CorporateLiveWire

CORPORATE TAX 2024

VIRTUAL ROUND TABLE

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Introduction & Contents

In this roundtable, we speak with experts from Colombia, Germany, Mexico and Nigeria to find out more about the latest trends and interesting developments relating to corporate tax in their jurisdiction. Amongst the highlighted topics, we discuss recent landmark cases, tax authority trends, steps taken to encourage greater financial transparency from businesses, and best practice procedures for multinational companies in their efforts to remain tax compliant.

James Drakeford
Editor In Chief

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Meet The Experts

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Founding partner of Reyes Abogados Asociados. She has extensive experience in International Tax Planning, including aspects related to taxes and contributions, exchange, commercial and labor regulations. She has participated in important Mergers and Negotiations and is recognized for her work at the National Tax and Customs Administration of Colombia.

She has lectured on tax planning in the Tax Law Specializations at the Universidad del Rosario and Universidad de los Andes and in the Master's Degree in Tax Law at the Universidad Externado de Colombia. Ms. Reyes is a member of the Colombian Chapter of the International Fiscal Association and of the Colombian Institute of Tax Law, as well as of the tax sections of the International Bar Association and the American Bar Association. In these scenarios he has led several panels on international taxation.

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Kelechi Ugbeva is the Managing Partner of WTS Blackwoodstone, the Nigerian network partner of WTS Global, the leading independent non-audit tax practice worldwide with representation in more than 130 countries. She is an international business lawyer and tax specialist.

Kelechi possesses over 22 years of experience as a legal and tax consultant. As a tax specialist, she has advised clients operating across a wide range of sectors including finance, technology, energy and manufacturing. Kelechi has extensive experience in Transfer Pricing and delivers a highly sought after technique in providing cross-border tax advisory services to multi-national clients.

Kelechi is rated as "highly regarded" by the International Tax Review in the area of General Corporate Tax.

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Dr. Markus Brem is the managing director of the GlobalTransferPricing team (www.GlobalTransferPricing.com), a consulting boutique specializing on transfer pricing and compliance management solutions for large and mid-sized multinationals. The company stands for interdisciplinary GTP knowledge, IT-based documentation applications and quantitative analysis models on arm's length income allocation and compliance work. Markus Brem was visiting scholar at the International Tax Program of the Harvard Law School and at Kobe University. He gave lectures on "The Multinational Firm and Transfer Pricing" at the Indian Institute of Management Ahmedabad, India, and the University of Augsburg.

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With more than 18 years of experience, Roberto Padilla Ordaz is a renowned lawyer and accountant, who focuses his professional practice on tax consulting, specialized in finance, real estate, M&A, and international taxation areas. He offers his clients an integral and successful approach to conduct in every matter he is involved.

He teaches several tax courses at the most prestigious universities in our country such as Instituto Tecnológico Autónomo de México (ITAM) and Universidad Iberoamericana (UIA), in undergraduate and graduate programs of both universities.

Roberto has authored several articles on tax matters published internationally for important international publications.

Q1. Have there been any recent changes or interesting developments in the tax landscape over the last 12 months?

Dr. Markus Brem

Brem: Among various changes in the tax landscape in Germany, some significant developments can be seen on transfer pricing.

Firstly, in 2025, the documentation provisions will become more intense with the obligation to have the documentation package ready at any time. Even more, in some instances, the new legal provision in the framework of Art. 90 Subs. 3 Tax Procedures Act applies backwards, (i.e. for tax audits starting in 2025 which cover previous years).

Secondly, in transfer pricing we have now a new ruling of the Federal Tax Court on both business restructuring and manufacturing services with cost plus models. Though the case dates back to financial years 2011-2013, the decision is seminal for practitioners in the upcoming years. Note that the Ministry of Finance of Germany has fully adopted the OECD Transfer Pricing Guidelines in its latest Administrative Principles (June 2023).

Thirdly, digitalisation is hotly discussed in Germany while pathbreaking decisions triggering governance changes can hardly be recognised. For transfer pricing issues, of course, tax documentation is not delivered by means of hardcopy anymore, but digitally, while legally the tax authorities are still bound to accept such hard copies. It would be worth to test to what extent they still like to carry hardcopy folders. Presumably, reading digital "documentation packages" will be done by AI soon. Drafting such docs is already AI-driven.

