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In this issue:

French court decision could trigger imposition of tax on all cross-border restructurings 1
China: SAT issues long-awaited EIT deduction rules for share-based incentives 3
Germany: Federal Tax Court has constitutional concerns about interest deduction limitation rule 4
Sweden: Luxembourg FCP has no liability to pay withholding tax in Sweden 5
United States: Impact of FATCA on non-FSI companies 6
In brief 7
Are You Getting Your Global Tax Alerts? 8

French court decision could trigger imposition of tax on all cross-border restructurings

A decision issued by the Administrative Court of Paris in 2011 raises the question of whether the restructuring of an entity with the effect that a French company could expect to derive less income in France than it derived before the restructuring could be regarded as an indirect transfer of profits.

The case involved a French company (Société Nestlé Finance France) that transferred its cash pooling activity to a related Swiss entity (Nestlé Treasury Centre Europe). The cash pooling function had been a purely administrative function carried out exclusively for the benefit of parties related to the French company. The French company did not receive any compensation for the transfer of the cash pooling activity. The Administrative Court concluded that the transfer of an internal administrative function to a foreign entity – even if the function only involved other affiliated companies – required the payment of arm's length compensation.

French case law deems the absence of compensation for a transfer of valuable tangible or intangible property to give rise to a transfer of profits. In the case of a cash pooling arrangement, however, the parties are exclusively related party affiliates that are not free to choose whether or not to participate in the cash pooling. Thus, an argument could be made that a transfer of a cash pooling activity should not require a payment to the transferor, because it does not constitute the transfer of a valuable intangible. Nevertheless, the court sided with the French tax authorities by recognizing the existence of an indirect transfer of profits, citing article 57 of the General Tax Code, which embodies the arm's length principle.

Presumption of indirect transfer of earnings

Under article 57, the French tax authorities must prove both the existence of a dependent relationship between the parties concerned and that a transfer of profits has taken place, i.e. the authorities have to demonstrate that a French enterprise is "dependent on" or "controls" a foreign enterprise(s) and that profits or advantages have been directly transferred/granted to that/those foreign enterprises to establish a presumption that there has been an indirect transfer of profits. Thus, in the present case, the taxpayer could have rebutted the presumption by demonstrating that adequate compensation had been paid for the transaction.

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The Administrative Court agreed with the tax authorities that the failure of the Swiss entity to compensate the French entity for the transfer of the latter's cash pooling activity gave rise to the presumption that there was an indirect transfer of profits. The court observed that the taxpayer "does not challenge the relevant elements relating to the legal, indirect transfer of profits" by simply arguing that "cash pooling activities were only general administration activities that did not have an intrinsic value."

In fact, the taxpayer should have rebutted that presumption by characterizing the benefits received by the foreign entity as adequate compensation to the restructured entity. The taxpayer should have invoked the existence of its own business reasons for the transfer, which would have allowed the entity to justify the transfer of its activity without receiving any compensation in exchange.

The Administrative Court concluded that nonpayment for the transfer of the cash pooling activity resulted in an indirect transfer of profits; however, the basis for this decision remains unclear.

Legal basis of decision – transfer of valuable intangible or payment for future loss of revenue?

The court stated that the fact that the group's clients are "captive" clients does not affect the presumption that there has been an indirect transfer of profits and thus does not give a taxpayer the right to transfer an activity without compensation. The court remarked in this context that the taxpayer "cannot argue that the administrative functions involved in the cash-pooling activities are without value." The court's reasoning is based on various arguments. First, under the "abnormal act of management theory," a company that performs an activity must be remunerated for that activity, even where the activity exclusively benefits other members of the group of which it is a member. In a cash pooling arrangement, there is thus an obligation for the other parties to compensate the cash pool leader by payment for intercompany transactions.

The court supported its reasoning by emphasizing that "the fact that the leader's clients are affiliates…does not mean that the cash pooling activities have no value, since the activity was not transferred to a third party but is still performed by an affiliate, which will then benefit from the same captive clients."

These aspects of the court's reasoning would seem to indicate that the court recognized the existence of monetary value in the function of the centralizing the management of funds deriving from the clients' involved in the arrangement. However, as the court did not provide any specific information regarding the criteria for selecting these clients, it is difficult to be sure whether the court considered that the client base did in fact add value to the cash pooling activity in France. But, because of the court's lack of clarity, it is also possible to draw the conclusion that the court was open to the possibility that the compensation should be characterized as compensation for the potential loss of revenue.

