

MAZARS U.S. TAX DESK NEWSLETTER

July 2018



IN THIS ISSUE!

Welcome to the latest edition of the Mazars U.S. Tax Desk Newsletter!

Despite it being the Summer season, there continues to be a significant number of changes in the international tax landscape unfolding.

In this issue, we give our insights and analysis on issues such as:

- Germany's limitation on deductibility of licence payments to related parties;
- Sweden's new interest deduction regulations;
- Belgium's 0% withholding tax on dividend payments to S Corp's;
- China's relaxation on the timing of withholding taxes;
- European directive on disclosure of cross border "arrangements" and
- Chile's introduction of the Common Reporting Standard.

The above is only a sample of the wide array of contributions in this issue. Please see page 2 for a full listing.

We are delighted that our publication is continuing to grow in content and circulation numbers. If you would like to share your country insights, please feel free to contact us.

CONTENTS

Page

EUROPE

○ Germany	Limited deduction for licence payments	4
○ Luxembourg	Introduction of the VAT group regime	8
○ The Netherlands	Expected Dutch changes - 2018 to 2021	11
○ United Kingdom	BREXIT – Practical Considerations	14
○ Ireland	EU Exchange of Information Directive	16
○ Sweden	New interest deduction provisions & CIT rate	19
○ Central & Eastern Europe	Implementation of ATAD and overhaul of the SSC taxation system	21
○ Belgium	Dividends paid to US S-Corporations qualify for zero withholding treaty rate	23
○ Poland	Introduction of Split Payment mechanism	25

ASIA

○ China	Withholding Tax on Payments to Non-Residents	27
	Withholding Tax (“WHT”) Deferral for Foreign Re-investment in China	31
○ Hong Kong	Introduction of Transfer Pricing Legislation	35

SOUTH AMERICA

○ Chile	Common Reporting Standard (CRS) Regulation recently implemented in Chile	42
---------	--	----

EUROPE

LIMITED DEDUCTION FOR LICENCE PAYMENTS

GENERAL

With the introduction of the “Lizenzschranke” in Sec. 4j EStG, there is a regulation which is directed against foreign preferential regulations for the taxation of income from usage transfer of rights. Some of the corresponding expenses can only be deducted to a limited extent.

BACKGROUND

The erosion of the tax base addressed in the OECD's BEPS (Base Erosion and Profit Shifting) project takes place through, in addition to cross-border financing, the cross-border transfer of rights. In particular, regulations providing for preferential taxation of royalty income (e.g. patent, licence, or IP boxes) without linking this advantage to active research and development activities, contribute to harmful tax competition and have fallen into disrepute. At the OECD level (BEPS Action Point 5), it was decided that such regulations should be abolished or adapted by 30 June 2021.

In the future, preferential taxation should only be permissible if there is substantial business activity, in particular where active research and development takes place abroad (called the Nexus approach).

In addition to the OECD requirements, Germany has unilaterally decided to introduce a defensive measure until the end of the aforementioned transitional period. According to Sec. 4j EStG, expenses for the usage transfer of rights arising after 31 December 2017 are subject to a deduction ban if the corresponding income abroad was subject to preferential low taxation.

REGULATORY AREA OF SEC. 4J

Sec. 4j EStG applies to all domestic taxpayers, regardless of whether their tax liability is unlimited or limited. The regulation also applies to both natural persons and corporations. Sec. 4j EStG covers “*expenses for the granting of the use or the right to use rights, in particular copyrights and industrial property rights, of commercial, technical, scientific and similar experience, knowledge and skills, for example plans, designs and procedures*”. The wording corresponds exactly to Sec. 50a para. 1 no. 3 EStG, which is why a comparable interpretation seems necessary in this respect. Thus, the provision applies in particular to rights protected under one of the following laws (Sec. 73a para. 2, para. 3 of The German Income Tax Act Enforcement Order (EStDV)):

- Copyright Act (Urhebergesetz)
- The Act on Designs (Designgesetz)
- Patent Act (Patentgesetz)
- The Act on Utility Models (Gebrauchsmustergesetz)
- Trademark Act (Markengesetz)

However, Sec. 4j EStG only covers licence expenses that are based on payments between related parties (Sec. 1 (2) of the German Foreign Tax Act (AStG)).

Note: In accordance with Sec. 4j (1) sentence 2 EStG, the scope of application is also extended to indirect licensing relationships. This is intended to prevent circumvention. Ultimately, the deduction prohibition also applies to licence payments from or to permanent establishments (PE) (Sec. 4j para. 1 sentence 3 EStG). In the case of assumed creditor/debtor relationships between several branches of a company (Sec. 1 para. 5 AStG, Sec. 16 of The German PE Profit Allocation Order (BsGaV)), however, the provision does not apply.

PREFERENTIAL LOW TAXATION

According to Sec. 4j para. 1 sentence 1 EStG, the deduction ban only applies “if the creditor’s income is subject to low taxation that deviates from the standard taxation in accordance with para. 2 (preference rule)”. This means that royalty income may be taxed at a low rate abroad as long as it is the generally applicable tax (standard taxation). At the same time, preferential taxation other than the standard taxation is harmless if it does not lead to low taxation within the meaning of section 4j (2) EStG. The “Lizenzschranke” only applies if preferential taxation other than the standard taxation is applied, resulting in low taxation. However, the known preferential regimes for income from intangible assets generally have tax rates well below the 25% threshold, which is why the low taxation criteria will be fulfilled.

Preferential taxation is not defined by law. Given the legal purpose of combating harmful tax competition in the form of foreign patent, licence, or IP boxes, it should only address such rules that specifically favour revenues from the usage transfer of rights. Mere geographical advantages (e.g. special economic zones) are no more covered than domestic trade tax havens.

The US has introduced a tax benefit in the form of Foreign Derived Intangible Income (FDII) as part of the recent tax reform. It is suspected, to a certain extent a widely held view, that this provision also falls within the scope of the “Lizenzschranke”. There are doubts, however, due to the fact that the benefit is linked to “deemed intangible income”, i.e. to a fictitious figure and therefore not to concrete income. Sec. 4j (1) sentence 1 EStG, on the other hand, requires a tax advantage for “income” abroad resulting from licence expenses in Germany. It remains to be seen how the administration will position itself on this.

According to Sec. 4j (2) EStG, low taxation exists if the creditor’s income is subject to income taxes of less than 25%. Please note the reference to “income”, i.e. a gross amount. The amount of operating expenses actually incurred is of no significance due to the revenue-based consideration. When determining the tax burden, however, benefits in the form of tax reductions, exemptions, credits, or reductions should be taken into account. The following examples are given in the explanatory statement to the law (Bundestag-Drucksache 18/11233, 15):

- Example 1
 - Situation - The State A resident creditor generates royalty income of 100 and has related deductible operating expenses of 20. The lower tax rate in state A, which differs from the standard tax rate, is 10%.
 - Solution - The income tax burden pursuant to Sec. 4j (2) EStG amounts to 10%.
- Example 2
 - Situation - The creditor resident in State B generates royalty income of 100. The standard tax rate applicable to royalty income in State B is 30%, but 50% of royalty income is tax-free.



- Solution - The income tax burden pursuant to Sec. 4j (2) EStG is 15 % (50 % of 30 %).

- Example 3

- Situation - The creditor resident in State C generates royalty income of 100. The standard tax rate applicable to royalty income in State B is 30%, but State C allows the deduction of notional operating expenses amounting to 60% of the royalty income.
- Solution - The income tax burden pursuant to Sec. 4j (2) EStG amounts to 12% (40% of 30%).

In all examples, the actual operating expenses are irrelevant.

LEGAL CONSEQUENCE

As a legal consequence, the expenses are only partially deductible in accordance with Sec. 4j (3) sentence 1 EStG. The non-deductible portion is determined as follows (Sec. 4j (3) sentence 2 EStG):

$(25\% - \text{burden of income taxes in \%}) / (25\%)$

- Example

- Situation - The domestic tax liable debtor has licence expenses of 100. The corresponding royalty income abroad is subject to preferential taxation for royalty income and a tax rate of 5%. The other requirements of Sec. 4j EStG are fulfilled.
- Solution - The non-deductible portion of royalty expenses is 80% $([25\% - 5\%] / 25\%)$. Applying the “Lizenzschranke” to a corporation in Germany thus results in an effective additional tax burden of 24% (assumed total tax burden of 30% multiplied by 80%).

The regulatory mechanism can easily lead to an additional burden on licence expenditure in Germany, which goes beyond the advantages obtained abroad in the taxation of licence income. Thus, Sec. 4j EStG can have excess legal consequences.

In order to avoid additional charges, the “Lizenzschranke” pursuant to Sec. 4j (1) sentence 5 EStG does not apply insofar as a CFC tax amount within the meaning of Sec. 10 (1) sentence 1 AStG is to be recognized on the basis of the corresponding license income. Since CFC tax concerns a net amount, but the exception is based on the recording of the gross amount “revenue”, a parallel application of Sec. 4j EStG and the CFC tax may nevertheless occur.

EXCEPTION ACCORDING TO SEC. 4J PARA. 1 SENTENCE 4. ESTG

Sec. 4j EStG pursues the goal of combating harmful tax competition and ensuring fair taxation of royalties (Bundestag-Drucksache 18/11233, 9). Accordingly, the provision is not intended to nullify every advantage abroad. Where foreign regulations stipulate that the benefits are linked to compliance with the requirements of the “Nexus Approach”, there should be no limitation on deductions. This is to be achieved by Sec. 4(1) sentence 4 EStG. Accordingly, the deduction ban does not apply if the low taxation of the creditor’s income results from a preferential arrangement “which corresponds to the Nexus approach under Chapter 4 of the 2015 Final Report on Action Point 5, OECD (2016), Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance, OECD/G20 Base Erosion and Profit Shifting Project”.

The OECD’s Nexus approach aims to ensure that tax incentives related to IP regulations are only granted to taxpayers who actually carry out research and development activities (OECD, Countering Harmful Tax Practices More Effectively, 2015, marginal 28). To determine a degree of benefit, qualified expenditure is set in relation to total expenditure. Details of implementation will be left to the States. As far as can be seen, only a few of the existing

preferential arrangements have currently been brought in line with the Nexus approach (e.g. in the Netherlands and Ireland).

