The Private Wealth & Private Client Review

Fourth Edition

Editor
John Riches

Law Business Research

The Private Wealth & Private Client Review

The Private Wealth and Private Client Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in
The Private Wealth and Private Client Review - Edition 4
(published in September 2015 – editor John Riches)

For further information please email
Nick.Barette@lbresearch.com

The Private Wealth & Private Client Review

Fourth Edition

Editor
John Riches

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

PUBLISHING MANAGER
Lucy Brewer

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL COORDINATOR
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Anne Borthwick

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2015 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2015, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-67-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

ALARCÓN ESPINOSA ABOGADOS

ALRUD LAW FIRM

ANDREAS NEOCLEOUS & CO LLC

BLUELYN

CHETCUTI CAUCHI ADVOCATES

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

CHRISTIE'S

CONE MARSHALL LIMITED

CONYERS DILL & PEARMAN

HASSANS INTERNATIONAL LAW FIRM

HEGER & PARTNER RECHTSANWÄLTE

HR LEVIN ATTORNEYS, NOTARIES AND CONVEYANCERS

KHATTARWONG LLP, A MEMBER OF WITHERS KHATTARWONG

KULELI ATTORNEYS AT LAW

LENZ & STAEHELIN

MAISTO E ASSOCIATI

MARXER & PARTNER RECHTSANWÄLTE

MCDERMOTT WILL & EMERY LLP

MCEWAN, ROBERTS, DOMINGUEZ, CARASSAI

MCKINNEY BANCROFT & HUGHES

MORI HAMADA & MATSUMOTO

NERINE TRUST COMPANY LIMITED

NISHITH DESAI ASSOCIATES

O'SULLIVAN ESTATE LAWYERS PROFESSIONAL CORPORATION

P+P PÖLLATH + PARTNERS

POTAMITISVEKRIS

RAYYIN & PARTNERS PRC LAWYERS

RETTER ATTORNEYS

RIVUS

RMW LAW LLP

RUSSELL-COOKE LLP

SAYENKO KHARENKO

STEP

STEPHENSON HARWOOD

SULLIVAN & CROMWELL LLP

UGGC AVOCATS

ULHÔA CANTO, REZENDE E GUERRA ADVOGADOS

WALKERS

WILLIAM FRY

WITHERS LLP

CONTENTS

Editor's Preface ...vii
John Riches

Chapter 1 EU DEVELOPMENTS ...1
Richard Frimston

Chapter 2 THE FOREIGN ACCOUNT TAX COMPLIANCE ACT ...9
Henry Christensen III and Toni Ann Kruse

Chapter 3 NOTES ON THE TAXATION OF WORKS OF ART IN THE UNITED KINGDOM...26
Ruth Cornett

Chapter 4 OECD DEVELOPMENTS ...33
George Hodgson

Chapter 5 ARGENTINA ...41
Juan McEwan and Agustín Lacoste

Chapter 6 AUSTRIA...50
Martin Ulrich Fischer

Chapter 7 BAHAMAS ...62
John F Wilson

Chapter 8 BELGIUM ...72
Anton van Zantbeek and Ann Maelfait

Chapter 9 BERMUDA...86
Alec R Anderson

Chapter 10 BRIZAL..........98

Chapter 22 INDIA ... 233
Joachim Saldanha and Megha Ramani

Chapter 23 IRELAND ... 249
Nora Lillis and Tina Curran

Chapter 24 ITALY ... 263
Nicola Saccardo

Chapter 25 JAPAN ... 273
Atsushi Oishi and Makoto Sakai

Chapter 26 LIECHTENSTEIN ... 284
Markus Summer and Hasan Inetas

Chapter 27 LUXEMBOURG ... 300
Simone Retter

Chapter 28 MALTA ... 315
Jean-Philippe Chetcuti and Priscilla Mifsud Parker

Chapter 29 MEXICO ... 329
Alfredo Sánchez Torrado and Roberto Padilla Ordaz

Chapter 30 NETHERLANDS ... 339
Dirk-Jan Maasland, Frank Deurvorst and Jules de Beer

Chapter 31 NEW ZEALAND ... 351
Geoffrey Cone

Chapter 32 RUSSIA ... 364
Maxim Alekseyev, Kira Egorova, Elena Novikova and Ekaterina Vasina

Chapter 33 SINGAPORE ... 375
Chua Yee Hoong

Chapter 34 SOUTH AFRICA 386
Hymie Reuvin Levin and Gwynneth Louise Rowe

Chapter 35 SPAIN 398
Pablo Alarcón

Chapter 36 SWITZERLAND 407
Mark Barmes, Arnaud Martin and Floran Ponce

Chapter 37 TURKEY 421
Turgay Kuleli

Chapter 38 UKRAINE 432
Alina Plyushch and Dmytro Riabikin

Chapter 39 UNITED ARAB EMIRATES 444
Amjad Ali Khan, Stuart Walker and Abdus Samad

