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E-News from the EU Tax Centre

Issue 148 – February 15, 2022

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.

Infringement Procedures and CJEU Referrals

Commission sends letters of formal notice to three Member States

On January 27, 2022, the European Commission sent letters of formal notice to Bulgaria, Greece and Spain due to a failure of each jurisdiction to correctly transpose the reverse hybrid mismatch provisions of Article 9a of the EU Anti-Tax Avoidance Directive 2017/952 ("ATAD 2") into domestic law. The letters of formal notice have not been made publicly available by the European Commission.

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Each Member State has two months to respond to the arguments raised by the European Commission, after which the Commission may decide to send a reasoned opinion.

As reported in E-News issue 147, the Bulgarian Parliament approved a first reading of a bill on January 20, 2022 that will introduce reverse hybrid mismatch rules in accordance with ATAD 2. The bill will need to be further approved in a second and final reading.

For more information, please refer to European Commission infringement procedures website.

EU Institutions

EUROPEAN PARLIAMENT

European Parliament sub-committee on tax matters (FISC) meeting on energy taxation

On February 10, 2022, the European Parliament sub-committee on tax matters (FISC) held a public meeting in which the sub-committee received a presentation on a review completed by the European Court of Auditors on “Energy taxation, carbon pricing and energy subsidies”. The review found that, while subsidies for renewable energy have almost quadrupled between 2008 and 2019, the level of subsidies for fossil fuels has remained relatively stable, with fifteen EU Member States currently spending more on fossil fuel than on renewable energy subsidies. The review also outlines how energy taxation can support efforts to tackle climate change but notes that the current levels of taxation do not reflect the extent to which different energy sources pollute. In this regard, the review states that carbon pricing and energy subsidies are important tools for achieving climate goals and concludes that the main challenge, in the opinion of the European Court of Auditors, is “how we strengthen the links between regulatory and financial measures to find the right mix between the two”.

For more information, please refer to the European Parliament FISC sub-committee webpage.

FISC meeting on EU dialogues with third countries and international institutions

On February 1, 2022, the European Parliament sub-committee on tax matters (FISC) held a public meeting on EU dialogues with third countries and international institutions. The meeting was structured in two panels.

The first panel focused on the position that the European Union plays within the framework of international negotiations on tax matters. During the meeting, it was noted that revenues generated by the OECD Pillar Two BEPS proposals for a global minimum effective tax rate would accrue more heavily to high-income jurisdictions, with lower-income jurisdictions still facing the administrative burden of implementing the new Pillar Two rules.

The panel contributor also noted the impact that the EU list of non-cooperative jurisdictions can have on shaping relationships between the EU and third countries – highlighting the positive effect that the listing process can have in incentivizing the introduction of measures to counteract harmful tax practices. However, it was also noted that the listing process can be subject to political dynamics driven by specific interests and that, in the contributor’s view, the listing criteria are not always

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applied in a consistent manner across all jurisdictions. The adverse impact of listing and related sanctions on the economic and social development of lower-income jurisdictions was also highlighted as an area of concern.

Following these panel contributions, a representative from the European Commission also discussed Commission initiatives in the areas of:

- The European Commission's role in OECD discussions and cooperation with the OECD;
- The Commission's dialogue with third countries and international institutions in the context of the EU list of non-cooperative tax jurisdictions;
- The EU-UK dialogue on countering harmful tax regimes; and
- Developments made by the European Commission in terms of administrative cooperation with third countries.

During the second panel discussion, representatives from the African Tax Administration Forum (ATAF) presented a summary of positions on the result of tax negotiations at OECD/G20 level, particularly the Pillar One and Two BEPS 2.0 proposals. In this regard, it was emphasized that even though Pilar Two is a step in the right direction, the reform of the global tax rules does not address the fundamentals of Africa's needs. In particular, the ATAF called for a fairer allocation of taxing rights between residence and source jurisdictions and an increase of the global minimum tax rate from 15 percent to 20 percent to help stem profit shifting out of Africa by some multinationals. The panel also heard that the ATAF continues to work with African governments to enhance exchange of information capabilities.

For more information, please refer to the European Parliament FISC subcommittee website.