According to the OECD report to which this legislation refers, marketing-related intangible assets are never entitled to preferential treatment. As a result, if trademarks or similar rights abroad are taxed at a preferential rate, Sec. 4j EStG should always apply, because the exception in Sec. 4j para. 1 sentence 4 EStG never applies in this respect.

INCOMPATIBILITY WITH EU LAW

Another notable aspect of the exception described above is its focus – alone and in abstract terms – on the design of the foreign regulation and its synchronisation with the OECD-Nexus approach. The actual activity abroad, on the other hand, is irrelevant. This means that the partial deduction ban should also intervene if the license creditor conducts substantial business activities abroad, but the foreign preferential arrangement does not link the preferential treatment to this activity. This seems questionable under EU law in view of the recent rulings of the European Court of Justice, according to which a national standard can only justify intervention on the basis of this justification ground if it specifically targets wholly artificial arrangements, which do not reflect economic reality, with the goal of unjustly benefiting from a tax advantage. (ECJ, decision dated 20.12.2017 – C-504/16 and C-613/16, Deister Holding AG/ Juhler Holding A/S). In view of the lump-sum structure of Sec. 4j EStG, compliance with this requirement is not possible.

In addition, there may be a violation of the Interest and Royalties Directive. Although the ECJ (decision dated 21 July 2011 – C-397/09 - Scheuten Solar) ruled that the Interest and Royalties Directive only protects creditors from legal double taxation, the “Lizenzschranke” results in economic double taxation for debtors. However, Sec. 4j EStG links the ban on deduction for the debtor with the tax burden of the creditor. Since Sec. 4j EStG, just like the Directive, specifically concerns licensing relationships between related parties, the standard contradicts the objective of the directive. The latter may have significance in relation to Switzerland: while the freedom to provide services does not provide any protection there, the Interest and Royalties Directive does so very well (see also Sec. 50g para. 6 EStG).

PRACTICAL NOTE

Existing licensing relationships must be checked urgently. In addition to the provisions of Sec. 4j EStG, the requirements of the foreign preferential regulation must be included in this examination. It must also be examined whether the waiver of the foreign preferential arrangement is preferable due to the excessive legal consequences of the German regulation. Consideration should also be given to relocating IP holding companies.

In view of the considerable doubts about Sec. 4j EStG under EU law, appeal procedures remain a credible option for action in EU/EEA cases. In view of the strict guidelines of the European Court of Justice rulings and the imprecise structure of Sec. 4j EStG, the provision is problematic against the background of fundamental freedoms.

In practice, however, not only the debtor but also the creditor should have his legal position clarified for tax purposes, as the latter is subject to taxation under Sec. 50a (1) No. 3 EStG, and in the EU and EEA context, the high requirements for granting the advantages of agreements and directives also raise concerns.

CONTRIBUTOR DETAILS

Andreas Lichel

Email: andreas.lichel@mazars.de
Phone: +49 30 20 888 – 1002

Dr. Ragnar Könemann

Email: ragnar.koenemann@mazars.de
Phone: +49 30 20 888 - 1536

LUXEMBOURG

INTRODUCTION OF VAT GROUP REGIME

On 13 April 2018, the Luxembourg Minister of Finance introduced before the Chamber of Deputies a draft bill n°7278 that will implement the VAT group regime in Luxembourg as of 31 July 2018. The draft bill is still subject to consultation with the EU VAT Committee and to the legislative process, which may delay its entry into force.

The implementation of the VAT group regime comes as a consequence of the abolition of the Independent Group of Persons regime (IGP) for the finance and insurance sectors. Indeed, the recent judgements of the Court of Justice of the European Union have restricted the application of the VAT exemption for IGPs only to activities in the public interest.

VAT GROUP ADVANTAGES

The main characteristic of the Luxembourg VAT group regime will be that the group members will be considered as one taxable person for VAT purposes and, therefore, all transactions carried out between the group members will be treated as outside the scope of VAT. This means that the group members will not charge VAT on the supplies of goods and/or services performed within the VAT group, regardless of the nature of the supply and the VAT deduction right of the receiving group members.



This will constitute a significant change compared to the IGP regime, where the VAT exemption was applicable only to support services rendered to entities with no or limited VAT deduction right.

Furthermore, there will be no restrictions regarding the VAT taxable status of the group members, i.e. VAT non-taxable persons (passive holdings), as well as operating or financial companies could form a VAT group.

The non-application of VAT within the VAT group will be advantageous for the entities with no or limited VAT deduction right, as it will lower their final VAT burden. However, it will also be beneficial for the entities having a full input VAT deduction right, as it will allow them to avoid the pre-financing of VAT on the transactions within the group.

The regime will be optional.

CONDITIONS FOR THE VAT GROUP

The following conditions will have to be fulfilled in order to form a VAT group:

- All entities will have to be established in Luxembourg. Luxembourg branches of foreign entities are also eligible;

- The entities should be closely bound by financial, economic and organizational links (cumulative conditions). The financial links will have to be certified by an independent auditor or a chartered accountant and such certificates must be renewed each year;
- An entity can only be a member of one VAT group;
- The participation in the VAT group should last at least two civil years.

The VAT group could be formed only when all entities fulfilling the legal conditions for the regime opt for it. However, an eligible entity may remain outside the VAT group, under certain conditions, if such exclusion will not result in VAT savings. An entity carrying out an economic activity likely to produce distortions of competition within the group (e.g. an activity that by its nature will not be specific to the activity of the group) cannot be part of the VAT group.

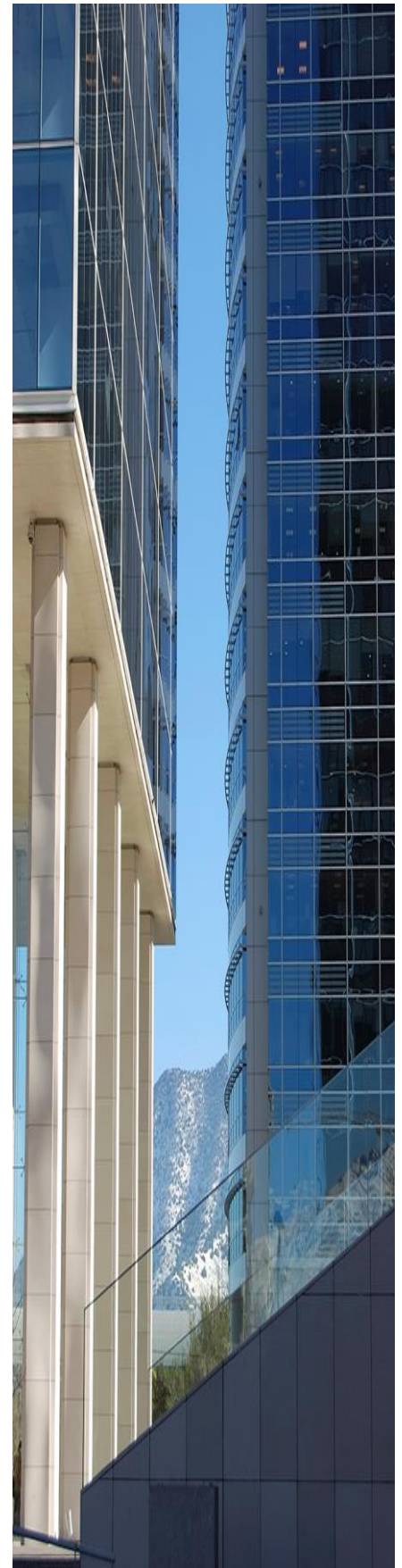
CONSEQUENCES OF THE VAT GROUP

The formation of a VAT group will entail numerous consequences for its members, the main ones being:

- The transactions between the group members will be outside the scope of VAT;
- The VAT group members will have to appoint among them a representative who will serve as the contact person for all exchanges between the VAT group and the VAT administration. The representative will introduce the VAT group incorporation request, as well as will take care of all VAT reporting obligations for the group;
- The VAT group will receive an individual VAT number that will be used in all communications with the VAT authorities. Each group member will also receive an auxiliary VAT number that should be used for their transactions (sales/purchases) with third parties;
- The representative will submit the VAT returns for the whole VAT group (as one), using the VAT number of the group. The members will cease to submit individual VAT returns. The EC Sales Lists will be also submitted by the representative but using the auxiliary VAT numbers of the group members;
- Each group member will be jointly liable for the VAT debts/penalties due by the VAT group;
- The input VAT deduction right will be calculated based on the final use of goods and services for the transactions with third parties (1st step - direct allocation, 2nd step – general pro-rata of deduction).

There will be specific requirements regarding invoicing, information to include in the VAT returns, notification to the VAT authorities of the entities that became eligible or no longer eligible to be a member of the VAT group, etc.

In accordance with the Court of Justice of the European Union case-law *Skandia* (C-7/13, 17 September 2014), one of the effects of joining a VAT group will be that, for VAT purposes, a single legal entity comprising a head office and its branch which are physically present in different territories shall



be dissociated and become two separate taxable persons, if one of the entities (the head office or the branch) is a member of a VAT group. This means that the transactions between the head office and its branch would be subject to VAT, while otherwise they would be outside the scope of VAT.

OUR RECOMMENDATION

The introduction of the VAT group regime constitutes an important development in Luxembourg, taking into consideration that already 16 other EU Member States have it implemented.

The scope of the VAT group regime is also broader than that of the former IGP regime, as it is not limited to only specific industries and transactions. As such, it can improve the situation of both entities having full or limited VAT deduction right.

The application for the VAT group regime will entail important consequences for the group members from the tax and administrative points of view. Therefore, the decision to opt for the regime should not be taken lightly and should be preceded by an in-depth analysis of the situation.

CONTRIBUTOR DETAILS

Francois Karolyi

Email: Francois.Karolyi@mazars.lu

Phone: +352 27 114 602

THE NETHERLANDS

EXPECTED DUTCH CHANGES - 2018 TO 2021

Through various incentives over recent years, Dutch government has clearly stated that the tax focus in the Netherlands should be both in the enhancement of its investment climate, as well as the combat of international tax avoidance.

