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OECD releases first set of BEPS deliverables

On 16 September 2014, the OECD released seven deliverables in response to its Base Erosion and Profit Shifting (BEPS) Action Plan of July 2013. The deliverables, which are available on the OECD website, address the following actions:
URL: http://www.oecd-ilibrary.org/taxation/books

- Action 1: Addressing the Tax Challenges of the Digital Economy
- Action 2: Neutralizing the Effects of Hybrid Mismatch Arrangements
- Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
- Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
- Action 7: Guidance on Transfer Pricing Aspects of Intangibles
- Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting
- Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

The following resources prepared by various member firms in the Deloitte network provide additional coverage related to these deliverables and other BEPS issues:

- *Arm's Length Standard*
  URL: http://www2.deloitte.com/global/en/pages/tax/articles/arms-length-standard.html?id=us:em:na:wta:eng:tax:092614
- Deloitte Tax Publications (UK)
  URL: https://www.taxpublications.deloitte.co.uk/tis/dtp.nsf?OpenDatabase
- Global Tax Alerts
  URL: http://www2.deloitte.com/global/en/pages/tax/articles/global-tax-alerts.html?id=us:em:na:wta:eng:tax:092614

CJEU rules on VAT grouping, branches and overseas head offices

The Court of Justice of the European Union (CJEU) issued a far-reaching decision on 17 September 2014 about the VAT treatment of charges made between a non-EU head office and its Swedish branch that was included in a Swedish VAT group. The court held in *Skandia America Corporation USA* (Skandia US) that where a branch of an overseas entity is part of a VAT group, any supplies of services made by an overseas head office in a non-EU country to that branch are considered to be made to the VAT group as a whole, and hence subject to VAT. It is then the responsibility of the VAT group to account for VAT on these supplies under the reverse charge provisions.

The *Skandia* decision may have ramifications for all businesses that have overseas head offices (or branches) and branches (or head offices) in an EU member state that are members of a VAT group in that country and that receive services from the overseas head office or branch. There is likely to be a particularly significant impact on the financial services sector (e.g. banks, insurance companies), where arrangements involving branches and VAT groups are common.

Previously, Advocate General (AG) Wathelet issued his opinion in the case on 8 May 2014, opining that an overseas company with a branch in an EU member state can be included in a VAT group and that transactions between a head office and a branch should not be liable to VAT, but suggesting that the combination of the use of a branch structure and participation in a VAT group should not lead to nontaxation for VAT purposes (as this would contravene EU law). (For prior coverage, see *World Tax Advisor*, 23 May 2014). Although the CJEU often follows the AG's opinion in its decisions, it is not required to do so.
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140523_2.html

Background

In 2007 and 2008, Skandia US was the global purchasing company for information technology (IT) services for the Skandia group. Skandia US carried out its activities in Sweden through its Swedish branch; the head office purchased the IT services from a third party, and made those services available to the branch. The Swedish branch processed the externally purchased IT services supplied to it by Skandia US, and then supplied these services to various entities in the wider Skandia corporate group. Skandia US charged the costs of the externally purchased IT services to its Swedish branch with a 5% mark-up, with costs allocated between Skandia US and the Swedish branch through the issuance of internal invoices.

The Swedish branch was a member of a VAT group in Sweden. (VAT grouping allows EU member states to treat two or more companies as a single person for VAT purposes, as a result of which transactions between VAT group members normally would be disregarded for VAT purposes.) The costs charged by the head office to the Swedish branch were disregarded for VAT purposes by Skandia on the grounds that since the supply was made within the same company, no VAT was due. However, the Swedish tax authorities concluded that the supplies from the US head office to its Swedish branch were subject to VAT in Sweden because the US head office was not part of the VAT group, and they imposed a tax assessment on the branch. Skandia appealed the assessment, and the Swedish courts requested a preliminary ruling from the CJEU.

CJEU decision

The CJEU decision is concise and clear. The court neither commented on nor discussed AG Wathelet's opinion.

First, the court confirmed that a VAT group is a single taxable person for VAT purposes. Thus, where a branch of an overseas entity is part of a VAT group in an EU member state, any supplies of services made by an overseas head office in a non-EU country to this branch must be deemed to be made to the VAT group as a whole (which effectively is a different person than the branch), and hence are subject to VAT. It is the responsibility of the VAT group to account for VAT on these supplies under the reverse charge mechanism.

Comments

As stated above, the *Skandia* decision likely will have a significant impact on organizations that have branches and VAT groups in EU member states, in particular, many companies within the financial services industry. The practical implications of the decision, however, will depend on the VAT law of each of the member states and the local tax authorities' interpretation of the CJEU's decision.

For example, under UK VAT law, where a branch or fixed establishment is part of a VAT group, this participation is considered to extend to the entity as a whole. As a result, services supplied by overseas members of the VAT group to other members of the VAT group are disregarded for VAT purposes (subject to anti-avoidance provisions for services bought-in from third parties). Any changes to the current UK position are expected to occur on only a prospective basis, and a transitional period is expected to allow for consultation with taxpayers in respect of any changes to law or practice.

Businesses that may be affected by this decision should assess the potential financial impact it could have on their organization and consider means of mitigating the additional VAT costs that could arise.

— Gary Campbell (London)
Partner
Deloitte United Kingdom
gdcampbell@deloitte.co.uk

Richard Insole (London)
Partner
Deloitte United Kingdom
rinsole@deloitte.co.uk

Australia:
Tax agreements bill relating to Switzerland treaty passed by both houses of parliament

The International Tax Agreements Amendment Bill 2014, which will give force of law to the revised tax treaty with Switzerland signed on 30 July 2013, was approved by the Australian House of Representatives and Senate on 4 September 2014 and is awaiting Royal Assent. The new treaty will replace the existing treaty that entered into force in 1981.

The Swiss parliamentary procedure for approving the treaty was completed on 20 June 2014, and the next step consists of a scrutiny period of 100 days. This period is expected to be completed in October 2014.

