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Analysis of BEPS measures in India's 2016 budget

India's 2016 budget, presented in parliament on 29 February 2016, contains various tax proposals relating to the OECD's base erosion and profit shifting (BEPS) project, including the introduction of country-by-country (CbC) reporting and transfer pricing documentation, a "patent box" regime and an equalization levy on specified digital transactions (for prior coverage, see *World Tax Advisor*, 11 March 2016). The proposed measures generally would apply as from the 2016-2017 financial year (1 April 2016 to 31 March 2017), unless otherwise noted.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160311_1.html

Background

Over the past few years, governments, tax authorities and nongovernmental organizations have expressed concern that multinational enterprises (MNEs) are not paying their "fair" share of taxes. In this environment, the OECD initiated a project to combat BEPS at the request of the G20 countries. The OECD issued its initial reports on BEPS in September 2014, and its

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final reports on the 15 BEPS actions in October 2015 (for prior coverage, see *World Tax Advisor*, 9 October 2015).
URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/151009_1.html

Many countries already have begun BEPS implementation, especially in relation to CbC reporting and transfer pricing documentation, so Indian MNEs that operate globally will need to be aware of the BEPS measures being implemented around the world.

In addition to changes in the domestic tax law that are being implemented by various countries, a number of the recommendations under the BEPS actions relating to permanent establishments (PEs), treaty shopping, etc. would require amendments to existing tax treaties. The renegotiation of the 3,000-plus tax treaties currently in force would require significant time and effort; accordingly, the OECD proposed that a multilateral instrument be signed by interested countries that would modify the tax treaties entered into by such countries. The multilateral instrument is expected to be available for signature in December 2016.

India's BEPS proposals

India, as part of the G20, is committed to the BEPS project. Accordingly, there was significant speculation around the country's implementation of the BEPS actions leading up to the issuance of the 2016 budget. The government proposes to implement BEPS measures in a phased manner, and the 2016 budget and related speeches and documents refer to certain measures relating to the BEPS actions.

CbC reporting and transfer pricing documentation: Under action 13 of the BEPS action plan, the OECD recommended a three-tiered approach to transfer pricing documentation that, *inter alia*, includes a master file, a local file and a CbC report.

In the 2016 budget, the Indian government has proposed introducing rules in relation to CbC reporting and the master file requirement that are in line with BEPS action 13. The required reporting of information would take transparency to a new level – MNEs would be required to provide details in the CbC report in relation to revenue, profits, tax payments, capital, accumulated earnings, number of employees and assets for each country in which the group operates. This would enable the transfer pricing authorities to undertake risk-based assessments (for example, they could question why only 5% of global profits are reported in India in a case where 40% of the MNE's employees are based in India).

Some specifics on the proposed rules are provided below:

- The reporting provisions would apply to an international group (a group that operates in two or more jurisdictions) with consolidated revenue exceeding a prescribed threshold. India would adopt the OECD-prescribed threshold of EUR 750 million (the equivalent in INR would be set based on the exchange rate on 31 March 2016).
- If the parent entity of an international group is resident in India, the parent would be required to file the CbC report in respect of the group by the due date for filing the income tax return for the relevant financial year (typically, 30 November following the end of the Indian financial year in March). Accordingly, the first CbC reports would be due by 30 November 2017 for the financial year 2016-2017.

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- An Indian subsidiary of an international group with an overseas resident parent would be required to file a CbC report if the parent entity is resident in a country with which India does not have an arrangement for the exchange of CbC reports, or if the country of residence systematically fails in exchanging information under such an arrangement and the Indian subsidiary has been informed of this fact by the relevant Indian authority. Where there is more than one Indian subsidiary, the group could nominate the entity to file the report on behalf of all the Indian entities.
- A requirement to maintain master file data would be introduced; the detailed requirements are yet to be prescribed.
- Stringent penalty provisions would be introduced for failure to provide required information or for providing inaccurate information.

Patent box: The government has proposed a landmark reform that would introduce a special regime for the taxation of income from patents, to encourage research and development in India. The regime would be introduced by following a recommendation from the BEPS action (action 5) dealing with countering harmful tax practices, which prescribes a "nexus approach," i.e. a substantial activity test for preferential regimes. Under the approach, income arising from the exploitation of intellectual property would be attributed to, and taxed in, the jurisdiction where substantial research and development activities are undertaken, rather than only in the jurisdiction of legal ownership.

Under India's proposed new regime, royalty income from a patent developed and registered in India would be taxed at a concessional rate of 10% of the gross amount (plus the applicable surcharge and cess), i.e. without granting a deduction for expenses. To qualify for the regime, the taxpayer would have to be an Indian resident that is the true first inventor of an invention and whose name is entered on the Indian patent register as the patentee. The regime would cover both new and existing patents.

It is interesting to note that the OECD has examined the intellectual property regimes of 15 countries and has concluded that all the regimes are inconsistent with the nexus approach, either in whole or in part; India's proposed patent regime also is likely to be examined by the OECD to determine whether it constitutes a harmful tax practice.

Equalization levy: The growth of the digital economy has posed challenges to the application of existing tax rules, e.g. characterization of income and establishment of nexus between transactions, activities and jurisdictions, etc. The BEPS final report on action 1 (addressing the challenges of the digital economy) concluded that the BEPS measures in relation to other actions will mitigate some aspects of the broader tax challenges relating to the digital economy; the report does not recommend that countries levy withholding tax on digital transactions, but it provides that countries may introduce, *inter alia*, an "equalization levy" as an additional safeguard against BEPS, provided they respect existing treaty obligations.

