Corporate Tax Alliance

Newsletter
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Corporate Tax Alliance
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Intro talk

Dear all,

2021 has come to an end. We hope you have had a good holiday break and rolled with fresh energy and enthusiasm into 2022.
In 2021 we could welcome three new CTA members:

- Germany, Melina Mavridou
- India, Ameya Kunte
- Israel, Henriette Fuchs

Looking back at the tax developments in 2021, the most published one was of course the agreement reached on Pillars 1 and 2. Although at first glance this seems to impact only the larger multinationals, the principals will no doubt drip through to impact the rest as well over time.
But seeds have also been planted to shore up revenues of governments around the world, whereby wealth and inheritance taxes feature prominently. Although we are a “corporate” tax alliance, we surely have to stay abreast of these developments.

In this edition of the Newsletter, we have contributions from:

- *India by Ameya Kunte and Chirag Chordia*
- *Singapore by Nico Derksen*
- *Uruguay by Valentina Ginel*

Brainstorming is ongoing for our annual physical CTA meeting 2022. It would be wonderful if 2022 will be our Face-2-Face year again.

Stay in touch, share your news with the network, ask questions, send comments… Let’s keep the CTA spirit interactive & alive!

Best of health & luck for 2022,
Jan, Guido & Nico

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Impact on cross border payments for software after Indian Supreme Court settles tax tussle

By Ameya Kunte and Chirag Chordia, Globeview Advisors LLP

Cross border payments made by Indian residents to purchase software from a non-resident has been a subject matter of dispute for many years. Most Indian tax treaties have a specific clause on taxation of fees for technical services and a conventional article on the royalties. The domestic law definition of royalty is very wide. Considering the treaties, Indian payers have viewed that such payments are in the nature of 'business income' and not 'royalty'.

Generally, 'royalty' payments attract withholding of taxes at around 11% under domestic law, and the rate varies under various treaties, e.g. 10% under the India Singapore tax treaty. The WHT is not required for 'business income' unless the non-resident has a 'permanent establishment' in India. Since the tax authorities argued such payments to be in nature of 'royalty', this resulted in tax demands for Indian residents who made software payments to non-residents without deduction of withholding taxes. In some cases, tax demands were raised directly against non-resident foreign entities.

After divergent views expressed by high courts on this issue, the Indian Supreme Court had an opportunity to address the same in March 2021 for the following software transactions:

• Sale of software by a non-resident directly to an end-user;

• Sale of software by a non-resident to Indian distributors for resale to customers in India;

• Sale of software by a non-resident to a foreign distributor for resale to customers in India;

• Software bundled with hardware and sold by foreign suppliers to Indian distributors or end-users.

The Supreme Court[1] In a landmark decision, ruled in favour of the taxpayers. The Supreme Court observed that the end-user in India received only a limited license to use the computer software by itself, with no right to sub-license, lease, make copies, etc. Further, in the cases of distributors, the distributor received only a non-exclusive, non-transferable license to resell the computer software. The Supreme Court opined that the payments would not constitute 'royalty' until the transfer of rights of the copyright embedded in the software. The Supreme Court ruling opines extensively on the copyright law and the ‘first sale doctrine’, or the 'principle of exhaustion’. The Supreme Court left the mere sale of software outside the ambit of 'royalty'.

The ruling settles the law in India on software payments for the historical transaction on similar fact patterns. India has been asserting its "source" based taxation rights on the tax policy side. Definition of 'royalty' in some recent Indian treaties like the treaty with Russia, Kyrgyz Republic and Kazakhstan include a specific language in the royalty definition to tax software payments. With the strong push from the developing nations, including India, the United Nations Committee of Experts on International Cooperation in Tax Matters is evaluating the addition to the Commentary on Article 12 dealing with computer software in the UN Model Convention[2].

Separately, India introduced an equalization levy (equivalent to the 'digital service tax') in 2016, with a restrictive scope. With effect from 1 April 2020, the scope of 'equalization levy' was widened to include online sale of goods or services by the non-resident e-commerce operator at 2%. India has been actively participating in the OECD's Inclusive Framework and involved in the BEPS Pillar 1 & 2 solution. With the agreement on Pillar 1, India is expected to withdraw the equalization levy. However, till then, the equalization levy provisions would continue to apply. It would also be interesting to see the application of the equalization levy in cases that fall below the threshold limits of BEPS Pillar One.

