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KPMG Insights

E-News from the EU Tax Centre

Issue 158 – July 20, 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.

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Latest CJEU, EFTA and ECHR

CJEU

AG considers that Italian tax withholding and reporting requirements for property intermediation services are not contrary to EU law

On July 7, 2022, Advocate General (AG) Szpunar of the Court of Justice of the European Union (CJEU or the Court) rendered his opinion in case C-83/21. The case concerns the compatibility with EU law of Italian legislation based on which providers of property intermediation services – including digital platform operators, are required to withhold tax and report certain data on short-term rental transactions performed by individuals.

In line with previous case-law, the AG concluded that the reporting and tax withholding obligations do not breach EU law. However, in the AG's view, the obligation to appoint a tax representative constituted a disproportionate restriction on the freedom to provide services.

For more details, please refer to Euro Tax Flash Issue 480.

AG opinion on procedural aspects related to the status of intervener in State aid cases

On July 14, 2022, AG Szpunar of the CJEU rendered his opinion in joined cases C-31/22 P(I),C-32/22 P(I) and C-74/22 P(I), on whether the status of intervener, admitted by the Court of Justice at the stage of appeal proceedings, continues for the referral of the case back to the General Court.

The plaintiffs are several taxpayers that benefited from the Belgian "excess profit" tax rulings. On September 16, 2021, the CJEU ruled that the Commission was correct to conclude that the Belgian tax rulings represent an aid scheme, and referred the case back to the General Court to decide if the scheme represented unlawful Stat aid (C-337/19 P) – see Euro Tax Flash Issue 455. Following the ruling in the C-338/19 P case, the plaintiffs submitted several observations to the General Court, relying on their status as interveners for the previous proceedings. The General Court refused to accept their observations, on the grounds that their intervener status was terminated once the CJEU issued its ruling.

The AG noted that the Court's procedural regulations are silent on the topic, and recommended that the CJEU finds that the status of intervener continues at the stage of the proceedings after the case has been referred back to the General Court. The AG also observed that such decision seems appropriate in particular in the case under dispute, where the interveners are among the addressees of the State aid decisions challenged in the case C-337/19 P and the outcome of the General Court's decision would impact them directly.

Infringement Procedures and CJEU Referrals

Reasoned opinions sent to Greece and Spain regarding the implementation of rules on hybrid mismatches

On July 15, 2022, the European Commission (EC) sent reasoned opinions to Greece and Spain for failing to communicate the required national measures implementing the reverse hybrid mismatch rules of the Anti-Tax Avoidance Directive 2017/952 ("ATAD 2"). The deadline for communicating the transposition of the rules into domestic legislation was December 31, 2021.

If Greece and Spain do not provide a satisfactory response to the EC within two months, the EC may decide to refer the infringements to the CJEU.

While Spain had previously introduced anti-hybrid measures in March 2021 (please refer to E-News Issue 128), Greece transposed the anti-hybrid rules in line with ATAD2 on June 30, 2022 (please see below).

For more information, please refer to the Commission's July 2022 infringement package.

EU Institutions

COUNCIL OF THE EU

Czech Presidency announces priorities for the second half of 2022

On July 12, 2022, during the first meeting of the Economic and Financial Affairs Council (ECOFIN) under the Czech Presidency, the Czech Minister of Finance presented the Presidency's main tax priorities for the second semester of 2022 (July 1, 2022 to December 31, 2022).

The Czech Presidency generally aims to simplify the tax system, combat tax evasion and reduce the number of unjustified tax exemptions. It is also envisaged to address the current legislative proposals, including the implementation of the EU's proposed Minimum Tax Directive, introduced to give effect to the OECD Pillar Two proposal. In this context, the Czech Minister of Finance noted during a public discussion on July 13, 2022, with the European Parliament's Subcommittee on Economic and Monetary Affairs (ECON) that the Czech Presidency will focus on the finalization of the implementation of the proposed EU Minimum Tax Directive with a view to reach unanimous agreement in the ECOFIN Council at the next scheduled meeting, on October 4, 2022.

The Minister noted that the Czech Presidency aims to fully utilize the time until the October meeting to negotiate and find suitable solutions for all Member States concerned. The Minister remains optimistic that these negotiations will prove to be successful without a need to apply alternative solutions such as enhanced cooperation. An update on the status of negotiations will likely be presented at the informal ECOFIN meeting in September. For more details, please refer to KPMG's Tax News Flash and the replay of the discussion, which is available on the European Parliament's website.

In addition, according to the draft agenda for Council meetings during the second half of 2022, the Czech Presidency plans to:

- agree on an update of the EU list of non-cooperative jurisdictions at the ECOFIN meeting on October 4, 2022;
- provide a progress report on the proposal for a Council Directive to prevent the misuse of shell companies (Unshell Directive) and proposal for a Council Directive laying down rules on a debt-equity bias reduction and on limiting the deductibility of interest for corporate income tax purposes (DEBRA Directive) at the ECOFIN meeting on December 6, 2022;

- reach political agreement on the Carbon Border Adjustment Mechanism (CBAM) at the ECOFIN meeting on December 6, 2022; and
- hold a policy debate on the implementation of the global agreement on re-allocation of taxing rights (Pillar One), new own resources and on the revision of the Energy Taxation Directive at the ECOFIN meeting on December 6, 2022.