The new Dutch government has introduced various tax measures which are to be implemented over the course of the governments four year term. Additionally, the government has been actively involved with the implementation of a multitude of other (international) tax measures, such as the:

- EU Anti-Tax Avoidance Directive 1 & 2 ('ATAD');
- multilateral instrument as part of the against Base Erosion and Profit Shifting project ('BEPS'); and
- amended Transfer Pricing Decree as published by the Dutch state secretary of Finance.

Needless to say, the Netherlands expects various new changes to its tax rules in the coming years. The road map outlined below aims to provide some guidance to the expected Dutch tax rule changes from 2018 through to 2021.

CONTRIBUTOR DETAILS

Frederik Habers

Email: Frederik.Habers@mazars.nl

Phone: +31 88 277 2309

Expected Changes - 2018

CIT rates

Up to €200.000 – 20%;
Above €200.000 – 25%

Dividend WHT

Exemption extended to corporate shareholders in treaty jurisdictions;
Extension subject to anti-abuse rules;
Holding cooperatives brought within the scope of the dividend WHT;
Provisions on exemption for hybrid structures.

Innovation box

Tax rate increased from 5% to 7%.

Adjustment Fiscal unity rule

Effective retrospectively from 25 October 2017.

Updated Transfer Pricing Decree

Includes recent BEPS/OECD developments;
TP rules for multinationals.

Expected Changes - 2019

CIT rates

Up to €200.000 – 19%;
Above €200.000 – 24%

Limitation of tax loss carry forward

Period limited from 9 to 6 years.

Implementation ATAD 1

Earnings stripping rules;
CFC Rules;
Exit Tax.

Limited depreciation real estate

Real estate in own use limited to depreciation over 100% of the so-called 'WOZ-value'.

Obtaining clearance APA/ATR

Substance requirements broadened with:

- (i) office 24 months;
- (ii) €100,000 wage cost.

Expected Changes - 2020

CIT rates

Up to €200.000 – 17.5%;
Above €200.000 – 22.5%.

Abolishment dividend WHT

Except payments to low-tax countries and/or EU blacklisted countries.

Implementation ATAD 2

CV/BV structures;
Hybrid mismatches.

Expected effective date MLI in the Netherlands

Includes rules preventing treaty abuse and avoidance of PE risk.

Fiscal investment institutions

No longer allowed to directly invest in real estate.

Implementation Mandatory Disclosure Directive

Effective retrospectively per 1 July 2018

Expected Changes - 2021

CIT rates

Up to €200.000 – 16%;
Above €200.000 – 21%.

Introduction of WHT on interest and royalties

Payments to recipients in low-tax countries and/or EU blacklisted countries subject to WHT.

UNITED KINGDOM

BREXIT – PRACTICAL CONSIDERATIONS

CURRENT STATUS

On 19 March 2018 the EU and the UK reached agreement on the draft withdrawal arrangements for Brexit. The UK will leave the EU on 29 March 2019, but the transition period will last until 31 December 2020.

The eventual agreement to withdraw from the EU Customs Union is, however, still subject to ongoing debate within the Houses of Parliament, largely due to the associated uncertainty surrounding the Northern Ireland border arrangements.

The political events of the last few months serve to highlight the volatility and complexity surrounding the Brexit process as the UK looks to disentangle decades of legal and political agreements with the EU.

Even though the vast majority of key stakeholders would prefer to avoid a “no-deal” scenario, “nothing is agreed until everything is agreed”. As a result, pressure on time and resources will greatly increase the closer it gets to 31 December 2020. Therefore, we are seeing many UK businesses undertaking planning now, in order to minimise any adverse effect on their operations, including if the eventual outcome is a “no-deal” scenario.

KEY ISSUES

The potential impacts of the UK leaving the EU vary quite significantly between different businesses. Outlined below are some of the key issues identified as potentially having a significant impact on UK businesses:

- Customs duties – Many groups currently use the UK as a logistics/distribution base to import goods from around the world and export them to the EU. Accordingly, companies are now considering alternative ways of structuring their operations, in order to mitigate the possibility of incurring double customs duties (although this will ultimately depend on the final agreement between the UK and the EU).
- VAT – As with Customs Duties, many groups use the UK as a base to export goods to the EU and are therefore reviewing the cash-flow and administrative impact with respect to VAT that may arise when the UK leaves the EU.
- People – The UK (and London in particular) has historically attracted many individuals from the rest of the EU who have relocated to the UK to work. Therefore, many businesses are now looking at ways to support their existing staff with increased immigration requirements as well as reviewing how they will attract high-quality recruits going forward.



- EU directives – UK holding companies with subsidiaries located in the EU have previously been able to rely on EU directives to allow for the payment of dividends, royalties and interest without the application of withholding tax. As they may not be able to rely on these directives once withdrawal is complete, many UK companies are reviewing intra-group financing arrangements and re-assessing intra-group cross-border transactions, in order to mitigate the effects which may result from the disapplication of EU directives.

GROUP REORGANISATIONS

We have found that many businesses are using the UK’s impending EU departure as an opportunity to review the overall structure of their global operations and assess how their group structure can be optimised to fulfil their commercial and financial objectives.

In particular, many global groups are not considering the issue of the UK leaving the EU in isolation, but are instead considering it in tandem with a number of other factors such as US tax reform, the EU Anti-Avoidance Directive (“ATAD”) and the impact of the OECD BEPS Project (in particular the Multi-Lateral Instrument (“MLI”) to amend tax treaties in respect of the BEPS project and Action Point 1 regarding the Digital Economy). Therefore, although the negotiations relating to the UK leaving the EU are causing much uncertainty, many groups are finding the UK leaving the EU to be a catalyst for pushing the business tax issues noted above, higher up the agenda of the key decision-makers within the business.

HOW BUSINESSES ARE PLANNING FOR BREXIT

We have outlined below some of the ways our clients are currently planning for the UK leaving the EU and how Mazars (both in the UK and globally) have been assisting clients with this process:

- Scenario planning – Many of our clients are undertaking scenario planning, in particular with regards to VAT and customs duties. We have been assisting clients with building scenarios. For example, one potential “no-deal” scenario would be the application of WTO customs duties.
- Relocation of EU distribution operations – As noted above, many of our clients that have UK-based distribution operations that service the EU market, are now considering whether to relocate these operations to another EU country. We have been assisting clients with reviewing possible locations to base their operations, the necessary implementation (for example, incorporation of a new company in the chosen jurisdiction) and advising on the potential tax effects which may arise as a result of the move.
- Immigration – We have been advising clients on the immigration obligations and requirements which may arise as a result of the UK leaving the EU and assisting them with setting up processes/procedures to ensure these requirements are fulfilled.
- Review of group structure – We have been working with a number of clients to review their group structure and assess whether/how the group could be reorganised to ensure that it continues to help fulfil commercial and financial objectives. This is both in light of the UK leaving the EU and other applicable global issues identified above, and also connected to the various action points within the OECD BEPS project.

CONTRIBUTOR DETAILS

Stephen Fuller

Email: Stephen.Fuller@mazars.co.uk

Phone: ++44 20 7063 4497

EU EXCHANGE OF INFORMATION DIRECTIVE

The EU has been busy, amending “*Directive 2011/16/EU on administrative cooperation in the field of taxation about mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements*”.

On 13 March 2018 the ECOFIN Council reached an agreement to adopt the European Commission’s proposals to amend Directive 2011/16/EU, primarily inspired by the OECD’s BEPS project Action 12. On 5 June 2018, the EU published the ECOFIN’s amendments.

Simply referred to as DAC6, these amendments introduce an obligation on persons to disclose potentially aggressive tax planning arrangements and then for the tax authorities to subsequently exchange this information. DAC6 reflects many of the underlying principles and concepts contained in existing Irish domestic tax legislation.

SCOPE OF DAC6

DAC6 imposes the mandatory reporting requirements on EU-based intermediaries who design, market, organise, make available for implementation or manage the implementation of potentially aggressive cross-border tax-planning schemes.

It also covers persons who provide aid, assistance or advice in relation to potentially aggressive cross-border tax-planning schemes, where they can be reasonably expected to know that they have performed that function.

In general, the disclosure requirements concern cross-border arrangements that have certain characteristics or “hallmarks”, which indicate that the main purpose or one of the main purposes of the arrangement is to obtain a tax advantage.



On one hand, the overall objective of the amendment is to provide EU Member States with additional tools to tackle perceived tax avoidance and aggressive tax planning, while on the other hand the Directive itself leaves those terms undefined.

The directive notes that aggressive tax planning arrangements and hallmarks, have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive countermeasures by tax authorities. Taking this into consideration, it would be more effective

to endeavour to capture potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. Those indications are referred to as 'hallmarks'.

There are "Generic Hallmarks" and "Specific Hallmarks", linked to the main benefit test set out in Annex IV of the directive, along with Specific hallmarks linked to cross border transactions, automatic exchange of information and beneficial ownership and transfer pricing.

Other "hallmarks", which will be reportable, do not require this main benefit test to be satisfied. Intermediaries will be required to report any reportable cross-border arrangements to their tax authorities. The Member State to whom the arrangements are reported must then automatically share this information with all other Member States.

WHO MUST DISCLOSE

Obligations to disclose information on reportable cross-border arrangements, with competent authorities lie with the intermediary, whose member state they are: -

- resident for tax purposes;
- have permanent establishment through which the services with respect to the arrangement are provided;
- are incorporated in or governed by the laws of;
- are registered with a professional association related to legal, taxation or consultancy services

Should intermediaries have multiple reporting obligations, exemption is provided from filing a disclosure, if it has proof that the same information has been filed in another Member State.

Similar to the existing Irish legislation, intermediaries are defined as "any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement". In practice this extends to include professionals in legal, tax, finance, accounting, with financial institutions also considered.

Where no intermediary is involved, exempted through prior reporting measures, legal privilege, or outside the jurisdiction of the EU, disclosure obligations fall back on the relevant taxpayer.

DISCLOSURE THRESHOLD

A "reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV of the directive, however again the broad drafting of the directive casts a wide net.

