The Corporate Tax Planning Law Review

Fifth Edition

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PREFACE

We are pleased to present the fifth edition of *The Corporate Tax Planning Review*. This volume contains 17 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany and Korea); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city state of Singapore; and several nations in the Global South (Colombia, Nigeria and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and, at times, uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Ouassila Mebarek, Adam Myers and Emily Wolfin at Law Business Research Limited for their editorial acumen and dedication to this project.

Jodi J Schwartz and Swift S O Edgar
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Chapter 3

COLOMBIA

Federico Lewin, Juan Andrés Palacios and Daniela Garzón[1]

I INTRODUCTION

Colombian tax regulation is moderately unstable. Over the past 32 years, there has been, on average, one tax reform every 1.8 years, resulting in tax uncertainty that affects tax planning for companies. However, the accession of Colombia to OECD membership is a key factor in understanding the general corporate tax planning landscape in the country. Colombia's political commitment to the OECD guidelines helps explain many of the recent changes to the tax framework. The outlook for future developments is likely to be aligned with OECD policies while responding to domestic particularities (i.e., the unbalanced proportion of tax revenue collected from enterprises rather than individuals or the need to remove tax benefits).

II LOCAL DEVELOPMENTS

The frequent changes in Colombian tax regulation demand constant revision of tax planning strategies of companies undertaking business in Colombia. The most recent Tax Reform Act (Law 2277 of 2022) was approved by the Colombian Congress in December 2022, whereby some important fiscal changes were enacted, including: (1) an increase of the capital gains rate; (2) the introduction of a CIT surcharge to certain sectors; (3) an increased tax burden on dividends; (4) the limitation of tax benefits; (5) the introduction of a minimum effective tax rate of 15 per cent; and (6) the introduction of significant economic presence (SEP) as an event triggering the taxation of foreign enterprises in Colombia.

Below, we will refer to key factors to bear in mind, such as CIT assessment depending on entity type, group structure, transactions with third parties and indirect taxes.

i Entity selection and business operations

Entity forms

Colombian companies and permanent establishments (PEs) are subject to CIT on their worldwide income, whereas foreign companies without a PE in Colombia are subject to CIT in Colombia only on their Colombian-source income. Before the 2018 and 2019 tax reforms, PEs were subject only to their attributable Colombian income. However, these reforms changed the rule, narrowing tax planning strategies for multinational businesses with PEs or branches in Colombia to tax their attributable Colombian and foreign-source income.

1 Federico Lewin and Juan Andrés Palacios are partners and Daniela Garzón is associate at Lewin & Wills.

An entity is deemed Colombian for tax purposes if any one of the following criteria is met:

a it has been incorporated in Colombia;
b its domicile is in Colombia; or
c its key managing decisions are made in Colombia.

From 2024, foreign entities with a SEP in Colombia will be subject to a 3 per cent CIT on the gross income derived from goods or services sold or rendered to customers in Colombia or to a 10 per cent withholding tax on cross-border payments when they do not register and declare the corresponding CIT in Colombia.

Partnerships and consortiums, among others, are joint venture agreements not deemed to be CIT taxpayers. Consequently, the parties to these types of agreements must assess their CIT liability according to their participation in the joint venture agreement. In addition, each party must comply with formal duties, such as keeping records of the activities developed by virtue of the agreement, to support the income, costs and expenses incurred.

Fiduciary business vehicles, similar to trusts, are vehicles commonly used in Colombia for different purposes, mainly in the construction and infrastructure sectors. These vehicles are fiscally transparent and therefore they are not taxpayers. In accordance with the transparency rules, the settlors and beneficiaries must report income, costs and expenses as if they received them directly. If the settlor or beneficiary is an individual, the income will be taxable at the moment of its distribution instead of being taxable at the moment of its perception by the fiduciary.

Private equity funds and collective investment funds are not taxpayers either. If certain requirements are met, participants in these funds will also defer income taxation until the funds are distributed. The 2018 and 2019 tax reforms established requirements to achieve deferral, to avoid funds being used for the sole purpose of deferring taxation.

