28 September 2015

Global Tax Alert

The Latest on BEPS - 28 September 2015

EY OECD BEPS project

Stay up-to-date on OECD's project on Base Erosion and Profit Shifting with EY's online site containing a comprehensive collection of resources, including news, Alerts and comment letters.

- Copy into your web browser:

http://www.ey.com/GL/en/Services/Tax/OECD-base-erosion-and-profit-shifting-project

OECD

On 25 September 2015, the OECD formally announced that it will release its final BEPS recommendations on 5 October 2015 as expected. The OECD will hold a news conference and a technical briefing, both by webcast, that afternoon.

EY will provide a comprehensive review of the final BEPS reports and the outlook for country action in a series of eight Thought Center Webcasts:

- OECD BEPS Project Outcomes: Highlights and Next Steps - 15 October, 10am EST
- OECD BEPS Project Outcomes Part 2: New Reporting under Action 13 - 20 October, 10am EST
- OECD BEPS Project Outcomes Part 3: Digital Economy Developments and Action 1 - 27 October, 12 noon EST
- OECD BEPS Project Outcomes Part 4: Permanent Establishment Developments and Action 7 - 5 November, 10am EST
- OECD BEPS Project Outcomes Part 5: Transfer Pricing and Actions 8-10 - 12 November, 10am EST
- OECD BEPS Project Outcomes Part 6: Anti-abuse Measures under Actions 3, 5, 6 and 12 - 19 November, 10am EST
- OECD BEPS Project Outcomes Part 7: Financial Payments and Actions 2 and 4 - 3 December, 10am EST
- OECD BEPS Project Outcomes Part 8: Dispute Resolution and Action 14 - 10 December, 10am EST

For more information and to register for the webcast series, click here. The link is to the first webcast which provides pre-registration for all future webcasts in the series.

Building a better working world

Australia

On 16 September 2015, the Australian Treasurer introduced a Bill in Parliament to implement previously-announced anti-avoidance and transparency measures. The multinational anti-avoidance law (MAAL), applicable to foreign multinationals generating certain profits earned from Australian customers without triggering an Australian permanent establishment (PE), would enter into force from 1 January 2016, as anticipated. However, compared to the earlier exposure draft, the scope has been significantly broadened to apply to arrangements where profits are ultimately taxed in high-tax jurisdictions (because the Bill does not include the draft's requirement for the income to ultimately be remitted to a "no or low tax" jurisdiction in order for the law to apply). Consistent with the previously-announced measures, the Bill also would implement the three-tier approach to transfer pricing documentation requiring a master file, a local file and a country-by-country (CbC) report in line with the OECD and G20 recommendations. These requirements would apply to income years commencing on or after 1 January 2016 for groups with an annual global revenue in excess of AU$1 billion. An Australian subsidiary of a global group would be required to submit the group's CbC report to the Australian Taxation Office (ATO) if the group's parent entity is not in a jurisdiction that implements CbC reporting and with which Australia has arrangements in place for the automatic exchange of CbC reports or if the ATO is not, in practice, able to obtain CbC reports from the parent jurisdiction. Finally, the Bill also introduces increased penalties for tax avoidance and transfer pricing where the taxpayer does not have a reasonably arguable position, with application to income years commencing on or after 1 July 2015.

See EY Global Tax Alert, *Australian multinational anti-avoidance law, country-by-country reporting and increased penalties*, dated 17 September 2015.

Belgium

On 3 September 2015, the Belgian Tax Authorities issued an addendum to the circular letter dated 30 November 2010 regarding the reporting of payments to recipients located in certain "tax havens." According to the Circular, non-compliance with the reporting obligations would automatically lead to non-deductibility of payments to recipients in tax havens that exceed €100,000. Tax havens as defined in the Circular are (i) jurisdictions that have no or low taxation (a nominal corporate income tax rate below 10%) or (ii) jurisdictions that do not effectively apply the OECD exchange of information standard based on the reviews performed by the OECD Global Forum on Tax Transparency and Exchange of Information (currently, these include Luxembourg, Cyprus, the Seychelles and the British Virgin Islands). The Addendum clarifies that non-compliance would not in itself lead to non-deductibility of payments when a double tax treaty applies that includes a non-discrimination clause or for payments protected by the free movement of capital provided for by European Union law; the Addendum indicates that this exception applies to payments to Cyprus and Luxembourg.

