



# World Tax Advisor

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## U.S. provides transition relief with FATCA notice, but issues remain

While new guidance from the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) issued 14 July 2011 (Notice 2011-53, revised by the IRS on 25 July 2011) provides transition relief and an extended timeline for various provisions under the Foreign Account Tax Compliance Act (FATCA), many issues remain that affected parties should keep top of mind.

FATCA, enacted in 2010 and codified in Internal Revenue Code sections 1471 to 1474, imposes information reporting and withholding requirements on payments to foreign financial institutions (FFIs) with respect to their U.S. accounts and imposes withholding, documentation and reporting requirements with respect to certain payments made to non-financial foreign entities (NFFEs). The purpose of FATCA is to identify U.S. taxpayers that hold assets abroad. Beginning on 1 January 2013, FATCA will require FFIs to report annually to the IRS information on financial accounts held by U.S. persons or NFFEs in which U.S. taxpayers hold a substantial ownership interest. If an FFI or NFFE fails to comply, a 30% withholding tax will apply on withholdable payments to the FFI. Withholdable payments generally include U.S.-source fixed or determinable, annual or periodic income (FDAP), as well as the gross proceeds from the disposition of assets that could produce U.S.-source interest or dividends. To avoid FATCA withholding, an FFI must enter into an agreement with the IRS, thus becoming a participating FFI, under which it agrees to identify U.S. account holders and comply with due diligence rules. Participating FFIs will be required to withhold tax on payments to non-participating FFIs and account holders who are unwilling to provide the required information.

### New guidance

Treasury and the IRS have determined that it is reasonable for regulations to provide for a phased implementation of FATCA because of the need for significant changes to the information management systems of FFIs and withholding agents. Under the phased implementation approach in Notice 2011-53, FFIs and U.S. withholding agents are given adequate time to build the systems needed to fully comply with FATCA. In brief, the phased procedures include the following:

- **30 June 2013 deadline to enter into an FFI agreement** – To qualify as a participating FFI – and avoid FATCA withholding – FFIs must enter into an FFI agreement by 30 June 2013 (an extension from 1 January 2013). An FFI that enters into an FFI agreement by this date will be ensured to be identified as a participating FFI by the IRS in time to avoid FATCA withholding that will begin 1 January 2014. FFIs that enter FFI agreements after 30 June 2013, but before 1 January 2014, will be considered participating FFIs for 2014, but they may be subject to FATCA withholding due to the lack of time to identify them as participating FFIs before FATCA withholding begins on 1 January 2014. The effective date for FFI agreements entered before 1 July 2013 will be 1 July 2013 and that for any FFI agreement entered after 30 June 2013 will be the date the FFI enters into the FFI agreement.
- **New account due diligence procedures generally must be in place from the effective date of the FFI agreement** – The due diligence procedure for pre-existing private banking accounts with a value of at least USD 500,000 will need to be performed within one year from the effective date of the FFI agreement and for pre-existing private banking accounts of a lower value by the later of 31 December 2014 or the first anniversary of the FFI agreement. For all other pre-existing accounts, due diligence procedures must be performed within two years of the effective date of the FFI agreement.
- **First-year reporting in regard to U.S. account simplified for the first year** – Reporting of gross receipts and gross withdrawals or payments from U.S. accounts will not be required for the first year of reporting (2013). However, an FFI will be required to report as a recalcitrant account holder any U.S. account holder identified by 30 June 2014 for which the FFI is not able to report the information as required by FATCA (e.g. due to failure to obtain a waiver from the account holder). In addition, an account for which a participating FFI has received a Form W-9 from the account holder (or, with respect to an account held by an NFFE, from a substantial U.S. owner of such entity) by 30 June 2014 must be reported to the IRS as a U.S. account by 30 September 2014. For each account for which a participating FFI is not able to report information, the FFI will report the account among its recalcitrant account holders in accordance with Notice 2010-60 and as prescribed in future guidance. The reporting with respect to recalcitrant account holders identified by 30 June 2014 will be required to be filed with the IRS by 30 September 2014.
- **FATCA withholding on payments to non-participating FFIs and NFFEs begins on 1 January 2014 for withholdable payments of FDAP** – FATCA withholding on payments to non-participating FFIs and NFFEs of withholdable payments of FDAP *and* gross proceeds will begin 1 January 2015. Pass-thru payments will become subject to FATCA withholding no earlier than 1 January 2015 and, therefore, the obligation to calculate any pass-thru percentage will not begin before the first calendar quarter of 2014.
- **Private Banking due diligence procedures modified to reduce review burden of private banking relationship managers** – Although a private banking relationship manager must identify any client for which such relationship manager has actual knowledge is a U.S. person, Notice 2011-53 provides that the review of account files to identify U.S. and non-U.S. accounts can be performed by any person designated by the FFI. Notice 2011-34 provided that such review would be carried out by the private banking relationship manager.