WHEN TO DISCLOSE AND AUTOMATIC EXCHANGE OF INFORMATION

Circumstances permitting, the intermediary or relevant tax payer has a requirement to disclose the "reportable cross-border arrangement" to local tax authorities where the first step occurs within 30 days of either:

- the reportable cross-border arrangement is made available for implementation; or
- the day after the reportable cross-border arrangement is ready for implementation; or
- the first step in the implementation of the reportable cross-border arrangement has been made.

Following disclosure to local tax authorities, they must within 30 days of the end of the quarter in which the report was made, share this information with other Member States.

RETROSPECTIVE EFFECT

A point of note for DAC6, where the first step of a reportable cross-border arrangement is implemented between the date of entry into force, 25 June 2018, and the date of application of this Directive, 1 July 2020, intermediaries

and relevant taxpayers are required to file information on those reportable cross-border arrangements by 31 August 2020. Thus, consideration must be given to those early day transactions in advance of the application date. Once reported to local authorities, expect the first automatic exchange of information to take place by 31 October 2020.

PENALTIES

Interestingly Member States shall lay down the rules on penalties for non-compliance with DAC6. The directive provides that member states:

“shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive”

DOMESTIC IMPLEMENTATION AND ENTRY INTO FORCE

The text of DAC6 has already been finalised and entered into force on 25 June 2018.

Member States are now required to transcribe this directive into domestic legislation no later than 31 December 2019, with direct application of the from 1 July 2020.

CONCLUSION

DAC6 has been drafted to counter tax avoidance and aggressive tax planning activities, however the broad drafting of the directive may result in its ineffective application across the EU.

The main purpose of DAC6 is to provide robust reporting mechanisms throughout the EU, that will enhance and increase tax transparency, discouraging intermediaries from designing, implementing and promoting tax aggressive cross-border arrangements, which effectively result in tax avoidance. However, considering the existing domestic mandatory reporting requirements in Ireland, the question of how useful the exchange of information will be, will remain to be seen.

CONTRIBUTOR DETAILS

Cormac Kelleher

Email: ckelleher@mazars.ie

Phone: +353 1 449 4456

NEW INTEREST DEDUCTION PROVISIONS & CIT RATE

A NEW PLAYING FIELD FOR COMPANIES

The government's proposal for new tax rules has now been adjusted from original proposal and submitted to the Board of Directors.

In June 2017, the Government presented its initial proposal on how the new tax rules for the business sector should be formulated. In the revised proposal, the government has taken on board criticisms and made adjustments that may be considered positive for the business sector. However, the proposed rules imply a lot of tightening, primarily in sectors that require large capital and thus loan financing. It remains to be seen how the rules will affect future investments, both domestically as well as from international players.

At a high level, the proposed changes are: -

- **Restriction of deductions for companies with negative net financials.** That the proposal would contain a restriction on this was expected, as the discussion about deduction entitlement for intra-group interest expenses has been on the table for a long time. Until 2008, Swedish companies had full deduction entitlement for borrowing costs of this kind. When free deduction entitlement was considered deliberately applicable in an international tax planning perspective, and thus considered a threat to the Swedish tax base, a somewhat difficult interpretation was introduced in 2009 and 2013. This meant that intra-group borrowing costs could only be deducted if interest income was taxed at a rate of at least 10% or if the loan is commercial. The interpretation scope provided here has created some problems in case law, and Sweden as well as many other countries have considered how to solve the issue with international groups' tax planning through interest deductions. Hence, the EU directive came into being based on the OECD's BEPS project, which is now the basis for the proposal.
- **The modified proposal** implies that the deduction restriction is based on EBITDA with a 30% deduction, negative net interest which cannot be deducted as above, may roll forward for a maximum of 6 years and may subsequently be offset against future positive interest. This rule applies to all companies with a negative net interest income of 5,000,000 SEK and companies



whose net interest income is less than the limit is therefore not covered by the restriction (the original proposal said 100,000 SEK, so this is a significant improvement), which can be compared with the EU recommendation on €3,000,000.

- The restriction above is compensated by **the corporation tax rate being reduced in two steps**, from current rate of 22% to 21.4% on 1 January 2019 and then to 20.6% on 2021.
- The government had previously proposed to introduce further restrictions on the right to utilize saved tax deficits. This proposal has not been continued in the version now presented to the council, which should be positive. Thus, if ownership changes have not taken place, companies will be able to offset their deficits against future profits indefinitely.
- As a further step in the EU's and OECD's ambition to counter international tax planning, rules are introduced against what is often termed **hybrid mismatches**. There are proposed interest limitation provisions in respect transactions between companies in an interest group. The proposal defines an "interest group" as a company that, directly or indirectly, hold at least 25% of the capital or the votes in the other company or, if the owner is a natural person, in both companies where the interest expenses has occurred. However, it is proposed that deductions may be made if the income received by a company in Sweden is also recorded in the State where the other company belongs within twelve months from the end of the tax year/financial year to which interest expenses relates.
- It is proposed to introduce a **primary deduction for companies in the construction of rented houses**. Property developers and managers are an industry that is potentially affected by the introduced interest rate deduction. The deduction applies to expenses for new construction, extension of building and rebuilding. Thus, according to the new proposal, value depreciation deductions are made in addition to the ordinary annual depreciation with an additional 2% of the expense for new construction, extension of building and rebuilding per year during the first six years following completion of the rental property. A person who acquires a completed rented house also receives the opportunity to deduct for the remaining year.

The proposal has been thoroughly revised from the previous version presented and it appears that the government has taken on the criticism put forward by the referral bodies. We will henceforth monitor the continued legislative process and its consequences the changes will have for national as well as international customers.

It is expected that the proposal should enter into force with effect from 1 January 2019.

CONTRIBUTOR DETAILS

Jenny Stenesjö Wöhrman

Email: Jenny.Stenesjo@mazars.se

Phone: +46 8 5620 38 08

CENTRAL AND EASTERN EUROPE

IMPLEMENTATION OF ATAD AND OVERHAUL OF THE SSC TAXATION SYSTEM

BACKGROUND

- The region's governments are giving an increasing role to consumption-type taxes: boosting collection efficiency is a major objective in most of the countries.
- Total labour cost remains high; the situation in Hungary has improved, but families continue to benefit most
- In two-thirds of the region, taxpayers are allowed to prepare IFRS based financial statements and to use these for taxation purposes.
- Levels of corporate income tax and the methods for calculating the tax base vary widely across the region.
- With the growth of documentation obligations, transfer pricing regulations are becoming more stringent.

VALUE ADDED TAX

Thanks to the positive economic climate of recent years, government budget deficits have improved and consumption has started to increase in most CEE states. Governments are trying to build upon this momentum by giving an increasingly prominent role to consumption-type taxes when planning fiscal revenues.

One of the most important sources of income is value added tax. Owing to EU regulations, the rules are mostly harmonized, but the tax rates applied vary widely across the region. The average normal VAT rate is around 20%. The 25% and 27% rates in Croatia and Hungary, respectively, are still particularly high.

Also signaling the budgetary importance of value-added taxes is the widespread introduction of modern digital technologies aimed at boosting the efficiency of VAT collection and reducing tax evasion. Such measures include the sectoral introduction of online cash registers and the increased monitoring of transport related transactions (e.g. the Hungarian Electronic Public Road Trade Control System). From 2018, in Hungary billing software must be connected to the tax authority's system, thus facilitating real-time electronic reporting.

TAXES ON EMPLOYMENT

The proportion of taxes and contributions on labour continues to decrease in the region. The total labour cost for employers is still close to 160% of net wages.

It is worth noting that as of 2018, the Romanian system of social contributions has been completely overhauled. Furthermore, this year Romania, Croatia and Montenegro each found ways to decrease personal income tax rates.

CORPORATE INCOME TAX

The difference between the lowest and the highest tax rates is as high as 20 percentage points, but methods for calculating the tax base vary widely, hence corporate income taxes of the studied countries cannot be compared on tax rates alone.

This notion is confirmed by the fact that certain countries have introduced tax schemes altogether different from traditional profit-based taxation. Historically Estonia had its own, unique system, whereby companies did not have to pay the 20% corporate tax as long as there was no withdrawal of income from the company. As of 2018, Latvia has chosen a similar path, and has also made distributed profits part of the tax base.

Across other CEE countries, the differences in the emphasis placed on corporate income tax are increasingly apparent. This year in Croatia, the corporate income tax rate decreased by a few percentage points, while a few kilometers away in Slovenia, there was a comparable increase. Overall, the average corporate income tax rate in the CEE region is a little over 17% (calculating with the highest rate in case of countries with a progressive tax system).

All CEE countries with traditional income tax regimes permit losses generated in previous years to be carried forward and offset against future taxable profits. Generally, this amount can be used for a limited time, usually 5-7 years, but in some countries only for 3-4 years. Only six countries continue to permit losses to be carried forward indefinitely.

The majority of the countries examined used some kind of interest limitation rule, which determines what part of the interest paid on corporate loans can be deducted from the income tax base. Thanks to the EU's Anti-Tax Avoidance Directive (ATAD), the earlier thin capitalisation provisions are being replaced by EBITDA based calculation methods. The same directive is also driving the standardisation of Controlled Foreign Company (CFC) regulations.

States in the region have a penchant for imposing withholding taxes on payments of interest, dividends and royalties (at rates of 15%, or even 19-20%). Naturally, these may be applied with attention to the provisions of the relevant tax treaties. At the same time, Lithuania, Estonia and Hungary continue not to impose withholding tax on capital gains.

In two-thirds of the CEE region, taxpayers are allowed to prepare IFRS-based separate financial statements and to use these also for taxation purposes. This has been a marked trend of recent years. In more than half of the countries, the tax system supports research and development (R&D) activities in some form or another.

TRANSFER PRICING, CBC-R

OECD's BEPS initiative has drawn attention to the fact that tax authorities should concentrate more on intra-group and, possibly, cross-border transactions.

Transfer pricing regulations have already been introduced to the tax systems of almost all the countries concerned, and now there is a growing emphasis on the accompanying documentation obligations. The fundamental objective of OECD prescribed country-by-country reporting (CBC-R) is to promote transparency by way of providing local tax authorities with the information necessary for assessing tax risks.