Bulgaria

On 12 September 2015, the Bulgarian Ministry of Finance published for consultation draft amendments to the Bulgarian Corporate Income Tax Act. One of the proposed amendments to be applied in 2016 would implement the latest changes to the European Union (EU) Parent-Subsidiary Directive (2011/96/EC) aiming to restrict the tax exemption on otherwise qualifying profit distributions to the extent that such profit can be deducted in the source state. In respect of the general anti-avoidance rule (GAAR) also included in changes to the EU Directive, the Government takes the view that no implementation measures are necessary because Bulgaria already has in place a domestic GAAR with a wider scope.

China

On 17 September 2015, the State Administration of Taxation (SAT) of China published on its website a consultation draft of a regulation to amend a circular that deals with transfer pricing among other matters. The draft generally follows the guidance on intangibles being developed in the OECD BEPS project, but also contains specific views on such topics as location savings, market premium and other location specific advantages. In addition to the traditional transfer pricing methods, the draft describes two "other methods": the "value contribution allocation method" for cases where comparables are difficult to find and the "asset valuation method" for valuation of equity shares and intangible property. The draft follows the three-tier approach to transfer pricing documentation, requiring filing of a master file, local file and CbC report. While the contents of the master file are consistent with the OECD guidelines, the local file requirements are significantly broader than the OECD guidelines, including a requirement to provide a "value chain analysis." The threshold for being required to file the master file and local file is the same as the current threshold for filing transfer pricing documentation. The CbC reporting obligation would apply to Chinese entities that are the parents of a multinational group with revenues higher than 5 billion Yuan (approximately €690 million, which is slightly below the OECD's €750 million threshold) or that are designated by the parent company of a foreign multinational group as a "surrogate parent entity" responsible for filing the CbC report. Additionally, the Chinese tax authorities would have the power to request that a CbC report be filed by the local subsidiary of a foreign group in the course of a special tax investigation if they are not able to obtain the corresponding information from the other country's tax authorities through exchange of information. Finally, the draft would require taxpayers to prepare "special files" for intra-group services, cost sharing arrangements and thin capitalization.

See EY Global Tax Alert, *China's Tax Authorities issue groundbreaking consultation draft to update transfer pricing rules in a post-BEPS environment*, dated 24 September 2015.

Denmark

On 18 September 2015, the Danish Ministry of Finance published for consultation a legislative proposal that includes changes to the country's transfer pricing documentation requirements. The proposed new rules, which are inspired by the OECD recommendations under BEPS Action 13, include a requirement for Danish corporate taxpayers (and permanent establishments) to file a master file, a local file, and (when applicable) a CbC report on an annual basis. The CbC reporting obligation would apply to ultimate parent companies of multinational groups that are tax resident in Denmark provided that consolidated turnover exceeded DKK5.6 billion (approx. €750 million) in the previous income year. Furthermore, Danish resident subsidiaries of a multinational group meeting the turnover condition would be required to file the CbC report, if the parent is not obliged to file a CbC report in its jurisdiction of residency, or if Danish tax authorities are not able to obtain such report through automatic exchange of information. The proposed new transfer pricing documentation and CbC reporting requirements would be applicable to fiscal years beginning on or after 1 January 2016. Failure to comply with the new rules would be sanctioned under the existing transfer pricing documentation penalty regime.

