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KPMG Insights

E-News from the EU Tax Centre

Issue 172 – March 9, 2023

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.

Today's edition includes updates on:

- **European Parliament:** European Parliament study on tax compliance costs
- **OECD:** OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors
- **Cyprus:** Transfer pricing frequently asked questions published
- **Czech Republic:** Revised list of non-cooperative jurisdictions for CFC rules published
- **Croatia:** Guidance on extra profit tax published
- **France:** Ruling on withholding tax on dividend equivalent payments issued
- **Luxembourg:** Draft bill to transpose the EU Public Country-by-Country Reporting Directive
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- **Germany (court decision):** Determination of foreign income for foreign withholding tax credit purposes
- **Italy (court decision):** SICAVs exempt from withholding tax on dividends distributed by Italian companies

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State Aid

Italy ordered to recover illegal State aid in the form of real estate tax exemption

On March 3, 2023, the Commission issued a decision requiring Italy to recover illegal State aid granted to certain non-commercial entities in the form of real estate tax exemptions.

In December 2012, the Commission found that real estate tax exemptions granted by Italy - between 2006 and 2011, to non-commercial entities engaged in certain social activities of economic nature was breaching the EU State aid rules. Nevertheless, the Commission did not order at that time the recovery of the aid on the grounds that the tax authorities did not have sufficient information to identify the beneficiaries. In 2018, the Court of Justice of the European Union (CJEU) partly annulled the Commission's decision and held that the Commission should have considered alternative methods to recover the aid.

The March 2023 decision acknowledged the difficulties Italian authorities may have in identifying the beneficiaries. Nevertheless, it noted that the illegal State aid could be recovered, even if partially. For example, the Commission suggested that Italy could use data from declarations submitted under the new real estate tax regime (replacing the one under dispute) in adjunction with other methods, e.g. self-declarations.

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

EU Institutions

European Parliament

European Parliament study on tax compliance costs

On February 22, 2023, the European Parliament sub-committee on tax matters (FISC) published a study on the tax compliance costs faced by European companies – with a focus on small and medium entities (SMEs).

The aim of the study is to quantify and compare the tax compliance burden faced by companies in the EU. The study also highlights differences in compliance costs based on the size of the company, their involvement in cross-border transactions and per type of tax. Key takeaways of the study include:

- private businesses in the EU face significant tax compliance costs, typically ranging between 1 percent and 2 percent of turnover. Compliance costs for businesses in the Member States (plus the UK) average around EUR 15,000 per year in absolute terms;
- tax compliance costs grow in absolute terms with firm size, but less than proportionally. This means that, when compared to larger businesses, smaller companies face significantly higher compliance costs;
- compliance costs were not significantly higher for businesses engaged in cross-border trade. However, companies operating purely domestically were more likely to face increased effective

tax rates due to reduced tax planning opportunities combined with efforts from local governments to recover lost revenues;

- complexity and uncertainty increase tax compliance costs. In the authors' view, measures that introduce minimum common standards (e.g. EU Anti-Tax Avoidance Directive) or that allow Member States to implement exceptions are not a helpful instrument to reduce compliance costs. Similarly, measures that apply to a limited set of companies – e.g. the 2016 common consolidated corporate tax base (CCCTB) proposal applicable only to large group, are less effective.

The authors conclude by suggesting that the best method of reducing compliance costs is the introduction of a harmonized tax base across all Member States and applicable to all companies – for example, the BEFIT.

For more information, please refer to the European Parliament's webpage.

Update on the European Parliament's opinion on the DEBRA file

On March 1, 2023, the European Parliament's sub-committee on economic and monetary affairs (ECON) exchanged views on the amendments tabled on the debt-equity bias reduction allowance (DEBRA) file. In his opening remarks, the ECON rapporteur on the file, Luděk Niedermayer (EPP/ Czech Republic), expressed his disappointment that the file has been put on hold by the Council.

As next steps, the proposed amendments are scheduled to be voted on at the ECON meeting on March 28, followed by a vote in the European Parliament plenary session on April 17, 2023. If approved, the amendments would represent the Parliament's opinion on the Directive, which is not binding on the Council. It would remain up to the Member States to re-start the work on DEBRA and agree on the final text of the Directive at Council level.

