E-News from KPMG's EU Tax Centre

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KPMG's EU Tax Centre helps you understand the complexities of EU tax law and how this can impact your business, enabling you to better predict how rules will develop and how to leverage opportunities and minimize risks arising from EU tax law.

E-News provides you with EU tax news that is current and relevant to your business. KPMG's EU Tax Centre compiles a regular update of EU tax developments that can have both a domestic and a cross-border impact. CJEU cases may have implications for your country.

Latest CJEU, EFTA and ECHR

Pending cases and CJEU judgments in the area of direct taxation

The list of Court of Justice of the European Union (CJEU) case law in the area of direct taxation was updated on March 31, 2017, and contains information on both pending cases and CJEU judgements.

Advocate General's Opinion in the *Argenta Spaarbank NV v Belgische Staat* case on the application of the EU Parent-Subsidiary Directive

On April 27, 2017, Advocate General ('AG') Kokott of the CJEU issued her opinion in the *Argenta Spaarbank NV v Belgische Staat* case (C-39/16). The case concerned Belgian rules under which the deduction of interest payments is disallowed to the extent that in the same tax year the taxpayer had received exempt dividends from shares held for less than one year. In dispute was whether these rules are compatible with the EU Parent-Subsidiary Directive.

For more information, please refer to ETF 321.

Advocate General's Opinion in *Austria v. Germany* on the interpretation of 'income from debt-claims with participation in profits'

On April 27, 2017, AG Mengozzi of the CJEU issued his Opinion in the *Republic of Austria v Federal Republic of Germany* case (C-648/15), concerning a dispute between the two Member States brought before the Court pursuant to Article 273 of the Treaty on the Functioning of the European Union (TFEU). The dispute concerned the interpretation of the phrase '*income from (…) debt-claims with participation in profits*' within the meaning of Article 11(2) of the double tax treaty between Austria and Germany.

The AG concluded that the CJEU does have jurisdiction to rule in this dispute and that the disputed phrase must be interpreted as covering income which provides a creditor with a part or a share in the debtor's profits, but not income which varies only in the event of losses incurred by that debtor.

For more information, please refer to ETF 322.

CJEU Opinion on whether the EU can conclude the EU-Singapore Free Trade Agreement alone (Opinion 2/15) and implications for Brexit

On May 16, 2017, the CJEU issued its Opinion on whether the European Union has exclusive competence to sign and conclude the free trade agreement with Singapore ('EUSFTA' or 'the Agreement'). The CJEU's Opinion was requested by the European Commission under the provisions of Article 218(11) TFEU. According to the Court, the provisions of the EUSFTA relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU. Therefore, the Agreement in its current form can only be concluded by the EU and the Member States acting together. It remains to be seen how the CJEU's Opinion will be used by the EU in its future negotiations for a potential free trade agreement with the UK.

For more information, please refer to ETF 323.

CJEU judgment in the *Berlioz Investment Fund S.A. v Directeur de l'administration des Contributions directes* case

On May 16, 2017, the CJEU rendered its judgment in the *Berlioz Investment Fund S.A. v Directeur de l'administration des Contributions directes* case (C-682/15). The case concerned a Luxembourg taxpayer company that refused to provide all the information requested from it by the Luxembourg tax authority – pursuant to a request from the

French tax authorities under the EU Directive on administrative cooperation in the field of taxation ('EU DAC') – and a penalty had therefore been imposed, without the possibility to appeal the demand. The Court found that the taxpayer can rely on the Charter of Fundamental Rights of the European Union to challenge not only the penalty imposed by the Luxembourg tax authorities for not providing the information requested, but also the legality of the demand itself. The CJEU concluded that the condition in the EU DAC regarding the '*foreseeable relevance*' of the information requested was also a necessary condition of the legality of the demand addressed by the Luxembourg tax authorities to the company.

For more information, please refer to ETF 324.