For more details, please refer to the Presidency's work program and draft agenda for Council meetings.

EUROPEAN COMMISSION

Public consultation on proposal for regulating tax advisers

On July 6, 2022, the EC launched a public consultation seeking input on the upcoming initiative on "Tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning".

The initiative is framed as a follow up to the EC's Unshell proposal (for more information, please refer to Euro Tax Flash Issue 471) and is aimed at tackling the role of enablers in setting up complex structures in non-EU countries with the objective of eroding the tax base of Member States through tax evasion and aggressive tax planning. It is envisaged that the proposal will include criteria for defining the forms of aggressive tax planning that are prohibited.

The consultation is split into two sections:

1. Call for evidence for an impact assessment, which sets out the following three policy options:
   - requirement for all enablers to carry out dedicated due diligence procedures;
   - prohibition to facilitate tax evasion and aggressive tax planning, combined with due diligence procedures and a requirement for enablers to register in the EU;
   - code of conduct for all enablers.

2. and a questionnaire, which seeks input on the role of enablers in contributing to tax evasion and aggressive tax planning and on the magnitude of the problem.

The consultation is open until October 12, 2022. An EC proposal is not expected until early 2023.

For more information, please refer to the EC's consultation website.

EUROPEAN PARLIAMENT

Resolution on national vetoes to undermine the global tax deal On July 6, 2022, members of the European Parliament (MEPs) adopted a resolution stating that EU and global tax rules are outdated for dealing with the modern-day economy, undermine the EU single market and lead to "unacceptable competitive advantages" for multinationals over SMEs. The resolution is critical of the decision by Hungary to veto the approval of the EU Minimum Tax Directive at the recent ECOFIN meeting on June 17, 2022 (see Euro Tax Flash Issue 478 for further details) and reminds Member States that unanimity decision-making in the EU requires a "very high level of responsibility, in line with the principle of sincere cooperation". The resolution states that, for the longer term, Member States should consider the benefit of transitioning to qualified majority voting and calls on the EC to relaunch the idea to gradually introduce majority voting on tax matters.

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

ECON adopts position on taxation of crypto-assets

On June 30, 2022, the Committee on Economic and Monetary Affairs (ECON) adopted a non-binding report calling for a better use of blockchain to fight tax evasion and for greater coordination by Member States on the taxing of crypto assets.

The resolution adopted by MEPs states that crypto assets must be subject to fair, transparent and effective taxation. It also invites authorities however to consider a simplified tax treatment for occasional or small traders and small transactions. The resolution calls on the EC to assess the ways in which the different Member States tax crypto assets and to evaluate these methods. The resolution calls for a clear and broadly accepted definition of crypto assets and for a coherent definition of what would constitute a taxable event. The resolution also calls for the amendment of the Directive on Administrative Cooperation (DAC) to include crypto assets in the exchange of information framework.

The resolution identifies blockchain as an instrument that national tax authorities should use to facilitate efficient tax collection and states that blockchain's unique features could offer a new way to automate tax collection, limit corruption and better identify ownership of tangible and intangible assets. The resolution calls on the EC to better integrate the use of blockchain into the different taxation initiatives and calls Member States to continue efforts to modernize their tax administrations.

A final vote in Plenary is currently scheduled for September 12, 2022.

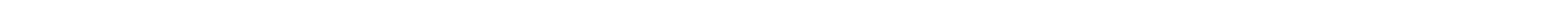
For more details, please refer to the European Parliament's website.

European Parliament debates taxation of windfall profits of energy companies – EC examines common EU action

On July 6, 2022, during a plenary session of the European Parliament, MEPs debated together with officials from the EC and the Council of the EU the policy option of taxing windfall profits of energy companies. The debate followed a resolution adopted by the European Parliament on May 19, 2022, where MEPs called on the EC and the Member States to coordinate the design of windfall profit taxation schemes.

In line with the comments made by Paolo Gentiloni (Commissioner for Economy) during the public hearing hosted by the FISC Subcommittee on June 27, 2022 (please refer to E-News Issue 157), the EC noted that it is already considering the legal and economic aspects of a windfall profits tax at EU level. The EC acknowledged that such a tax must be carefully designed to avoid undesirable market distortions. While the EC further noted that designing and implementing a windfall profit tax is generally feasible, it was stressed that there are certain elements of complexity that the EC's services are examining in more detail. These relate to the definition of extraordinary profits, timing aspects and tax rates. According to the EC's official, a more coordinated EU approach in the design of windfall profits taxation would be useful. To this end, the EC's services are assessing whether there is scope for further EU action on the matter. The EC also referred to its previous guidance on the application of fiscal measures on infra-marginal profits in Annex 2 of the RePowerEU.

Along the same lines, the Council expressed its general endorsement of windfall profit taxation in the current energy context. It noted that it is among the tax measures that the Czech Presidency of the EU Council will consider during its term and added that the experience of countries that recently implemented windfall profit taxation should be observed to see if such taxes fulfilled their objectives.



