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E-News from the EU Tax Centre

Issue 137 – July 27, 2021

KPMG's EU Tax Centre compiles a regular update of EU and international tax developments that can have both a domestic and a cross-border impact, with the aim of helping you keep track of and understand these developments and how they can impact your business.

Latest CJEU, EFTA and ECHR

COURT OF JUSTICE OF THE EUROPEAN UNION

AG opinion on the Spanish sanctions applicable for failure to report assets held abroad

On July 15, 2021, Advocate General (AG) Henrik Saugmandsgaard Øe issued his opinion in the case Commission vs Spain (C-788/19). The case concerns the sanctions imposed by Spain for failure to report assets held abroad.

Under Spanish legislation introduced in 2012, Spanish taxpayers are required to disclose information on assets (including properties, bank accounts and financial assets) held abroad –

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Form 720. Failure to comply with the obligation leads to several negative consequences, including classifying the assets as unjustified asset gains and their inclusion in the general tax base regardless of the date of acquisition, imposing a fine of 150 percent, as well as fixed fines. The European Commission found that the sanctions are disproportionate and discriminate against taxpayers who invest across borders in the EU Single Market. As a result, it decided to refer Spain to the Court of Justice of the European Union (CJEU).

The AG analyzed the Spanish legislation in light of the freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU). In the AG's view, the regulations represent a restriction on the free movement of capital as they can deter Spanish tax residents from investing in other jurisdictions. Since this specific restriction can be justified by the objectives pursued by the legislation at issue (i.e. the fight against tax fraud and tax evasion), the AG focused on the question of whether the sanctions are proportional.

The AG noted that, in the specific case of real estate, and bank accounts opened abroad after the Council Directive 2014/107/EU on mandatory automatic exchange of information in the field of taxation entered into force, the Spanish authorities had the means to carry out the necessary checks to determine additional tax liabilities. Therefore, in his view, sanctioning the failure to disclose this information or the late submission of the Form 720 by treating the assets as unjustified capital gains and imposing a fine of 150 percent of their value represent disproportionate measures, as they go beyond what is necessary. On the other hand, for cases when the old directive on mutual assistance applied – where the exchange of information was not automatic or compulsorily – it could be argued that the sanctions are proportionate.

The AG also found that the fixed fines applicable under the regulations at hand are higher than those applied in internal situations. As such, he concluded that the fines represent a breach of EU law.

EFTA

Referral regarding the Norwegian limited interest deduction rule

On July 1, 2021, the Oslo District Court requested an advisory opinion from the EFTA Court in a case (E-3/21) concerning the compatibility of the Norwegian limited interest deduction rule with the EEA agreement.

State Aid

General Court decision on Commission's decision to investigate several Dutch tax rulings

On July 14, 2021 the General Court of the European Union issued its judgment in a case (T-648/19) concerning the Commission's decision to initiate a formal investigation procedure with regard to several tax rulings issued by the Dutch tax administration.

In short, the disputed tax rulings were issued for two Dutch holding companies (ultimately owned

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by US corporations) and endorsed a method to calculate the royalties paid by the Dutch entities to other group companies for the use of the intellectual property.

The European Commission performed a provisional assessment and found that the level of royalties might be higher than what independent companies would have negotiated. As a result, in their view, the taxable profit of the Dutch subsidiaries was lower than it would have been if the royalties had been priced in accordance with the arm's length principle. Based on these findings, the Commission considered that the tax rulings conferred a selective advantage to the Dutch subsidiaries and decided to open an in-depth investigation. The taxpayers (i.e. the Dutch subsidiaries) initiated a judicial action before the General Court of the EU.

In its July 14 judgment, the General Court dismissed the grounds for annulment submitted by the taxpayers and dismissed their action.

The Court considered that the Commission did not initiate prematurely the formal investigation procedures. As such, the Commission was entitled to treat the rulings as being individual State Aid at this stage of the assessment (without extending the preliminary investigation to include similar tax rulings issued for other companies, or to companies with a similar structure). The Court reiterated that the decision at hand is not definitive and may evolve during the formal investigation. Moreover, the Member State and other interested parties would be given the opportunity to participate effectively in the formal investigation and provide additional information.

The Court also found that the Commission complied with the procedural rules, did not fail to meet its obligation to state reasons and did not perform errors of assessment.

For more details, please refer to a KPMG TaxNewsFlash or the Court's press release.