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[1] Engineering Analysis Centre of Excellence Private Limited [TS-106-SC-2021] - https://main.sci.gov.in/supremecourt/2011/38137/38137_2011_33_1501_26629_Judgement_02-Mar-2021.pdf

[2] https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-10/CRP.22%20UN%20Model%20Double%20Taxation%20Convention%20between%20Developed%20and%20Developing%20Countries.pdf

The traditional shrink-wrapped software is being replaced by digital copies and "Software as a Service" in evolving markets. The rationale laid down by the Indian Supreme Court for traditional business transactions may not apply wholly to the new transactions. Evaluation of such cases on its own merits, in the light of the Indian Supreme Court judgment, would be necessary for deciding applicability of withholding requirements and equalization levy & Pillar 1 outcome.

Singapore Update on the Multilateral Instrument

By Nico Derksen, Owner/ Director International Tax Management Pte Ltd

Introduction

The OECD had introduced a Multilateral Instrument ("MLI") to facilitate the implementation of the Base Erosion and Profits Shifting ("BEPS") standards in the numerous Double Tax Agreements ("DTA") that required to be amended around the world.

Singapore is an active member of the OECD Inclusive Framework, and committed itself to adhere to the minimum standards as set by the OECD.

Being a small island state with no natural resources, Singapore has been attracting investments and business over the years by providing an excellent educational, legal, logistic, and financial infrastructure, supported by an attractive (semi) territorial tax system and tax incentives.

It is therefore interesting to take a look at how Singapore approaches the MLI.

Timeline

- On 7 June 2017 Singapore signed the MLI.
- On 21 December 2018, Singapore deposited its instrument of ratification of the MLI, after which on 1 April 2019 the MLI entered into force for Singapore.
- As per 1 July 2021, the amendments made by the MLI for 47 of Singapore's DTAs have taken effect.

Positions

Singapore has taken the following positions:

Article 6 (Purpose of a Covered Tax Agreement)

Paragraph 1 – To include a statement in the preamble of the DTA to clarify that the DTA is intended to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

Paragraph 3 – To include a statement in the preamble to reflect a desire to further develop economic relationship or enhance cooperation in tax matters.

Article 7 (Prevention of Treaty Abuse)

Paragraph 2 – To adopt the Principal Purpose Test in Singapore' DTAs to prevent treaty abuse. Asymmetrical application of simplified limitation of benefits rules will not be allowed.

Paragraph 4 – To include the discretionary relief provision which would give a competent authority discretion to grant treaty benefits to a taxpayer, upon request, despite the taxpayer failing the Principal Purpose Test.

Article 13 (Artificial Avoidance of Permanent Establishment Status through Specific Activity

Exemptions)

Paragraph 3 – To opt in to Option B for the list of activities that are deemed not to constitute a permanent establishment. This ensures that businesses with foreign operations do not unduly create taxable presence in the foreign jurisdiction.

Article 16 (Mutual Agreement Procedure)

Paragraph 1 – To adopt the alternative minimum standard to paragraph 1 such that resident taxpayers can approach IRAS for mutual agreement procedure (MAP) assistance and IRAS will implement a bilateral notification or consultation process to inform Singapore's treaty partner when IRAS rejects a MAP application.

Paragraphs 2&3 – To adopt these two paragraphs to facilitate dispute resolution.

Article 17 (Corresponding Adjustments)

Paragraph 1 – To include a provision to allow jurisdictions to make corresponding adjustments and consult with one another in the event of a transfer pricing adjustment.

Article 18 (Choice to Apply Part VI)

To opt in to the mandatory binding arbitration provisions to be applied to all DTAs covered under the MLI

Article 19 (Mandatory Binding Arbitration)

Paragraph 12

- To reserve such that any unresolved issues arising from a mutual agreement procedure case

shall not be submitted to arbitration if a decision on this issue has already been rendered by

a court or administrative tribunal of either jurisdiction.

- Paragraph 12 – To reserve such that the arbitration process will terminate if, at any time after

a request for arbitration has been made and before the arbitration panel has delivered its decision, a decision concerning the issue is rendered by a court or administrative tribunal of either jurisdiction.

