The latest on BEPS

28 April 2014

Overview

Welcome to The Latest on BEPS, a biweekly report with brief summaries of the latest activity in the OECD Base Erosion and Profit Shifting (BEPS) project and the latest country specific legislative and administrative activity related to the global focus on BEPS. Links to more detailed information are included. A new edition will be issued as a Global Tax Alert every other week to provide updates on developments during the preceding two weeks.

OECD

On 14-15 April 2014, the OECD held a public consultation on the Discussion Draft on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (Action 6 of the BEPS Action Plan). The consultation included representatives of the business community, the country delegates to Working Party 1, which has responsibility for tax treaty matters, and its Focus Group on Treaty Abuse, and members of the OECD secretariat. The dialogue focused on key aspects of the proposed approach set forth in the discussion draft, which would introduce into the OECD model tax treaty a two-tier mechanism for addressing concerns about the potential for “treaty shopping.” Concerns were expressed about the uncertainties that would be created with the proposal to couple a US-style limitation on benefits provision with a more general anti-abuse rule in the form of a UK-style “main purpose” test. Following the consultation, the Working Party will continue development of proposed amendments to the OECD model treaty and accompanying explanatory additions to the commentary to the model treaty.

On 16 April 2014, the OECD held informal meetings on the Discussion Drafts on Hybrid Mismatch Arrangements (Action 2 of the BEPS Action Plan). These meetings included representatives of the business community, the country delegates to Working Party 11, which has responsibility for this work, and members of the OECD secretariat. The informal dialogue focused on broad issues with respect to the proposed approach set forth in the Discussion Drafts, including the scope of the proposed rules, the interaction with other BEPS focus areas, the particular implications for regulated financial services businesses, and transition issues. The OECD will hold a public consultation on the Discussion Drafts on hybrids on 15 May 2014.
On 23 April 2014, the OECD held a public consultation on the Discussion Draft on the Tax Challenges of the Digital Economy (Action 1 of the BEPS Action Plan). On 16 April 2014, the OECD posted on its website close to 500 pages of comments that had been submitted on the Discussion Draft. The consultation included representatives of the business community, the country delegates to the OECD Task Force on this issue, and members of the OECD secretariat. The dialogue covered a wider range of issues, including the difficulties associated with any attempt to ring fence the digital economy for special tax treatment, the importance of several of the other BEPS focus areas in addressing issues with respect to the digital economy, and the significance of VAT issues in this area.

Representatives of EY participated in all of these consultations. The OECD intends to complete its work on all three of these areas in advance of the September 2014 deadline set forth in the BEPS Action Plan for these Actions 1, 2, and 6.

Australia
On 16 April 2014, the Australian Taxation Office (ATO) released two new draft transfer pricing Taxation Rulings and new two draft Practice Statements, which represent the ATO's first documented view on how the new transfer pricing laws introduced in 2013 (Subdivisions 815-B and 815-C) should apply. The documents set out high ATO expectations regarding what taxpayers need to do. Understanding these expectations is important because the ATO has become increasingly aggressive on transfer pricing issues and because taxpayers will be subject to base 25% penalties if the ATO successfully challenges their transfer pricing documentation as not establishing a reasonably arguable position on a given matter. Consistent with the global trends and the broader BEPS debate, ATO compliance activities are expected to be heavily focused on transfer pricing compliance for the foreseeable future.

See Global Tax Alert, Australia issues draft tax guidelines regarding transfer pricing documentation, penalties and reconstruction, dated 17 April 2014.

France
On 15 April 2014, the French Tax Administration (FTA) released its draft regulations on the new “anti-hybrid” financing provisions that were included in the 2014 Finance Bill. The draft regulations are open for public consultation between 15 April and 30 April. Following this public consultation process, the draft regulations could be subject to some amendment before final guidelines are issued by the FTA. It should be further noted that these draft regulations are currently binding on the FTA.

See Global Tax Alert, French Tax Administration releases draft regulations on “anti-hybrid” financing provisions, dated 16 April 2014.

Russia
On 9 April 2014, the Russian Ministry of Finance issued a letter to the tax authorities on the beneficial ownership concept for Russian source payments. The letter provides a definition of beneficial ownership and denies beneficial ownership status where a transaction or series of transactions results in all or nearly all of the income being paid to another party that is not eligible for treaty benefits. In order be considered as the beneficial owner, there must not only be legal grounds for a person’s direct receipt of the income, but that person must also be the direct beneficiary of such income (i.e., the person that in fact receives the benefit of the income and that determines its subsequent economic fate).

In determining the beneficial owner of income, an intermediate link, such as a conduit company for example, cannot be regarded as the person having the actual right to income if it has very narrow powers in relation to the income concerned and may therefore be regarded as a fiduciary or administrator acting on behalf of other interested parties. The letter provides three examples of conduit transactions related to payment of dividends, interest and royalties, where the recipient of income is not treated as the beneficial owner of income.

It is anticipated that the tax authorities may start challenging the application of tax treaties on beneficial ownership grounds, even if no beneficial ownership provision exists in the particular treaty (which would contradict existing court practice). Representatives of the Finance Ministry have unofficially confirmed the “retroactive” effect of the letter, which does not set forth any new rule of law but rather provides an interpretation of a tax treaty term over which the Ministry claims interpretative power as a “competent authority” under treaties.
For additional information with respect to this Alert, please contact the following:

**Ernst & Young LLP, International Tax Services, Washington, DC**
- Barbara Angus  +1 202 327 5824  barbara.angus@ey.com
- Yuelin Lee  +1 202 327 6378  yuelin.lee@ey.com

**Ernst & Young LLP, Global Tax Desk Network, New York**
- Gerrit Groen  +1 212 773 8627  gerrit.groen@ey.com
- Daniel Brandstaetter  +1 212 773 9164  daniel.brandstaetter@ey.com

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**Additional EY BEPS contacts**

- **EMEIA**
  - Christian Ehlermann, Munich
    +49 89 14331 16653
  - Transfer Pricing
    - Chris Faiferlick, Washington, DC
      +1 202 327 8071
  - EMEIA
    - Mat Mealey, London
      +44 20 7951 0739
- **Asia Pac/Japan**
  - Jonathan Stuart-Smith, Tokyo and Singapore
    +65 6309 6022
  - Transfer Pricing
    - Ronald van den Brekel, Rotterdam
      +31 88 40 79016
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