EU Institutions

EUROPEAN COMMISSION

European Commission proposes a series of carbon pricing reforms as part of its 'Fit for 55 package'

On July 14, 2021, as part of its European Green Deal initiative, the European Commission released a package of reforms (so-called the "Fit for 55 package") aimed at ensuring the EU meets its emission reduction goal of a 55 percent reduction of 1990 emission levels by 2030. The package includes, inter alia, the following legislative proposals and policy initiatives:

- a revision of the EU emissions trading system (ETS). Key changes would extend the ETS coverage to include a broader scope of sectors, increase emission caps, and progressively withdraw free permits for emission intensive, trade exposed sectors;
- the introduction of a carbon border adjustment mechanism (CBAM), which establishes a "shadow ETS" for certain goods being imported into the EU to avoid further carbon leakage;

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- a revision of the Energy Taxation Directive, to align the taxation of energy products with EU energy and climate policies. The aim is to promote clean technologies and removing existing incentives encouraging the use of fossil fuel.

For more details please refer to ETF 454 and the Commission's dedicated webpage and FAQ document.

Proposals to strengthen the EU anti-money laundering rules

On July 20, 2021 the European Commission released a package of legislative proposals aimed at strengthening the EU's anti-money laundering rules. The package consists of four proposals, as follows:

- the establishment of a new EU anti-money laundering authority (AMLA). The body will coordinate its national counterparts in each EU Member State and enhance cooperation among national financial intelligence units. The Commission aims to establish the AMLA in 2023, with the authority becoming fully functional in 2024;
- a new regulation on anti-money laundering /countering the financing of terrorism rules, which will also revise the entities subject to these rules;
- a directive which will replace the existing AML Directive (EU Directive 2015/849, as subsequently amended);
- a recast of the regulation on transfers of funds (Regulation 2015/847).

For more details please refer Commission's press release and FAQ document.

EUROPEAN PARLIAMENT

FISC – public hearing on tax transparency

On September 9, 2021, the European Parliament Subcommittee on Tax Matters (FISC) will hold a public hearing on tax transparency. The discussion will take stock of current initiatives or legislative proposals in this area and will aim to identify areas that could benefit from increased transparency.

For more details please refer to the European Parliament's press release.

Local Law and Regulations

France

DAC6 filing services temporarily suspended

On July 8, 2021, the French tax authority announced that the national online service for reporting cross-border arrangements under the EU mandatory disclosure rules (DAC6) will be temporally

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suspended starting July 29. The service will resume as of the beginning of September and the filing deadlines will be extended accordingly.

Parliament approves “corrective" Finance bill, including changes to loss carry-back rules and to withholding tax refunds

On July 12, 2021, the French Parliament approved the “corrective" Finance bill 2021. The bill includes a temporary extension of rules on the carry-back of losses, i.e. for up to the previous three tax years (previously up to one year), and the removal of the EUR 1 million ceiling – see E-news Issue 134. The changes were introduced based on the Commission’s recommendation on the tax treatment of losses – see ETF 449.

The bill also seeks to align the domestic withholding tax on capital gains derived by non-resident shareholders with EU law. Under the French participation exemption regime, capital gains derived by resident companies on the sale of qualifying participations are 88 percent exempt from corporate income tax. On the other hand, French withholding tax applies on capital gains derived by non-residents, at the standard rate of French corporate income tax (currently 28 percent) if the participation exceeds (or exceeded at any time in the previous five years) a 25 percent threshold.

In order to make this legislation compatible with EU law, French administrative regulations were issued, allowing parent companies resident in another EU Member State to qualify for the participation exemption above, provided certain conditions are met. However, based on a decision dated October 14, 2020, the French tax authorities may not rely on their own guidance to provide a partial refund – see E-news Issue 122. Rather, as the domestic legislation is contrary to the EU freedoms, the corresponding withholding tax must be refunded in full.

The “corrective” Finance bill 2021 aims to close the loophole “opened” by this court decision. Thus, for shares sold from June 30, 2021, the French tax code would allow EU / EEA companies a refund of the French withholding tax. The refund would be equal to the difference between the domestic withholding tax due and the amount of the French corporate income tax that would have been due under the participation exemption regime, had the seller been a French resident entity. The refund would also apply for certain non-EU/EEA residents, provided certain conditions apply.

For more details please refer to a KPMG TaxNewsFlash.

Germany

Termination of the double tax treaty with the United Arab Emirates

Based on a recent update published by the German Ministry of Finance, Germany has decided not to extend the double tax treaty concluded with the United Arab Emirates. The current treaty stipulated that it would remain in force for ten years after its entry into force, and it could be prolonged for another ten years if both parties agreed. Since Germany notified the UAE that it does not intend to extend the treaty, it will be terminated as of December 31, 2021.

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Gibraltar

Corporate income tax rate increases in light of the recent OECD/G20 agreement on BEPS 2.0

On July 20, 2021, Gibraltar's Chief Minister announced several tax measures, including the increase of the current corporate income tax rate. In short, the rate would increase to 12.5 percent (from the current 10 percent) for accounting periods beginning after July 20, 2021. The Chief Minister explained that this step increase is meant to avoid an abrupt upward change to a tax rate of 15 percent if or when there is a global agreement instituted for a minimum tax rate.

