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Environmental taxes in the EU on the rise

The use of environmental taxes and charges by the EU member states has increased significantly over the past few years, both as a result of policy initiatives and as a means to raise revenue. As environmental issues soar up the political agenda, various "green" taxes have been introduced by governments to encourage more environmentally friendly behavior. Environmental taxes also have been embraced as a politically acceptable – and viable – way to raise revenue, which can mean that new taxes are introduced on short notice with limited (if any) advance consultation with businesses.

Environmental taxes can affect a wide range of businesses, and, for many businesses, understanding the scope and impact of these taxes is an integral part of controlling tax risk and costs. It also can be useful to include the amount of environmental tax paid in calculating the total tax contribution for a particular jurisdiction, given that the tax is paid at source and it is not easy to shift liability for environmental taxes.

There is no legal, official or universally-accepted definition of environmental tax, but the term is often used to describe a tax that imposes a cost on a product or activity that has a specific negative impact on the environment (e.g. taxes on emissions, energy, packaging and products, transport or waste) or to provide a tax benefit to a product or activity that benefits the environment.

There is no common system of environmental taxes within the EU (although there is movement toward harmonizing energy taxation at the EU level through the energy taxation directive); each member state has its own environmental tax regime, and the types of taxes, scope, reliefs, rates and compliance requirements vary significantly. These disparities can create challenges for businesses, both in terms of identifying their various environmental tax obligations and in complying with such obligations. It therefore is important for businesses engaged in cross-border operations to consider their environmental tax strategy and risk profile.

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There is a wide range of existing environmental taxes, including the following:

- Taxes on waste – The UK landfill tax is due on a disposal of material as waste that is made by way of a landfill at a landfill site (covered by a license or permit under specific environmental legislation). Similarly, in Norway, landfill duty is charged on a disposal of material as waste. There are a number of taxes on waste disposed of in Belgium, including the Walloon region's tax on waste possession, the tax on waste incineration and the levy on the disposal of waste in the Flemish region.
- Taxes on packaging – Examples include packaging duty in Portugal, Ireland's levy on plastic bags and excise duty due in Finland on beverage packaging.
- Taxes on water – A number of European countries tax the use of water; for example, Denmark levies a tax on wastewater discharged to lakes, streams and the ocean and the percolation of water into the soil. Estonia levies a water pollution charge on the emission of pollutants into water bodies, and a water abstraction charge for the right to extract water from certain bodies of water or groundwater.

Some examples of recent changes to environmental taxes include the following:

- Romania – As from 1 January 2013, 80% of used oils are recovered, with any shortfall being taxed. The definition of "waste oils" is broad and includes any mineral or synthetic lubrication or industrial oils that have become unfit for the use for which they were originally intended. The legislation does not contain any exceptions for oil used in industrial processes, etc. that cannot be recovered (e.g. because they are used as raw materials for finished products or consumed entirely during use).
- Spain – New taxes on energy products and power were introduced on 1 January 2013. The Spanish government heavily subsidizes energy companies to enable them to maintain low prices to consumers. Spain has accumulated debt of USD 31 billion and a large annual "tariff deficit" (the difference between the cost of generating power and the regulated price consumers pay for it). The new measures are designed to address these issues. The excise duties legislation has been amended; there are new environmental energy taxes, such as a 7% tax that will be levied on electricity production; and there will be a tax on the storage of used nuclear fuel.
- Sweden – A congestion tax was introduced in Gothenburg on 1 January 2013. The tax is charged on Swedish-registered vehicles each time a vehicle passes through the control points in Gothenburg from Monday to Friday between the hours of 6:00 am and 6:29 pm.
- UK – The climate change levy (CCL) is charged on certain energy products for use as fuels by business consumers (e.g. electricity, natural gas and coal). Fossil fuels used to generate electricity previously were exempt from CCL, but as from 1 April 2013, a carbon price support rate is levied on supplies of fossil fuels to generators with a generating capacity exceeding two megawatts. Generators are required to self-account for the carbon price support rate of CCL, and those previously exempt from the main rate of CCL may now need to register for CCL to self-account for the carbon price support rate (e.g. operators of combined heat and power stations, and non-combined heat and power generators with a capacity exceeding two megawatts).

These examples illustrate the variety of environmental taxes that apply in Europe – even within the field of energy taxes (to which most of the above examples relate). As the tax rates and number of different environmental taxes increase, businesses need to keep pace to manage their differing environmental tax liabilities.

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Compliance with China's SAFE and tax registration requirements for equity awards under scrutiny

Many multinational companies that have implemented equity plans in China have discovered that this is not always a straightforward process. In addition to designing a suitable plan to support human resources and business strategies in China, companies need to take various registration requirements into account, such as registration of the equity plan with the local tax bureau, and, if participants in the plan include Chinese nationals, registration with the State Administration of Foreign Exchange (SAFE).