In the past year, taxpayers in the CEE region also had to actively participate in launching the CBC reporting system.

THE CEE 2018 TAX GUIDE LINK

<https://www.mazars.ro/Home/News/Latest-News/Mazars-Central-and-Eastern-European-Tax-Guide-2018>

CONTRIBUTOR DETAILS

Edwin Warmerdam

Email: Edwin.Warmerdam@mazars.ro

Phone: +40 31 229 26 00

BELGIUM

DIVIDENDS PAID TO US S-CORPORATIONS QUALIFY FOR ZERO WITHHOLDING TREATY RATE

In a welcomed tax ruling (6 February 2018), the Belgian Office for Advance Tax Rulings was tasked with determining whether an “S” corporation (a US corporation that is a pass-through for US tax purposes but not for Belgian corporation income tax purposes) is considered a US resident under the 2006 Belgium-US income tax treaty (the “Treaty”). The Office ruled that the S Corporation is a “corporate body”, which was entitled to the 0% dividend withholding tax rate under the Treaty.

THE DETAIL

Article 10, Paragraph 4, a) of the Treaty provides in part that if a Belgian company pays a dividend to a US resident, the Belgian 30% dividend withholding tax shall be imposed on the receipt of such dividend if the beneficial owner of the dividend is a company that is a resident of the United States that has owned directly shares representing at least 10% of the capital of the Belgian company paying the dividends for a 12-month period ending on the date the dividend is declared.

Article 1, Paragraph 6 of the Treaty generally states that if *“an item of income, ... derived by or through a person that is fiscally transparent”* pursuant to US or Belgian law, then *“such item shall be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income, profit or gain of a resident.”*

In the case, the US Subchapter S corporation, a 100% shareholder of a Belgian limited liability company, received dividends from the Belgian company. The Belgian Ruling office held that the S corporation was considered a US resident for purposes of the Treaty and thus could benefit from the zero-withholding tax rate under Article 10, Para. 4 of the Treaty.

In interpreting Article 1, Paragraph 6 of the Treaty, the ruling office determined that the income may be considered derived by “a resident of a State” (here, the S corporation) so long as the income is treated by the US as “profit or gain of a resident” (i.e., the shareholders of the S corporation were qualifying US tax residents). The Belgian ruling office reasoned that, because, under US federal income tax law, income derived by an S corporation is “income, profit or gain” of its shareholders, such items of income derived by or through the S corporation should be considered derived by a US resident.

THE TAKEAWAY

The Ruling is noteworthy and provides legal certainty in that it clearly provides, for the first time, the Belgian tax administration’s views on the interpretation of Article 1, paragraph 6, of the US-Belgium Tax Treaty, effective as of 1 January 2006. This provision has been the subject of controversial discussions, as well as restrictive and, in many cases taxpayer unfavourable, interpretations that limited the eligibility of US MNCs for the zero rate on dividends.



US investors owning Belgian corporations through a hybrid US parent qualifying as a corporation for Belgian corporate tax purposes should review their current WHT positions and apply for a WHT refund for previously received dividends within the statute of limitation.

CONTRIBUTOR DETAILS

Joeri De Ceuleneire

Email: joeri.deceuleneire@mazars.be

Phone: +32 (0)9 265 83 20

POLAND

INTRODUCTION OF SPLIT PAYMENT MECHANISM



A split payment will be introduced with effect from 1 July 2018.

The split payment mechanism is based on the assumption that the payment for purchased goods or services will be split between two accounts (i.e. VAT will be paid into special VAT account, while the net sales value will be paid to the supplier's company bank account).

The usage of the split payment mechanism will be optional and only feasible in respect of domestic transactions between VAT payers.

In order to facilitate the making of payments under the new system, banks are obliged to open special VAT accounts for every active Polish VAT payer.

VAT payers will be able to use the funds gathered on VAT account, as a rule, only to settle their own VAT liabilities. To encourage VAT payers to participate in the VAT split payment system, a number of simplifications will be provided for purchasers who opt to use the split payment mechanism.

CONTRIBUTOR DETAILS

Kinga Baran

Email: k.baran@mazars.pl

Phone: +48 22 25 55 326

ASIA

WITHHOLDING TAX ON PAYMENTS TO NON-RESIDENTS

In October 2017, the State Administration of Taxation (“SAT”) released the *“Bulletin on Matters Regarding Withholding Enterprise Income Tax at Source for Non-Resident Enterprises”* (“SAT Bulletin [2017] No. 37, Bulletin 37”). Bulletin 37 was effective from 1 December 2017.

Bulletin 37 brings significant changes to the manner in which Chinese payers will deal their withholding obligations. Bulletin 37 repeals previous guidance issued in 2009, being *“Interim Administrative Measures on the Collection of Withholding Income Tax on Nonresident Enterprises”* (Guoshuifa [2009] No. 3) (“Circular 3”) and some relevant articles in other circulars.

TIMING OF WITHHOLDING

Under the current Enterprise Income Tax Law (“EIT Law”), the withholding obligation arises at the time the payment is made or becomes due, whichever date is earlier. In particular, “payment becoming due” is further stipulated under the Detailed Implementation Rules to be the time when the payer has booked as expenses on an accrual basis in its accounting record. If the payable is not paid on the due date, but the payer has claimed deduction for EIT purposes, the withholding obligation arises at the time of EIT annual filing of the payer.

With respect to dividends, as stipulated in SAT Bulletin [2011] No.24 (“Bulletin 24”) the withholding tax obligation arises on the date of the resolution to declare the dividend or the date of payment, whichever date is earlier.

Bulletin 37 abolishes the provision in Bulletin 24 on dividend payment. Under Bulletin 37, the withholding obligation on dividend payment shall arise when the payment is actually made.

Similarly, for equity transfer, the transferee should only perform its withholding obligation at the time of actual payment. In the event of payment by instalments, the related provision under Bulletin 24 is also abolished. Bulletin 37 provides a more lenient treatment by allowing tax payment to be made in instalments. Tax shall only be required to be withheld after the full recovery of the costs to the transferor, i.e., only when the real gain is realized with cash payments.

In summary, the timing of withholding is becoming more lenient and can be summarized as follow:

- On payment of expenses - Withholding tax obligation is triggered when payment is made or becomes payable, whichever date is earlier. On a payable that is due but not paid, but the costs and expenses are claimed as a deduction for EIT purposes, the timing of the withholding obligation would be at the time of filing annual EIT return.



- On dividends - Withholding tax obligation is triggered when the payment is actually made.
- For equity transfer- The transferee would perform its withholding obligation at the time of actual payment. In the event of payment of consideration in instalments, withholding tax would also be made in instalments. Instalment payments should be treated as a recovery of investment cost so that tax would only be required to be withheld after the full recovery of such costs. The implication of that is the vendor and the purchaser would need to communicate with each other as to the amount of tax to be withheld, and the timing of the withholding. This may need to be specified in the Purchase and Sales Agreement.

CALCULATION OF THE WITHHOLDING TAX AMOUNT

Calculating the gain on transfer of property can be complicated as it involves ascertaining the gain. Bulletin 37 reiterates certain principles established under Circular Guoshuifa [2009] No. 698 (“Circular 698”). These include the provisions that undistributed retained profit of the investee enterprise cannot be deducted in calculating the gain on the transfer of equity and the gain would need to be grossed up by any withholding tax that the buyer has to bear.

In dealing with the exchange rate conversion, the following principles are established by Bulletin 37:

- The foreign currency income or gain should be based in RMB.
- With respect to the timing of exchange rate conversion, the following rules are to be used:
 - the withholding tax should be converted to RMB according to the exchange rate on the date the withholding tax obligation arises. For example, in the case of dividends, the withholding tax amount should be converted to RMB at the time the dividends are paid, as that would be the timing of the withholding obligation.
 - where the non-resident recipient self-reports and files a tax return, the amount shall be converted to RMB according to the exchange rate on the day before the issuance of tax payment certificates. For example, in the case of the non-resident carrying on services in China and deciding to file a tax return to report the profits of the services, the amount would be converted on the day before issuance of tax payment certificate.
 - where the competent tax authority orders a non-resident to pay tax, the amount shall be converted to RMB according to the exchange rate on the day on which the decision of setting the deadline for settling the tax payment is made.

The withholding agent would therefore need to arrange its schedule to withhold tax and proactively communicate with the tax authority as to comply with the new rule in relation to exchange rate.

- With respect to calculation of the gain on equity transfer, there is a change from the previous practice. Under the new approach, where the proceeds and the costs are in a currency other than RMB, they should be converted into RMB first before calculating the gain. The exchange rate to be used would be the one on the day the withholding obligation arises (or the day before the issuance of tax payment certificate, or the day before the decision of deadline to settle the tax payment is made, as the case maybe and noted above).

This can be illustrated in the following example:

Assume the non-resident purchased an equity interest in a Chinese entity previously in Canadian dollars, and now is selling the same equity interest in US dollars, both the proceed and the cost would be converted to RMB using the exchange rate as noted above. Then the gain in RMB would be computed.

This eliminates the need to have multiple conversions under Circular 698. Under Circular 698, in the above scenario, the cost would be converted to US dollars at the historical rate first, with the gain computed in US dollars and then converted to RMB.

LIABILITIES OF WITHHOLDING AGENT FOR NON-COMPLIANCE

There are two non-compliance behaviors. Firstly, failure to withhold and secondly failure to remit the tax withheld to the tax authority. These non-compliant behaviors are subject to different liabilities in levying fines and late payment surcharges. The first non-compliance may result in a penalty ranging from 50% to 300% of tax under-withheld, whereas the second non-compliance would result in late payment surcharges.

Bulletin 37 provides a detailed description on the above. The Bulletin provides a list of situations which constitute “tax withheld but not remit to the tax authority” i.e., the second non-compliant behavior. Any other situations would be considered to be “failure to withhold tax that is due”.