OECD and other International Institutions

Organisation for Economic Cooperation and Development – OECD

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

In February 2023, the OECD published the Secretary-General Tax Report to the G20 Finance Ministers and Central Bank Governors providing updates on the latest developments in international tax reforms, including on the OECD's BEPS initiatives, tax transparency efforts and other G20 tax deliverables. Key updates include:

- *Pillar One:* The report makes reference to the most recent work result in form of a public consultations on the progress report on the administration and tax certainty aspects of Amount A, the draft MLC provisions on digital services taxes and other relevant similar measures under Amount A and the design elements of Amount B relating to the simplification of transfer pricing rules. The report asks the G20 members for their continued support and willingness to compromise for the Multilateral Convention to be agreed in time for signature by mid-2023.
- *Pillar Two:* According to the report, the Inclusive Framework will continue to release further agreed administrative guidance on an ongoing basis, to ensure the GloBE Rules continue to be

implemented and applied in a coordinated manner. In addition, the report advises that the work on the Subject to Tax Rule (STTR) is well advanced and that the Inclusive Framework aims to agree on the remaining outstanding issues to enable signature of the STTR multilateral instrument by mid-2023.

- *Tax transparency:* The report provides updates on the progress made by the Global Forum in conducting peer reviews of the implementation of the Automatic Exchange of Information (AEOI) and the Exchange of Information on Request (EOIR) standards. In relation to AEOI, the report notes that the Global Forum has started a second round of peer reviews focused on reviewing in greater detail the effectiveness of the implementation of the standard with the aim to have reviewed around 100 jurisdictions by the end of 2025.
- *BEPS Project implementation:* The report provides updates on the OECD's monitoring of the effective implementation of BEPS minimum standards including Action 5 on Harmful Tax Practices, Action 6 on Tax Treaty Abuse, Action 13 on CbC Reporting and Action 14 on Mutual Agreement Procedures.
- *Carbon Mitigation:* The report informs that a first meeting of the Inclusive Forum on Carbon Mitigation Approaches (IFCMA) took place on February 9 and 10, 2023.The IFCMA takes stock of different carbon mitigation approaches applied by its members and considers their effectiveness and combined global impact.

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

Local Law and Regulations

Croatia

Guidance on extra profit tax published

On February 14, 2023, the Croatian tax authorities issued guidance on the calculation and reporting of the new extra profit tax. The guidance provides details on the effect of mergers in calculating extra profits. The guidance also clarifies that taxpayers that fall in scope of the solidarity contribution (as defined in EU Regulation 2022/1854) are subject to the Croatian extra profit tax irrespective of whether they meet the revenue threshold test under the extra profit tax regime. The guidance also includes a special form or calculating and reporting the extra profit tax.

For more information regarding the key features of the Croatian profit tax, please refer to a report prepared by KPMG in Croatia.

Cyprus

Transfer pricing frequently asked questions published

On February 10, 2023, the Cyprus tax authorities published a set of frequently asked questions (FAQs) with the purpose of clarifying certain provisions of the new transfer pricing legislation law (for more information, please refer to E-News Issue 157).

Key questions addressed by the FAQs concern:

- clarifications of the obligation to include in the Cyprus Local File certain categories of controlled transactions;
- how the EUR 750m threshold is determined in the context of rental income activities during each tax year;
- whether purchases and sales need to be aggregated for the purposes of assessing whether the threshold has been exceeded;
- whether the Cyprus Local File and Summary Information Table is prepared using the tax year or the accounting year of the company;
- under which category of the Summary Information Table should Financial Guarantees be reported;
- with regards to intra group loans, whether a transfer pricing study needs to be prepared every tax year or only if there is a change;
- who is responsible for the completion and the submission of the Summary Information Table;
- whether the Cyprus Tax Department circular with title "Tax treatment of intra group back to back financing transactions" is still applicable following the enactment of the new transfer pricing legislation and regulations.

The FAQs are expected to be expanded with additional questions in the future.

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

Czech Republic

Revised list of non-cooperative jurisdictions for CFC rules published

On February 24, 2023, the Czech Republic published a revised list of non-cooperative jurisdictions in the Financial Bulletin. The update reflects the recent updates to the EU list of non-cooperative jurisdictions adopted by the Council of the European Union (please refer to Euro Tax Flash Issue 506).

According to the Czech CFC rules, a controlled company or permanent establishment automatically qualifies as a CFC where it is a tax resident of a jurisdiction that is included on the list of non-cooperative jurisdictions at the end of its taxation period. Where this is the case, the entire income of the CFC from all activities is subject to tax at the level of the controlling Czech entity (i.e. not only passive income under the regular CFC rules).

The updated list entered into force for CFC purposes on February 21, 2023.

France

Ruling on withholding tax on dividend equivalent payments issued

On February 24, 2023, the French tax authorities issued two rulings on the application of dividend withholding tax on payments to non-residents in connection with certain financial transactions resulting in deemed dividend equivalents.