Domestic CIT

Colombian taxpayers are subject to CIT on their net taxable income, which results from the sum of all revenues realised by the taxpayer, minus the sum of all specifically excluded items of income, minus the sum of all costs and expenses allowed as deductions.

The general CIT rate is 35 per cent. As of fiscal year 2023, a 15 per cent minimum tax is is applicable to Colombian companies, and the capital gains tax is 15 per cent (instead of 10 per cent). A CIT surcharge is applicable to financial entities, stockbrokers and insurance companies (5 per cent, until 2027), non-renewable extractive industries (up to 15 per cent, depending on the price of the commodities) and hydroelectric power generators (3 per cent, until 2026).

Certain activities and special regimes benefit from preferential CIT rates. Hotels, book publishers and theme parks are subject to a 15 per cent CIT rate if certain requirements are met. Exports from free trade zones are subject to a 20 per cent CIT rate (while other income would be subject to the ordinary rates).

The 2022 tax reform abolished the 10-year CIT exemption for investments in agriculture and a five-year income tax exemption for 'orange' businesses that used to benefit taxpayers dedicated to certain activities in the creative industry and added value technologies. It also eliminated the 27 per cent special CIT rate on mega-investments generating at least

400 jobs and investing at least around US$260 million. However, businesses that fulfilled the requirements to access these special treatments before the entry into force of the 2022 tax reform can still benefit from them until they expire.

In addition to the regular deductibility requirements, costs and expenses incurred abroad by Colombian taxpayers are subject to a limitation of 15 per cent of the taxpayer's net taxable income assessed without considering these deductible items. This limitation is not applicable where the payment has been subject to withholding tax, when it corresponds to certain interest payments (deemed from a foreign source) or when it corresponds to payments made in connection with the import of movable tangible property. In addition, payments to a foreign parent entity are deductible in Colombia only if they were subject to withholding tax and the transfer pricing regime.

The 2022 tax reform established an express prohibition on deducting royalties paid for the exploitation of non-renewable natural resources.

In addition to double taxation relief, which will be explained below, the Colombian tax regime provides a foreign tax credit applicable to Colombian taxpayers obliged to pay CIT abroad with regard to their foreign-source income. The tax paid abroad can be credited towards the Colombian CIT liability, provided that the amount does not exceed it.

Dividends and other repatriation mechanisms

In addition to CIT, the distribution of dividends is subject to dividends tax at different rates depending on the characteristics of the beneficiary. Dividends paid to foreign companies or individuals are subject to a 20 per cent withholding tax. Dividends paid to Colombian tax residents (individuals) are subject to a dividends tax at an effective rate up to 20 per cent depending on their annual income. Dividends distributed to Colombian companies are subject to a 10 per cent withholding tax (applicable only in the first distribution between Colombian companies), creditable towards further distributions to the ultimate beneficiary (individual or foreign investor).

The winding-up of Colombian companies is a taxable event for their shareholders. The applicable tax is calculated on the excess of the distribution over the adjusted equity contributions. The rate is 35 per cent if the stake has been owned for less than two years and 15 per cent if the stake has been owned for two years or longer.

Capitalisation requirements

The funding of operations in Colombia through debt implies that interests earned by foreign companies are subject to a zero per cent to 20 per cent withholding tax, depending on the features of the financing facility and, if between related parties, are also subject to the transfer pricing regime.

Thin capitalisation rules were reformed by the 2018 and 2019 tax reforms to limit the deductibility of interests originated in debts with related parties exceeding twice the net worth of the Colombian taxpayer. Before these reforms, the thin capitalisation rule was applicable as a limit to the deductibility of interests originating in debts with any debtor exceeding three times the net worth of the Colombian taxpayer.

Double tax agreements

Currently, Colombia has double tax agreements (DTAs) with 21 jurisdictions. The application of DTAs is a valuable tool to prevent double taxation and reduce the tax liability of foreigners undertaking business in Colombia. The following table summarises the main features of Colombia's DTA network.