Highlights of the new treaty are as follows:

- The definition of "person" will include a trust.
- A permanent establishment no longer will include assembly projects.
- The source country default withholding tax rate on dividends will be 15%, and reduced as follows:
    - 0% for intercorporate dividends on nonportfolio holdings where the recipient holds more than 80% of the distributing company (subject to certain conditions);
    - 0% for dividends beneficially owned by a body carrying out government functions (including a central bank), complying Australian superannuation funds and tax-exempt Swiss pension schemes that have holdings not exceeding 10% in the distributing company; and
    - 5% for intercorporate dividends on other nonportfolio holdings.
- The withholding tax rate on interest will be 10%, reduced to nil in the source country for interest derived by an unrelated financial institution resident in the other country, a body carrying out government functions (including a central bank), complying Australian superannuation funds and tax-exempt Swiss pension schemes.
- The withholding tax rate on royalties will be 5%.
- A general anti-abuse rule will operate to disallow treaty benefits if one of the principal purposes of a person in creating or assigning property or rights in respect of which income was paid, or in becoming a resident of Australia or Switzerland, was to take advantage of treaty benefits.

The revised Australia-Switzerland treaty is not a "post-BEPS" treaty – most of the renegotiations took place in 2011 before the action plan and key announcements were released under the OECD's base erosion and profits shifting (BEPS) project.

Once Australia and Switzerland have notified each other in writing through diplomatic channels of the completion of their domestic requirements for approving the treaty, the new treaty will enter into force on the date of the last notification. Assuming the last notification occurs no later than 31 December 2014, the relevant effective dates in the case of Australia would be:

- Fringe benefits tax – Effective for benefits provided on or after 1 April 2015;
- Withholding tax on income derived by a resident of Switzerland – Effective for income derived on or after 1 January 2015; and

- Other Australian tax – Effective for income, profits or gains derived in the income year beginning on or after 1 July 2015.

For Swiss withholding tax purposes, if the treaty enters into force in 2014, it would apply to amounts paid or credited on or after 1 January 2015; for all other taxes, the treaty would apply to tax years beginning on or after 1 January 2015.

For both countries, if the treaty enters into force in 2014, the exchange of information article would be effective for information that relates to taxation or business years beginning on or after 1 January 2015.

It should be noted that if the relevant notifications are not exchanged by 31 December 2014, the effective dates for the new treaty generally would be deferred.

— Peter Madden (Sydney)
Partner
Deloitte Australia
pmadden@deloitte.com.au

Vik Khanna (Melbourne)
Partner
Deloitte Australia
vkhanna@deloitte.com.au

David Watkins (Sydney)
Partner
Deloitte Australia
dwatkins@deloitte.com.au

Isabelle Mac Innes (Sydney)
Director
Deloitte Australia
imacinnes@deloitte.com.au

Brazil:
New regulations released on transition tax regime

The Brazilian tax authorities issued two instructions on 18-19 September 2014 (Normative Instructions (NI) No. 1,492/14 and No. 1,493/14, respectively) that provide new guidance on the transition tax regime (RTT) and on Law 12,973/14, the law that repeals the RTT regime as from 1 January 2015. (For prior coverage, see the alerts dated 24 September 2013, 15 May 2014 and 3 June 2014.)
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-brazil-240913.pdf?id=us:em:na:wta:eng:tax:092614
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-brazil-160514.pdf?id=us:em:na:wta:eng:tax:092614
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-brazil-030614.pdf?id=us:em:na:wta:eng:tax:092614

The RTT was enacted in 2009 to ensure the tax neutrality of accounting changes relating to income recognition and the computation of costs and expenses in light of Brazil's conversion of its accounting rules to IFRS. Under the RTT, taxpayers are required to follow the accounting criteria and methods in effect on 31 December 2007 (i.e. the rules in effect before the law introducing IFRS was enacted). Law 12,973/14 repeals the RTT regime as from 1 January 2015 and provides for an early adoption option, under which a taxpayer can adopt the changes made by the law as from 1 January 2014.

Normative Instruction 1,492/14

NI 1,492/14 amends an NI issued in 2013 (NI 1,397/13), which was the original NI that regulated the law intended to ensure the tax neutrality of accounting changes in light of Brazil's conversion of its accounting rules to IFRS.

NI 1,397/13 introduced rules providing that, for tax purposes, the calculation of assets, liabilities and net equity should be based on the 31 December 2007 accounting provisions. Specific provisions of NI 1,397/13 include the following:

- It introduced a new reporting requirement for taxpayers subject to the actual taxable income regime to submit their books electronically as from calendar year 2014, but still required the Transition Fiscal Accounting Control (FCONT) return to be filed for calendar year 2013.
- It provided that when a corporation calculates and pays interest on net equity (INE) to its shareholders and deducts expenses incurred in making such payments when calculating its income tax liability, the net equity to be considered in the INE calculation should be the equity accrued in accordance with the accounting provisions in effect on 31 December 2007.
- It provided that tax-exempt dividends and profits should be calculated using the accounting criteria in effect on 31 December 2007, and any excess dividends/profits (i.e. dividends/profits that are not calculated based on these

standards) should be subject to the applicable tax at the level of the recipient (corporate income tax (IRPJ and CSL) for resident corporations, individual income tax for resident individuals and withholding tax for nonresidents).

