NovioTax

DAC6 and the use of safe harbours in non-EU jurisdictions

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MNEs making use of safe harbour taxation rules, in the E.U. as well as in third-countries, may oblige the E.U.-based taxpayers within the MNEs to report these safe harbour arrangements to tax authorities in the E.U. under the E.U. Directive on Mandatory Disclosure Rules ("DAC6").[1] In this blog, we take a look at the safe harbour provisions of non-E.U. jurisdictions (specifically, India and Brazil) and when making use of these safe harbour provisions may give rise to a reporting obligation under Hallmark E.1 of DAC6. The blog also sheds some light on transfer pricing methods for pricing low value-adding intragroup services ("LVAS") as defined in Chapter VII of the OECD TP Guidelines.

E.U. Directive on Mandatory Disclosure Rules/DAC6

DAC6 imposes mandatory reporting of cross-border arrangements, affecting at least one Member State, where the said arrangements fall within one of a number of specified "Hallmarks". The use of the words, "affecting at least one Member State", means that the reportability of arrangements under the Directive is not limited to cross-border transactions within the E.U; it also includes arrangements between entities in the E.U. and entities in non-E.U. jurisdictions (for instance, an arrangement/ transaction between a Dutch company and an Indian/Brazilian company). The aim of the DAC6 Directive is to improve tax-transparency and tackle potentially aggressive (cross-border) tax-planning arrangements in order to protect the tax base of the E.U. Member States.

DAC6 entered into force on 1 July 2020, with retroactive effect, up to and including 25 June 2018. The Dutch Ministry of Finance, as is the case with most other E.U. countries, has postponed the first reporting date by six months, observing the effects of the COVID-19 pandemic. In accordance with the Dutch Decree[2] implementing the DAC6 Directive, existing arrangements that qualify under any of the DAC6 Hallmarks need to be reported to the Dutch tax authorities by the last day of February 2021.

Some of the DAC6 Hallmarks need to be met along with a "main benefit test"[3] in order for the arrangement to become reportable under these Hallmarks. This is, however, not the case for the Hallmarks in Section E of the Directive, which relate to transfer pricing arrangements. Section E includes potentially aggressive transfer pricing arrangements falling into the following categories:

- Hallmark E.1 > Unilateral safe-harbour provisions
- Hallmark E.2 > Transfer of hard-to-value-intangibles (HTVI)
- Hallmark E.3 > Intragroup cross-border transfer of functions and/or risks and/or assets

Safe harbour provisions & Hallmark E.1 of DAC6

In the interest of certainty and administrative simplicity, some jurisdictions offer taxpayers (who meet certain, specified criteria) the option to be taxed based on "safe harbour provisions". These are usually a simple set of prescribed transfer pricing rules in connection with clearly and carefully defined transactions. Opting to be taxed on the basis of safe harbours exempts the eligible taxpayers from the application of the general transfer pricing rules of the jurisdiction and thereby, to avoid some of the difficulties that arise in applying the arm's length principle. In other words, safe harbour provisions substitute taxpayers' obligations under the general transfer pricing regime of the particular jurisdiction with simpler obligations. Often, eligible taxpayers complying with the safe harbour provisions will be relieved from burdensome compliance obligations, including some or all associated transfer pricing documentation requirements. (Reference is made to the Indian and Brazilian policy of applying fixed profit margins based on the functionality of a company or a transaction).

[1] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[2] Decree of 24 June 2020, no. 2020-11382

[3] The "main benefit test" ("MBT") is met if it can be established that obtaining a tax advantage is the main benefit (or one of the main benefits) of the cross-border arrangement, as a person may reasonably be expect to derive. In order to determine whether the MBT is met, all the relevant facts and circumstances need to be taken into account.