Infringement procedures & referrals to CJEU

Commission requests France to abolish withholding tax imposed on non-resident loss-making companies

The Commission asked France to cancel a withholding tax on dividends distributed by French companies to non-resident companies resident in the European Union or in the European Economic Area (EEA) that are in a loss-making position. According to the Commission, this withholding tax is contrary to the free movement of capital, on the ground that it leads to immediate taxation without the possibility of a refund, whereas French companies in similar situations are not subject to taxation. If France fails to respond to the Commission's reasoned opinion within two months, the case may be referred to the Court of Justice of the European Union. The Commission's May infringements package is available here.

Referrals to CJEU

Denmark

On January 19, 2017, the Østre Landsret requested the CJEU to render a preliminary ruling in the *NN A/S v. Skatteministeriet* case (C-28/17). The CJEU was asked to determine whether non-resident companies that maintain a permanent establishment in Denmark are treated less favorably than resident companies with respect to the off-setting of losses, and to clarify the factors that should be taken into account in assessing whether the 'equivalent condition' introduced by the CJEU in its judgment in the *Philips* case (C-18/11) is met.

Norway

On September 27, 2016, a request was made to the EFTA Court for an advisory opinion in the case of *Yara International ASA v. the Norwegian Government* (E-15/16). The Borgarting Court of Appeal (Borgarting lagmannsrett) asked the EFTA Court to determine whether Norwegian rules, which only allow a tax deduction on group contributions in the case of companies liable to taxation in Norway that pay contributions to other companies that are also liable to taxation in Norway, are compatible with the freedom of establishment under the EEA Agreement. The requirement for tax liability under the disputed legislation is questioned.

EU Institutions

EUROPEAN COUNCIL

Council authorizes the opening of Brexit negotiations and adopts Negotiating Directives

On May 22, 2017, the General Affairs Council (Article 50), in an EU 27 format, adopted a decision authorizing the opening of Brexit negotiations with the UK and nominating the Commission as the EU negotiator. It also adopted Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union ("Negotiating Directives"), which are based on a recommendation presented by the Commission on May 3, 2017, and the guidelines adopted by the European Council (Article 50) on April 29, 2017. The adoption of both documents represents the start of negotiations with the UK, following the notification of its intention to withdraw from the EU.

The Negotiating Directives outline the priorities for the first phase of the negotiations, which include guaranteeing the rights of EU and UK citizens and their family members, reaching agreement on a single financial settlement of the UK's obligations as an EU member, and safeguarding peace, stability, and reconciliation on the island of Ireland .

The first formal meeting between the EU and the UK negotiators is expected to take place in June.

EUROPEAN COMMISSION

European Commission publishes Taxation Paper on tax uncertainty

On April 7, 2017, Taxation Paper No. 67 was published by the European Commission. The paper provides information on the principal sources and effects of tax uncertainty and examines domestic measures and EU initiatives to improve tax certainty.

The paper concludes that policy makers should focus on planning tax reforms properly, with pre-announced consultations and clear communication, and on establishing a structured approach in managing the reform process. It suggests that the best policy at the international level is to improve cooperation in tax matters, not only on information exchange but also by developing a common approach to fighting aggressive tax planning and agreeing on a clear distribution of tax revenues for cross-border investment.

EUROPEAN PARLIAMENT

PANA Committee investigations – update

The European Parliament's Committee of inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion ('PANA Committee') held five meetings between April 6, 2017 and May 9, 2017, where the findings of studies commissioned by the Committee were presented, including the two studies on the "Role of intermediaries in the schemes revealed in the Panama Papers" and "Rules on independence and responsibility regarding auditing, tax advice, accountancy, account certification services and legal services".

In the meeting held on May 4, 2017, Pierre Moscovici, the European Commissioner responsible for Economic and Financial Affairs, briefed the Members of the Committee on current and upcoming Commission initiatives in the area of combating tax fraud and tax evasion, including the planned EU blacklist of tax havens that is to be published later this year.

The Committee also organized a public hearing with representatives of the Channel Islands, Gibraltar and Madeira, who were questioned on their government's role in combating money laundering, tax avoidance and tax evasion. A recording of the Hearing, Statements by the speakers and their replies to the written questions and the official Press Release are available.