The first ruling notes that dividend withholding tax also applies to amounts distributed by French companies and that have the character of “proceeds from stocks and shares” or “similar income”. The ruling also notes

that this withholding tax applies to the extent that the beneficial owner of the income is a person who has the right to dispose of the income freely and who is tax domiciled or has its registered office outside France. As such, in certain situations, the determination of the beneficial owners of the income on which this withholding tax applies may present specificities, in particular with regard to the tax treatment of certain activities of banks concerning the temporary acquisition of shares in French companies and transactions on certain derivative products. In this respect the ruling sets out a list of types of income considered similar to dividend income, which includes:

- the fraction of remuneration or expenses which is considered as distributed income, due to it being disallowed as a deduction for the corporate tax base;
- salaries that are excessive or do not correspond to actual work;
- expenses reintegrated into profits;
- excess interest;
- remuneration of directors of public limited companies classified in the category of income from securities.

In addition, the ruling sets out a list of cases of income where withholding tax does not apply, which includes:

- sums paid to the partners as advances, loans or instalments and treated as movable income, in the absence of proof to the contrary;
- under certain conditions, distributions benefiting international organizations, foreign sovereign states and the central banks or public financial institutions of those states;
- distributions subject to special regimes involving the levying of flat-rate taxes substituted for ordinary taxes.

The second ruling provides guidance on the withholding tax treatment related to temporary acquisition of shares and transactions related to derivative products entered into with non-residents. This ruling also confirms that any transfer of value subordinated or determined, explicitly or implicitly, by reference to a dividend constitutes a dividend equivalent and is subject to withholding tax.

Isle of Man

Update of Pillar Two implementation in Budget 2023-24

On February 21, 2023, the government presented the 2023-24 budget.

As part of the budget speech, it was announced that further details of the Island's position in respect of the global minimum tax rate initiative (Pillar Two) would be taken by the government ahead of the summer recess. The Isle of Man is considering the introduction of local rules consistent with this overall aim and is currently in the process of weighing up the available options.

For more details, please refer to a report prepared by KPMG in the Isle of Man.

Luxembourg

Draft bill to transpose the EU Public Country-by-Country Reporting Directive

On February 24, 2023, the Luxembourg government published a draft law to transpose the EU Public Country-by-Country (CbC) Reporting Directive into domestic law (the Directive).

The draft bill is largely in line with the Directive. Luxembourg intends to make use of the "safeguard clause" and therefore in-scope groups would be allowed to defer the disclosure of commercially sensitive information, for up to five years. Also, Luxembourg intends to exempt companies from the requirement to publish the CbC reports on their website, provided that they are made available free of charge on the website of the local commercial registry.

Luxembourg intends to apply the rules in line with the deadline set under the Directive, i.e. for financial years starting on or after June 22, 2024.

For more information on the Country-by-Country Reporting Directive, please refer to the EU Tax Centre's dedicated website.

Malta

DAC6 annual notification submission by non-disclosing intermediaries extended

On February 17, 2023, the Maltese Commissioner of Taxation published an announcement informing that the deadline for submission of the annual notification by non-disclosing intermediaries is being extended to March 30, 2023. This extension relates to annual notifications regarding cross-border arrangements where the triggering event took place during 2022.

Additionally, the announcement notes that further notifications will be issued when the 2022 annual notification form is available for download.

Netherlands

Ruling on permanent establishment risks where employees work from home

On February 21, 2023, the Dutch tax authorities issued a ruling providing clarifications on when an employee working from home constitutes a permanent establishment in the Netherlands for a foreign company.

The case concerned a foreign company of an international group in the service sector, which has three employees who work remotely from their homes in the Netherlands. This working arrangement is a result of the employee's personal choice and the company does not reimburse the employees for any costs incurred for working from home. Additionally, the company does not have any other employees and does not carry out any other activities in the Netherlands. Furthermore, the functions and activities of the employees do not imply that they have the authority - formally or de facto - to conclude contracts.

According to the Dutch tax authorities, the work of the three employees based in the Netherlands should not create a permanent establishment (PE) in the Netherlands for the foreign company, since the employees home office is not at the disposal of the company and the employees do not have authority to conclude contracts on behalf of the company.

Report on taxation of foreign workers published

On February 15, 2023, the Dutch tax authorities issued a report on taxation of foreign workers providing guidance on payroll tax issues that may arise in an international context specifically in cases where foreign employers become active in the Netherlands.

The report mainly describes the legislation, regulations and case law as of January 1, 2022, and the associated practice and notes that developments thereof are only included in very exceptional cases. The key issues addressed by the report include:

- payroll taxes obligation in connection with the existence of permanent establishment in the Netherlands;
- the concept of a notional permanent establishment;
- application of double tax treaty article on income from employment, with focus on OECD Model Convention Article 15 (2017);
- international contributions including working in more than one EU Member State;
- tax collection;
- recalculation of foreign wages according to the Dutch standards;
- collection of taxes.

