



Remarks

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Industry Briefing - BEPS Update/International Tax Initiatives

BEPS 1: Minimum Standards

Good Afternoon,

I will give a brief overview of the BEPS Minimum standards and I would start by saying that the package of 4 is mandatory and some will require legislative changes.

The 4 Minimum standards are:

- 1). Action 5: Harmful tax practices, including transparency of tax rulings.
- 2). Action 6: Preventing the Granting of Treaty Benefits (Treaty Abuse).
- 3). Action 13: Country by Country reporting (CbC).
- 4). Action 14: Effective Dispute Resolution Mechanisms (MAP).

BEPS is a universal agreement by the G20 countries and the OECD members (and non-members) who established an inclusive framework. The inclusive framework includes interested countries committing to implement the BEPS package and the minimum standards which will enable countries to participate, on equal footing, in the standard setting process in BEPS related matters. Additionally, countries will participate in peer reviews which allow for the annual review of the jurisdiction's compliance to the standards, allows for the discussion of challenges and sharing of best practices, and to seek guidance and training. It is interesting to note that Jamaica, Panama and Bermuda are.

BEPS Minimum Standard

1. Action 5: Harmful Tax Practices

This action involves a process for reviewing preferential tax regimes to ensure that they are not harmful and that there is a transparency framework that applies to tax rulings. Reports from this Action offer a detailed framework that requires the spontaneous exchange of information (EOI) on taxpayer rulings. There are four key factors that can determine whether a regime is harmful (potentially):

- 1). No effective exchange of information for the regime.
- 2). No or low effective tax rate under the regime.
- 3). Lack of transparency.
- 4). The regime is ring-fenced which is explicitly or implicitly excluding resident taxpayers from taking advantage of benefits; prohibiting enterprises from benefiting from regimes operating in domestic markets; and it includes regimes that do not permit transactions in domestic currency.

Additionally, there are eight other factors to determine whether a regime is harmful:

- 1). An artificial definition of the tax base.
- 2). Failure to adhere to international transfer pricing principles.
- 3). Foreign source income exempt from residence country taxation.
- 4). Negotiable tax rate or tax base.
- 5). Existence of secrecy provisions.
- 6). Access to a wide network of tax treaties.
- 7). The regime is promoted as a tax minimization vehicle.
- 8). The regime encourages operations or arrangements that are purely tax-driven and involve no substantial activities.

The varying types of regimes are: Intellectual Property, Headquarters, Distribution and service center, Banking and Insurance, Fund Management, Financing or Leasing Entities, Shipping, and Holding Companies. These regimes are related to Financial Services and will have some impact on the industry. The nexus approach (basic approach) deals with the alignment of taxes with substance by ensuring that taxable profits cannot be shifted artificially from countries where value was created.

2. Action 6: Treaty Abuse.

The minimum standard for protection against treaty shopping requires countries to include in their tax treaties a preamble (expressed statement) that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion. Multilateral Instruments (MLI) (discussed later) could modify existing tax treaties by including the express statement in the preamble of existing treaties.

Within the BEPS MLI, Article 7, the minimum standard on treaty abuse, and specific anti-abuse rules related to **dividend transfer transactions, transactions involving immovable property, dual resident entities and treaty shopping using third country permanent establishments (PE)** are addressed.

Also, there are other Articles within the MLI relative to treaty abuse that may be deemed relevant to offenses of splitting up of contracts, a tie-breaker rule, and hiring out of labour.

Action 13: Country-by-Country Reporting (CbC)

This Action requires a legal framework for the automatic exchange of information (AEOI). In most cases this exchange of information will follow the Multilateral Competent Authority Agreement (MCAA). It is important to also note that notwithstanding the signing of a multilateral agreement, the exchanges of the CbC report will be bilateral and done electronically. The agreement allows a mechanism for each jurisdiction to retain control over which jurisdictions they undertake exchanges with, and allows for a high level of confidentiality and data safeguard.

The implementation of this Action has three core levels: Master file, Local File and CbC Report.

- The **Master file** provides high-level information relative to Multinational entities (MNEs) global operations and transfer pricing policies.
- The **Local file** provides for the detailed transactional transfer pricing documentation of local entities.
- The **CbC Report** requires for MNEs with revenue greater than 750,000,000 euros, or the equivalent, to file a CbC report that will show a breakdown of the revenue, profit, income, and other economic activity indicators for each tax jurisdiction where they transact business. The filing obligation is on the resident ultimate parent company.

