WHT AND DOUBLE TAXATION

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STRUCTURE OF THE PRESENTATION

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INTRODUCTION: WHT AND CREDIT METHOD

- Spanish CIT/PIT rely on the credit method to eliminate double taxation
- Ordinary credit (limit “domestic” tax)
  - WHT excess can be deducted as ordinary trading expenses if derive from “business profits”
- Application per country (except PE income), but...
- Requirements for creditability of (individual) foreign WhT
  - Report of the Spanish Tax Agency 8.3.2021

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EFFECTIVE PAYMENT OF WHT

- Taxpayer is obliged to provide evidence of the actual payment of WHT

    - Judgment of the Supreme Court of 18.06.2020: WHT must be effectively paid to be credited (refund)
    - No credit for WHT if there is no effective payment
        - Refunds
        - Credits
        - Deferral (binding ruling of the General Directorate for Taxation, DGT 29.7.02/Supreme Court 11.3.13)
        - Or recourse (DGT 23.7.14)
            - Except tax sparing/matching credit (DGT 5.10.16)

    - Burden of Proof/Traceability (EOI)
        - Certification of actual payment by CA?

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CONFLICTS OF QUALIFICATION AND DTT

- WHT is only creditable when derives from the “correct” application of a DTT

  - WHT > DTT
    - Incorrect WHT due to the (in)application of exclusive taxing right clauses
      - Taxpayer is obliged to provide evidence of the correct classification of foreign income
      - If Spanish tax authorities deem the classification to be incorrect: denial of credit
        - Refund at source country
          - But if source country is right?
        - Compatible with par. 32.3 OECDMC Commentaries (arts. 23A and 23B)?
        - Preference of OECDMC as context
        - Recourse to MAP (DGT 14.4.16)/Directive 2017/1852/EU?

CONFLICTS OF QUALIFICATION AND DTT

- WHT is only creditable when it is derived from the “correct” application of a DTT

  - Central Economic-Administrative Court 21.3.2013 (DTT w/ Mexico and Germany)
    - WTH on a “royalties” payment
      - Spanish tax authorities challenge Mexican/German qualification of income (independent services/business profits)
      - Denial of creditability
    - Solution: seek refund of WHT by source country.

    - The taxpayer has no obligation to provide evidence of correct application fo domestic law in the absence of a DTT
      - DGT 11.6.18 (Guatemala)

CONFLICTS OF QUALIFICATION AND DTT

- WHT is only creditable up to the DTT limits

    - Creditable WHT must not excess DTT limits:
        - WHT in excess not creditable
            - National Court of 28.12.15 (DTT Argentina)
                - Technical assistance 15% WHT vs 10% DTT
                - No possible refund
                - Not creditable

        - Obligation to apply MFN clauses
            - DGT 14.4.14
                - WHT on royalties 15% (art. 12.2 DTT Brazil)
                - MFN: Reduction to 10%
                - Excess not creditable

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WHT AND ORDINARY CREDIT

- WHT is compared to the equivalent Spanish taxation

  - WHT normally levied on gross income
  - Equivalent domestic tax is calculated using domestic rates and domestic tax base rules
    - Supreme Court 14.6.2013/Central Economic-Administrative Court 24.11.20

    - 100K of interest from Brazil (15% WHT) = 15K
    - Equivalent domestic tax: gross payment – (worldwide) deductible expenses (according to domestic law) * Domestic Tax Rate (25%)
      - (100K – 50K) * 25% = 12,5K

    - Pending issues:
      - What expenses to consider?

DEDUCTION OF EXCESSIVE WHT

- Excessive WHT (over equivalent domestic tax) is deductible as a trading expense (tax base)
  - Only if WHT is applied on business profits (domestic definition)
    - Some cases of rental income (DGT 13.10.16)

  - Example:
    - Technical assistance Colombia WHT 15K (royalty)
    - Equivalent Spanish tax 12,5K
    - Excessive WHT 2,5K (deductible)

  - Supreme Court 14.11.22: Max deduction = WHT (if Spanish equivalent tax is 0)
    - The tax authorities denied deduction in a case where the equivalent tax in Spain was 0 due to the deduction of domestic expenses

MY THOUGHS

- Spanish taxpayers are obliged to…
  - gather evidence on the effective payment of the WHT
  - gather evidences on the correct application of DTT by foreign tax administrations
  - ensure that the WHT applied (by the withholding agent) complies with DTT, MFN clause…
  - claim refund from foreign tax administrations
  - compare foreign WHT with deemed equivalent taxes without territorial limitations

- Spanish tax authorities:
  - do not promote the use of MAP (or other EU procedures) to assist taxpayers
  - do challenge foreign classification of income based on the OECD Commentaries and disregarding domestic classification at the country of the

THANK YOU!

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