



Title

The Ministry of Finance of Colombia issued the proposed regulations on the Significant Economic Presence rule

Brief Summary

On June 30, 2023, the Ministry of Finance of Colombia issued the proposed regulations (hereinafter, the “**Proposed Regulations**”) on the Significant Economic Presence rules. The Proposed Regulations are open for comments until July 15, 2023.

Detail/Facts

By the end of 2022, the Colombian Tax Reform was approved by the Colombian Congress (Law 2277 of 2022). The final version of the Law included the Significant Economic Presence (“SEP”) rule as a new nexus criterion for tax liability in Colombia; this new nexus criterion is applicable to non-resident companies if the non-resident is engaged in the sale of goods to Colombian clients and/or the non-resident is engaged in the provision of “qualified digital services” to Colombian clients/users. The SEP rule will only be applicable as from January 1st, 2024.

A non-resident that falls within the scope of application of the SEP rule may elect taxation under one of two mechanisms:

- i. A 10% withholding on the total amount paid (i.e., gross income); or
- ii. A 3% rate over the gross income declared on a tax return (in this case the 10% WHT would not apply).

Below you will find a summary of the SEP Proposed Regulations:

I. Specific definitions for purposes of interpreting the SEP rules:

The Proposed Regulations include the following definitions:

- i. **Clients:** means “any individual, corporate entity or entity without legal personality located in the Colombian territory that pays or hires the acquisition of goods or services, offered by non-residents or non-domiciled individuals or entities”.
- ii. **Users:** means “any individual, corporate entity or entity without legal personality located in the Colombian territory that acquires or uses a digital interface identifying himself with a username and password to access the mentioned digital interface”.
- iii. **Digital interface:** means “any technological program, including websites or part this, or application, including mobile apps, or any other system allowing access to users and/or clients located in Colombia to interact and/or to digitally communicate with non-residents or non-domiciled persons or entities.”
- iv. **Digital services:** means “services provided by means of the internet or by an electronic network, in an automated way that requires a minimum human intervention by the service provider and that are impossible to provide in absence of information technology. Digital services include the services listed in the section 2 of article 20-3 of the Colombian Tax Code and exclude those services defined by the Colombian tax laws, such as technical services, consultancy services, technical assistance services



and education services, even if these services are provided through an electronic network or platform.”

II. Sale of goods or provision of services to clients/users located in Colombia:

Under the Proposed Regulations, there would be a sale of goods or provision of services to clients/users located in Colombia when:

- i. The domicile or habitual abode of the client/user is in Colombia.
- ii. The payments are made through credit/debit cards or other type of cards or vouchers, or any other means of payment located in Colombia.
- iii. The credit/debit card used to pay has been issued in Colombia.
- iv. The delivery address is in Colombia (for the case of sale of goods).
- v. The IP address of the device used by the client/user locates him in Colombia at the time the transaction is made.
- vi. The mobile country code (MCC) of the international identity of the mobile service subscriber on the SIM card used by the client/user locates him in Colombia.

III. Obligations for non-residents with SEP in Colombia:

Under the Proposed Regulations, the non-resident that falls within the scope of application of the SEP rule would have the following obligations:

- i. To opt between filing the tax return and paying the tax by means of such tax return or to pay the tax by means of a withholding tax.
- ii. If the non-resident with SEP in Colombia opts to file an annual tax return, such non-resident would be obliged to: register with the Colombian Tax Authority (DIAN as per its acronym in Spanish) in the Unique Tax Registry (“RUT” as per its acronym in Spanish) to obtain a Colombian Tax ID (“NIT” as per its acronym in Spanish), and update the RUT when required; file the tax return and pay the tax due within the deadlines established by the National Government; the non-resident will also be required to make advanced payments on a four-monthly basis at a 2% rate. The advanced payments would be creditable from the final tax liability determined on the annual tax return to be filed.
- iii. If the non-resident with SEP in Colombia opts to file a tax return, such non-resident must file a request before the “DIAN” indicating that the non-resident is opting to not being subject to the 10% withholding tax. Such request would be solved by an administrative act issued by the DIAN, and it would be applicable as from the first calendar day of the second month following to the date in which the administrative act become enforceable.
- iv. If the non-resident with SEP in Colombia opts for the withholding, the non-resident would be exempted of the obligation to file the tax return in Colombia only if the entirety of the payments received were subject to withholding.



The Proposed Regulations also includes some formalities that the non-resident would be obliged to comply with to be able to comply with the aforementioned obligations (in particular, with the obtention or update of the Tax ID.

Additionally, the Colombian clients/users would be obliged to issue the “supporting document for transactions with parties not obliged to issue electronic invoices” in order to be able to support its costs, deductions, and deductible taxes.

Continue the conversation

The Latin America Markets, Tax Group and KPMG in Colombia have developed planning opportunities and would welcome the opportunity to continue the conversation with you.

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