India's budget proposes the introduction of an equalization levy on specified digital transactions. The levy would be 6% of the gross consideration paid by Indian residents (or Indian PEs of a nonresident) to nonresidents that do not have a PE in India. The payments proposed to be covered include online advertisements and related facilities/services; however, the government could designate additional services to be covered by the levy. The levy would

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not apply where the aggregate amount payable to a nonresident does not exceed INR 100,000 in a year. The effective date and specific rules relating to the levy are yet to be announced.

The equalization levy would be administered by the income tax department; however, it is pertinent to note that the rules relating to the levy would not be incorporated into the Indian Income-tax Act, 1961 and there could be challenges for nonresidents in claiming tax treaty benefits, including a credit for the levy in their home country. It also is interesting that the Indian tax tribunals consistently have taken the position that no withholding tax applies on payments for online advertising.

General anti-avoidance rule: India's implementation of a general anti-avoidance rule (GAAR) was deferred in the 2015 budget, to align with the BEPS project (specifically, BEPS action 6). There are no changes proposed in the 2016 budget in relation to the GAAR; however, the finance minister stated in his speech on the budget that the GAAR would be implemented as from financial year 2017-2018.

Comments

India has begun its implementation of BEPS. Rather than displaying a "knee-jerk" reaction to the recommendations or rushing to implement measures on the BEPS actions, the government is implementing measures in a deliberate and phased manner. These measures mark the beginning of a new era for taxpayers, in which a paradigm shift will occur as their objectives change from "tax planning" to "tax risk management."

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Australia:
Tax changes proposed to promote the funds industry

The Australian government introduced a bill into parliament on 3 December 2015 that would introduce a new tax system for certain managed investment trusts (MITs). Once these rules are enacted, eligible MITs (referred to as "attribution MITs" (AMITs)) would be able to elect to apply the new rules retroactively as from 1 July 2015, although the expectation is that retroactive elections would be made by managers only in very rare circumstances, given the pervasive nature of the changes required to implement the regime. The bill also contains other changes affecting MITs, including some with retroactive application.

The purpose of the new tax system for AMITs would be to enhance the international competitiveness of the Australian funds management industry by improving the operation of Australian tax law for eligible funds that elect to be treated as AMITs. In particular, the AMIT regime seeks to:

- Modernize the tax rules for AMITs;
- Increase certainty for both AMITs and investors;

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- Provide greater flexibility; and
- Reduce compliance costs.

The AMIT regime also would aim to facilitate the creation of new types of fund products, such as income accumulation funds and funds with different classes of units (e.g. to invest in specific pools of assets or to provide currency hedging).

Current MIT regime

The current MIT regime is designed to promote the Australian funds management industry by providing tax concessions to offshore investors to increase the attractiveness of investing in Australian-managed funds. The regime offers certain foreign investors (generally, investors that are resident in a country that has concluded an exchange of information agreement with Australia) access to a reduced 15% rate of withholding tax on MIT distributions (and a 10% rate for funds investing in certain "green" buildings). Dividends, interest and royalties paid by MITs remain subject to the relevant withholding tax rate.

The effective operation of the MIT regime relies on various industry practices that have developed over time, a number of which are not strictly accepted by the Australian Taxation Office (ATO). This has created a level of complexity and uncertainty for both fund managers and investors. The proposed AMIT tax system was developed after extensive consultation with the managed funds industry and the ATO to provide managers and investors with greater certainty.

Key features of the proposed AMIT regime

The proposed AMIT regime contains a number of significant changes with various effective dates, including provisions that would apply on a retroactive basis. In addition, the ATO has introduced draft companion guidelines to accompany the AMIT bill, which set out the ATO's views on the application of various aspects of the rules and would become binding public rulings following the enactment of the law.

The following is a summary of the key features of the proposed AMIT regime:

Elective regime: An eligible MIT would have to elect for the AMIT regime to apply, and this election would be irrevocable; the AMIT rules would not apply without an election. Fund managers would need to evaluate the benefits and risks associated with a fund electing to enter the new AMIT regime, and the effective date for such an election. A number of factors (e.g. utilization of tax losses, availability of certain rollover provisions, historical errors in tax calculations, etc.) would affect whether the election should be made, as well as the timing of the election.

Separate fund treatment for classes within a fund: The AMIT regime would allow AMITs with multiple classes of units to make an irrevocable election to treat each class of units as a separate AMIT with separate fund property (Class AMIT). Making the election would quarantine taxable income and losses to the investors in the relevant class.

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This measure would provide managers with substantial flexibility in the structuring of funds, particularly funds registered under the Corporations Act (e.g. it would allow the issue of separate classes of units for individual assets or pools of assets). One of the drivers for the Class AMIT changes is to facilitate multi-currency, multi-class units for a fund to attract foreign investment, and the changes would enable foreign currency exchange impacts effectively to be quarantined in the relevant class. For existing MITs making the Class AMIT election, any carried-forward tax attributes (e.g. tax losses or net capital losses) would have to be allocated to classes on a fair and reasonable basis.