The OECD Transfer Pricing Guidelines[4] ("OECD TP Guidelines"), while recognizing the benefits of safe harbour regimes (compliance relief, certainty and administrative simplicity),[5] warn of the risks associated with the unilateral application of safe harbours by any jurisdiction. One of these being the increased potential for double taxation or double non-taxation. The risk of double-taxation can be demonstrated by considering, for instance, the Indian safe harbour rules for FY 2019-20 for determining arm's length prices for certain specified transactions.[6] Consider, for instance, that the safe harbour rate prescribed for "provision of software development services " was 20% mark-up on the operating costs (until FY 2016-17, since when it has been changed to 18%). This meant that an Indian subsidiary, providing software development services to its foreign parent (that provided software development services to its customers), could have opted to pay income tax in India on the basis of a profit equal to its operating costs plus 20% thereof. Opting for this safe harbour provision *could* have led to double taxation for MNEs (on the whole) because (generally speaking) 20% mark-up would have been on the higher-side of the benchmarked range for profits of comparable software development companies. If the profit allocation in India (i.e. 20% mark-up) could not have been supported by an adequate benchmark analysis (based on the functions, assets and risk profile of the Indian company), the parent company would have had to adjust the internal transfer price paid to the Indian company to reflect the benchmark study (i.e. to a lower mark-up). This would have triggered (partial) double taxation for the MNE (on the whole) with respect to the transaction.

While (in the interest of compliance relief, certainty and administrative simplicity) foreign enterprises carrying out operations in India might be tempted to opt to pay income taxes in India based on these safe harbour rates (applicable to the specified activities within certain industries), this may, in some cases, lead to a certain degree of double-taxation because (typically) the profit allocation/transfer price of a particular transaction under the Indian safe harbour rules tends to be at the higher end or even exceed the benchmarked profit allocation/arm's length price of the particular transaction as determined under the transfer pricing rules of other jurisdictions.

On the other hand, if the safe harbour rate prescribed by a certain jurisdiction is too low (when compared to a benchmarked profit allocation in respect of the particular functions, assets and risk profile of the particular company that opts for such safe harbour provisions), it can lead to double non-taxation. With reference to the case above, if the parent company claims a tax deduction in its resident jurisdiction based on the arm's length principle (and substantiated by a benchmarked profit allocation) it will lead to (partial) double non-taxation. (Reference is made to *Example D*).

In light of the underlying aim of DAC6 to arm tax authorities with information regarding "potentially aggressive cross-border arrangements", the aim of Hallmark E.1, which concerns "arrangements involving unilateral safe harbour rules", is to impose reporting obligations in respect of the use of unilateral safe harbour rules that could potentially lead to double non-taxation. However, since the Hallmark is to applied without the "main benefit test", the intention behind the Hallmark could also be to impose reporting obligations in respect of the use of unilateral safe harbour rules that could potentially lead to double-taxation because an MNE opting to be taxed at a safe harbour rate above the benchmarked arm's length rate in one jurisdiction (as it could be in the case of India's safe harbour rate prescribed discussed above) may try to pass off this safe harbour as an arm's length allocation in the corresponding jurisdiction (which could be an E.U. Member State). In such case, whether or not such arrangement amounts to aggressive tax planning, the arrangement (in the opinion of the authors) is reportable under Hallmark E.1 because the potential for double taxation could lead to base erosion in the Member State.

Reportable arrangements under Hallmark E.1

Neither the Directive nor the Dutch Decree implementing the Directive provide a definition of "unilateral safe harbour rules". A "safe harbour" is, however, defined/described in Para. 4.110 of the OECD TP Guidelines as *"a transfer pricing regime is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules. A safe harbour substitutes simpler obligations for those under the general transfer pricing regime. Such a provision could, for example, allow taxpayers to establish transfer prices in a specific way, e.g. by applying a simplified transfer pricing approach provided by the tax administration. Alternatively, a safe harbour could exempt a defined category of taxpayers or transactions from the application of all or part of the general transfer pricing rules. Often, eligible taxpayers complying with the safe harbour provision will be relieved from burdensome compliance obligations, including some or all associated transfer pricing documentation requirements"*. The OECD TP Guidelines do not provide an explanation for when a safe harbour could be considered as "unilateral".

