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In this issue:

Swiss Supreme Court rules on treaty beneficial ownership in connection with derivative transactions

Switzerland's Federal Supreme Court issued two important decisions on 5 May 2015 regarding the concept of beneficial ownership of income under tax treaties, as it applies to total return swaps and futures contracts.

A total return swap is a financial contract in which the parties agree to exchange the return (dividends and price changes) of an underlying asset or a basket of underlying assets for a set rate. In such an arrangement, the party receiving the total return will receive income generated by the asset, as well as the benefit if the price of the asset increases over the life of the swap. In return, the recipient must pay to the counterparty the set rate over the life of the swap. If the price of the asset drops over the life of the swap, the total return recipient will be required to pay the counterparty the amount by which the asset has dropped in price.

A futures contract is a financial contract between two parties to buy an underlying asset or a basket of underlying assets at a predetermined price, with settlement occurring in the future. For Swiss market index (SMI) futures, the underlying assets are the shares representing the SMI. SMI futures are traded on the EUREX stock exchange.

The cases involved two Danish banks that had fully hedged Swiss equities positions and claimed refunds of Swiss withholding tax on dividends received. The Federal Tax Administration (FTA) denied the refunds on the grounds that the conclusion of these derivative transactions resulted in the loss of beneficial ownership of dividends received from Swiss shares acquired for hedging purposes. The banks appealed to the Federal Administrative Court, which ruled against the FTA. The FTA appealed, and the Federal Supreme Court reversed the decisions of the Federal Administrative Court and upheld the position of the FTA.

Total return swap case

In 2007, a Danish bank entered into total return swap agreements with several counterparties; the underlying assets for the agreements were shares in Swiss companies. On the basis of the swap agreements, the bank was required to pay the counterparties an amount equal to the returns generated during the life of the swaps (i.e. dividends) and the bank received fixed interest based on LIBOR, as well as an additional margin.

To hedge the swap positions, the bank purchased the corresponding number of the underlying Swiss shares of the total return swap. Dividends were paid on the shares and a 35% Swiss withholding tax was levied. The Danish bank claimed a full refund of the withholding tax, based on the Switzerland-Denmark tax treaty in effect at the time. The treaty did not contain a beneficial ownership clause in the dividends article or an anti-abuse provision.

The FTA denied the refund on the grounds that the bank was not the beneficial owner of the dividends because it had entered into the total return swap agreements and was de facto obliged to forward the Swiss dividends received to the swap counterparties. The bank appealed to the Federal Administrative Court, which concluded in 2012 that, even though the bank entered into the swap transactions, it retained beneficial ownership of the dividends; therefore, the court granted a full refund of the withholding tax.

In its decision, the Federal Supreme Court confirmed that the beneficial owner concept is implicit in all tax treaties, i.e. a recipient of dividend income must be the beneficial owner to claim treaty benefits, even if the relevant treaty does not contain a specific reference to beneficial ownership.

Beneficial ownership requires that a dividend recipient have certain rights and authority with respect to the use and disposition of the dividends received; these rights are limited if the recipient is legally or de facto obliged to pass on the dividends to a third party. A further indication of beneficial ownership is the assumption of the dividend risk, i.e. the beneficial owner should be the party that bears the risk that no dividend will be distributed.

The Federal Supreme Court concluded that the Danish bank was obligated to forward the dividends to the counterparties, that this obligation was inextricably linked to the dividend distributions on the underlying shares and that the bank did not assume any risk in the transaction and, consequently, could not be considered the beneficial owner of the dividends.

SMI futures case

A Danish bank sold SMI futures and purchased the underlying Swiss shares to hedge the position. To exit its position when the futures contracts were about to expire, the bank repurchased the contracts and sold the shares that served as a hedge. The futures and shares were traded via different brokers. Over the life of the SMI futures, the bank collected dividends on the acquired Swiss shares and then claimed a refund of the 35% Swiss withholding tax, based on the Switzerland-Denmark treaty.

The FTA again took the position that the bank was not the beneficial owner of the dividends and, therefore, was not entitled to treaty benefits – because of the sale of SMI futures, the bank was factually obliged to pass on the Swiss dividends received to third parties. The FTA also suspected that the buyers of the SMI futures and the sellers of the Swiss shares were identical, and that the entire transaction was prearranged with the sole purpose of benefitting from the favorable withholding tax rate under the treaty. Furthermore, the acquisition of the shares was fully debt-financed by the bank's parent company and no evidence was presented that the interest paid was not dependent on the dividend payments received on the Swiss shares. The bank was criticized for not disclosing the financing agreement with the parent company. However, the bank appealed the FTA's decision and the Federal Administrative Court ruled against the FTA.

The Federal Supreme Court's opinion referred to its definition of beneficial ownership in the other Danish bank case, although the facts of the SMI futures case were more complex and not entirely clear. Nevertheless, the court held that the facts that the shares were traded in block trades and not anonymously over the stock exchange, and that the counterparties behind the brokers were not disclosed, indicated that the transactions were prearranged. Further, the bank fully hedged the position and did not bear any risk. As such, the economic (i.e. nontax) reason for the brokers and the bank to conclude the transactions was not apparent. Finally, the nondisclosure of the financing arrangement was considered indicative of a potential harmful interdependence between the dividends received and the interest paid by the bank. The court held that the FTA was correct in denying the withholding tax refund.

Impact of the decisions on the financial market

During the time these cases have been proceeding through the judicial system, the FTA has denied or suspended numerous similar refunds of Swiss withholding tax in cases involving derivatives. It is important to note that the Federal Supreme Court decisions are not directly applicable to other cases – each case must be analyzed on its own merits, so different outcomes are possible.