Chapter 40 UNITED KINGDOM 451
Christopher Groves

Chapter 41 UNITED STATES 463
Basil Zirinis, Katherine DeMamiel, Elizabeth Kubanik and Susan Song

Appendix 1 ABOUT THE AUTHORS 481

Appendix 2 CONTRIBUTING LAW FIRMS’ CONTACT DETAILS 503

EDITOR'S PREFACE

There is no doubt that the twin recurring themes for 2015 at a global level in private wealth planning are those of transparency and regulation. The zeal of policy makers in imposing ever more complex and potentially confusing sets of rules on disclosure of beneficial ownership information seems unabated.

i Common reporting standard (CRS)

The centrepiece of cross-border automatic information exchange is CRS. This FATCA equivalent for the rest of the developed world is set to come into effect from 1 January 2016. At the last count just over 90 countries had committed to CRS. Its principal effects will be felt in two waves – among the so-called early adopters group the rules will take effect from 1 January 2016 and first information exchanges will apply in September 2017. For the second wave, there will be a year's delay.

What is interesting about CRS is that the OECD has taken a central role in producing coordinated guidance on its interpretation. The draft guidance initially published in July 2014 was somewhat sketchy in nature and we can expect, as we move towards the beginning of next year, revised and more detailed guidance on a number of key issues.

Deep concerns exist about the extent to which information exchange between tax authorities under CRS will remain secure in the hands of the 'home' countries of beneficial owners. While the 'normal' way of signing up to CRS is via the multilateral convention that provides for exchange with other signatory nations, there are indications that some jurisdictions (at this stage the Bahamas, Hong Kong and possibly Switzerland) may seek to adopt a more 'bilateral' approach implementing CRS. If this approach becomes more widespread, then the practical implementation of CRS could be significantly delayed by jurisdictions who negotiate treaties on a one-by-one basis with 90 other countries.

While CRS is often compared to FATCA, there are some material differences that emerge from closer scrutiny. Whatever the shortcomings of FATCA, the ability to issue a global intermediary identification number and to sponsor entities on a cross-

border basis somewhat lessens the bureaucratic excesses of its impact. What is distinctly unclear about CRS at this point is whether equivalent mechanics will emerge. As CRS is currently written as a series of bilateral treaties between jurisdictions with no domestic law 'anchor' (as is the case with FATCA) concerns are being expressed about the potential duplication for complex cross-border structures of reporting. In this context, the July 2014 introduction to CRS notes that the rules as to where a financial institution (FI) will be deemed resident differs between jurisdictions – in some cases this will be based on the place of incorporation whilst in others it may be based on the place of effective management.

There are concerns as to how non-financial entities (NFEs) will be dealt with under CRS. There is anecdotal evidence emerging already in the context of FATCA that financial institutions, driven by concerns about fines from regulators for NFEs and the related ownership structure are subjecting bank account applications for NFEs to additional enquiries that generate very significant costs and delay.

It is noteworthy that there has been a significant crossover from the anti-money laundering (AML) or terrorist financing regime coordinated by the Financial Action Task Force (FATF). This is expressly provided in the CRS model treaty that imports into CRS the FATF concept of beneficial ownership. In the CRS world, this is known as 'controlling persons'. By expressly linking the definition of controlling persons to that of beneficial ownership employed for FATF purposes, there is the prospect of the beneficial ownership definition evolving over time in accordance with principles adopted in that domain. It is noteworthy that, as well as looking to ultimate legal and beneficial ownership of an entity, these definitions also look to the capacity to exert influence and control in the absence of any formal legal entitlement. Thus the expanded definition is as follows.

Beneficial owner refers to the natural person who ultimately owns or controls a customer or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.[1]

It is completely appreciated that, in a law enforcement context, criminals and terrorists do not typically advertise their involvement in ownership structures where they are liable to be detected by the appropriate agencies. Transporting this definition wholesale, however, into the world of tax information exchange where domestic tax authorities may draw unfair and adverse implications from an attribution of being a 'controlling person' is more questionable. It is not a complete response to this concern to say, in the final analysis, if someone has no ability to enjoy the benefit of assets held within a particular structure that they can demonstrate this – the potential costs and bureaucracy of an unwarranted tax audit that may arise from such a misunderstanding will be more difficult to quantify.

Another area of concern is the capacity for banks who have, in the past, misclassified or misunderstood information about ownership structures. If this information is simply

1 http://www.fatf-gafi.org/pages/glossary/a-c/ – The Recommendations were adopted by FATF on 16 February 2012. (emphasis added).

'copied over' from AML records for CRS purposes then there is scope for false and misleading information to be exchanged in circumstances where the 'beneficial owners' may be completely unaware of such mistakes or misclassifications.