New categories of widely held investors: Broadly, under the current regime, a fund can qualify as a MIT only if it is considered "widely held"; the rules provide a list of entities (including foreign pension funds, foreign collective investment vehicles and certain government entities) that are deemed to be widely held investors, which can assist the fund in meeting the widely held requirement. The AMIT bill proposes to expand this list (with effect from 1 July 2014) to include foreign life insurance companies, wholly owned subsidiaries of deemed widely held investors and certain limited partnerships. This change would open up the MIT rules to a number of common offshore investment structures that currently do not qualify (e.g. structures with corporate blockers or global funds using a limited partnership feeder). The expanded list would need to be considered to determine whether an existing Australian fund would satisfy the widely held test and, hence, would qualify as an MIT. The extended list of deemed widely held investors also would be relevant in establishing new funds, and should assist Australian managers in attracting foreign capital.

Attribution model: The AMIT regime contains an "attribution" model for determining investors' tax liabilities that would require tax amounts to be attributed to investors on a fair and reasonable basis, in accordance with the constituent documents of the fund. The constituent documents would need to be reviewed to identify any changes required to provide for the attribution of tax to investors on a fair and reasonable basis (either in accordance with the current practices of the manager or based on other fair and reasonable practices). The extent to which the constituent documents need to be amended would require careful consideration, as would the potential for re-settlement of the fund as a result of any amendments. Electing into the AMIT regime also could provide managers with an opportunity to review and modernize other aspects of trust deeds, such as distribution requirements and provisions regarding the issue and redemption of units.

Overstatements/underdistributions of taxable income: The AMIT regime would allow funds to carry forward "unders" and "overs" (e.g. in situations where the actual taxable income of the fund is under or over the taxable income notified to investors at the time of distribution) to the year in which the variance is discovered. Alternatively, an AMIT would be able to revise its distribution statements relating to the income year in which the variance occurred. An AMIT would have four years from the end of the relevant income year to issue revised statements.

Although the carryforward of overs/unders is in line with current industry practice, it has never been accommodated by the tax rules. Making an AMIT election to apply the new rules would eliminate the potential uncertainty associated with over/under adjustments. (In an acquisition situation, the codification of overs/unders could shift the risk of historical errors to the investors and the acquirer. Therefore, more detailed due diligence may be required where the target or acquirer is, or would become, an AMIT.)

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Shortfall taxation and penalties: An AMIT could be subject to penalty tax if it had an under/over as a result of "recklessness" or "intentional disregard" of the law. Fund managers would need to consider the adequacy of controls, and review or develop documentation evidencing the adherence to controls to mitigate potential penalties.

Deemed fixed trust treatment: AMITs would be deemed to be "fixed" trusts, providing certain benefits (e.g. ease of satisfying the carryforward loss rules, franking credit passthrough, access to certain capital gains tax rollovers, etc.). This would address concerns that, under current law, it is difficult (if not impossible) for a fund to satisfy the fixed trust definition, such that the favorable exercise of the ATO's discretion would be required for a fund to qualify as a fixed trust.

Cost base adjustments: Where the taxable income attributed to an investor from an AMIT exceeds the cash distribution, investors would be permitted to increase the cost base of their units. The rules also specifically would provide for adjustments to the cost of units held on revenue account. The upward cost base adjustment would prevent the double taxation that otherwise could arise where investors previously suffered tax on amounts retained by the fund and potentially are subject to tax again on a disposal of their units.

Recovery of MIT withholding tax from investors: In some situations, it is possible for custodians and trustees to have a liability to MIT withholding tax that exceeds any associated cash distribution. In this case, the custodian/trustee would have an ability to recover this withholding tax from its investors. It is expected that custodians/trustees would take steps to ensure they have the ability legally to take the steps necessary to enable them to recover any liability to MIT withholding tax.

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Australia:
Legislation on automatic exchange of information enacted

On 18 March 2016, legislation was enacted that implements the OECD's Common Reporting Standard (CRS) for the automatic exchange of financial information in Australia as from 1 July 2017. The first exchanges of information will occur in 2018 for the period 1 July 2017 to 31 December 2017. In subsequent years, information will be exchanged for the preceding calendar year.

The CRS is a standardized set of rules developed by the OECD that requires financial institutions resident in a participating jurisdiction to implement due diligence procedures to

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document and identify reportable accounts, as well as to establish reporting processes on the reportable accounts identified.

Australia previously signed the CRS Multilateral Competent Authority Agreement (MCAA) on 3 June 2015. The MCAA is the administrative agreement that enables CRS information to be exchanged between countries' tax authorities, provided appropriate legislation requiring financial institutions to identify and report the information and administrative arrangements for the exchange of information between tax authorities are in place.

The legislation enacts the requirements of the CRS into Australian law. As such, Australian financial institutions will need to implement due diligence procedures and report financial information and details on nonresident accountholders to the Australian Taxation Office (ATO). The ATO will exchange this information with the foreign tax authorities of nonresidents in other signatory countries. Similarly, the ATO will receive financial account information annually on Australian residents in other countries. This transparency is intended to ensure that Australian residents with financial accounts in other countries are complying with Australian tax laws, and to act as a deterrent to tax evasion.

The legislation inserts a new subdivision "396-C – Common Reporting Standard" into Schedule 1 of the Tax Administration Act 1953. The provisions broadly include the following:

- Financial institutions are to carry out CRS due diligence procedures to identify reportable accounts held by foreign tax residents and provide a statement to the Commissioner of Taxation about those accounts no later than the first 31 July after the calendar year. Importantly, the "wider approach" is adopted, so that all jurisdictions are treated as reportable jurisdictions, which allows Australian financial institutions to collect and retain residence information for all nonresidents of Australia, not only those in signatory countries;
- Financial institutions that fail to collect accountholder self-certifications about the jurisdiction of residence for tax purposes may be subject to administrative penalties;
- Accountholders that provide false or misleading self-certifications also may be subject to penalties;
- Nil reports do not need to be filed by Australian financial institutions; and
- Financial institutions will need to keep records for at least five years that explain the procedures used for identifying reportable accounts.