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Given the growing volume of equity plans already registered and the increasing interest from companies in equity incentives, the tax and SAFE authorities have increased their scrutiny of the registration process.

SAFE registration

On 20 February 2012, the SAFE issued guidance (Circular 7, which supersedes previous guidance issued in 2007) on the initial registration and ongoing reporting requirements for equity plans. Circular 7 emphasizes the need for employers to comply with the registration requirements and signals the authorities' intent to strengthen reporting and administration in this area.

Certain local considerations are relevant to the guidance provided by Circular 7.

Beijing

- Further to the issuance of Circular 7, the Beijing SAFE requires all companies to strictly adhere to the SAFE registration requirements. Reregistration of equity plans in accordance with Circular 7 is required, even if a company previously registered its equity plan. Without proper reregistration, a company may face challenges when fulfilling its ongoing quarterly SAFE reporting obligations, applying for an annual quota and/or repatriating equity funds to China.
- The Beijing authorities will carry out an in-depth review before SAFE registration can be completed. The authorities have become more attentive to details, such as the specific wording that must be included on the relevant documents to support the authenticity of the equity plan(s) to be implemented.

Shanghai

- Given that Circular 7 has, to some extent, shifted the responsibility for monitoring the transfer of foreign currency in connection with equity plans to local financial institutions, banks in Shanghai are tightening internal controls on equity-related transactions.
- Equity plans' funds that relate to Chinese nationals may be rejected by banks where ongoing SAFE reporting is not performed in a timely manner.
- Some banks request a statement of the inbound annual quota for equity funds when companies submit an annual report to the SAFE, although this is not specifically required under Circular 7.

Jiangsu

- Internal training has been conducted at the municipal SAFE bureaus to highlight noncompliant transactions with respect to equity awards offered in China.
- Some municipal SAFE bureaus have raised inquiries about the foreign exchange status of prior grants as part of the SAFE registration process of new equity plans. Internal guidelines setting out penalties for noncompliance also have been circulated.

Tax registration

All equity plans offered in China must be registered with the company's in-charge tax bureau(s), and technically this must take place before the equity plan is rolled out. Failure to fulfill this regulatory requirement will result in the imposition of penalties on the company and may disqualify participants from benefitting from the preferential tax treatment of stock option income.

Beijing

- Most Beijing tax bureaus have developed formal procedures for the registration of equity plans, which include the submission of specific documents that will be reviewed by the tax authorities.
- In some tax bureaus, the tax officer can request an on-site interview with the company or its authorized agent in order to review the documents.

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Shanghai

- The local tax bureaus can impose penalties if they conclude that a company has failed to comply or is late in complying with the tax registration requirements for equity plans. An increasing number of companies in Shanghai are being challenged if they fail to register in a timely manner. This may lead to further inquiries about the tax compliance status of equity gains realized from these equity plans.
- Some tax bureaus require that ongoing tax reporting be performed upon new grants of equity awards by providing detailed grant information. Failure to fulfill this requirement on time would disqualify the participants from adopting the preferential tax treatment for stock option income, even if the initial tax registration was made with the local tax bureau.
- Companies should notify the local tax bureau of any subsequent amendments to the registered equity plan by providing updated documentation.

Jiangsu

- Both the initial tax registration and ongoing reporting for equity plans are required and standardized processes have been established.
- The registration of equity plans is becoming an important area of scrutiny. When tax de-registering individuals who were offered equity awards by an equity plan, some local tax bureaus may request the registration certificate of the equity plan.

Comments

Given the increased level of scrutiny, companies that have not yet registered their equity plans under the tax and/or SAFE rules should evaluate any previous compliance failures and take a proactive approach to addressing these to mitigate future risks. Companies that have registered should monitor local requirements to ensure that ongoing reporting is aligned with the new processes for tax and SAFE filings.

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Belgium: Withholding tax exemption for researchers and patent income deduction to be amended

The Belgian government submitted a draft bill to parliament on 19 April 2013 that would amend the withholding tax exemption for qualified researchers and the patent income deduction.

The main change to the patent income deduction (which treats 80% of qualifying patent income as exempt) would be that, as from tax year 2014, small and medium-sized enterprises (SMEs) would be able to claim the deduction on patents they own, even if the patent was not developed or improved in a research and development (R&D) center.