The IRS anticipates publishing proposed regulations by 31 December 2011 and final regulations in the summer of 2012. IRS and Treasury also anticipate issuing draft FATCA reporting forms in conjunction with the proposed guidance and final forms to be published for use in the summer of 2012.

## Underlying issues

Although Notice 2011-53 provides substantial transition relief, there remain central issues that the IRS and Treasury have yet to address, including:

- Clarifying the treatment of certain FFIs;
- Expanding the concept of exempt and deemed compliant entities; and
- Providing a better definition of which financial products will be subject to withholding.

Moreover, the notice locks down the minimum 18-month period that FFIs have said they need to make system changes necessary to comply with the rules. FFIs that were hoping to have more time to address the transition will need to work within this timeframe.

Some observers perceive the extension as a sign that Treasury intends to proceed with some of the more controversial requirements outlined in previous guidance (i.e. Notices 2010-60 and 2011-34). These include the broad application of pass-thru payments and the broad definition of private banking, which may include any account of an individual that is serviced or maintained as part of a private banking relationship.

Notice 2011-53 also clarified that FFIs must have their procedures in place to deal with new customers at the time their FFI agreement becomes effective – in most cases this will be 1 July 2013. This deadline may require changes not only to customer on-boarding processes but also the systems that support them.

In addition, the transition relief, as originally written did not extend to payments to NFFEs. However, the IRS has clarified in revised Notice 2011-53 that the phased implementation and withholding transitional relief extends equally to payments to NFFEs. Although revised Notice 2011-53 did provide relief regarding the start date for FATCA withholding, it does appear to broaden the accounts subject to the private banking pre-existing due diligence procedures to include both individual and entity accounts with a value of at least USD 500,000.

In most situations, FATCA will be a very far-reaching undertaking for FFIs. Even with the transition relief, it will be challenging for larger institutions to be ready in time. As affected entities prepare to comply with FATCA, the following are some questions to consider:

- Who is championing the FATCA initiative in the organization? In most organizations, this will be the Chief Compliance Risk officer or the COO.
- Is there a governance structure in place to oversee and monitor FATCA compliance, and have a project leader and key stakeholders been identified?
- Has the organization completed an assessment of the impact and costs of FATCA?
- Are there any strategic business decisions that need to be made? Some of these may involve exiting certain markets, customers or investments.
- Have budgets for FATCA implementation and compliance been established?
- Is the organization addressing any legal concerns related to FATCA?
- What is the internal and external communication plan regarding FATCA, which can be critical for discussions with customers, analysts, investors and other stakeholders?

The implementation of FATCA is an expensive undertaking; however, noncompliance may give rise to potential reputational and monetary risks and could hinder business decisions and transactions. Affected institutions should ensure their organizations understand and are addressing potential FATCA exposure.