European Parliament adopts legislative resolution on hybrid mismatches involving non-EU countries

On April 27, 2017, a legislative resolution on the proposal for a Council directive amending the EU Anti-Tax Avoidance Directive 2016/1164 to address hybrid mismatches with third countries was adopted by the European Parliament. The resolution contains amendments to the draft directive proposed by the Economic and Financial Affairs Council (ECOFIN) on February 21, 2017. The legislative procedure for the proposed amendments is Consultation, meaning that only the European Parliament will be consulted and the proposal will be adopted by the Council.

EU Parliament adopts 'red lines' on Brexit negotiations

On April 5, 2017, the European Parliament adopted a resolution, which officially lays down its key principles and conditions for approval of any agreement with the UK. Members of the European Parliament (MEPs) emphasized the importance of securing equal and fair treatment for EU citizens living in the UK and British citizens living in the EU and called on both sides to negotiate in good faith and full transparency.

ECON Committee organizes public hearing on C(C)CTB

On May 3, 2017, the European Parliament's Committee on Economic and Monetary Affairs (ECON) organized a public hearing on the Common (Consolidated) Corporate Tax Base (C(C)CTB). The purpose of the meeting was to hear the views of various stakeholders (including business representatives and representatives of trade unions), in view of preparing the European Parliament's reports on the C(C)CTB proposal.

Parliament again rejects the AML blacklist

In the plenary session held on May 12, 2017, MEPs vetoed a list drawn up by the European Commission of countries considered to be at high-risk of money laundering, financing terrorism or promoting tax evasion under the EU's Anti-Money Laundering Directive. The list was vetoed because the MEPs consider it too limited.

An earlier list, drawn up last year – a duplicate of one produced by the Financial Action Task Force (FATF) – was rejected by Parliament earlier this year. The Commission currently identifies eleven countries, including Afghanistan, Iraq, Bosnia and Herzegovina, and Syria, which it judges to be deficient in countering money laundering and terrorist financing. This second update makes a minor change to the previous list by removing Guyana and adding Ethiopia.

For more information on the AML blacklist, please refer to ETF 304.

Joint Committee meeting on the public Country-by-Country Reporting Directive

On May 3, 2017, the joint Committee of the ECON and the Committee on Legal Affairs held a meeting in which they discussed the **amendments** for the Proposal amending Directive 2013/34/EU as regards Disclosure of Income Tax Information by Certain Undertakings and Branches ('public CbCR'), tabled by the MEPs. The vote in the joint Committee is scheduled for May 30, 2017.

OECD

New guidance for Automatic Exchange of Financial Account Information in Tax Matters

On April 6, 2017, the OECD released additional Frequently Asked Questions related to the Common Reporting Standard (CRS) and the second edition of the Standard for Automatic Exchange of Financial Account Information in Tax Matters, both in order to support the consistent implementation of the CRS.

For more information, please see the OECD's press release.

Additional guidance on implementation of Country-by-Country reporting

On April 6, 2017, the OECD released additional guidance on the implementation of Country-by-Country (CbC) reporting concerning notably the definition of revenues, the definition of 'related party' for the purposes of Table 1 of the CbC report and the definition of 'total consolidated group revenue'.

KPMG's new Automatic Exchange of Information (AEoI) reporting tool

KPMG has created a tool that helps clients report under the Automatic Exchange of Information (AEOI) requirements, which cover reporting requirements under the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard.

For more information, please refer to KPMG's insights.

Country-by-Country reporting: implementation status and exchange relationships between tax administrations

On May 4, 2017, the OECD announced the activation of ''Automatic Exchange Relationships (AER)'' under the Multilateral Competent Authority Agreement on the Exchange of CbC Reports. More than 700 AERs have already been established in jurisdictions committed to exchanging CbC Reports, including those between EU Member States under EU Council Directive 2016/881/EU.

For more information, please refer to KPMG's insights.