[4] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2017

[5] Para. 4.106 - 4.109 of the OECD TP Guidelines

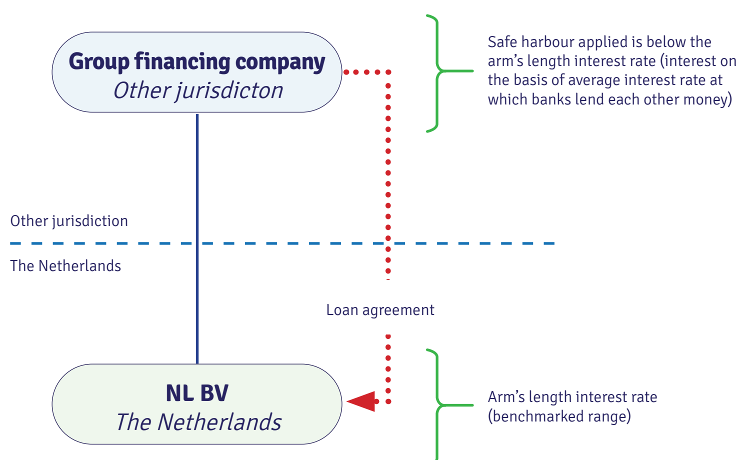
[6] CBDT Notification No.r 46/2017/F 370142/6/2017 – TPL; https://www.incometaxindia.gov.in/communications/notification/notification46_2017.pdf

Since Hallmark E.1 applies only to *unilateral* safe harbours, we can safely say that arrangements involving the use of bilateral or multilateral transfer pricing safe harbours are excluded from the reporting obligation under this Hallmark. This seems logical since bilateral and multilateral safe harbours should not (generally speaking) lead to double taxation and double non-taxation[7] whereas, as previously discussed, the reason for the inclusion of unilateral safe harbours in scope of Hallmark E.1 could be that they result (in certain cases) in double taxation and double non-taxation, thereby creating opportunities for aggressive tax planning.

This brings us to an interesting question: Whether multilateral safe harbours provisions introduced by the OECD and applied by jurisdictions in a non-bilateral/multilateral manner may be covered under the DAC6 reporting obligations of Hallmark E.1. in cases wherein the implementations of these safe harbour rules in the local laws and/or regulations in the jurisdictions at hand do not align with the OECD TP Guidelines. Consider, for example, the transfer pricing method established by the OECD in Chapter VII of the OECD TP Guidelines with regard to low value-adding services (i.e. a 5% markup applied on the relevant costs[8]). From the Dutch policy perspective, observing common practice, safe harbour rules that are based on a standard on which international consensus has been reached, such as the OECD TP Guidelines or the reports of the Joint Transfer Pricing Forum of the European Commission ("EU JTPF"),[9] should not be considered as unilateral safe harbour rules reportable under Hallmark E.1.

In practice though, situations can arise where, for example, countries are involved in transfer pricing transactions wherein the safe harbour rules implemented in the local laws and/or regulations in the jurisdictions at hand are not aligned with the international consensus/OECD TP Guidelines. As such, varied implementation of Chapter VII of the OECD TP Guidelines between states with regard to low value-adding services does not necessary mean that it will result in a reportable event under Hallmark E.1. This, however, may be the case in some situations and therefore, needs some attention. (Reference is made to *Example B*).

Example A - Interest on loans



A Dutch company has raised a loan from a group financing company in another jurisdiction. Pursuant to Article 8b of the Corporate Income Tax Act[10], the Dutch company imputes interest expenses that are in line with the at arm's length principle (based on a benchmark study). In the other jurisdiction, it is permitted to calculate interest between group companies on the basis of average interest rates at which banks lend each other money. The interest rate is below the arm's length interest rate as shown in the benchmark study of the Dutch company. This qualifies as a unilateral safe harbour rule for the purposes of Hallmark E.1. (from the point of view of the revenue authorities in the Netherlands). If the company in the other jurisdiction makes use of the safe harbour rule this will trigger a reportable event under Hallmark E.1.[11]

However, if the benchmark study would reveal that the (safe harbour) interest rate applied in the state of the group financing company falls within the at arm's length interest rate this would not trigger a reportable event under Hallmark E.1. as the safe harbour rate applied falls within the arm's length interest range.[12] In addition, if the at arm's length interest rate determined by means of a benchmark study is taken into account by both, the Dutch company and the group financing company, the unilateral safe harbour rule has not actually been opted for.[13] In both cases there would be no reporting obligation under Hallmark E.1.