What follows from this is an increased importance for professional advisers to actively engage with clients to discuss the implications of these changes. Taken together, the combined impact of these changes is likely to be seen in years to come as a 'paradigm shift' in international wealth structuring. It is therefore critically important that the advisory community equips itself fully to be able to assist in a pro-active manner.

ii Public registers of beneficial ownership

On 20 May 2015, the EU published the final version of its fourth anti-money laundering directive (4AMLD). This commits the EU Member States to providing a public register of beneficial ownership within the next two years. What is noteworthy about the terms of the regulation is the fundamental distinction that has been drawn between ownership information about 'legal persons' (including companies and foundations) on the one hand, and 'legal arrangements' (including trusts) on the other. There is an obligation for information on legal persons to be placed in the public domain while information relating to trusts and equivalent arrangements will be restricted so that it is only made available to competent authorities.

The acceptance in the drafting of these regulations that there is a legitimate distinction to be drawn between commercial entities that interact with third parties, primarily in the context of business arrangements, and private asset ownership structures that are primarily designed to hold wealth for families is an encouraging one.

It should not, however, be assumed that the emphasis on privacy that underpinned this particular distinction will necessarily be a permanent one. There is a very strong constituency within the EU that still argues that a public register of trusts should be introduced at some stage in the future.

Turning to the UK, 2016 will see the introduction of a public register of beneficial ownership for companies in the UK. This legislation, to a large extent, anticipates the impact of 4AMLD although it is not completely symmetrical. The centrepiece of UK domestic legislation is the public identification of persons with influence over UK companies, known as 'persons exercising significant control' (PSCs). There are significant penalties for non-compliance. In particular, in circumstances where a PSC does not respond to the request for information from a company, not only can that refusal generate potentially criminal sanctions, it can also result in any economic benefits deriving from the shares as well as the ability to vote being suspended.

While it is appreciated that there are reasons why sanctions need to be applied to encourage people to comply, the harsh economic penalties may be seen as totally disproportionate to non-compliance. It is interesting to note that the PSC concept analogous to that of the 'controlling persons' in the context of CRS. As with CRS, the most complex area here is the extent to which those being seen to exert 'influence' without formal legal entitlement may be classified as PSCs.

One further interesting issue that needs to be considered as matters move forward is whether the impact of the EU public register for corporate entities will result in a 'back door' trust register in many cases. One of the categories for disclosure of PSCs in

the UK register is 'ownership or influence via a trust'. In circumstances therefore where a trust holds a material interest in a company, this can result in not only the trustees and protectors of the trust, but also family members with important powers (such as hire and fire powers) being classified as PSCs and having their information placed on a public register. While this register will not give direct information about beneficiaries as such, in many cases it will provide a significant degree of transparency about family involvement. It seems likely that, over time, the EU will also look to 'export' a requirement for beneficial ownership information on public registered companies to be incorporated in many of the international finance centres. While IFCs have indicated that they are sceptical about the adoption of such registers in circumstances where there is not a common standard applied to all jurisdictions, it remains to be seen how long this stance can be maintained once 4AMLD is in full force.

iii Position of the United States

The United States stands out as having secured a position for itself in the context of cross-border disclosure that many feel is hypocritical. Specifically there is a carve out from CRS on the basis that the US has implemented FATCA. The constitutional position in the US where measures of this nature would tend to be introduced at a state rather than federal level also complicates the picture. In the absence of any comprehensive regime to regulate trustee and corporate service providers, the US appears to have achieved a competitive advantage in administering 'offshore' structures because it has exempted itself, in practical terms, from reciprocation on automatic information exchange. This is already leading to many considering the US as an alternative base from which to administer family structures in a more 'private' setting than is possible in IFCs once CRS take effect.

iv Global legal entity identifier system (GLEIs)[2]

A development flowing from the 2008 financial crisis is the introduction of GLEIs. In December 2014 a regulatory oversight committee relating to GLEIs introduced a task force to develop a proposal for collecting GLEIs information on the direct and ultimate parents of legal entities. The policy is to ensure financial intermediaries can track who they are dealing with as counterparties in investment transactions. The underlying policy that drives the creation of the GLEIs is to create transparency in financial markets. In the current phase 1 of the project, the information required to be collected is limited to 'business card information' about the entities concerned and will therefore be limited to a name, address and contact number. However, the 'level 2' data that is likely to be required will extend the reference data to relationships between entities. This could result in beneficial ownership information being required in due course. This proposal is likely to see some development in the course of the next six months but is yet another illustration of overlapping regimes for collecting beneficial ownership information that are likely to have a substantial effect on the operation of family wealth holding structures in the years ahead.