Withholding tax exemption

Companies that employ qualifying researchers to work on R&D projects or programs currently benefit from a partial exemption from withholding tax on the wages of these employees; only 25% of the withholding tax due must be paid to the tax authorities, which results in a 75% tax exemption. The bill proposes to increase the exemption from 75% to 80%. The increased exemption would be applicable to all categories of companies (e.g. universities, R&D centers and companies active in R&D).

The increased exemption would apply as from the first day of the month following the date the law is published in Belgium's Official Journal.

The bill also provides a number of clarifications and would introduce some new formalities.

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Definition of R&D projects or programs – R&D projects or programs are those aimed at the following:

- Fundamental research – This includes experimental or theoretical activities aimed at gaining new knowledge on the fundamental aspects of occurrences and observable facts, without the objective of a direct practical application or use.
- Industrial research – This involves the acquisition of new knowledge and skills to develop or substantially improve products, procedures or services. The manufacturing of parts for complex systems needed for industrial research (and especially for the validation of technologies) would be included, but prototypes would be excluded.
- Experimental development – This involves the acquisition, combination, modeling and use of existing scientific, technical, business or other relevant knowledge and skills for the development of new, modified or improved products, procedures or services.

Reporting obligation – Firms (except for universities and scientific institutions) would be required to report the following information on their R&D activities to a specific government agency (the department of federal scientific knowledge):

- Identification of the withholding tax debtor;
- Description of the project or program that evidences it would fall within the scope of the new definition of R&D; and
- Expected start and end date of the project or program.

The reporting obligation generally would apply as from 1 January 2014; R&D projects and programs that existed before the new law entered into force would have to comply with the reporting obligation as from 1 January 2015.

Validation of projects or programs – Companies and the tax authorities would be able to request binding advice from the department of federal scientific knowledge regarding the R&D nature of a project. The procedure for obtaining a ruling would be set forth in a royal decree.

Comments

The proposed changes aim at strengthening R&D activities and innovation in Belgium by increasing the tax credits for employees involved in R&D projects and allowing SMEs to access more easily the patent income deduction regime. However, at the same time, the draft bill introduces more stringent control measures regarding eligibility for the incentives.

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Brazil:
More changes to IOF rate

The Brazilian government issued a decree on 4 June 2013 that reduces the rate of the tax on financial transactions (IOF) from 6% to 0% for the following transactions:

- Exchange transactions carried out by foreign investors wishing to bring funds into Brazil to provide margin guarantees (whether initial or additional) required by the stock, futures and commodities exchanges (including transactions involving simultaneous operations); and
- Exchange transactions carried out by foreign investors wishing to bring funds into Brazil for specific financial and capital markets purposes (including transactions involving simultaneous operations).

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The reduced rate previously applied only to investments in the stock exchange and specific types of funds and bonds.

It is important to note that the other IOF rules have not changed; specifically, the 6% rate continues to apply to foreign loans with a term of less than one year.

The decree is effective as from 5 June 2013, the date it was published in the official gazette.

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China:
SAT clarifies when a secondment arrangement creates a PE

China's State Administration of Taxation (SAT) issued guidance on 19 April 2013 (Bulletin 19) that clarifies when the secondment of an employee by a nonresident company will give rise to a taxable presence (i.e. establishment) – or permanent establishment (PE) – in China. The issuance of the bulletin was followed by a SAT interpretation note issued on 6 May. Bulletin 19 clarifies and expands on SAT guidance on secondments released in 2010 (Circular 75) and applies as from 1 June 2013.

Bulletin 19 provides welcome clarification of the PE risk associated with certain secondment arrangements and introduces a two-prong test for determining whether a seconded employee remains the employee of the nonresident company (with the result that the activities of the expatriate employee create a PE in China), or whether the individual is an employee of the host Chinese company. The guidance also directs the Chinese tax authorities to undertake a robust review of documentation and the substance of secondment arrangements, and sets out the type of documentation and information that companies should maintain to minimize challenges.

Two-prong test

Although not specifically stipulated in the bulletin (but described in the separately issued interpretation note), the SAT takes the position that an establishment will arise under Chinese domestic law if the nonresident company satisfies a two-prong test, consisting of a "basic factor" and one of five "reference factors":

Basic factor – The nonresident company bears all or part of the responsibilities and risks for the work product of the seconded employee and routinely conducts the individual's performance evaluations.

Five reference factors –

1. The Chinese company pays management or service fees or fees of a similar nature to the nonresident company;
2. The payments made by the Chinese company to the nonresident company are greater than the amount of the remuneration, social welfare and other costs of the seconded employee paid by the nonresident company;
3. The payments made by the Chinese company are partially retained by the nonresident company;
4. The remuneration borne by the nonresident company was not fully taxed in China; and
5. The nonresident company decides on the number, qualification, remuneration and working place of seconded employees.