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[7] As noted in Para 4.119 of the OECD TP Guidelines, bilateral and multilateral safe harbours adopted by means of agreements between the competent authorities of countries could largely eliminate the problems of non-arm's length results and potential double taxation and double non-taxation arising under (unilateral) safe harbours.

[8] Para. 7.61 of the OECD TP Guidelines

[9] The Netherlands follows the recommendations of the E.U. Joint Transfer Pricing Forum as much as possible, except where it makes a reservation. See para 1.5 of the Dutch Transfer Pricing Decree of 22 April 2018, no. 2018/6865.

[10] This aligns with Article 9 of the OECD Model Tax Convention.

[11] Reference is made to example 21 of the Dutch Decree clarifying Hallmark E.1. Decree of 24 June, 2020, no. 2020-11382.

[12] Reference is made to example 22 of the Dutch Decree clarifying Hallmark E.1. Decree of 24 June, 2020, no. 2020-11382.

[13] By doing so, any partial non-taxation as a result of the safe harbour margin would be eliminated, and there would be no reason to report this transaction under Hallmark E.1.

Example B - low value-adding intragroup services

As defined in Section D of OECD TP Guidelines, low value-adding intragroup services (“LVAS”) are services that are of a supportive nature and are not forming part of the core business of the MNE group.[14] Typically, these services relate to accounting, finance, legal, HR, IT *et al.* In Chapter VII of the OECD TP Guidelines, a simplified method is proposed to determine the transfer price for LVAS. In determining the arm’s length charge for LVAS, a profit mark-up to all costs in the pool (with the exception of any pass-through costs) should be applied. The OECD TP Guidelines indicates a mark-up of 5% as appropriate.[15] This mark-up does not need to be justified by a benchmarking study.[16] The 5% mark-up on relevant costs in respect of LVAS is also supported by a broad database study conducted by the EU JTPF in 2011. The study establishes mark-ups of between 3 and 10% as appropriate for LVAS, and indicates that 5% mark-up is most commonly used.[17]

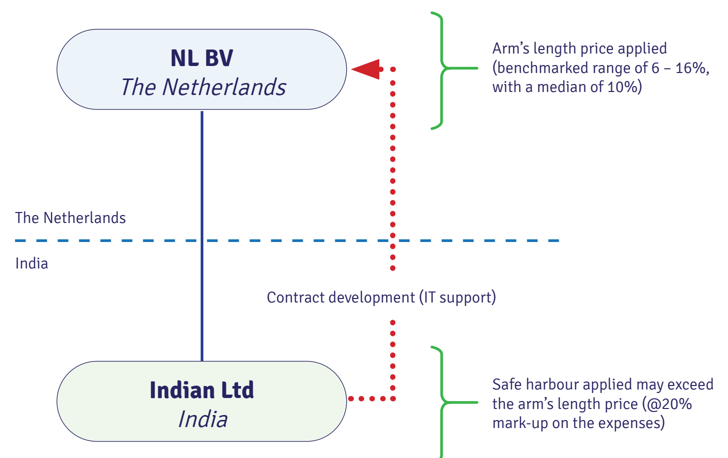
Consider, for instance, that Company X, resident in State X, an EU Member State, provides low value-adding intragroup services (accounting, finance, HR and IT) to Company Y in State Y, Company Z in State Z and Company Q in State Q. State X has adopted the 5% mark-up in respect of all value-adding intragroup services provided. State Y has not endorsed the simplified (5% - LVAS) mark-up method and required a propose benchmarking study, State Z has only adopted part of the 5% mark-up and applies this only to relative standard services (accounting and financing) and State Q applies the 5% mark-up proposal in the OECD TP Guidelines, but is not a member of the OECD.