— Ferdinando Mercuri (Lausanne)
Partner
Deloitte Switzerland
fmercuri@deloitte.ch

Markus Weber (Zurich)
Partner
Deloitte Switzerland
markweber@deloitte.ch

Annemarie Ruegger (Zurich)
Director
Deloitte Switzerland
aruegger@deloitte.ch

André Kuhn (Zurich)
Senior Manager
Deloitte Switzerland
akuhn@deloitte.ch

OECD releases revised discussion draft on definition of permanent establishment

On 15 May 2015, the OECD, as part of the action plan to address base erosion and profit shifting (BEPS), released a revised discussion draft on action 7. Action 7 is focused on updating the definition of taxable presence (i.e. a permanent establishment or PE) in article 5 of the OECD model tax treaty to prevent abuse of the threshold for allocating taxing rights on trading activities to different jurisdictions, in particular, through the use of *commissionnaire* arrangements and benefits from specific activity exemptions. The OECD also is considering the modernization of the PE threshold in relation to digital cross-border business, in line with the work on the digital economy (Action 1). (For additional coverage, see United States Tax Alert, 19 May 2015.)
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-unitedstates-19-may-2015.pdf

The discussion draft selects proposals, and in some cases refines them, from the alternatives put forward in the discussion draft issued on 31 October 2014 (for prior coverage, see OECD Tax Alert, 4 November 2014). The revised draft analyzes the comments received, debates the choices made by the Working Group and sets out proposed amendments to article 5 of the model treaty and its associated commentary.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-oecd-051114.pdf

As with other discussion drafts on BEPS actions, the proposals do not represent a consensus view from the G20/OECD governments involved, but are designed to provide substantive proposals for public analysis and comment.

Proposals for amendments to article 5

Artificial avoidance of PE status through commissionnaire arrangements and similar strategies: The discussion draft specifies that, as a matter of policy, where activities performed by an intermediary in a country result in the regular conclusion of contracts to be performed by a nonresident entity, the nonresident entity will have a taxable PE in that country unless the intermediary is an independent agent acting in the ordinary course of its business. As a result, the discussion draft proposes changes to the rules on dependent and independent agents to address *commissionaire* and other undisclosed agent arrangements by:

- Amending the agency PE rules (article 5(5) of the model treaty) to include not only contracts in the name of the nonresident entity but also contracts for the transfer of, or the granting of the right to use, property, or the provision of services by the nonresident where the intermediary "habitually concludes contracts, or negotiates the material elements of contracts"; and

- Strengthening the requirements (article 5(6) of the model treaty) for an agent to be considered independent, such that this will not be the case where the agent acts "exclusively or almost exclusively for one or more enterprises to which it is connected."

The proposals for an updated commentary on article 5 include a number of examples to assist with new and uncertain concepts, such as "negotiating material elements of contracts." This would include, for instance, a situation where a person acts as the sales force for the nonresident entity and where the negotiation of the material elements of the contracts is limited to convincing the account holder to accept standard terms. The discussion draft also clarifies that the proposed changes to independent agent status will not result in an automatic exclusion for unrelated agents acting exclusively for one enterprise (e.g. in the case of start-up companies). The discussion draft and the proposed commentary specifically note that the extension of the dependent agent PE concept does not include "buy-sell" distributors, even where these are low-risk and "regardless of how long the distributor would hold title in the product sold." Instead, BEPS concerns related to low-risk distributor arrangements will be addressed through the work on the transfer pricing of risks and capital (Action 9 of the BEPS action plan).

Artificial avoidance of PE status through the specific activity exemptions: BEPS concerns have arisen with respect to the activity exemptions in article 5(4) of the model treaty, under which a PE is deemed not to exist where a place of business is used solely for certain activities. The OECD proposes to modernize the PE exemptions for specific activities (such as maintenance of a stock of goods for storage, display, delivery or processing, purchasing or the collection of information) included in article 5(4) by ensuring that these would apply only where the activity (or activities) in question is (are) preparatory or auxiliary in relation to the business as a whole. This would reflect modern ways of doing business, since such activities increasingly may represent a key part of a business's value chain (including supply chains involving digital sales).

The discussion draft proposes updating the commentary by including additional guidance on the meaning of "preparatory or auxiliary," as well as examples. The draft notes that:

> *"…an activity that has a preparatory character is one that is carried on in contemplation of the carrying on of what constitutes the essential and significant part of the activity of the enterprise as a whole' and 'an activity that has an auxiliary character… generally corresponds to an activity that is carried on to support, without being part of, the essential and significant part of the activity of the enterprise as a whole.*"

Storing and delivering goods to fulfill online sales may not be considered preparatory or auxiliary if such activities are an essential part of the company's sales or distribution business.

Fragmentation of activities between related parties: The discussion draft proposes (in a new paragraph 4.1 to article 5 of the model treaty and updated commentary) the creation of a PE where activities in a country are "fragmented" between group companies to meet the exemptions for activities that are preparatory or auxiliary. The proposal would prevent the specific activity exemptions from applying where the "overall activity resulting from the combination of the activities carried on …by the same enterprise or connected enterprises…is not of a preparatory or auxiliary character" (which includes activities of locally resident entities) provided the activities constitute “complementary functions that are part of a cohesive business operation.”

Splitting up of construction contracts: The discussion draft addresses the splitting up of contracts between group companies to circumvent the specific 12-month time period for creating a PE for a building site, construction or installation project (article 5(3) of the model treaty). The recommendations set out in the proposed updated commentary are as follows:

- Adding an example to illustrate the application of the “principal purpose” test for the prevention of treaty abuse (Action 6 of the BEPS action plan) to deal with the splitting up of contracts; and
- Suggesting an alternative provision (where treaties do not include the principal purpose test) to add connected activities (exceeding 30 days’ duration) carried on by connected enterprises to the period of time on site for the purposes of determining the 12-month period.