The main changes made to NI 1,397 by NI 1,492 are as follows:

Topic	Early adopters in 2014	Non-early adopters in 2014
Filing of the FCONT return	Filing not applicable	Filing required until calendar year 2014
INE computation	Calculate statutory net equity in accordance with Law 6,404/76	Calculate net equity based on the accounting criteria in effect on 31 December 2007 or, alternatively, in accordance with Law 6,404/76
Net equity pick-up criteria	Calculate net equity pick-up using net equity calculated in accordance with Law 6,404/76	Calculate net equity pick-up using net equity calculated based on the accounting criteria in effect on 31 December 2007, or in accordance with Law 6,404/76; however, if the taxpayer has an equity interest in another entity that elected early adoption, it must use the net equity measured in accordance with Law 6,404/76 (the NI is silent on equity interests in entities that are non-early adopters, which indicates that the option based on the criteria in effect on 31 December 2007 still may be available in such cases)
Dividend distributions	Taxpayer can obtain relief from the taxation of dividends generated in the period 1 January 2008 through 31 December 2013 in excess of the balance sheet amount determined based on the accounting criteria in effect on 31 December 2007	Taxpayer can obtain relief from the taxation of dividends generated in the period 1 January 2008 through 31 December 2013 in excess of the balance sheet amount determined based on the accounting criteria in effect on 31 December 2007. Excess dividends distributed related to 2014 will be taxed as follows: (i) at the progressive withholding tax rates (0%-27.5%) when paid to a resident individual; (ii) at the applicable corporate income tax (IRPJ and CSLL) rates when paid to a corporate entity; and (iii) at a 15% withholding tax rate when paid to a nonresident not located in a tax haven (25% if located in a tax haven).

Normative Instruction 1,493/14

NI 1,493/14 is the first guidance that focuses on the initial adoption of the measures in Law 12,973/14 that provide tax neutrality should prevail in cases where the "sub-accounts" are properly maintained where there are differences (positive or negative) between the "accounting GAAP" reported on the ECD (digital accounting bookkeeping return) and the "tax GAAP" assets reported on the FCONT return (transition tax regime control return). Further clarity is provided on the mechanisms that apply to the corporate taxable income computation on how to account for such differences to ensure tax neutrality.

Other topics covered by NI 1,493 in relation to tax neutrality include procedures to be adopted for the sale of real estate units and in relation to government contracts, financing leases, present value adjustments and fair value adjustments.

NI 1,493/14 also grants the tax neutrality referred to above to the early adopters of Law 12,972/14 in calendar year 2014, regardless of whether their sub-accounts are in place.

Comments

Although NIs 1,492/14 and 1,493/14 are considered important guidance for Brazilian taxpayers on the application of Law 12,973/14, further guidance still is expected to be issued by the tax authorities. Early adoption of the changes made under Law 12,973/14 must be made on the federal fiscal debts and credits return (DCTF) for August 2014, which will be due on the 15th business day of October 2014.

— Cristina Arantes Berry (Sao Paulo)
Partner
Deloitte Brazil
caberry@deloitte.com

Marcelo Natale (Sao Paulo)
Partner
Deloitte Brazil
mnatale@deloitte.com

Chile:
Tax reform may require action before year end to avoid loss of opportunities

Chile's congress gave its final approval to the tax reform bill on 10 September 2014; the tax reform law is expected to be published, and thus to become effective, before the end of September 2014. The reform makes sweeping modifications to the tax law, and investors may need to act before year end to avoid the loss of certain opportunities. (For detailed prior coverage, see the alert dated 23 August 2014.) The changes aim at collecting an additional 3% of GDP, establishing a more equitable tax system and new incentives for investment and savings and reducing tax evasion and avoidance.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-chile-230814.pdf?id=us:em:na:wta:eng:tax:092614

The major changes introduced by the reform include the following:

- The introduction of a dual tax system;
- A gradual increase of the First Category Income Tax rate;
- Several anti-avoidance rules, including new thin capitalization rules, the introduction of controlled foreign company rules, a general anti-avoidance rule and additional requirements for the deduction of payments to foreign related parties;
- The introduction of a program for voluntary disclosure of foreign assets and income;
- Certain measures relating to indirect taxes;
- Certain measures relating to small and medium-sized companies; and
- Various other measures, including elimination of the benefit that allows amortization of certain tax goodwill over 10 years.

Effective dates for the changes vary and range from 1 October 2014 through 1 January 2017.

Among the items on which investors may need to consider taking immediate action to avoid the loss of opportunities are the following:

- Completing/executing financing structures – Tighter thin capitalization rules will apply starting 1 January 2015. However, loans granted in 2014 will be grandfathered and will not be subject to the new rules, unless the loans are modified or assigned after 2014.
- Initiating/executing post-acquisition restructurings and other mergers – The tax goodwill benefit that allows taxpayers to amortize over 10 years a tax goodwill balance available after stepping up nonmonetary assets to fair market value following an upstream merger will be repealed. Only mergers initiated in 2014 and completed before 1 January 2016 will be grandfathered, with the related goodwill remaining amortizable. To be grandfathered, a taxpayer will be required to file a sworn declaration on initiated mergers before 31 December 2014.
- Evaluating new acquisitions and investment projects, as well as implemented tax structures – Investors should consider updating financial models to detect – and reassessing funding and tax structures to mitigate – potential onerous effects of the new rules on certain distributions and the tighter thin capitalization rules, both effective 1 January 2015. This also should allow investors to assess the impact of tax rate increases on cash flow and effective tax rate under both new tax regimes, for reporting and planning purposes.

— Joseph Courand (Santiago)
Partner
Deloitte Chile
jcourand@deloitte.com

Regina Scherzer (New York)
Client Service Executive
Deloitte Tax LLP
rescherzer@deloitte.com

France:
New protocol to treaty with Luxembourg addresses taxation of gains on shares in real estate companies

On 5 September 2014, France and Luxembourg signed a protocol to the tax treaty dating from 1958, as amended by several earlier protocols. The new protocol contains rules on the tax treatment of capital gains derived from the sale of shares in real estate-rich companies.

Under the existing treaty, and unlike the treatment under the OECD model, capital gains on the sale of shares in companies whose assets are comprised mainly of real estate located in a contracting state are not taxable at all in the state where the property is located. For example, capital gains derived by a Luxembourg company from the disposal of shares held directly or indirectly in a company holding real estate located in France will be taxable only in Luxembourg. These gains generally will be exempt from taxation in Luxembourg if the requirements for application of Luxembourg's participation exemption regime are satisfied.

The protocol adds a new paragraph four to article 3 of the treaty to close the loophole under which it is possible for an investor in one country to avoid tax in the other country by selling shares in an entity holding property in that other country, rather than selling the property itself.

