Peru: 
Update on compliance initiatives

A ruling issued in June 2012 and regulations issued on 18 December 2012 seem to indicate that it is increasingly the Peruvian government’s intention that taxpayers should provide specific evidence to allow the tax authorities to control and verify the accuracy of transactions that have a taxable consequence in Peru. The December regulations provide clarification of certain formalities and requirements relating to the ability to claim tax deductions and establish tax basis.

The ruling, issued in June 2012, aimed to clarify how the formal requirement regarding the use of the Peruvian financial system applies in situations involving agreements for the purchase and sale of Peruvian stock entered into between two nonresident entities. The main issue addressed in the ruling was whether, where a nonresident entity acquires shares in a Peruvian company from another nonresident entity and the acquisition gives rise to Peruvian-source income in the hands of the transferor, the acquirer will be able to adequately evidence the tax basis in the shares when requesting “certification” of the acquisition cost of the shares from the tax authorities only if the payment for the stock has been processed through the Peruvian financial system.

To determine the capital gains tax on the alienation of Peruvian shares on a net basis, Peruvian tax law requires the taxpayer to provide evidence to the tax authorities about the acquisition price of the shares. A nonresident transferor must submit a formal application to the tax authorities for a certification of the tax basis in the shares; this application entails a preliminary audit by the authorities. Until the certification is issued, it will not be possible to deduct the transferor’s basis in the shares from the agreed sale price. Before the June 2012 ruling, the Peruvian tax authorities would issue a certification when sufficient reliable documentation was provided during the audit to accurately demonstrate the acquisition value of the shares in accordance with Peruvian income tax law. In 2012, the tax authorities revised their practice with regard to the certification criteria. Specifically, the tax authorities began requesting – during the tax basis certification audit procedure – evidence showing that the payment of the share acquisition price was made through the Peruvian financial system. If the taxpayer was unable to produce the evidence, the nonresident acquirer was denied any tax basis in the shares acquired.

According to the June ruling, the requirement that cash be paid through the Peruvian financial system in order to claim a tax basis (when the price exceeds the equivalent of USD 1,000) does not make a distinction between resident and nonresident acquirers, even though the provision concerned is intended to apply principally to resident taxpayers. Because the provision is binding law, the tax authorities have concluded that it must be interpreted as forming part of the income tax rules when considering the applicable requirements for certifying the tax basis of a nonresident acquirer of Peruvian shares.

Even though the ruling itself is in the nature of interpretative guidance and is not binding law, it must be followed by the tax authorities as a matter of internal practice. Thus, an auditor is likely to follow the ruling approach when conducting an audit procedure, and deny any tax basis in shares where the relevant payment was not made through the Peruvian financial system.

Comments

Although the ruling has been subject to criticism, it seems clear from the income tax regulations issued on 18 December 2012 that the government intends to encourage taxpayers to use specific supporting evidence that will allow the tax authorities to control and verify the accuracy of transactions that have tax effects. It is in this context that the new interpretation adopted in the ruling should be viewed – it is designed to facilitate the monitoring of transactions involving the acquisition of Peruvian stock and thus enable the Peruvian tax authorities to collect the applicable income tax.

Nonresident taxpayers wishing to reduce the capital gains tax burden on future disposals of their Peruvian investments or to accurately assess the tax risks involved in such transactions should pay special attention to the interpretative guidance in the ruling at least until additional guidance is issued on the tax treatment of capital gains derived from the alienation of Peruvian stock.

— Gustavo Lopez-Ameri (Lima) 
Partner 
Deloitte Peru 
glopezameri@deloitte.com 

Ana Luz Bandini (New York) 
Senior Manager 
Deloitte Tax LLP 
anbandini@deloitte.com