Income tax treaties

Country	Dividends	Interest	Royalties	In force?
Bolivia	Source	Source	Source	Yes
Brazil	Up to 15 per cent	Up to 15 per cent	Up to 15 per cent	No
Canada	Up to 15 per cent	10 per cent	10 per cent	Yes
Chile	Up to 7 per cent	Up to 15 per cent	10 per cent	Yes
Czech Republic	Up to 15 per cent*	10 per cent†	10 per cent	Yes
Ecuador	Source	Source	Source	Yes
France	Up to 15 per cent*	10 per cent†	10 per cent	Yes
India	5 per cent*	10 per cent†	10 per cent	Yes
Italy	Up to 15 per cent	Up to 10 per cent†	10 per cent	Yes
Japan	Up to 15 per cent	Up to 10 per cent	Up to 10 per cent	Yes
Luxembourg	Up to 15 per cent	Up to 10 per cent	10 per cent	No
Mexico	Zero per cent*	Up to 10 per cent†	10 per cent	Yes
Netherlands	Up to 15 per cent	Up to 10 per cent	10 per cent	No
Peru	Source	Source	Source	Yes
Portugal	10 per cent*	10 per cent	10 per cent	Yes
South Korea	Up to 10 per cent	10 per cent†	10 per cent	Yes
Spain	Up to 5 per cent	10 per cent†	10 per cent	Yes
Switzerland	Up to 15 per cent	10 per cent†	10 per cent	Yes
United Arab Emirates	Up to 15 per cent*	10 per cent	10 per cent	No
United Kingdom	Up to 15 per cent*	10 per cent†	10 per cent	Yes
Uruguay	Up to 15 per cent	Up to 15 per cent	Up to 10 per cent	No

* These DTAs provide a higher withholding tax rate when the company distributing the dividends is a Colombian company and the profits out of which the dividend is distributed were not taxed at the corporate level, as follows: 25 per cent for the Czech Republic; 15 per cent for India; 33 per cent for Mexico; 33 per cent for Portugal; 15 per cent for South Korea; 15 per cent for France; 15 per cent for the United Kingdom; and without limitation for United Arab Emirates.

† These treaties to avoid double taxation provide the non-taxation at the source of the interest paid to the other state or to certain public entities of the other state. The following treaties also provide the non-taxation of certain other activities: Spain and Switzerland – sale on credit of merchandise and loans granted by banks; and the Czech Republic – sale on credit of merchandise and loans granted by banks for a period not exceeding three years; United Kingdom and Luxembourg – interest paid to a recognised pension fund.

Anti-avoidance

Through the most recent tax reforms, Colombia established mechanisms to avoid the base erosion and profit shifting (BEPS) of multinational companies operating in Colombia, in accordance with the OECD guidelines. Among other measures, Colombia has implemented a controlled foreign corporation regime applicable to foreign entities controlled by Colombian tax residents and a general anti-avoidance rule.

Colombian legislation establishes two types of tax regimes applicable to operations with foreign companies operating in low-tax jurisdictions: non-cooperative jurisdictions and preferential tax regimes. These operations are subject to severe tax effects, such as a 35 per cent withholding tax, regardless of the nature of the income (interests, dividends and others).

In addition, all operations performed by Colombian taxpayers within non-cooperative jurisdictions or preferential tax regimes are subject to the transfer pricing regime, whether or not they are related parties.

Likewise, since 2004, Colombia has a transfer pricing regime that is applicable to operations with foreign related parties that follows the OECD guidelines and aims to ensure that intercompany transactions are at arm's length.

In 2021, Colombia complemented the tools to fight against tax avoidance with a new mechanism to register the beneficiary owners of certain legal persons and legal arrangements.

The 2022 tax reform extended the definition of 'place of effective management' to capture foreign companies whose day-to-day operation decisions are taken in Colombia. It also established the SEP concept to tax foreign entities that, despite not having a physical presence in the country, do have a connection to the country through their digital presence or by taking advantage of the Colombian market.

ii Common ownership: group structures and intercompany transactions

There are no consolidated group taxation mechanisms under Colombian tax law; however, groups of companies should take the following into account when evaluating their tax planning strategies:

a dividends distributions: as previously mentioned, as a general rule, dividends distributed by a Colombian subsidiary to another Colombian company are subject to a 10 per cent withholding tax. This can be avoided if the dividend distribution is made to a Colombian holding company (CHC) or if it is made within a group of companies, or within controlled and controlling companies, duly registered with the Chamber of Commerce; and

b the CHC regime: pursuant to the 2018 and 2019 tax reforms, a new holding regime was adopted in Colombia. This regime, as is further explained below, is highly attractive for foreign companies or individuals investing in various jurisdictions throughout Colombia. It is therefore a very interesting tax planning tool for multinationals.