Moreover, a finding that the affiliates paid compensation to the French entity in exchange for its fund administration services also enabled the court to justify the value of the activity. The court pointed out that the French taxpayer had been compensated with a spread on the funds it managed and that the margin was so profitable that the taxpayer did not incur any exchange risk. Thus, it would seem that, in the opinion of the court, the monetary value resulted not from the existence of the "captive" client base, but from the restructured entity's revenues. The negative repercussion for the taxpayer following the transfer of its activity would not be the loss of its client base, but a potential decrease in its revenues.

The second part of the decision confirms this hypothesis: the court reduced the amount of the reassessment proposed by the tax authorities on the basis of the remuneration of the funding activity paid to the French taxpayer. The compensation received in 2001 and 2002 for the taxpayer's cash pooling activity served as a basis for estimating the potential loss in revenue it would suffer.

The judge reduced the reassessment by retaining the effective tax rate applied by the taxpayer throughout the audit period. Before the case was litigated, the French tax authorities had argued the tax rate should have been higher, but they eventually concluded that the tax rate applied was in accordance with the arm's length principle. Thus, the court based its decision on the presence of revenue leading to a reassessment based on an estimate of the restructured entity's potential loss of profits.

Principle of compensation of losses from profit from OECD Guidelines

The emergence of this new principle of compensation for restructuring operations may have been espoused by the court because it is referred to in the OECD transfer pricing guidelines. Section E of Chapter IX of the guidelines deals with the

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"compensation of the restructured entity based on the termination or the renegotiation of the relevant existing agreements." The guidelines state that restructuring operations frequently result in the termination of contractual agreements, which could negatively affect the restructured entity. The negative effects could take the form of restructuring costs, conversion costs, and/or a reduction in potential profit. Thus, companies would have to ensure compliance with the arm's length standard both in related party transactions and in the context of cross-border restructurings between related parties.

The OECD guidelines apply the arm's length principle to restructuring operations by assuming that the restructured entity, subject to exceptional costs, receives compensation equal to what would have been paid between independent parties. Thus, under certain conditions, the OECD allows for compensation in the case of a reduction in potential profits due to the termination of contractual agreements after a restructuring. However, the guidelines also emphasize that not all contractual terminations should give rise to compensation. The payment of remuneration is subject to the condition that independent parties would have agreed on compensation by the insertion of a payment clause.

To determine whether this principle should apply, the OECD proposes a four-step test:

1. Does the written contract have a clause relating to compensation?
2. Is the clause of an arm's length nature?
3. Do the legal or tax clauses mention the right to compensation?
4. In an arm's length situation, would the party have compensated the other party?

However, this type of test is not suitable for a situation in which there is a transfer of support functions among affiliates in the same group. In fact, it is difficult to conceive how a group could conclude a cash pooling contract with a third party under the same conditions (i.e. for the exclusive benefit of group members). Thus, even if this new principle of compensation for restructuring operations has been articulated, it would seem problematic in its implementation until further developed.

The Nestlé Group has appealed the decision, which is currently pending before the Administrative Court of Appeal. If the Court of Appeal upholds the decision of the Administrative Court, there is a possibility that the transfer of an activity, even of an administrative nature, could be classified as a "transfer of profits abroad" in the absence of compensation. However, in light of the doubts expressed in the analysis above, it seems unlikely that the appeals court will affirm the decision of the lower court.

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China:
SAT issues long-awaited EIT deduction rules for share-based incentives

China's State Administration of Taxation (SAT) issued Bulletin 18 on 31 May 2012, which permits an enterprise income tax (EIT) deduction that relates to employee remuneration provided in the form of restricted shares, share options and other share-related incentives (collectively, "share-based incentives"). Bulletin 18 will apply as from 1 July 2012.

According to Bulletin 18, a deduction for EIT purposes will be allowed only in the year the share-based incentives are exercised, regardless of whether there is a vesting period for the incentives. The EIT deduction is based on the difference between the fair market value (FMV) of the shares at the date of exercise and the exercise price, with the amount of the deduction treated as a remuneration expense of the company for EIT purposes.

The above treatment primarily applies to Chinese tax resident enterprises listed on the Shanghai or Shenzhen stock exchanges that provide share-based incentives to their employees in accordance with the Measures Governing Equity Incentive Plans of Listed Companies (Circular 151) issued by the Securities Regulatory Commission. However, it also applies

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to Chinese resident companies listed on offshore stock exchanges and Chinese unlisted companies that adopt share-based incentive schemes in line with Circular 151.