With respect to the list, it comprises of:

- The withholding agent has expressly informed the payee that tax has been withheld;
- The amount of the tax withheld or to be withheld as a separate item in the withholding agent’s accounting ledger;
- The amount of the tax payable is deducted or is stated to be amortized as a separate item in the withholding agent’s tax filing; or
- There is other evidence which indicates that the tax has actually been withheld.

Any of the above non-compliance would result in late payment surcharges.

TIMELINE FOR SELF-REPORTING BY THE NON-RESIDENT IS RELAXED

Under the current practice, if the withholding agent has not performed its withholding obligation, the non-resident taxpayer shall within 7 days from the due date settle with the local tax authority at the location where the income is derived, the so-called self-reporting. Failure to do so would result in late payment surcharges.

Considering the difficulties for the non-resident taxpayers to comply with the 7 days requirement, the timeline has been relaxed.

Essentially, under Bulletin 37, the date the non-resident taxpayer must report and pay the tax is as follow:

- Where the non-resident taxpayer does not voluntarily report and pay the tax, the competent tax authority may request the non-resident taxpayer to pay the withholding tax within a prescribed period, and the prescribed date would be the due date; and
- Where the non-resident taxpayer voluntarily reports and pays the tax before the competent tax authority requests payment within a prescribed period, the date on which the tax payment is made will be deemed to be the due date of such tax payment.

Consequently, the 7 days requirement before the commencement of late payment surcharge has been relaxed quite substantially. In effect, if the non-resident taxpayer voluntarily reports and pays the tax on its own initiative, the late payment interest will not be levied at all under point 2 above.

OTHER TAX COLLECTION AND ADMINISTRATION PROCEDURES BEING SIMPLIFIED

Under the repealed Circular 3, the withholding agent was required to perform contract registration with its competent tax authority within 30 days from the date the contract is concluded. This provision is removed. In addition, for contracts involving multiple payments, Bulletin 37 has cancelled the provision requiring the withholding agent to settle

all taxes within 15 days prior to the last payment. These revisions generally simplify the taxpayer's withholding procedures.

Bulletin 37 also provides a welcomed reporting procedure for the reporting of income of the same nature but deriving from various locations and involving multiple local tax authorities. Under this method, where the withholding agent has failed to withhold taxes, the non-resident taxpayer can select one location to self-report and settle the tax. It would be up to the relevant local tax authority to communicate with the tax authority at the withholding agent's location and the locations from which the relevant income is derived.

Unfortunately, for indirect transfer of more than two Chinese taxable properties resulting in taxation on the transfer, the gain on the transfer attributable to the indirect transfer of each of the Chinese taxable properties would not be regarded as "income of the same nature", and reporting to each of the relevant local tax authority is required.

In addition, Bulletin 37 also clarifies the respective duties of tax authorities at the withholding agent's location and the location where the income is derived. For withholding agents, they shall report and withhold tax to the tax authority at their location, whereas in the case of self-reporting, the non-resident taxpayer shall report tax to the tax authority at the location where the income is derived.

OUR COMMENTS

Bulletin 37 is a welcomed change to the current withholding tax regime, tackling the existing problems, clarifying many of the existing controversial issues, and simplifying the withholding procedures.

Bulletin 37 has not dealt with the practical problem in relation to the circumstance in which both the buyer and the vendor of an equity transfer are overseas entities or individuals. Theoretically, under the EIT Law, the payer, i.e., the buyer, is designated as the withholding agent, and non-resident payer is not being excluded. Indeed, in an indirect transfer situation, Bulletin [2015] No 7 ("Bulletin 7") has also stipulated that the non-resident transferee to be the withholding agent. Nevertheless, many non-resident transferees, being not aware of the Chinese tax implication, would face difficulties in discharging the withholding obligations. Their tax advisers would need to assist by paying close attention to their withholding obligation and the relevant legal liabilities. In the circumstance, the non-resident vendor should self-report its taxes to avoid any penalties and late payment charges.

Bulletin 37 has taken effect on 1 December 2017. Unpaid dividends and instalment payments on property transfer where withholding tax has not been settled prior to the effective date are eligible for the treatments under Bulletin 37.

For example, in the case in which dividends have been declared but unpaid prior to 1 December 2017, to the extent the withholding tax has not been settled, under the new practice, the withholding tax would not be due until the dividends are paid.

Bulletin 37 is accompanied by a helpful official interpretation of the new rules, which contains a detailed discussion of key issues, as well as specific examples. This interpretation can be found in the SAT's official website: <http://www.Chinatax.gov.cn/n810341/n810760/c2878586/content.html>

It should be pointed out that while the contract registration requirement under Circular 3 is abolished, withholding agents and non-resident taxpayers should be aware of other rules that may require contracts to be submitted to the tax authorities. These rules include Bulletin of the SAT and the State Administration of Foreign Exchange [2013] No 40, Bulletin of the SAT [2015] No. 60, Bulletin [2015] No 7. These rules relate to Tax Filing for Outbound Payments of Trade in Services, Entitlement to Tax Treaty Benefits and Issues relating to Indirect Transfer of Chinese taxable assets.

CONTRIBUTOR DETAILS

Michael To

Email: michael.to@mazars.hk

Phone: +852 2909 5680

WITHHOLDING TAX (“WHT”) DEFERRAL FOR FOREIGN RE-INVESTMENT IN CHINA



Under the Enterprise Income Tax Law before the change, dividends derived by a non-tax resident enterprise (“Non-resident entity”) are subject to a withholding tax at 10% unless a more favourable tax treaty benefit applies. In August 2017, the State Council released measures to improve the business environment for foreign investors in China, including the proposal to allow foreign investors to enjoy a withholding tax deferral treatment.

On 28 December 2017, four PRC government bodies, namely the Ministry of Finance (“MOF”), State Administration of Taxation (“SAT”), National Development and Reform Commission (“NDRC”) and Ministry of Commerce (“MOC”) jointly issued Caishui [2017] 88 (“Caishui 88”), which clarifies the criteria to enjoy the withholding tax (“WHT”) treatment, application procedures and responsibilities, and post-administration by the tax authorities.

Subsequently, the SAT issued one public note [2018] No.3 (“Public Note No.3”) and an official interpretation to further elaborate the Caishui 88.

The treatment would be effective retrospectively from 1 January 2017, and tax payments already settled on eligible re-investment can be refunded. The above four ministries also jointly released a list of Questions and Answers through the MOF’s official website on 28 December 2017. Readers can also refer to the website on their interpretations.

WHAT IS THE PREFERENTIAL TREATMENT ON WHT IN CAISHUI 88?

Foreign investors who obtain distributable profit from a PRC resident enterprise could enjoy deferral of WHT which would otherwise be imposed on the distribution, provided certain conditions are met. All of the conditions must be met.

WHAT CONDITIONS SHOULD BE FULFILLED?

- **Direct investment – The non-resident entity shareholder must use the distributable profit for another direct investment in China.**

According to the Caishui 88, direct investments include:

- Injection in paid-up capital or capital reserves of a PRC resident enterprise or enterprises, whether it is the distribution paying enterprise or another PRC resident enterprise;
- Establishing new PRC resident enterprises;
- Acquiring the equity rights of PRC resident enterprises from unrelated parties;
- Other modes specified and accepted by MOF and SAT (a catch-all clause allowing for future expansion of activities involving Chinese entities).

However, the following situations are excluded from being qualified for the tax deferral treatment:

- Injection in paid-up capital or capital reserves of publicly listed companies or acquiring shares of publicly listed companies UNLESS the investments are considered as strategic investments according to the <Administrative Measures on Strategic Investment in Listed Companies by Foreign Investors> (the MOC Order [2005] No. 28); or
- Acquiring the equity rights of the PRC resident enterprises from related parties.

- **Qualified distributable profit**

It refers to the dividend, profit distributions and other returns on equity investments arising from the distribution of realized retained earnings by the PRC resident enterprise. It includes undistributed profits in prior years. The key is the retained profits must have been realized. It seems that interim dividends would not qualify unless at the time of distribution, there are indeed sufficient retained earnings.

- **Profits must be directly transferred to investee companies**

Whether the profit is in cash or in non-cash format, the investment must be transferred directly to the accounts of the investee.

Caishui 88 specifies that if the investment is in cash, it must be remitted directly to the bank accounts of the investee companies. Before the investment is made, the cash should not be remitted to other bank accounts of other parties such as agents either in China or outside China. Similarly, cash remitted to the bank accounts of the non-resident entity and then re-invested into China would not qualify for the tax deferral treatment.

If the direct investments are in non-cash forms such as benefits in kind or securities, they must also be transferred directly to the concerned investee companies. Intermediate holding or temporary holding by other companies or individuals of the relevant profits would disqualify the foreign investor from enjoying this tax deferral treatment.

- **Encouraged investment projects – The invested projects or the projects undertaken by the investee Chinese entities must be encouraged projects.**

Encouraged projects refer to projects that are classified as encouraged under either [The Industry Catalogue Guide for Foreign Investment] (the “2017 Catalogue”) or under the Preferential Industry Catalogue for Foreign Investment in Central and Western Regions], also revised in year 2017.

Public Note No.3 further elaborates that operating activities in connection with these encouraged projects should be at least one of the following in order to be qualified:

- Production activities or provision of services;
- R&D activities;
- Investments in construction projects or acquiring machinery and equipment and
- Other activities to be specified at a later time.

According to the official interpretation, the tax preference would be enjoyed as long as the business activities of the investee are within the scope of encouraged projects at that time. Subsequent amendments to the abovementioned Catalogues would not affect the already enjoyed tax deferral treatments.

FILING PROCEDURES AND FOLLOW UP ADMINISTRATION

According to the Caishui 88, foreign investors that are qualified for the tax deferral treatment should file appropriate returns and provide relevant information/documents in order to support their claims for tax deferral treatments. The relevant profit distributing enterprises should assess the relevant documents and file for records with the relevant PRC tax bureau if they consider that the foreign investors are qualified.

The PRC tax bureau will perform follow up checks on the qualifications. If it is found that the foreign investors are not qualified for deferral tax treatments under Caishui 88, the profit distributing enterprise would be treated as having failed to fulfill the withholding tax obligations. WHT and late payment surcharges would then be imposed. Late payment surcharge shall be computed from the date when the relevant dividends are actually paid. It is therefore recommended that profit distributing enterprises should carefully review the materials and proactively discuss with their in-charge tax authorities.