Insurance: The discussion draft considers whether a specific PE threshold is required in relation to insurance businesses. The draft proposes no specific PE threshold for insurance businesses in the model treaty; instead, insurance businesses would be treated like businesses in any other industry (unless specific variations from the model treaty are negotiated in bilateral agreements between specific countries), and the general changes proposed to the PE threshold would apply equally to them.

Profit attribution to PEs and interaction with action points on transfer pricing

The G20/OECD Working Party acknowledges that further guidance and examples are required in respect of the attribution of profit to PEs, particularly in relation to businesses outside the financial services industry. The discussion draft comments that the outcome of the BEPS work on transfer pricing, in particular intangibles, risk and capital, also will need to be taken into account. The OECD has agreed to undertake follow-up work on the application of the principles for the attribution of profit to PEs after final recommendations on transfer pricing are released in September 2015. The work on the new guidance is expected to be completed by the end of 2016, in line with the timetable for negotiation of the multilateral instrument that will implement changes to the PE threshold in tax treaties.

Comments and business next steps

Governments are pressing ahead with changes to the threshold for a PE to prevent the artificial avoidance of PEs where a company, or group, has significant activity in a country. Some of the changes, such as those that create a PE for a principal where it operates via *commissionaire* or undisclosed agent arrangements in market countries, were widely anticipated. Some, such as the changes to the exemption for holding stock, changes to agents that are considered independent and the new anti-fragmentation rule, are believed necessary to ensure that a group’s complex supply chain does not allow it to artificially avoid a taxable presence in a country where significant activities take place. Businesses will welcome the clear statement of the policy intention that buy-sell distributors, including limited risk distributors, should not create a PE of their principals (although the simultaneous holding of stock locally by a principal is likely to create a PE due to the anti-fragmentation rule). Similarly, principals operating toll manufacturing arrangements may, subject to other local activities and factors, continue to be exempt from having PEs in the toll manufacturing country.

However, the changes outlined in the discussion draft are wide-reaching and, because of the potential impact on commercial trading arrangements, remain a key area of concern for all businesses, including those that are not undertaking BEPS strategies. Additional compliance costs will be created for businesses, for example, when they have to determine who (and where) material elements of contracts are negotiated, what is preparatory or auxiliary in the context of the business and what is a cohesive business operation. Administration costs will arise for the tax authorities that will have to monitor and audit these areas. In addition, since the PE threshold is the standard by which primary taxing rights over trading profits are allocated to one country or another, concerns remain that the uncertainty inherent in the new definitions will lead, in the short to medium term at least, to disputes between tax authorities and businesses, and between tax authorities, that may result in double taxation.

One specific area of concern is the use of the commentary – rather than the treaty article itself – to clarify some key areas. For example, the policy intention is that limited risk distributors would not create a PE of an overseas principal, but it would be helpful to include this in the text of article 5 itself so that it becomes binding on countries adopting the new PE threshold. Likewise, the further reliance on premises being "at the disposal" of a nonresident (a concept that has been subject to considerable comment, dispute and debate over its use in the commentary for many years) to explain why toll manufacturing should not, of itself, create a fixed place of business PE for the stock-owning principal would be improved if "at the disposal" were included in article 5.

The proposed changes to article 5 highlight the potential for differences in treatment between groups with vertically-integrated supply chains where group companies may, in the future, create a local country taxable presence of a nonresident, and those that use third parties (e.g. third party distributors or, potentially, third party warehouses operated by an independent logistics company), which may not. This, and the reliance on the "at the disposal" test, does not appear to be a satisfactory distinction to draw.

It was anticipated that the OECD would choose to continue to treat insurance businesses in the same way as businesses in other sectors, but the insurance industry will be relieved that it will not have to deal with the excessive compliance burden that would have been placed on it if the shift from residence to source taxation proposed in the October 2014 draft had been taken forward.

It is very positive that the OECD has agreed to provide further guidance, with appropriate time for analysis, on applying the principles for attributing profit to PEs (as set out in the 2010 *Report on the Attribution of Profits to Permanent Establishments*) to nonfinancial services businesses by December 2016. It is possible that there will be limited additional profit attributed to some of the newly-created PEs in practice, particularly where there are no significant people functions in the local country, and, as such, the changes may become a question of compliance only.

Comments on the revised discussion draft must be submitted by 12 June 2015. There will not be a public consultation meeting, but comments received will be discussed by the G20/OECD

Working Party before final recommendations are delivered to the G20 Finance Ministers' meeting on 8 October 2015. Changes to bilateral tax treaties to reflect amendments to the PE threshold are likely from 2017 through the multilateral instrument, unless countries choose to use bilateral protocols to implement change more quickly.

— Bill Dodwell (London)
Partner
Deloitte United Kingdom
bdodwell@deloitte.co.uk

Alison Lobb (London)
Director
Deloitte United Kingdom
alobb@deloitte.co.uk

Belgium:
Foreign account reporting required for individuals

A royal decree published in the Belgian official state journal on 13 April 2015 details the requirement for resident individuals to report foreign accounts to the Central Point of Contact (CPC) of the National Bank of Belgium (NBB) (The CPC is a register of the bank account numbers and all types of contracts held at financial institutions in Belgium by resident and nonresident individuals and legal persons.)

Belgian individual income taxpayers have been required to report the existence of foreign accounts in their Belgian income tax returns since 1997. The reporting obligation was revised in 2012 to require that such accounts be registered with the CPC, even though, at the time, the CPC was not capable of receiving the information.

The registration procedure with the CPC effectively did not apply for tax years 2012 to 2014, since there was no platform within the NBB to receive the required information. As a result, taxpayers that reported foreign accounts in their income tax returns have not yet received a request to provide information to the CPC. However, the Belgian tax authorities soon will start issuing letters to these taxpayers, requesting reporting to the CPC for the 2012-2014 period. Once such a letter is received, the taxpayer will have two months (starting from the third day following the date on which the request was sent) to comply with the reporting requirement.