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## **Australia: ATO identifies GST areas of focus**

The Australian Taxation Office (ATO) has published details of its compliance program for the 2011-2012 financial year (i.e. 1 July 2011-30 June 2012). The program, which covers all federal taxes and duties administered by the ATO, identifies the focus areas, what the ATO regards as risks and the measures it will apply to address such risks. With respect to Goods and Services Tax (GST), the ATO has flagged its concern about several risk areas, including the following:

- International and cross-border transactions;
- Financial supplies, in particular, whether certain transactions are being characterized correctly, and whether taxpayers making both financial supplies and taxable and/or GST-free supplies are using fair and reasonable apportionment methodologies to claim input tax credits;
- Among large businesses, the adequacy of corporate governance processes for managing indirect tax risks (with a focus on the mining, retail, manufacturing, agriculture, electricity, gas, water and waste industries);
- Large businesses engaging in capital-raising activities, such as initial public offerings, mergers and acquisitions, rights issues and share buy-backs, and GST credits being over-claimed on related costs;
- The integrity of business systems among small- to medium-size enterprises, with a focus on the retail, construction, financial and insurance services and mining industries, and on entities involved in mergers and acquisitions;

- Incorrectly/fraudulently claimed GST refunds and GST serious evasion; and
- Noncompliance and evasion in relation to excise, fuel tax credits and other fuel-transfer payments obligations.

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## **China: Foreign employees required to participate in social insurance scheme**

The 2010 Social Insurance Law, which entered into effect on 1 July 2011, applies to both Chinese nationals and foreigners who work in China. On 10 June 2011, the Ministry of Human Resources and Social Security issued draft implementation rules under which all foreigners who legally work in China, including those on secondment arrangements and local hires, are required to participate in the Chinese social insurance scheme.

Participation in the social insurance scheme means that individuals have to contribute to basic pension and medical insurance, work-related injury insurance, unemployment insurance and maternity insurance schemes. Both employers and employees are required to contribute.

The relevant authorities will issue a social security number and card to “registered” foreigners (employers are required to register all qualifying employees with the local social insurance authority within 30 days after the employee commences employment).

The implementation rules were issued in draft form for public consultation, which was completed on 17 June 2011. However, it is still unknown whether changes will be made to the rules as drafted, when they will be finalized and how strictly the final rules will be enforced. Previous rules requiring “nationals” of Hong Kong, Macau and Taiwan to participate in the Chinese social insurance scheme were not enforced by most local governments in China. As a result, few, if any, such “nationals” participate in the Chinese social insurance scheme. This time, however, we believe that it is more likely than not that the implementation rules, when ultimately issued, will be enforced even though the timing of their enforcement may vary nationwide.

Affected employers should continue to monitor developments, consider any changes to procedures and additional administrative measures that would be necessary should the rules be implemented and enforced, begin to identify employees who might potentially be affected and estimate additional costs that could result from participation in the Chinese social insurance scheme. It is possible that some employees may not view making (employee) contributions to the scheme as a “benefit” to them and may require employers to make them whole. Employees may well insist that their employer continue to make contributions to their respective home-country schemes. Finally, it should be noted that nationals of countries that have concluded a totalization agreement with China may be exempt, although at present, only Germany and South Korea have entered into such agreements with China.

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## **Dominican Republic: Transfer pricing regulations introduced**

The Dominican Republic published Ruling No. 04-2011 on 2 June 2011 that sets out transfer pricing regulations applicable to related party transactions. The arm’s length principle was introduced into the Dominican Republic tax code in 1992, and an attempt to implement transfer pricing rules in 2006 resulted in an amendment to the tax code that gave the tax authorities the power to create specific transfer pricing rules through an administrative ruling. After a long period without administrative regulations, Ruling No. 04-2011 sets out the scope, methodologies and documentation requirements

applicable to taxpayers. The new rules are consistent with, and based on, the OECD Transfer Pricing Guidelines, and are applicable as from calendar year 2011.

## Scope

The regulations apply to any operation or transaction entered into by domestic corporations with:

- Foreign related or associated parties;
- Individuals, corporations or enterprises resident or domiciled in low-tax jurisdictions or tax havens; and
- Related or associated parties with Free Trade Zone Regime status.