OECD and other International Institutions

OECD

OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors

On July 11, 2022, the OECD published the Secretary-General Tax Report to the G20 Finance Ministers and Central Bank Governors announcing a delay in the OECD's BEPS 2.0 project to address the tax challenges arising from the digitalization of the economy, as well as providing an update on the other G20 tax deliverables. Key updates include:

- *Pillar One:* The work on the detailed provisions of the new Multilateral Convention (MLC) and its Explanatory Statement in respect of Amount A are expected to be completed so that a signing ceremony of the MLC can be held in the first half of 2023. This shall enable the MLC to enter into force in 2024, once it has been ratified by a critical mass of jurisdictions as defined by the MLC. This represents a delay compared to the Inclusive Framework October 2021 agreement that envisaged the MLC signing ceremony to be organized by mid-2022, with a view to allowing it to come into effect in 2023 (for more details, please refer to Euro Tax Flash Issue 458).

- *Pillar Two:* The technical work on a 15 percent global minimum corporate tax rate is largely complete, with the GloBE Implementation Framework to be released later this year to facilitate implementation and co-ordination between tax administrations and taxpayers. The OECD also recognizes that most Inclusive Framework members are planning for an entry into force in 2024, which represents a slight delay compared to the Inclusive Framework October 2021 agreement that provided for the Pillar Two rules to be brought into law in 2022 and to be effective in 2023 (i.e. IIR and STTR) with the UTPR coming into effect in 2024 (for more details, please refer to Euro Tax Flash Issue 458).

- *Tax Transparency:* The report notes that Dominica has started automatic exchanges on financial account information, leaving a total number of four jurisdictions (Anguilla, Niue, Sint Maarten and Trinidad and Tobago) that fail to comply with the tax transparency standards.

- *Crypto-asset reporting*: Ahead of the G20 meeting in October 2022, the OECD will finalize a new crypto-assets reporting framework (CARF) and amendments to the common reporting standard (CRS) to ensure that the tax transparency instruments available to tax administrations are sufficiently modern and cannot be undermined by new technologies.

- *Carbon Mitigation:* In June 2022, the OECD established the Inclusive Framework on Carbon Mitigation Approaches to help countries share data and methods to help facilitate an evidence-based dialogue about the different efforts around the world to reach net zero emissions.

For more details please refer to KPMG's Tax News Flash and the OECD's press release.

Public consultation on progress report on Amount A (Pillar One)

On July 11, 2022, the OECD/G20 Inclusive Framework on BEPS released for public comments a progress report on Amount A of the OECD Pillar One solution to reallocate profits of multinational enterprises to market jurisdictions.

The progress report includes a consolidated version of the operative provisions on Amount A (in form of domestic model rules) including the Amount A building blocks that have already been released for public comments. The report notes that while the work on the building blocks is well advanced, the rules

as shown in the report do not reflect the final agreement at the level of the Task Force on the Digital Economy (TFDE) and highlight specific open issues still to be discussed and agreed upon.

It is further clarified that the report does not yet deal with the rules on the administration of the new taxing right, including the tax certainty-related provisions, as well as the implications of withholding taxes. In this context, the report assures that these questions will be addressed, with a view to agreeing and developing the relevant rules by the time of the Inclusive Framework meeting in October 2022.

Furthermore, according to the report, it is envisioned that the MLC will contain provisions requiring the withdrawal of all existing digital service taxes (DSTs) and relevant similar measures and the commitment not to enact these in the future. In this regard, the MLC shall include a definitive list of existing measures and provide for the elimination of Amount A allocations for jurisdictions imposing future DST measures.

Comments on the progress report are requested by August 19, 2022.

For more details please refer to KPMG's Tax News Flash and the OECD's press release.

Updated profiles for jurisdictions applying arbitration rules under the BEPS MLI

On June 28, 2022, the OECD published updated profiles for jurisdictions applying arbitration rules under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

For more information, please refer to the OECD's dedicated website.

Local Law and Regulations

Denmark

Ruling on permanent establishment risks where Danish employee works on behalf of a German affiliate

On July 6, 2022, the Danish Tax Agency (Skattestyrelsen) issued a binding statement providing clarifications on when a Danish employee's work constitutes a permanent establishment in Denmark for a foreign associated company.

The case concerned a Danish tax resident who was employed as Nordics Sales Manager by a Danish group entity. The employee acted as a key account manager for existing customers on behalf of a German group entity that developed and produced products for the Nordics region and was tasked with identifying new business opportunities and growing the group's sales in the region. The employee worked out of Denmark and spent 90 percent of his time in Denmark.

The agency held that the work performed by the Danish employee does not constitute a permanent establishment for the German group company as the employee was not authorized to negotiate prices, contracts, and enter into legal obligations on behalf of the German group company. The Agency found that the employee's tasks were not of such a nature that they could be considered to play a decisive role in the conclusion of agreements, which was carried out at the level of the German group company.

France

New limitations on interest rates in respect of shareholder loans

On June 30, 2022, the French Ministry of Finance issued the quarterly interest rates to determine the deductibility of interest payments to shareholders. According to French tax rules, corporations may deduct interest payments to shareholders up to the average interest rate as defined by the Ministry unless the taxpayer can provide evidence demonstrating that any higher interest rate applied is at arm's length. For companies with a 12-month fiscal year ending between June 30, 2022 and September 29, 2022, the rates were set as follows:

- 1.42 percent for fiscal years ending between June 30, 2022, and July 30, 2022;
- 1.51 percent for fiscal years ending between July 31, 2022, and August 30, 2022;
- 1.60 percent for fiscal years ending between August 31, 2022, and September 29, 2022.