The bulletin further provides that, for purposes of the application of a tax treaty, a PE would exist if the establishment through which the business of the nonresident is carried on is relatively "fixed" and "permanent."

Documentation and substantive review

To determine whether the nonresident company has any enterprise income tax liability, Bulletin 19 stipulates that the tax authorities should review specific documents, as well as the actual substance of the secondment arrangement. The following documentation and information will be relevant:

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- Any agreements between the nonresident company, the Chinese company and the seconded employee;
- Any internal management guidelines prepared by the nonresident company or the Chinese company in respect of seconded employees, e.g. with respect to job responsibility, risk and evaluation;
- Information on payments made by the Chinese company to the nonresident company, the relevant accounting treatment and the settlement of the seconded employee's individual income tax (IIT) liability; and
- Information on any disguised payments (e.g. related party transactions, waiver of debt) relating to the secondment.

Stewardship services

Bulletin 19 provides that if the seconded employee furnishes services in China solely for the purpose of exercising the rights of a nonresident company (that is the shareholder of the Chinese company), these activities should not give rise to an establishment or PE of the nonresident company in China. Examples of such activities include providing investment advisory services to the nonresident company in respect of the Chinese company and representing the nonresident company at shareholder and/or board of directors meetings of the Chinese company.

Comments

A critical factor in ascertaining whether a PE has been created in China as a result of the activities of an expatriate employee is the actual identity of the "employer" of the individual concerned. To that end, Bulletin 19 adopts the substance-over-form approach in making such a determination and provides for a "two-prong" test. The basic determining factors and approach of this test are an extension of the principles in Circular 75 and are largely consistent with the relevant principles in the 2010 OECD model treaty. The basic factor focuses on the relationship between the nonresident company and the individual – whether, in substance, they still maintain an employer-employee relationship. The five reference factors largely focus on financial arrangements between the nonresident company and its Chinese affiliate to assess whether the nonresident company derives income as a result of the arrangement.

Bulletin 19 is helpful in clarifying the PE risk associated with typical secondment arrangements. The SAT seems to discourage certain reimbursement schemes. Currently, many nonresident companies pay remuneration and other related costs to a seconded employee in advance, then seek full reimbursement from the Chinese affiliate through a service fee arrangement (or other transactions), with or without a mark-up. Such structures are often set up to take account of various business and regulatory considerations (e.g. SAFE constraints). However, unless the characterization of the relationship between the nonresident company and the seconded employee is beyond doubt (or unless it is totally clear that the "basic factor" test is not satisfied), the first of the five reference factors seems to suggest that such a reimbursement scheme would be detrimental when determining whether a PE has been created by the activities of a seconded employee. Further, the first three reference factors seem to imply that a PE in China could be created where a group company deploys employees worldwide through an internal HR company, which typically charges a small fee.

On the other hand, the second and third reference factors reconfirm the SAT's view in Circular 75 that, from a Chinese enterprise income tax perspective, a direct reimbursement by a Chinese company is acceptable if the nonresident company does not earn a profit from the arrangement. The arrangement itself should not be viewed as a negative factor in determining whether a PE is created as a result of a secondment arrangement.

Lastly, as stated above, Bulletin 19 mandates that the tax authorities undertake a vigorous review to assess the tax obligations of a nonresident company. To minimize the possibility of challenges, all documentation relating to secondment arrangements should be drafted with care and should include the intercompany agreement, the secondment policy and guidelines, the employee secondment letter and details of any reimbursement requirements. Affected companies also should ensure that the terms of the documentation are adhered to and that the substance of the arrangement (e.g. activities carried out by both the companies and the individual) supports what is prescribed in the documentation.

Short and medium-term secondments – Further to Circular 75, Bulletin 19 explicitly links the Chinese IIT treatment of an individual seconded by a nonresident company with a potential PE assessment of the nonresident company.

Bulletin 19 specifically requires that the "remuneration borne by the nonresident company and not fully taxed in China" be considered as one of the criteria in determining whether a PE exists. This implies that under a secondment arrangement that does not constitute a PE, individuals assigned by a nonresident company to its Chinese affiliate normally should be the economic employees of the local affiliate, and the affiliate should properly report their Chinese IIT. If the nonresident company continues to bear the remuneration costs for such individuals and the remuneration is not fully taxed in China, the

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nonresident company may be considered the economic employer of the individuals during their secondment in China, which could result in a PE. In practice, this position could impact nonresident companies that send foreign individuals to work in China for a short or medium-term period, that continue to bear the costs of the remuneration of the individuals and that try to limit travel to China to avoid reporting their Chinese IIT. These types of mobility arrangements are clearly at risk under Bulletin 19 and should be reviewed carefully.