For more details please refer to a KPMG TaxNewsFlash.

Ireland

Public consultation on the OECD's revised two-pillar approach

On July 20, 2021, the Irish Department of Finance launched a public consultation on the OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting's revised two-pillar approach.

As previously reported, Ireland is engaged in discussions at OECD level but did not sign the IF Statement of July 1, and noted their reservations on the proposal for a global minimum effective tax rate of "at least 15 percent" – see E-news Issue 136.

The current consultation aims to identify both the opportunities and the challenges brought by the IF proposals, in light of Ireland's tax framework and industrial policy. Interested parties are invited to provide comments by September 10.

Kenya

Finance Act 2021 enacted

On July 1, 2021, the Finance Act 2021 was published in the official gazette. Changes include, inter alia:

- the introduction of country-by-country reporting for multinational enterprises;
- updated beneficial ownership requirements for the purposes of applying reduced double tax treaty rates;
- the extension of the scope of corporate income tax to include income accruing from businesses carried out "over the internet or an electronic network', including through a digital marketplace;
- limiting digital services tax to non-resident entities, while also reducing the scope of the tax (media services or income subject to withholding tax would be exempt);
- removing the ten-year limit for carrying forward tax losses;
- updated thin capitalization rules, i.e. the deductible interest expense is limited to 30 percent of EBITDA.

For more details please refer to a KPMG TaxNewsFlash

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Mauritius

Finance Bill 2021 released for consultation

The Finance Bill 2021 has been released for consultation in Mauritius. Key tax changes include incentives offered to non-citizens to work and live in Mauritius, including the introduction of a 10-year family occupation permit. The bill would also bring changes in respect of trusts, while foundations would no longer be eligible to apply for non-residence and be exempt from income tax in Mauritius.

For more details please refer to a KPMG TaxNewsFlash

Oman

Country-by-country reporting clarifications

On July 7, 2021, the Oman tax authority announced the suspension of a requirement to file a country-by-country (CbC) report for the fiscal year 2020 - see E-news Issue 136.

Subsequently, on July 14, 2021, the tax authorities issued a clarification that the CbC reporting suspension is applicable only to those qualifying multinational entities (MNE) groups with an "ultimate parent entity" resident outside Oman. Furthermore, the clarification explicitly provides that the CbC notification requirement for reporting fiscal year 2021 continues to apply for all covered tax resident entities in Oman and is to be filed on or before December 31, 2021.

For more details please refer a KPMG TaxNewsFlash.

Turkey

Clarifications on beneficial ownership notification requirements

On July 13, 2021, the Turkish tax authorities published guidelines detailing the scope and procedural aspects of the recent beneficial ownership notification requirements. Based on the guidelines, the beneficial owner is defined as:

- for legal entities: individuals holding more than 25 percent of the legal entity, and individuals ultimately controlling the company (in the event that the shareholders holding more than 25 percent of the shares are not the real beneficiaries / no individual holds more than 25 percent);
- for partnerships: individuals who exert the ultimate control on the partnership, and senior executives of the partnership if the real beneficiary can not be identified;
- for trusts: persons holding the title of founder, trustee, manager, auditor or persons with influence over the organization.

The first notification is due by August 31, 2021.

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Local Courts

Italy

Supreme Court decision on the interpretation of the beneficial ownership clause

On June 22, 2021, the Italian Supreme Court issued its judgment (Order 17746/ 2021) in a case concerning the applicability of the double tax treaty between Italy and the Netherlands to royalties paid to a Dutch company. The Italian tax authorities challenged the applicability of the favorable treaty provisions on the grounds that the Dutch recipient is a conduit company, which is not the beneficial owner of the payments.

In its ruling, the Supreme Court overturned the decision of the Regional Tax Commission for Lombardy, which previously determined that the Italy-Netherlands treaty was applicable based on the tax residence certificate made available by the Dutch recipient and a statement confirming that the entity is the beneficial owner of the payment.

The Supreme Court argued that the regional tax commission did not properly interpret the concept of "beneficial ownership", which, in their view, is aimed at tackling tax treaty abuses. The court also reiterated its previous case-law based on which only the person having legal and economic control over the income can be treated as the beneficial owner. Moreover, the burden of proof for identifying the beneficial owner rests on the Italian payer that has the obligation to withhold at source the tax due by the non-resident.

Netherlands

Interest deduction on group loan, hybrid elements in group structure

The Dutch Supreme Court (*Hoge Raad*) issued its judgment in a case concerning a claim for the deduction of interest on a loan entered into to finance an acquisition, where the interest costs were also deductible in other countries due to hybrid elements in the group structure.