## Concepts

The regulations introduce several common transfer pricing concepts and provide definitions as follows:

- **Foreign corporation or enterprise** – An economic or commercial entity that, regardless of its place of incorporation, operates in the Dominican Republic and has its capital based on foreign contributions (i.e. foreign contributions directly or indirectly represent 50% of the capital or votes necessary for corporate control).
- **Related parties** – Companies, enterprises or individuals, whether or not resident in the Dominican Republic, that meet any of the following criteria:
  - One of the parties participates directly or indirectly in the management, control or capital of the other party (i.e. it holds at least 50% of the capital or control of the other company);
  - Companies, enterprises or individuals that participate directly or indirectly in the management, control or capital of such parties;
  - Companies, enterprises or individuals resident in the Dominican Republic that have a permanent establishment (PE) abroad;
  - A PE in the Dominican Republic with its headquarters abroad, or another PE of the same company, or a company, enterprise or an individual connected with such a PE;
  - A company, enterprise or an individual that enjoys an exclusive relationship with another entity as an agent, a distributor or a dealer for the sale of goods or the provision of services, where the contractual relationship has unusual preferential characteristics compared to relationships between unrelated parties in similar circumstances;
  - A company, enterprise or an individual that assumes responsibility for the losses or expenses of another; and
  - Companies or enterprises that constitute a “decision unit.” A decision unit is presumed to exist when a corporation is a partner of another corporation and has, with respect to the second corporation, a majority of votes, decision-making powers or the power to appoint board members.
- **Comparability analysis** – A comparison of the conditions in a controlled transaction with the conditions in transactions between independent parties, taking five factors into account: product or service characteristics, functional analysis, contractual relationships, economic circumstances and business strategies.
- **Comparable transactions** – Transactions between related parties may be comparable to transactions between unrelated parties if there are no significant economic differences that affect the price of goods or services, or if differences do exist, the margin can be adjusted in accordance with guidelines in the new regulations (taking into account payment terms, traded quantities, publicity and advertising, commissions, packaging, freight, insurance and exchange rate, among other factors).
- **Tax havens** – Jurisdictions or territories that offer preferential tax benefits to attract foreign capital investment.

## Transfer pricing methodologies

The regulations set forth the following methods to determine the appropriateness of transfer prices:

- Cost plus method;
- Comparable uncontrolled price method;
- Transactional net margin method;
- Profit split method;

- Residual profit split method; and
- Resale price method.

The most appropriate valuation method would be the one most closely aligned to the economic substance of the transaction – taking into account the business structure, available information, transactions and functions – and requiring the fewest adjustments possible to eliminate any differences between comparable transactions.

### Information return

Beginning with the 2011 tax year, taxpayers that engage in related party transactions must submit an annual information return to the tax authorities. The return is due 60 days after the income tax return due date (income tax returns are due within 120 days after the close of the fiscal year). The following data must be included in the information return:

- Local taxpayer identification data, such as identification number, name, etc.;
- Country in which the related foreign company(ies) is (are) located;
- An itemization of income (export of goods or services, etc.) and expenses (import of goods or services, etc.), including amounts stated in U.S. dollars and payments dates.

### Next steps

Affected taxpayers should be preparing to carry out a transfer pricing analysis on their related party transactions to ensure compliance with the transfer pricing rules and with the information reporting requirements.

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## France:

### Amended Finance Law 2011 notably affects trusts, wealth tax and introduces exit tax

The French Parliament passed the 2011 Amended Finance Law on 6 July 2011, and the legislation has been confirmed as complying with the Constitution by the Constitutional Council. The amended law, which contains significant changes to the taxation of trusts and wealth tax and introduces an exit tax system, will enter into force upon publication, which is expected in the near future.

#### Taxation of trusts

The amended Finance Law contains new provisions on the tax treatment of foreign trusts, clarifying the application of the wealth tax to trusts and specifically providing that transfers made through a trust will be subject to inheritance tax and gift tax if the settlor is a resident of France at the time of death or if the assets held via a trust are located in France (unless otherwise provided by an applicable tax treaty).

Currently, trusts are not recognized under France's personal tax law; instead, general tax principles are used to tax income arising from a trust, assets held in a trust or a transfer of property via a trust. This treatment has sometimes resulted in the absence of any taxation in France. To address this issue and ensure the taxation of assets and income held in a trust, the French tax code will contain new defined terms (including "trust" and "settlor") and will set out events that trigger taxation and identify who will be liable to tax. "Trust" is defined as any legal structure created under the law of another country by a person, known as the "settlor," to place assets or rights under the control of an administrator (trustee), in the interest of one or more beneficiaries. "Settlor" is defined as the person who sets up a trust or, in cases in which the trust was set up by a person acting in a professional capacity, the person who has placed the assets or rights in the trust.