Under the protocol, a sale of shares (or an assignment of shares, stock or similar rights) in a company deriving most of its value from real estate located in a contracting state no longer will be exempt from tax in the state where the property is located. New paragraph four provides that taxation rights on gains derived by a resident of a contracting state from the sale of shares or similar rights in an entity (including a company, trust or other institution) whose assets or goods are comprised of, or derive more than 50% of their value directly or indirectly from, immovable property located in the other contracting state will be granted to that other state. In applying this paragraph, immovable property allocated by such an entity to its own business activities will not be taken into account (e.g. where an entity owns a hotel property and also operates the hotel).

Under the new rule, the treaty no longer will pose an obstacle to the full application of French domestic tax law to capital gains derived from shares in companies predominantly holding real estate located in France.

The protocol will apply from the beginning of the financial year following the year in which it enters into force as a result of the exchange of notifications between the contracting states. The new rule will not apply retroactively. Assuming both countries complete their ratification procedures by the end of 2014, the protocol will apply as from 1 January 2015.

The protocol does not make changes to any other provisions of the treaty affecting the real estate industry, although the French and Luxembourg governments have expressed their intent to continue negotiations with a view to "modernizing" the treaty provisions.

This article has been prepared by professionals in Taj, French tax and legal firm, member of Deloitte Touche Tohmatsu Limited.

— Sarvi Keyhani (Paris)
Partner
Taj
skeyhani@taj.fr

Marie-Pierre Hoo (Paris)
Director
Taj
mhoo@taj.fr

Luxembourg:
New treaty signed with Croatia

Luxembourg and Croatia signed their first income tax treaty on 20 June 2014. The new treaty should boost economic and bilateral ties; stimulate the flow of capital, trade and technologies between the two countries; and increase the competitiveness of both jurisdictions.

The main features of the tax treaty, which generally follows the OECD model, are as follows:

Residence – The protocol to the treaty provides that a collective investment vehicle will be considered a resident for treaty purposes and the beneficial owner of the income it receives if it is treated as a body corporate for tax purposes in its country of residence. Where the collective investment vehicle is not treated as body corporate for tax purposes, it nevertheless will be considered an individual resident in the country in which it is established and as the beneficial owner of the income it receives.

This provision should be beneficial for the Luxembourg investment fund industry, in particular, for FCPs/SICAVs/SICAFs that would be allowed to benefit from the treaty.

Permanent establishment – A dredging project will be considered a permanent establishment if the project lasts for more than 12 months.

Dividend, interest and royalties – The treaty provides for a 5% withholding tax on dividends paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company; the rate in all other cases will be 15%. From a practical perspective, however, there should be few circumstances under which the default 15% rate will be invoked, given the 12% Croatian and 15% Luxembourg domestic withholding tax rates on dividends, and the fact that a full exemption from withholding tax under the EU parent-subsidiary directive will apply where certain conditions are satisfied.

The interest article is interesting (and potentially beneficial) for the Luxembourg fund industry, and especially for debt funds. Even though payments made to residents of the other country generally will be subject to a 10% withholding tax, an exemption will apply in certain cases, such as where interest is paid to financial institutions or to collective investment vehicles, such as FCPs/SICAVs/SICAFs. The provision will not affect the treatment of interest payments made by a Luxembourg resident, since Luxembourg generally does not levy withholding tax on interest paid to a nonresident under its domestic law. Moreover, the EU interest and royalties directive provides an exemption for interest payments between the two countries if certain conditions are satisfied.

For royalties, a 5% withholding tax rate will apply to payments to a resident of the other country. The definition of royalties includes payments of any kind received as consideration for the use of, or the right to use, a copyright of literary, artistic or scientific work (including cinematographic films); a patent, trademark, design or model, plan, secret formula or process; or for information concerning industrial, commercial or scientific experience. The provision will not change the effect of Luxembourg domestic law, since Luxembourg does not levy withholding tax on royalties paid to a nonresident. Moreover, the EU interest and royalties directive provides an exemption for royalty payments between the two countries if certain conditions are satisfied.

Capital gains – Capital gains derived from real estate-rich companies will remain taxable in the country where the immovable property is located. However, this rule will not apply to gains derived from the sale of shares of companies listed on an approved stock exchange of one of the contracting states, to gains derived from the sale of shares in the course of a corporate reorganization or where the immovable property from which the shares derive their value is immovable property (such as a mine or a hotel) in which a business is carried on.

Exchange of information – The treaty reflects the OECD standards relating to the exchange of information, and the protocol details the kind of information that should be included in the information request to demonstrate the relevance of the information to the request (e.g. identity of the person, tax purpose, etc.).

Entry into force – The treaty will enter into force once both countries complete their respective ratification procedures, and will become effective in the year following the exchange of ratification instruments between the two countries.

— Christophe Diricks (Luxembourg City)
Partner
Deloitte Luxembourg
cdiricks@deloitte.lu

Vincent Reynvoet (Luxembourg City)
Senior Manager
Deloitte Luxembourg
vreynvoet@deloitte.lu

Mexico:
Hydrocarbons Revenue Law in force

On 11 August 2014, Mexico's president promulgated additional laws related to energy reform that were approved by congress earlier in the month. The new Hydrocarbons Revenue Law generally applies as from 12 August, although certain provisions will not become effective until 1 January 2015.

The Hydrocarbons Revenue Law sets out the rights and responsibilities, including applicable contributions and taxes, of the Mexican government and private companies with respect to contracts for the exploration and extraction of hydrocarbons. The law also establishes a framework for government/private company participation in such activities, and a tax regime for income arising from such activities (as well as any assignments for the exploration and extraction of hydrocarbons).

Four types of agreements may be concluded by the government and private parties:

- Licensing agreements;
- Production sharing/profit sharing agreements;
- Services agreements; and
- Assignments.