As from tax year 2015 (income year 2014), reporting to the CPC will be possible, and affected taxpayers will need to comply with the registration requirement. The foreign account information will have to be reported to the CPC no later than the date the 2014 Belgian income tax return is filed. Specifically, for accounts opened during income year 2014, taxpayers must proactively report the required information to the CPC (i.e. they will not receive a request from the tax authorities for the information during 2015). If the reporting was made in a previous year, the procedure does not need to be repeated for subsequent years (unless there are new foreign bank accounts).

The royal decree addresses who must report, the accounts that must be reported and how the reporting should be carried out. The reporting obligation applies to accounts of all kinds held by an individual taxpayer, his/her partner or their dependent children with a foreign bank, exchange, credit or savings institution at any time during the taxable period. The scope of reportable accounts is not limited to "standard" accounts providing the option to receive income, collect or deposit cash and execute or receive payments, but also is extended to, for example, securities accounts, investment accounts and PayPal accounts used in a professional context (but not to foreign life insurance contracts). Both an electronic filing procedure and a paper filing procedure are available.

In an international employment context (e.g. cross-border commuters, split employment, etc.), taxpayers are likely to have foreign accounts that are subject to the reporting obligation. In past years, the Belgian tax authorities did not pursue the actual reporting of foreign accounts to the CPC, and there were no concrete guidelines on what was required to be reported. However, in light of the new decree and the fact that the CPC now is capable of receiving the required information, Belgian individuals holding such accounts will have to take action to report the accounts, either in response to a request from the tax authorities or at the time they file their 2014 income tax return.

— Frédéricq Jacquet (Liege)
Director
Deloitte Belgium
frjacquet@deloitte.com

Canada:
Relief proposed from nonresident employer payroll withholding obligations

In the 2015 Canadian federal budget announced on 21 April 2015, the Minister of Finance proposed a legislative change that would provide relief to nonresident employers with respect to withholding taxes on amounts paid to their nonresident employees working temporarily in Canada. Specifically, "qualifying nonresident employers" would be exempt from payroll withholding requirements for payments made after 2015 to "qualifying nonresident employees."

Background

Canadian tax laws currently impose withholding obligations on any nonresident employer paying remuneration to a nonresident employee for services rendered in Canada. The amount of the withholding is determined in accordance with section 102 of the Income Tax Regulations (commonly referred to as "Reg. 102 withholding"). An employer may be relieved of this withholding obligation only if it obtains a formal waiver from the Canada Revenue Agency (CRA) and, if subject to Quebec withholding, from the Minister of Revenue of Quebec.

The waiver process is a burdensome task for multinational enterprises operating in a competitive global market. Failure to obtain a waiver creates compliance risks when employees are sent on business travel to Canada, even for a very short duration.

Under the current system, a waiver is granted on an employee-by-employee basis and for a specific time period. It is challenging for multinationals to comply with the CRA's administrative Reg. 102 withholding requirements because of the degree of unpredictability associated with business travel. Employees often travel on short notice, and there may be insufficient time to obtain a waiver before the employee's first remuneration in Canada. If a waiver is not obtained, the employer must withhold taxes and the employee must file a Canadian tax return to obtain a refund of the taxes withheld. Where the employee is exempt from tax under an applicable tax treaty, the withholding tax simply constitutes a “deposit” of tax that the CRA is required to refund after processing the relevant tax return. This waiver system has been the subject of considerable criticism from the business community for being inefficient, impractical and burdensome.

Proposed change

To reduce the administrative burden on businesses with cross-border employee travel, the federal budget proposal would exempt qualifying nonresident employers from the Reg. 102 withholding requirements for payments made after 2015 to qualifying nonresident employees.

An employee would be a qualifying nonresident employee in respect of a payment if the employee:

- Is exempt from Canadian income tax on the payment under an applicable tax treaty; and
- Is not present in Canada for 90 or more days (including nonwork days) in any 12-month period that includes the time of the payment.

To be a qualifying nonresident employer, an employer (other than a partnership) would be required to:

- Be resident in a country that has concluded a tax treaty with Canada;
- Not carry on business in Canada through a permanent establishment in its fiscal period that includes the time of the payment; and
- Be certified by the CRA at the time of the payment.

If the employer is a partnership, the second and third conditions above would have to be satisfied, and at least 90% of the partnership’s income for the fiscal period that includes the time of the payment would have to be allocated to persons that are resident in a treaty country.

The CRA would be authorized to deny or revoke certification if the employer fails to meet the conditions above or fails to comply with its Canadian tax obligations.

Where an employer obtains certification but the conditions that provide relief from payroll withholding cease to apply (e.g. if qualifying nonresident employee is status is lost because the employee fails to satisfy the less-than 90 days in Canada test), the employer would continue to be liable to withhold and remit any amounts from remuneration paid to the employee. Penalties would not be imposed on a qualifying nonresident employer for failing to withhold if, after reasonable inquiry, the employer had no reason to believe, at the time of payment, that the employee did not meet the conditions to be a qualifying nonresident employee.

Although a qualifying nonresident employer would not be obligated to carry out Reg. 102 withholding under the circumstances noted above, the employer would continue to be responsible for its reporting requirements under the Canadian Income Tax Act with respect to amounts paid to its employees (e.g. issuing T4 information slips).

Certification would not be conclusive as to whether a nonresident employer has a taxable presence in Canada and, as such, would be relevant only with respect to determining the qualifying status for withholding tax purposes.