Having defined "trust," French tax law also will be amended to determine the level of taxation in France. If the transfer of property via a trust is considered a gift or inheritance as defined by French law, the normal rules for gift tax or inheritance tax will apply. In all other cases, inheritance tax will apply at the time of the settlor's death, even if assets are not actually

transferred to the trust's beneficiaries. If beneficiaries are the direct heirs of the settlor, inheritance tax will be due according to the brackets and rates applicable to direct heirs (i.e. at a marginal inheritance tax rate of 45%). In all other cases, inheritance or gift tax will be due at the highest inheritance tax rate (i.e. 60%). The highest rate also will apply if the trustee is resident in a country included on France's black list of tax havens or, for trusts established since 11 May 2011, if the settlor is a French tax resident.

Moreover, as from 1 January 2012, assets held in a trust will be included in net assets subject to the French wealth tax. The settlor of the trust will be the taxpayer for these purposes.

Any trusts involving French residents (either as the settlor or as beneficiaries) should be reviewed to determine the tax obligations and financial consequences under the amended rules.

## **Wealth tax**

The tax threshold for the wealth tax will be increased from EUR 800,000 to EUR 1.3 million for 2011, so that taxpayers whose net worth is less than EUR 1.3 million will not pay any wealth tax in 2011. Those whose net worth exceeds that amount will have the tax assessed and settled according to the current rules and progressive scale (progressive rates from 0% to 1.8%)

As from 2012, wealth tax will be calculated on all net taxable value on a simplified scale. Taxpayers with assets of between EUR 1.3 million and EUR 3 million will be subject to a tax of 0.25% and those with assets over EUR 3 million will be subject to tax at a rate of 0.5%. This is not a two-bracket progressive scale, but rather a proportional scale for the entire assets of a taxpayer, with the rate depending on the amount of the taxpayer's net worth.

The mechanism setting the total of wealth tax and income tax at an upper limit of 85% of the previous year's income will no longer apply as from 2012, and the reduction per dependent will be increased to EUR 300 and extended to children who are claimed as dependents in the household.

In addition, changes will be made to the compliance obligations in respect of the wealth tax; the deadline for submitting the return and paying any tax due will be postponed to 30 September 2011 (from 15 June 2011).

As from 2012, taxpayers with net worth of less than EUR 3 million will no longer have to file a complete wealth tax return; instead, their worldwide net taxable assets will be reported on their individual income tax returns. When filing an income tax return, a taxpayer will have to be able to prove the amount of his/her net worth (this means assessing goods listed as assets and debts as liabilities). While claiming to have introduced a simplified tax return process for individuals with assets under EUR 3 million by reducing the wealth tax return filing obligations, the law has, in fact, considerably increased the complexity of filing income tax returns.

Although the French government has issued a number of communications on the simplification of the wealth tax return, taxpayers should be prepared for a potential future tax audit by retaining all supporting documents. This implies preparing a complete French wealth tax return to assess net worldwide taxable assets, even though supporting documents will no longer have to be submitted to the tax authorities.

## **Exit tax**

Following a 2004 decision by the European Court of Justice (ECJ), France abolished its exit tax as incompatible with EU law. Based on recommendations provided in the ECJ's decision – and to discourage the transfer of domicile outside of France for fiscal reasons – the 2011 amended Finance Law introduces a new exit tax mechanism that applies retroactively for certain residents transferring their domicile since 3 March 2011.

Upon departure from France, income tax and social taxes will be levied on the unrealized capital gains on certain securities/equivalents and payables, as calculated on the value on the day before the transfer outside France. To do this, the law introduces a new trigger event so that the transfer of tax residence is deemed to have taken place on the day prior to the actual departure, i.e. one day before the taxpayer ceases to be subject to a worldwide tax obligation in France.