OECD and other International Institutions

OECD

Public consultation on Model Rules for Nexus and Revenue Sourcing (Pillar One – Amount A)

On February 4, 2022, the OECD/G20 Inclusive Framework on BEPS released for public comment Draft Model Rules for Nexus and Revenue Sourcing in relation to Amount A of the OECD Pillar One solution to reallocate profits of multinational enterprises to market jurisdictions.

The Draft Model Rules for Nexus and Revenue Sourcing are part of the to be developed Model Rules on the functioning of Amount A of the Pillar One solution. According to the public consultation document, the Model Rules are developed to serve as the basis for the substantive provisions that will be included in the Multilateral Convention (MLC) implementing Amount A. They shall also provide a template for the implementation of the new taxing rights over Amount A in a jurisdiction's domestic legislation.

The nexus rules provide for a nexus test that is only satisfied when the amount of revenue that an MNE derives from a jurisdiction is material (in general, where the MNE derives at least EUR 1 million in revenue). To determine whether an MNE has sufficient nexus to a jurisdiction, the revenue sourcing rules prescribe how to identify the jurisdiction in which revenue arises for a given type of revenue. Based on this identification, MNEs are required to source all revenue, generally on a transaction-by-transaction basis, to the respective market jurisdiction using reliable allocation indicators.

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Comments on the Draft Model Rules for Nexus and Revenue Sourcing are due before February 18, 2022. For more details, please refer to Euro Tax Flash issue 465 and the OECD's release.

Multilateral Instrument updates

On February 9, 2022, Lesotho, Thailand and Viet Nam signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

The MLI now covers 99 jurisdictions (68 ratifications) and in total 2,898 unique tax treaties that have been listed by those signatories. A number of 1,821 treaties has already matched, i.e. treaties that have been notified by (at least) two signatories, and are expected to be modified by the MLI.

Measures included in the MLI address treaty abuse, strategies to avoid the creation of a "permanent establishment", and hybrid mismatch arrangements. The MLI also enhances the dispute resolution mechanism, especially through the addition of an optional provision on mandatory binding arbitration, which has been taken up by 33 jurisdictions as of February 2022.

For more information, please refer to the OECD press release.

Local Law and Regulations

Denmark

Updated guidance on transfer pricing documentation

On February 3, 2022, the Danish Ministry of Culture released a statement proposing a 5 percent tax on revenue for streaming services in Denmark. The collected revenue would be used to fund the production of Danish film and television industry.

For an overview of existing, proposed and withdrawn digital services taxes, please refer to KPMG's development summary of the taxation of the digitalized economy.

Updated guidance on transfer pricing documentation

On January 31, 2022, the Danish Ministry of Finance published updated guidance with respect to the legislative amendments to transfer pricing rules (November 2021) requiring the submission of the transfer pricing documentation within 60 days of the due date for filing the tax return, unless an extension is granted (for previous coverage see E-News issue 144).

The guidance provides the possibility to submit the prior year's master file as a preliminary master file where the master file for the current fiscal year is not final by the submission due date and the prior year's master file is less than one year old. In this case, it is further required to briefly describe any significant changes concerning the taxpayers that are not covered in the local file.

The new transfer pricing documentation requirements apply for fiscal years beginning on or after January 1, 2021.

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Germany

Guidance on the application of the royalty deduction limitation rules published

The German Federal Ministry of Finance recently issued circulars on the application of the royalty deduction limitation rules dated January 5 and 6, 2022.

Those rules were introduced with effect from January 1, 2018 and provide that royalty expenses are not deductible or are only partially deductible where the corresponding income for the foreign recipient is subject to lower taxation deviating from standard taxation (i.e. preferential tax regime) and the recipient is a related party of the payor. The deduction limitation does not apply if the preferential tax regime applied at the level of the recipient complies with the OECD's nexus approach.

The guidance dated January 5, 2022, deals with the general application of the rules and provides clarifications on the definition of harmful preferential tax regimes, nexus requirements and the burden of proof for taxpayers. In addition, the guidance dated January 6, 2022, includes a non-exhaustive list of preferential tax regimes classified as harmful by the OECD Forum on Harmful Tax Practices (FHTP) for the assessment periods 2018 to 2020.