Comments

This proposal is a welcome development, as it would provide relief to multinational businesses that employ frequent business travelers to Canada or send employees to Canada on short-term assignments and it is in line with the broader effort to reduce administrative "red tape" relating to Reg. 102 withholding. Since the change would be effective as from 1 January 2016, nonresident employers must continue to withhold tax in Canada (unless a waver has been obtained) for the remainder of 2015.

— Fatima Laher (Toronto)
Partner
Deloitte Canada
flaher@deloitte.ca

China:
Tax audit plans for 2015 announced

China's State Administration of Taxation (SAT) has announced the nationwide tax audit plans for 2015. The plans set out the main sectors/industries that will be the focus of audits during calendar year 2015, as well as the timetable for the local tax bureaus to provide reports to the SAT.

Audit targets are divided into two main categories: mandatory and "instructive" (the latter being sectors/industries in which the SAT recommends that audits be conducted). In addition, the local tax bureaus have discretion to carry out tax audits on taxpayers in other sectors/industries.

- **Mandatory targets:** The local tax bureaus must select taxpayers from each of the following categories for audit:
  - Enterprises engaged in the export business that enjoy VAT/consumption tax exemptions or refunds;
  - Enterprises conducting transactions in the gold sector (e.g. sales and purchases of gold); and
  - Taxpayers conducting capital-related transactions (e.g. share transfers).
- **Instructive targets:** The local tax bureaus have discretion to select taxpayers from one or more of the following categories for audit:
  - Taxpayers engaged in the real estate/construction business;
  - High-income individuals (for individual income tax audits); and
  - Enterprises engaged in the education/training business for profit.
- **Discretionary targets:** The local tax bureaus can expand or refine the scope of audit targets. For example, in addition to the six categories in the national plan (listed above), the Shanghai tax bureau has added the following industries/types of taxpayers:
  - E-business;

- Oil trading;
- General wholesale and retail;
- Auto maintenance and repair;
- “Key taxpayers,” i.e. enterprises that are considered to contribute a comparatively large share of government tax revenue; and
- Individuals serving in senior management positions in the financial and real estate industry or in state-owned enterprises, and lawyers.

Comments

Companies falling within the scope of the tax audit plan should closely monitor the progress of audit activities and may wish to conduct self-reviews to ensure that risk areas are addressed and that appropriate supporting documentation is available. Professional assistance may be required for controversial issues where guidance is limited.

Given the intensified scrutiny by China’s tax authorities on service fee and royalty payments made overseas, these payments are likely to be one of the most examined items in tax audits.

— Martin Lin (Shanghai)
Partner
Deloitte China
mlin@deloitte.com.cn

Mike Jiang (Shanghai)
Partner
Deloitte China
jnjiang@deloitte.com.cn

Colombia:
Withholding tax rates clarified on payments abroad

The Colombian tax authorities issued a ruling on 29 April 2015 that clarifies the withholding tax rates applicable to certain payments made by Colombian residents to foreign entities.

Law 1739 of 2014 provides that, while foreign entities generally are subject to a 33% income tax on their Colombia-source income that is not attributable to a branch or permanent establishment (PE) in Colombia, the rate will be increased for four years, from 2015 to 2018, as follows:

Year	Rate
2015	39%
2016	40%
2017	42%
2018	43%

The introduction of the temporarily increased income tax rate created uncertainty regarding the withholding tax rates applicable to Colombian-source payments made abroad to foreign entities because articles 408, 410 and 411 of the tax code provide for rates of 10% and 33% for certain payments, and these articles were not changed by Law 1739.

The new ruling clarifies that the withholding tax rates applicable to income covered by the above articles remain unchanged; to amend these rates, the legislature would have to have included a specific provision in Law 1739 and it did not do so. As a result, the relevant provision of Law 1739 does not affect the withholding tax rates in other articles of the tax code – it applies only to other Colombia-source income obtained by foreign entities that is not attributable to a Colombian PE. Accordingly, taxpayers may continue to apply the 10% and 33% withholding tax rates (as provided in articles 408, 410 and 411) on the following payments made abroad:

- Interest on loans with a term of less than one year;
- Royalties;
- Fees and commissions for services provided in Colombia (fees paid for technical assistance, consulting and technical services are subject to the 10% rate);
- Rental payments; and
- Payments made to an entity located in a tax haven.

— Mario Andrade (Bogota)
Partner
Deloitte Colombia
maandrade@deloitte.com

Oscar Jiménez (Bogota)
Manager
Deloitte Colombia
ojimenez@deloitte.com

European Union:
European Commission unveils plans for digital single market

The European Commission issued a series of documents on 6 May 2015, outlining the plans for a digital single market (DSM) strategy for the EU. The overall aim of the DSM is to improve business and consumer access to digital goods and services across Europe; create optimal conditions and a level playing field for digital networks and innovative services to thrive; and maximize the growth potential of the digital economy. The DSM effectively would create a regulatory framework for the internet across the EU – the initiative is broad and ambitious and would affect areas such as e-commerce, network service providers, broadband, telecommunications, shipping and delivery of goods, innovation and copyright rules. The DSM also includes a number of VAT measures that would simplify existing rules and reduce administrative burdens on businesses in the EU arising from the application of the 28 different VAT regimes.

The Commission aims to announce VAT legislative initiatives for the following in 2016:

- Extending the single electronic registration and payment mechanism (the “mini one-stop shop” that currently allows EU businesses supplying certain e-services to consumers in other member states to account for their intra-EU supplies through an electronic portal in their home country) to intra-EU and third country online sales of tangible goods to private consumers;
- Introducing an EU-wide simplification measure (a VAT threshold) to assist small start-up e-commerce businesses;
- Allowing for home country controls, including a single audit of cross-border businesses for VAT purposes; and

- Eliminating the VAT exemption for the importation of small consignments from suppliers outside the EU.

The strategy also proposes to explore the cost of cross-border deliveries and geo-blocking (the blocking of access to web sites in other countries), and a range of other nontax issues that the Commission considers to be obstacles to cross-border trading.