Germany

Draft DAC7 legislation published

On July 12, 2022, a draft law was published by the German Ministry of Finance to transpose the Council Directive (EU) 2021/514 (DAC7) into German domestic law. The law would require digital platform operators to provide the German tax authorities with information about certain users ("sellers") on their platform to enable the German tax authorities to exchange this information with other EU Member States.

For more details, please refer to KPMG's Tax News Flash.

Greece

Transposition of anti-hybrid mismatch rules

On June 30, 2022, legislation to transpose anti-hybrid mismatch rules into national law, in line with the EU Anti-Tax Avoidance Directive 2017/952 ("ATAD 2"), was published in the Greek Official Gazette. The implementation followed a public consultation, as covered in E-News issue 156.

The rules apply retroactively from January 1, 2022.

Increased penalties for failure to comply with beneficial ownership registration requirements

On June 16, 2022, legislation was published in the Greek Official Gazette amending the penalties for non-compliance with the Beneficial Ownership (UBO) disclosure requirements.

Where non-compliance previously resulted in a penalty of EUR 10,000 per violation, the new rules provide for the following fines for legal entities that do not disclose information, disclose information incorrectly or do not keep the required information at the registered office or establishment of the company:

- EUR 5,000 (for legal entities with a net turnover of up to EUR 100,000);
- EUR 10,000 (for legal entities with a net turnover between EUR 100,000 and EUR 700,000);
- EUR 20,000 (for legal entities with a net turnover between EUR 700,000 and EUR 8,000,000);
- EUR 40,000 (for legal entities with a net turnover of more than EUR 8,000,000).

In addition, the new rules provide for the following late filing penalties:

- EUR 100 where the disclosure is made within one month after the respective filing deadline;
- EUR 500 where the disclosure is made between one month and three months after the respective filing deadline;
- where the disclosure is made later than three months after the respective filing deadline, the penalties for non-disclosure outlined above apply.

Hungary

Termination of double tax treaty with the United States

On July 8, 2022, the Hungarian Government announced that it was officially notified by the United States of the termination of the 1979 income tax treaty between Hungary and the United States.

According to a press release issued by the Hungarian Government, the United States had previously requested that Hungary should abandon its veto against the adoption of the EU Minimum Tax Directive at the level of the ECOFIN Council (for more information, please refer to Euro Tax Flash Issue 478).

On July 15, 2022, the U.S. Treasury Department officially confirmed the termination of the income tax treaty between the two countries, which will take effect for withholding and other taxes from January 1, 2024.

For more details, please refer to KPMG's Tax News Flash.

Ireland

Updated guidance on anti-hybrid rules

On June 29, 2022, the Irish tax authorities published updated guidance on the application of the Irish anti-hybrid rules. The principal amendments to the guidance include:

- Section 3 (interpretation): broadening of the definition of “entity” to include forms of business that do not have legal personality and clarification of the definition of a “hybrid entity”.
- Section 12 (new section): Reverse hybrid rule to reflect the introduction of reverse hybrid mismatches into the Irish anti-hybrid legislation in line with the deadline prescribed by ATAD II. The section sets out relevant definitions and provides guidance on the operation of the rule.

For more information, please refer to the Irish tax authority e-brief.

Italy

Public consultation launched on the implementation of DAC7

On June 30, 2022, the Italian Ministry of Finance launched a public consultation on a draft law to transpose the Council Directive (EU) 2021/514 (DAC7) into Italian domestic law. The law would require digital platform operators to provide the Italian tax authorities with information about certain users (“sellers”) on their platform to enable the Italian tax authorities to exchange this information with other EU Member States.

The deadline for responses to the public consultation is July 20, 2022.

For more information, please refer to the press release of the Italian Ministry of Finance.

Kenya

Tax measures included in the enacted 2022 Finance Bill

On July 8, 2022, the 2022 Finance Bill was published in the Official Gazette in Kenya. Key tax measures include:

- introduction of a lower tax rate of 15 percent (standard rate: 30 percent) for companies operating a carbon market exchange or emission trading system that is certified by the Nairobi International Financial Centre Authority;
- increase of the capital gains tax rate from 5 percent to 15 percent;
- additional institutions excluded from the application of the thin capitalization rules;
- exclusion from digital service tax for non-resident taxpayers with a permanent establishment in Kenya;
- introduction of Country-by-Country reporting rules as well as transfer pricing documentation requirements (local and master file) in line with BEPS Action 13.

The amendments came into effect on July 1, 2022.

The previously proposed increase of the digital service tax rate from 1.5 percent to 3 percent applied on the gross transaction value – as covered in E-News issue 154 – has not made it in the final 2022 Finance Bill, i.e. the rate remains at 1.5 percent.

For more details, please refer to a report prepared by KPMG in Kenya.

