Dbriefs Bytes Transcript

30 May 2014

For comments on Action 15, see **the highlighted text below**.

BEPS

(i) OECD BEPS webcast

Well, a number of BEPS-related stories this week – but the most important, of course, is the OECD BEPS webcast which was presented on Monday of this week.

This is the third of the OECD's BEPS webcasts. And, as usual, it was a mixture of information that we already knew, plus some gold nuggets of new stuff that we didn't.

Let me go through the gold nuggets :

Action 6 (prevent treaty abuse)

In regard to Action 6 (prevent treaty abuse), this is what I learnt :

- It is likely that the LOB article will contain a "derivative benefits" provision.
- The LOB article will address the concerns, which the public has raised, in regard to collective investment vehicles, pension funds, and dual listed companies. Specifically in regard to CIVs, the treatment of CIVs in the current OECD Commentary, will be reflected in the LOB article.
- The Commentary will provide guidance to tax authorities on how to apply the discretionary grant provision within the LOB article.
- And it seems clear that the final report will include both an LOB article and a "main purpose" provision.

I was disappointed that there was no reference, in the webcast, to changing the "main purpose" provision from "one of the main purposes" to "the main purpose".

Action 8 (transfer pricing aspects of intangibles)

In regard to Action 8 (the transfer pricing aspects of intangibles), this is what I learnt :

- The current discussion draft will be finalized very soon. It comprises amendments to chapters I, II and VI of the OECD Transfer Pricing Guidelines.
- Section B of the amended chapter VI is the most important part of the draft. It discusses who is entitled to intangible-related returns, in the context of the so-called DEMP functions : development, enhancement, maintenance and protection functions. The OECD has decided that there is a strong interaction between the section B content, and the proposed future work on risk, re-characterization, capital, and special measures (which are covered by BEPS Actions 9 and 10).
- Accordingly, immediately after the finalization of this current discussion draft, the OECD will put significant resources on the follow-up transfer pricing issues of : excessive capitalization, low functionality, and mere contractual assumption of risk. A discussion draft on these follow-up topics will be issued in December 2014.

Action 13 (transfer pricing documentation and country-by-country reporting)

In regard to Action 13 (which deals with transfer pricing documentation and country-by-country

© 2014. For information, contact Deloitte Touche Tohmatsu Limited.

reporting), this is what I learnt :

- The OECD is now using the terminology of a three-tier approach: CbC template, Masterfile, and Local File.
- The OECD describes the CbC template as containing quantitative information, and as a risk assessment tool only.
- The Masterfile and Local File are described as containing both qualitative and quantitative information.
- The OECD is concerned about how this new documentation framework is implemented. Accordingly, they will give a major focus to developing an implementation plan, which will be issued in January 2015. The objectives of the implementation plan will be to guarantee (the OECD's word) :
- Consistency in the approaches by governments
- That the relevant information is available to governments, for which it is relevant, on a timely basis
- That commercially sensitive information is treated confidentially
- That the costs for both taxpayers and tax administrations are balanced
- And to secure that the information is used as intended

Action 15 (multilateral instrument)

In regard to Action 15 (which involves the development of a multilateral instrument), and which is not yet fully in the public domain, Pascal Saint-Amans of the OECD said this :

- **"A multilateral instrument is feasible!". The OECD's group of expert international lawyers has found precedent in areas other than tax.**
- **Treaty changes (for example, as in Actions 6, 2 and 7) will be inserted into the OECD model treaty, and in addition they will be included in the multilateral instrument.**
- **By including the treaty changes in the multilateral instrument, Pascal said it would be like "killing 3,000 birds with one stone!" – in reference to the 3,000 bilateral tax treaties in the world today.**
- **The multilateral instrument will be negotiated through an international conference, which will include developing countries. This could start in early 2015.**

Action 1 (digital economy) and Action 2 (hybrid mismatch arrangements)

Although the OECD webcast did cover Action 1 (the digital economy) and Action 2 (hybrid mismatch arrangements), I didn't see any gold nuggets with those two Actions.

The only other point to note is in regard to the September 2014 deadline for seven of the Actions. That deadline is actually the G20 Finance Ministers meeting, which will be held on 20 & 21 September.

Pascal Saint-Amans said that the OECD is "on track" to submit to that G20 meeting its seven deliverables, which are its reports on :

- The five Actions which are currently in the public domain to a full extent : Action 1 (digital economy), Action 2 (hybrid mismatch arrangements), Action 6 (prevent treaty abuse), Action 8 (transfer pricing aspects of intangibles), and Action 13 (transfer pricing documentation and country-by-country reporting).
- And, in addition, the other two Actions which are not currently in the public domain : Action 5 (harmful tax practices) and Action 15 (multilateral instrument).

He also said that the OECD is making good progress with the BEPS Actions which have a deadline in 2015.

If you would like to listen to a recording of the OECD webcast, please go to BEPS Central by following the link in the summary slides at the end of this video.

(ii) Action 13 consultation meeting

© 2014. For information, contact Deloitte Touche Tohmatsu Limited.

In last week's Dbriefs Bytes, I described the OECD's public consultation meeting on Action 13 (transfer pricing documentation and country-by-country reporting) - which was held in Paris on 19 May.

As I said, there was a spirited debate on several issues, such as confidentiality, materiality, and the method of transmission of the files and reports.

Another issue which caused a spirited debate was the question of language : should the files and reports be in English only or should other languages be used (in addition to, or even possibly instead of, English)?

The private sector unanimously said that it should be English only.

In contrast, some tax officials and civil society groups argued in favour of translation into other languages. The primary reason for this is that some local country tax administrations simply don't speak English, or not very widely. For example, the Japanese delegate to the OECD looked around and asked why there are not more Japanese, Chinese and Korean companies in attendance at the meeting. It's not because they're uninterested, he said – it's because of the language barrier.

If you work in Asia, I think you will immediately accept the point.

Of course, there's also a sensitive sovereignty issue. The Mexican delegate put it this way :

"There's no Mexican law that is in English, [and] there are no provisions in Mexican law that provide for the use of documents in the English language."

(iii) EU: digital report

Available only in English (so far), the European Commission published, on Wednesday of this week, the report of its expert group on the taxation of the digital economy.

The report is 78 pages long. If you would like to obtain a copy of the report, please follow the link in the summary slides at the end of this video.

Disclaimer
Please note that the comments made in BEPS Central, to some extent, are based on material obtained from sources outside Deloitte.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte network") is, by means of this video, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this video.

About Deloitte
Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.