Although some of the proposals in the Commission's strategy may be uncontroversial, others may be met with objections, and obtaining consensus from all 28 EU member states may be challenging.

— Jason Craig (London)
Partner
Deloitte United Kingdom
jasoncraig@deloitte.co.uk

Aili Nurk (London)
Senior Manager
Deloitte United Kingdom
anurk@deloitte.co.uk

Germany:
Parliament recommends codification of 5% addback of dividends for trade tax purposes in tax group situations

On 8 May 2015, the upper house of the German parliament launched an initiative to codify the tax authorities' position on the trade tax treatment of dividends distributed by a nonresident subsidiary to its German parent company that is a controlled company in a German tax group. According to the tax authorities, such dividends should be only 95% exempt (as is the case for corporate income tax purposes).

This issue has been controversial since the federal tax court (BFH) upheld a taxpayer-favorable decision of the lower tax court of Muenster on 17 December 2014, in which the lower court ruled that such dividends must be treated as fully tax exempt for trade tax purposes, rather than only 95% exempt, as argued by the tax authorities. Under German law, dividends received by German companies from their German and foreign subsidiaries generally benefit from a 95% tax exemption if certain minimum shareholding requirements are met, with the remaining 5% of the dividends deemed nondeductible business expenses subject to taxation for corporate income tax and trade tax purposes.

The case involved dividends distributed by a nonresident subsidiary to its German parent company that was a controlled company in a German tax group. Under the tax group rules, the income of the controlled entity is attributed to the controlling entity: for corporate income tax purposes, the 95% exemption for dividends is applied at the level of the controlling entity, but for trade tax purposes, a different rule provides for a full exemption at the level of the controlled entity. Since the trade tax income attributed to the controlled entity does not include any dividend income, there is no basis for applying the provision that adds back 5% of the dividend income as deemed nondeductible business expenses at the level of the controlling entity. According to the BFH, adding back 5% of the dividends at the level of the controlling entity would contradict the language of the statute.

The upper house of the German parliament favors the introduction of legislation to introduce a 95% trade tax exemption for such dividends, and has asked the government to examine this option as part of the legislative process on another draft bill. The government issued a statement on 13 May agreeing to consider parliament's request.

The introduction of a 95% trade tax participation exemption for dividends from foreign subsidiaries to a controlled entity in a German tax group effectively would reverse the decision of the BFH. The fact that the government did not immediately reject the request of the upper house of parliament could indicate that the rule may be introduced during the legislative process.

— Andreas Maywald (New York)
Client Service Executive
Deloitte Tax LLP
anmaywald@deloitte.com

Netherlands:
Bank tax treaty with the UK in effect

The bank tax treaty between the Netherlands and the UK entered into force on 30 April 2015 and applies retroactively as from 1 January 2011. The treaty was concluded between the two countries on 12 June 2013 to address potential double taxation arising from the fact that both the Netherlands and the UK levy bank taxes (the UK tax was introduced on 1 January 2011, and the Dutch tax on 1 October 2012).

The treaty covers the Dutch bank tax, the UK bank levy and any identical or substantially similar taxes that may be imposed in addition to, or in place of, these taxes. The treaty also includes articles on the elimination of double taxation, a mutual agreement procedure and exchange of information.

The treaty stipulates that the contracting state in which the parent company or the head office is resident will have the primary authority to levy bank tax, because this is the entity that carries the systemic risk. The other contracting state will refrain from taxation, but will grant a credit for bank tax levied in the residence state. For example, if a UK parent company has a Dutch-registered subsidiary, the Netherlands will have to grant a credit for the UK bank tax levied on the UK parent company's worldwide bank tax base. However, if the direct parent company has its registered office in the UK, but the ultimate parent company of the group is resident in the Netherlands, the Netherlands is not required to grant a credit – instead, the UK will have to grant a credit for the Dutch bank tax levied.

Where an entity considers that the actions of one of the contracting states are not in accordance with the convention, it may present its case to either competent authority. If the competent authority of that contracting state is unable to resolve the issue on its own, it may resolve the case by mutual agreement with the competent authority of the other contracting state. In addition, the treaty requires the exchange of information relevant to carrying out the provisions of the convention or to the administration or enforcement of bank taxes.

— Peter Kavelaars (Rotterdam)
Partner
Deloitte Netherlands
pkavelaars@deloitte.nl

Jasper Korving (Rotterdam)
Manager
Deloitte Netherlands
jkorving@deloitte.nl

In brief

China: China's General Office of the State Council released a new "negative list" on 20 April 2015 that further reduces the number of sectors in which foreign investment is restricted or prohibited; the list was released along with the framework plans for three new pilot free trade zones (FTZs) in Fujian, Guangdong and Tianjin. The negative list applies in these pilot FTZs, as well as in the Shanghai FTZ as from 8 May 2015. Foreign investors engaged in activities that are not included on the list will enjoy the same treatment as domestic investors (i.e. national treatment), so it will not be necessary to obtain preapproval for a foreign investment project or to set up a foreign-invested enterprise. Instead, a reporting requirement will apply. The removal of certain restrictions on the 2015 list signal the government's intent to further liberalize foreign investment in the country.

Greece: A new installment settlement scheme has been introduced for overdue taxes and tax debt assessed by the Greek tax authorities, under which taxpayers will be granted full or partial relief from interest and penalties that otherwise would be due if certain requirements are fulfilled.

