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Guidance reinforces requirements to establish beneficial ownership status in Russia

On 1 June 2018, Russia's Federal Tax Service (FTS) made available a letter dated 28 April that it sent to the regional departments of the FTS and their tax offices and that functions as guidance to the local tax authorities on the application of the concept of beneficial ownership (BO). The letter clarifies the criteria that the tax authorities should consider when determining BO status, provides practical examples of when tax treaty benefits should be denied and summarizes tax controversy practice regarding the application of the concept. Although the guidance in the letter is not binding tax law, the tax authorities generally must follow guidance issued by the FTS. The guidance likely will make it more burdensome for foreign recipients of Russia-source income (*e.g.* foreign holding and treasury companies) to qualify for benefits under an applicable tax treaty and prove BO status.

The BO rules, introduced into the tax code in 2015 and amended in 2017, require foreign companies seeking benefits under a Russian tax treaty to provide the payer of the income with documentation that establishes that the company meets Russia's BO requirements. The foreign company also must provide a tax residence certificate, an "apostil" (unless the treaty parties agree to waive this requirement) and a notarized Russian translation of all documents that are in a foreign language. The Ministry of Finance has issued several letters that clarify the steps a Russian payer of income must take to confirm that the foreign recipient is the beneficial owner of the income (for prior coverage, see *World Tax Advisor*, 28 April 2017 and *World Tax Advisor*, 26 February 2016). Failure to comply with the documentation requirements will result in the Russian payer being held liable for withholding tax on the payments at domestic rates (*e.g.* 15% on dividends and 20% on interest, royalty and other payments), as well as fines (20% or 40% of understated tax) and late payment penalties.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170428_4.html
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160226_6.html

The key interpretations and conclusions of the FTS in the new letter are as follows:

- The BO concept is a tool used to prevent tax treaty abuse. It should not be applied in a narrow technical sense – when determining BO status, the tax authorities must consider the purpose and meaning of the treaty, as well as the substance-over-form principle and the prevention of tax treaty abuse. Under the FTS' interpretation, BO falls within the scope of the "unjustified tax benefit" concept and the general anti-avoidance rule (GAAR) (for prior coverage, see *World Tax Advisor*, 13 October 2017) and, therefore, should be applied in conjunction with the GAAR.
  URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/171013_6.html
- Where a dispute arises regarding the application of treaty benefits, the key responsibilities of the tax authorities are to analyze the business purpose and the nature of the relevant transaction. Treaty benefits should be denied where a series of transactions was carried out with the main purpose of eroding the tax base or where arrangements were set up in such a way to allow the granting of reduced tax rates under a treaty.
- The application of the BO concept in conjunction with the GAAR allows the tax authorities to expand the application of BO beyond cases involving treaty abuse. For example, the authorities can reclassify the arrangements (*e.g.* debt into equity) and apply tax rules relevant to the reclassified income, and interpret a series of transactions as hybrid structures resulting in the application of the relevant local rules preventing base erosion.
- The BO concept may apply not only to the receipt of passive income, but also other types of income (*e.g.* intercompany service fees).
- Tax treaty benefits may be granted only to a tax resident of the treaty partner that is the actual (beneficial) owner of the income.
- Treaty benefits may not be granted where financing activities and income repatriation are not sufficiently connected with the investment of foreign capital into the Russian economy.
- Holding companies generally should not be treated as beneficial owners because their business activities are limited to investing in affiliated entities and financing (treasury) activities, and they receive only passive income (such as dividends, interest and royalties). One-time business transactions of holding companies (*e.g.* consulting services, foreign currency exchange gains, purchases of preferred shares, participations in other companies, etc.) are irrelevant in the overall BO analysis.
- Taxpayers must be able to substantiate why their transactions are executed in a certain form and the participation of a foreign entity in their business and transaction structure, and provide a reasonable and sustainable justification for such structure and the risks assumed.
- The tax authorities should consider all of the following factors when analyzing whether a foreign recipient of income is the beneficial owner:
  - Reasons for including the foreign entity in the structure, and whether the entity operates as an independent business unit;
  - Whether the foreign entity has economic substance, such as ownership of sufficient tangible and intangible assets, personnel and offices, and whether it incurs a material amount of expenses to maintain its operations, etc.;
  - Evidence that the company receiving the income does not pass on the income to another nonresident company;

- Ability of the company's officers to exercise power and authority with respect to the use and disposal of the income received from Russia; and
- Level of business activities and entrepreneurial risks assumed.

According to the FTS, the foreign company should not be treated as a beneficial owner of income if the company's activities cannot be viewed as a separate business unit, the company is not engaged in or bears no financial or other risks customary for entrepreneurial activities, the payments received flow through to other affiliated entities, the company earns no benefit from the use and disposal of the income received and the company's employees do not exercise management and control over the company's operations. If the tax authorities determine that some or all of these factors are present, they likely will conclude that the company does not meet the BO requirements.

- The tax authorities may deny tax treaty benefits if they can show that the income recipient does not meet the BO criteria. It is not necessary for the authorities to ascertain the identity of the real beneficial owner of income, but if the taxpayer discloses the beneficial owner and provides evidence that the actual beneficial owner is entitled to the reduced tax rates under the relevant treaty, the tax authorities should verify whether the actual beneficial owner receives the income from a participation in the company that directly received the income from Russia, examine any evidence presented by the recipient of the income to support the BO status and confirm that the actual beneficial owner reported the indirectly received income and paid tax on the income in its country of residence.

