trade or business (such corporations are known as United States real property holding corporations (USRPHCs).

Under FIRPTA, upon the disposition of a USRPI by a foreign person, such person must report the gain or loss as if it were effectively connected with a United States trade or business (ECI) and pay tax on any net gain at rates applicable to United States persons. The FIRPTA rules also impose a withholding obligation on persons acquiring USRPIs (transferees) from foreign persons.

Narrow exemptions from FIRPTA exist. The PATH Act expands available exemptions and thereby increases the appeal of United States real property investments for many investors.

Key FIRPTA reforms

FIRPTA withholding rate increased to 15 percent

As discussed above, the PATH Act increases the FIRPTA withholding rate from 10% to 15% on the purchase of a USRPI from a foreign person, and is effective 60 days after enactment of this provision.

New FIRPTA exemption for foreign pension funds

The PATH Act also provides a new and complete exemption for qualified foreign pension funds (including their wholly-owned subsidiaries) from taxation under FIRPTA. Specifically, the PATH Act provides an exemption from FIRPTA for foreign pension funds meeting the following requirements:

- The fund is created or organised under the law of a country other than the United States;
- The fund is established to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (or persons designated by those employees) of one or more employers in consideration for services rendered;
- The fund must not have a single participant or beneficiary with a right to more than 5% of its assets or income;
- The fund must be subject to government regulation and provide annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it operates, and under such laws either (i) contributions made to it are deductible or excluded from the gross income or taxed at a reduced rate, or (ii) taxation of any of its investment income is deferred or taxed at a reduced rate.

Increased exemption for publicly traded interests

The PATH Act also increases the size of shareholdings of publicly-traded REITs that are exempt from FIRPTA to 10%, from the previous 5% exemptions.

Foreign investors can now hold up to 10% of a publicly traded Real Estate Investment Trust's (REIT's) stock without triggering FIRPTA upon the disposition of such stock or upon distributions from the REIT that are attributable to gain from the sale or exchange of a USRPI.

New exemption for qualified shareholders of REITs

The PATH Act provides another new exception from FIRPTA for certain "qualified shareholders" of REITs. Only certain foreign persons can be eligible for "qualified shareholder" status, provided they meet a series of specific requirements. For instance, if it meets the necessary criteria, a publicly traded foreign mutual fund may be able to qualify.

Cleansing rule no longer applies to REITs and RICs

Generally speaking, FIRPTA does not apply to the gain recognised upon the sale of shares of a USRPHC if all of the USRPHC's USRPIs were disposed of in transactions in which the full amount of the gain was recognised during a testing period, and the USRPHC did not hold any USRPIs as of the date of the share sale. This is known as the "FIRPTA cleansing rule," and is based on the rationale that tax on the gain from USRPIs has already been imposed. The PATH Act provides that the cleansing rule no longer applies to United State persons. Special rules apply to REIT stock owned by other REITs or RICs.

Conclusion

BDO has the knowledge and expertise to help clients evaluate their FIRPTA exposure and comply with FIRPTA tax and withholding obligations.

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CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 17 February 2016.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
British Pound (GBP)	1.29001	1.43956
Canadian Dollar (CAD)	0.64873	0.72395
Euro (EUR)	1.00000	1.11579
Indian Rupee (INR)	0.01310	0.01462
Singapore Dollar (SGD)	0.63884	0.71291
US Dollar (USD)	0.89610	1.00000

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