Dual employment – Companies also should examine any dual employment arrangements, under which a seconded employee works for both the nonresident company and the Chinese affiliate and receives remuneration from both companies. In practice, it is often difficult to demonstrate to the satisfaction of the Chinese tax authorities that there is a clear separation of work (under a dual employment arrangement) performed by the individual for the Chinese company and the nonresident company and the corresponding risk and responsibility borne by both companies. Therefore, in these cases, a thorough review of the assignment or employment structure and relevant documentation is recommended to avoid a potential PE challenge.

Conclusion

While Bulletin 19 provides welcome guidance on the PE risk associated with certain secondment arrangements, the bulletin heralds a stepping up of the SAT's administration of cross-border secondment arrangements. A nonresident entity that assigns employees to China to perform services for a Chinese subsidiary or affiliate for extended periods without having the subsidiary or affiliate employ the individuals locally runs the risk of being regarded as having a PE in China as a result of the individuals' activities. This is an area in which taxpayers can expect intense scrutiny from the Chinese tax authorities. Companies that regularly assign or second expatriate employees to Chinese subsidiaries or affiliates should review their secondment practices and policies to ensure that both the form and the substance of the arrangements are aligned with the guidelines in Bulletin 19, Circular 75 and the Commentary to the OECD model treaty.

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Greece:
Guidance issued on corporate and withholding tax issues

Greece's Ministry of Finance issued guidance on 7 June 2013 that clarifies the withholding tax treatment of dividends and certain corporate income tax rules in light of the changes introduced by Law 4110/2013, which was introduced earlier in 2013.

The salient points of the circular are as follows.

Taxation of dividends

- The new reduced dividend withholding tax rate of 10% will apply to profit distributions that are decided by an ordinary general shareholders' meeting as from 1 January 2014. For profits distributed in 2013, the rate is 25%.
- With respect to distributions by a corporation (SA) of profits of previous financial years or interim dividends, where a special general shareholders' meeting decides on the distribution during 2013, the applicable withholding tax rate is 10%, provided the distribution will be finally approved by a decision of the ordinary general shareholders' meeting in 2014. However, where a limited liability company (EPE) distributes profits of previous financial years, the

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applicable rate will be 25%, since there is no provision similar to the rule for SAs, meaning that there is no regular general assembly to approve the decision in 2014.

- The circular makes it clear that the decrease in the rate of withholding tax on profit distributions made by an SA will not give rise to a refund of excess withholding tax (i.e. tax at the rate of 25% less tax at the rate of 10%) where an SA makes a distribution out of income consisting of dividends that have suffered withholding tax at the 25% rate.
- Where a dividend is distributed abroad by a foreign company to a Greek resident individual and the amount so distributed is not repatriated to Greece, the Greek tax due must be remitted to the Greek authorities by the individual. Where tax has been withheld from the dividend in a country with which Greece has concluded a tax treaty, such tax may be offset against the Greek tax due to the extent such amount does not exceed the amount of tax payable in Greece. A certificate issued by the competent foreign authorities is required to verify the amount of the tax paid abroad.
- The new 10% rate applies to foreign-source dividends paid to a Greek resident individual in 2013.

Application of EU parent-subsidiary directive

- The two-year holding period no longer needs to have been met when dividends are paid for the exemption from withholding tax under Greece's application of the EU parent-subsidiary directive (PSD) to be available, i.e. the two-year period can be completed subsequent to the distribution of the dividends. If the two-year holding period ultimately is not completed, the tax and corresponding penalties are due retroactively.
- The same rule applies to dividends distributed to a company resident in Switzerland.

Corporate income tax

- The circular makes it clear that, where the PSD applies, the tax exemption with respect to distributions from subsidiaries is granted to Greek parent companies even when they are in a loss position. Such companies must report the relevant income in a special tax reserve.
- If the above income is subsequently distributed/capitalized, income tax and withholding tax paid abroad may be credited against the Greek tax due.
- The two-year holding period requirement also must be met, as above, for dividends paid to a Greek parent company by a subsidiary resident in another EU member state to be exempt under Greece's application of the PSD.

Private Sector Involvement (PSI) Impairment losses

- Greek companies may deduct losses incurred on the exchange of Greek sovereign bonds in equal annual installments over 30 financial years. The first installment is deducted in the accounting period in which the exchange takes place, and the provision has retroactive effect as from that time.
- Losses arising as a result of sovereign bond exchanges are deductible regardless of the reason for which the bonds were acquired (e.g. pharmaceutical companies that have accepted the bonds as a debt payoff).
- In particular, if the PSI losses are recharged to another entity, the losses may be deducted in the financial year in which they are so recharged.
- The above described tax treatment also applies to losses incurred under the buyback program.
- The circular makes it clear that, in the case of companies that already have deducted PSI impairment losses under the previous law (i.e. which allowed for a deduction until maturity), the remaining amount may be deducted in 29 equal installments.