---

2 http://www.leiroc.org/.

v Conclusion

The challenges of keeping abreast of changes in the regulatory and transparency arena are significant. These issues look set to be a significant driver in wealth strategy in the next three to five years. Navigating these issues will increasingly become a required skill set for professional advisers.

John Riches
RMW Law LLP
London
September 2015

Chapter 29

MEXICO

Alfredo Sánchez Torrado and Roberto Padilla Ordaz[1]

I INTRODUCTION

As part of major reforms introduced by the executive branch of Mexico's federal government, important national sectors which in the past seemed 'unchangeable' are facing an ongoing shifting process derived from such reforms.

Mexico, member of the OECD since 1994, and one of the world's most important emerging market economies, plays an important role and has become an attractive destination for international investments within the Latin American region, which has led to the existence of an important number of wealthy individuals within an environment of unequal distribution of wealth.

Since the second half of the 1990 decade, Mexico has taken a more active approach to becoming an attractive investment spot by broadening its double taxation treaty network.

Taxation in Mexico is founded on a series of laws and regulations that are in constant flux. The major tax reform of 2014, which derived in the enactment of a new Income Tax Law, had an important impact on individuals, by incorporating new tax brackets up to a 35 per cent tax rate from the previous limit of 30 per cent and imposing taxation to gains obtained from the sale of publicly traded shares (until 2013 these were generally tax-exempt) and dividends received from both national and international companies at a rate of 10 per cent.

Inequality of income has been a historical problem for Mexican society. The authorities have constantly focused on developing policies for establishing additional taxes to the already captive taxpayers while the informal economy keeps growing as a response to the lack of formal employment that could provide the means of support for

1 Alfredo Sánchez Torrado is a partner and Roberto Padilla Ordaz is an associate at Chevez Ruiz Zamarripa y Cia, SC.

a significant number of Mexican households. Such inequality derives from the existence of a very big number of high net worth individuals in Mexico who hold investments abroad.

A major concern of wealthy individuals, not only in Mexico but worldwide, is the current trend of tax administrations to execute information-exchange agreements intended to provide additional elements for exercising audit faculties with respect to capital placed in investment structures abroad. Mexican tax authorities along with foreign tax administrations are playing an active role in response to the US Foreign Account Tax Compliance Act regulations, the Organisation for Economic Co-Operation and Development (OECD) BEPS (Base Erosion and Profit Shifting) action plan and the Common Reporting Standard of the OECD.

An outcome of the 2014 tax reform was the elimination of the option for income tax payment on a no-name basis. This payment alternative was applicable to Mexican resident individuals for income obtained from investments held overseas and represented a secure method of tax compliance under a confidentiality scheme.

Tax authorities are likewise focusing on gathering information with respect to inbound transactions conducted by taxpayers. Recently enacted provisions oblige individuals and corporations to constantly inform of specific transactions targeted as part of aggressive tax planning or with the intention of detecting money laundering.

Owing to the regulations that have recently been enacted, additional administrative resources must be invested by taxpayers so as not to fall into default with any of the obligations established therein.

Overall, taxation in Mexico for private wealth is constantly changing, and tax authorities are playing an active role not only on verifying whether individuals' tax obligations are duly being complied with, but also in promoting actions to reach agreement on a broad exchange of information and obliging taxpayers to keep providing information on their transactions.

II TAX

Domestic legislation establishes that Mexican resident individuals are subject to income tax with respect to their worldwide income.

An individual is deemed resident in Mexico if his or her dwelling is located within the country. If such individual holds property in Mexico and another country, the Mexican residence would be afforded if his or her main centre of interest (the place where more than 50 per cent of its overall income is obtained) is located in Mexico.[2]

Mexican resident individuals are subject to a progressive tax rate on their annual income. The 2014 tax reform increased the maximum tax rate from 30 per cent to 35 per cent.

Depending on the type of activities conducted by individuals, miscellaneous formal obligations may have to be complied with.[3]

2 2015 Federal Fiscal Code.

3 2015 Mexican Income Tax Law.

Individuals are obliged to file an annual tax return on 30 April following year-end; however, depending on the type of income received, advance income tax returns may have to be filed before the Mexican tax authorities during the ongoing tax year. Mexican tax legislation provides that the tax year runs from 1 January through 31 December.

Several items of income are fully or partially income tax-exempt. Until 2013, individuals were fully exempt on gains derived from the sale of dwellings, to the extent that in the five previous tax years no other sale of dwellings was carried out. Since 2014 such sales are partially exempt for an amount of approximately US$230,000 (considering 2015 figures).

A major impact on individuals resulting from the most recent tax reform is a limit on the amount of personal deductions that could offset taxable income, such as medical expenses, additional contributions to private pension funds and interest on mortgages for acquisition of dwellings. The annual limit of personal deductions corresponds to the lower of approximately US$6,000 (considering 2015 figures) or 10 per cent of the individual's annual taxable income.

