

Title

The Ministry of Finance of Colombia regulates the Significant Economic Presence rule

Brief Summary

On November 27, 2023, the Ministry of Finance of Colombia issued Decree 2039 which regulates how the Significant Economic Presence rule will apply.

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 corporate income (“CIT”) 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 enter into force 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 an annual CIT tax return (in this case the 10% WHT would not apply).

On November 27, 2023, Ministry of Finance issued Decree 2039 (“the Regulations”) establishing the rules of operation of the SEP. As follows a summary of the Regulations:

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

- 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 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 other provisions, 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 Regulations, the criteria to determine if the client/users are located in Colombian territory are as follows:

- 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.

For the sale of goods, the clients/users would be considered to be located in Colombia when at least two of these conditions are met. In the case of services one of the conditions will be sufficient.

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

Under the 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: (a) 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; (b) chose between the non-application of the WHT or the application of the WHT; (c) file the tax return and pay the tax due within the deadlines established by the National Government; (d) the non-resident will also be required to make advanced payments on a bi-monthly basis at a 2% rate upon gross income. The advanced payments would be creditable from the final tax liability determined on the annual tax return to be filed. – It should be noted that in the "Draft Regulations" the Government outlined that the advance payments would be calculated on the net income (i.e., gross income after cancelations, rebates and/or discounts), therefore, there is lack of clarity in this regard.–.
- iii. A "self-managed" and simplified registration process is established following current enforceable rules for non-residents registration with the Colombian Tax Authority ("CTA").
- iv. In the case that the non-resident with SEP has previously registered with the Colombian CTA for VAT purposes as a non-resident service provider, no additional registration process would be required. The non-resident should undertake a simple update of the registration to include its responsibility as a SEP-CIT taxpayer.
- v. A non-resident with SEP that has registered in the RUT opting to file a tax return, can make a "de-registration" provided it meets certain requirements. The request shall be validated and authorized by the DIAN.
- vi. 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.

IV. Rules regarding the order of priority to determine the withholding agent:

The Regulations set forth the following order of priority to determine the withholding agent when, in a single transaction, there are multiple withholding agents involved:

- i. Withholding agents listed in article 368 of the Colombian Tax Code (among Colombian resident entities), unless the seller or provider of services from abroad states under oath that

- it does not meet the requirements to have a SEP in Colombia, or it has opted to file an annual SEP tax return requesting to be exempt of the SEP withholding.
- ii. The financial entity issuer of the debit/credit card, provided that the card is used as a payment method and the financial entity has the sufficient information for the withholding.
 - iii. The payment gateway when they make the payment. It should be noted that the Regulations emphasize that, irrespective of the withholding priority order, the gateway shall provide the information required by the issuer of the debit/credit card to withhold the respective tax when applicable.
 - iv. The cash collectors on behalf of third parties.
 - v. The seller of prepaid cards.
 - vi. Other withholding agents designed as such by the DIAN.

V. Entry into force of the Regulation

The Decree is drafted in a way that two of the articles, namely articles 1 and 12 will entry into force on January 1, 2024. These articles basically regulate elements related to the determination of the CIT for which non-residents with SEP will be liable to and its responsibilities.

The other articles of the Regulations, namely articles 2 thru 11 entered into force on November 27, 2023, refer to different topics such as ability to send requests via questions, claims and suggestion channel (PQRS) regarding registration in the RUT of non-residents with SEP.

VI. Other considerations:

The Regulations also include rules regarding the exchange rates that must be considered for purposes of (i) the filing of the SEP annual tax return (ii) the payment of the SEP CIT tax liability determined in such tax return and (iii) for the payment of the bimonthly advanced payments.

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.

Additionally, the Regulations set forth that the Colombian clients/users acquiring goods or services from non-residents with SEP in Colombia would be allowed deduct the respective payments for income tax purposes and to use / recover any applicable VAT as an input VAT even if no income tax withholding has been applied, as long as the non-resident with SEP has opted to file an annual tax return and has opted to not to be subject to the SEP withholding. The above must be supported by a copy of the RUT of the non-resident with SEP in Colombia. However, it should be noted that the Regulations do not specifically establish any reference to article 122 of the Tax Code regarding payments abroad, so more analysis is required.

Finally, it should be highlighted that the SEP rule introduced by the Tax Reform established that for purposes of the determining when a SEP takes place, activities carried out by related entities should be aggregated. However, the Regulations do not address how the aggregation in question should be determined.

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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.

Name	Phone	Email
<u>Colombia - International Tax</u>		
Ricardo Ruiz	+57 (1) 618 8000	ricardoarui@kpmg.com
Juan C Urrego	+57 (1) 618 8000	jurrego@kpmg.com
Oscar Munevar	+57 (1) 618 8000	omunevar@Kpmg.com