Late amendments to the legislation require the Commissioner of Taxation to publish an annual report providing aggregated, "de-identified" data (i.e. data from which the identifying information on specific nonresidents has been removed) on the financial holdings of foreign residents in Australia. The de-identified data will indicate the aggregate number of accounts held by residents of each country and the aggregate dollar value of holdings in the accounts. The stated aim behind these amendments is to inform developing-country neighbors that have not yet signed up for the CRS how many of their citizens have financial accounts in Australia.

The ATO expects to release automatic exchange of information guidance for CRS and FATCA (the US Foreign Account Tax Compliance Act) by the end of March 2016, and to release technology specifications for reporting in July 2016.

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Belgium: Tax haven blacklists updated

The Belgian government published two royal decrees on 10 and 11 March 2016 that update the lists of countries that are considered "tax havens" for purposes of the dividends received deduction (DRD) regime and the reporting requirement that applies to payments made to tax haven jurisdictions (for prior coverage, see *World Tax Advisor*, 8 January 2016).
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160108_4.html

Dividends received deduction

Under the DRD regime, 95% of dividends received by a Belgian company (or a Belgian branch of a foreign company) from a domestic or foreign company are exempt from tax if certain requirements are met, with the remaining 5% subject to tax at the normal rate of 33.99%.

One requirement to qualify for the DRD is that the company distributing the dividends must be subject to corporate income tax or a similar foreign tax. This requirement will be deemed not to be met if the dividends are: (1) paid by a company that is not subject to Belgian corporate income tax or a similar foreign tax; or (2) paid by a company resident in a country that imposes corporate taxation at a nominal or effective tax rate below 15%. With respect to the second scenario, Belgian corporate income tax law historically has included a "black list" of countries in which the statutory nominal or effective tax rate is lower than 15%. A taxpayer can rebut the presumption that dividends are received from a tax haven company by producing evidence that the distributing company is subject to a nominal and effective tax rate of at least 15%.

The new royal decree reduces the number of countries on the black list from 51 to 31. More than 30 countries have been removed (including Cuba, Panama and the Seychelles) due to changes in the relevant tax law environments, and 19 countries have been added. The current list is as follows: Abu Dhabi, Ajman, Andorra, Bosnia and Herzegovina, East Timor, Gibraltar, Guernsey, Isle of Man, Jersey, Kosovo, Kuwait, Kyrgyzstan, Liechtenstein, Macau, Macedonia, Maldives, Marshall Islands, Micronesia (Federated States), Moldova, Monaco, Montenegro, Oman, Paraguay, Qatar, Ras al-Khaimah, Serbia, Sharjah, Turkmenistan, Umm al-Quwain, United Arab Emirates and Uzbekistan.

The updated black list is applicable to dividends distributed or attributed as from 1 January 2016, although the old list still may be relied on for dividends distributed or attributed in accounting years ending before 1 April 2016.

Reporting obligation for payments made to tax havens

Under Belgian corporate income tax law, all direct or indirect payments exceeding EUR 100,000 per taxable period that are made to persons located in tax havens must be reported

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annually on a specific form annexed to the corporate tax return. Failure to comply with the reporting obligation will result in the payment being nondeductible. A tax haven for purposes of this reporting obligation is defined as a country that: (1) does not levy corporate tax or that has a statutory corporate tax rate of less than 10%; or (2) for the entire taxable period in which the payment was made, does not substantially or effectively apply the OECD transparency and exchange of information standards.

With respect to the corporate tax rate requirement, a black list of tax haven countries has been in the corporate income tax legislation since 2010. Inclusion on this black list constitutes a nonrebuttable presumption that a country is a tax haven, i.e. any payments made to a jurisdiction on the list must be reported and the taxpayer may not produce evidence to avoid the application of the list and the related reporting obligation.

Three countries have been removed from the black list (Andorra, Maldives and Moldova) and five countries have been added (Marshall Islands, Pitcairn Islands, Somalia, Turkmenistan and Uzbekistan), bringing the total number of countries on the list to 30: Abu Dhabi, Ajman, Anguilla, Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Fujairah, Guernsey, Isle of Man, Jersey, Marshall Islands, Micronesia (Federated States), Monaco, Montenegro, Nauru, Palau, Pitcairn Islands, Ras al-Khaimah, Saint-Barthelemy, Sharjah, Somalia, Turkmenistan, Turks and Caicos Islands, Umm al-Quwain, United Arab Emirates, Uzbekistan, Vanuatu and Wallis and Futuna.

The updated list is applicable to payments made as from 1 January 2016, although the old list can be relied on for payments made in accounting years ending before 1 April 2016.

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Germany:
Tax treaty override provision in line with constitution

In a decision dated 15 December 2015 (and published on 12 February 2016), Germany's constitutional court confirmed that the legislature can enact tax treaty override provisions that aim to secure Germany's taxation rights, despite treaty provisions to the contrary. The federal tax court (BFH) had referred the case to the constitutional court in 2014 – that court has the sole authority to determine whether domestic laws contradict constitutional principles (for prior coverage, see *World Tax Advisor*, 28 February 2014).
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140228_3.html

Tax treaties in Germany are not "self-executing." For a tax treaty to become applicable, it must be transposed into German domestic law, which requires the consent of both the upper and lower houses of parliament. Once transposed, a treaty will have equal status with "ordinary" domestic tax law; in other words, the treaty will not supersede ordinary domestic law, or vice versa. Because of this equality of status, the prevailing opinion has been that the German

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legislature has the power to subsequently enact rules that override the provisions in Germany's existing tax treaties.