Tax credit for companies

- A Greek company that receives dividends from a nonresident company may be granted a tax credit for tax paid abroad on the dividends even where the dividend-paying company is resident in a country that has not concluded a tax treaty with Greece.
- Where dividends are paid from a nontreaty country, the Greek taxpayer must obtain a certificate from the foreign competent authorities or a certified auditor to certify the amount of tax paid abroad for tax year 2013.

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Indonesia:
MOF clarifies withholding tax rules for mining companies

Indonesia's Ministry of Finance issued a regulation on 27 February 2013 that addresses the withholding tax obligations of companies operating under production-sharing contracts, contracts of work and coal contracts of work (collectively, "Contracts"). The regulation requires that such companies withhold tax at the rates prescribed under the law and regulations prevailing on the date the withholding tax becomes payable. The regulation was issued to bring the withholding tax rates in line with current law and to reduce the tax and administrative burden on parties providing services to mining companies.

As background, the withholding tax provisions of some Contracts contain rates that applied on the date the Contracts were signed. Such Contracts typically last for 20 to 30 years, and the withholding tax rates in the Contracts generally are much higher than current rates. This disparity has created a disadvantage for parties providing services to mining companies. Although, in general, withholding tax can be credited against the service provider's income tax liability, the application of higher withholding tax rates can result in a service provider being in a tax overpayment position, which will trigger a tax audit if the service provider requests a cash refund.

Although the regulation was issued to provide fair treatment for service providers, it remains unclear whether a regulation issued by the Ministry of Finance can supersede the provisions of the Contracts, which generally have a special status under Indonesian law.

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Peru:
Audits initiated on direct and indirect transfers of shares or participating interests

The Peruvian tax authorities (SUNAT) recently notified certain resident companies that audit procedures are being initiated to verify compliance with the capital gains tax rules governing the direct or indirect transfer of shares or participating interests.

These notifications include requests for detailed information on fiscal year 2012, such as the following:

- Local records showing the shareholder composition during the period subject to review;
- Information on movement in the bank and cash accounts, including bank statements of local and foreign institutions;
- The form submitted to the tax authorities reporting direct or indirect transfers of shares or participating interests;
- Agreements or pre-arrangements connected with the sale of the shares, in which the conditions for the transfer can be identified;
- A description and diagram of the economic group, including all related parties and the percentage of each entity's participation;
- Information on changes in the composition of the shareholders, including the number of shares or the extent of participating interests owned by each shareholder and the percentage of the company's equity represented; and
- Forms submitted by the nonresident or the Peruvian company on its behalf to report and pay the capital gains tax triggered by a direct or indirect transfer of shares.

The documentation must be submitted within a specific time frame (approximately one month and a half).

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Failure to comply with the documentation requests could result in an assessment on deemed income, as well as penalties; once the deadline passes, documents cannot be subsequently submitted as evidence.

Rules on direct and indirect transfers

Under Peru's capital gains tax rules, in absence of a local acquirer, a domestic legal entity whose shares or participating interests are acquired is jointly and severally liable with a nonresident transferor for the payment of any capital gains tax that may arise from a direct or an indirect transfer if, within the 12-month period before the transfer, the parties were economically related. That being said, a literal reading of the law suggests that where there is a local acquirer, the local issuer will no longer be jointly and severally liable, but only in the case of an indirect transfer. It should be emphasized, however, that the position is by no means certain.

Separate rules apply to direct and indirect transfers of shares or participating interests.

Under the direct transfer rules, which apply as from 2010, capital gains derived by a nonresident (whether a legal entity or an individual) from the alienation of shares or participating interests "within the country" are taxed at a special reduced rate of 5%; otherwise, the rate is 30%. An alienation is deemed to take place within the country if the shares are recorded in the Peruvian Securities Market Public Registry and the transfer is made through a Peruvian stock exchange. Unless the alienation is made through a stock exchange (or its equivalent), the nonresident transferor must obtain a certification from the Peruvian tax authorities confirming the basis of the shares or participating interests; if the certification is not obtained, the tax applies on the gross amount.