Luxembourg

Agreement on the taxation of cross-border workers

On June 22, 2022, Luxembourg and Belgium agreed on a protocol in the double tax treaty between both countries facilitating teleworking for cross-border workers. Based on the agreement, work performed at home is considered to be performed in the contracting state in which cross-border commuters would normally have carried out their work where the working days at home do not exceed 34 days.

The protocol will apply from January 1, 2022 and will enter into force once the ratification instruments are deposited.

Netherlands

Updated decree on the attribution of profits to a permanent establishment

On July 1, 2022, a new decree on the attribution of profits to a permanent establishment was published replacing the old decree of January 15, 2011. The decree is intended to provide clarity on the manner in which the Dutch Tax and Customs Administration deals with profit attribution to permanent establishments. The most important changes are the incorporation of the results of the OECD's BEPS project and the source exemption that was introduced into the Dutch Corporate Income Tax Act 1969 ('CITA') in 2012. A number of editorial changes have also been made and references to other decrees/policy statements and documents have been updated.

For more details, please refer to a report prepared by KPMG in the Netherlands.

Updated transfer pricing decree published

On July 1, 2022, the new transfer pricing decree was published replacing the old decree of April 22, 2018 and section V of the Questions and Answers (Financial Service Entities) Decree from 2014.

Key changes compared to the previous decree from 2018 include:

- new rules in respect of financial transactions to align with the OECD guidelines;
- an amendment to the option to recharge on a cost basis for low-value added services;
- clarifications in respect of governmental aid measures, in particular in response to the COVID-19 pandemic;
- textual changes to ensure the terminology used is more consistent with the terminology used in the OECD guidelines and in Dutch legislation and regulations.

For more details, please refer to a report prepared by KPMG in the Netherlands.

Draft bill implementing public Country-by-Country Reporting Directive

On July 5, 2022, the Dutch government published draft legislation to implement the EU public Country-by-Country Reporting Directive. The Directive requires qualifying multinational enterprises doing business in the European Union to publicly disclose their income tax information. EU Member States have until June 22, 2023 to transpose the Directive into national law and the rules will apply 12 months after the transposition deadline, i.e. from the commencement date of the first financial year starting on or after June 22, 2024.

Based on the proposed bill, the Netherlands intends to make use of the so-called "safeguard clause", under which Member States can choose to allow in-scope groups to defer the disclosure of commercially sensitive information, for up to five years. Also, companies would be required to publish the reports on their website, as the Netherlands does not intend to use the option under which they

could grant an exemption from publication, provided the reports are made available free of charge on the website of the local Chamber of Commerce.

For more information, please refer to the EU Tax Centre's dedicated website.

Romania

Proposed increase of dividend withholding tax and changes to the micro-company regime

On July 4, 2022, the Romanian Government published a draft bill amending the domestic tax code. Key proposed measures in the field of direct taxation include:

- an increase of dividend withholding tax on payments made to non-resident companies – from 5 percent to 8 percent, where the local rules implementing the EU Parent-Subsidiary Directive do not apply;
- changes to the micro-company regime, both in terms of scope and revenue threshold below which companies can opt for the regime.

Spain

Plans to introduce windfall profit tax on energy and banks announced

On July 12, 2022, Spain's Prime Minister expressed the Government's intention to impose a new windfall profit tax on certain energy companies as well as on banks. Similar to the windfall profit taxes introduced by other countries, the measure aims to raise funds to finance measures that would provide relief from rising inflation and energy prices and is intended to apply to the extraordinary profits of electric, gas, and oil companies resulting from the recent increase in gas prices. According to the Prime Minister, the windfall profit taxation covers banks as they also benefited from exceptional gains during the current circumstances.

No details have been revealed with respect to the characteristics of the new windfall profit tax. However, the Spanish Prime Minister noted that the tax will apply to profits made during fiscal years 2022 and 2023. Reportedly, the new windfall profit taxes will be presented in the coming weeks to the Parliament with a view to come into force on January 1, 2023.

Spain launches public consultation on reporting tax forms for crypto-assets holders

On June 27 and 28, 2022, the Spanish Ministry of Finance launched a public consultation concerning the introduction of new tax reporting forms, which aim to provide the Spanish tax authorities with information concerning crypto-assets and related transactions.

The consultation relates to the reporting requirements for crypto-asset holders that were introduced as part of a law providing for measures to prevent and fight tax fraud, which was published on July 10, 2021. The consultation proposes three new tax form models that would require the reporting of the cryptocurrency balance as at December 31, transactions with cryptocurrencies and cryptocurrencies held abroad.

Interested parties were invited to send comments by July 18 and 19, 2022.

Switzerland

Extension of Covid-19-related agreement on the taxation of cross-border workers

On June 29, 2022, Switzerland and France agreed on an extension of the special tax agreement in respect of cross-border workers during the COVID-19 pandemic until October 31, 2022. Based on the agreements, working days worked from home because of measures to combat the coronavirus pandemic are considered to be spent in the contracting state in which cross-border commuters would normally have carried out their work.

France and Switzerland recognize that the working from home model has evolved significantly since the start of the pandemic with a real shift in the way employees have embraced the flexibility of home and office work. Both countries agree that it is required to redefine the tax rules so that they reflect this new reality. The extension has therefore been put into place to give both countries more time to agree on a permanent solution to facilitate remote working across borders.