Comments

Although the SAT has issued a number of tax circulars on the individual income tax (IIT) treatment of income derived by an employee from share-based incentives, Bulletin 18 is the first time the SAT has clarified the corresponding EIT treatment of the deductibility of the relevant costs. As stipulated in the relevant IIT regulations, when an employee exercises a share option, the difference between the FMV of the shares and the exercise price are treated as employment-related income and are subject to IIT. For share options, Bulletin 18 essentially follows the same treatment as the prevailing IIT regulations for determining the amount of the remuneration costs and the timing of the EIT deduction.

With respect to restricted shares, the IIT regulations provide that taxable income for IIT purposes is calculated based on the average amount of the FMV of the shares on the vesting date and the FMV on the share registration date (assuming no employee payment is required). If the vesting date of restricted shares is considered the "exercise date" under Bulletin 18, the amount of the EIT deduction is determined based on the FMV of the shares on the vesting date. This treatment will result in an inconsistency between the taxable amount for IIT reporting and the amount claimed as an EIT deduction.

According to Chinese GAAP, remuneration expenses related to equity-settled share option plans are measured as the fair value of the options on the grant date and charged to the profit and loss account over the vesting period. (Bulletin 18 seems to focus on equity-settled share-based incentives, so our discussion in respect of the book-to-tax difference is based on such equity-settled plans. The accounting treatment of cash-settled share-based incentives will be different.) The following table provides a brief comparison of the accounting and tax differences for share option plans:

Items	Accounting rules	EIT rules
Time to recognize remuneration expenses	Each balance sheet date in the vesting period	Exercise date
Measurement	Fair value of the options on the grant date	Difference between the FMV of the shares on the exercise date and the exercise price

Companies should consider the deferred tax impact of the different accounting and tax treatment of share-based incentives.

Bulletin 18 leaves some issues unresolved; in particular, further clarification is needed on the following:

- It is not entirely clear whether a group member company, other than the listing entity itself, can claim the EIT deductions under a group plan of share-based incentives; and
- Chinese subsidiaries of multinational companies that provide a global plan of share-based incentives are often recharged for the costs in respect of their local employees. Bulletin 18 is silent on how such recharge will impact the EIT deduction.

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Germany:
Federal Tax Court has constitutional concerns about interest deduction limitation rule

In a decision dated 13 March 2012, Germany's Federal Tax Court (BFH) granted a suspension of the execution of a tax assessment on a German AG because the BFH has concerns about the constitutionality of the interest deduction limitation rules. The BFH overruled a decision of the local tax court of Munich, which had rejected the taxpayer's application for the suspension.

Under the interest deduction limitation rules, the deductibility of interest expense is limited to 30% of the taxable EBITDA of the business. One exception to the limited deduction is the "stand-alone clause." The stand-alone exception generally

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applies if the taxpayer can demonstrate that the company is not part of a group of companies and that no more than 10% of any group entity's net interest expense is paid on debt to substantial (i.e. more than 25%) shareholders, parties related to such shareholders or secured third parties (generally termed "harmful shareholder financing"). Harmful shareholder financing exists where a shareholder directly grants a loan to its business, as well as where a bank with recourse to the shareholder grants a loan. This rule primarily targets back-to-back financing, but according to the tax authorities, it also covers cases in which a qualified shareholder provides a bank guarantee.

The taxpayer in the case relied on the stand-alone clause for which it qualified, in principle. However, the taxpayer's shareholder had granted bank guarantees that – in conjunction with direct loans – led to a presumption of harmful shareholder financing. As a result, the taxpayer could not deduct the entire interest expense and had to pay corporate income tax.

The BFH granted the suspension of execution of the tax assessment. It did not question the constitutionality of the interest deduction limitation rules as such, but the court has concerns that the presumption of harmful shareholder financing simply because of bank guarantees may be too far-reaching and thus may violate the equality principle in the constitution.

It remains to be seen whether the Constitutional Court, Germany's only court that is competent to decide on the constitutionality of a law, will agree with the BFH. Because the BFH decision was made in proceedings for temporary legal protection, the BFH was not required to refer the question to the Constitutional Court. However, given that that BFH has now raised constitutional doubts, the local tax court of Munich, the court of first instance, likely will consult the Constitutional Court.

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Sweden:
Luxembourg FCP has no liability to pay withholding tax in Sweden

In a case from March 2011, Sweden's Administrative Court of Appeal stated that a foreign non-UCIT fund undertaking established in the form of a Luxembourg FCP (*fonds commun de placement*, which is not a legal person) was not liable to withholding tax in Sweden. The basis for the court's decision was that the Swedish Withholding Tax Act only stipulates tax liability for foreign individuals (and estates of a foreign individual) and foreign legal persons. Moreover, the Administrative Court of Appeal acknowledged the fact that the Luxembourg FCP was organized in a manner similar to a Swedish investment fund. Hence, the court concluded that withholding tax could not be levied because the fund is not a legal person and not transparent for withholding tax purposes, and the tax withheld must be repaid to the fund.