Draft bill to implement tax relief measures for coping with the coronavirus crisis published

On February 3, 2022, the German Federal Ministry of Finance issued a draft bill to implement tax relief measures for coping with the coronavirus crisis. Key tax measures include:

- The option of using the declining-balance method of depreciation for movable fixed assets shall be extended by one year. Accordingly, assets that are acquired or manufactured in 2022 (currently only 2020 and 2021) can be depreciated by up to two and a half times the depreciation on a straight-line basis, but limited at 25 percent.
- The option to carry-back losses shall be extended indefinitely from one to two years. Thus, a loss carry-back would be possible in both years directly preceding the year in which a loss was incurred. In addition, the maximum amount of a loss carry-back is increased from EUR 1 million to EUR 10 million (or from EUR 2 million to EUR 20 million in the case of a joint assessment of spouses) also for the fiscal year 2023 (currently only available for fiscal years 2021 and 2022).
- Extension of the filing deadline for tax returns as follows:
  - 2020 tax returns: Extension of the filing deadline by an additional three months until August 31, 2022 (previously May 31, 2022).
  - 2021 tax returns: Extension of the regular filing deadline by four months (from February 2023 to June 2023).
  - 2022 tax returns: Extension of the regular filing deadline by two months (from February 2024 to April 2024).

The draft bill was forwarded to relevant associations for comments. As a next step, the publication of the government's draft bill is expected.

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Italy

Guidance on hybrid mismatch rules

On January 26, 2022, the Italian tax authorities published final guidance on hybrid mismatches and reverse-hybrid mismatches in line with the ATAD, following a public consultation process carried out in November 2021 (for previous coverage please see E-News issue 142). The guidance provides clarifications in respect of:

- the scope of these rules;
- relevant definitions;
- documentation requirements; and
- tax assessment procedures.

In addition, the guidance notes that the anti-hybrid mismatch rules do not qualify as specific anti-avoidance rules and, therefore, cannot be suspended through a disapplication ruling.

The Italian rules are applicable from January 1, 2020 (in respect of hybrid mismatches) and from January 1, 2022 (in respect of reverse hybrid mismatches).

Changes to the cooperative compliance regime

On February 8, 2022, a ministerial decree was published in the Italian Official Gazette which provides for lower thresholds for taxpayers to qualify for the "cooperative compliance regime." The cooperative compliance regime is intended to increase the level of certainty about tax issues through dialogue between taxpayers and the tax administration, in order to arrive at a common assessment of conditions that are likely to generate tax risks.

Taxpayers may benefit from the regime on a voluntary basis if they meet certain organizational criteria, including having a "tax control framework" in place. In addition, access to the regime is given to resident taxpayers and to non-resident taxpayers with a permanent establishment in Italy and with turnover or revenues of EUR 1 billion or more (for fiscal years 2022, 2023 and 2024). Taxpayers previously qualified for the regime if their turnover or revenue exceeded EUR 5 billion (for fiscal years 2020 and 2021).

For more information, please refer to a report prepared by the KPMG member firm in Italy.

Jersey

Launch of public consultation on substance reporting requirements for partnerships

The Jersey Government has launched a public consultation on new reporting requirements for partnerships and partners, with the aim to further strengthen the economic substance rules for partnerships following the introduction of the "Economic Substance Law" in July 2021 (for previous coverage please see E-News issue 134). The proposed new rules include the following provisions:

- Partnerships would have to submit a new combined notification containing details of economic substance and tax information, if applicable;
- Partners of a partnership would be responsible for reporting their share of any taxable partnership income in their own Jersey income tax return;

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- Partners of a partnership would be assessed by the Jersey tax authorities on their own share of taxable partnership income, i.e. the joint assessment of general partnerships will be discontinued.

The deadline for responses to the public consultation is March 31, 2022. The new rules are to be applied as from January 1, 2023.

Lithuania

Changes to corporate income tax law

On December 7, 2021, the Lithuanian Parliament approved the amendment of the corporate income tax law. Key amendments include:

- The introduction of reverse hybrid mismatch rules in accordance with the ATAD 2, effective as from January 1, 2023.
- Continuation of the higher corporate income tax rate of 20 percent (standard corporate income tax rate: 15 percent) for banks and credit institutions with profits exceeding EUR 2 million per tax period, as from July 1, 2022.
- New documentation requirements to claim expenses for corporate income tax purposes, as from May 1, 2022.