The most salient features of the hydrocarbons law are as follows:

- The normal 10-year carryforward period for net operating losses is extended to 15 years for taxpayers that carry out activities in deep water offshore wells and/or oilfields.
- New depreciation rates are introduced (in both the Hydrocarbon Revenue Law and the Income Tax Law), as follows:
    - 100% on assets used for exploration, secondary and enhanced recovery and maintenance;
    - 25% on assets used for the development and exploitation of fields; and
    - 10% on investments for storage and transportation (e.g. pipelines, tanks, etc.).
- The VAT rate on hydrocarbon exploration and extraction activities will be 0% to the extent the activities are carried out with the Mexican oil fund (the institution created to manage the resources obtained by the contracts and assignments granted).
- In addition to the consideration paid by a contractor to the federal government, the contractor will be required to pay to the municipal and state governments a monthly tax (based on the surface area) for the exploration and extraction of hydrocarbons. The tax, which will be used to pay for the environmental impact of the activities, will be MXN 1,150 per km2 during the exploration phase and MXN 6,500 per km2 during the extraction phase.
- Mexican state-owned production entities and Mexican corporations may participate in public tenders individually, as joint ventures or as consortiums.

— Eduardo Barron (Mexico City)
Partner
Deloitte Mexico
edbarron@deloittemx.com

Miguel Llovera (Mexico City)
Partner
Deloitte Mexico
mllovera@deloittemx.com

Netherlands:
2015 tax plan presented to parliament

The Netherlands Minister of Finance presented the Tax Plan 2015 to the lower house of parliament on 16 September 2014. Certain provisions relevant to corporations, and other proposed legislation that could affect corporations, are described below.

Tax measures relating to innovation – The research and development allowance (RDA) is expected to be set at 60% in 2015. Taxpayers that are entrepreneurs for income tax purposes and corporate income taxpayers are eligible to deduct the allowance. The cabinet will examine the possibility of combining the RDA and the R&D tax rebate into a single integrated scheme that would be part of the payroll taxes system as from 2016.

Additionally, contract research by public knowledge institutions no longer would be eligible for the R&D tax rebate, on the rationale that knowledge institutions fail to sufficiently pass on the benefit of the R&D tax rebate to their clients.

Nondeductibility of foreign penalties – Penalties and settlements paid to the Dutch state or to European institutions currently are nondeductible. It is proposed to also disallow the deduction for penalties paid to foreign states or any of their constituent parts. The same would apply to foreign settlement amounts, and to foreign administrative penalties if they are similar to Dutch administrative penalties. The disallowance of the deduction would apply to taxpayers that are entrepreneurs for income tax purposes and to corporate income taxpayers. A "flanking" measure is proposed, under which payments made by employers to employees for such penalties would be regarded as taxable wages.

Tier 1 capital of insurance companies – Under the EU directives, insurance companies may have an obligation to maintain a certain minimum capital. This may comprise fully paid, subordinated liabilities. Based on the directives, such liabilities may be based on the companies' "tier 1" capital, and this could qualify the instruments as equity for tax purposes. A measure is proposed that would provide that such equity instruments would be considered debt capital for insurance companies. As a result, any payments made in respect of these instruments could be deducted from taxable profits as interest.

Interest on tax payments – Dividend withholding tax would be included within the scope of the taxes that are subject to interest.

Corporate income tax liability for public sector companies – Separate from the Tax Plan 2015, the cabinet has submitted a bill that would amend the rules involving the corporate income tax liability of public sector companies. Public sector companies often are exempt from paying corporate income tax under the current rules, while private companies must pay corporate income tax for the same activities. One of the government's reasons for introducing the bill is to respond to criticism from the European Commission, which has initiated a state aid inquiry into the Dutch rules.

Under the proposed rules, any government institution carrying on a business would be presumed to be liable for tax, irrespective of its legal form. Certain exceptions would apply, including one regarding the performance of public duties. The exemption for Dutch international sea ports is possibly the most interesting aspect of the proposals from a corporate tax perspective. Although the European Commission objected to this exemption on the grounds of state aid, the Netherlands would maintain its position until all (or most) European international sea ports are subject to corporate income tax.

The new rules are intended to become effective on 1 January 2015, but they effectively would apply only for financial years starting on or after 1 January 2016.

In addition to these items, other legislative developments are expected in spring 2015, including an important amendment to the Dutch fiscal unity rules that would allow cross-border fiscal unities. The amendment to the EU parent-subsidiary directive combatting hybrid loan mismatches also is expected to be implemented into Dutch tax law.

— Pie Geelen (New York)
Client Service Executive
Deloitte Tax LLP
pigeelen@deloitte.com

Michel Ruijschop (Rotterdam)
Senior Manager
Deloitte Netherlands
MRuijschop@deloitte.nl

Russia:
"Beneficial owner" concept may be introduced

Russia's Ministry of Finance (MOF) is planning to introduce the concept of the "beneficial owner" of income into Russian tax law as part of Russia's national strategy for counteracting tax abuse (referred to as "de-offshoring of the economy"). The draft law that proposes the changes to the tax code was published on the official website of the MOF on 27 May 2014, and the revised version on 2 September. If enacted, these changes would limit the availability of benefits under Russia's income tax treaties.

Russia's tax treaties generally are based on the OECD model treaty and provide for reduced rates of withholding tax on dividends, interest and royalties where the recipient of the income is the beneficial owner. Even though beneficial ownership is a standard requirement in many of Russia's treaties, the term currently is not defined in the tax code. Thus, the legislative introduction of this concept would give the Russian tax authorities considerably stronger grounds for challenging issues related to the concept of "beneficial ownership" in the future.

In the absence of a formal definition of the term, the Russian tax authorities historically have considered the beneficial owner of income to be "the person who has the actual right to receive the income." According to clarification letters issued by the MOF (i.e. responses to specific taxpayers' queries that are not binding on other taxpayers, but that indicate the position of the tax authorities), the term "actual recipient of income" should not be used in a narrow technical sense; rather, it should be interpreted in light of the object and purpose of the OECD model treaty and the application of the substance-over-form principle. The MOF concluded that treaty relief should not be granted merely because income was immediately received by an entity located in a jurisdiction that has concluded a treaty with Russia. The letters further clarify that the foreign recipient should have an "actual right to receive the income," so the provisions of a treaty may apply if the following criteria all are simultaneously met:

- The foreign recipient operates under a contract with a person distributing the income that would be recognized under Russian civil law;
- The foreign recipient does not act as an agent or conduit for another person that actually benefits from the income concerned; and
- The foreign recipient is considered an ultimate beneficiary, i.e. the person with the right to determine the income's "economic destiny."