A 5% mark-up can be considered as a unilateral safe harbour in jurisdictions (like State Y and State Z) that do not fully follow or consistently apply the OECD’s simplified approach for LVAS. It should, however, be noted that a difference in implementation of Chapter VII of the OECD TP Guidelines between states with regard to LVAS does not necessary imply that this will result in a reportable event under Hallmark E.1. Only if the LVAS are predominantly based on services like (for instance) IT development/ support, insurance/brokerage, real estate, legal (M&A) *et al* a 5% mark-up *could* result in a price below the arm’s length value, and accordingly, may trigger a reportable event under Hallmark E.1. We have conducted a benchmarking study for large groups of service providers (HR, IT, Legal, Finance, Administrative et al) and expect that only in remote cases the application of Chapter VII of the OECD TP Guidelines may trigger reportable events.

Hence, it must be verified on a case-by-case basis whether Chapter VII of the OECD TP Guidelines with regard to LVAS has been implemented in the local laws and/or regulations in the jurisdictions at hand in order to determine if effectively there is a unilateral safe harbour and/or whether this may result in a reportable event under Hallmark E.1.

Example C - Indian safe harbour provisions

A software developer/MNE, headquartered in the Netherlands, has a support/software development facility in India. The operations of the Indian subsidiary are akin to that of a contract developer. The parent company in the Netherlands is responsible for important functions relating to design and control of development, including determining the course of “blue-sky” design, control over strategic decisions regarding design/development programmes, management and control of budgets and programmes to support/align the developments with customer awareness. This parent company owns all the software related intangibles.



The Indian subsidiary operates under supervision of the parent company in the Netherlands. It develops the software according to the instructions received from the parent company, and its entire output is purchased by the

[14] Para. 7.47 of the OECD TP Guidelines enumerates activities that do not fall under the simplified approach.

[15] Para. 7.61 of the OECD TP Guidelines

[16] In addition, in Para 7.37 of the OECD TP Guidelines it is argued that taxpayers in appropriate circumstances may merely allocate the costs of providing those services if, for instance, a cost-benefit analysis indicates that the additional tax revenue that would be collected does not justify the costs and administrative burdens of determining what an appropriate arm’s length price might be in some cases. In such cases, charging all relevant costs rather than an arm’s length price may provide a satisfactory result.

[17] EU JTPF meeting 27 October, 2009, and related study, “BM contribution to illustrate available generic evidence relating to intra group services profit margins—European Service Provider Profit Margin Analysis,” https://src.bna.com/koO

parent company. Based on a benchmarking study conducted on behalf of the parent company, the Indian subsidiary could be considered to be a supplier of software development services, an appropriate arm's length remuneration for which should be determined by the cost-plus method.

In the interest of administrative simplicity and certainty, the Indian company has opted to pay corporate income taxes in India based on the Indian safe harbour provisions prescribed in respect of companies engaged in software development services. Accordingly, the Indian subsidiary pays corporate income tax (at the normal CIT rate) on a "deemed profit" equal to its expenses plus 20% thereof. It's OPEX amounts to, USD 50,000,000. Thereby, the Indian subsidiary reports a turnover of USD 60,000,000, and accordingly a taxable income of USD 10,000,000 in India.

Observing mandatory transfer pricing disclosure rules in the Netherlands, the parent company in the Netherlands is required to file a Local and Master File to the Dutch tax authorities annually. In this context, a functional analysis is carried out to ascertain the value of the contributions of the parent company as well as all the subsidiaries. The analysis reveals that the Indian subsidiary (and other subsidiaries with a similar functions, assets and risk profile) is characterized as the "tested party" (i.e. performing the least complex functions when compared to the other party of the transaction).

Accordingly, it is determined that the cost-plus method is the most appropriate transfer pricing method for pricing the purchase of clothes from the Indian subsidiary. The benchmark study performed to determine the arm's-length remuneration for the contract development services of the Indian subsidiary reveals that a mark-up of 6% - 16% on software development services with a median of 10% is the arm's length range for the remuneration/profit allocation. Thereby, the appropriate profit allocation in respect of the functions, assets and risks of the Indian subsidiary (in other words, the arm's length compensation that the parent company should be paying for the software developments services of the Indian subsidiary) is within the range of USD 53,000,000 - USD 58,000,000 (applying a 6% - 16% mark-up on the OPEX).