Comments

The application of tax treaty benefits and BO status have been areas of focus for the Russian tax authorities in recent years, and this trend is likely to continue. The FTS letter clarifies the practical approach that the tax authorities will take in determining BO status, and clearly signals that the authorities intend to rely on the BO concept in conjunction with the GAAR to prevent tax base erosion and treaty abuse. This will require taxpayers to prepare comprehensive BO documentation, as well as documentation demonstrating the business purpose of cross-border transactions before receiving any income from a Russian source.

Potentially affected parties should understand the contents of the FTS letter and be aware that they may need to provide additional information to the tax authorities to support BO status and the business purposes of transaction(s) and their ownership structures. They also should review existing and future cross-border transactions and structures, consider whether restructuring is needed to mitigate potential tax disputes and ensure that robust documentation evidencing substance, functions, risks, etc. is available.

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State tax implications of US *Wayfair* decision for non-US companies

On 21 June 2018, the US Supreme Court issued its decision in *South Dakota v. Wayfair et.al.*, overturning the "physical presence nexus standard" previously established by the court for a US state or locality to impose a sales or use tax collection responsibility on a remote seller.

Prior to *Wayfair*, non-US companies that sold goods or taxable services to US customers generally were not subject to state or local sales tax collection on such sales unless they had a physical presence in the state of the customer, either directly or through an agent. With the court's decision in *Wayfair*, remote sellers with a virtual presence in a state (including non-US companies and/or their US subsidiaries) are faced with potential collection and filing responsibilities in states with laws similar to those of South Dakota, as well as in states with provisions extending nexus to "the extent permissible under the US Constitution." Further, generally neither permanent establishment (PE) rules nor tax treaties provide safe harbors for foreign companies when determining nexus for state (or local) sales and use tax purposes.

Considerations for foreign companies with US sales

The South Dakota statute upheld in *Wayfair* imposes a sales tax collection responsibility on sellers if, on an annual basis, they have greater than USD 100,000 in sales to, or 200 or more transactions with, South Dakota customers.

As a general rule, the levy of sales/use tax under the South Dakota statute is determined based on the location of the purchaser, without regard to where the sale originated. As a result of the Supreme Court's decision, to the extent a remote seller, whether domestic or foreign, has sufficient sales/transactions in a state with a rule similar to the one upheld in South Dakota, the seller now will have a collection obligation in that state. It is important to note that states generally are not bound by tax treaties, and bilateral tax treaties generally do not otherwise apply to non-income taxes at the state level.

Based on *Wayfair*, companies should consider the following:

- **Whether a state potentially may levy sales and use tax:** As noted above, a sale typically is subject to sales/use tax in the state of the purchaser. However, it can be complicated to determine where to source a particular sale, especially where the purchaser is a large organization with many locations. For example, the sale of a software license that is used by an organization with office locations in multiple tax jurisdictions may result in sales tax potentially spread among those jurisdictions. In addition, certain states already have enacted remote seller statutes similar to the one at issue in *Wayfair*, while others have not.
- **Whether the products and/or services being sold are subject to tax:** Unlike some value added taxes, the vast majority of states limit the imposition of sales tax primarily to sales of tangible property, *i.e.* many services are not subject to sales and use tax. However, an increasing number of states tax different kinds of business services, notably those involving data processing, software and online or other cloud-based information technology services. In addition, certain states do not tax software except where it is delivered in tangible form, while others tax electronically downloaded software and "software as a service" subscriptions.
- **Whether exemptions are available:** A number of different types of exemptions may exist, depending on a particular state's rules. These exemptions typically apply to one or more of the following:
  - Sales of goods or services for use in manufacturing or industrial processing;
  - Sales made for resale; and
  - Sales to non-profit, government or other tax exempt entities.

Compliance requirements

As states generally do not recognize branches in the context of sales/use taxes, the legal entity making the sale and with nexus in the state has the sales/use tax collection responsibility and must register with the state and file periodic sales/use tax returns. Companies will need to have systems in place to be able to accurately compute and collect sales tax at the time of the sale to the customer.

In addition, approximately 10 states have enacted sales tax notification and/or reporting statutes, which may require remote sellers to provide in-state buyers with information regarding their use tax obligations and/or a report to the state detailing in-state purchases. Failure to comply in some instances may result in the levy of per transaction penalties, the amount of which could exceed the underlying sales/use tax.

Companies may have an obligation to register for sales tax collection even where an exemption exists. States typically require certain documentation to be maintained by the seller, such as properly completed resale exemption certificates, to validate their qualification for an exemption.

Other considerations

Potential retroactivity: Sales/transaction-based nexus statutes or administrative rules have been in effect since at least 2016 in a number of states, and whether the state will enforce the Wayfair decision retroactively must be carefully analyzed.

Tax exposure for prior periods: Prior to registration in a state, companies should analyze whether there are any exposures for prior sales to customers (or for failure to provide the required information to buyers or a state revenue agency) and whether a pre-registration agreement with a certain state (*e.g.* through a voluntary disclosure agreement) should be negotiated.

Effect on other state taxes: The court's ruling in *Wayfair* potentially also may impact the state-level nexus determinations for income, gross receipts, telecom, utility and/or franchise taxes. While many states ultimately conform to the benefits of PE clauses in US bilateral tax treaties for state income tax purposes, certain states do not limit the income tax base to effectively connected income, and may not extend safe harbors such as those provided by Public Law 86-272 to foreign taxpayers. (Public Law 86-272 is a US law enacted in 1959 that prohibits states from levying a net income tax upon an out of state company if the company's activities in a state are limited to the solicitation of orders for the sale of tangible personal property and the orders are approved and filled from outside the state.)