The MOF issued a letter on 9 April 2014, in which it explicitly stated that treaty benefits will not be granted where Russian-source income is paid in connection with a transaction, or a series of transactions, that results in a foreign person claiming the benefits of an applicable tax treaty in relation to dividends, interest or royalties if the foreign person further pays out the income (directly or indirectly, in full or in part, at any time and in any form) to another person that would not have been able to apply the relevant treaty provisions or would have been subject to Russian withholding tax at a higher tax rate on the basis of a treaty between Russia and the country of tax residence of such other person had that other person received the income directly from Russia. In other words, according to the MOF, for an entity to be considered the beneficial owner of income, it must be legally entitled to receive the income and should be the ultimate beneficiary. The letter also contains examples of structures involving these conditions.

New provisions in the draft law

The position expressed by the MOF in its 9 April letter is reflected in the draft law that would introduce the beneficial ownership concept to Russian tax law. According to the draft law, the beneficial ownership concept for purposes of determining the applicability of a tax treaty would be based on the following principles:

- The actual recipient (beneficial owner) of income would mean a person that, either directly or via direct and/or indirect participation in other organizations or by other means, possesses the right to own, use and dispose of such income, or a person in whose interest another person is entitled to use and dispose of such income.
- A foreign company would be regarded as having the actual right to receive income if it is the ultimate beneficiary of such income, i.e. the entity that actually benefits from the income and has the right to determine its subsequent economic destiny. The functions performed by such a company, its authority and the risks assumed in connection with such income also would be taken into account in establishing the actual right to income.
- Tax treaty benefits would not apply if the foreign person claiming them has limited authority to dispose of the income received, acts as an intermediary in relation to such income without performing any other functions or assuming the risks, directly or indirectly, of paying such income (fully or partially) to another person that would not be able to apply the respective tax treaty provisions and enjoy the related treaty benefits if it received the income directly from Russian sources.

If the beneficial ownership concept is adopted, the tax authorities likely would apply this concept even where the text of the relevant tax treaty does not explicitly mention that the recipient of income must be a beneficial owner.

According to the draft law, for purposes of determining the applicability of a tax treaty, a tax agent paying income to a foreign recipient company would be entitled to request confirmation that the recipient has the actual right to receive such income. A foreign company would be able to apply directly to the Russian tax authorities for a tax refund if a tax agent fails to apply the provisions of an applicable treaty. To submit such a refund claim, a foreign company would be required to provide a number of documents, including a tax residence certificate and confirmation that it has the actual right to receive the income.

Impact on existing structures and future transactions

If the beneficial ownership concept described above is introduced into Russian tax law, it would affect a number of structures that have been used by taxpayers investing in Russia (e.g. financing, holding, licensing structures), as well as the operations of foreign companies involving Russian securities and financial instruments (even if the transactions are executed outside of Russia). These changes also may affect the timing and complexity of obtaining a tax refund from the Russian tax authorities.

For example, if a company has been involved in any of the operations listed below, it should consider evaluating whether the nonresident recipient claiming benefits under the applicable treaty would be viewed as a beneficial owner under the draft law:

- Transactions involving intermediary holding companies that are used to obtain treaty benefits, and/or investment structures that may lack substance, which could require application of a “look-through” approach;
- Hybrid instruments and entities;
- Back-to-back arrangements (e.g. financing, licensing, etc.);
- Programs and applications sold online through intermediary virtual stores;
- REPO and securities lending transactions between two nonresidents, or a Russian resident and a nonresident, involving Russian bonds, shares or depository receipts (DRs), if the nonresident counterparty is located in a nontreaty jurisdiction or in a jurisdiction with a tax treaty that provides a less-favorable taxation regime in relation to interest and/or dividends and there is a coupon or dividend distribution during the term of the REPO or securities lending contract;
- Total return swaps (TRS), either funded or unfunded, involving underlying Russian securities or DRs under which all payments derived from such securities (e.g. dividends/coupon payments) are passed over under the TRS arrangement;
- Syndicated loans funded to the Russian borrowers, where interest payable by the Russian borrower to the arranger is further distributed between several banks;
- Sub-participation loans; and
- Other financial and investment structures involving low-tax jurisdictions.

Next steps

The inclusion of the beneficial owner concept in the tax code, as proposed by the MOF, would give the tax authorities considerably stronger grounds for challenging the applicability of Russia’s tax treaties on this basis, and would lead to greater scrutiny of beneficial ownership in the future. Although it is possible that the text of the draft law may be further revised, the new concept of beneficial ownership and the proposed approach for its application are unlikely to change significantly.

Taxpayers investing in Russia or trading in Russian securities and/or financial instruments that involve Russian securities or participation interests, and other companies that receive income from Russian sources, should monitor developments to determine how their businesses may be affected by the new legislation and what actions may be appropriate to reduce the related tax risks.

— Estella Dzhantukhanova (New York)
Client Service Executive
Deloitte Tax LLP
esdzhantukhanova@deloitte.com

In brief

Australia – Legislation has been enacted that repeals the provisions that allow companies to carry back certain tax losses to two prior tax years. The legislation also abolishes the mining tax (Minerals Resource Rent Tax). The repeal of the loss carryback provisions applies retroactively from the start of the 2013-2014 income year. The abolition of the mining tax applies as from 1 October 2014; affected entities no longer will accrue mining tax liabilities after that date. The Australian Taxation Office will amend the assessments for taxpayers that claimed loss carrybacks during the relevant period, and no penalties or interest will apply if taxpayers pay any amounts due "within a reasonable time."