Colombian companies with a minimum 10 per cent participation in the capital of at least two subsidiaries can opt in, provided that one of their main activities is investing in securities, investing in shares of foreign or Colombian companies, or the management of these investments.

The CHC regime provides tax benefits for (1) the shareholders of the CHC and (2) the CHC itself, as summarised in the following tables.[2]

Tax benefits for the shareholders of the CHC

	Colombian tax resident	Foreign tax resident
CHC distributes dividends to	Colombian tax resident Taxed in Colombia, with right to a foreign tax credit on any tax paid abroad by the company that distributed dividends to the CHC.	Exempt from dividends tax in Colombia, provided that (1) the income out of which the dividends were distributed is attributable to activities carried out by foreign entities; (2) the income out of which the dividends were distributed is not covered by the Colombian controlled foreign entities regime; and (3) the shareholder is neither resident in a non-cooperative jurisdiction nor subject to a preferential tax regime.

2 Lewin & Wills, Colombian Corporate Tax Overview 2023 edition.

	Colombian tax resident	Foreign tax resident
Sale of shares of the CHC by	Exempt from capital gains tax and CIT in Colombia, provided that (1) the price received in consideration for the shares is attributable to value created by foreign entities;[3] and (2) the company from which the CHC is selling the shares does not qualify as a Colombian controlled foreign entity.	Exempt from capital gains tax and CIT in Colombia, provided that (1) the price received in consideration for the shares is attributable to value created by foreign entities; (2) the company from which the CHC is selling the shares does not qualify as a Colombian controlled foreign entity; and (3) the shareholder is neither resident in a non-cooperative jurisdiction nor subject to a preferential tax regime.

Tax benefits for the CHC

	Colombian company	Foreign company
Dividends received by the CHC from	Taxable in Colombia with CIT, but not subject to dividends tax.	Exempt from CIT in Colombia, provided that the income out of which the dividends were distributed (1) is attributable to activities carried out by foreign entities; and (2) is not covered by the Colombian controlled foreign entities regime.
CHC sells its shares in a	Taxable in Colombia, under the capital gains tax or CIT, as applicable, depending on the circumstances.	Exempt from capital gains tax and CIT in Colombia, provided that the income out of which the dividends were distributed (1) is attributable to activities carried out by foreign entities; and (2) is not covered by the Colombian controlled foreign entities regime.

The controlled foreign companies regime

Under the Colombian controlled foreign companies regime (the CFC regime), individuals and companies that are tax residents in Colombia and directly or indirectly control a foreign entity and hold participation equal to or higher than 10 per cent are deemed to have accrued the income, costs and deductions relating to passive income obtained by the CFC, in the same taxable year in which such income, costs and deductions accrued in the CFC. This tax recognition is made by each Colombian tax resident proportionally to their participation in the CFC.

It is important to highlight that the applicable provisions explicitly forbid the use by the controlling Colombian tax resident of any tax losses accrued at the level of the CFC and that for the purposes of the application of this regime, passive income is deemed to comprise the following, among other things:

a income from the alienation or rental of immovable property;

b certain income from the trade of goods;

c royalties; and

d certain income from intercompany services.

Domestic intercompany transactions

Although there are no special transfer pricing rules applicable to domestic intercompany transactions, there are special rules for the assessment of the CIT or capital gains tax levied in the sale or exchange of assets in all domestic transactions. These rules include statutory

3 The amount of profits generated as a consequence of activities carried out in Colombia by the CHC is considered as value not created by the foreign entity and is therefore not covered by the capital gains tax or CIT exemptions.

pricing thresholds that use criteria to assess the fair market value, aimed at ensuring that, for tax purposes, the assets are not alienated for a value that varies more than 15 per cent from their market value.