These files/reports must be uniformed and information should be standardized in order to make adequate assessment of information in order to to mitigate risk. Essentially, it affords taxpayers the ability to provide consistency in transfer pricing positions, and allows tax administrations to obtain useful information to assess and monitor transfer pricing risks, observe red flags, and undergo audits.

3. Action 14: Dispute Resolution

BEPS MLI Article 16 addresses this Action and is also referred to as the Mutual Agreement Procedure or (MAP). Its purpose is to provide businesses with an effective tax treaty based dispute resolution procedure in order to avoid double taxation. Its aim is to ensure consistent and proper implementation of tax treaties, inclusive of effective and timely resolution of disputes.

At its core, MAP allows:

- ❖ Taxpayers options to present their case to a Competent Authority (CA) of either treaty jurisdiction if the taxpayer believes that they are not being taxed in accordance with treaty irrespective of domestic laws.
- ❖ It also allows Taxpayers the ability to request MAP assistance within three years from first notification of action resulting in taxes being not in accordance with treaty.
- ❖ It allows The CA, if the objection appears justified and if a satisfactory solution cannot be made, to seek resolution by mutual agreement.
- ❖ And lastly, MAP allows The CA to resolve and consult for the elimination of double taxation in cases not provided for in the treaty.

It is fitting to note that The Bahamas can benefit from this Action due to the impending creation of the International Arbitration Center in The Bahamas.

Action 15: Multilateral Instruments (MLI) and the implementation of the BEPS Minimum Standards

I have mentioned on a few occasions the Multilateral Instrument which is Action Number 15 of BEPS. It is not one of the Minimum Standards, however it is interesting to note as it applies to some of the minimum standards.

The essential use of MLIs to implement various minimum standard actions namely, Actions 6 and 14, involves the amendments to legislations and signing of agreements. This action proposes swift modifications for BEPS negotiations relative to tax treaties. Further, this action point can be explored at the time The Bahamas has committed to commence discussions on signing tax treaties and BEPS implementation.

The Way Forward

In June of this year, I had the opportunity to attend a workshop in Mexico City which focused on BEPS and the 4 Minimum Standards. I must say that the workshop was quite intense, and there many representatives from countries who are currently members of the inclusive framework and have already began the implementation of one or more of the 4 Actions. There were a few jurisdictions, like the Bahamas, who were seeking information in order to make an analysis and an informed decision as to whether their country should implement BEPS. What was unique about The Bahamas is that when compared to other participants we were the only jurisdiction absence of a corporate and income tax structure and that we have not signed a tax treaty agreement with any country. These components being integral aspects of BEPS, lends to the question “will it be beneficial for The Bahamas to implement BEPS Minimum Standard or any one of the 15 Action Plans?”

Well, in an era of globalization, we have seen a proliferation in cross border trade and investments, growth of multi-nationals, and sophisticated tax structures. Is The Bahamas equipped to survive in this era? As previously stated, we are presently without a corporate tax structure, income tax structure and existing tax treaties or double taxation agreements and these are all encompassing of the core purpose and principles of BEPS.

As The Bahamas seeks to address globalization and market ourselves in a manner to attract more business to our shores, we need to ask ourselves whether we will succeed in this initiative given our current tax structure. Treaty agreements may include clauses with stipulations to not do business with companies resident in a low-tax or tax haven jurisdiction. The imminence of countries opting out of doing business with us due to our current tax structure and non-adherence to BEPS minimum standard may be real. We must remain steadfast in our commitment to ensure that The Bahamas stays aligned with global initiatives in order to avoid losing business or to be deemed as an unattractive or non-compliant jurisdiction.

The Bahamas has to now consider what its initial plans are for the implementation of BEPS. We are bitterly aware of the constant movement of the goal post, and pressures placed on countries whom the OECD may consider to be “non-compliant”. With the signing on as a member of the inclusive framework, The Bahamas’ commitment to transparency with the OECD will be affirmed. Back in June , a hard deadline for commitment and implementation had not been established, however, in the absence of some traction to implement, The Bahamas can face penalties or loss in reputation by the OECD.

Notwithstanding the country’s intention to restructure its tax regime and implement BEPS, consultation, further research and analysis by tax specialists or experts, legislative bodies and the OECD should commence in the very near future. BEPS implementation is a major undertaking which will involve a sound understanding of tax laws, exhaustive consultation and negotiations and will ultimately require legislative review and amendments. Additional consideration should be made with respect to technology upgrades, and the hiring of specialized and trained personnel for the establishment of a tax authority.

I will end by saying that the decision to become a member of the inclusive framework, and to commit to the implementation of the BEPS minimum standard will require an official communication of our intention to be sent to the OECD by the Competent Authority.

END

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