RETROSPECTIVE TREATMENT

Caishui 88 prescribes that dividend received on or after 1 January 2017 are eligible for this WHT deferral if qualified. Foreign investors are entitled to claim possible tax refund within 3 years from the date when the relevant taxes have been actually paid. However, caution should be taken in this regard as different tax bureaus may adopt different interpretations and treatments.

WITHDRAWAL OF INVESTMENTS

In case of future investment withdrawal by the foreign investors through equity transfer, buy-back and liquidation etc., the foreign investors should report and settle the WHT which has been deferred to the tax bureau in charge within 7 days after receiving the relevant withdrawal investment payments.

There are questions remaining in this regard. In the case of partial equity transfer, Caishui 88 is silent as to how to determine the tax-deferred portion of dividends. Which method should be used: first-in-first-out, last-in-first-out or weighted average? It can only be presumed that the first-in-first-out method would be used.

In the case of which the non-resident entity qualifies for tax treaty reduction of withholding tax, would the reduced WHT rate be applicable? One would think that the WHT rate at the time of direct re-investment should prevail.

CORPORATE RESTRUCTURING ELIGIBLE FOR SPECIAL TAX TREATMENT

Caishui 88 provides a specific relief provision for non-resident entities which have obtained the tax deferral treatment and subsequently carry out an intra-group restructuring and elect for the special tax treatment. Under this provision, the non-resident investor can continue to enjoy such tax deferral treatment.

OUR OBSERVATIONS

It is no doubt a welcoming news to non-resident investors who are contemplating to further invest in encouraged projects in China.

However, there would still be some uncertainties that the authorities concerned should clarify in the near future.

One of them is that WHT would be re-imposed when the investment amounts are clawed back to foreign investors. In practice, it would take many years before it would happen. It seems that the Circular 88 does not specify which party should be responsible for filing and paying the relevant WHT.

Also, if the distribution is not in cash form but in benefits in kind, how the basis is adopted to compute the possible WHT when the investment amounts are returned to foreign investors.

Thirdly, there is no time limitation as to WHT deferral. It seems that the WHT would be re-imposed as long as the investment amounts are clawed back to foreign investors, which may be many years later or even decades later. As such, do the tax authorities expect that the profit distributing PRC resident enterprises should retain the amounts of WHT for an indefinite period of time?

Therefore, clarifications from the SAT are necessary.

CONTRIBUTOR DETAILS

Michael To

Email: michael.to@mazars.hk

Phone: +852 2909 5680

HONG KONG

INTRODUCTION OF TRANSFER PRICING LEGISLATION



Hong Kong has historically relied upon its tax laws and a Departmental Interpretation Practice Note (“DIPN”) to combat tax avoidance. Subsequent to joining the Organisation for Economic Co-operation and Development (“OECD”)’s inclusive framework for Base Erosion and Profit Shifting (“BEPS”) in June 2016, and publishing the outcome of the consultation exercise in July 2017, a draft bill mainly to implement key actions arising from the BEPS agenda was gazetted (Inland Revenue (Amendment) (No. 6) Bill 2017) (“Amendment Bill”) on 29 December 2017. It is expected to be passed and implemented.

The Amendment Bill introduces a statutory transfer pricing regime and the OECD-recommended transfer pricing documentation requirements, as well as other proposed changes for Hong Kong to meet the four minimum standards of the OECD’s BEPS Action Plans. It also significantly empowers the Inland Revenue Department (“IRD”) to combat transfer pricing avoidance.

ADOPTION OF THE OECD TRANSFER PRICING GUIDELINES

The transfer pricing rules dealing with “Provision between Associated Persons” compose of a fundamental transfer pricing rule, called Rule 1 in the Amendment Bill and the separate enterprises principle attributing income or loss to a branch or permanent establishment of a non-Hong Kong resident person in Hong Kong, called Rule 2 in the Amendment Bill.

Rather than defining the arm's length principle by way of comprehensive provisions, the transfer pricing Rule 1 will specifically adopt the OECD's 10 July 2017 version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TP Guidelines").

The consequence of this is that the OECD TP Guidelines would be more than just guidelines as stipulated under the DIPN No. 46, but effectively become the TP law for Hong Kong.

THE FUNDAMENTAL TRANSFER PRICING RULE (RULE 1)

The scope of the proposed provisions is meant to cover both cross-border and domestic transactions. The covering of domestic transactions is a surprise to many Hong Kong entities which have domestic inter-company transactions, e.g., management fees and interest-free loans. These domestic inter-company transactions will need to be reviewed to ensure that they are following arm's length principle. The scope also encompasses transactions involving tangible and intangible assets, services, financial and other business arrangements.

Rule 1 has the effect of requiring a tax return adjustment where connected parties have entered into transactions in which the pricing of these transactions differ from an arm's length price and the difference results in a potential unwarranted Hong Kong tax advantage.

In this context, Hong Kong tax means tax imposed by the Inland Revenue Ordinance ("IRO"). Hence, apart from profits tax, the arm's length requirement will also apply to property tax and salaries tax.

In making this transfer pricing adjustment, the IRD is empowered to adjust a taxpayer's profits upwards or losses downwards. Consequently, it is a one-way street adjustment.

There is no downward adjustment to taxable profits. Nevertheless, there is a compensating adjustment mechanism allowing relief for the disadvantaged person if that party is also subject to Hong Kong tax on the income (e.g., Hong Kong to Hong Kong transactions). To the extent it is a cross-border transaction, the non-resident party would need to seek relief from the relevant tax jurisdiction of which the non-resident party is resident, unless the disadvantaged non-resident party would seek relief from the Mutual Agreement Procedures resolution mechanism under the relevant tax treaty.

OFF-SHORE TRANSACTION

If a transaction made between a Hong Kong taxpayer and an associated person produces offshore sourced income, and the associated person is not subject to Hong Kong profits tax, the transaction would have no impact on Hong Kong taxation. Consequently, no Hong Kong tax advantage would have been created, even if the transaction is considered as not following the arm's length principle. In that scenario, the IRD would not be empowered to make any adjustment.

PRICING METHODOLOGIES

As the OECD TP Guidelines will be followed, and the guidelines lay down the five transfer pricing methodologies, taxpayers will therefore have to establish their arm's length position based on one of the five transfer pricing methodologies (i.e., comparable uncontrolled price method, resale price method, cost plus method, transactional net margin method and the transactional profit split method) provided under the OECD TP Guidelines.

TRANSFER PRICING PROVISIONS APPLICABLE TO DOMESTIC TRANSACTIONS

If a tax adjustment is made on a domestic transaction of a Hong Kong entity with another related Hong Kong entity, the disadvantaged person, i.e., the other Hong Kong party whose income or loss should also be adjusted in order to avoid double taxation, can apply to the IRD for the corresponding adjustment of its income or losses. Nevertheless, to the extent the tax rate or the tax profile is different, it may have an overall tax impact to the group. For example, if a transfer pricing adjustment is to be made to the interest of a related party loan, even though the lender may have higher interest income to be reported, the borrower may still be subject to the deductibility of the interest paid. To the extent the interest is not deductible, the taxpayer group would be penalized.

The above would also apply to the situation where both Hong Kong taxpayers have losses. In the event a transfer pricing adjustment is made to decrease the tax loss of the advantaged taxpayer, the disadvantaged taxpayer should be able to seek corresponding relief to increase its tax loss by the transfer pricing adjustment amount.

PENALTY

Responding to submissions made during the consultation on the penalty with respect to transfer pricing adjustments, the government has provided some concessions in the draft legislation. A new provision in Section 80 is introduced. Under this new provision, the IRD is empowered to impose penalties not exceeding 100% of the amount of tax undercharged (3 times under the consultation paper), resulting from transfer pricing adjustments, unless it can be proved that reasonable efforts have been made to determine the arm's length price for the transactions.

It is expected that reasonable efforts would include preparation of a proper transfer pricing documentation to substantiate that the transfer pricing is at arm's length.

INTELLECTUAL PROPERTY

A new Section 15F is introduced. The provision will have the effect to deem receipt of income by a person who has contributed in Hong Kong to the Development, Enhancement, Maintenance, Protection or Exploitation ("DEMPE") functions of intellectual property owned by an overseas associate. The deemed income will be determined based on the value contribution and will be taxed as a trading receipt arising in or derived from a trade, profession or business carried on in Hong Kong.


This provision is seen as not necessary by many professionals. It is argued that if certain DEMPE functions are performed in Hong Kong, these DEMPE services should have been rewarded as service fees which should be covered in Rule 1 already. It remains to be seen whether this provision will become law.

PERMANENT ESTABLISHMENT

Even though the government has maintained the position that Hong Kong would adopt the BEPS minimum standards, it is a surprise that the Amendment Bill fully adopts the OECD's BEPS action plan on permanent establishment thresholds for companies resident in a country which does not have a Double Tax Agreement ("DTA") with Hong Kong.

The adoption of this new permanent establishment threshold for non-DTA resident companies having activities in Hong Kong is found in Schedule 17G of the Amendment Bill "*Meaning of Permanent Establishment in Hong Kong*". This takes into account the latest post BEPS thinking around preparatory and auxiliary





activities and anti-fragmentation, as well as the revised dependent agent threshold and independent agent test. This position is more stringent than the existing position taken in many of Hong Kong's DTAs.

The unfortunate part of this development is the small number of DTAs that Hong Kong has entered. In particular Hong Kong does not have DTAs with many countries that Hong Kong has significant business connections, e.g., the United States of America and Australia.

The transfer pricing rules would also apply to a permanent establishment in Hong Kong of a non-Hong Kong resident. This is found in Rule 2 of the Amendment Bill. Rule 2 has a similar effect to Rule 1, but applies to the attribution of profits to a permanent establishment of a non-Hong Kong resident using the separate enterprise principle, i.e., the permanent establishment is considered as a separate enterprise from the head office and the same fundamental transfer pricing rule in Rule 1 would apply.