India: Following the release of India's 2015 budget, the tax authorities began to issue notices to foreign portfolio investors (FPIs) to assess minimum alternate tax (MAT) for prior years (for prior coverage, see *World Tax Advisor*, 8 May 2015). It has been reported that the fate of these assessments largely will depend on the outcome of the ruling in the case of *Castleton Investments*, which currently is being considered by the Supreme Court of India, and the parties reportedly have agreed to expedite the case. Some FPIs also have challenged their assessments in the Bombay High Court (although the court has issued a stay against the assessment in one case, this was based on procedural grounds, rather than on the merits of the case). The government has formed a committee to develop recommendations on how to efficiently resolve these disputes, and other disputes that may discourage foreign investment. In the interim, the tax authorities have announced that they are suspending the issuance of any new MAT assessments to FPIs and refraining from any "coercive action," and that they will not reopen existing cases unless a statute of limitations issue exists.
URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/150508_ib.html

Switzerland: The Federal Council has outlined the parameters for draft legislation to be prepared for the Corporate Tax Reform III, or CTR III, after the end of the consultation period on draft legislation published in 2014 (for prior coverage, see Switzerland Tax Alert, 23 September 2014). The following previously proposed measures will not be included in the draft legislation: the notional interest deduction on equity, changes to the participation exemption regime, the introduction of a capital gains tax on individuals and a provision that would allow parent companies to assume losses of Swiss and foreign subsidiaries that could not be used at the level of the subsidiary.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-switzerland-230914.pdf

Turkey: The Ministry of Finance is considering whether to bring electronically supplied services supplied by nonresident businesses to Turkish consumers within the scope of Turkish VAT. In principle, such supplies already are taxable in Turkey but, as there is no registration mechanism for nonresident entities and no self-accounting mechanism for consumers, it is not possible to account for the VAT due. The tax authorities are considering how they could collect the VAT due on such supplies, such as by imposing the obligation to withhold tax on payments made by consumers on the banks processing the transfers. There is no timetable for the introduction of new legislation or guidance, and it is unlikely that any announcements will be made until after the Turkish general election in June.

Tax treaty round up

At the end of each month, World Tax Advisor provides an update on recent tax treaty developments, with a focus on items that directly affect the withholding tax rates of the key jurisdictions covered by the Deloitte International Tax Source (DITS). Additional coverage may include stated negotiating priorities and other important tax treaty trends.
URL: http://www.dits.deloitte.com?id=us:em:na:wta:eng:tax

Unless otherwise noted, the developments discussed below are not yet in force.

Argentina-Chile: When in effect, the treaty signed on 15 May 2015 provides for a 10% withholding tax rate on dividends paid to a company that holds directly at least 25% of the capital of the payer company; otherwise, the rate will be 15%. A 4% withholding tax rate will apply to interest derived from the credit sale of machinery and equipment by a recipient that is the seller of the machinery/equipment; a 12% rate will apply to interest on loans granted by banks and insurance companies or from bonds or securities that are regularly and substantially traded on a recognized securities market. Otherwise, the rate will be 15%. A 3% withholding tax rate will apply to royalties paid for the use of, or the right to use, news. A 10% rate will apply to royalties paid in respect of copyrights for literary, artistic or scientific works (excluding royalties for motion picture films or films or tape for use in television broadcasting); and royalties paid for a patent, design or secret formula and industrial, commercial or scientific equipment or information, as well as payments for technical assistance. The rate in all other cases will be 15%.

Austria-Montenegro: The 2014 treaty entered into force on 21 April 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 5% of the capital of the payer company; otherwise, the rate will be 10%. The rate on interest will be 10%. A 5% withholding tax rate will apply to royalties paid for a copyright of literary, artistic or scientific work, including cinematographic films and recordings on tape or other media used for radio or television broadcasting or other means of reproduction or transmission or for computer software; and a 10% rate will apply to royalties paid for a patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

Croatia-Portugal: The 2013 treaty entered into force on 28 February 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company; otherwise, the rate will be 10%. A 10% withholding tax rate will apply to interest and royalties.

Croatia-Turkmenistan: When in effect, the treaty signed on 29 April 2014 provides for a 10% withholding tax rate on dividends, interest and royalties.

Czech Republic-Iran: When in effect, the treaty signed on 30 April 2015 provides for a 5% withholding tax rate on dividends. A 0% rate will apply to interest paid in connection with credit sales of merchandise or equipment and to interest paid on bank loans; otherwise, the rate will be 5%. An 8% rate will apply to royalties.

France-Germany: When in effect, the protocol signed on 31 March 2015 to the existing treaty provides that where dividends are paid out of income or gains derived from immovable property by a tax-exempt investment vehicle that distributes most of its income or gains annually, and the recipient of the dividends directly or indirectly holds 10% or more of the capital of the vehicle paying the dividends, the dividends may be taxed at the domestic rate applying in the source state. The protocol does not amend the rates for other dividends, interest or royalties.

Germany-Jersey: The treaty signed on 7 May 2015 to replace the existing agreement dating from 2008 contains no provisions on dividends, interest or royalties, so the domestic rates will continue to apply when the new treaty enters into effect.

Hungary-Saudi Arabia: The 2014 treaty entered into force on 1 May 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 5% withholding tax rate on dividends. Interest will be taxable only in the state of residence of the recipient. A 5% rate will apply to royalties paid for the use of, or the right to use, industrial, commercial or scientific equipment; otherwise, the rate will be 8%.

Iceland-Georgia: When in effect, the treaty signed on 13 May 2015 provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 25% of the capital of the distributing company; otherwise, the rate will be 10%. A 5% withholding tax rate will apply to interest and royalties.

Indonesia: The multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended, entered into force in Indonesia on 1 May 2015 and generally will apply as from 1 January 2016.

Ireland-Pakistan: When in effect, the treaty signed on 16 April 2015 to replace the 1973 treaty provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 25% of the capital of the payer company; otherwise, the rate will be 10%. The withholding tax rate on interest and royalties (and fees for technical services) will be 10%.