Targeted are those taxpayers who were domiciled in France for at least six of the 10 years before the transfer and who hold directly or indirectly at least 1% of the capital of a company (or the holding is valued at more than EUR 1.3 million) at the

time of the transfer. Unrealized capital gains on the securities and equivalents are taxable, as well as payables representing an additional price to be received in execution of an indexation clause (earn-out payments). In addition, regardless of the length of the taxpayer's tax residence in France or the size of the shareholding, all declared capital gains on a transaction carried out in France that benefited from a postponed date of taxation will be taxed at the time of the transfer.

While tax is immediately triggered, payment may be postponed under certain cases:

- A legal extension without the taxpayer having to provide financial guarantees is granted for transfers to an EU Member State or to a registered EEA country, provided the EEA country has signed both an administrative assistance treaty and a treaty that provides administrative assistance for recovery of tax;
- Taxpayers that transfer their domicile outside France and the EU/EEA can opt for an extension, but they will be asked to provide financial guarantees (e.g. bank guarantee) before departure and to designate a tax representative in France. However, when the transfer is made for professional reasons, adjustments are permitted to avoid having to provide guarantees.

The grace period ends, triggering payment of the tax due, when certain events take place, such as the sale, purchase, reimbursement, cancellation or donation of securities (under certain conditions) or the taxpayer's death. Additionally, provided the securities have been kept, the tax will be cancelled or refunded eight years after the transfer of domicile outside France or, in the event of a return to France, prior to the eight-year period. Finally, taxpayers who transfer their domicile outside France must comply with new tax reporting obligations.

While additional guidance is expected from the tax administration, taxpayers who left France since 3 March 2011 should determine whether they are liable to pay the exit tax once the law enters into force. Taxpayers planning a transfer of domicile, even for professional reasons, should prepare for the exit tax in advance of the transfer.

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## Germany:

### Tax court clarifies legal remedies for negative binding ruling from tax authorities

In a recent decision issued by the tax court of Munich, the court further clarified the procedural rules when the tax authorities refuse to issue an advance ruling or issue a ruling that does not follow the position taken by the taxpayer.

Under the German General Tax Code, a taxpayer may apply for a binding ruling, asking the tax authorities to confirm the taxpayer's legal position on a planned structure. The ruling request must include a description of the relevant facts, as well as the taxpayer's position on the tax consequences of the structure. The tax authorities have discretionary power to decide whether to issue a ruling and whether or not to agree with the taxpayer's position (positive ruling/negative ruling). The ruling application is subject to a fee, depending on the amount of tax at stake.

The tax court of Munich held that the issuance of a binding ruling is an administrative act that gives the taxpayer (applicant) the same procedural rights as a person would have with respect to other administrative acts which a taxpayer may have reviewed by the courts. However, the court does not have to review the legal position taken by the tax authorities; instead, it is only obliged to review whether or not the tax authorities made proper use of their discretionary powers within the limits set by the General Tax Code. According to the tax court, the position taken by the authorities in a negative ruling will exceed the scope of its discretionary powers only if the tax authorities (i) misinterpret the facts of the case; (ii) fail to provide a statement of reasons as to why they do not accept the taxpayer's position; or (iii) clearly fail to take the jurisprudence of the highest courts into account.

Because none of these factors were present in the case, the tax court of Munich held that the taxpayer was not entitled to a positive ruling. The court noted, however, that the taxpayer still would have the option to initiate court proceedings against the tax assessment after implementing the structure.

This decision leaves taxpayers in a quandary: if a negative binding ruling is issued, a taxpayer has the right to take the matter to court, but court proceedings will not provide any certainty on the tax treatment of the intended structure.

If the tax court of Munich's decision is confirmed by the Federal Tax Court, legal recourse against negative rulings from the tax authorities would be feasible only where the tax authorities clearly violate the limits of their discretionary powers (e.g. the authorities fail to provide reasons for their position). The case is pending before the Federal Tax Court.

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## **Russia: New capital gains exemption available for 2011**

A recent change in the tax legislation has continued the trend of making Russia more attractive from a capital gains tax perspective for investors. This article describes the latest change and then reminds readers of the broader participation exemption rules in Russia, including those aimed specifically at promoting long-term investment and innovation.