Belgium – The notional interest deduction (NID) rate for tax year 2016 has been determined. The rate is based on certain average reference indices of the third quarter in the penultimate year preceding the tax year, and a maximum variation of 1% is allowed from one tax year to another. The three-month average is 1.562% for July-September 2014, and the NID rate for tax year 2016 will, in principle, amount to 1.63% (2.13% for small and medium-sized entities), i.e. the rate calculated based on the maximum (negative) variation of 1% compared to tax year 2015.

New Zealand – The 2014 New Zealand general election was held on 20 September 2014, with the national party winning a majority vote and securing a third term in government. From a tax perspective, this likely means "business as usual" and a continuation of the broad-based low-tax framework once a minister of revenue is appointed.

Tax treaty round up

At the end of each month, the *World Tax Advisor* provides an update on recent tax treaty developments, with a focus on items that directly affect the withholding tax rates of the key jurisdictions covered by the Deloitte International Tax Source (DITS). Additional coverage may include stated negotiating priorities and other important tax treaty trends.
URL: http://www.dits.deloitte.com?id=us:em:na:wta:eng:tax

Unless otherwise noted, the developments discussed below are not yet in force.

Australia-Switzerland – See article in this issue.
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140926_3.html

Bulgaria-Norway – When in effect, the tax treaty signed on 22 July 2014 provides for a 5% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company; otherwise, the rate will be 15%. The rate on interest will be 5%, with an exemption for interest paid in connection with the sale on credit of any industrial, commercial or scientific equipment and on all bank loans. The rate on royalties will be 5%.

Colombia-India – The 2011 treaty entered into force on 7 July 2014 and will apply in Colombia from 1 January 2015 and in India from 1 April 2015 for income taxes; it applies from 7 July 2014 for all other taxes. When in effect, the treaty provides for a 5% withholding tax on dividends and a 10% withholding tax on interest and royalties.

Croatia-Luxembourg – See article in this issue.
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140926_7.html

Cyprus-Norway – The 2014 treaty to replace the existing treaty dating from 1955 entered into force on 8 July 2014 and will apply as from 1 January 2015. When in effect, the new treaty provides for a 0% rate on dividends paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company; otherwise, the rate will be 15%. The rate on interest and royalties will be 0%.

Czech Republic-Singapore – The 2013 protocol to the 1997 treaty entered into force on 12 September 2014 and will apply from 1 January 2015 in the Czech Republic and from 1 January 2016 in Singapore for withholding and other taxes; the exchange of information provisions apply from 12 September 2014. When in effect, the withholding tax rate will be 0% on royalties for any copyright of literary, artistic or scientific work, except for computer software, and including cinematograph films and films or tapes for television or radio broadcasting; 5% on royalties received as consideration for the use of, or the right to use, industrial, commercial or scientific equipment; and 10% on royalties received as consideration for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process or computer software, or for information concerning industrial, commercial or scientific experience. The withholding tax rates on dividends and interest will not be affected by the protocol.

Estonia-Switzerland – When in effect, the protocol to the 2002 tax treaty signed on 25 August 2014 provides for a 0% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company for at least one year prior to the dividend payment, or to a pension scheme; otherwise, the rate will be 10%. Interest and royalties will be taxable only in the state of residence of the recipient.

France-Luxembourg – See article in this issue.
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140926_6.html

France-Saudi Arabia – The two countries have agreed, via an exchange of notes, to extend the application of their 1982 income, inheritance and capital tax treaty for a period of five years, beginning 1 January 2014.

Germany-Israel – When in effect, the tax treaty signed on 21 August 2014 to replace the 1962 treaty (as amended by a 1977 protocol) provides for a 5% rate where dividends are paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company; otherwise, the rate generally will be 10%. However, where the distributing company is a real estate investment company, the rate will be 15% where distributions are paid to a recipient that holds directly less than 10% of the capital of the distributing company; otherwise, the domestic rate will apply. A 0% rate will apply where interest is paid on corporate bonds traded on a stock exchange in the source state, or to a pension fund; otherwise, the rate will be 5%. Royalties will be taxable only in the state of residence of the recipient.

India-Bhutan – The 2013 treaty entered into force on 17 July 2014 and will apply as from 1 January 2015 in Bhutan and as from 1 April 2015 in India. When in effect, the treaty provides for a 10% withholding tax rate on dividends, interest and royalties (as well as technical or professional service fees).

Indonesia-Papua New Guinea – The 2010 treaty entered into force on 5 March 2014 and will apply as from 1 January 2015. When in effect, the treaty provides for a 15% withholding tax rate on dividends and a 10% rate on interest and royalties.

Japan-Sweden – The 2013 protocol to the 1983 treaty enters into force on 12 October 2014 and will apply as from 1 January 2015 for withholding and other income taxes (certain other provisions relating to the mutual agreement procedure, the exchange of information and the collection of revenue claims apply as from 12 October 2014). When in effect, the protocol provides for a 0% withholding tax on dividends paid to a company (other than a partnership) that holds, directly or indirectly, at least 10% of the voting power of the payer company for the six-month period ending on the date entitlement to the dividends is determined; otherwise, the rate will be 10%. The 0% rate will not apply, however, if the payer company is entitled to a deduction for dividends paid to its beneficiaries in computing taxable income in its state of residence. Interest (with exceptions for certain contingent interest) will be taxable only in the state of residence of the recipient. Royalties will be taxable only in the state of residence of the recipient.

Luxembourg-Saudi Arabia – The 2013 treaty entered into force on 1 September 2014 and will apply as from 1 January 2015. When in effect, the treaty provides for a 5% rate on dividends. Interest will be taxable only in the state of residence of the recipient. The rate for royalties paid in consideration for the right to use industrial, commercial or scientific equipment will be 5%; otherwise, the rate will be 7%.

OECD – The OECD published the condensed version of the 2014 model treaty on 1 September 2014. (For prior coverage of the 2014 update to the model treaty, see the 25 July 2014 tax treaty roundup).
URL: http://newsletters.usdbriefs.com/2014/Tax/WTA/140725_tr.html

Singapore-Rwanda – When in effect, the tax treaty signed on 26 August 2014 provides for a 7.5% withholding tax rate on dividends. A 10% withholding tax rate will apply to interest and royalties.

