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Global Tax Alert

News from EY Americas Tax

Mexico: Taxpayers should be aware of Mexico's new reportable transaction obligation

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As part of the tax reform enacted on 9 December 2019, Mexico established a new reportable transaction obligation in Articles 197 to 202 of the Federal Fiscal Code (FFC).

Article 197 of the FFC generally requires tax advisors to disclose reportable transactions. Transactions are reportable to the extent there is a tax benefit in Mexico, regardless of the residence of the taxpayer receiving the benefit. The new articles of the FFC further provide that in certain instances the taxpayer is required to report the transaction.

The new reporting requirements include severe penalties for noncompliance. These penalties may apply to taxpayers and tax advisors. The penalties for not disclosing a reportable transaction or disclosing it incompletely or with errors could be as high as 50-70% of the tax benefits that were obtained or expected to be obtained in all tax years. The tax authorities also could impose a penalty ranging from US\$2,700 to US\$108,000.

This new reportable transaction obligation is in addition to the existing requirement to report "relevant transactions" by filing Form 76. There may be cases in which a transaction is considered both relevant and reportable. Taxpayers or tax advisors should continue to disclose relevant transactions on a quarterly basis.

The tax authorities are expected to issue guidance implementing the new reportable transaction rules and establishing a *de minimis* amount that is not required to be reported.

Covered tax advisors

The primary responsibility to disclose a reportable transaction lies with the tax advisor and at a secondary level the taxpayers. "Tax advisor" is defined as any individual or entity that, in the ordinary course of business, provides tax advice and is responsible for, or is involved in, the design, trading, organization, implementation or administration of an entire reportable transaction. A tax advisor also is an individual or entity that makes available a transaction that will be implemented by a third party. The mandatory disclosure rules apply to tax advisors that are resident in Mexico, are a permanent establishment of a nonresident, or are resident outside of Mexico with a related party in Mexico.

Entities operating under the same brand or commercial name as the Mexican resident advisor are deemed to be related (and therefore deemed advisors). Additionally, the taxpayer's disclosure that the service agreement is concluded with the nonresident advisor is insufficient to avoid the presumption that the advice is provided by the taxpayer's Mexican related party.

Reportable transactions

The term "transaction" (*esquema* in Spanish) includes any plan, project, proposal, advice, instruction or recommendation provided expressly or tacitly with the objective to materialize a series of legal acts. A transaction should not include filings with the authorities or defense in the case of controversy with the authorities.

Tax benefits are deemed to include the monetary value of any reduction, elimination or temporary deferral of a tax. These benefits include amounts achieved through deductions, exemptions, non-recognition of gain or income, adjustments or no adjustments of the taxable base, tax credits, the re-characterization of a payment or activity and a change of tax regime, among others.

In the event that a transaction generates tax benefits in Mexico but is not reportable in accordance with Article 199 of the FFC or there is a legal impediment to disclosure by the tax advisor, the tax advisor must provide a report to the taxpayer explaining the reasons why the transaction is considered as non-reportable or why there is an impediment to disclosing it.

General versus personalized transactions

Reportable transactions are classified as general or personalized. "General" transactions are those designed for all or a subset of taxpayers that require little or no modification for their implementation. "Personalized" transactions are those designed for a specific taxpayer. This distinction determines the timing of the reporting obligation as explained further below.

Taxpayer obligation

Mexican resident taxpayers or permanent establishments of a nonresident are required to disclose reportable transactions in the following cases:

1. The tax advisor does not provide the proper documentation to demonstrate that either the disclosure has been done or the transaction is considered as non-reportable.
2. The reportable transaction has been designed, organized, implemented and administered by the taxpayer.
3. The taxpayer obtains tax benefits in Mexico from a reportable transaction that has been designed, marketed, organized, implemented or administered by a person that is not considered a tax advisor.
4. The tax advisor is a resident abroad without a permanent establishment in Mexico.
5. There is a legal impediment for the tax advisor to disclose the transaction.
6. Under an agreement between the tax advisor and the taxpayer, the taxpayer agrees to take care of any disclosure obligation.

In addition, Mexican resident taxpayers are also required to disclose reportable transactions when they perform activities with nonresident related parties and the transactions generate Mexican tax benefits for the nonresident.

Mandatory disclosure requirement

This new mandatory disclosure requirement applies to any kind of transaction that generates a Mexican tax benefit and has one of the following characteristics:

1. The transaction avoids the exchange of tax or financial information between foreign and Mexican tax authorities, as defined.