### **Capital gains taxation**

Previously, Russian companies that had more than 50% of their assets in the form of real estate located in Russia, and that were quoted on a Russian stock exchange, were at a disadvantage compared to companies quoted on overseas exchanges. Gains earned by foreign investors from the disposal of shares (and on derivatives of these shares) in the former case were subject to a 20% withholding tax (absent any applicable double tax treaty).

Federal Law No. 132-FZ (dated 7 June 2011, but applying retroactively to transactions taking place after 1 January 2011) aims to level the playing field. That law exempts from withholding tax gains earned by foreign entities from the sale of shares in "real estate rich" Russian entities that are traded on "organized securities markets" (OSM), as well as on derivatives of these shares. An application can be made to the Russian tax authorities for a refund of tax already withheld in 2011.

Care should be taken when considering whether or not the shares are recognized as being traded on an OSM. Under Russian tax law, shares are considered to be traded on an OSM if all of the following conditions are satisfied:

- The securities are accepted for trading by at least one organized stock exchange that has the relevant rights according to national legislation;
- Information on the price has been disclosed to the mass media (including electronic mass media) or can be provided by the organizer of the trade or other authorized person to any interested person within three years after the transaction date; and
- The market price was calculated during the three-month period before the transaction date (if required by applicable legislation).

"Applicable legislation" is defined as, and refers to, the state where the trade took place. Thus, care should be taken when trading electronically, because the territory of the transaction should be defined by the taxpayer, i.e. the foreign seller of the shares or derivatives in question.

The extension of the withholding tax exemption to the circumstances described above may thus increase the attractiveness of the Russian stock market for nonresident investors.

## Participation exemption

Turning to Russia's broader participation exemption, in principle, this currently applies only to dividends. Thus, dividends received by a Russian legal entity from its foreign or Russian subsidiary may be taxed at a 0% rate, provided all of the following requirements are met when the decision to pay the dividend is made:

- The recipient of the dividends has continuously owned the shares in the company distributing the dividends for a period of no less than 365 calendar days;
- The recipient of the dividends holds no less than 50% of the share capital of the company distributing the dividends, which gives it the right to receive at least 50% of the dividends; and
- If the company distributing the dividends is incorporated in an overseas jurisdiction, it must not be included on the "blacklist" of jurisdictions approved by the Russian Ministry of Finance, which includes, in particular, the British Virgin Islands, Cyprus and Malta.

For dividends declared from the results for years preceding 2010, the cost of the shares held in the company distributing the dividends also had to be no less than RUB 500 million. The abolition of this requirement in 2009 significantly broadened the applicability of the participation exemption.

A broader participation exemption for capital gains does not currently exist in Russia, but a targeted exemption was introduced at the end of 2010 for capital gains derived from the alienation or redemption of shares in Russian companies held continuously for more than five years. The provision applies to shares in the following categories as at the transaction date:

- The shares have not been traded on an OSM throughout the holding period; or
- The shares are traded on an OSM and throughout the holding period have been shares in a company operating in the high technology (innovation) sector of the economy; or
- The shares were not traded on an OSM when originally acquired, but at the date of their alienation or redemption *are* traded on an OSM and are shares in a company operating in the high technology (innovation) sector.

No guidance on the procedure for determining whether a company operates in the high technology (innovation) sector of the economy has been issued. The rules apply to shares acquired from 1 January 2011 and to disposals no earlier than 2016.

The new exemption, together with the participation exemption for dividends, provides new and interesting opportunities for structuring Russian investments through Russian companies, especially in the high-technology sector.

## Comments

Russian tax practitioners see the 2011 changes as part of the positive trend of improving the investment climate in Russia, facilitating an inflow of foreign investors into the Russian stock market, stimulating the use of passive and active sources of income and increasing the liquidity of Russian shares.

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## In brief

**Brazil** – Provisional Measure No. 517/10 was converted into Law 12,431/11 and published in the official gazette on 27 June 2011. Provisional Measure 517 was originally published on 31 December 2010 creating additional incentives for long-term financing to meet the increasing demand for infrastructure investment due to the upcoming Football World Cup and Olympic Games.