Under Colombian tax regulations, if certain statutory requirements are met, intercompany reorganisations, such as contributions of property, mergers and spin-offs, can be tax-free, which means that the taxable event can be deferred.

Contributions of property

Property transfers to companies, as capital contributions, can be deemed tax-free events, provided that the tax cost is maintained in connection with both the transferred property and the stock issued in consideration for the contribution.

Mergers and spin-offs

The tax-free treatment is achieved if the statutory requirements are met. These requirements include a tax cost rollover concerning both the transferred assets and the new shares issued to the shareholders, a continuity of interest and a continuity of business enterprise.

International intercompany transactions

There are various provisions of Colombian tax regulations that are relevant when planning international intercompany transactions. Most of them are aimed at preventing tax abuse. Below, we refer to the ones we consider the most relevant.

Transfer pricing regime

The Colombian transfer pricing regime follows the OECD guidelines and is applicable to transactions between a Colombian party and (1) a foreign related party or (2) a related party located in a free trade zone. Colombian transfer pricing regulations also apply to all transactions involving a person or entity located, resident or domiciled in a non-cooperative jurisdiction (tax haven), even if the parties are not related. Under this regime, the prices or profit margins shall be set at arm's length. It is expected that arm's-length remuneration will be obtained for the transfer of functions, assets or risks within a group of companies. This provision is based on the OECD report on business restructurings. As part of the formal obligations arising from the transfer pricing regime, the Colombian taxpayer shall prepare supporting documentation that includes a master file containing all relevant global information in connection with the multinational group, as well as a local report with all the information regarding the operations carried out by the taxpayer.

Tax-free reorganisations

As a general rule, reorganisations involving a foreign party are eligible for tax-free treatment only if the entity receiving the assets is a Colombian tax resident and the previously mentioned statutory requirements are met.

Mergers and spin-offs between two or more foreign entities entailing the transfer of assets located in Colombia imply, as a general rule, a taxable event in Colombia, unless the assets owned in Colombia that are transferred as a consequence of the reorganisation represent 20 per cent or less of the worldwide combined assets of the participating entities. In the latter case, the resulting transfer of the Colombian assets could be eligible for tax-free treatment observing the statutory requirements and related rules, as previously discussed.

Conversely, all capital contributions of property where the transferor is a Colombian tax resident and the transferee is a foreign entity are a taxable event in Colombia, without exception. Moreover, these contributions are subject to the Colombian transfer pricing regime, even if the parties are not related; hence, the value attributed to the contributed property shall be at arm's length.[4]

Withholding tax on cross-border payments

Colombian subsidiaries and branches of foreign companies are allowed to deduct payments made to their home offices only if such payments were subject to (1) withholding tax in Colombia and (2) the Colombian transfer pricing regime. Moreover, whenever the payment is made in consideration for a service, the Colombian taxpayer must be able to demonstrate to the tax authorities that the service was real (i.e., it was rendered).[5]

Following the 2018 tax reform, the withholding tax rate applicable to payments made to the Home Office in consideration for management services increased from 15 per cent to 33 per cent.

In addition, Colombian tax regulations impose withholding taxes on most payments deemed from a Colombian source, ranging from zero per cent to 35 per cent, depending on the type of payment.

Limitation on deductibility of tax losses

Any tax loss generated in the sale of assets between related parties or between a corporation and its shareholders is not deductible in Colombia.

Thin capitalisation rule

With only very few exceptions, interest paid to a related party is deductible only if the Colombian entity's total indebtedness has an average value not exceeding twice its net equity (on 31 December of the preceding year). This limitation to the deductibility of interest applies to both cross-border inbound indebtedness and local indebtedness.[6]

Dividends received by the Colombian entity

In the absence of tax treaty relief, dividends received from a foreign affiliate are fully taxable in Colombia unless the CHC is subject to the CHC regime, as previously discussed.