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Chile:
Tax reform bill will include measures on taxation of goods/services sold online

The Chilean government is working on a tax reform bill that would simplify and modernize the corporate income tax system, and on 21 June 2018 the president announced that the bill will include measures to tax e-commerce. (At the time this issue was going to press, additional announcements were expected on potential measures.)

On 11 March 2018, the new government led by President Piñera took office and, in the president's inaugural speech, he pledged to make adjustments that would simplify the tax reform implemented by the previous government, to boost investment and economic growth.

Since then, the government has been holding meetings to set the course of the reform, which initially proposed gradually reducing the Chilean corporate income tax rate (27%) to the average for OECD countries (25%), in addition to simplifying the dual tax system (for prior coverage, see *World Tax Advisor*, 19 August 2016). Under the dual tax system, taxpayers are subject to one of the following tax regimes:
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160819_4.html

- The fully integrated regime, under which partners/shareholders are taxed on their share of the profits that are accrued annually by the Chilean entity, at a combined income tax rate of 35%; or
- The partially integrated regime, under which shareholders are taxed when profits are distributed, generally at a combined income tax rate of 44.45%, although foreign partners/shareholders that are resident in a country that has a tax treaty in force with Chile will be entitled to a full tax credit and, thus, may benefit from a combined rate of 35%.

The Ministry of Finance recently indicated that the government has postponed the idea of lowering the corporate tax rate. Instead, the tax reform bill would be oriented toward the modernization and simplification of the current tax system, making the system more taxpayer-friendly and providing taxpayers a higher degree of certainty on the tax treatment of their investments.

The "reintegration" of the tax paid by companies with the tax payable by shareholders (withholding tax in the case of nonresident shareholders) is still under analysis. The previous tax reform reduced the corporate tax credit for shareholders on distributed profits from 100% to 65%, resulting in a combined Chilean tax charge of 44.45% under the partially integrated regime (except for shareholders from treaty countries, which continue to benefit from a 100% credit), as described above.

The measures under analysis include the following:

1. Full integration of the tax regimes;
2. Clarifying the scope of the general anti-avoidance rule;
3. Reducing the number of tax records that companies must keep; and
4. Simplifying the regime for small and medium-sized enterprises.

On 21 June, the president announced that the bill will include proposals on the taxation of services rendered and goods sold by digital platforms.

The government is analyzing the creation of a new "tax on digital services" that would tax the income of nonresident companies providing digital services to Chilean customers through internet platforms for intermediation and entertainment (including online advertising services, streaming, data transmission and digital intermediation). According to the Ministry of Finance, the new rules would follow the recommendations of the OECD on this topic.

Another focus of the reform would be on digital commerce, which would consist of strengthening and modernizing border controls in relation to imports of tangible goods acquired through digital platforms that are not established in Chile (*i.e.* not resident in Chile and not registered in Chile for tax purposes), to ensure the collection of VAT and customs duties, where applicable.

The government expects to present the bill to Congress in September 2018.

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India:
AAR and tribunal address what constitutes a PE

Two recent rulings issued by India's Authority for Advance Rulings (AAR) have considered what constitutes a permanent establishment (PE) in India, while the Mumbai Income Tax Appellate tribunal (ITAT) has examined the criteria for a dependent agent permanent establishment (DAPE) to exist.

Indian subsidiary of foreign company is not a PE

The taxpayer in the first ruling, issued on 31 May 2018, is an exporter of crude oil from the Middle East. The taxpayer had established a subsidiary in India as a separate legal entity, to provide procurement-related support services under a service agreement and business/marketing support functions under a proposed addendum to the service agreement. The subsidiary received arm's length compensation for its services. The taxpayer requested a ruling from the AAR on whether the subsidiary constituted a PE of the taxpayer in India.

The AAR held that the Indian subsidiary would not automatically constitute a PE of the taxpayer unless it could be demonstrated that:

- The taxpayer proposes to carry out its main business either itself from an establishment in India, or through its employees and personnel; or
- The Indian subsidiary can act as an agent of the parent company in India (*i.e.* it proposes to carry out activities that are mentioned specifically in the relevant tax treaty between India and the jurisdiction of residence of the taxpayer as constituting an agency PE).

Foreign-based global payment solution provider's processor in India is a PE

The second AAR ruling, issued on 6 June 2018, concerned a Singapore-based company that is a member of a group of companies providing global payment solutions and is engaged in the business of processing electronic payments for transactions. The taxpayer provides its customers in India with interface processors, allowing automatic connection to the group's network and processing centers. The taxpayer facilitates the authorization, clearing and settlement of payment transactions via the network and processing centers outside India. The taxpayer's Indian subsidiary owns and maintains the interface processors at customers' premises in India.

Relying on the decision of India's Supreme Court in the *Formula One World Championship* case (for prior coverage, see *World Tax Advisor*, 26 May 2017), the AAR considered the conditions set forth by the court to create a fixed place PE and ruled against the taxpayer, observing that:
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_5.html

- The interface processors located in India constitute a PE of the taxpayer in India;
- Services rendered with respect to the use of a global network and infrastructure to process card payment transactions for customers in India also constitute a PE of the taxpayer in India;
- The payment of arm's length remuneration to the PE on account of the Indian subsidiary for activities performed/to be performed in India does not absolve the taxpayer from any further attribution of its global profits in India because the functions, assets and risks of the Indian subsidiary do not reflect the functions and risks of the taxpayer performed or undertaken by the subsidiary;
- A proportion of the fees received by the taxpayer from Indian customers (comprising transaction processing fees, assessment fees and miscellaneous transaction-related fees) would be classified as royalties under article 12 of the India-Singapore tax treaty. However, since the royalties are effectively connected to a PE, they would be taxed under article 7 (business profits), rather than article 12. Such fees cannot be classified as fees for technical services under article 12 since the services are standard services; and
- Indian nonresident withholding tax at the appropriate rate should be applied to the full amount of all payments made to the taxpayer.