This announcement comes after Switzerland and the EU agreed on continuing a flexible application of the social security rules for remote workers until December 31, 2022.

For more details, please refer to a report prepared by KPMG in Switzerland.

Tanzania

Tax measures in the enacted Finance Act 2022

On June 30, 2022, the Parliament of the United Republic of Tanzania approved the Finance Act 2022 to impose and alter certain taxes, duties, levies, and fees, and to amend certain laws relating to the collection and management of public revenues. Key corporate income tax measures include:

- the introduction of a digital services tax to be charged on payments made by individuals to non-resident persons at a rate of 2 percent on the turnover (excluding VAT);
- a broadened definition of the word “business” to include transactions carried out through the internet or digital marketplace, which will now be subject to taxation in Tanzania;
- tightened thin capitalization rules (only paid-up share capital will be considered as equity for purposes of calculating the debt-to-equity ratio, i.e. paid-up share premium and retained earnings have been excluded);
- a withholding tax reduction from 15 percent to 10 percent on service fees paid to non-residents in the film industry;
- amendment of the “Beneficial Owner” definition.

The new tax measures came into effect on July 1, 2022.

For more details, please refer to a report prepared by KPMG in Tanzania.

Turkey

Extension of special corporate tax rate for financial sector companies and limitation to notional interest deduction

On July 5, 2022, amendments to the Turkish tax law were published in the Official Gazette. Key amendments include:

- indefinite extension of the currently applicable increased corporate tax rate of 25 percent for certain financial sector companies, instead of the standard corporate tax rate of 20 percent. (for previous coverage, please refer to E-News issue 152);
- limitation to notional interest deductions by way of allowing for a deduction only within a period of five years (i.e. in the tax period in which the capital increase decision is recorded and the following four years);

- voluntary disclosure for certain domestic and foreign assets,
- authorization for the Turkish Ministry of Finance to issue regulations requiring the disclosure of information on ultimate beneficial owners of legal entities and unincorporated persons.

Reduced income taxation in relation to the newly established Istanbul Finance Center

On June 28, 2022, legislation was published in the Official Gazette in Turkey to promote Istanbul as an international finance center (Istanbul Finance Centere – IFC).

Under the new law, eligible financial institutions in the IFC will be granted a number of tax incentives including a standard 75 percent reduction in taxable profits generated from “exported financial services”. The latter relates to financial services provided to non-residents and ultimately used abroad.

In the initial phase (accounting periods 2022 to 2031), the taxable profit reduction will be increased to 100 percent.

Uganda

Tax measures in budget 2022/2023

On June 14, 2022, Uganda’s Minister of Finance gave a speech on the 2022/2023 budget, which provides for the following main corporate tax measures:

- amendment of the definition of “Beneficial Owner”;
- amendment of the definition of “Exempt Organisation”;
- amendment to the rules regarding the taxation of rental income;
- extension of the “tax holiday” for income earned from the Bujagali hydro power project.

The amendments came into effect on July 1, 2022.

For more details, please refer to a report prepared by KPMG in Uganda.

United Kingdom

Legislation for energy profits levy on extraordinary oil and gas profits enacted

On July 11, 2022, the UK Parliament (the House of Commons) approved legislation for a new tax on extraordinary profits of oil and gas companies operating in the UK and the UK Continental Shelf. The levy will be charged at a rate of 25 percent (bringing the headline tax rate for oil and gas companies to 65 percent) on profits arising on or after May 26, 2022.

It is further clarified that the levy is of temporary nature and will be phased out when oil and gas prices return to historically normal levels. The legislation also includes a sunset clause, which will remove the levy after December 31, 2025. In addition, HMRC published technical guidance on how the new levy will operate.

For more background, please refer to E-News issue 157.

Consultation launched on the tax treatment of foreign sovereign investors

On July 4, 2022, the UK Government launched a consultation on a revised approach to sovereign immunity from direct tax. Foreign sovereigns – including heads of state and sovereign wealth funds, are currently exempt from direct tax liability in the UK. The stated aim of the consultation is to introduce

legislation which will provide transparency and clarity on the principle of and conditions for sovereign immunity and to strike a balance between supporting investment in the UK and delivering fairness between different participants in the UK market.

According to the consultation document, the new rules are envisioned to apply from April 1, 2024 to income recognized in accounting periods ending on or after that date for entities subject to corporation tax, and from April 6, 2024 to individuals.

The consultation process closes on September 12, 2022.

For more details, please refer to a report by KPMG in the UK.

Local Courts

France

French Supreme Court holds that add-back under participation exemption represents partial taxation

On July 5, 2022, the French Supreme Court (Conseil d'État) issued a decision confirming that the 5 percent add-back under the French participation exemption regime results in partial taxation of dividends received.

Under the domestic tax rules implementing the EU Parent – Subsidiary Directive, foreign dividends benefit from a 95 or 99 percent exemption from corporate income tax, if certain conditions are met. However, the French parent company is required to add back an amount equal to 5 percent of the gross dividend income, which is deemed as non-deductible for corporate income tax purposes. In March 2022, the French tax authorities issued guidance stating that the 5 percent add-back cannot be considered as leading to the partial taxation of dividends. Following an action for annulment raised by a French taxpayer, the case was brought in front of the French Supreme Court.