For more information, please refer to a report prepared by the KPMG member firm in Lithuania.

Notification of use of reportable cross-border arrangements under DAC6

On January 14, 2022, the rules on mandatory disclosure rules on reportable cross-border arrangements (DAC6 implementation) were amended, requiring relevant taxpayers to file information about their use of disclosed reportable cross-border arrangement until June 15 of the following calendar year. The notification requirement relates to cross-border arrangements that were disclosed to the Lithuanian tax authorities or the tax authorities of another EU Member State.

The notification must be made by submitting the form PRC914 "Notification on the use of the reportable cross-border arrangement" to the Lithuanian tax authorities.

Montenegro

2022 amendments to corporate income tax law

On December 31, 2021, the Montenegrin Parliament enacted amendments to the domestic tax law under the program “Europe Now”. Key tax measures include:

- Progressive taxation of corporate profits is introduced as of January 1, 2022:
  - Profits up to EUR 100,000 are subject to a tax rate of 9 percent;
  - Profits ranging from EUR 100,000 to EUR 1.5 million are subject to a tax rate of 12 percent;
  - Profits over EUR 1.5 million are subject to a tax rate of 15 percent.
- The withholding tax rate is increased from 9 percent to 15 percent.
- New transfer pricing rules are introduced and provide for a new definition of related parties, an extended list of transfer pricing methods in line with the arm’s length principle and transfer pricing documentation requirements.

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For more information, please refer to a report prepared by the KPMG member firm in Montenegro.

Netherlands

Tax treaty negotiation plan for 2022 published

On February 1, 2022, the Dutch Ministry of Finance published a release in respect of its tax treaty negotiation plans for 2022. The list includes eleven countries* that the Netherlands intends to continue negotiations with. The list further includes four countries** with which Netherlands intends to start (re)negotiations.

* Belgium, Brazil, Kyrgyzstan, Morocco, Moldova, Mozambique, Uganda, Portugal, Russia, Sri Lanka and United Arab Emirates.

** Bahrain, Barbados, Rwanda and Suriname.

Serbia

2022 tax measures introduced

On December 9, 2021, the Serbian Government published amendments to the domestic corporate income tax law in the Official Gazette. Key amendments include:

- Tax exemption for capital gains in respect of contributions (transfers) of intellectual property to a resident legal entity if such entity does not dispose of the intellectual property within two years,
- Extension of the income tax and social security relief for founders of innovative start-ups. The relief consists of an exemption from mandatory social security contributions and the tax paid on income for a period of 36 months (subject to certain conditions).

The measures are effective from January 1, 2022.

South Africa

Reduction of corporate income tax rate

On February 24, 2021, the South African Finance Minister announced that the corporate income tax rate would be reduced to 27 percent (from 28 percent) for companies with years of assessment beginning on or after April 1, 2022. The rate reduction still has to be enacted and shall be accompanied by a broadening of the corporate income tax base by limiting interest deductions and assessed losses.

For more information, please refer to a report prepared by the KPMG member firm in South Africa.

United Arab Emirates

Transfer pricing implications with introduction of corporate income taxation

As previously covered in E-News issue 147, the UAE Ministry of Finance announced on January 31, 2022 its plans of introducing corporate income taxation on federal level which will be effective for financial years starting on or after June 1, 2023.

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With the introduction of a corporate income tax, the OECD transfer pricing rules would be applicable in the UAE. All companies would have to comply with the transfer pricing rules and documentation requirements. These transfer pricing rules would be mandatory and could also be applicable to domestic transactions.

For more details, please refer to the dedicated website of KPMG Lower Gulf Limited.

Local Courts

France

Applicability of treaty benefits to a company benefiting from corporate income tax exemptions

On February 2, 2022, the French Supreme Administrative Court issued a decision concerning the applicability of the double tax treaty concluded between France and Tunisia. The case relates to payments made by a French taxpayer to a Tunisian company that benefited from export incentives in Tunisia. The Tunisian company only derived foreign-source income, and therefore all profits were exempt from corporate income tax in Tunisia. The French tax authorities considered that, since the Tunisian company was tax exempt, it could not qualify as a tax resident in Tunisia for the purposes of the double tax treaty concluded between France and Tunisia. As a result, withholding tax was assessed on the payments made by the French taxpayer.