Q2. With Bitcoin valuations reaching a record high in March 2024 and cryptocurrencies in general also surging, how are these financial products being factored in by tax authorities?

Kelechi Okparaocha

Okparaocha: In Nigeria, though cryptocurrencies are being treated with immense caution by regulators in the financial services, tax authorities are developing tax forms and regulations to appropriately tax digital assets. Significantly, Nigeria's Capital Gains Tax Act (per an amendment by Section 3 of the Act by the Finance Act 2023) makes provisions to tax digital assets at the rate of 10%.

Roberto Padilla

Padilla: Currently, Mexico does not have a specific taxation regime for crytpo-assets which are not considered as legal currency. Aligned with current tax legislation, Mexico's Tax Ombudsman Office issued a report establishing that transfer of crypto-assets falls within the general regime applicable to the sale of goods.

Non-financial entities engaged in the sale, purchase, storage, custody or transfer or virtual assets must comply with anti-money laundering regulations, which include the obligation of filing notices before the competent authorities.

Monica Reyes Rodriguez

Rodriguez: The Colombian Tax Administration published the compilation and unification of the official tax doctrine on crypto assets. Ruling 100142-467 dated 14 October 2022 addressed the following aspects of the Colombian tax treatment of crypto assets:

- Official definition of crypto assets for tax purposes.
- Accounting treatment under doctrine by the National Accounting Council. ("Consejo Nacional de la Contaduría").

Q2. With Bitcoin valuations reaching a record high in March 2024 and cryptocurrencies in general also surging, how are these financial products being factored in by tax authorities?

Monica Reyes Rodriguez

- Obligation for Colombian Tax Residents to report crypto assets in income and Equity tax returns.
- Exchange Control rules applying on crypto assets that have been traded in foreign currency.
- Realisation and accrual of income arising from the crypto asset trade for individuals who are not obliged to keep accounting books and for companies and individuals required to keep them.
- Treatment of payments in kind.
- Treatment of costs and expenses in kind.
- Taxation of the increase in market value of crypto assets.
- Income tax treatment of earnings for crypto asset mining activities.
- Differentiation between earnings arising from decentralised financing ("DeFi") and earnings from decentralised loans.
- Characterisation of barters of real estate for crypto assets.
- Capital gains tax on transactions of crypto assets.
- Withholding taxes on payments in crypto assets.
- Territoriality of Colombian taxes on transactions abroad on crypto assets by Colombian residents.
- Tax consequences of payments in Colombia for transactions crypto assets abroad.
- Colombian withholding taxes and VAT applying on transactions through foreign exchanges. Documentary support.
- Colombian tax treatment of gift cards or codes in crypto asset platforms.
- Invoicing of crypto-asset sales.
- Characterisation of Non-Fungible Tokens ("NFT") for Colombian tax purposes.

Doctrine by the tax administration is compulsory for the tax authorities. The taxpayers may opt for other interpretations.

Q3. Are there any other regulatory or legislative changes on the horizon that you think will impact the tax landscape in your jurisdiction?

Kelechi Okparaocha

Okparaocha: To encourage investments in the Nigerian Oil and Gas sector, the Oil and Gas Companies (Tax Incentives, Exemption, Remission, etc.,) Order 2024 was promulgated to introduce notable tax credits, incentives, and allowances. Notably, the Order introduced tax credit incentives for non-associated gas greenfield developments. It also makes provisions to grant an investment allowance on gas utilisation on qualifying expenditure on plant and equipment incurred in respect of projects in the midstream oil and gas industry.

Furthermore, the Nigerian Export Processing Zone Authority and the Federal Inland Revenue Service issued a joint guideline for tax compliance by approved enterprises operating in Nigeria Export Processing Zones (EPZ) ("The Guidelines") to provide information and guidance to relevant stakeholders, especially Approved Enterprises operating in the EPZs of their tax obligations in Nigeria. Notably, the Guidelines reiterates that Approved Enterprises are exempt from taxes, levies, and rates for activities carried out in the relevant EPZ. However, where such Approved enterprises provide services to persons who are unapproved enterprise (such as Approved Enterprises whose licences have been invalidated) the Approved enterprise is to include, collect and remit VAT. Also, where an Approved Enterprises makes payment to an unapproved enterprise or to non-resident entities, they are to deduct WHT, where applicable. It also introduces the obligation to file WHT and VAT returns in line with the WHT Regulations and the VAT Act respectively, amongst others. Notably, considering the tax exemptions enjoyed by Approved Enterprises in EPZs, the Guidelines significantly alter the interaction of non-resident entities and other entities with Approved Enterprises.