Under the indirect transfer rules, which apply as from February 2011, capital gains derived from certain indirect transfers of the shares of, or participating interests in, a Peruvian legal entity fall within the scope of the Peruvian tax net (and will likely be taxed at a rate of 30%). Specifically, the rules apply in the following situations:

- Where the shares of (or participating interests in) a nonresident entity that, in turn, owns directly or indirectly shares of (or participating interests in) a Peruvian entity are transferred and either of the following circumstances is present:
  - The market value of the shares (or participating interests) of the Peruvian company owned directly or indirectly by the nonresident entity is equal to 50% or more of the market value of all the shares or participating interests representing the equity capital of the nonresident for the 12-month period before the transfer, and there is a transfer (or transfers) of stock (or participating interests) representing 10% or more of the equity capital of the nonresident entity within the relevant 12-month period); or
  - The nonresident entity is resident in a tax haven or low tax jurisdiction for Peruvian tax purposes, unless it can be demonstrated that the previous condition is not satisfied.
- Where the nonresident (directly or indirectly) issues new shares or participating interests as a consequence of a capital increase (generated by a new capital contribution, capitalization of credits or a reorganization), and assigns them a value below their market value. This deeming provision will apply, however, only if at least one of the circumstances in the previous bullet is present.

Joint tax liability and compliance obligations

Before the 2011 rules, nonresident taxpayers deriving capital gains that were subject to income tax in Peru were responsible for making the tax payment if no withholding mechanism was available (e.g. in the absence of a resident purchaser or a clearance and settlement institution for transfers through a stock exchange). However, as from 2012, the Peruvian company is jointly liable for the tax if, within a 12-month period before the (direct or indirect) transfer, the Peruvian company is considered to be economically related to the nonresident transferor. There is no joint tax liability with respect to indirect alienations where a resident purchaser acts as a withholding agent.

The 2011 rules require a resident legal entity to notify the tax authorities when its shares or participating interests are transferred indirectly. Since a procedure already applies to the reporting of direct transfers, the tax authorities were directed to issue guidance on the procedure for reporting indirect transfers. However, such guidance has not been issued, so the authorities recently posted information on their website requesting that taxpayers use the procedure for direct transfers for reporting their indirect transfers.

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Comments

Even though the Ministry of Economy and Finance is expected to issue additional regulations that hopefully will provide capital gains tax provisions that are workable for both taxpayers and the tax authorities, the tax authorities have started to monitor relevant transactions by collecting information that will allow them to collect any tax due.

Failure to comply with the information requests could result in the tax authorities applying the tax code rules for making an assessment based on deemed income, as well imposing penalties. Potentially affected taxpayers should evaluate the risk of an information request and start designing a plan for appropriate compliance.

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Romania:
Higher withholding tax rate on certain income derived by nonresidents

An ordinance published by the Romanian government on 23 January 2013 and applicable as from 1 February 2013 contains measures designed to prevent aggressive tax planning by nonresidents.

According to the new rules, income derived by a nonresident is subject to a 50% withholding tax rate (rather than the normal 16%) if the recipient is resident in a country that has not concluded an exchange of information agreement with Romania and the payment arises from a transaction that is deemed to be artificial. The increased tax rate will apply even if the beneficiary of income is resident in a country that has concluded a tax treaty with Romania, but the payment is made in a jurisdiction with which Romania does not have an agreement regarding the exchange of information. The effect of the law on the applicability of the tax treaty provisions in such a case would seem to be uncertain.

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United Kingdom:
Overseas Territories agree to join EU5 pilot program to combat tax evasion

The UK Chancellor announced on 2 May 2013 that all British Overseas Territories with significant financial centers have signed on to the UK government strategy on tax transparency.

The overseas territories, including Bermuda and the British Virgin Islands, have followed the Cayman Islands, the Isle of Man and Gibraltar in announcing that they will join the recently announced “EU5” (i.e. France, Germany, Italy, Spain and the UK) pilot that involves the automatic exchange of information bilaterally with the UK, and multilaterally with the EU5. In April, two other UK Crown Dependencies with significant financial sectors, Guernsey and Jersey, agreed to share information on non-resident UK citizens with the UK government, but they have not yet consented to participate in the pilot program.

The EU Tax Commissioner has welcomed the British Overseas Territories’ agreement to engage in tax transparency with the five largest economies in the EU, but has made clear that the EU will continue to push for information sharing across all 27 EU member states.

The EU Finance ministers met in Brussels on 14 May where it was agreed that the EU should commence negotiations with five European countries that are not EU members, i.e. Andorra, Liechtenstein, Monaco, San Marino and Switzerland. At the subsequent EU leaders meeting on 22 May, Austria signalled that it was prepared to end its objection to EU-wide automatic exchange of tax information. Luxembourg also made a similar commitment, but reserved its position until the EU’s negotiations with Switzerland have advanced. It is anticipated that the international focus on tax information exchange will

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continue and that it will be one of the key themes of the forthcoming G8 summit that is being held in the UK on 17/18 June.