Most tax-exempt items of income must be reported to the Mexican tax authorities in order to maintain such status otherwise they are deemed taxable income.

i Taxation on real estate

Individuals are subject to income tax on gains derived from the sale of immoveable property. The tax basis of immoveable property is subject to restatement by Mexican inflation and subject to depreciation rules (except for land).

The Income Tax Law provides a tax computation procedure for individuals that results in having two types of gains, determined based on the number of years of their investment holding period. The first basket is taxed as part of the taxpayers' ordinary income, while the second basket is taxed at their previous five-year effective tax rate following the procedure established for such purposes.

Gains obtained from immoveable property deemed as ordinary income are subject to the annual progressive rate (maximum rate of 35 per cent), and in the case of sale transactions they are conducted before a notary public, who is then responsible for computing and remitting the corresponding tax to the authorities.

Local taxes apply to the acquiring party of immoveable property. State and municipal legislation may vary, however; property taxes normally range between 2 per cent to 5 per cent, which is habitually applicable to the greater out of cadastral value, according to each state's records, appraisal value or transaction value.

ii Taxation of gains of publicly traded securities

The tax exemption regime for gains obtained by individuals and non-residents derived from the sale of shares through the stock exchange was repealed by the 2014 tax reform.

As of 2014, individuals and non-residents in certain cases are obliged to pay income tax at a 10 per cent rate over gains derived from the sale of securities through authorised stock exchanges or recognised derivative markets.

Specifically, this new regime is applicable to shares issued by Mexican companies, or where the value stems more than 50 per cent from Mexican real estate, and securities that represent them such as American depository receipts; foreign shares that are listed

on the Mexican stock exchange through its international quotation system; securities that represent indexes such as ETFs or TRACs, which are sold on the Mexican Stock Exchange and equity financial derivative transactions referred to shares listed on the Mexican Stock Exchange or referred to indexes on such shares that are realised in the Mexican market.

Mexican financial intermediaries must conduct the computation of gains or losses derived from sale transactions. Mexican resident individuals are entitled to offset losses against gains from the sale of securities.

Losses obtained from the sale of shares can only be offset against gains obtained from the sale of shares. A 10-year period is established for carrying forward losses obtained by taxpayers.

At year-end, Mexican financial intermediaries are obliged to provide Mexican resident individuals the information of the annual computation of gains or losses obtained during each calendar year. If a final gain is obtained, Mexican-resident individuals are obliged to remit to the tax authorities the 10 per cent income tax jointly with their annual tax return. The annual tax return for individuals is due to be filed on 30 April of the following year.

Non-residents can apply tax treaty benefits based on their tax residence. Mexico has an extensive network of tax treaties and exchange of information agreements.

There are some exceptions to which the 10 per cent rate does not apply, such as publicly traded securities that were acquired or sold in private transactions (the 10 per cent tax regime is applicable in cases where shares sold do not represent more than 1 per cent of the issuer's overall stock) and sales conducted by a person or group that within a 24-month period sells more than 10 per cent of an issuer's stock or its control, as defined in the Stock Market Law.

iii Taxation on dividends

Until 2013, Mexican legislation established an integrated profit distribution system in which profits were taxed at the level of the distributing entity, and no additional taxation was imposed on the recipients of such dividends.

As a result of the 2014 government's tax reform, individuals and non-residents are subject to an additional 10 per cent income tax on dividends received from profits generated in 2014 and the following years. Such income tax must be withheld by the distributing entity and remitted to the tax authorities.

Mexican resident entities are required to maintain separate records of profits generated until 2013 and of profits generated starting 2014 for the purposes of determining whether the additional 10 per cent income tax withholding is applicable or not in case any distribution to individuals or non-residents is conducted.

Additionally, Mexican resident individuals are subject to the additional 10 per cent tax on dividends received from non-resident entities, which must be paid in the month following such in which they receive profits.

In certain cases, tax treaties can reduce or eliminate the 10 per cent rate on dividends paid by Mexican resident corporations.

iv Preferential tax regime rules

Mexican residents holding investments in foreign vehicles are obliged to determine whether income arising from such investment is subject to a preferential tax regime.

Under Mexican legislation, and from a general approach, income is subject to a preferential tax regime when it is not subject to taxation abroad or is subject to income tax lower than 75 per cent of the income tax that would have been triggered and paid in Mexico, even when such situation derives from the application of special regulations, tax refunds, tax credit or any other procedure.

Income obtained from entities or foreign transparent legal vehicles is deemed as subject to a preferential tax regime, except when such vehicle conducts entrepreneurial activities and its passive income represents 20 per cent or more of its overall income.

An exception for not considering that income is subject to a preferential tax regime is established by the Mexican Income Tax Law for such cases where a Mexican resident does not exert control (directly or through a third party) in the management of foreign entities or legal vehicles to such a degree that could decide the moment of profit distribution. The Mexican Income Tax Law assumes that the Mexican resident exerts control; thus, proof to the contrary must be obtained in such applicable cases.