AEOI Avoidance Scheme Disclosure Facility launched

On May 5, 2017, the OECD launched a disclosure facility on the Automatic Exchange of Information (AEOI) portal, which allows parties to report potential schemes to circumvent the Common Reporting Standard (CRS).

For more information, please refer to OECD's press release.

Local Law and Regulations

Germany

Publication of guidance on procedure for non-residents to claim refund of withholding tax on portfolio dividends

On April 13, 2017, updated guidance on the procedure to claim refunds of withholding tax on portfolio dividends by non-residents was published by the Federal Central Tax Office. According to the guidance, as of January 1, 2017, dividends are deemed to be received when payment is due. Furthermore, when a tax treaty provides for a 15 percent withholding tax on portfolio dividends, a refund claim can be filed electronically. However, based on Article 50j of the Income Tax Code, the reclaim must be filed in writing if the withholding tax is less than 15 percent.
The guidance also makes clear that a refund must be claimed within six months of the dividend distribution and banks can submit refund claims on behalf of their clients.

Draft bill on partial/entire non-deductibility regarding preferentially taxed intra-group royalties adopted by Lower House of Parliament

On April 27, 2017, the draft bill on partial/entire non-deductibility for preferentially taxed intra-group royalties was approved by the Lower House of the German Parliament (Bundestag).To enter into force the bill must now be approved by the Federal Council (Bundesrat).

CRS FAQs published by the Federal Central Tax Office

On May 2, 2017, FAQs on the automatic exchange of financial account information in tax matters were published by the Federal Central Tax Office. The most relevant points are: information concerning tax year 2016 must be reported by July 31, 2017, and can be submitted from June 1, 2017; amounts and payments may be reported in EUR, USD or the currency of the account into which the payment is made; official data record descriptions will be available; and integration tests will be conducted.

List of jurisdictions for automatic exchange of information published

On May 5, 2017, a preliminary list of jurisdictions with which Germany will automatically exchange financial account information in tax matters was published by the Ministry of Finance. The exchange will start on September 30, 2017.

Ireland

Update on procedure for requesting opinions/confirmation on EU/ OECD exchange of information requirements

On April 19, 2017, the Irish Revenue's Large Cases Division announced an update to its Tax and Duty Manual, including the procedure for and the additional mandatory information that must be supplied at the time of making a request for an opinion/confirmation where EU and/or OECD exchange of information requirements apply.

Update of offshore funds regime manuals

On April 27, 2017, the Revenue announced updates to two Tax and Duty Manuals on offshore funds (27-02-01 and 27-04-01) aimed at providinggreater clarity on the operation of the offshore funds regime.

Italy

Amendment to patent box regime excludes trademarks from tax benefits

On April 24, 2017, an amendment to the Italian patent box regime was introduced, which excludes trademarks from the list of items that qualify as intellectual property (IP). Only the following items are identified as IP and therefore qualify for patent box treatment: software protected by copyright, patents, legally protectable designs and models, legally protectable processes, secret formulas, industrial/commercial/scientific knowledge including know-how. It is important to note that a certain percentage of income attributable to the use of qualifying IP is excluded from the tax base.

For more information, please refer to KPMG's TaxNewsFlash.

Luxembourg

New patent box regime announced for 2018

On April 26, 2017, the prime minister announced the introduction of a new patent box regime in 2018. The purpose of the new regime is to encourage research and development (R&D) activities in Luxembourg and to stimulate R&D spending by foreign investors in Luxembourg.

For more information, please refer to KPMG's TaxNewsFlash.

The Netherlands

The American Internal Revenue Service (IRS) summons for Dutch tax evasion authorized by US District Court

On April 3, 2017, the US Justice Department announced that the US Federal District Court in the Western District of Texas authorized the US Internal Revenue Service to serve a John Doe summons to seek the identities of Dutch residents who have debit/credit cards linked to bank accounts located outside the Netherlands. The purpose of the summons is for the Dutch government to determine if Dutch residents thus identified are in compliance with Dutch tax law. The request is based on the Netherlands–United States Income Tax Treaty.