The following conclusions can be drawn from the AAR ruling:

- Active equipment, a network or infrastructure in India through which business is conducted can constitute a fixed place PE depending on the facts and circumstances;
- Payments for standardized services arguably would not be subject to withholding tax unless a PE is created; and
- The long-accepted argument that the payment of arm's length consideration to a PE extinguishes the risk of additional profit attribution is not necessarily valid and can be challenged. This is in line with similar observations in the commentary to the OECD model treaty.

Indian franchisee does not create DAPE of a franchise-owner in India

On 29 June 2018, the ITAT ruled in the case of a US franchise-owner that entered into a master franchise agreement (MFA) with an Indian company, under which the US company granted a franchise for its stores in India to the Indian company. Under the MFA, the Indian company was entitled to the ongoing use of the US company's trademark and to use new technology, new product development and system improvement in consideration for store opening fees and payment of a fee equivalent to 3% of sales revenue. The Indian company also had the right to enter into sub-franchise agreements, on which the US company was entitled to receive store opening fees and 3% of sales revenue.

The US company maintained that the franchise income received from the Indian company should be treated as royalty income, taxable at 10% in India. The Indian tax authorities took the position that the Indian company constituted a DAPE of the US franchisor in India, with the result that the franchise income should be treated as business income, taxable at 40% in India.

The Mumbai ITAT disagreed with the tax authorities, holding that the Indian company did not satisfy any of the conditions to constitute a DAPE of the US company in India, as specified in article 5(4) (PE article) of the India-US tax treaty. As a result, the US company's income from franchising in India could not be subject to tax as business income in India. The ITAT's decision was based on the following facts and circumstances:

- The Indian company did not in any manner act on behalf of the US company;
- Although 3% of sales revenue was payable to the US company as consideration for the rights granted under the MFA, all the profits and losses from the stores belonged only to the Indian company and the sub-franchisees;
- While certain clauses within the MFA entitled the US company to examine the accounts, approve suppliers and exercise some control over advertising, neither the Indian company nor the sub-franchisees retained any stock or goods on behalf of the US company;

- The Indian company did not enter into sub-franchise agreements or other agreements on behalf of the US company; all agreements were independently negotiated, entered into and executed by the Indian company; and
- The sales prices of products sold in the Indian retail outlets were determined by the Indian company, with only limited guidance from the US franchisor.

The ITAT also observed that certain restrictions provided in the MFA were only to safeguard the brand value of the franchisor and to ensure the correct receipt of royalty income.

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Ukraine:
Consequences of transactions with residents in low tax jurisdictions clarified

Guidance issued by Ukraine's tax authorities on 2 May 2018 clarifies the consequences of transactions with residents of one of the countries included on the "low-tax" jurisdiction list, then subsequently removed from the list (for prior coverage, see *World Tax Advisor*, 23 February 2018). Estonia, Georgia, Hungary, Latvia and Malta were removed from the low-tax jurisdiction list effective 7 March 2018 and Bulgaria was removed as from 25 April. The guidance addresses specifically whether transactions taking place in 2018 before the removal of the countries from the list should be deemed to be controlled transactions.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180223_4.html

Countries are included on Ukraine's low tax jurisdiction list if they have not concluded an exchange of information agreement with Ukraine, do not exchange information with Ukraine, or if the country's corporate tax rate is five or more percentage points lower than the (18%) rate in Ukraine or the country operates a preferential tax regime and it is possible not to pay corporate income tax in the country.

In general, business transactions with residents of listed countries are treated as controlled transactions for transfer pricing purposes (regardless of whether the parties are related), and taxpayers may deduct only 70% of the cost of goods, work and services purchased in transactions with residents of listed countries unless the taxpayer can demonstrate that the transactions are on arm's length terms.

In the May guidance, the tax authorities state that if a Ukrainian taxpayer engaged in a transaction with a counterparty from one of the excluded countries during the period 1 January to 25 April 2018, the transaction will be deemed to be controlled for the period the country was on the list if two conditions are satisfied: (i) the value of the transaction within the relevant period exceeds UAH 10 million; and (ii) the Ukraine taxpayer's total annual revenue exceeds UAH 150 million. In this case, any transactions with an entity incorporated in Estonia, Georgia, Hungary, Latvia or Malta during the period from 1 January 2018 to 7 March 2018 (25 April 2018 for Bulgaria) will be deemed to be controlled and will be subject to the above restrictions.

Currently, 79 jurisdictions remain on Ukraine's low tax jurisdiction list.

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United Kingdom:
New treaties signed with Guernsey, Isle of Man and Jersey

On 2 July 2018, the UK signed new tax treaties with Guernsey, Isle of Man and Jersey to replace the 1952 treaties for Guernsey and Jersey and the 1955 treaty for Isle of Man. The provisions in the three new treaties with the Crown dependencies are similar and reflect some of the measures under the OECD BEPS project.

When in effect, each treaty will provide for a 15% withholding tax rate on dividends paid out of income (including gains) derived directly or indirectly from certain immovable property by an investment vehicle resident in a contracting state whose income from such property is exempt from tax and that distributes most of that income annually (other than dividends paid to pension schemes, which will be exempt); otherwise, the rate will be 0%.