The Supreme Court noted that the add-back is based on a fixed percentage, which doesn't allow taxpayers to take into account the actual costs. Therefore, in the Supreme Court's view, the add-back results in partial taxation of dividends, when the actual costs incurred are less than the fixed 5 percent amount. The ruling is in line with a January 2022 decision of a lower French court, which held that, since dividends do not benefit from a full exemption, taxpayers are entitled to a foreign tax credit up to the French tax corresponding to 5 percent of the dividends – see E-news Issue 149.

CFC legislation compatible with EU freedom of capital movement

On April 25, 2022, the French Supreme Court (Conseil d'État) issued a decision in a case concerning the compatibility of the French controlled foreign company (CFC) rules with EU law. The Supreme Court held that the applicability of the regime under dispute in respect to third countries does not infringe EU law.

The case concerns a French company with a subsidiary located in Mauritius. The Mauritius company derived gains from selling shares in foreign subsidiaries. Following a tax audit, the French tax authorities held that the Mauritian company is a CFC and therefore the capital gains derived from the sale of shares were attributable to the French shareholder and were taxable in France.

The Supreme Court, referring to settled CJEU case-law, noted that in order to determine whether national legislation, in third country situations, must be judged under the free movement of capital or the freedom of establishment under the Treaty on the Functioning of the European Union (TFEU), the purpose of the legislation at issue was decisive. In the Supreme Court's view, the measures under dispute target cases where French taxpayers have a 'decisive influence' over the decisions of the subsidiary established outside France, even if the French shareholder does not hold the majority of the capital or the voting rights. As a result, the measure under dispute had to be assessed in the light of the freedom of establishment. Since the freedom of establishment principle does not cover third countries, the Supreme Court rejected the plaintiff's claim that the CFC rules are in breach of EU law.

The Supreme Court also rejected that plaintiff's claim that no tax advantage was gained by interposing a Mauritius entity in the structure. In this respect, the Supreme Court noted that the capital gains would not have benefited from participation exemption in France – if the shares were held directly by the French plaintiff, due to the fact that the minimum two year holding period required under local rules was not met at the time of the disposal.

Ruling on French rules on cross-border loss relief

On June 9, 2022, the Administrative Court of Appeal of Versailles (Court) published a decision on the French rules on the deductibility of losses from foreign permanent establishments. The case concerns a French company which sought to deduct from its taxable base in France the losses incurred at the level of its permanent establishment (PE) in Luxembourg arguing that the PE had ceased to exist during the previous year and therefore loss relief could not be claimed in Luxembourg. The French tax authorities denied the deduction on the grounds that under the double tax treaty concluded between France and Luxembourg, PE profits were only taxable in the latter jurisdiction.

Citing settled CJEU case-law (in particular case C-650/16), the Court held that France has to allow the deduction of final foreign PE losses in cases where the company i) has exhausted all the possibilities of deduction of those losses in the Member State in which the PE was situated, and ii) has ceased to collect any revenue from the PE. In light of the above, the Court held in favor of the plaintiff and ruled that the losses incurred by the PE could be deducted in France.

Italy

Withholding tax rules in respect of dividends paid to US investors in breach of EU law

On July 6, 2022, the Italian Supreme Court issued a decision confirming that the Italian tax treatment of dividends paid to investors in the United States breaches the free movement of capital, as provided under the TFEU. The plaintiff – an U.S. investment fund, filed several refund claims for withholding tax levied on dividends that were received between 2007 and 2010. The basis for the refund claims was that the tax treatment of dividends paid to investment funds established in third countries was discriminatory and discouraged investors from acquiring shares in non-resident investment funds. Based on these grounds, the plaintiff requested the refund of the difference between the dividend withholding tax rate of 15 percent (as per the double tax treaty concluded between Italy and the U.S.) and the rate that would have applied to Italian investment funds (12.5 percent at that time, applied to the annual increase in the net asset value).

The Supreme Court confirmed, citing settled CJEU case-law, that domestic rules providing for lower tax rates for domestic collective investment funds, while imposing a higher withholding tax rate on outbound dividends, represented a restriction on the free movement of capital. On these grounds, the supreme Court held that the plaintiff was entitled to a refund of the difference between the tax treaty rate of 15 percent and the domestic rate of 12.5 percent.

Several other rulings were subsequently issued, confirming the availability of refunds for a German investment fund and other U.S. investment funds.

Starting July 1, 2011, Italian investment funds are no longer subject to tax – tax is now levied at the level of the investor. Based on the Supreme Court ruling, foreign investment funds, which received dividends after the change was enacted, might be entitled to a full refund of withholding tax.

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

Netherlands

Allocation of debt and equity capital to permanent establishments

On May 12, 2022, a Dutch appellate court (Gerechtshof's-Hertogenbosch) issued a decision in a case that dealt with, among others, whether an arm's length interest rate was taken into account for a permanent establishment (PE) in Libya. More specifically, the dispute was whether the creditworthiness of the Dutch legal entity was correctly taken as a starting point and whether sufficient adjustments were made for the increased risk profile of the Libyan PE.

