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Guidance issued on reporting obligations for indirect transfers

Contacts

Ana Luz Bandini
abandini@deloitte.com

Francisco Prados
frprados@deloitte.com

The Peruvian tax authorities (SUNAT) recently issued guidance setting out the reporting procedures that resident legal entities must follow with respect to indirect transfers of their shares or participating interests. The reporting rules, which entered into effect on 5 June 2014 (under Resolution No. 169-2014) and are supplemented by additional provisions that entered into effect on 28 June (under Resolution No. 200-2014-SUNAT), require resident legal entities to report certain transfers by 31 July 2014.

The SUNAT had been expected to issue formal reporting guidance in 2011, shortly after new capital gains tax rules were introduced on 16 February 2011. Although the SUNAT did not provide any formal guidance for complying with the reporting obligation, it did post information on its website that set out an "interim" procedure. The June 2014 guidance replaces the interim procedure and provides much-needed clarity for taxpayers.

Indirect transfers and capital gains tax

According to February 2011 rules, capital gains derived from the following indirect transfers of the shares of (or participating interests in) a Peruvian legal entity fall within the Peruvian tax net (likely taxed at a rate of 30%):

- Where the transfer involves shares of (or participating interests in) a nonresident entity that directly or indirectly owns shares of (or participating interests in) a Peruvian entity and either:
  - During the 12 months before the transfer, the market value of the shares (or participating interests) of the Peruvian entity owned directly or indirectly by the nonresident entity is equal to 50% or more of the market value of all the shares (or participating interests) representing the equity capital of the nonresident; and the transfer (or transfers) of shares (or participating interests) represents 10% or more of the equity capital of the nonresident entity within that 12-month period; or
  - The nonresident entity is resident in a tax haven or low-tax jurisdiction for Peruvian tax purposes, unless it can be demonstrated that the previous condition is not satisfied.
- Where a nonresident (directly or indirectly) issues new shares (or participating interests) as a consequence of a capital increase (generated

by a new capital contribution, capitalization of credits or a reorganization), and assigns them a value below their market value. This provision will apply only if at least one of the conditions described in the previous bullets is present.

Where the acquirer is a nonresident, the Peruvian legal entity whose shares or participating interests are acquired is jointly and severally liable with the nonresident transferor for the payment of any capital gains tax that may arise from an indirect transfer if, in the 12-month period before the transfer, the parties are economically related; the income tax regulations contain a list of situations where parties are deemed to be economically related for these purposes.

The 2011 law requires resident legal entities to notify the SUNAT when their shares or participating interests are transferred indirectly, in accordance with reporting rules issued by the SUNAT to facilitate compliance and collection of the applicable capital gains tax.

As noted above, the SUNAT did not provide formal guidance for complying with the reporting obligation until June 2014, giving rise to practical implementation issues. However, to assist affected taxpayers with their compliance obligations until official guidance was issued, the SUNAT posted information on its website indicating that the traditional preapproved form used for reporting a direct transfer, issuance or cancellation of shares (or participating interests) was required to be used until official guidance was published. The form could be downloaded from the SUNAT's website and had to be printed and submitted in hard copy within the first 10 business days of the month following the month in which the transaction took place.

New requirements

The June 2014 guidance requires a resident legal entity to report an indirect transfer of its shares (or participating interests) using Form 1605 ("Issuance, Direct and Indirect Transfer and Cancellation of Shares"), which must be submitted online using the user ID and password provided by the SUNAT to the taxpayer to securely access the website. The minimum information to be provided on Form 1605 is as follows:

- Identifying information about the nonresident entity whose shares (or participating interests) are transferred and the transferor, including the country of incorporation and the tax identification number, if applicable;
- Identifying information about the acquirer, including the country of incorporation and the tax identification number;
- Information about the transaction, including the percentage of the market value of the legal entity involved in the transfer; and
- Information on the foreign stock exchange involved in the transfer, if applicable.

The resident legal entity must submit the electronic form reporting any indirect transfers of its shares (or participating interests) that take place as from 1 June 2014; the form must be submitted in the month following the month in which the transaction is concluded, taking into account the due dates for monthly obligations approved by the SUNAT. The online system will issue an electronic certificate containing a serial number, which will be the only evidence of compliance that the SUNAT will accept in the event of an audit.

Transactions concluded during the interim period—i.e. from 16 February 2011 until 31 May 2014—also must be reported in accordance with the new guidance, unless the resident legal entity already reported the transaction and provided all the information required by the SUNAT in the new guidance; otherwise, such transactions must be reported by 31 July 2014.

Failure to comply with the reporting obligation before the filing deadline could result in the imposition of a penalty equal to 30% of the tax units (1 UIT 2014 = PEN 3,800) involved in the transaction per electronic form omitted, plus interest.

Comments

The official guidance provides much-needed clarity on complying with the reporting obligation applicable to indirect transfers, but also imposes a tight deadline for reportable transactions that took place in the period from February 2011 through May 2014.

Nonresident entities with subsidiaries or investments in Peru should determine whether they had any reportable transactions during this period and assist the Peruvian legal entities in gathering the information required to submit the electronic form(s) within the prescribed deadlines.