A 0% withholding tax rate will apply on interest and royalties paid to the following recipients (otherwise, the domestic rate will apply):

- An individual;
- A company whose principal class of shares is substantially and regularly traded on a recognized stock exchange; and
- A company less than 25% of whose shares or other rights are owned, directly or indirectly, by persons who are not residents of the other contracting state.

A 0% rate also will apply on interest paid to a pension scheme, a bank or building society and any other financial institution unrelated to and dealing wholly independently with the payer.

In addition, each treaty will apply a 0% rate on interest and royalties paid to any other person provided the competent authority of the treaty partner that has to grant the benefits determines that the establishment, acquisition or maintenance of that person, or the conduct of its operations, does not have as its principal purpose or one of its principal purposes to secure the benefits of the 0% rate.

Each treaty will enter into force on the date as of which both treaty partners have notified the other that they have ratified the treaty. Each treaty will apply for withholding tax purposes to amounts paid or credited as from the first day of the second month following the date the treaty enters into force.

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Uruguay:
Guidance issued on compliance obligations of digital services providers

Guidance issued by Uruguay's tax authorities and published in the official gazette on 29 May 2018 clarifies the tax obligations of nonresidents supplying digital services in the country. The decree, which applies as from 1 July 2018, has both nonresident income tax (IRNR, a tax levied on the income of nonresidents that do not have a permanent establishment in Uruguay) and VAT implications.

Nonresident suppliers of certain e-services (see below) have been subject to IRNR and VAT since 1 January 2018 on supplies made to customers (both businesses (B2B) and private individuals (B2C)) in Uruguay. The decree requires such nonresident suppliers to pay IRNR and VAT on a monthly basis starting on 1 July 2018. The tax authorities will be announcing an installment regime for nonresidents to make payments relating to supplies made during the period 1 January to 30 June 2018.

Covered services

The following supplies fall within the scope of digital services:

- Production, distribution or intermediation of films or tapes, TV streaming or audiovisual downloads through the internet or other technological platforms, apps or other similar means (advertising is not covered); and
- Mediation and intermediation activities rendered by digital service providers carried out through the internet.

The mediation and intermediation services imply an intervention in the principal operation of the supplier (*i.e.* supply or demand of services):

- The services primarily are automatic, which implies a minimum level of human intervention and the services cannot be carried out without information technology; and
- The specific services are the principal operation of the supplier.

The services will be deemed to be wholly rendered in Uruguay (and therefore fully subject to IRNR and VAT) when both the buyer and the seller are located in the country. If either the seller or the buyer are located abroad, only 50% of the services will be deemed to be rendered in Uruguay and, thus, only 50% of the services will be subject to IRNR and VAT.

Criteria to determine customer location

The decree clarifies that a customer will be deemed to be in Uruguay for purposes of the above rules if the invoicing address or the IP address used to purchase the services is located in Uruguay. If the buyer's location cannot be determined using the invoicing or IP address, a presumption will arise that the customer is in Uruguay if the service payments are made through electronic payment means managed from Uruguay (*e.g.* credit or debit cards).

Compliance requirements for nonresident suppliers

In cases of B2B supplies of digital services, the local recipient must withhold both IRNR and VAT on the payment starting on 1 July 2018. For B2C supplies, the tax authorities intend to require the nonresident supplier to register for Uruguayan VAT and account for the tax directly, although no mechanism to facilitate this process has been set up. In the interim, the tax authorities are likely to require nonresident entities that only provide the services outlined above to appoint an agent in Uruguay for tax purposes.

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In brief

Australia: On 21 June 2018, the Australian Taxation Office (ATO) issued a ruling on the central management and control (CMAC) test for determining corporate residence and that sets out a new approach to the test. According to the ruling, a company that has its CMAC in Australia and carries on business (whether in Australia or not) will be deemed to carry on business in Australia. The ATO considers that it is no longer necessary for any part of the actual trading or investment operations to take place in Australia since the CMAC activities are part of carrying on the business. The ruling will impact foreign operating companies of Australian groups, foreign intermediary holding companies controlled by Australian groups and foreign holding companies of foreign-controlled Australian groups.

In another residence related development, the Board of Taxation review of the tax residence rules for individuals published on 10 July 2018 proposes a modernization of the statutory tests, including adopting a "bright line" physical presence test for foreign individuals working in Australia and for Australian nationals working overseas. The changes could have significant implications for mobile employees, limiting the scope and benefit of the "temporary resident" concession. There is no timetable for any changes.

Barbados: The tax authorities issued a press release on 6 July 2018 announcing that the Ministry of Finance, Economic Affairs and Investment has postponed the effective date of the new individual income tax rate band (40% for individuals earning more than BBD 75,000) from 1 July 2018 to 1 August 2018. The new rate band was part of the budget proposals presented on 11 June (for prior coverage, see *World Tax Advisor*, 22 June 2018).
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180622_1.html

Chile: The tax authorities issued a resolution on 30 April 2018 amending the application of the reverse charge mechanism for withholding and accounting for VAT by authorized withholding agents. From 1 August 2018, the requirement to apply the reverse charge mechanism no longer will depend on the nature of the supply but will be determined by the extent to which taxpayers comply with their VAT filing and payment obligations. Taxpayers that repeatedly fail to comply with their VAT obligations will be included on a list published on the tax authorities' website. Withholding agents involved in transactions with taxpayers on the list will be required to withhold and account for VAT.