Article 23 (Type of arbitration process)

The final offer arbitration will be the default mode of arbitration.

Paragraph 3 – To provide for Singapore to enter into discussion with Singapore's treaty partner

to reach an agreement on the type of arbitration process to apply if Singapore's treaty partner

reserves, under paragraph 2, to apply the independent opinion arbitration instead.

Paragraph 4 – To opt in to the confidentiality provision. Under the confidentiality provision, taxpayers and their advisors must agree not to disclose to any other person any information received from either jurisdiction or the arbitration panel in the course of the arbitration process. A breach of this provision could give rise to the termination of the mutual agreement procedure

as well as the arbitration proceeding.

Article 24 (Agreement on a Different Resolution)

Paragraph 2 – To allow jurisdictions to agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered.

Article 28 (Reservations)

Paragraph 2

- To reserve such that cases which are subject to Singapore's domestic general anti-

avoidance rules will not be eligible for arbitration in Singapore.

- Where a reservation has been included by Singapore's treaty partner to prevent cases which

are subject to its specific domestic law provisions from qualifying for arbitration, that same reservation would similarly apply to cases that are subject to Singapore's domestic law provisions which are analogous to the domestic law provisions specified in the reservation included by that treaty partner.

Article 36 (Entry into Effect of Part VI)

Paragraph 2 – The arbitration provisions provided under the MLI will be available to a case presented before the entry into force of the MLI only if both jurisdictions agree that it will apply to that specific case.

Conclusion

From the swift acceptance and implementation, and the positions taken towards the standards, it can be concluded that Singapore is seriously committed to help counter undesirable behaviour that is driven by the aim for tax avoidance, whilst strongly voicing its sovereign rights to protect and enhance its economic position as a small service oriented economy in the global environment.

URUGUAY TAX HOLIDAY REGIME - UPDATE
Benefits for new residents

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By Dra. Valentina Ginel and Cra. Valentina Ingold Innovation Tax & Trust

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Taxation in Uruguay, in principle, is limited to income originated within the territory. However, Uruguayan tax residents are also required to pay Personal Income Tax (IRPF) at a rate of 12% on the returns on movable capital they have abroad (for example, interest and dividends).

The situation of those who are not tax residents is different, since they pay the Non-Resident Income Tax (IRNR) and are not subject to tax on the aforementioned income.

In the event that a foreigner acquires the Tax Residence in Uruguay, he would be taxed with personal income tax, so his income from movable capital placed abroad would be taxed.

What is the Tax Holiday Regime?

The "Tax Holiday" consists of allowing new tax residents to choose the regime they prefer to pay taxes on foreign capital income.

Those persons who have acquired tax residence as of fiscal year 2020 will have the following options:

a) Pay IRNR for the fiscal year in which the change of residence is verified and for the following 10 years. In this way, income from movable capital abroad would not be taxed, since they are only taxed within the scope of personal income tax;

b) Pay IRPF from the year in which the tax residence is acquired at a rate of 7% indefinitely (instead of the general rate of 12%), that is, it will always be taxed the mentioned rate.

Those who acquired tax residence as of July 1, 2007 and before fiscal year 2020 and exercised the option to pay IRNR, may benefit from the regime until completing the 10 (ten) fiscal years, whether or not the tax period has ended.

Once the Tax Holiday is finished, the taxpayer who chose to pay IRNR will begin to pay personal income tax at a rate of 12%.

Those who have chosen to pay personal income tax at the special rate of 7%, will continue to do so indefinitely.

Who is eligible for the Tax Holiday?

Provided that the taxpayer had resided abroad and now changes his tax residence to Uruguay, he will be entitled to the benefits of the franchise (tax holiday scheme). In this sense, the taxpayer's nationality or citizenship is not taken into account.

It even seems that the current regulations allow the inclusion of those who, having Uruguayan nationality, emigrated and are now returning to the country.

However, at the moment it is not clear whether a specific period of stay abroad should be considered when applying for the franchise.

In our opinion, in the case of Uruguayan nationals, in order to exercise the option, they should prove that they were indeed tax residents abroad and during that period they had not established any grounds for tax residence in Uruguay.

How to exercise the option.