It is worth noting that, in any case, the Colombian entity has the right to a foreign tax credit, which means that the tax paid abroad in connection with the dividends can be credited towards the entity's CIT liability in Colombia (provided that the amount to be credited does not exceed the CIT liability in Colombia).

4 Colombian Tax Code Section 319-2.

5 Colombian Tax Code Sections 124 and 260-3.

6 Colombian Tax Code Section 118-1.

iii Third-party transactions

Sales of shares or assets for cash

The gain generated in the sale of assets or shares for cash is taxable in Colombia, as follows:

a if the alienated asset or stock is a fixed asset for the taxpayer and the taxpayer has held it for a minimum two-year period, the sale generates capital gains tax at a 15 per cent rate;[7] and

b if the alienated asset or stock is not a fixed asset for the taxpayer, or if the taxpayer has held the asset or stock for a period shorter than two years, the gain is deemed a regular item of income, subject to income tax at a 35 per cent rate.

As previously explained, Colombian tax regulations establish that, for tax purposes, alienations shall be made at a value that shall not vary by more than 15 per cent from the fair market value of the asset, and set forth some criteria to determine the market value of different types of assets.

With regard to real estate, some criteria relevant in determining the fair market value may be the cadastral appraisal and the self-appraisal. If stock is not traded in a recognised stock exchange, there is a presumption that its fair market value cannot be lower than 130 per cent of the 'intrinsic' value. Tax losses generated in the sale of stock are not deductible.

The sale of stock that is traded in the Colombian stock exchange is not a taxable event in Colombia, regardless of the tax residency status of the seller, and provided that the shares that were alienated during the calendar year do not represent more than 10 per cent of the share capital of the listed company.

Tax-free or tax-deferred transactions

As explained in Section II.ii, if certain statutory requirements are met, tax-free treatment for in-kind contributions, mergers and spin-offs is available. This also applies to third-party transactions.

As a consequence of mergers and spin-offs between either related or third parties, part of the tax losses is transferable to the beneficiary entities. Nonetheless, tax losses are transferable only if the corporate purpose or economic activity of the merging or dividing entity was the same as that of the beneficiary entities before the transaction.

International considerations

Further to the 2018 and 2019 tax reforms, indirect sales of shares of Colombian companies and assets located in Colombia via the sale of stock in a foreign holding company are now taxable events, unless:

a the company whose stock is sold is listed in a recognised stock exchange, provided that no more than 20 per cent of the stock is owned by the same real beneficiary; or

b the underlying assets located in Colombia represent 20 per cent or less of the book and market value of the total assets owned by the alienated entity.

7 Colombian Tax Code Sections 300 and 313.

iv Indirect taxes

The Colombian tax regime establishes a general VAT applicable on the sale of goods and the provision of services in Colombia or from abroad. In addition, a consumption tax is applicable to certain businesses.

Since 2017, the general rate of VAT has been 19 per cent. This tax is applicable to the sale and import of movable tangible property, intangible property associated with industrial property, and the provision of services in Colombia and from abroad. Many basic consumer goods and services are subject to a reduced 5 per cent rate, a tax exemption (giving the right to VAT credit) or a tax exclusion (not giving the right to VAT credit). Exports are VAT exempted. As a general rule, all VAT paid to suppliers of goods and services that constitute a cost or expense of the taxpayer's income-producing activity is creditable towards the VAT collected by the taxpayer from its clients.

The 2016 tax reform established that services provided in Colombia or from foreign countries to persons located in Colombia are subject to VAT in Colombia. In addition, that tax reform introduced a presumption under which services rendered from abroad but with beneficiaries located and resident in Colombia are deemed services rendered inbound and are therefore subject to VAT. This presumption affects digital services rendered to Colombian beneficiaries. The enforcement of this measure caused controversies relating to the imposition of formal and substantial tax obligations in Colombia to foreign providers of digital services. Indeed, this has been subject to polemic as it aims at extending formal duties to foreigners. In any case, the Colombian regime provides a VAT withholding tax mechanism if the foreign providers are not registered before the national tax authorities. According to this mechanism, credit card issuers and designated entities receiving payments on behalf of the foreign providers of services are obliged to withhold the VAT.