Q3. Are there any other regulatory or legislative changes on the horizon that you think will impact the tax landscape in your jurisdiction?

Kelechi Okparaocha

It is worth mentioning that in February 2024, the Nigerian Federal Government introduced an Expatriate Employment Handbook (the Handbook) which introduced an Expatriate Employment Levy mandating all Nigerian entities engaging resident Expatriates, to pay a defined annual levy for Expatriates engaged in its services as directors or otherwise. The Handbook imposes a fine for non-compliance or breach of the provisions of the levy within stipulated timeframes. Significantly, the implementation of the Levy was subsequently suspended to allow for further consultation with stakeholders. Despite its suspension, it is recommended that companies are on the lookout for related tax or regulatory provisions.

Q4. Have there been any recent landmark cases or examples of new case law precedent?

Dr. Markus Brem

Brem: In August 2023, the Federal Tax Court ruled on transfer pricing issues with regard to product deliveries and business restructuring (BFH I R 54/19, Aug 9, 2023). The fact pattern provides for an ideal analysis situation: the group exists of only two related-party entities with the "contract" manufacturer in a country with small labour costs, delivering products to the sales unit which is the headquarters in a high-cost country.

Interestingly, the case allows to assess the arm's length character of transfer pricing, not only from the perspective of the contract manufacturer ("provider") but also from the headquarters unit ("recipient"). The tax dispute arose from the perspective of the German tax authority claiming that the markup on manufacturing costs abroad was too high and, hence, not at arm's length. Our arm's length assessment of transfer pricing as well as the cost and profit allocation between the related parties brought forward that, though the profitability (operating margin) of the Provider is high, the beneficiary of that business model with manufacturing function abroad is the headquarters unit. Its margins like the profit level indicator EBIT% or the operating margin of the respective profit centre with inbound purchases from the related-party unit abroad resulted higher ratios, compared to a fictious situation of local making.

Other features of this case are also interesting for transfer pricing practitioners such as the decisions on business restructuring including the transfer of only one-single customer, or the ruling on the hierarchy of legal norms for income adjustments in the course of the tax audit (i.e. the relationship between the mechanism of constructed dividends vs. adjustments on the basis of Art. 1 Foreign Tax Act).

Kelechi Okparaocha

Okparaocha: In the case of *JB Daudu SAN v. Hon. Minister for Finance, Budget, and National Planning & Anor.*, the constitutionality or otherwise of the provisions of the Rules and Practice Directions which prescribe the payment of half or 100% of disputed assessments prior to the hearing of an appeal was laid to rest. The Court ruled that the provision was unconstitutional, null, and void on the basis, amongst others, that it impaired the constitutionally guaranteed rights to fair hearing and appeal. Prior to this decision, various legislative provisions were cumulatively to the effect that an Applicant challenging a tax assessment was mandated to deposit half or 100% of the assessed amount into an interest yielding federal account pending the hearing and resolution of the appeal.

Also, in *Checkpoint Software Technologies BV Nigeria Limited (Checkpoint) v. Federal Inland Revenue Service*, the Tax Appeal Tribunal declared the Income Tax (Country by Country Reporting) Regulations 2018 as illegal, null, and void.

Q5. Are you noticing any trends in the tax authorities' current approach?

Dr. Markus Brem

Brem: We have been observing the following trends in tax audits where transfer pricing is at stake:

- The arm's length test deploying the "Resale Minus Margin Method" is not in place anymore, although many experts claim that this test model shall be considered as "standard method". Rather, each tax audit starts with the notion that the operating profitability of entities abroad (EBIT% ratios) could serve as arm's length proxy. Notably, only in specific instances the EBIT% margin might serve as sufficient proxy for the arm's length test, in most analysis cases however yet not. Also, gross profits and gross margins do not tell much about the arm's length character of transfer prices and income allocation for income tax purposes.