Income subject to a preferential tax regime is taxed at the level of the Mexican resident investor at the moment in which such income is generated, regardless of whether it has been distributed to such investor.

Mexican resident individuals and entities are obliged to comply with filing an informative return in case they obtain income subject to a preferential tax regime, conduct transactions through foreign transparent legal vehicles or obtain income arising from any territory established on the black list of the Mexican Income Tax Law transitory provisions.

Failure to comply with such informative return or providing incomplete information is a criminal offence. Administrative rules[4] provide relief on specific cases for not filing the informative return, specifically if income is derived from a country that has entered into a broad exchange of information agreement with Mexico.

v Gifts

Gifts in Mexico are tax-exempt in the following cases:

a gifts between spouses or those received by descendants from their lineal ascendants;

b gifts received by ascendants from their lineal descendants, to the extent goods received are not sold or given to other lineal descendant in any degree; or

c other gifts that do not exceed an approximate amount of US$4,700 (considering 2015 figures). For the excess amount thereof, income tax must be paid.

A donee must consider the tax basis of goods received in relation to the donors immediately before they granted such goods as a gift. The acquisition date of goods received must also correspond to the acquisition date of donors.

4 2015 Miscellaneous Tax Resolution.

However, in cases where income tax is paid on a gift transaction, the acquisition cost would correspond to the appraisal value considered for computing such tax and the acquisition date such in which the tax is paid.

The donee has to declare the amount of gifts received in his or her annual tax return in order not to lose the exemption.

III SUCCESSION

Successions do not give rise to a taxable event provided the recipient of the deceased's estate reports this situation in his or her annual tax return. If such report is not made, the transferred estate is taxable.

Non-residents are not exempt from tax on real estate and shares that have a source of wealth located in Mexico. Transfer of such assets would be subject to taxation according to the corresponding provisions.

Contrary to what occurs in other jurisdictions, Mexican legislation does not include an estate tax. Notwithstanding this, certain property taxes may be triggered depending on the local legislation of each state and municipality.

No forced heirship regime exists in Mexico; however, upon intestacy, succession rules would be applicable in any of the following cases:[5]

a the deceased left no will, or is void;
b the will does not provide for the entirety of the estate;
c conditions established to heirs are not complied with; or
d beneficiaries renounce the will.

If the succession rules are required, descendants, spouses and ascendants, among other, are considered as heirs in different amounts and according to specific rules. In case of any dispute, the civil courts will decide according to the civil legislation applicable.

It is not essential to have a will executed under Mexican law. In general terms Mexican legislation recognises any will executed and formalised in a foreign jurisdiction, to the extent it is valid in such jurisdiction and is not against Mexican law.

Mexican and foreign residents can make wills in Mexico. Even though there are several types of wills in Mexico, the most common is the 'public open will', which is executed before a Mexican notary public in the presence of a witness and is formalised in a public deed.

Under Mexican legislation, the beneficiaries of a will are entitled to decline or transfer their rights under such will in favour of other persons.

The Federal Civil Code provides specific situations in which wills may be contested for specific cases in which they are deemed void pursuant to the corresponding provisions.

An executor manages the deceased's estate and handles the disposal of the assets of the estate. Such executor could be appointed in the will or could be elected by the beneficiaries.

5 Federal Civil Code.

In general terms, the executor of the estate should make an inventory of all the assets of the estate and manage such assets until their distribution to the beneficiaries.

In addition, the executor is obliged to file the annual estimated tax returns of the estate. Alternatively the beneficiaries could opt to recognise the taxable income corresponding to their share of the estate.

IV WEALTH STRUCTURING AND REGULATION

Tax wealth structuring in Mexico has been focused primarily on estate planning and preserving confidentiality.

A very common vehicle used in wealth structuring is the Mexican trust or *fideicomiso*, which is a commercial contract governed by the Mexican General Law of Negotiable Instruments and Credit Operations.

Such law includes several mandatory provisions, but also allows *fideicomisos* to include other legal contractual provisions, making them one of the most flexible types of contracts in Mexico, enabling them to be used for different purposes.

i Fideicomiso (trust)

In general terms, a *fideicomiso* consists of three parties: settlor; trustee and beneficiary. The settlor is the individual or entity that transfers title or management of certain assets and rights to the trustee. The trustee is the party that holds the assets in trust and has the responsibility of performing and complying the purposes and goals of the *fideicomiso*. Finally, the beneficiary is the party that is designated to benefit from the assets and rights contributed to the *fideicomiso*, whether by using and enjoying the assets or rights, or by receiving income from such assets or rights, among others. Under Mexican law, the beneficiary can be the settlor itself.