However, opting to be taxed at the safe harbour rate prescribed for software developers has resulted in the Indian subsidiary reporting a turnover above the arm's length range (i.e. USD 60,000,000). Based on Para 3.62 of the OECD TP Guidelines, when the relevant condition of the controlled transaction (e.g. price or margin) falls outside the arm's length range and comparability defects remain (i.e. when the price charged does not satisfy any point in the arm's length range), the primary transfer pricing adjustment can be made using the median determined by means of the benchmark study (i.e. 10% mark-up in this case). This position is also reflected in Para 2.3 of the Dutch TP Decree (2018). The excess amount (i.e. USD 5,000,000) will be disregarded in calculating and determining the tax base in the Netherlands for the parent company.

As a result, in the Dutch income tax return (as well as Local and Master Files) of the parent company, the pricing of the internal transaction (i.e. purchase of software development services from the Indian subsidiary) will be adjusted downwards from USD 60,000,000 (i.e. the profit allocated to the Indian subsidiary in accordance with the safe harbour provisions) to USD 55,000,000 (reflecting the median of 10% mark-up). Hence, opting for the safe harbour rules in India results in double taxation of the same income to the tune of USD 5,000,000. In order for the actual allocation of profits to be consistent, along with the primary (profit) adjustment, a secondary adjustment will have to be made in the Netherlands. In this respect, the excess amount (USD 5,000,000) could be recognized (in the Netherlands) as an (non-taxable) informal capital contribution being made by the parent company to the Indian subsidiary. This should be non-taxable (at the level of the Dutch parent company).

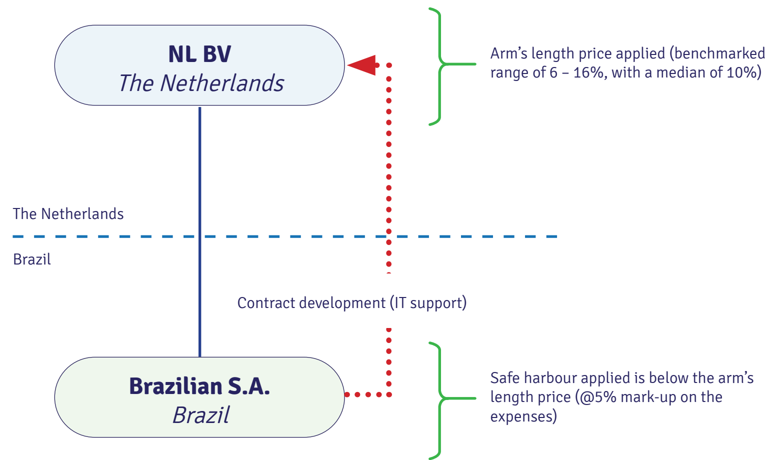
Along with reporting the double taxation in the Dutch corporate income tax return and clarifying the transfer pricing policy in the Local and Master Files, the parent company and its advisers are required to report the utilization of the Indian safe harbour provisions in respect of the Indian subsidiary under Hallmark E.1 of DAC6. If, for some reason, the parent company does not make the primary and secondary adjustments in its transfer pricing documentation, the company and its advisers as well as directors could be found to be in default of the DAC6 regulations.

Example D - Brazilian safe harbour provisions

Contrary to the previous example, where a unilateral safe harbour provisions permit taxpayers to report income below the arm's length range (as determined in accordance with the OECD TP Guidelines) in the jurisdiction providing the safe harbour provisions, taxpayers would have an incentive to opt for safe harbour based taxation.

The facts being similar to the facts in the previous example but the software development subsidiary being in Brazil (instead of India). Brazilian TP provisions deviate/deviated to a certain extent from the OECD TP Guidelines as it in some cases adopts fixed margins for various methods regardless of the specific value attribution of a tested company. For illustration purposes we will apply a relative low fixed mark-up of 5%, which is just below the arms' length benchmarked range (of 6 – 16%, with a median of 10%).