2. The transaction avoids the application of Mexican tax rules for investments in transparent tax entities or preferential tax regimes.
3. The transaction consists of one or more legal acts that allow for the transfer of tax losses to a party that did not generate the loss.
4. The transaction consists of a series of interconnected payments or transactions that return all or a portion of the initial payment to the original payer, its shareholders or related parties.
5. The transaction involves a nonresident applying a tax treaty with Mexico with respect to income that is not subject to tax or is subject to tax at a beneficial rate compared to the general corporate rate in the country or jurisdiction of the nonresident's residence.
6. The transaction involves certain intercompany transactions such as: the transfer of hard to value intangible assets; business restructuring with no consideration for the transfer of assets, functions or risks and resulting in a reduction of more than 20% of the Mexican operating income; the transfer or the granting of the temporary use of assets or rights without consideration; performing services or functions that are not compensated; the use of non-reliable comparables for benchmarking unique and high value transactions; and the use of a unilateral protection regime pursuant to the laws of a foreign country.
7. The transaction avoids generating a permanent establishment in Mexico under income tax laws and tax treaties.
8. The transaction involves the transfer of a fully or partially depreciated asset and allows the related party to depreciate the asset.
9. The transaction involves a hybrid mechanism.
10. The transaction avoids identifying the beneficiary of income or assets.
11. The transaction generates income for a taxpayer to avoid the expiration of tax loss carryforwards and creates a future deduction for the taxpayer or a related party.
12. The transaction avoids the application of dividend withholding tax on individuals or foreign residents.
13. The transaction provides for the leasing of assets that are then leased back to the original party or a related party.
14. The transaction has accounting and tax values that differ by more than 20%.

In addition, any mechanism that is designed to avoid these mandatory reporting requirements must be reported.

Once reported, the tax authorities will assign an identification number to the transaction for purposes of the annual reporting requirement. To the extent the transaction is reported by the tax advisor, the tax advisor must provide the information to the taxpayer for purposes of reporting the tax benefit obtained each year.

Timing of reporting

Beginning 1 January 2021, disclosure of reportable transactions is required for those transactions designed, marketed, organized, implemented or administered from 2020 onwards. However, reportable transactions designed, marketed, organized, implemented or administered before 2020 must be disclosed by the taxpayer (not the adviser) if any kind of tax benefit is reflected in tax year 2020 or later. The detailed guidance on how to report any transaction has not yet been issued.

After the transition period of 2020, general reportable transactions must be reported within 30 days of the day they are marketed to a taxpayer.

Personalized reportable transactions must be reported within 30 days of the day in which the transaction is made available to the taxpayer for its implementation, or when the first legal act of the transaction is carried out, whichever occurs first.

Additionally, the taxpayer and the tax advisor must inform the tax authorities of any modification to the reported information within 20 days of the modification.

Information to be reported

The taxpayer or tax advisor that is reporting the transaction must report the name, address, and tax identification number for the tax advisor or the taxpayer, as well as information related to other involved advisors, if applicable. In addition, the reporting must include: (i) a detailed description of each of the steps of the transaction along with a technical explanation of the Mexican and foreign tax rules;

(ii) a description of the tax benefit obtained or expected; and
 (iii) the tax years for which the transaction was or will be implemented.

The tax authorities may request additional information after the initial filing is made. In which case, the tax advisor or taxpayer will have 30 days to respond to the information request, which must be made under penalties of perjury.

Implications

Taxpayers and tax advisors in Mexico should be carefully reviewing transactions in 2020 and in prior years to understand the benefits obtained and whether the transaction gives rise to a reporting obligation. Transactions prior to 2020 that result in tax benefits must be disclosed.

For additional information with respect to this Alert, please contact the following:

Mancera, S.C., Mexico City

- ▶ Koen van 't Hek koen.van-t-hek@mx.ey.com

Ernst & Young LLP (United States), Latin American Business Center, New York

- ▶ Ana Mingramm ana.mingramm@ey.com
- ▶ Pablo Wejcman pablo.wejcman@ey.com
- ▶ Enrique Perez Grovas enrique.perezgrovas@ey.com

Ernst & Young LLP (United States), Latin America Business Center, Miami

- ▶ Terri Grosselin terri.grosselin@ey.com

Ernst & Young LLP (United Kingdom), Latin American Business Center, London

- ▶ Lourdes Libreros lourdes.libreros@uk.ey.com

Ernst & Young GmbH, Latin American Business Center, Germany/Switzerland/Austria, Düsseldorf

- ▶ Ignacio Arias ignacio.arias@de.ey.com

Ernst & Young GmbH, Latin America Business Center, Germany/Switzerland/Austria, Frankfurt

- ▶ Yolanda Alegria yolanda.alegria@de.ey.com

Ernst & Young Abogados, Latin America Business Center, Madrid

- ▶ Jaime Vargas jaime.vargas.c@es.ey.com

Ernst & Young Tax Co., Latin America Tax Desk, Japan & Asia Pacific

- ▶ Raul Moreno, *Tokyo* raul.moreno@jp.ey.com
- ▶ Luis Coronado, *Singapore* luis.coronado@sg.ey.com

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