United States – An intergovernmental agreement to improve international tax compliance and to implement the Foreign Account Tax Compliance Act (FATCA) was signed between the US and Lithuania on 26 August 2014.

United States – A US Department of the Treasury official has indicated that self-certifications used by foreign financial institutions (FFIs) in intergovernmental agreement (IGA) jurisdictions must be approved by the Treasury for the forms to be considered valid. The position is grounded on language included in certain portions of the IGA. This language does not appear in the requirements for new account holders, but rather in the due diligence language for preexisting account holders. As such, it is unclear whether Treasury will limit the approval requirement for self-certifications acquired in connection with preexisting account due diligence or whether approval will be required for any self-certification used by an

FFI in an IGA jurisdiction. To clarify its position, Treasury currently is working on further guidance regarding the approval process for self-certifications.

Venezuela-Palestinian Territories – When in effect, the treaty signed on 16 May 2014 provides for a 10% withholding tax rate where dividends are paid to a company (other than a partnership) that holds directly at least 10% of the capital of the distributing company; otherwise, the rate will be 15%. A 5% withholding tax rate will apply to interest and a 10% rate will apply to royalties.

Vietnam-Palestinian Territories – The 2013 treaty entered into force on 2 April 2014 and will apply as from 1 January 2015. When in effect, the treaty provides for a 10% withholding tax rate on dividends, interest and royalties.

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France
France Publishes New Transfer Pricing Documentation Form
The French Tax Administration (FTA) on 16 September published the official form taxpayers must file to comply with the new transfer pricing documentation requirements imposed by Article 223 *quinquies* B of the French Tax Code. Companies subject to this new requirement must submit the new form, covering fiscal year 2013, by 20 November 2014.
Issue date: 22 September 2014
URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-tpalert-2014-17.pdf?id=us:em:na:wta:eng:tax:092614

OECD
OECD Release on Transfer Pricing Documentation: The New Global Standard
The OECD's final revisions to Chapter V of the transfer pricing guidelines, issued 16 September, materially reduce the documentation burden on businesses contemplated in the 30 January 2014 discussion draft on transfer pricing documentation and CbC reporting, and clarify many of the issues that had concerned businesses. However, the full impact of the additional requirements the new Chapter V imposes will not be understood until January 2015, when the OECD releases additional guidance on implementation issues, including timing.
Issue date: 17 September 2014
URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-tpalert-2014-014.pdf?id=us:em:na:wta:eng:tax:092614

OECD Chapter I Release: Important Guidance on Location-Specific Advantages and Passive Association
The OECD's revised guidance in Chapter VI of the transfer pricing guidelines defines intangibles as assets other than physical or financial assets that are capable of being owned or controlled by a single enterprise. Under this definition, location-specific characteristics and workforce in place are not considered intangibles, because they are not capable of being owned or controlled; rather, they should be considered comparability factors to be taken into account in a transfer pricing analysis. The revisions to Chapter I, issued 16 September as part of the release of Base Erosion and Profit Shifting (BEPS) deliverables provide important guidance on location-specific characteristics, workforce-in-place, and synergy benefits as comparability factors.
Issue date: 18 September 2014
URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-tpalert-2014-015.pdf?id=us:em:na:wta:eng:tax:092614

OECD Release on Intangibles: Many Issues Unanswered
The OECD on 16 September issued revisions to Chapter VI of the transfer pricing guidelines, Special Considerations for Intangibles, as part of the release of base erosion and profit shifting (BEPS) deliverables. This release is a work in progress, as several important sections remain in draft form and will only be finalized as part of the 2015 BEPS deliverables. However, the release provides important guidance in the many areas that are final, and for those that are not, it provides insight into the likely direction of future guidance.
Issue date: 19 September 2014
URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-tpalert-2014-16.pdf?id=us:em:na:wta:eng:tax:092614

Switzerland

Draft legislation on Corporate Tax Reform III published

On 22 September 2014, the Swiss federal government published draft legislation on the Corporate Tax Reform III, the most comprehensive corporate tax reform in more than 50 years. The main objective of the reform, which likely will become effective on 1 January 2019, is to enhance Switzerland's attractiveness as a location for multinational companies.

Issue date: 23 September 2014

URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-switzerland-230914.pdf?id=us:em:na:wta:eng:tax:092614

United States

Schumer Anti-Inversion Bill

On 10 September 2014, Senate Finance Committee member Charles Schumer (D. NY) introduced the Corporate Inverters Earnings Stripping Reform Act of 2014, which is intended to prevent earnings stripping of domestic corporations that are members of a worldwide group of corporations that includes an inverted corporation, and to require agreements for certain related party transactions with those members.

Issue date: 11 September 2014

URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-unitedstates-110914.pdf?id=us:em:na:wta:eng:tax:092614

OECD Releases the BEPS Project 2014 Deliverables

On 16 September, the Committee on Fiscal Affairs of the OECD released the documents promised in the 2013 Action Plan on Base Erosion and Profit Shifting. Five of the seven documents were previously issued in draft form and the 2014 deliverables provide refinements to the recommendations in the earlier drafts; two of the seven documents are entirely new. This alert provides a summary of the 2014 deliverables.

Issue date: 19 September 2014

URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-190914.pdf?id=us:em:na:wta:eng:tax:092614

Treasury Anti-Inversion Notice

On 22 September 2014, the US Treasury issued Notice 2014-52, which announces its intent to issue regulations that would (i) increase the effective tax rate to foreign acquirers of US targets by limiting the opportunities to achieve tax efficiencies in the course of integrating the operations, management, and financing of the businesses, and (ii) tighten the anti-inversion rules of section 7874. This generally would directly increase US targets' tax costs and thereby reduce the after-tax returns for their foreign acquirers. Treasury indicates the regulations will generally be effective for transactions concluded on or after 22 September 2014.

Issue date: 23 September 2014

URL: http//www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-unitedstates-230914.pdf?id=us:em:na:wta:eng:tax:092614