**Indonesia** – The Director General of Taxation has issued a circular regarding the tax collection policies for fiscal year 2011, with a view to boosting tax collection and focusing on tax arrears of income tax, VAT and building tax. Specific taxpayers have been prioritized as tax collection targets, including those who have the ability to pay outstanding taxes but fail to cooperate during the tax collection process; those who show signs of insolvency, are involved in insolvency proceedings or who have completed the insolvency process; and those who are about to be liquidated/dissolved or are in the liquidation process. In certain cases, the tax collection process may include blocking a taxpayer's or tax guarantor's bank accounts, preventing a tax guarantor from travelling abroad and taking the tax guarantor into custody.

**Liechtenstein** – The tax authorities have issued guidance on advance ruling requests. According to the guidance, a ruling may be issued before the implementation of a planned structure and with respect to the possible application of the general anti-avoidance rule. An advance ruling request must be in writing and in German and must include a complete description of the facts and the applicant's interpretation of the law. If the actual facts do not deviate from the facts presented in the ruling request, the opinion of the tax authorities in the ruling will be considered binding. Rulings will be issued free of charge.

**Thailand** – The Bank of Thailand has announced that, as from 26 March 2011, juristic persons located in Thailand (including branches, agent offices, partnerships and joint ventures) and individuals residing in Thailand engaging in international finance and investment activities must submit reports on their foreign currency transactions and other related information to the bank if their international investment transactions meet prescribed thresholds.

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### Brazil

#### Tax treatment and regulatory procedures of derivative transactions changed

The government has issued two sets of rules granting authority to the National Monetary Council to establish specific requirements for the negotiation of derivative instruments and that make changes to the Financial Transactions Tax on such transactions. [Issued: 1 August 2011]

**URL:** [http://www.deloitte.com/view/en\\_GX/global/services/tax/international-tax/5ee631ca20781310VgnVCM2000001b56f00aRCRD.htm?id=us\\_email\\_Tax\\_WTA\\_080511](http://www.deloitte.com/view/en_GX/global/services/tax/international-tax/5ee631ca20781310VgnVCM2000001b56f00aRCRD.htm?id=us_email_Tax_WTA_080511)

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### Peru

#### New law clarifies scope of capital gains tax on indirect transfers

The government has enacted a law that clarifies rules introduced in February on the capital gains tax treatment of indirect transfers of shares or participating interests in a Peruvian company. [Issued: 22 July 2011]

**URL:** [http://www.deloitte.com/view/en\\_GX/global/services/tax/2eb5db24e0351310VgnVCM2000001b56f00aRCRD.htm?id=us\\_email\\_Tax\\_WTA\\_080511](http://www.deloitte.com/view/en_GX/global/services/tax/2eb5db24e0351310VgnVCM2000001b56f00aRCRD.htm?id=us_email_Tax_WTA_080511)

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### Russia

#### President signs transfer pricing legislation into law

The president has signed a law that introduces major changes to Russia's transfer pricing legislation. The new law will enter into force on 1 January 2012, but some provisions will be deferred until 2013 and 2014. [Issued: 28 July 2011]

**URL:** [http://www.deloitte.com/view/en\\_GX/global/services/tax/transfer-pricing/d0118b677b091310VgnVCM3000001c56f00aRCRD.htm?id=us\\_email\\_Tax\\_WTA\\_080511](http://www.deloitte.com/view/en_GX/global/services/tax/transfer-pricing/d0118b677b091310VgnVCM3000001c56f00aRCRD.htm?id=us_email_Tax_WTA_080511)

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## United States

### IRS to Combine APA and MAP Programs

As part of the continuing efforts to improve the international operations of the Internal Revenue Service, officials have announced two major changes to the agency's international operations as they relate to transfer pricing.

[Issued: 28 July 2011]

**URL:** [http://www.deloitte.com/view/en\\_GX/global/services/tax/transfer-pricing/b10c1f5ac4191310VgnVCM3000001c56f00aRCRD.htm?id=us\\_email\\_Tax\\_WTA\\_080511](http://www.deloitte.com/view/en_GX/global/services/tax/transfer-pricing/b10c1f5ac4191310VgnVCM3000001c56f00aRCRD.htm?id=us_email_Tax_WTA_080511)

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