The 2018 and 2019 tax reforms introduced a CIT credit for VAT paid on the import, formation, construction or acquisition of real productive fixed assets. Before this tax reform, taxpayers were only able to deduct the VAT paid in the acquisition or import of capital assets. The introduction of this full credit of VAT is one of the most important measures that the government has taken to promote investment in the country.

The VAT regime provides particular incentives, such as:

a the exclusion of VAT on the temporary importation of heavy machinery and equipment not produced in Colombia for basic industry;

b the exclusion of VAT on the importation of machinery and equipment that is not produced in Colombia used for recycling and other environmental activities, including environmental monitoring and control systems;

c the exclusion of VAT on the imports of ordinary industrial machinery that is not produced in Colombia used for the transformation of raw materials by qualified exporters;

d the exclusion of VAT on the importation of machinery and equipment not produced in Colombia, used in the treatment of atmospheric emissions;

e the exclusion of VAT on the sale of machinery and equipment used in projects and activities previously registered in the National Registry for the Reduction of Greenhouse Gas Emissions (RENARE); and

f the exemption of VAT on the purchase of certain goods, equipment and merchandise relating to the investment and pre-investment in projects aiming for the generation or utilisation of renewable energy.

In addition to incentives mentioned above, the regulation provides three special regimes with benefits related to VAT.

a The free trade zones regime excludes from custom duties and import VAT the 'introduction' of foreign goods to the free trade zone and exempts from VAT the sale of goods from the rest of the Colombian territory to free trade zones users.

b The Plan Vallejo is a special imports regime to promote Colombian exports that provides a special drawback mechanism. By using this regime, exporters can temporarily import raw materials and other goods without triggering customs duties and enjoying a preferential deferral of VAT.

c The international trading companies regime is applicable to companies whose main purpose is the commercialisation and sale of Colombian products in the international market. This regime allows international trading companies that are duly registered before the Colombian authorities to buy goods in the national market to issue a special certificate to the seller, without paying VAT. In exchange, the company must export the products acquired within six months.

Certain economic activities, such as mobile phone and internet services, restaurants and sale of cars, are subject to consumption tax at a rate of 4 per cent, 8 per cent or 16 per cent, instead of being subject to VAT. Contrary to VAT, consumption tax is non-creditable.

In general terms, smart planning of indirect taxes in Colombia for companies should be focused on understanding the VAT regime and consumption tax, as well as the particular benefits for certain sectors or businesses. The sale of shares or participation rights is not subject to indirect taxes.

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

In addition to having incorporated several recommendations of the BEPS reports into the domestic tax regulations, Colombia is a signatory of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument) (MLI) since 7 June 2017, although this convention is not yet enforceable.

The following table provides an overview of the applicability of the different clauses of the MLI for each of Colombia's double taxation treaties that qualify as covered treaties. As Switzerland did not include the double taxation treaty with Colombia as covered by the convention, this treaty will not be modified by the MLI.

Overview of the applicability of the MLI clauses for double taxation treaties

	Clause	Covered treaty country								
		Canada	Chile	Czech Republic	France	India	Korea	Mexico	Portugal	Spain
Hybrid mismatches	(3) Transparent entities	N	N	N	N	N	N	N	N	N
	(4) Dual-resident entities	N	N	N	N	Y	N	N	N	N
	(5) Application of methods for elimination of double taxation	N	N	N	N	N	N	N	N	N