Local Courts

Germany

Determination of foreign income for foreign withholding tax credit purposes

On August 17, 2022, the German Federal Court (Court) issued a decision (I R 14/19) in a case concerning the deductible business expenses for the determination of foreign income and the available amount of the foreign withholding tax credit thereon.

The plaintiff was a German GmbH which was receiving license income from its Chinese subsidiary and on which 10 percent tax was withheld in China based on the China – Germany (1985) double tax treaty. In calculating the relevant withholding tax credit, the German tax authorities challenged the amount of deductible business expenses considering that all business expenses for the year under dispute were to be deducted, including those related to ongoing development work, thus reducing the maximum amount of foreign withholding tax credit to Nil.

The Court ruled in favor of the plaintiff and held that only business expenses treated as incurred in the tax year must be deducted when determining the amount of foreign withholding tax credit for such year. The business expenses that relate to ongoing development work not yet completed have no economic nexus with income incurred in the current year and therefore need not be deducted.

In giving its decision, the Court noted that, when determining the amount of foreign withholding tax credit for a year, only business expenses of a specific assessment period that have an economic nexus to specific proceeds of the same assessment period are to be considered as deductible.

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

Italy

SICAVs exempt from withholding tax on dividends distributed by Italian companies

On December 21, 2022, the second-level tax court of Abruzzo (Court) held that Luxembourg SICAVs (Société d'investissement à Capital Variable) are entitled to a refund of withholding tax levied on dividends

paid by Italian companies. Similar decisions were issued by the Italian courts on February 7 and February 16, 2022 (for more information, please refer to E-News Issue 149).

This decision reaffirms the intention of the Italian tax courts to abolish discriminatory tax treatment suffered by foreign investment funds in Italy and to provide for withholding tax refund opportunities for investment funds that received dividends from Italy prior to the law change.

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

KPMG Insights

Preparing for Pillar Two

As part of the Future of Tax & Legal webcast series, KPMG International held a webcast on February 15 and 16, 2023 providing updates on recent developments in respect of the OECD's Pillar 2 solution.

The OECD has released further Administrative Guidance on nearly 30 issues concerning the implementation of the GloBE rules. A number of these are likely to be critical to the implementation projects for in scope MNEs. These include rules surrounding the Qualifying Domestic Minimum Top-up Tax and the manner in which CFC taxes are to be treated. This session outlined this new guidance.

Please access the Future of Tax & Legal webpage for a replay of the sessions.

Pillar One: Where Next?

2023 is the year of implementation for the OECD's Pillar Two global minimum tax rules. But agreement has yet to be reached on Pillar One – the other half of the OECD's BEPS 2.0 package. Within the world of Pillar One, the future for Amount A (the proposed reallocation of taxing rights over a small set of large, highly profitable companies) and Amount B (a transfer pricing simplification project that would apply to small and large businesses alike) is much less certain.

On February 28, 2023, KPMG LLP held a one-hour webcast on where Pillar One may go next, focusing on:

- Status of Amount A, Amount B, and the removal of digital services taxes
- Expected developments in 2023
- Implications for the future of the international tax system and how countries apply transfer pricing rules.

Please access the event page for a replay of the session.

EU Carbon Border Adjustment Mechanism: Preparing for the new regulation

The implementation of the European Union's (EU) Carbon Border Adjustment Mechanism (CBAM) on October 1, 2023 is expected to reshape global trade at large. It is imperative that businesses understand and prepare for the changes that the mechanism will bring about.

On February 14, 2023, a panel of KPMG professionals provided insights into the inner workings of CBAM, explored the effect that these measures have on organizations situated both within and outside of the EU, and delved into why the decarbonization of production, whether it's within the EU or abroad, is expected to be a key source of competitive advantage for selling into the EU market.

Please access the event page for a replay of the session.

Domestic tax rules governing family business transfers

For many family businesses, sustaining prosperity for the long run depends on how well they plan transfers of business assets and family wealth from one generation to the next. Tax, legal, and a host of other issues come into play.

It focusses on the domestic tax rules governing family business transfers and analyse of the outcomes of two case studies in which the shares in a family business are transferred on the owner's death (inheritance) and in which the transfer happens during the owner's lifetime (gifting).

Various case studies are analysed pertaining to their significant disparities between tax regimes on whether:

- A specific tax relief is available and what conditions must be met to gain that tax relief
- Taxes are applied on inheritances and family gifts directly or through other taxes and charges, such as capital gains taxes and stamp duties

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

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