China: A draft law that makes fundamental changes to the individual income tax (IIT) system was submitted to the Standing Committee of the National People's Congress for deliberation on 19 June 2018 and released to the public for consultation on 29 June. The draft would revise the definition of a resident, consolidate various categories of income, and introduce more itemized deductions and anti-avoidance rules. Significantly, the draft would adopt the "183-day test" for determining residence, which would make it easier for a non-China-domiciled individual to be considered a Chinese resident so that the individual's worldwide income could be subject to Chinese IIT. Anti-avoidance rules (similar to those that apply for enterprise income tax purposes) would allow the Chinese tax authorities to initiate tax adjustments and collect underpaid tax with overdue interest in certain situations. If approved, the law generally would become effective on 1 January 2019.

European Union: On 21 June 2018, the Court of Justice of the European Union (CJEU) ruled that Danish tax legislation that provides for an exemption from Danish withholding tax on dividends distributed by a Danish resident company to Undertakings for the Collective Investment of Transferable Securities (UCITS) resident in Denmark, but not to nonresident UCITS established in other EU member states, is a violation of EU law (for prior coverage, see *World Tax Advisor*, 26 January 2018). UCITS established outside the EU also should be covered by the decision. Following the ruling, Denmark will be required to amend the rules on the taxation of dividends distributed to Danish and foreign UCITS. Foreign investment funds may be able to claim repayments of Danish withholding taxes suffered on dividends. The CJEU decision may be relevant for other EU member states that have similar laws.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180126_ib.html#EU2

Greece: Parliament ratified a law on 14 June 2018 that includes the introduction of an additional condition for determining whether tax losses carried forward by a legal entity will be forfeited when there is a change in ownership, which has retroactive effect as from 1 January 2014.

Hong Kong: An ordinance that expands the scope of the profits tax deduction for capital expenditure incurred on the purchase of intellectual property rights (IPRs) was enacted on 29 June 2018. The ordinance expands the scope of the profits tax deductions for capital expenditure incurred from purchasing IPRs from five types to eight. The original five types of IPRs are patents, know-how, copyrights, registered designs and registered trademarks; added to this list are rights in layout design (topography) of integrated circuits, plant varieties and performances. Such capital expenditure may be deducted generally over five consecutive years on a straight-line basis starting from the year of purchase. The new rules apply to expenditure incurred in year of assessment 2018/19 and thereafter.

International: The tax authorities from five countries – Australia, Canada, Netherlands, the UK and the US – announced on 3 July 2018 that they have established a joint operational alliance called the "Joint Chiefs of Global Tax Enforcement" or "J5" to enhance the level of international and cross government cooperation to build a comprehensive and global response to international and transnational tax crime. Membership of the J5 includes the heads of tax crime units and senior officials from the tax authorities of each country. The five-country alliance will build on existing international cooperation by sharing intelligence, data, technology and expertise, and will work together on joint operations to crack down on those that enable and facilitate offshore tax crime. More details on the J5 initiatives will be released during 2018.

Italy: On 2 July 2018, the tax authorities published further expected guidance on the new VAT electronic invoicing (e-invoicing) obligation that will apply as from 1 January 2019 (for prior coverage, see *World Tax Advisor*, 11 May 2018). The guidance clarifies that mandatory e-invoicing will not apply to foreign taxable persons that have an Italian VAT registration number – only Italian resident companies will fall within the scope of the new rules. Based on the new

guidance, as from 1 January 2019, e-invoices must be issued by Italian resident companies and e-invoices can be received by nonresident companies that are VAT-registered in Italy. In the latter case, the Italian supplier that issues the e-invoice also must issue a paper invoice (if so requested by the customer). Both the paper and electronic invoices will be valid for the purposes of recovering VAT. A law decree issued on 27 June 2018 officially postpones the application of the e-invoicing obligation for supplies of fuel from 1 July 2018 to 1 January 2019.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180511_ib.html#Italy

Malaysia: Malaysian Financial Reporting Standard 15 (MFRS 15), "Revenue from Contracts with Customers," sets forth a new approach to revenue recognition that could affect companies' tax computations. MFRS 15 is effective for reporting periods commencing on or after 1 January 2018, with early application permitted. It applies to new contracts created on or after the effective date and to existing contracts that are not yet complete as of the effective date. Since the tax rules and regulations for revenue recognition have not been amended, changes in the timing or amount of revenue recognized under MFRS 15 could give rise to book-tax differences. Affected companies should consider MFRS 15 when calculating their tax estimates and advance tax payments beginning from year of assessment 2018 (assuming the company has not opted for early adoption) for basis periods commencing on or after 1 January 2018.

New Zealand: Legislation motivated by BEPS concerns and containing tax measures affecting multinationals has passed its third reading (with small last-minute changes at the final stages) and received royal assent (for prior coverage, see *World Tax Advisor*, 11 May 2018). The act will affect New Zealand's debt pricing, thin capitalization calculation and permanent establishment rules, among other things, and generally will apply to income years starting on or after 1 July 2018.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180511_ib.html #NZ

Nigeria: On 19 June 2018, the tax authorities (FIRS) released country-by-country (CbC) reporting regulations effective for reporting years beginning on or after 1 January 2018 and that generally follow the BEPS action 13 final report. Multinational (MNE) groups with an ultimate parent entity (UPE) or constituent entity (CE) that is a tax resident of Nigeria and consolidated revenue of at least NGN 160 billion during the accounting year immediately preceding the reporting year are required to file CbC reports not later than 12 months from the last day of the reporting year. A resident CE must notify FIRS on or before the last day of the group's reporting accounting year whether it is the group's reporting UPE or surrogate parent entity, or provide FIRS the identity and tax residence of the entity that will file the CbC report. Penalties apply for failure to comply with the CbC reporting and notification requirements. Nigeria is expected to implement the automatic exchange of CbC reports by the first CbC report filing due date (*i.e.* 31 December 2019) to avoid duplication of filing obligations by MNE groups in Nigeria.