A lower District Court had ruled on a division of debt and equity (relevant in applying an arm's-length allocation of interest expense) that deviated significantly from the position taken by the taxpayer, which had not taken any debt into account – a deviation from the debt/equity ratio of the Dutch legal entity, the reasons for which the taxpayer had not been able to demonstrate.

Following a second appeal brought forward by the taxpayer, the appellate court rejected the plaintiff's arguments that a third party would not have provided any form of financing to the PE due to the political and social situation in Libya during the financial year. Instead, the appellate court upheld the lower court's interpretation that the capital allocation approach, read in conjunction with the fungibility approach, was regarded as the preferred method for the application of Article 7 of the OECD Model Convention in the Netherlands. Therefore, in the appellate court's view, this method was applicable in the case under dispute, even though no tax treaty existed between Libya and the Netherlands. As a result, the appellate court confirmed that part of the debt incurred by the Dutch taxpayer was allocable to the PE, and a result the related interest should also be allocated to the PE.

For more information, please refer to KPMG's Tax News Flash.

KPMG Insights

2022 KPMG Africa Tax Virtual Conference

On July 20, 2022, KPMG will host the 2022 KPMG Africa Tax Virtual Conference. Join us as we look towards how the next chapter for tax matters in Africa will unfold for the remainder of 2022 and beyond. What insights will be revealed that will help leaders of tax functions adjust their vision and set a different course to operate within the new business realities of Africa?

The virtual conference is designed for finance and tax executives with oversight for African operations. The KPMG Head of Tax for the Africa Region will open the conference with a fireside chat with the

KPMG EMA Region Head of Tax who will share his experience working with tax leaders across the region who are tasked with leading and developing their tax functions of the future.

Senior KPMG member firm leaders will then deliver panel discussion sessions, together with tax leaders from leading multinational organizations and regulatory and revenue authorities that will dive deeper into two of the most pressing tax issues that continue to impact African operations including:

- What challenges the recent BEPS 2.0 developments may present and how might the story unfold?
- How to reimagine the tax and finance functions of the future.

Please access the event page to register

Withholding tax study 2022

The 15th edition of the withholding tax (WHT) study prepared by KPMG in Luxembourg analyzes the WHT rates of 124 jurisdictions applicable on interest, dividends and capital gains derived by Luxembourg UCITS SICAVs and FCPs based on their legal status as of 1 January 2022.

In addition to the analysis, the study provides further insight into topics like Mandatory Disclosure Rules (DAC6), FATCA and developments in CSR and the sustainable investments sector.

For more information, please refer to the KPMG withholding tax study

KPMG and Microsoft collaborate to help C-suites predict tax outcomes

The future of tax is at a tipping point as organizations work to keep pace with a rapidly changing business landscape, shifts in tax policy, heightened compliance and reporting requirements, workforce challenges, and the untapped potential of data. As part of their multi-billion-dollar global alliance, KPMG and Microsoft are making significant investments to deliver advanced cloud-based tax technologies that are designed to help companies transform and lead amid continued market disruption.

KPMG and Microsoft are helping companies to enable their operations to be future-ready through AI, machine learning, automation, and data & analytics applications on the KPMG proprietary Digital Gateway platform, enabled by the Microsoft Azure cloud. The collaboration is resulting in a wealth of new technology capabilities for tax and finance leaders in more than 140 jurisdictions globally through the KPMG Tax Reimagined service offering.

For more information, please refer to the KPMG in the US press release.

Understanding the realities of global tax transparency

Increasingly companies are moving away from having an approach which is mostly focused on creating shareholder value when it comes to conducting their business. The increase of shareholder returns used to be the dominant decision-making factor, whereas the effect of a business on the environment and society was not always considered an equally important factor. Today and even more in the (near) future, for companies to succeed overtime, they need to balance the interests of their stakeholders. In order to meet the sustainability requirements stakeholders may have, companies may need to prioritize the Environmental, Social and Governance (ESG) aspects of running a business.

Various stakeholder groups (e.g., investors, governments, civil society, employees, NGOs and corporate rating agencies) consider tax as an important part of ESG. Having a sustainable approach to

tax and being transparent about the company's tax position are considered key for determining whether a company's tax position is in line with ESG standards.

Although many companies acknowledge this, it is still not always clear what tax transparency is about. This Q&A-article aims to give some background and more clarity on tax transparency in general and on the increasing attention towards this topic.

Repowering Europe - transforming Europe into a more sustainable, self-sufficient energy economy

Europe has been a front-runner in climate protection and a driver of the global environmental agenda, with the region aiming to become the first climate-neutral continent by 2050. It continues to develop a solid policy system to meet this target through its flagship European Green Deal, its July 2021 legislation package 'Fit for 55' and its recently introduced REPowerEU.

In response to the ongoing energy price crisis, which has been exacerbated (and brought to the fore) by the situation in Ukraine, the EU published the REPowerEU plan on March 22, 2022. Dubbed the 'REPowerEU strategy' the proposal is geared towards making Europe independent from Russian fossil fuels and accelerating the green energy transition. Both investors and developers have had a strong positive reaction to the proposal for joint European action for more affordable, secure and sustainable energy that is not tied to Russia.

For more information, please refer to KPMG's "Repowering Europe" report.

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