Even though legal title over the assets and rights is actually transferred to the trustee (which means the trustee is the legal owner of such assets and rights), such legal title is limited, since the trustee cannot dispose for his own benefit of the assets and rights transferred to it, as it holds title under a fiduciary capacity. Thus, Mexican legislation requires trustees to keep separate accounting books and records for assets and rights held in trust.

In general terms, only a Mexican bank or other qualified and regulated financial institutions may act as trustee in a *fideicomiso*. Trustees are required to exercise good faith and shall use diligent and professional efforts to promote and protect the best interests of the assets and rights in trust.

Regardless of the purpose for which a *fideicomiso* is created, all *fideicomisos* shall either be revocable or irrevocable. The first case occurs when the settlor reserves for him or herself the right to revoke or modify the agreement (i.e., settlor maintains the legal ability to 'reacquire' the assets and rights from the trustee). In the second case, the settlor cannot revoke the agreement, at least until the settlor has fulfilled his or her obligations.

From a tax perspective, when asset contributions are made to a *fideicomiso* in which settlors reserve the right to reacquire such assets, no sale is deemed to exist at that moment. Tax is triggered when such reacquisition right is lost or when a third party is appointed as beneficiary of the trust.

Depending on the purposes of the *fideicomiso*, the trustee may require either constant or specific supervision and direction, or simply certain assistance in satisfying the *fideicomiso's* purposes. This is accomplished by a governing body working in the form of a committee, which is called the technical committee. The committee's duties can be as specific or as broad as determined by the parties creating the *fideicomiso*.

Fideicomisos are normally created for a specific period, and in terms of law they cannot exceed 50 years; although, under certain specific cases such term can be extended.

Fideicomisos can terminate for several reasons, such as the *fideicomiso* reaching its purpose; such purpose becoming impossible to satisfy; by agreement of the settlor, trustee and beneficiary; when revoked by the settlor; among other cases. Upon expiration, and unless otherwise provided by the *fideicomiso* agreement, the assets and rights in trust will be transferred to the settlor or to the beneficiary, as the case may be.

While the three persons that are part of this agreement have legal personality, the *fideicomiso* itself does not have any legal personality; this means that there is no new legal person formed under the contract, but rather the trustee acts on behalf of the parties. Thus, *fideicomisos* are not deemed to hold the capacity of a 'resident' vehicle.

Therefore, all income received for any activities carried out by the *fideicomiso* is not taxable to the trustee but taxable for the beneficiary, as the activities are being carried out on behalf of the parties of the *fideicomiso*.

Mexican legislation provides a specific tax treatment for *fideicomisos* through which entrepreneurial activities are carried out. Mexican fiduciary institutions are obliged to compute a tax profit or tax loss derived from activities conducted thereof and report them to the *fideicomiso's* beneficiaries, who are obliged to consider as part of its annual taxable income the tax result in the corresponding participation; therefore, such type of *fideicomisos* are pass-through vehicles. Losses generated in *fideicomisos* are not shifted to the beneficiaries, as they can only be offset against income generated in such vehicle.

In addition, fiduciary institutions are obliged to file advance and final tax payments on behalf of the *fideicomiso's* beneficiaries, who are entitled to claim credit for the portion of those payments that corresponds to their participation.

ii Foreign investment structures

Investment structures held overseas are commonly implemented by high net worth Mexican resident individuals.

Overseas structures are commonly established with estate planning and confidentiality purposes. Mexican tax authorities are constantly striving to obtain information about Mexican individuals and their investments abroad.

As a result of this, Mexican resident individuals and companies are investing important resources in complying with all informative obligations enacted by Congress and regulated by the Mexican tax authorities.

iii Anti-money laundering regulations

The Anti-Money Laundering statute became effective in July 2013, which from a general overview requires financial and non-financial institutions to report 'vulnerable' transactions.

A series of vulnerable transactions must be reported such as gambling or betting games, issuance of credit or prepaid cards not issued by financial institutions, lending activities not conducted by financial intermediaries, sale of jewellery or watches, sale of new or used vehicles, armoured services and acquisitions on behalf of third parties.

Each vulnerable activity must be reported in case the transaction thereof exceeds the amounts established for each case within the period of time provided thereof.

The Mexican government created a special Financial Intelligence Unit which is responsible for receiving all the reports that must be filed according to the anti-money laundering statute and administrative rules and is responsible for analysing them in order to detect transactions linked to money laundering.

Non-compliance with anti-money laundering reports leads to penalties from the tax authorities. Providing false information is deemed a criminal offence punishable by jail.

iv Reporting obligation on 'relevant' transactions

The 2014 tax reform introduced a new provision to the Federal Fiscal Code that obliges taxpayers to report 'relevant' transactions determined by the tax authorities through administrative rules.