	Clause	Covered treaty country								
		Canada	Chile	Czech Republic	France	India	Korea	Mexico	Portugal	Spain
Treaty abuse	(6) Purpose of a covered tax agreement	Y	Y	N	N	Y	Y	N	N	Y
	(7) Prevention of treaty abuse	Y	Y	Y	Y	Y	Y	Y	Y	Y
	(8) Dividend transfer transactions	N	N	N	Y	N	N	N	N	Y
	(9) Capital gains from alienation of shares or interest – value from immovable property	N	Y	N	Y	Y	N	Y	Y	Y
	(10) Anti-abuse rule for PE in third jurisdiction	N	N	N	N	N	N	N	N	N
	(11) Restrict a party's right to tax own residents	N	Y	N	N	Y	N	Y	Y	N
Avoidance of PE status	(12) Commissionaire arrangements and similar strategies	N	Y	N	Y	Y	N	Y	N	Y
	(13) Specific activity exemptions	N	Y	N	Y	Y	N	Y	Y	Y
	(14) Splitting up of contracts	N	N	N	Y	Y	N	N	N	N
	(15) Definition of a person closely related to an enterprise	N	Y	N	Y	Y	N	Y	Y	Y
Improving dispute resolution	(16) Mutual agreement procedure	N	Y	Y	Y	N	Y	Y	Y	N
	(17) Corresponding adjustments	N	N	N	Y	N	N	N	Y	N
Arbitration	(18)–(26)	N	N	N	N	N	N	N	N	N

ii Taxation of the digital economy

Further to the 2016 tax reform, Colombia started levying VAT on many forms of the digital economy.

Some of the services that are now taxed are those rendered to Colombian beneficiaries through software, mobile applications and satellite broadcasting.

This VAT is generally collected by Colombian credit card or debit card issuers or gift card or prepaid card sellers, as well as any other Colombian designated entity or person who receives payments on behalf of foreign renderers.

The 2018 and 2019 tax reforms added services rendered through digital platforms, the assignment of the rights of use or the right to exploit intangibles, and 'other digital services destined to users located in Colombia' to the list of taxable services. Cloud computing and hosting remain untaxed.[8] The 2022 Tax Reform introduced the concept of SEP that will enable, from 2024, the taxation of foreign businesses without a physical presence in the country that maintain a deliberate and systematic interaction with customers in Colombia. The SEP was designed as a temporary instrument to tax the digital economy while a multilateral solution is reached. Foreign businesses with SEP in Colombia may opt in for filing and paying income tax at a rate of 3 per cent on the gross income derived by the SEP or to be subject to a 10 per cent withholding tax on the payments derived by the SEP. DTAs can vary the extent of application of the SEP in particular cases.

iii Tax treaties

Colombia is a party to18 bilateral treaties to avoid double taxation, which follow the OECD Model Tax Convention; a multilateral convention to avoid double taxation (Directive 578/2004 of the Andean Pact); and eight limited-scope income tax treaties to avoid double taxation on sea and air transportation activities.

Recent changes to and outlook for treaty network

Since 2019, new 'generation' treaties to avoid double taxation entered into force, opening the door to a controversial disparity in the application of the most-favoured-nation clause application to technical services, technical assistance and consulting services, excluded from the definition of 'royalties'. These new treaties include the DTAs concluded with the UK (entered into force in 2019), France (entered into force in 2022), Italy (entered into force in 2022) and Japan (entered into force in 2022), as well as four of the recently subscribed treaties (Uruguay, the Netherlands, Brazil and Luxembourg), which are currently undergoing the process of approval. Despite being signed recently, the DTA with the United Arab Emirates does not contain the updated royalties definition.

IV RECENT CASES

In the past three years, the highest tax court (*Consejo de Estado, Sección Cuarta*) has dealt with a large amount of case law, which unifies the application of the general requirements to deduct costs and expenses in different case scenarios, the applicable criteria to tax losses subject to compensation in merger processes and the extension of the reduced statute of limitations to VAT and withholding tax returns, among other tax-related matters.

V OUTLOOK AND CONCLUSIONS

During 2022, the Constitutional Court will study more than 30 constitutional actions against different provisions of the 2022 tax reform. In particular, CIT surcharges, the limitation of certain tax benefits and the prohibition of deducting royalties for the exploitation of non-renewable natural resources are being subjected to constitutional scrutiny.

8 Lewin & Wills, Colombian Corporate Taxation Overview, 2019 and 2020 editions.

The government also announced the possible submission of a bill to reform the municipal tax regime. Despite the text of this reform being undisclosed, it is expected that its main objective is unifying municipal tax systems.

Colombia is also expected to adopt Pillar One and Pillar Two shortly after the OECD announces the final agreement, and urges member countries to adopt the new measures.

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