Ireland-Thailand: The 2013 treaty entered into force on 11 March 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 10% withholding tax rate on dividends. The rate will be 10% on interest paid to a financial institution (including an insurance company), or paid with respect to a sale of equipment, merchandise or services on credit (except where the sale is between persons not dealing with each other at arm's length); otherwise, the rate will be 15%. The rate on royalties for the use of, or the right to use, a copyright of literary, artistic or scientific work, including software, and motion pictures and works on film, tape or other means of reproduction for use in connection with radio or television broadcasting will be 5%; a 10% rate will apply to royalties paid for the use of, or the right to use, industrial, commercial or scientific equipment or a patent; and the rate will be 15% where royalties are paid for the use of, or the right to use, a trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

Ireland-Zambia: When in effect, the treaty signed on 31 March 2015 to replace the 1971 treaty provides for a 7.5% withholding tax rate on dividends and a 10% rate on interest. The withholding tax rate on royalties paid in respect of a copyright of scientific work or a patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience will be 8%; otherwise, the rate will be 10%.

Malaysia: Draft guidance from the Inland Revenue Board (IRB) indicated that Malaysia-based financial institutions and other persons with due diligence and reporting obligations under the US Foreign Account Tax Compliance Act (FATCA) would be required to begin reporting information to the IRB by 30 June 2015 (for prior coverage of the draft guidance, see *World Tax Advisor*, 27 March 2015). The IRB has now announced that this deadline has been deferred to an unspecified date because the intergovernmental agreement between Malaysia and the US to implement FATCA still is being finalized.
URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/150327_tr.html

Netherlands-Malawi: When in effect, the treaty signed on 19 April 2015 to replace the treaty that was terminated in 2014 provides for a 5% withholding tax rate on dividends paid to a company that holds at least 5% of the capital of the payer company; a 0% rate will apply to dividends paid to pension funds. In all other cases, the domestic withholding tax rates will apply: 15% for the Netherlands and 10% for Malawi. The treaty provides for a 10% withholding tax rate on interest and a 5% rate on royalties.

Netherlands-UK bank tax treaty: See article in this issue.
URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/150522_9.html

Portugal-Georgia: The 2012 treaty entered into force on 18 April 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 25% of the capital of the payer company; otherwise, the rate will be 10%. A 10% withholding tax rate will apply to interest and a 5% rate will apply to royalties.

Saudi Arabia-Azerbaijan: The 2014 treaty entered into force on 1 May 2015 and will apply as from 1 January 2016. When in effect, the treaty provides for a 5% withholding tax rate where dividends are paid to the government, the central bank, an entity wholly owned by the government or a recipient that has invested at least USD 300,000 (or its equivalent in any other currency) in the capital of the distributing company; otherwise, the rate will be 7%. A 7% withholding tax rate will apply to interest and a 10% rate will apply to royalties.

Sweden: On 23 April 2015, the Ministry of Finance released a memorandum on proposed legislation to introduce the OECD Standard for the Automatic Exchange of Financial Account Information in Tax Matters. The memorandum describes the proposed legislative changes that are necessary to implement the OECD standard in Sweden, and also proposes the required changes in respect of the amended EU directive on administrative cooperation in the field of taxation. The proposed legislation, which may apply as from 1 January 2016, would require financial institutions with a reporting obligation in Sweden to identify foreign accountholders and report them to the Swedish tax authorities, which would then automatically provide the information to the tax authorities of the country in which the accountholder is resident.

United States: The Treasury Department released draft updates to the US model income tax treaty, which is used as a baseline for negotiating US tax treaties, for public comment on 20 May 2015. The draft provisions address topics including “stateless” income or double nontaxation of income; corporate inversions; and the limitation on benefits, including limits to address base erosion and profit shifting (BEPS). The US model has not been updated since 2006.

United States: An intergovernmental agreement to improve international tax compliance and to implement the Foreign Account Tax Compliance Act (FATCA) was signed with Kuwait on 29 April 2015.

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Australia

Draft diverted profits legislation to be released/GST to be extended
Australia’s Treasurer announced on 11 May 2015 that legislation will be introduced to address tax avoidance by multinationals in respect of diverted profits. Draft legislation for consultation was issued on 12 May, and if approved, the new rules are intended to apply as from 1 January 2016.
Issue date: 11 May 2015
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-australia-11-may-2015.pdf

2015-16 federal budget: What does it mean for multinationals?
Australia’s 2015-16 federal budget, handed down on 12 May 2015, contains a range of measures designed to address tax avoidance by multinationals, including an amendment to the general anti-avoidance rules, enhanced penalties and new transfer pricing documentation,

as well as the imposition of goods and services tax to a broad range of intangibles supplied from outside Australia.
Issue date: 14 May 2015
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-australia-14-may-2015.pdf

OECD

OECD releases draft guidance on cost contribution arrangements

The OECD on 29 April 2015 released a discussion draft on cost contribution arrangements (CCAs) that contains proposed revisions to Chapter VIII of the transfer pricing guidelines. The CCA discussion draft was issued in relation to the OECD's base erosion and profit shifting (BEPS) action plan under action 8 (transfer pricing valuation with respect to transfers of intangibles).
Issue date: 6 May 2015
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-transfer-pricing-alert-15-008-6-may-2015.pdf

United States

OECD releases revised discussion draft on BEPS action 7 – Preventing artificial avoidance of PE status

On 15 May 2015, the OECD Committee on Fiscal Affairs released a new discussion draft of BEPS action 7, *Preventing the Artificial Avoidance of PE Status*, The discussion draft, which is not a consensus document, chooses among the multiple-choice options of the 2014 discussion draft of action 7 and provides proposed commentary language that expands upon each chosen option. Comments are requested on the new discussion draft by 12 June 2015.
Issue date: 19 May 2015
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-unitedstates-19-may-2015.pdf