TAX EVENT WRAP UP

TPMinds Asia 2020

BDO is delighted to once again sponsor TPMinds Asia 2020 as part of this year's digital series.

The digital experience offered participants a different perspective in joining selected sessions in a more flexible and agile way, limiting the time commitment usually afforded to a three day conference and allowing participants from across Asia to join in.

Notable speakers from a number of MNEs with presence in the APAC region painted a realistic picture of what we are all seeing in our local markets and was a good forum to gain a level of 'new comfort', practical guidance and confirmation of uncertainty that everyone is experiencing. Perhaps the strongest message echoed across the event is that now, more than ever, there is a need to maintain contemporaneous records of changing circumstances and transfer pricing positions adopted. When in doubt – ask – as corporates, advisers and tax authorities alike tread new ground in these unchartered waters.

A number of tax authorities from Singapore, Australia and Malaysia, as well as the OECD and UN participated and outlined how they are adapting to economic activity impacted by the pandemic and guiding taxpayers in their territories through unprecedented times of uncertainty.

COVID-19 KEY THEMES AROUND APAC

Whilst there was wide ranging debate and discussion, a number of key themes dominated many panel discussions. We have provided a snapshot of these.

GUIDANCE

- The OECD's TP Covid-19 project started on the back of an economic landslide prompted by a global health crisis testing the principles on which business is conducted and value chains are built on. The sudden onset and the subsequent trail of disruption has left businesses and policy makers scrambling for practical guidance on what the future brings and what today's actions mean for tomorrow's outcomes, hence the need for contemporaneous record keeping and documentation being the recommended approach.
- The OECD is planning to issue a different type of guidance for COVID-19, based more on Frequently Asked Questions (FAQs) and whilst based on existing OECD guidance, the guidance will hopefully provide practical examples or case studies which illustrate how different circumstances can be considered.
- A number of concerns exist around allocation, or reallocation of benefits and losses amongst related parties, as well as how tax authorities in various jurisdictions will collaborate with taxpayers and each other. Corporates still want consistency and certainty despite unprecedented scenarios, but consistency and certainty will be hard to achieve.
- A small number of tax authorities have issued some guidance, whilst most are waiting on OECD guidance – which is anticipated before the end of 2020. The Australian Taxation Office stands out as a tax authority leading the charge on disclosing its expectations for taxpayers during these uncertain times.

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COVID-19 KEY THEMES AROUND APAC *CONT.*

IMPACT OF INCENTIVES AND GOVERNMENT ASSISTANCE

- The impact of whether government assistance should be shared across the group was hotly debated. Also the subject of how this assistance will be reflected in benchmarking data.
- Compliance, especially in relation to benchmarking studies, should expect some relaxation of the screening criteria for loss making companies as this will allow for a more accurate reflection of the current environment and impact. However, reliable data won't be available for some time, making any comparability analysis virtually impossible in the short term. Therefore, there will be a need for greater reliance or consideration of:
  - The use of the full range of outcomes
  - Comparability factors
  - Isolating one or two years of COVID-19 results and/or constructing unique ranges
  - Inclusion of loss companies during periods of economic turmoil.
- Regardless of the extent of analysis undertaken, care will be required. One tax authority commented that hindsight will reveal what the comparable data shows and therefore whether decisions made at the time are defendable – hardly comforting words.
- Governments are providing subsidies, moratoriums and holidays for various taxpayers' compliance obligations with expected future scrutiny for businesses impacted. It goes without saying that this empathy will transcend into future compliance activity as governments look to generate revenues to fund substantial investments and incentives paid to keep their economies going during COVID-19.
- A host of other considerations were hotly debated:
  - The allocation of losses between related parties, particularly in relation to limited risk distributors, was a feature of many panel sessions. Additionally, whether limited risk service providers should be paid even where no services have been provided.
  - Tax authorities were aligned in their views that these decisions should always be based on actual conditions. Thus confirming a general expectation that limited risk distributors should not unfairly bear the burden of losses incurred and such losses or expenditures should fall more to the principal or entrepreneur within the group.
    - This point was debated by some who noted that the economic impact of COVID-19 has been substantially increased by government decisions to shut down whole economies or parts of economies in an effort to curtail a global pandemic. The losses may not be the result of decisions made by the principal.
    - Nevertheless, it is clear tax authorities will be alert to allocation of losses, extraordinary costs incurred, variation of contracts or re-characterisation of businesses as a result of COVID-19. Again, emphasising the need to maintain robust analysis of positions adopted, including evidence of market or industry response and quantification of the economic impact of COVID-19 compared with budgets.
  - Transfer pricing policies – most corporates considered the need for consistency and robustness in both TP policies and how these were applied in practice, even during the global pandemic. That is, you shouldn't swap in and out of different pricing models or re-characterise the business just because of COVID-19. If this was the case, it is more likely to demonstrate a weakness in the existing policy.
  - Current interest rates on loans are at an all-time low, encouraging MNEs to rethink intercompany financing arrangements as cash flow management has been a key concern for MNEs. Uncertainty is encouraging businesses to prefer debt over equity financing to allow easier movement of funds. We expect that robust record-keeping of decision making processes is paramount for future proofing these transactions and indeed, a number of tax authorities noted that it was unlikely one would find third party evidence of interest free loans during the crisis, but rather, interest free periods requiring deferred interest to be repaid at some point in the future.