Bill on Country-by-Country Reporting implementing Directive 2016/881 adopted by Parliament

On April 18, 2017, the Lower House of the Dutch Parliament adopted a bill implementing Directive 2016/881 on the Mandatory Exchange of Information in the field of taxation (EU CbCR) into national legislation.

Portugal

Publication of annual disclosure of amounts transferred to tax havens

On May 3, 2017, Law No. 14/2017 was gazetted.This law requires tax authorities to annually publish online the total annual value of amounts transferred by taxpayers to countries, territories and regions with privileged tax regimes. The measure took effect on May 4, 2017. Its purpose is to combat fraud and tax evasion.

Sweden

Tax Agency issues statement on the classification of foreign partnerships as legal entities

On April 7, 2017, a statement was issued by the Swedish Tax Agency clarifying the classification of a foreign partnership as a separate legal entity, even though a Swedish partner could use assets of the partnership.

Under Swedish law, foreign legal entities are taxed on certain types of income (e.g. Swedish permanent establishment income), whereas Swedish companies are taxable on their worldwide income.

Guidance on interest compensation for excess withholding tax clarified by tax authorities

On April 20, 2017, a clarification was issued by the Swedish tax authorities on interest compensation for excess withholding tax. The clarification was made following a recent decision rendered on April 11, 2017, by the Swedish Tax Agency, in which it ruled that interest compensation for excess withholding tax will only be granted if the withholding tax had been withheld contrary to EU law. The decision also noted that interest is calculated from the day after the tax was withheld to the day of recovery. Claims regarding refunds of excess withholding tax may be filed within five years of the pay date and the decision may be appealed within two months.

Tax Agency clarifies tax treatment of foreign mutual funds

On March 22, 2017, the Swedish Tax Agency published a clarification on the treatment of foreign mutual funds, which was based on a Supreme Administrative Court decision in a case unrelated to WHT (case no. (No. 45310-15; judgment dated March 18, 2016). According to the clarification, foreign non-UCITS funds that are considered to be “foreign legal entities’’ are not comparable to Swedish mutual funds (UCITS) or to Swedish special funds (non-UCITS), for the purposes of the Swedish WHT Act and the WHT exemption rule.

The question of whether overseas non-UCITS funds that are foreign legal entities are comparable to Swedish funds in the context of withholding tax is currently subject to litigation in the Administrative Court of Appeal. In decisions recently issued by the Administrative Court, the Swedish Tax Agency's interpretation has not been upheld. The Administrative Court has continued to grant repayments to non-UCITS funds that are foreign legal entities, stating that the Supreme Administrative Court decision of March 18, 2016, which concerned standardized income taxation for investors, does not affect an EU law assessment in relation to dividend withholding tax.

United Kingdom

New register and reporting of "beneficial ownership" of trusts

The UK government is introducing a new Trust Register. Trustees will be required to comply with reporting regulations via an online register. This register won't be available to the public but will be accessible by law enforcement bodies and the UK Financial Intelligence Unit.

The rules are still in draft form which means that amendments are possible. However, this new register is expected to enter into force on June 26, 2017.

The purpose of this new register for trustees is to comply with the Fourth Anti-Money Laundering Directive but also with HMRC's move towards digitalization.

For more information, please refer to the KPMG's TaxNewsFlash.

Finance Act 2017 enacted

On April 27, 2017, Finance Bill (No. 2) 2016-17 received Royal Assent and was enacted as Finance Act 2017. The Bill introduced changes to interest restrictions, loss relief and the substantial shareholdings exemption for the purposes of corporate income tax.

For more information, please refer to KPMG's TaxNewsFlash.

Update on hybrid mismatch guidance

On March 31, 2017, Her Majesty's Revenue and Customs (HMRC) published an update on its draft hybrid guidance. This notably concerns quasi-payments, hybrid entity double deduction mismatches and imported mismatches.

For more information, please refer to KPMG's TaxNewsFlash.