The case involved a German resident individual who earned income from employment exercised in Germany and in Turkey. Based on the relevant provision in the 1985 Germany-Turkey tax treaty (which has been superseded by a new treaty dating from 2011), Germany granted the individual an exemption from German tax for the employment income earned in Turkey (such income could be taken into account only for purposes of determining the applicable German tax rate).

The treaty override provision in section 50d (8) of the Income Tax Code allows Germany to impose tax (despite provisions to the contrary in an applicable tax treaty) on the employment income of a German tax resident if the individual is unable to demonstrate that the employment income was actually taxed and the assessed tax was paid in the contracting state, or that the other state specifically waived its taxation rights. In the case before the court, the taxpayer did not provide such evidence and, therefore, the tax authorities treated the employment income earned in Turkey as being fully taxable in Germany, despite provisions to the contrary in the Germany-Turkey tax treaty.

The BFH noted in its decision referring the case to the constitutional court that the interaction between tax treaty law and domestic tax law needed to be refined. According to the BFH, although a treaty and German domestic law rank equally, the negotiated provisions in a treaty limit the legislature's latitude to introduce measures that deviate from the treaty.

In its decision, the constitutional court made a detailed analysis of the relationship between tax treaties and ordinary domestic law, and concluded that tax treaties do not rank superior to ordinary domestic law. For ordinary domestic law, however, the "*lex posterior derogat legi priori*" principle (a later law repeals the former law) applies, which means that the legislature can unilaterally introduce rules that deviate from earlier provisions in a tax treaty.

The constitutional court's decision likely will affect several similar pending cases involving the treaty override provisions, and the court is likely to reach the same conclusions in these cases.

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Gibraltar:
Additional changes to corporate income tax return filing obligation announced

Recent changes to Gibraltar's Income Tax Act imposed an obligation for all Gibraltar-registered companies to file "full and complete" tax returns, including accounts, regardless of whether the company has assessable income (for prior coverage, see *World Tax Advisor*, 22 January 2016). The Commissioner of Income Tax now has clarified that the change in the filing obligation applies as from accounting periods ending on or after 1 January 2016, and not from

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periods *commencing* on or after 1 January 2016 (as was previously indicated). Additionally, the Gibraltar Income Tax Office (ITO) has issued guidance setting forth the type of accounts that companies without assessable income are required to file with their tax returns.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160122_6.html

As previously announced, tax returns filed for companies that derive assessable income of GBP 1.25 million or more within an accounting period must be accompanied by audited accounts. In contrast, companies that derive assessable income of less than GBP 1.25 million within an accounting period are required to submit accounts accompanied by an independent accountant's report (as defined in section 30 of the Income Tax Act) along with their tax returns.

The ITO guidance sets out the type of accounts required to be filed with the tax returns of companies that do not derive assessable income:

Type of company	Type of accounts
Large company	Tax returns must be accompanied by audited accounts
Medium-sized company	Tax returns must be accompanied by audited accounts, but the profit and loss account may be in an abridged form
Small company	Tax returns must be accompanied by only an abridged balance sheet

The parameters used to define the size of a company for the purposes of determining the applicable filing requirement in the table above are contained in the Companies Act 2014 (schedule 9).

The deadline for filing tax returns remains unchanged at nine months from the end of the accounting period.

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Israel:
Government exploring possibility of imposing VAT on foreign suppliers of digital services

Israel's Ministry of Finance published a legislative memorandum on 13 March 2016 requesting public comments on the potential application of Israeli VAT to foreign suppliers of digital products and services to Israeli residents.

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The memorandum draws on some of the OECD's recommendations on action 1 of the base erosion and profit shifting (BEPS) project (i.e. addressing the challenges of the digital economy), specifically relating to the difficulties of collecting VAT from individuals. It also follows the issuance of a draft circular by the Israel Tax Authority (ITA) in April 2015 concerning the internet-based activities of foreign companies in Israel (for prior coverage, see *World Tax Advisor*, 8 May 2015). However, while the draft circular related only to services, the legislative memorandum covers the supply of both goods and services to Israeli residents.
URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/150508_ib.html

Under the current VAT rules, foreign providers of digital services that operate in Israel are required to register for VAT purposes in Israel. However, a reverse-charge mechanism may apply in certain cases, under which Israeli-resident dealers or individual purchasers of imported goods and services are required to pay VAT on the goods/services imported. According to the memorandum, the government is considering shifting the burden of paying the VAT from the recipient to the supplier in certain situations.

The memorandum focuses on the types of business activities it considers to be "digital services," regardless of where the services are provided or whether they are provided to Israeli residents directly from the supplier or via an online store. The following activities would be considered as a supply of digital services:

- Electronic services: The supply of software, entertainment products, books, music, gambling, games, television shows, movies, internet broadcasting and e-learning services;
- Communication services: Telephone services, telephone services via the internet (VoIP), fax services, internet access services and other similar services; and
- Broadcasting: Radio and television broadcasting services.