- Tax practitioners do not sufficiently reflect the difference between transfer pricing and the arm's length test. Built on the Law of Obligations, the former refers to setting and invoicing the transfer price, like pricing the exchange of any good, asset, right, service, or guarantee. Transfer pricing might, or not, be established with features like budgeting, risk assumptions, year-end-adjustments, and residual allocation. The latter represents the arm's length test and, by default, is construed along the transfer pricing methods as proposed by the OECD Transfer Pricing Guidelines. It is worth highlighting that such Guidelines are, first and foremost, guidelines for tax authorities and the tax agencies involved in competent authority procedures. Of course, the taxpayer is advised to apply such test models for the arm's length assessment and the documentation process.

- Last, but not least, we see that tax authorities are keen on attempting to avoid such competent authority procedures (mutual agreement procedures) as they appear costly. Such procedures do bind governmental resources and, in practice, are likely to end in a "negotiation result" with only a portion of the stake to be adjusted. Hence, we have seen quite many tax audit cases where the controversy was resolved within the tax audit procedure under the compromise to renounce on appeal (i.e. outside any mutual agreement procedures).

Kelechi Okparaocha

Okparaocha: Primarily, in recent times, while the Nigerian tax authorities claim to have adopted a customer centric approach, it is clear that the authorities are keen on significantly raising tax revenues for the government while encouraging investment. Notably, this is supported by the recent publication of the policies referenced (in response to question 3) above, as well as the aggressive commencement of tax audits and investigations.

Q6. Given the lack of standardisation amongst tax authorities and the fast-changing nature of the tax landscape, what advice would you give to multinational companies to ensure that they always remain fully tax compliant?

Dr. Markus Brem

Brem: In today's world of compliance burden, it would be a very costly endeavour to "always remain fully tax compliant". Indeed, such objective would request a huge package of additional resources deployed by the multinational firm, like additional manpower, additional software and data, internal processes defined, and reporting mechanisms not yet installed. Please, think about the thousands of mid-sized multinational groups. For example, transforming internal processes to fully comply with the Anti-Tax Avoidance Directive is a big job for a large number of multinationals – and for some it appears even too burdensome.

Don't get me wrong, I do not mean that the taxpayer should intentionally neglect tax provisions or even shift taxable profits and/or reduce its tax base artificially abroad. What I insist on reflecting is the trade off in there, as in other economic decision-making. Going for zero risk requires investing in heavy defence systems against hazards of scrutiny, audits, and income allocation. Are companies and taxpayers in possession of such resources? My answer is "No". Hence, I recommend the following:

(a) standardise the multinational's internal processes and data across related parties, countries, fact pattern, etc.;
(b) address the riskiest tax compliance issues such as subject-to-tax rules, VAT & customs, transfer pricing & income allocation, obligatory reporting such as DAC6 hallmarks, CbC-Reporting, Pillar-II, and the like;
(c) prepare with reporting features for compliance areas where the likelihood of being audited is high, say above 25%.

We should also note that some market participants pursue their own business model with self-interest when they postulate even more compliance and anything like "becoming fully compliant".

Kelechi Okparaocha

Okparaocha: To ensure consistent tax compliance, the following are recommended:

- Engaging the services of a competent local tax consultant who is going to be responsible for providing regular updates on tax changes within jurisdictions.
- Conducting of regular periodic tax risk assessments or tax health checks.
- Maintaining accurate and clear documentation and records of financial transactions, internal processes, transfer pricing documents, agreements, and correspondence with tax authorities.

Q7. What have tax authorities in your region done to encourage greater financial transparency from businesses?

Kelechi Okparaocha

Okparaocha: Nigerian tax authorities encourage financial transparency by doing the following:

- Implementation of Tax Identification Number (TIN) as a unique identifier for taxpayers. It can be used to track taxpayers, promote transparency, and tax compliance.
- Introduction of the digital tax administration solution – TaxPro Max – as part of its efforts at modernising tax administration in Nigeria for ease of tax compliance and increased transparency. The platform basically automates tax processes as tax registration, filling and remittances can be done via the platform.
- Increased tax reviews, audits, and investigations by tax authorities.
- Enhanced Exchange of Information pursuant to various international agreements which facilitate the sharing of financial information between tax authorities to combat tax evasion and money laundering. Thereby improving financial transparency.

Q7. What have tax authorities in your region done to encourage greater financial transparency from businesses?