OECD: On 16 July 2018, the OECD announced that the Platform for Collaboration on Tax is requesting public comments on a revised "toolkit" report that aims to help developing countries design policies on the taxation of offshore indirect transfers of assets. A companion document to the revised report summarizes comments received from August to October 2017 on the previous draft of the report, and how the revised report responds to those comments (for prior coverage, see *World Tax Advisor*, 18 August 2017). Comments on the revised report are requested by 24 September 2018.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170818_ib.html#OECD

On 16 July 2018, the Global Forum on Transparency and Exchange of Information for Tax Purposes published peer review reports assessing seven jurisdictions' compliance with the international standards on tax transparency and exchange of information upon request. The reports cover Guernsey, Indonesia, Japan, Kazakhstan, Philippines, San Marino and the US. In addition, Bosnia and Herzegovina, Cape Verde and Swaziland have joined the global forum, which now has 153 members.

On 3 July 2018, the OECD released a discussion draft on the transfer pricing aspects of financial transactions that follows the previous work of the G20/OECD in relation to actions 8-10 of the BEPS project on aligning transfer pricing outcomes with value creation. The discussion draft includes guidance on how to accurately delineate the mix and types of debt and equity used to fund an entity within a multinational (MNE) group; transfer pricing considerations for treasury activities performed within MNE groups relating to intragroup loans, cash pooling and hedging contracts; and application of the arm's length principle to captive insurance arrangements. The draft guidance also describes different approaches for pricing financial guarantees on intragroup guarantee transactions, most typically where a guarantor provides a guarantee on a loan taken out by a fellow group member from an unrelated lender. Comments on the discussion draft are invited by 7 September 2018.

Peru: Draft legislation issued on 4 May 2018 proposes to lift the suspension of the application of the general anti-avoidance rule (GAAR) in Peru's tax code, which provides the tax authorities the power to take actions to combat tax avoidance. The GAAR has been suspended since 2014 because the Ministry of Economy and Finance has not published the regulations for the application of the GAAR. One reason for the proposal is that Peru is looking to become a member of the OECD, which requires its members to have a GAAR. Congress and the president must approve the legislation before it can be enacted.

United Kingdom: On 6 July 2018, the government published draft legislation to be included in the next Finance Bill, which will be introduced to parliament following the next budget in the autumn. Comments are invited by 31 August 2018. A number of measures are effective partly or wholly from 6 July 2018, including amendments to the corporate interest restriction rules and to the rules on corporation tax relief for carried-forward losses. In respect of some consultations, including those relating to withholding tax on royalties, hidden economy conditionality, the intangible fixed assets regime and tax abuse and insolvency, the government is continuing to consider the responses and will respond "in due course."

United States: On 11 July 2018, the Department of the Treasury and the Internal Revenue Service issued a treasury decision containing final regulations on certain inversion and post-inversion transactions, which finalize proposed regulations and remove temporary regulations from April 2016 (for prior coverage, see US tax alert, 6 April 2016). (Certain other provisions of the April 2016 regulations were finalized in January 2017; for prior coverage, see US tax alert, 17 January 2017.) The regulations apply in certain situations where a foreign corporation directly or indirectly acquires the assets of a US corporation or partnership (as described in section 7874 of the Internal Revenue Code), and they aim to address certain transactions structured to avoid the purposes of section 7874 and certain post-inversion tax avoidance transactions. The treasury decision summarizes the comments received on the proposed regulations and explains the revisions reflected in the final regulations. The effective date of the final regulations is 12 July 2018, and the applicability dates for various measures are set forth in the final regulations.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-united-states-6-april-2016.pdf
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-united-states-17-january-2017.pdf

Vietnam: New customs guidance that applies as from 5 June 2018 may have a significant impact on import and export activities across many sectors and likely will require many enterprises to make substantive changes to their existing internal control and accounting systems. Among other things, the grounds that that will lead the customs authorities to challenge declared values are clarified and more detailed guidance is provided on compliance requirements for export manufacturing or processing enterprises.

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-Brazil: The 2017 protocol to the 1980 treaty will enter into force on 29 July 2018 and will apply as from 1 January 2019 for withholding tax purposes. When in effect, the protocol 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 for a 365-day period that includes the day the dividends are paid (for the purpose of computing that period, changes in ownership that directly result from a corporate reorganization of the company that holds the shares or the payer company will not be taken into account); otherwise, the rate will be 15%. The reduced rates under the protocol will not apply to distributions of profits that have not been previously subject to tax at the company level. The rate on interest will be 15%. A 15% rate will apply to royalties arising from the use of, or the right to use, trademarks; otherwise, the rate will be 10%. However, the 10% rate will apply (i) to royalties paid under contracts relating to the transfer of technology only if the contracts are registered or authorized according to the requirements of the domestic law; and (ii) to payments for the use of, or the right to use, literary, dramatic, musical or other artistic work, including software, only if the recipient is the author or his/her heirs; otherwise, the rate will be 15%.

Chile-China: Through exchanges of notes dated 16 April 2018 and 6 June 2018, the Chilean and Chinese competent authorities confirmed the triggering of a most-favored nation clause in the 2015 tax treaty, effective as from 1 January 2017. As a result, reduced withholding tax rates apply to certain interest. The 4% rate applies to interest derived from loans granted by banks, insurance companies and "other financial institutions" (other enterprises substantially deriving their profits by raising debt finance in the financial markets or by taking deposits at interest and using those funds in carrying on a business of providing finance). The 4% rate also applies to interest paid to qualifying enterprises primarily engaged in a lending or finance business and to interest paid on trade receivables for machinery and equipment; however, a 10% rate will apply to interest paid as part of an arrangement involving back-to-back loans or a similar arrangement. The 5% rate applies to interest derived from bonds or securities that are regularly and substantially traded on a recognized securities market. Otherwise, the rate is 15%, reducing to 10% as from 1 January 2019. Taxpayers may be entitled to a refund of excess tax withheld as from 1 January 2017.