If the measures outlined in the memorandum are enacted, foreign suppliers and operators of online stores that currently are not obligated to register for VAT in Israel would be required to register and pay the output VAT on digital services they provide to Israeli individual customers. The reverse charge would apply to digital services provided to an Israeli-registered trader, a nonprofit organization or a financial institution. Each foreign supplier or operator of online stores providing digital services to Israeli residents would have to specifically consider whether registration would be required or whether the reverse charge would apply.

Where registration would be required, the registration requirement would be imposed on the foreign supplier of digital services to Israeli residents, or on the operator of the online shop through which the digital services are supplied. According to the memorandum, a foreign resident that provides digital services would be required to register in a dedicated registry in Israel that would be determined by the Minister of Finance. The foreign supplier also would be subject to compliance requirements, such as filing a periodic VAT return accounting for the relevant transactions and the related VAT recorded, with the reporting period to be determined by the minister.

A foreign supplier would be exempt from the registration requirement if its annual turnover from the supply of digital services to Israeli residents does not exceed the annual turnover of an exempt dealer (approximately NIS 99,006).

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Comments on the memorandum are due by 4 April 2016. Draft legislation is expected to be introduced after the comment period, but the timeline for the legislation is unclear.

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In brief

China: The premier previously announced that property developers and construction, financial and consumer services will be brought within the scope of China's VAT as from 1 May 2016, which will complete the country's VAT reform project (for prior coverage, see *World Tax Advisor*, 11 March 2016). On 11 March 2016, China's State Administration of Taxation announced that the deadline for the first VAT return filings after the reform will be extended from 15 June 2016 to 25 June 2016, to allow taxpayers more time to prepare for the VAT.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160311_3.html

Colombia: Based on guidance issued by the tax authorities, transactions giving rise to Colombian-source income that is classified as business profits, but that is not taxable in Colombia under an applicable tax treaty, must be reported as transactions giving rise to income that does not constitute taxable income or capital gains in cases where the income concerned has not been subject to Colombian withholding tax. Under the business profits article of Colombia's tax treaties, outbound payments that are classified as business profits may not be taxed in Colombia where the recipient of the payments is: (i) a nonresident of Colombia that is a resident of the treaty partner country and that carries on business in Colombia, but that does not have a permanent establishment in Colombia; or (ii) a person that is both a resident of Colombia and a resident of the treaty partner country and that carries on business in Colombia, but that does not have a permanent establishment in Colombia.

European Union: Advocate General Kokott of the Court of Justice of the European Union (CJEU) issued an opinion on 17 March 2016 stating that, in regards to the taxation of interest paid by Portuguese borrowers to lenders in other EU member states, a Portuguese law that prohibits the lenders from deducting financing costs directly linked to the taxed activity is an unlawful restriction on the freedom to provide services. The challenged law requires domestic borrowers to withhold tax on interest paid to lenders in other EU member states at a specified rate (20% under the facts of the case, but currently 25%), or a lower rate provided in an applicable tax treaty. The tax is levied on the gross amount of the interest income, and the lender may not deduct any costs incurred to produce such income. However, Portuguese resident lenders receiving interest income are subject to corporate income tax (at a 25% rate under the facts of the case, but currently 21%), but the lender may deduct its operating expenses (including financing costs) in calculating its taxable income. The CJEU now must issue its decision in the case.

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Finland: The Administrative Court has ruled that a contractual, open-ended non-UCITS fund is comparable to a Finnish tax-exempt investment fund and, therefore, based on the EU free movement of capital principle, Finnish tax may not be imposed on income from Finnish real estate derived by the non-UCITS fund.

Netherlands: The Supreme Court issued a decision on 4 March 2016 in which it ruled on the extent to which nonresident taxpayers can claim a refund of Dutch dividend withholding tax, following a decision issued by the Court of Justice of the European Union (for prior coverage, see EU tax alert, 18 September 2015). The court concluded that, in principle, the imposition of the withholding tax on dividends distributed to nonresidents could constitute a restriction on the free movement of capital where a comparison to a domestic situation (including both dividend withholding tax and individual/corporate income tax) would result in a lower tax burden than in the cross-border situation. That appeared to be the case only for one of the individuals involved, but not for the other individual or the French company.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-europeanunion-18-september-2015.pdf

Poland: The Ministry of Finance confirmed in a communication dated 5 February 2016 that settlements between Polish taxpayers and their related parties have recently become an area of interest to the tax authorities and that they will be subject to detailed scrutiny. During the first quarter of 2016, the Ministry plans to focus on expanding its personnel and developing knowledge in the field of transfer pricing, while in the second quarter it will carry out tax inspections focusing on those entities that have not paid corporate tax in recent years despite significant revenue growth.

Serbia: As from 1 March 2016, the corporate income withholding tax return for income and amounts received by nonresident and resident legal entities must be submitted electronically. Additionally, it has been clarified that a resident payer of income to a nonresident must submit a withholding tax return, as well as an appropriate certificate of residence, even if the income in question is exempt from taxation in Serbia due to an applicable tax treaty.

BEPS corner

In each issue that provides updates on developments in the OECD's base erosion and profit shifting (BEPS) initiative, *World Tax Advisor* includes a "BEPS corner" covering these developments.