Local Courts

Netherlands

Dutch Supreme Court judgments on interest deductions for ´cash box´ companies

On April 21, 2017, the Dutch Supreme Court rendered judgments (15/05278, 15/05357 and 16/03673) in three cases concerning the deductibility of interest on loans to a Dutch group. The facts of the cases can be summarized as follows:
The group wanted to deduct the interest paid on intercompany loans from the taxable

gains of recently acquired Dutch companies that had generated the gains from disposals of businesses or assets before being acquired. The loans, which were externally sourced but routed through a group company, were used to fund shareholdings in non-Dutch group companies. Dividends were paid by the latter to the Dutch companies in question, e.g. to fund the interest payments on the loans. These dividends were exempt from tax under the Dutch participation exemption. The tax authorities refused the deductions, mainly on two grounds: (1) the Dutch anti-avoidance doctrine of 'fraus legis' and (2) Dutch anti-avoidance legislation aimed at artificially created interest payments. While the cases primarily involved the interpretation of domestic law, they raised two EU law-related issues. The first concerned the argument that the interest deduction should be denied, because it related to tax-exempt dividends and this was contrary to the intent of the Dutch corporate income tax rules (one of the constituent elements of the 'fraus legis' doctrine). The Supreme Court noted that the ability to deduct such interest was the direct result of CJEU case law (the Bosal case) and so could not be said to be contrary to Dutch tax rules. The second concerned the taxpayer's argument that to refuse a deduction would be discriminatory since a deduction would have been allowed if the dividends had been received from Dutch companies. The Supreme Court noted that it was settled CJEU case law that taxpayers could not invoke EU law in cases of tax avoidance or tax evasion.

District Court of Zeeland-West-Barbant judgment on portofolio dividends received by Japanese pension fund

On March 30, 2017, the District Court of Zeeland West-Barbant rendered judgment in case no. AWB 14_7470 concerning a dividend withholding tax refund on portfolio dividends received by a Japanese pension fund. The dividends had initially been taxed at 15 percent. The pension fund was not subject to corporate income tax in Japan and therefore could not credit the withholding tax incurred in the Netherlands against its profit tax liability or obtain other tax relief. The pension fund requested a refund of the Dutch withholding tax based on the free movement of capital in relation to third countries as provided for in Article 63 of the Treaty on the Functioning of the EU. The taxpayer also referred to the CJEU's decision in the *Commission v. Finland* (C-342/10) case, in which the Court ruled that the legislation of a Member State that taxes dividends paid to foreign pension funds at a higher rate than that applied to domestic pension funds is contrary to the free movement of capital. However, the tax inspector refused the refund, arguing that in order to obtain a refund the pension fund must be comparable with a Dutch pension fund. Under the Dutch Corporate Income Tax Act (CITA) (Section 5(1)(b) and (3) and Section 3 of the Decree implementing the CITA), pension funds established in the Netherlands are exempt from corporate income tax if they are set up for the primary purpose of caring for certain categories of people (e.g. employees and former employees in the case of invalidity and old age).
According to the Court, the Japanese pension fund had not met the conditions for a corporate income tax exemption and it therefore ruled that the fund was not entitled to a refund of dividend withholding tax.

The United Kingdom

Coal Staff Superannuation Scheme Trustees Ltd: request for expedited referral to CJEU in light of Brexit

This case concerns the corporate trustee of a pension fund that wanted to have its case referred to the CJEU for a preliminary ruling as soon as possible. It argued that the CJEU will no longer have jurisdiction over UK-related cases post-Brexit and that it will thus be ‘’peremptorily deprived of […] ability to seek assistance of the Court’’ if the issue is not promptly referred to the CJEU.

On April 26, 2017, the Upper Tribunal (UTT) dismissed the appeal because of the difficulty in determining how many questions to refer to the CJEU and because it is unlikely that this case will have repercussions beyond the facts at issue. The UTT also justified its decision on the ground that there is already an important established body of case law from the CJEU on restrictions on the free movement of capital.

Robert van der Jagt
Chairman, KPMG’s EU Tax Centre and Partner,
Meijburg & Co

Key links

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KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen,
Netherlands