The French Supreme Administrative Court noted that despite benefiting from an exemption for foreign-source income, the Tunisian company was still subject to tax on its domestic-source income. As such, despite not deriving any domestic-source income, the company still qualified as a tax resident for the purpose of the relevant tax treaty and was entitled to treaty benefits.

Kenya

Withholding tax on purchases of software licenses

The Kenyan High Court (the “Court”) issued a judgment in a case concerning the applicability of withholding tax on purchases of software licenses.

The Court noted that, under Kenyan tax law, annual subscription fees related to software licenses do not automatically qualify as royalties. Instead, and in line with the OECD Model Tax Convention and related Commentaries, an analysis should be performed to determine whether the transaction involved the transfer of any rights to exploit the related copyright.

The Court also noted that the plaintiff was merely acting as a distributor that purchased and resold software, without receiving the right to modify the software. Therefore, in the Court’s view, the payments were not made for the right to exploit the copyright. Based on these facts, the Court set aside the ruling of a lower court and concluded that the payments do not qualify as royalties.

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For more details please refer to a tax alert prepared by KPMG in Kenya.

Poland

Depreciation rates may be adjusted retroactively

On February 4, 2022, the Polish Supreme Administrative Court (the "Court") issued a ruling concerning the possibility to adjust depreciation rates for fixed assets.

The Court concluded that taxpayers are allowed to adjust depreciation rates at any time, as long as the statute of limitation for assessing the tax liability is not exceeded, and provided that the maximum depreciation rates, as listed in the Polish law, are not exceeded. Such changes would also apply retroactively, in which case the taxpayers are required to amend the previous tax returns.

For more details please refer to a KPMG TaxNewsFlash.

KPMG Insights

The next chapter for BEPS Pillar 2 and the possible implications for multinationals

As part of the Future of Tax & Legal webcast series, KPMG International will hold a session on March 9, 2022, focusing on the next chapter for BEPS Pillar 2 and the possible implications for multinationals. With the OECD expected to release new detailed commentary in February 2022, this webcast should be a chance to consider a more detailed analysis of what these developments mean for multinational organizations and explore key considerations and actions for tax leaders.

Please access the event page to register.

Tax defensive measures implemented by European states

The EU Tax Centre is closely monitoring the developments of defensive tax and administrative measures adopted by EU / EEA jurisdictions, plus the UK, against countries included on the EU list of non-cooperative jurisdictions for tax purposes as well as on equivalent national lists, where applicable.

For an update on the tax defensive measures implemented by European states and the latest developments related to the EU List of non-cooperative jurisdictions, please refer to this article.

Corporate income tax in the UAE

On January 31, 2022, the tax landscape of the United Arab Emirates (UAE) shifted yet again when the Ministry of Finance made the breakthrough announcement that a new federal corporate income tax system will be implemented in the UAE, effective financial years commencing on or after June 1, 2023.

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For details and updates on the latest developments, please refer to the dedicated website of KPMG Lower Gulf Limited.

Restructuring – Tax and Legal Considerations

As part of the Future of Tax & Legal webcast series, KPMG International held a session focusing on the tax and legal aspects of restructuring financially troubled companies on January 25, 2022. The topics covered addressed tax and legal issues relevant to debtor companies, creditors and acquirors of financially distressed assets including debt modification, bankruptcy, stressed asset dispositions and internal reorganization. A replay of the webcast is available here.

Navigating Tax Transparency

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 has prepared a range of supports and leading technology solutions to assist tax departments to accurately compile information on a company's tax footprint and manage compliance with tax transparency standards and changes.

For more information, please refer to the dedicated KPMG webpage.

KPMG Insights on the EU Green Deal

The KPMG Virtual Center of Excellence (VCOE) for Excise and Environmental Taxes and KPMG member firm professionals developed a set of materials on the EU Green Deal. For further details please refer to the dedicated KPMG umbrella page, or to KPMG's EU Green Deal Policy Guide which has been developed to summarize the key takeaways from each of the reforms in the European Commission's 'Fit for 55' package of carbon reform measures.

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