Based on the Indian example the OPEX of the Brazilian software development company is USD 50,000,000. Accordingly, and applying the Brazilian fixed mark-up of 5%, the internal transaction between the Brazilian subsidiary and the parent company in the Netherlands (i.e. the purchase of software development) will be priced at USD 52,500,000. The Brazilian software development subsidiary will pay taxes in Brazil on income amounting to USD 2,500,000.



Again, observing Para 3.62 of the OECD TP Guidelines, the parent company adjusts (i.e. primary TP adjustment) the internal pricing to reflect the arm's-length standard using the median as a reference point (i.e. an upwards adjustment from USD 52,500,000 to USD 55,000,000). The difference between the income allocated to the Brazilian subsidiary in accordance with the safe harbour provisions and the income allocated to the Brazilian subsidiary according to the OECD TP Guidelines (i.e. USD 2,500,000) is effectively not taxed in both, Brazil and the Netherlands. In order for the actual allocation of profits to be consistent, a secondary adjustment will have to be made in the Netherlands, treating the excess amount (i.e. USD 2,500,000) as a deemed dividend received from the Brazilian subsidiary. This amount would (likely) be exempt from taxation by virtue of the Dutch participation exemption.

The utilization of the Brazilian safe harbour provisions, which allow the Brazilian subsidiary to report income below the arm's length range (as determined in accordance with the OECD TP Guidelines) in Brazil, should be reported to the Dutch tax authorities under Hallmark E.1 of DAC6. Otherwise the advisers as well as directors of the Dutch company could be in default under the DAC6 regulations.

Some concluding thoughts

Hallmark E.1 of DAC6 may impose reporting obligations in case of use of safe harbour provisions that are not in line with the arm's length principle.

In light of the underlying aim of DAC6 to arm tax authorities with information regarding "potentially aggressive cross-border arrangements", the aim of Hallmark E.1, which concerns "arrangements involving unilateral safe harbour rules", is to impose reporting obligations in respect of the use of unilateral safe harbour rules that could potentially lead to double non-taxation. However, since the Hallmark is to applied without the "main benefit test", the intention behind the Hallmark could also be to impose reporting obligations in respect of the use of unilateral safe harbour rules that could potentially result in (partial) double taxation.

Based on the wording of Hallmark E.1, it involves: cases (i) where the safe harbour rate prescribed by a certain jurisdiction is too low (when compared to a benchmarked profit allocation in respect of the particular functions, assets and risk profile of the particular company that opts for such safe harbour provisions). This may impact for instance countries, like Brazil that have prescribed fixed margins that in certain cases are lower than that prescribed by benchmark studies. Other cases (ii) relate to countries that have prescribed safe harbour margins that exceed the arm's length price (like for instance most Indian safe harbour margins). As safe harbour provisions may lead to double non-taxation (if safe harbour margins are too low) or partial double taxation (if safe harbour margins exceed the arm's length price) they may trigger reportable events under Hallmark E.1.

In relation to the LVAS, a 5% mark-up can be considered as a unilateral safe harbour in jurisdictions that do not fully follow or consistently apply the OECD's simplified approach for LVAS. This means that it must be verified on a case-by-case basis whether Chapter VII of the OECD TP Guidelines with regard to LVAS has been implemented in the local laws and / or regulations in the jurisdictions at hand in order to determine if effectively there is a unilateral safe harbour. We have conducted a benchmarking study for large groups of service providers (HR, IT, Legal, Finance, Administrative et al) and expect that only in remote cases the application of Chapter VII of the OECD TP Guidelines may trigger reportable events under Hallmark E.1. Hence, as a precautionary measure companies may consider using general benchmark ratios – specified per type of service (development, IT, legal, finance, HR et al) in Local and Master Files to avoid any debate on the application of Hallmark E.1.

Not much information has been made available by the Dutch tax authorities regarding the impact of reporting arrangements under Hallmark E.1 (or any DAC6 Hallmark for that matter). Reasonably speaking, we expect that the reports will be shared with the tax authorities of other jurisdictions under the automatic information-exchange mechanism within the E.U. and other treaty partners.

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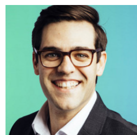

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