Canada: The Minister of Finance has presented the 2016-2017 budget in the House of Commons, including proposals regarding certain recommendations of the OECD set out in its final reports on the BEPS initiative released in October 2015:

- The country-by-country (CbC) reporting standard for transfer pricing documentation would be adopted for years beginning after 2015 for multinational enterprises with consolidated group revenues of at least EUR 750 million, and whose ultimate parent entity is resident in Canada. Canadian-resident subsidiaries could also be required to file CbC reports where Canada cannot obtain the CbC report from the subsidiary's

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parent's jurisdiction, or the corporate group designates a Canadian subsidiary as a surrogate parent to fulfill the filing obligation. CbC reports would be due within one year of the end of the fiscal year to which the report relates. Draft legislation will be circulated for comment in the coming months, and the first exchange of CbC reports is expected by June 2018.

- The government would address treaty shopping through the incorporation of either a principal purpose test or a limitation on benefits rule into Canada's existing treaties. The amendments would be achieved through bilateral negotiations, the development of the multilateral instrument in 2016 or a combination of both approaches. No mention was made of a previously released proposal to introduce domestic anti-treaty shopping rules that was put on hold pending the outcome of the BEPS project. It would appear that this proposal is unlikely to be reintroduced.
- The budget indicates that the OECD's recently revised transfer pricing guidelines reflect current audit and assessing practices of the Canada Revenue Agency (CRA), with the exception of revisions pertaining to two areas where follow-up work by BEPS project participants continues: the development of a threshold for the proposed simplified approach to low value-adding services and the definition of risk-free and risk-adjusted returns for minimally functional entities. The CRA will determine its approach after such work is completed.
- The BEPS minimum standard concerning the spontaneous exchange of certain tax rulings with other jurisdictions would be implemented, with exchanges commencing in 2016 through existing mechanisms, and subject to existing safeguards concerning confidentiality of taxpayer information.
- The government is continuing to examine the recommendations pertaining to the other aspects of BEPS.

Czech Republic: On 27 January 2016, the Czech Republic was one of the 31 countries that signed the Multilateral Competent Authority Agreement on the exchange of CbC reports (for prior coverage, see *World Tax Advisor*, 12 February 2016). This is one of the first practical examples of the implementation of the BEPS action steps in the Czech tax practice. The signing of the agreement indicates that related legislation will be adopted at the local level. The first exchange of reports between the Czech Republic and other signatories is expected to take place no later than September 2018 for the 2016 taxation period. The information collected by the Czech tax authorities will influence the selection of entities to be audited, as well as the audit method and the procedure for providing evidence. The financial results of local companies will be assessed in the context of the entire group, which has not been the case to date.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160212_bc.html

India: The 2016 budget contains various tax proposals relating to the OECD's BEPS project, including the introduction of CbC reporting and transfer pricing documentation, a patent box regime and an equalization levy on specified digital transactions. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160325_1.html

Italy: A CbC reporting obligation was introduced in the 2016 budget law. See Italy global transfer pricing alert, 10 March 2016.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-16-008-10-march-2016.pdf

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Liechtenstein: The government issued a press release on 4 March 2016 announcing that it has asked the tax authorities to prepare a consultation report on revising Liechtenstein tax legislation to address the various actions under the BEPS initiative. Liechtenstein has committed to implementing a new global standard for taxation, taking into account the importance of a level playing field. The consultation will include the following: (1) the introduction of a linking rule for dividends within corporate groups, to avoid double nontaxation; (2) the introduction of CbC reporting for multinational enterprises with annual consolidated group revenue equal to or exceeding EUR 750 million; (3) the introduction of transfer pricing documentation requirements for large companies; (4) transitional provisions for the existing intellectual property box regime until the end of 2020; and (5) a legal definition and clarification of the term "ruling." A legislative proposal is expected to be submitted to parliament sometime in 2016.

OECD: On 22 March 2016, the OECD published the standardized electronic format (CbC XML schema) for CbC reporting. The schema has been designed primarily to be used for the automatic exchange of CbC reports between competent authorities. It also can be relied upon by companies for transmitting the CbC report to their tax authorities, provided the use of the CbC XML Schema is mandated under domestic law.

OECD: The OECD released a discussion draft on 29 February 2016 that includes changes to articles 3 and 4 of the model tax treaty and commentary with respect to the treaty residence of pension funds. See the tax treaty round up in this issue.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160325_tr.html

United Kingdom: The roadmap relating to Budget 2016 includes the government's view on, and response to, each of the actions under the OECD BEPS project. See UK tax alert, 16 March 2016.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-united-kingdom-16-march-2016.pdf

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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.

Bulgaria-Romania: When in effect, the treaty signed on 24 April 2015 to replace the 1994 treaty provides for a 5% withholding tax rate on dividends (except for dividends that are hidden profit distributions under Bulgarian domestic law or income assimilated to dividends for tax purposes under Romanian domestic law, which will be subject to the domestic law of the relevant state). The rate on interest and royalties will be 5%.

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Chad: On 4 February 2016, Chad joined the OECD Automatic Exchange of Information Agreement (2014) on the introduction of the automatic exchange of information in tax matters on a reciprocal basis.

Colombia: See in brief item in this issue.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160325_ib.html

Cyprus-Ukraine: When in effect, the protocol to the 2012 treaty signed on 11 December 2015 provides for a 5% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 20% of the capital of the payer company and has invested at least the equivalent of EUR 100,000 in the shares or other rights of the payer company; otherwise, the rate will be 10%. A 5% rate will apply to interest. The withholding tax rate on royalties will not be affected by the protocol.

Czech Republic-Turkmenistan: When in effect, the treaty signed on 18 March 2016 provides for a 10% withholding tax rate on dividends, interest and royalties.