PERMANENT ESTABLISHMENTS

- At the time of the initial pandemic phase, many tax authorities announced their intent to be flexible and reasonable in their approach to the determination of a service PE. Countries like Australia, Malaysia, Singapore issued guidance saying that if employees were 'stranded' in a location, they would take a flexible approach. However, with restrictions easing in some countries, or the prospect of the pandemic continuing into 2021, tax authorities may not be ready to offer further relaxations. Thus, if employees don't return to their place of business, the tax authority may determine a Service PE based on their period of stay.

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COVID-19 KEY THEMES AROUND APAC *CONT.*

SUBSTANCE

- Substance has long been analysed and debated between tax authorities and taxpayers. What happens in a global pandemic where key decision makers may be residing away from their usual place of business? Will this impact a tax authority's views? Do we need a new interpretation of substance as we continue to work remotely or adapt to our 'new normal'? It makes sense there should be some layer of consistency between how tax authorities view substance and the presence of a permanent establishment as a result of COVID-19. This debate also lies at the core and challenge of digitalisation and traditional metrics of value creation and business activity within a jurisdiction. So one hopes it will be considered more deeply as an extension of the work on the Digital Economy.

DIGITAL TAX

- Turning to a non-COVID-19 topic, a panel explored the wide ranging number of jurisdictions which have already introduced a digital services tax as we await final guidance from the OECD. It's clear a number of jurisdictions have not been prepared to wait for global agreement or risk whether ultimately it will serve the purpose sought. The panel debated a number of issues, including:
  - Whether more jurisdictions will introduce unilateral measures as a result of lower revenues in the face of the economic impact of COVID-19
  - Whether Pillar 1/2 will impose tax on transactions or industries previously excluded
  - A concern that a 'one size fits all' approach for Amounts A, B and C is not workable
  - Whether corporates will be subject to double or triple tax because of variations of tax on digital businesses in the form of GST/VAT/ other indirect taxes as well as a digital services tax
  - Ultimately, how challenging it will be to reach consensus on a wide range of issues such as thresholds, rates of tax, minimum tax… to name a few.
- We note the number of unilateral measures is increasing quickly and may be more than most expect, where up to 30 jurisdictions may have implemented or be planning to implement local measures.

IN CONCLUSION…

Whilst it is difficult to draw any conclusions or certainty in a time of such uncertainty, there was one consistent theme through-out each panel discussion and networking lounge, whether you were a tax authority, adviser or taxpayer. That theme is the need to prepare and maintain robust analysis and evidence to support whatever positions are adopted by your group. This might sound like an added burden in an environment where limited resources and even more limited budgets exist, however, it will pay "defense dividends" in the future. The evidence we refer to is not transfer pricing documentation, albeit, that will need to come later. The evidence we refer to is business information, commercial information, data, analyses, forecasts, internal communications, examples of what you are seeing with suppliers, customers and more broadly within your industry sector or geography with a focus on clearly delineating the impact of COVID on your business and, further, being able to evidence would have happened 'but for' the pandemic. Compiling an initial defense file contemporaneously as decisions are made in quick response to unfolding commercial events, which are based on hard evidence, will best position corporates to defend their positions in the (likely) event of a tax authority review of COVID-19 years in the future. Let's hope the year/s under review will be limited and we close this COVID chapter as quickly as possible.

We wish you health and safety as we all traverse this unique period in our personal and professional lives. We hope your business rides the economic COVID-19 wave as best you can and look forward to meeting you again as we thrive together in the future.

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