

**International Bar Association (IBA)**

**Recent Developments in International Taxation**

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**Colombia**

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Recently, in Colombia, a tax reform was adopted through Law 2277 of 2022. Although it made several modifications to the tax legal regulations, this report only refers to important modifications in international matters:

### **1. Taxation of non residents who have significant economic presence in Colombia:**

Non-residents with significant economic presence in Colombia were subject to corporate income tax (CIT) in Colombia. It has been set that a person has significant economic presence in Colombia if they maintain deliberate and systematic interactions in the Colombian market, with customers and/or users located in Colombia and, during the previous taxable year, or in the current taxable year had obtained gross income from transactions with Colombian users of around three hundred thousand dollars ( USD \$300.000 aprox.) The rule also specifies that it is presumed that there is deliberate and systematic interaction in Colombian territory when there is marketing deployment with 300,000 or more customers located in Colombia during the previous taxable year or the current taxable year, or when the non-resident establishes the possibility of displaying prices in Colombian pesos (COP).

The non-residents with significant economic presence in Colombia may choose to file the income tax return and pay a fee of 3% on the total gross income derived from transactions with Colombian users and in such case, they will not be subject to withholding tax. If they do not opt for this mechanism (the application of the 3% three percent rate to the total gross income), they will be taxed by the ordinary method and be subjected to the regular tax rate that currently is 35% for the Corporate Income Tax, rate that has not been modified by the recent tax reform.

It is a rule clearly aimed at achieving income taxation to the provision of digital services, which is very in vogue today and, therefore, the regulation creates a kind of "digital service tax" because it is assumed that most, if not all digital service providers abroad will take the 3% tax on gross income option.

It is important to highlight that in Colombia all the provision of digital services from abroad is subject to VAT since the tax reform adopted in 2016 (law 1819 de 2016) including the digital services. The reason is simple: taking into account that the recipient of the service was in Colombia and VAT is a tax levied on consumption, there was no justification for services provided in the country to be taxed while services provided from abroad were not subjected to tax. It is clear that the main justification for the tax is equality for all providers of digital and any other type of services: It does not matter from where the service is provided, because what is important for VAT purposes, as a consumption tax, is the country of destination, the country in which the service is consumed.

## **2. Adoption of a “domestic minimum top up tax”.**

Pillar 2, with the progress made in its development and according to the latest recommendations of the OECD, currently aims to ensure that multinational companies or groups with consolidated revenues exceeding seven hundred fifty (750) million dollars are taxed at least 15% at a global level and therefore, proposes a minimum tax of 15% . It also encourages the OECD members to adopt a domestic minimum top up tax in their jurisdictions, which would allow the country to impose top-up tax on low-taxed profits of multinational groups, rather than allowing a foreign jurisdiction to do so.

Law 2277 of 2022 adopted, in the Corporate income Tax, a domestic minimum top up tax on profits of 15%, that is not properly a domestic minimum top up tax that responds to the recommendations and guidelines given by the OECD regarding Pillar 2 for the following reasons:

First, it applies to any type of taxpayer, not only to multinational companies or companies that consolidate financial statements.

Second, the tax purpose is that no legal entity is taxed in Colombia with an adjusted tax rate (Corporate Income tax) of less than 15%, regardless their income or category.

Third, in the case of parent companies of multinational groups that consolidate in Colombia, it applies to any amount of consolidated annual income, so it does not observe the minimum of SEVEN HUNDRED FIFTTY 750 million euros recommended by the OECD as a threshold.

The tax rate is determined as follows: The adjusted tax between the taxpayer's adjusted accounting profit.

A few categories of taxpayers will not be subject to this minimum tax. These are the following:

- Departmental and local State entities where the State holds more than 90% that exercise monopolies of lottery, and liquors and alcohols that have a special rate of 9%.
- Companies constituted as “Special Economic and Social Zones” in the taxable year in which their corporate income tax rate is 0%
- Those taxpayers whose financial statements are not subject to consolidation and their adjusted profit is less than zero.
- Those taxpayers whose financial statements are subject to consolidation and the sum of the adjusted profit is equal to or less than zero.
- Concession contracts and public-private partnerships.

Even if the tax adopted by Colombia does not correspond in nature to the minimum tax suggested by the OECD in the framework of Pillar 2 because of the reasons explained before, the tax implemented in Colombia does have the potential to ensure, except for the cases that it excluded from its application, that member companies of multinational groups located in Colombia, whose effective tax rate is less than 15% for benefits that the country may have granted them for their location in our territory, end up paying the global minimum tax in Colombia, and in this way, not yield fiscal sovereignty) to other countries. This is something to rescue from the minimum tax created with the recent tax reform.

However, the fact that it has been set out for all taxpayers and not only for companies belonging to multinational groups, blurs the purpose of the rule a bit and ends up affecting small Colombian companies that end up taxing at 15%, without really consulting their ability to contribute or that can potentially reduce foreign direct investment in the country of taxpayers with effective tax rates below 15% for tax benefits granted by Colombia through great efforts, because they can decide to move their investment to a country where this minimum tax does not exist and has effective tax rates of less than 15%. It would have been desirable for the tax to have been enacted only for companies belonging to multinational groups and for a threshold to have been set (considering consolidated income) above which they would be subject to the minimum tax.

### **Treaty developments:**

Currently, Colombia has signed 17 bilateral double tax treaties (DTTs)<sup>1</sup>; 13 of them are in force and 4 of them are not yet in force<sup>2</sup>. Besides these bilateral tax treaties, Colombia, as a member of the Andean community, is subject to decision 578 of 2004, “*regime to avoid double taxation and prevent tax evasion*” which is binding to Bolivia, Ecuador and Peru.

The most recent developments in this area, considering those from 2022 to date, are the following:

1. The signature of the Double Taxation Treaty (DTT) with Brazil took place on August 5<sup>th</sup> of 2022. Not yet in force.
2. The signature of the Double Taxation Treaty (DTT) with the Kingdom of the Netherlands took place on February 16<sup>th</sup> of 2022. Not yet in force.
3. Colombia-Czech Republic double taxation treaty (DTT) entered into force on January 1<sup>st</sup> of 2022.

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<sup>1</sup> The countries with which Colombia has signed a bilateral agreement to avoid double taxation are the following: Brazil, Chile, Czech Republic, France, India, Italy, Japan, Mexico, Kingdom of The Netherlands, Portugal, South Korea, Spain, Switzerland, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, and Uruguay.

<sup>2</sup> The ones not yet in force are: Brazil, Kingdom of the Netherlands, Uruguay and United Arab Emirates.

4. Colombia-Japan double taxation treaty (DTT) entered into force on September 4th of 2022.