The later change on attribution of profits to permanent establishment may have significant implications for financial institutions operating through branches in Hong Kong, given that this effectively makes the OECD's approach to profit attribution to a permanent establishment a Hong Kong tax requirement.

TRANSFER PRICING DOCUMENTATION

The Amendment Bill introduces the three-tiered transfer pricing documentation requirements along the line as outlined in the Consultation Report. The transfer pricing documentation requirements include the country-by-country Report ("CbCR"), master file and local file.

The filing obligations and implications are summarized below.

CbCR

Ultimate parent entities that are resident in Hong Kong of multinational group with consolidated turnover of HK\$ 6.8 billion in the previous year will be required to prepare and submit CbCR for accounting periods beginning on or after 1 January 2018. The CbCR will be in the form of an electronic record with a digital signature. Deadline for submission is within 12 months after the accounting year-end date.

The multinational group which is subject to the above CbCR requirement may also nominate a Hong Kong constituent entity as the surrogate parent entity in Hong Kong to file the CbCR in Hong Kong.

The CbCR filing obligation will also apply to Hong Kong constituent entities of a multinational group that are not the ultimate parent entity in the following situations:

- The ultimate parent entity is not required to file CbCR in the jurisdiction in which the ultimate parent entity is a tax resident;
- Even CbCR is required in that jurisdiction, there is no automatic exchange arrangement with Hong Kong in order to have access to the CbCR; or
- There is a systemic failure to exchange the CbCR.

To address concerns raised during the consultation, the government exempts the Hong Kong constituent entity from filing the CbCR under the above circumstances, if a non-Hong Kong resident surrogate parent entity of the multinational group has filed the CbCR in another jurisdiction that has the necessary exchange mechanism in place with Hong Kong.

The Amendment Bill proposes to ride on the Multilateral Convention on Mutual Administrative Assistance in Tax Matter ("Multilateral Convention") as the main platform for exchanging CbCR's with other jurisdictions.

The ultimate parent or the surrogate parent entity in Hong Kong of the multinational group which is reportable under CbCR must file written notice with the IRD within 3 months after the end of a reporting period, informing the relevant

details of the entity that will be filing the CbCR. For example, for a reportable group with accounting year end on 31 December 2018, the reporting entity must give the notification on or before 31 March 2019.

There is a penalty provision for offences such as failure to file reports or notifications; provision of misleading, false or inaccurate information; or omission of information in the CbCR itself. The penalty applies to the reporting entity as well as service providers assisting to do the CbCR filing.

MASTER AND LOCAL FILE

All enterprises which carry on trades or businesses in Hong Kong, and which is engaged in transactions with associated enterprises, Hong Kong or non-Hong Kong residents, will be required to prepare master and local files, for accounting period beginning on or after 1 April 2018, unless the enterprise meets either one of the following exemptions:

- Exemption based on size of business

An enterprise which satisfies any two of the three conditions below will not be required to prepare master and local file:

- Total annual revenue not more than HK\$200 million;
- Total assets not more than HK\$200 million; and
- Employ an average of not more than 100 employees in the year.

- Exemption based on related party transactions

If the amount of a category of related party transactions for the relevant accounting period is below the proposed threshold, the enterprise will not be required to prepare a local file for that particular category of transactions, or a master file for the enterprise:

- Transfer of properties (tangible properties such as inventory) (other than financial assets and intangible): HK\$ 220 million;
- Transfer of financial assets: HK\$ 110 million;
- Transfer of intangible: HK\$ 110 million; and
- Any other transactions, e.g., service income and royalty: HK\$ 44 million.

It should be noted that the filing of local file will apply to each taxpayer, whereas the filing of master file will apply to the group to which the taxpayer belongs. Therefore, each entity in a group will be required to prepare its respective local file, to the extent it does not meet any of the above exemptions, whereas the group will only need to prepare one master file which will be shared by all companies within the group.

Local file should be prepared within 6 months of the accounting period of the entity, whereas the master file should be prepared within 6 months of the corresponding accounting period of the group. Likely it will be the accounting year end of the ultimate holding entity. The content requirement for the master file and local file is along the



recommendations in the final report of Action 13 of the OECD BEPS project. The preparation requirement will apply for accounting periods starting on or after 1 April 2018.

ADVANCED PRICING ARRANGEMENT (“APA”)

The Amendment Bill proposes to codify the new APA regime, and to extend application of the APA regime to unilateral APAs.

The Commissioner of Inland Revenue has the power to revoke, cancel or revise an APA already concluded. Nevertheless, it is confined to cases where (i) critical assumptions are not met, (ii) the applicant fails to comply with the obligations stated in the APA, or (iii) the applicant makes an incorrect statement, provides incorrect information or omits to make a statement or certain information, and the misstatement is material.

OUR COMMENTS

The extension of the transfer pricing rules to salaries tax and property tax in the Amendment Bill is beyond the report of the Consultation Report. The transfer pricing rules in most jurisdictions only apply to profits tax. It is our view that if transfer pricing rules were to be extended to salaries tax and property tax, the relevant provisions should go through a separate consultation. It remains to be seen how individuals having salaries income could be impacted.

The Amended Bill goes significantly beyond the BEPS minimum standards. For example, it adopts the OECD’s BEPS action items on permanent establishment thresholds (BEPS Action Plan 7). This is in contrast with a large number of other jurisdictions, in particular the jurisdictions in Asia, which stick with the minimum standards and have opted out of at least some of these developments.

One item that many professionals have concerns about is the absoluteness in approach to determining “the arm’s length price” making the IRD assessor the sole arbiter of whether the profit or loss in the tax return is correct. This does not appear to recognize that in benchmarking exercise, there is always be a range of possible arm’s length prices, which is legitimate. In addition, there may also be special factors which could make the actual result outside the range. By making the IRD assessor the sole arbiter, it places a significant burden of proof on the taxpayer. We are hoping that this can be addressed by means of issuance of a DIPN.

There is no explicit provision which appears to directly change Hong Kong’s territorial source based taxation system. However, further consideration may be needed in some areas.

The Amendment Bill brings Hong Kong in line with international practice in a number of areas. The introduction of the transfer pricing law may help to ensure that Hong Kong would not be placed on any international blacklists by the OECD or European Union.

Despite the fact that transfer pricing documentation will not be due until 2019, taxpayers are recommended to seek professional assistance to prepare for such compliance obligations. Professional assistance would also be needed to perform necessary benchmarking studies to establish arm’s length prices ahead.

CONTRIBUTOR DETAILS

Michael To

Email: michael.to@mazars.hk

Phone: +852 2909 5680

SOUTH AMERICA

CHILE

EXPIRATION OF RELIEF FOR US SHAREHOLDERS



Chile is one of the few Latin American countries that is currently a member of the OECD. The Common Reporting Standard (“CRS”) developed by such international body, approved by its Council on 15 July 2014, provides that jurisdictions which gather information of their financial institutions should implement procedures aimed at exchanging, on an annual basis, such information with other jurisdictions. Chilean tax authority (“SII”) has recently published the corresponding Resolution, by means of which CRS became fully operative in Chile.

During the last years, Chile has implemented several changes into its Tax system, mainly included in Law 20780 (2014) and Law 20.899 (2016). Within such amendments, the country has moved forward with the implementation of several measures contained in the OECD’s BEPS plan. CRS regulation could be situated among the pending matters that Chile had in the context of Action 12 of the BEPS plan, whose content is precisely aimed at enhancing international tax transparency and the ability of jurisdictions to tackle offshore tax evasion.

In that context, the SII has recently issued Resolution N° 48 of May 31, 2018 which provides the legal and administrative framework of CRS in Chile. Set out below is a Q&A addressing some of the most common queries.

ENTITIES SUBJECT TO CRS IN CHILE

Any financial institution, Chilean tax residents, or entities without Chilean tax residency, which have one or more branch offices in Chile, provided they correspond to the following types of entity:

- Custody institutions
- Deposit institutions
- Investment entities

- Specific insurance companies

INFORMATION TO BE REPORTED

Financial institutions must deliver to the SII the information required by CRS, provided the account holder or their controllers (in the case of non-financial passive entities) are foreign tax residents. The general information to be provided is the following:

- Information concerning account holder/controller of financial account:
 - Full name
 - Address
 - Date of birth
 - Taxpayer number
 - Country of tax residency
- Information concerning the financial account:
 - Account number
 - Account balance
 - Amount of interests, dividends, gross income or other payments carried out, or charged to the account

TERMS

Resolution N° 48 of 2018 provides that an Affidavit should be filed by the corresponding entities on a yearly basis, no later than June 30, concerning each one of the “New accounts” and “Pre-existing accounts” which could be qualified as “*Financial accounts related to Entities domiciled in a foreign country*” maintained by the financial institution anytime within January 1 and December 31 of the former calendar year. Notwithstanding the foregoing, there is a special transitory regime concerning the 2018 Affidavit, whose term expires in June 30, 2018.

CONTRIBUTOR DETAILS

Felipe Yañez

Email: felipe.yanez@mazars.cl

Phone: +56 (2) 29 63 33 00

US Desk –
Here to help
you!



HERE TO HELP YOU!

International firms with a competitive advantage have real time access to insightful foreign tax knowledge. The right advisor helps to identify opportunities and to manage risk profiles. Given the far-reaching effects of the OECD BEPS project, awareness of legislative and regulatory changes has never been more important.

The Mazars US Tax Desk was created to help US companies successfully manage these challenges. We can help you to ask the right questions, set priorities and define the action plans needed to succeed in the fast-moving landscape of international tax.

The Mazars US Tax Desk is a platform for companies with existing international operations and those looking to enter other jurisdictions.

In working with the Desk, companies will be able to access a wealth of multifaceted, cross border experience in areas such as:

- International tax structuring
- Transfer pricing
- Inbound and outbound investment
- Intellectual property planning
- Financing structuring
- Treaties – interpretation and maximisation of benefits
- Research and development tax credits
- Cross border financing, leasing and licensing
- Corporate acquisitions and divestments

We are here to help you! As part of our programme to keep you up to date on what is happening in the world, we will publish regular newsletters. These will discuss important tax legislative changes, provide on the ground insight, but most importantly, identify how this news is of relevance to you.