The Tax Agency had appealed the decision, but the Supreme Administrative Court denied the leave to appeal in April 2012. This implies that the decision of the Administrative Court of Appeal is still valid and should be applicable to fund undertakings in the form of a Luxembourg FCP, and potentially other investment funds that are non-legal persons and organized in a manner similar to a Swedish investment fund.

In this context, it should be noted that, as from 1 January 2012, the withholding tax on dividend distributions paid to certain foreign fund undertakings resident within the EEA or in a country with which Sweden has a tax treaty that includes a provision of exchange of information or with which Sweden has an agreement regarding exchange of information in tax matters was abolished.

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United States:
Impact of FATCA on non-FSI companies

Seeking to address perceived abuses by U.S. persons with offshore assets, the U.S. Congress enacted the Foreign Account Tax Compliance Act (FATCA) in 2010 to assist the Internal Revenue Service (IRS) in identifying offshore income held by U.S. persons. FATCA identifies offshore income by compelling non-U.S. entities to report the identities of U.S. accountholders to the IRS, using a new U.S.-sourced withholding tax levied against non-cooperative foreign entities to enforce compliance. Similarly, related legislation requires U.S. persons to specifically identify substantial foreign assets (and income related to such assets) beginning on their U.S. tax returns filed in 2012. Comparing the information it obtains from compliant foreign entities with the new U.S. tax return information, the IRS believes it will quickly be able to identify sources of unreported foreign income and discourage tax evasion.

FATCA's mechanism for compelling compliance, a new 30% withholding tax on U.S.-source income, will have a significant impact on all U.S. and foreign financial institutions (FFIs) and will likely encourage FFIs, as well as other affected foreign entities, to share information with the IRS for the first time. The withholding tax will be imposed in a similar manner to the existing withholding tax on U.S.-source income under Chapter 3 of the Internal Revenue Code by requiring payers (or withholding agents) of U.S.-sourced income and gross proceeds to withhold 30% on payments to non-U.S. entities that do not certify their compliance with FATCA. To avoid the tax, FFIs must enter into formalized agreements with the IRS to share the identities of U.S. account and asset holders. Other affected non-U.S./non-FFI entities seeking to avoid the tax will be required to provide information to the withholding agents relating to any of their substantial U.S. owners.

In proposed regulations released in February 2012, the U.S. Treasury and IRS provided detailed requirements that U.S. withholding agents, FFIs and other non-U.S. entities must comply with to avoid the withholding liability under FATCA. The proposed regulations also detail exceptions and exclusions to the withholding and suggest a broader framework of international cooperation seeking to ease challenges of FATCA compliance on foreign entities. Anyone affected by FATCA needs to understand the implications of these rules, exceptions and frameworks on their industry and business and prepare to address them. The proposed regulations have eased some of FATCA's compliance deadlines, but some hurdles (and opportunities) still exist to prepare processes, systems and business relationships for a smooth transition to the new, more transparent international business environment that FATCA attempts to create.

Industry impacts

Companies that are not in the financial services industry (non-FSI companies) may potentially be impacted by FATCA on several different levels. Although FATCA's primary purpose is to impose reporting requirements on financial institutions outside the U.S. by placing a withholding burden on U.S. withholding agents for payments to non-compliant foreign entities, non-FSI companies should be aware that FATCA will likely have impacts on their businesses as well. The primary impact that FATCA will have on non-FSI companies is to deem them withholding agents for purposes of FATCA, as well as having other ancillary impacts depending on how non-FSI companies structure certain internal and external business activities. The following is a sample of some of the common scenarios where non-FSI companies are likely to be impacted by FATCA:

- Non-FSI companies making withholdable payments to foreign payees – Withholdable payments include U.S.-source fixed, determinable, annual and periodic payments ("FDAP," generally income payments such as dividends, interest, royalties), as well as gross proceeds from the sale of U.S. assets that could produce U.S.-source dividends or interest. Although there is an exception for payments made in the ordinary course of business that are non-financial, there is substantial uncertainty about how non-FSI companies will substantiate the character of payments. Further guidance is expected to be released by Treasury regarding the definition of a "non-financial payment," which will impact the necessary steps for non-FSI companies in this regard. Some types of FATCA withholdable payments commonly made by non-FSI companies include:
    - Swaps, futures and other hedging activities – Non-FSI companies will need to collect documentation from counterparties to substantiate FATCA compliance of the counterparties. If non-FSI companies determine that any counterparties are noncompliant, non-FSI companies will need to develop and/or implement withholding, depositing and reporting capabilities.
    - Stock/bond redemptions and dividend payments – If a non-FSI company redeems stock or bonds or makes dividend payments, it may need to collect FATCA documentation on its shareholders depending on how they structured the transactions. Any non-FSI company that contracts out dividend and redemption payments to third parties may be partly shielded from FATCA liability and responsibility, but will need to

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develop controls and negotiate indemnification in the event that the third party provider fails to properly comply with its delegated FATCA responsibilities.