Luxembourg: On 3 July 2018, the draft law transposing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) into Luxembourg law was submitted to the parliament for discussion and final vote. The draft law confirms Luxembourg's initial choice of provisions (*i.e.* reservations and notifications relating to the MLI). There is no confirmed timeline for Luxembourg's ratification of the MLI and, under normal circumstances, it would be reasonable to expect the ratification instrument to be deposited with the OECD before the end of 2018. However, upcoming parliamentary holidays and legislative elections inject uncertainties into the process. It seems most likely that for Luxembourg's covered tax agreements, the MLI would become effective on 1 January 2020 in respect of both withholding taxes and all other taxes (when the taxable year corresponds to the calendar year).

Luxembourg-Senegal: The 2016 treaty entered into force on 14 June 2018 and will apply as from 1 January 2019 for withholding tax purposes. When in effect, the treaty provides for a 5% withholding tax on dividends paid to a company (other than a partnership) that holds directly at least 20% of the capital of the payer company; otherwise, the rate will be 15%. A 10% rate will apply to interest. A 6% 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 10%.

Malta-Botswana: When in effect, the treaty signed on 2 October 2017 provides that where dividends are paid by a Malta company to a Botswana resident, the Maltese tax on the dividends may not exceed (i) the amount chargeable on the profits out of which the dividends are paid or, for a period of 10 years from the date of entry into force of the treaty (renewable by mutual agreement), (ii) 15% of the profits out of which the dividends are paid, if the dividends are paid out of gains or profits earned in any year in respect of which the company is in receipt of any tax benefit under the provisions regulating aids to industries in Malta, and certain other conditions are met. A 5% rate will apply to dividends paid by a Botswana company to a Malta company that holds at least 25% of the capital of the payer company; otherwise, the rate will be 6%. An 8.5% rate will apply to interest. 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 7.5%.

OECD: Kazakhstan signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 25 June; Peru and United Arab Emirates signed the MLI on 27 June; and Estonia signed the MLI on 29 June 2018. For the MLI to enter into force for these jurisdictions, they must ratify the convention in line with their domestic constitutional requirements and deposit their ratification instruments with the OECD. A total of 80 jurisdictions have now signed the MLI (representing 82 covered jurisdictions).

Sweden, New Zealand and the UK deposited their instruments of ratification for the MLI on 22 June, 27 June and 29 June 2018, respectively. The MLI will enter into force for New Zealand, Serbia (which ratified the MLI on 5 June 2018), Sweden and the UK on 1 October 2018. The MLI can enter into effect for a specific tax treaty that is a "covered tax agreement" only after a three-month period following the date of ratification has expired for all parties to the covered tax agreement. The default timings are that modified withholding tax provisions will have effect for payments made after the first day of the following calendar year; and changes relating to taxes levied with respect to taxable periods will have effect for taxable periods beginning on or after a period of six calendar months has elapsed (or less if both parties agree).

Vanuatu and Macedonia signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as amended) on 21 June and 27 June 2018, respectively. The convention provides for the exchange of information on request, spontaneous exchanges, automatic exchanges, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. A total of 124 jurisdictions now are participating in the convention.

On 5 July 2018, the OECD published an update on the bilateral relationships that have been activated for the automatic exchange of information under the Common Reporting Standard (CRS), reflecting new relationships established under the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA). Over 3,200 bilateral relationships are in place worldwide – an increase of over 500 relationships since the last update in April 2018 – covering over 90 jurisdictions (for prior coverage, see *World Tax Advisor*, 13 April 2018). The OECD expects more jurisdictions to activate bilateral relationships for the automatic exchange of CRS information in the coming months, so that over 100 jurisdictions will be able to exchange CRS information in September 2018.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180413_bc.html#OECD

An OECD update dated 26 June 2018 indicates that Vanuatu and Kazakhstan are the latest jurisdictions to have signed the CRS MCAA, with exchanges of CRS information intended to commence in September 2018 for Vanuatu and in September 2020 for Kazakhstan. A total of 102 jurisdictions now have signed the CRS MCAA.

United Kingdom: The UK has signed new tax treaties with Guernsey, Isle of Man and Jersey to replace the 1952 treaties for Guernsey and Jersey and the 1955 treaty for Isle of Man. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180720_6.html

Vietnam-Macao: When in effect, the treaty signed on 16 April 2018 provides for a 10% withholding tax rate on dividends, interest and royalties.

Global tax alerts

Germany
New guidance published on cost sharing arrangements
On 5 July 2018, the Federal Ministry of Finance released a circular that adopts the arm's length standard for the examination of cost sharing arrangements and incorporates by reference the principles of Chapter VIII of the OECD's transfer pricing guidelines.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-18-019-17-july-2018.pdf
Issue date: 17 July 2018

OECD
New guidance released on transactional profit split method and hard-to-value intangibles
On 21 June 2018, the OECD released two consensus reports concerning the 2017 transfer pricing guidelines, the first containing revised guidance on the transactional profit split method and the second dealing with the implementation of the OECD's approach to hard-to-value intangibles.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-18-020-17-july-2018.pdf
Issue date: 17 July 2018