The exercise of the option must be made once only through a sworn statement before the General Tax Office (DGI) using Form 0306 of DGI. Once the option is exercised, it cannot be modified.

The deadline for submitting this information will be until January 31 of the year following the one to be included, even for those years in which no benefits have been received.

Once Form 0306 is completed, it must be sent by email to the box residents0306@dgi.gub.uy or presented in person at the RUT Department - Exclusive RUT of Montevideo or Interior Offices.

Along with the form the identity document of the person making the option and a copy of Form 3106 must be presented (or attached, if applicable) (in case they had presented it to DGI to choose to pay IRNR before the modifications established by the regulations in force).

To prove their status as beneficiary of the franchise, the taxpayer must present the copy of the form stamped by DGI (Certificate 6306) before the entities legally obliged to withhold IRPF otherwise.

Withholding agents could be, for example, financial intermediation institutions, IRAE taxpayers, the State, Departmental Governments, Autonomous Entities, Decentralized Services and other state and non-state public persons, among other agents designated in the regulations.

Once the copy is presented, the withholding agent should automatically refrain from withholding personal income tax after verifying the validity of the option on the DGI website.

TAX RESIDENCE IN URUGUAY 183-DAY RULE

By Dra. Valentina Ginel Innovation Tax & Trust

The Uruguayan Tax Resident status is what determines the quality of taxpayer in Uruguay. Currently there are five ways by which a natural person can acquire tax residence. One of them is by staying in the country for more than 183 days.[3]

The count begins when the person enters the country. Even if it has only been for a few hours, the day of arrival is taken as a full day of stay, not being relevant the point of entry (air, sea or land), the reason for the stay, or the spirit of permanence. It is an eminently objective factor in which it is enough to prove that you stayed in Uruguayan territory for the time required in the regulation during the calendar year (period that begins on January 1 and ends on December 31).

The 183 days must be totalled within the same calendar year, not requiring that they be consecutive. Short periods of stay with different duration periods can be computed, as long as the sum of the days is greater than 183.

Regarding this issue, it is important to highlight the concept of the so-called "Sporadic Absences" and the precedent set by the Contentious-Administrative Court in judgment N ° 179/2019. Although according to the regulations, these are absences from Uruguayan territory for periods of less than 30 calendar days, so they are computed as if they were days of permanence, the Court determined that said rule cannot be applied literally. It concluded, as the DGI expressed in its position, that to compute sporadic absences these should be not only brief, but also occasional, eventual, thus corresponding to the meaning of the expression itself: that they happen infrequently and in isolation. For this reason, when computing sporadic absences, cases of abuse based on a literal interpretation of the regulations that distort the purpose of the institute cannot be given rise to.

The status of tax resident, at least for countries that follow the OECD guidelines, is proven through the Certificate of Tax Residence (CRF). In Uruguay, it is a document issued by the DGI that indicates that a certain person is a tax resident of the country.

To obtain the CRF, the person needs to be previously registered in the RUT (Single Tax Registry) like any other taxpayer. The certificate is requested from the DGI, for which it is necessary to present a Form N ° 5202, accompanied by a note addressed to the tax authority requesting its issuance and explaining the reasons that led to configure the tax residence in Uruguay along with the relevant supporting documentation.

Normally, it is sufficient to present as proof an immigration certificate issued by the National Customs Directory where the entries and exits of the country are detailed. It must be taken into account that many times all entries may not appear, so you must have some additional documentation, for example, a copy of the duly stamped passport, tickets for the means of transport used or the immigration documents that support the trip.

For this reason, it is recommended, mainly to MERCOSUR residents, who usually use the document or identity card to enter Uruguay, that they use a single Passport as much as possible, in order to document with the stamp all the entrances and exits of the country.

Once the Tax Authority confirms the tax residence, the applicant will receive the Certificate of Tax Residence in a PDF format file in the email provided in Form No. 5202. It is important to highlight that tax residence is appreciated year after year. This means that the fact of obtaining the status of tax resident for a certain year does not imply that it will be maintained in the future, since over time the circumstances that allowed it to be configured may change. For these reason, if a person is interested in maintaining their status as a tax resident in Uruguay, they should pay attention not to fail to comply with the requirements.

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[3] IRPF DGI Ordered Text, Title 7, Article 6, Subsection 1, Literal A.