The Supreme Court dismissed an appeal of the Deputy Minister of Finance. The Deputy Minister first contested the decision of the lower appellate court that the interest costs were arm's length and therefore, in principle, deductible. The Supreme Court, however, noted that taxpayers have the freedom to choose the method of financing companies. This freedom also applies in cases involving group companies. In the Court's view, the fact that the financing method selected, e.g. loan financing versus capital contribution, results in a lower tax burden does not alter the business reasons behind the transaction. Therefore, the interest that is payable can be an arm's length expense even where this concerns group loans, provided that the conditions for the group loans were determined in accordance with the arm's length principle.

The Deputy Minister also contested the conclusion of the lower appellate court that the interest deduction was not prohibited by Dutch anti-abuse provisions (Section 10a of the Corporate Income Tax Act 1969). In short, the provisions at hand limit the deductibility of interest expenses related to group loans. Several exceptions apply, including in cases where an external loan was used to finance the internal loan, provided there is a "parallelism" (similar characteristics) between the two. The appellate court had determined that the taxpayer could invoke the rebuttal provision because the interest was, in substance, payable to a third party. According to the lower

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appellate court, there was sufficient parallelism between the group loan and third-party loans, and this was not altered by the fact that an entity involved with the financing structure was a hybrid entity (an entity that is regarded as a transparent entity by one country and as a non-transparent entity by another).

Lastly, the argument that the lower appellate court had wrongly rejected the tax inspector's appeal on the basis of abuse of law arguments was also dismissed by the Supreme Court. In accordance with previous case law, the Supreme Court concluded that using an asymmetrical treatment of benefits from a foreign participation (exempt under the participation exemption) and of costs related to that participation (deductible pursuant to a 2003 judgment in the Bosal case by the Court of Justice of the European Union) is not contrary to the spirit and intent of the law—provided that the interest costs are set off against acquired profits or against benefits created in another artificial manner.

For more details please refer a KPMG TaxNewsFlash.

KPMG Insights

KPMG Insights into the new Pillar 1 and Pillar 2 webcast

On Thursday, July 22, KPMG organized a webcast on insights into the new Pillar 1 and Pillar 2 framework, during which KPMG firms' speakers provided perspectives from the United States, Europe, the UK, China and Australia. The webcast slides and replay will be available shortly on KPMG's Future of Tax & Legal webcast series page.

Navigating tax transparency - KPMG Tax Impact Reporting

With environmental, social and governance (ESG) rising on leadership agendas globally, tax practices and governance are becoming critical ESG measures, with tax transparency often being used as a key metric for demonstrating a responsible attitude towards tax.

KPMG Tax Impact Reporting can assist in understanding and progressing tax transparency within your business, helping to inspire both confidence and support from investors, customers and regulators. Through this service offering, KPMG professionals from around the world can help your tax department inform stakeholders of your business's approach to tax, use data-driven methodologies to help accurately compile information on your tax footprint, provide guidance for compliance with tax transparency standards and changes, and use leading technology solutions to support your business on its journey.

For further details please refer to the dedicated KPMG page and the related brochure.

Country-by-country reporting

Tax transparency is here to stay. A combination of public pressure and political willpower at both the G20/OECD and European Union (EU) levels has resulted in a paradigm shift in the global

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tax landscape.

Non-public country-by-country reporting is certainly helping tax authorities gain a better understanding of the overall tax picture of an MNE business and structure, and help ensure better coordination between authorities to prevent double non-taxation. Further on public country-by-country reporting brings additional considerations and concerns to be weighed against the perceived benefits.

For the latest information on the EU's initiatives on public and non-public country-by-country reporting please refer to the dedicated KPMG page.

Taxation of the Digitalized Economy

KPMG publishes an overview of tax measures implemented, proposed and announced in response to the challenges arising from the digitalized economy. For further details concerning the tax treatment of the digital economy, including digital services tax, please refer to the dedicated KPMG page and the KPMG digital economy tax tracker mobile app

DAC6 Resources

KPMG's EU Tax Centre publishes an overview of latest developments and country summaries on the implementation of the Mandatory Disclosure Requirements (MDR of DAC6), including a DAC6 transposition and reporting overview (updated February 23, 2021). KPMG's DAC6 Summary and Observations memo is also available for download. For further information on how KPMG can assist you in meeting the demands of the EU MDR regime, please refer to the dedicated KPMG page.

Tax measures in EU Green Deal - Carbon Border Adjustment Mechanism (CBAM)

According to the UN, as of June 2021 there are 195 signatories to the Paris Agreement to limit their CO2 emissions. However, the Paris Agreement permits countries to set their own ambitions within certain parameters. The EU has stated its ambition to cut emissions by 2030 by 55 percent in comparison with 1990 levels. This commitment was made as part of the EU Green Deal, which is a comprehensive package of tax and non-tax measures, which includes, among others the CBAM.

For on overview of the features of the EU CBAM and what it means for businesses please refer to the dedicated KPMG page.

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