See EY Global Tax Alert, *Denmark publishes proposal to introduce Country-by-Country Reporting*, dated 24 September 2015

Japan

On 28 May 2015, the Tokyo District Court rendered its decision in a dispute over the existence of a permanent establishment of a US resident person conducting an online retail business of selling auto parts and accessories to Japanese customers. The taxpayer used an apartment and warehouse located in Japan for storage and delivery and for the receipt of returned products. Part-time Japanese employees packed orders, included appropriate product instructions, arranged for delivery, and handled product returns. In analyzing the existence of a PE, the court held that the activities mentioned in Article 5(4) of the Japan-US Double Tax Treaty (equivalent to Article 5(4) of the OECD Model Convention) are not automatically deemed to be "preparatory or auxiliary." It held that such activities should only be treated as exceptions to the general definition of PE if they are preparatory or auxiliary in character. The court noted in particular that a warehouse located in Japan for quick delivery to customers and the ability to handle returned products were important elements of the online retail business. Because these activities and other activities performed in Japan were in fact "significant" for an online retail business, the court upheld the existence of a PE in Japan. Furthermore, the court held that the entire sales income from the business activity should be attributed to the PE, without any deductions, due to (i) the functional significance of the activities in Japan and (ii) the fact that the taxpayer did not cooperate in the tax audits process, did not disclose its accounting books and did not file a tax return for the sales income in the US.

Kuwait

Kuwait's Department of Inspections and Tax Claims (DIT) has recently changed its approach to the interpretation of the PE concept with respect to services rendered by nonresidents in Kuwait. The DIT has introduced the concept of a "Virtual Service PE," pursuant to which, when determining whether the period when services are rendered by a nonresident exceeds the (usually 183-day) threshold provided in a tax treaty, no consideration is to be given to the physical presence of employees or contractors of the service provider for establishing the nexus. Thus, a service PE may be created even if employees of the service provider are not present there and perform their activities entirely offshore. This may result in the denial of income tax relief claimed by nonresidents under the applicable double tax treaties of Kuwait. Although the new approach adopted by the DIT has not been officially announced, in several recent cases, the DIT has denied use of the OECD interpretation of PE clauses in double tax treaties and has subjected nonresident companies to domestic taxation on the basis of the "Virtual Service PE" concept.

See EY Global Tax Alert, *Kuwait Tax Authorities adopt "Virtual Service PE" concept*, dated 21 September 2015.

Netherlands

On 15 September 2015, the Dutch Ministry of Finance issued its tax budget proposals for fiscal year 2016. The proposals would implement the three-tiered approach to transfer pricing documentation developed as part of Action 13 of OECD's BEPS project, consisting of a CbC report, master file and local file. These requirements are proposed to be applicable for fiscal years starting on or after 1 January 2016. The CbC reporting obligation would apply to Dutch tax resident entities that are considered the ultimate parent company of a multinational group with consolidated group turnover exceeding €750 million in the preceding reporting year or that have been designated as a "surrogate parent company." In addition, a Dutch subsidiary of a multinational group would be required to file the CbC report for the entire multinational group if the CbC report was not exchanged with the Netherlands by the country of the parent company or surrogate parent company. The master file and local file obligation would apply to Dutch tax residents of a multinational group with a group turnover exceeding €50 million in the preceding fiscal year, and these files would only need to be presented upon the request of the Dutch tax authorities. In addition, the proposals implement the recent amendments to the EU Parent-Subsidiary Directive, denying the application of the Dutch participation exemption for income from an otherwise qualifying participation to the extent that this income can "directly or indirectly" be deducted in the source state, regardless of whether the subsidiary is resident inside or outside the EU. The draft legislation furthermore incorporates the wording of the general anti-abuse rule as provided in the amended EU Directive into the current specific anti-avoidance rules of the Dutch Corporate Income Tax Act and Dutch Dividend Withholding Tax Act. If adopted, the proposals are expected to come into effect on 1 January 2016.

See EY Global Tax Alerts: *Dutch Government publishes 2016 Budget Proposal*, dated 16 September 2015, and *The Netherlands releases draft law implementing new transfer pricing requirements in line with BEPS Action 13*, dated 16 September 2015.

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