  - Interest payments to foreign lenders – Payments made on loans to foreign lenders likely will be common withholdable payments. There is an exception available for this type of payment (i.e. the grandfathered obligation clause), but analysis will be necessary to determine the extent to which non-FSI companies can utilize the exception, and controls will be required to track changes in contract terms that might undermine the efficacy of the exception.

- Internal "financing" operation located outside the U.S. – Any entities that are part of the corporate group that are located outside the U.S. and whose primary function is securing or providing financing for other entities within the corporate group may be an excepted FFI under FATCA's hedging/financing center of non-financial group exception. Non-FSI companies will need to analyze the business conducted by those entities to determine the extent to which they can utilize the exception.

Next steps

- Impact assessment – Identify the business units, operational areas, IT systems and legal documents (e.g. counterparty agreements, vendor contracts, etc.) impacted by FATCA. Operational areas that would be impacted include vendor onboarding, payment processing, tax withholding and depositing and regulatory reporting.
- Payee classification – Classify payees and other impacted relationships (e.g. counterparties for derivatives contracts) per FATCA rules to identify documentation requirements.
- Implementation planning – Make business decisions that would reduce the implementation and ongoing costs for FATCA compliance. Leverage and modify existing processes and systems to further reduce implementation costs and business disruption.
- Communication – Communicate with internal and external stakeholders.
- Governance – Update policies, procedures and legal documents.

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In brief

Latvia – In a departure from the trend towards increasing the rates of VAT, the VAT rate in Latvia is to be reduced from 22% to 21% for supplies of goods and services with a tax point on or after 1 July 2012.

Russia – The lower house of parliament (Duma) approved an amendment to the tax code on 7 June 2012 exempting payments on qualifying Eurobonds and other debt instruments issued before 1 January 2014 from withholding tax in Russia if: the recipient provides a residence certificate from a jurisdiction with which Russia has concluded a tax treaty containing an interest exemption; and the bonds are listed on an approved foreign stock exchange and cleared through an approved international clearing system. Consequently, once enacted, Russian withholding agents will not have to withhold tax from qualifying interest payments. The amendments were submitted to the upper house (Federal Council) for consideration on 15 June and also must be signed by the president before entering into force.

United Kingdom – The U.K. tax authorities have published detailed proposals, including draft legislation, for the introduction of a general anti-abuse rule (GAAR). The proposed GAAR is narrowly targeted at "abusive" arrangements. This follows the announcement in the budget that the government intends to introduce a GAAR in response to the Aaronson Study Group Report. The proposed GAAR will apply to the main direct taxes and National Insurance. As announced at the budget, it will be expanded to cover Stamp Duty Land Tax, and the consultation document also proposes extending it to inheritance tax. It is confirmed that the government will establish an advisory panel, members of which will come from both

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the tax authorities and business, to give opinions on cases where the authorities propose to apply the GAAR and to develop guidance on its use. Comments are invited by 14 September 2012.

United States – The 2011 FBAR forms (TD F 90-22.1) and certain 2010 FBAR forms must be received by the U.S. Treasury by 30 June 2012. No extensions are available. The forms are required to be filed by U.S. persons with a financial interest in or signature authority over a foreign financial account if the aggregate value of the accounts exceeds USD 10,000 at any time during the calendar year.

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Brazil
More changes to IOF on "short-term" external loan transactions
On 14 June 2012, the government published a decree that amends the Financial Transactions Tax (IOF) by changing the definition of "short-term" for purposes of inbound loans and offshore bond issues (overseas debt). The new decree reduces the term from an average of five years to two years to trigger the IOF at a rate of 6%. [Issued: 19 June 2012]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/cfcaefa406608310VgnVCM3000001c56f00aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/dttl_tax_alert_Brazil_190612.pdf

Denmark
Parliament passes corporate income tax changes
The Parliament passed a bill on 13 June 2012 that contains a number of provisions designed to ensure that multinational companies contribute to the financing of Danish welfare and to collect more revenue from such companies. Some of the provisions will be effective as early as 1 July 2012. [Issued: 15 June 2012]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/db5a6ba8d30f7310VgnVCM1000001956f00aRCRD.htm
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