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In brief

European Union – The Court of Justice of the European Union (CJEU) has ruled in a Bulgarian case in which the issue was whether VAT that was charged in error should be refunded to the supplier. The taxpayer charged VAT on a supply that was later found to be exempt, following an audit of its customer by the tax authorities. As a result of the audit, the customer's claim to deduct the tax charged was denied. It appears from the CJEU decision that the definitive denial of the customer's input VAT claim meant that the process for correcting the error that is provided in Bulgarian law was no longer available and that the Bulgarian tax authorities took the view that there was, therefore, no mechanism for the taxpayer to recover the overcharged VAT. The CJEU concluded that this was not permitted under EU law.

European Union – The CJEU has gone straight to judgment in the Dutch case of X BV, involving the treatment of a disposal of a 30% shareholding in a company to which X BV supplied management services. X BV reclaimed input VAT incurred on costs associated with the disposal of its interest in the jointly owned company, and the Dutch tax authorities challenged the deduction on the grounds that the VAT was irrecoverable because it related to an exempt supply of the shares (or possibly to a "non-supply" if the sale of the shares did not form part of the company's economic activity). X BV argued that the transaction amounted to the disposal of part of its business and a transfer of a going concern, so the associated VAT was attributable to its past (taxable) supplies of management services and should be recoverable. The CJEU agreed with the Dutch tax authorities, concluding that the sale of shares could not be viewed as a transfer of a going concern and, hence, that related VAT was irrecoverable unless it could be related to the wider taxable business that the company carried on, which was something that the CJEU left to the national court to consider.

Greece – The deadline for legal entities to publish their financial statements is extended from 10 June 2013 to 10 July 2013.

Israel – The standard VAT rate increased from 17% to 18% on 2 June 2013.

Namibia – During the reading of the 2013/2014 budget speech, the Minister of Finance announced a change in the tax rate for companies other than mining and mining services companies. The rate reduction has now been gazetted, so the 34% rate is reduced to 33% for companies with tax years commencing on or after 1 January 2013.

OECD – The OECD has approved a revised section of the Transfer Pricing Guidelines for Multinational Entities and Tax Administrations in respect of the use of bilateral safe harbors. The OECD comments that the revised section provides opportunities for countries to relieve some compliance burdens and to provide greater certainty for cases involving smaller taxpayers or less complex transactions. This should assist developing countries in designing a transfer pricing compliance system, despite having limited resources.

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Canada

Tax Court rules on scope of Canadian foreign affiliate anti-avoidance rule

For many years, the Canada Revenue Agency has asserted a broad view of paragraph 95(6)(b) of the Income Tax Act and has used it to challenge many financing transactions involving the establishment of a foreign affiliate of a Canadian taxpayer. On 29 May 2013, the Tax Court of Canada released its decision in *Lehigh Cement Limited v. the Queen* and *CBR Alberta Limited v. the Queen*. While the taxpayers were ultimately successful since the most reasonable alternative transaction would have achieved the same Canadian tax result, the Court did state that the foreign affiliate anti-avoidance rule is broadly applicable to any acquisition or disposition of shares that is principally tax-motivated.
[Issue date: 1 June 2013]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/3a27c2553880f310VgnVCM3000003456f70aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/Global%20Tax%20Alerts/2013/dttl_tax_alert_Canada_010613.pdf

Germany

Amended Tax Act 2013 approved

Germany's upper and lower houses of parliament approved the Tax Act 2013 on 6 and 7 June 2013, respectively, as part of the "Tax Act implementing the Administrative Assistance Directive and amending tax regulations." The "Tax Act 2013 light," which still must be signed by the president and published in the Federal Gazette to become effective, includes changes to the anti-hybrid rule, withholding tax refund claims for hybrid entities, payments from a German partnership to a foreign partner and the Real Estate Transfer Tax. [Issue Date: 13 June 2013]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/9d797ebd7fd3f310VgnVCM2000003356f70aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/Global%20Tax%20Alerts/2013/dttl_tax_alert_Germany_130613.pdf

Gibraltar

Tax treatment of intercompany interest amended

The Gibraltar government has approved changes to the taxation of intercompany interest in response to the conclusion of the EU Code of Conduct Group that Gibraltar's tax treatment of intercompany interest was not in line with EU requirements. The amendments result in interest received on intercompany loans falling within the scope of taxation in Gibraltar where the interest is deemed to accrue in or derive from Gibraltar; as a result, any interest receivable that is subject to taxation will be taxed at a rate of 10%.[Issue date: 11 June 2013]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/46b636c22b43f310VgnVCM2000003356f70aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/Global%20Tax%20Alerts/2013/dttl_tax_alert_Gibraltar_110613.pdf

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