Upon issuance of the corresponding tax form, which must be used for reporting purposes, a series of transactions subject to be reported were disclosed. Among such transactions are the following:

a financial derivative transactions;
b financial transactions involving coupon strips;
c change in an entity's shareholders;
d sale of shares;
e change of residence to Mexico;
f sale of intangible assets;
g financing transactions;
h accrued interests in long-term financing; and
i financial assets contributed to *fideicomisos*.

Taxpayers are relieved of reporting such transactions if their aggregate amount in a tax year is lower than 60 million pesos. This exception is not applicable to financial institutions.

This new obligation is part of the current trend of the Mexican tax administration for gathering information on transactions conducted by taxpayers in order to provide additional elements for conducting tax audits that might derive in an increase in tax collection from both, individuals and legal entities.

v Exchange of information agreements

As a G20 and OECD member country, Mexico has actively participated with other OECD countries in the development of new standards for exchange of financial information in a more expedite manner.

Mexican authorities have shown a keen interest in acquiring information on overseas investments of Mexican residents by being part of the Early Adopters Group

(EAG) for adopting the common reporting standard, which is the new standard in automatic exchange of information between tax authorities developed by the OECD.

Mexican tax authorities, acting as signees of the Multilateral Competent Authorities Agreement, have sent a clear message on their position on challenging tax evasion by enabling the exchange of information in an automatic standardised manner.

It is expected that Mexico will conduct its first automatic exchange of information under the new standard in September 2017, jointly with the rest of the EAG members.

V CONCLUSIONS AND OUTLOOK

Tax reforms in Mexico have resulted in an increase in the federal government's revenue derived from tax collection and have enabled Mexican tax authorities to gather more information on transactions conducted both by corporations and individuals in Mexico and abroad.

As part of a global trend, tax reforms are being focused on gathering information of each country's tax residents with respect to assets and investments held overseas in a more efficient, standardised and automated manner. Fiscal secrecy appears to be the central topic to be challenged by tax administrations worldwide, through a scheme of unparalleled international cooperation.

Jurisdictions that in the past were considered traditionally secretive are currently adopting a more open position for exchanging information with foreign governments. Mexican tax authorities are currently executing exchange information agreements that will allow them to exercise their audit faculties on investments held by Mexican resident individuals.

Mexican high net worth individuals have been constantly concerned about the confidentiality of their investments both in Mexico and overseas. The current trend of tax administrations seems challenging and more scrutiny is expected. The five-year statute-of-limitation of the Mexican tax authorities' audit faculties has led an important number of Mexican investors to follow a voluntary tax regularisation programme with respect to such investments; however, more complex investment structures should be expected to try to achieve privacy and confidentiality for Mexican investors.

The elimination of income tax payment on a no-name basis has resulted in discouragement for Mexican resident individuals with overseas investments to comply with their payment obligations, as confidentiality and security is a major concern for investors.

The current economic turmoil is having a major adverse effect on foreign currency exchange rates with respect to the Mexican peso, and will certainly encourage investors to seek alternatives for hedging their position, considering that Mexican resident individuals are obliged to recognise as part of their taxable income unrealised foreign exchange gains generated in each tax year.

Appendix 1

ABOUT THE AUTHORS

ALFREDO SÁNCHEZ TORRADO

Chevez Ruiz Zamarripa y Cia, SC

Alfredo Sánchez Torrado is a partner and specialises in federal taxation matters in Mexico, with an emphasis on international transactions, M&A, financial products, investment structures and estate planning. Alfredo is a CPA from the Instituto Tecnológico Autónomo de Mexico (ITAM) in Mexico City, where he has taken postgraduate programmes in international taxation. He obtained the tax specialist certification from the Mexican Institute of Public Accountants. He is the author of numerous publications on taxation matters and is an active member of the Tax Committee of the Mexican Institute of Financial Executives (IMEF) and of the Mexican chapter of the Society of Trust and Estate Practitioners (STEP). Alfredo is a board member of several corporations and he is member of their audit and compensation committees and has written several publications on taxation topics.

ROBERTO PADILLA ORDAZ

Chevez Ruiz Zamarripa y Cia, SC

Roberto Padilla Ordaz is an associate and specialises in federal taxation matters in Mexico, with an emphasis on M&A, financial institutions and investment structures. Roberto is a public accountant from the Instituto Tecnológico Autónomo de Mexico (ITAM) in Mexico City, where he took a postgraduate course in corporate advisory. Roberto holds a master's degree in tax law from Universidad Panamericana in Mexico City. He has contributed to several publications on taxation topics.

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC
Vasco de Quiroga 2121
Piso 4, Santa Fe
01210 Mexico City
Mexico
Tel: +52 55 5257 7000
Fax: +52 55 5257 7001/02
sanchezt@chevez.com.mx
rpadilla@chevez.com.mx
www.chevez.com