Roberto Padilla

Padilla: As part of Mexico's regulatory framework in compliance with the Financial Action Task Force, entities are obliged to comply with anti-money laundering regulations which have existed for the past decade. Individuals and entities are obliged to comply with a series of obligations in case they conduct any of the so-called "vulnerable activities".

According to FATF's report on Mexico[1], it is compliant on 10 of the 40 recommendations and largely compliant on 22 of them. It remains partially compliant on seven recommendations, and non-compliant on one recommendation. The report concluded that Mexico has a good system to tackle money laundering and terrorist financing, but that it should step up efforts in pursuing launderers and confiscating their assets to mitigate the significant risks.

Monica Reyes Rodriguez

Rodriguez: Under Law 2277 of 2022, the Colombian Government tried to increase the penalisation of tax evasion but the final dispositions that were enacted include contradictory provisions that allow liable taxpayers to mitigate the consequences.

Even though the new law lowered existing thresholds on the omission of assets or the inclusion of inexistent liabilities for equity tax purposes, and on the value of the tax savings from the omission of earnings, or from undue application of tax deductions, credits, tax withholdings or advance payments, the following provisions make the penalisation of evasion less feasible:

- Proof that the taxpayer's intention was fraudulent must be provided by the tax administration before reporting the taxpayer to the judges. An objective sanction was in place before.
- The tax authorities are not entitled to report taxpayers to the judges until all appeals before the administrative authorities have been decided.
- Tax officers must rely on the decision of a committee headed by the tax director or his delegate to initiate the proceedings before the judicial branch. This type of committee has proved to be pachydermic.
- Any criminal accusation will be extinguished in two opportunities when the taxpayer agrees to pay all assessed taxes, penalties, and interest.

Notwithstanding the above, Law 2277 of 2022 did not amend prior regulations that allow criminal judges to decide whether the taxpayer should be subject to higher penalties applying to other types of crimes. This possibility violates basic principles regarding legal certainty:

- The principle on preferential application of the most favourable disposition.
- The characterisation of autonomous criminal types ("Delictum Su Generis")
- The Absorption Principle ("Principio de Consunción") whereby the most ample type of conduct absorbs the most simple.

1. *https://www.fatf-gafi.org/content/dam/fatf/documents/reports/fur/Follow-Up-Report-Mexico-2022.pdf.coredownload.pdf*

"As part of Mexico's regulatory framework in compliance with the Financial Action Task Force, entities are obliged to comply with anti-money laundering regulations which have existed for the past decade. Individuals and entities are obliged to comply with a series of obligations in case they conduct any of the so-called "vulnerable activities"."

*- **Roberto Padilla** -*

Q8. What tax incentives and exemptions exist in your jurisdiction and how can companies benefit from these?

Kelechi Okparaocha

Okparaocha: Some of the incentives available under Nigerian tax laws include the following:

- Companies that incur capital expenditure on the provisions of facilities, for the purpose of a trade or business which is located at least 20km away from such facilities provided by the government
- A 20% tax credit for expenses incurred on research and development in addition to capital allowance (up to 95% in the first year) instead of depreciation.
- Pursuant to the Nigerian Start-Up Act 2022, licensed start-ups may enjoy 100% expenditure on research and development cost and a 30% investment tax credit for an investor in a licensed start-up.
- Gains arising from the disposal of the shares of a licensed start-up are exempt from capital gains tax provided that the shares have been held for a minimum of 24 months.
- Interest on long-term foreign loans with repayment periods above seven years (with a two-year grace period), between five and seven years (with a grace period of not less than 18 months), and between two and four years (with a grace period of not less than 12 months) enjoy 70%, 40%, and 10% tax exemption, respectively.
- Companies liable to hydrocarbon tax can offset the costs of producing associated gas upstream of the measurement point from their crude oil production profits.
- Companies in a pioneer industry may apply for pioneer status and would be entitled to:
- a three-year tax holiday, which may be extended for two further terms of one year each or one further term of two years.
- relief from withholding tax on dividends paid to its shareholders during the tax holiday; and
- the postponement of the deduction of capital allowance until the end of the tax holiday.
- Approved enterprises operating within a free trade zone are exempt from all federal, state, and local government taxes, levies, and rates.
- Real estate and investment companies are entitled to exemption of withholding tax from rental income received by the company.

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