Finland-Germany: When in effect, the treaty signed on 19 February 2016 to replace the 1979 treaty provides for a 5% withholding tax rate on dividends paid to a company (other than a partnership or a German real estate investment trust company) that holds directly at least 10% of the capital of the payer company; otherwise, the rate will be 15%. Interest and royalties will be taxable only in the state of residence of the recipient.

Germany-Jersey: The 2015 treaty entered into force on 30 January 2016 and applies retroactively as from 29 August 2014. The treaty does not contain any provisions on dividends, interest or royalties, so the domestic rates apply.

Germany: See article in this issue.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160325_5.html

Hungary-Iran: When in effect, the treaty signed on 30 November 2015 provides that dividends will be taxable only in the state of residence of the recipient. A 0% rate will apply to interest paid in connection with a sale of merchandise or equipment on credit or paid on a loan or credit granted by a bank; otherwise, the rate will be 5%. The rate on royalties will be 5%.

India-Indonesia: The 2012 treaty to replace the 1987 treaty entered into force on 5 February 2016 and will apply as from 1 January 2017 for Indonesia and as from 1 April 2017 for India. When in effect, the new treaty provides for a 10% withholding tax rate on dividends, interest and royalties (as well as technical service fees).

India: The Delhi High Court recently ruled that the parliament does not have the power to amend a tax treaty unilaterally and that the definition of royalties under India's domestic law will not override the definition provided under a relevant tax treaty.

Italy-Romania: When in effect, the treaty signed on 25 April 2015 to replace the 1977 treaty provides for a 0% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company and has done so, or will have done so, for an uninterrupted period of two years in which the date the

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dividends are paid falls; otherwise, the rate will be 5%. The rate on interest and royalties will be 5%.

Kenya: On 8 February 2016, Kenya joined the multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed on 25 January 1988, and the amending protocol, signed on 27 May 2010.

Luxembourg-Andorra: The 2014 treaty entered into force on 7 March 2016 and will apply as from 1 January 2017. When in effect, the treaty provides for a 0% withholding tax rate on dividends paid to a recipient that holds directly (1) at least 10% of the capital of the payer company, or (2) a participation with an acquisition cost of at least EUR 1.2 million in the payer company, for an uninterrupted period of at least 12 months; the 5% rate will apply 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 15%. Interest and royalties will be taxable only in the state of residence of the recipient.

OECD: The OECD released a discussion draft on 29 February 2016 that includes changes to articles 3 and 4 of the model tax treaty and commentary with respect to the treaty residence of pension funds. The changes are part of action 6 (preventing the granting of treaty benefits in inappropriate circumstances) and will ensure that a pension fund is considered to be a resident of the state in which it is constituted, regardless of whether the fund benefits from a limited or full exemption from taxation in that state. Comments must be submitted by 1 April 2016.

Philippines-Turkey: The 2009 treaty entered into force on 11 January 2016 and will apply as from 1 January 2017. When in effect, the treaty provides for a 10% 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 15%. A 10% rate will apply to interest. Film and television royalties will be taxed at 15%; otherwise, the rate will be 10%.

Poland-Bosnia and Herzegovina: The 2014 treaty entered into force on 7 March 2016 and will apply as from 1 January 2017 for withholding tax purposes. 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 15%. The rate on interest and royalties will be 10%.

Portugal-Senegal: The 2014 treaty entered into force on 20 March 2016 and will apply as from 1 January 2017. 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%. The rate on interest and royalties will be 10%.

Romania-United Arab Emirates: When in effect, the treaty signed on 4 May 2015 to replace the 1993 treaty provides for a 0% withholding tax rate where dividends are paid to a company at least 25% of whose capital is owned, directly or indirectly, by the government or a government institution; otherwise, the rate will be 3%. A 3% rate will apply to interest and royalties.

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Senegal: On 4 February 2016, Senegal joined the multilateral Convention on Mutual Administrative Assistance in Tax Matters, signed on 25 January 1988, and the amending protocol, signed on 27 May 2010.

Singapore-United Arab Emirates: The 2014 protocol to the 1995 treaty entered into force on 16 March 2016 and will apply as from 1 January 2017. When in effect, the protocol provides that dividends and interest will be taxable only in the state of residence of the recipient. The withholding tax rate on royalties will not be affected by the protocol.

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Italy
Italy introduces country-by-country reporting requirement
Italy introduced a country-by-country reporting obligation in its 2016 budget law approved on 28 December 2015 and effective 1 January 2016.
Issue date: 10 March 2016
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-16-008-10-march-2016.pdf

United Kingdom
Budget 2016 confirms commitment to competitive business environment, but includes BEPS measures
The budget delivered by the UK Chancellor on 16 March 2016 reaffirms that the UK will remain a competitive business environment and released a “Business Tax Roadmap” setting out the reforms by which the government proposes to achieve this objective. The roadmap includes a further drop in the corporation tax rate and changes to the loss relief rules and the withholding tax on royalty payments, as well as the government’s view on, and response to, actions under the OECD base erosion and profit shifting project.
Issue date: 16 March 2016
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-united-kingdom-16-march-2016.pdf

United States
IRS issues three transfer pricing International Practice Units
The US Internal Revenue Service issued three new transfer pricing IPUs on 4 and 7 March 2016. The IPUs address the residual profit split method, services that US parent companies and their affiliates provide to their CFCs and an outbound taxpayer’s contemporaneous transfer pricing documentation.
Issue date: 16 March 2016
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-16-009-16-march-2016.pdf

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