

Title

The Colombian Tax Authority Issues Doctrine on Significant Economic Presence Rule Application

Brief Summary

Law 2277 of 2022 introduced to the Colombian System the Significant Economic Presence (“SEP”) Rule, which represents a new nexus criterion for corporate income (“CIT”) tax liability in Colombia. The SEP rule has effects as of January 1, 2024, and applies to non-resident companies engaged in the sale of goods and/or the provision of qualified digital services to Colombian clients/users.

The Colombian Tax Authority (“CTA”) issued official doctrine / interpretation on the application of the SEP Rule (i.e., Ruling No. 100208192- 890).

Detail/Facts

In Ruling No. 100208192-890, the CTA answered several questions raised by taxpayers regarding the understanding and application of the SEP provisions set forth in the currently enforceable regulations, namely the Colombian Tax Code (“CTC”) and the Unique Tax Decree (“UTD”). The following were the issues addressed by the CTA:

1. A non a non-resident with SEP that registers during the year is required to include in his SEP CIT the income obtained since January 1 of the year of registration.

At first hand it should be considered that a non-resident with SEP can comply with its obligations by (i) registering with the CTA and filing a SEP CIT return through the form prescribed for such purpose or, (ii) paying the tax through the withholding at the source as income tax.

If the non-resident choses the registration and return filing alternative, the non-resident shall report in its SEP CIT return all the SEP related income obtained during the corresponding taxable year, irrespective that they register during the course of the year.

The foregoing since pursuant to the provisions of article 1.6.1.5.7. of the UTD the CIT is an annual tax which taxable period coincides with the calendar year (i.e., starts in January 1 and ends in December 31).

2. When does the non-resident with SEP obligation to make the SEP CIT advance payments to the CTAs starts?

Non-residents with SEP are subject to make advance payments as soon as they are registered in the Unique Tax Registry (“RUT” by its acronym in Spanish) and within the bimonthly deadlines set forth by law. For example, if a non-resident with SEP registers in the RUT on November 1, 2024, the non-resident will be required to calculate the advance payment for the November-December period and pay it in January 2025.

3. If the non-resident has been subject to WHT prior to its registration, can the non-resident credit them in the calculation of the annual tax?

Yes, WHT suffered prior to the registration can be credited from the corresponding taxable year’s SEP CIT annual liability.

4. If a non-resident with SEP decides to register with the CTA but opts for the alternative of complying via WHT applied by his users/clients, is the non-resident required to make the bimonthly advance payments?

No, if a non-resident with Colombian SEP choses to comply with its CIT SEP obligations by accepting the application of WHT by his clients/users, then the non-resident will not be required to make bimonthly advance payment irrespective that he chooses to register in the RUT.

5. When should non-residents with Colombian SEP recognize the SEP related income?

This depends on whether the non-resident is required to keep accounting books. If affirmative he shall recognize the income based on the accrual principle, conversely if the non-resident is not required to keep accounting books, he shall recognize the SEP related income when payment is received.

6. How should cancelled, annulled or rescinded transactions be treated for Colombian SEP purposes?

Pursuant to the provisions of article 26 of the CTC the taxable income is represented in the income susceptible of producing a net increase of the equity of the taxpayer.

At its turn article 20-3 of the CTC establishes than non-residents with SEP are liable to SEP CIT upon the SEP related gross income originated form the sale/provision of goods/services to Colombian clients/users.

Consequently, the CTA interprets that the corresponding “gross income” are represented in all the ordinary and extraordinary income realized in the taxable year that is susceptible to increase the equity when recognized.

In that train of thought, in the case of cancelation, annulment or rescission of operations the taxpayer shall assess if the income has been actually realized and therefore if it can increase its equity. If the taxpayer concludes that the income has not been realized, then it shall not be included in the SEP CIT calculation.

Continue the conversation

The Latin America Markets, Tax Group and KPMG in Colombia have developed planning opportunities and would welcome the opportunity to continue the conversation with you.

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