E-News from the EU Tax Centre

Issue 186 – November 8, 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:

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- **European Parliament:** ECON Committee adopts resolutions on the role of tax policy in times of crisis and on further reform of corporate taxation rules
- **Cyprus:** Consent to OECD/G20 Inclusive Framework agreement on UTPR and QDMTT Safe Harbour (Pillar Two)
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Infringement Procedures and CJEU Referrals

Infringement Procedures

Belgium referred to the CJEU for failing to correctly transpose the CFC provisions under ATAD

On October 23, 2023, it was reported in the Official Journal of the EU that the European Commission referred Belgium to the Court of Justice of the European Union (CJEU) for failing to correctly transpose the controlled foreign company (CFC) rules of the Anti-Tax Avoidance Directive (ATAD).

The referral follows a reasoned opinion sent by the Commission on December 2, 2021, calling on Belgium to amend its CFC rules. The Commission argued that, contrary to Article 8(7) of ATAD, Belgian CFC provisions do not allow a taxpayer to deduct tax paid by a CFC entity in its state of residence from the taxpayer's Belgian CFC liability. The Commission announced its decision to refer Belgium to the CJEU on April 19, 2023 – for previous coverage please refer to E-News Issue 176.

CJEU Referrals

CJEU referral on the compatibility with EU law of withholding tax on dividends paid by Spanish Basque companies to non-residents

On September 19, 2023, the High Court of Justice of the Basque Country (the High Court) in Spain made a reference to the CJEU regarding the compatibility of the withholding tax on dividends paid to non-residents with the free movement of capital.

The plaintiff was a company resident for tax purposes in the UK, which received dividends from a Spanish company. The dividends were subject to a 10 percent withholding tax (in line with the Spain-UK double tax treaty). The withholding tax was final and the plaintiff could not recover the tax paid in Spain (despite the fact that it was in a tax loss position in the relevant year). Had the recipient of the dividend income been a Spanish resident company incurring tax losses, the Spanish corporate income tax system would have allowed the recovery of the taxes withheld.

The High Court questioned the compatibility of the rules at hand, which established a different treatment based on the tax residence of the recipient, with the free movement of capital. The query was raised in particular in light of the CJEU decision in case C-416/17 and the Spanish Supreme Court's ruling on the incompatibility of Spanish withholding taxation with EU law (for previous coverage, please refer to E-News Issue 178).

EU Institutions

European Parliament

ECON Committee adopts resolutions on the role of tax policy in times of crisis and on further reform of corporate taxation rules

On October 24, 2023, the European Parliament's Committee on Economic and Monetary Affairs (ECON) adopted two resolutions regarding (i) a report on the role of tax policy in times of crisis (the Tax Policy report) and, (ii) a report on further reform of corporate taxation rules (CT Rules report). Thereby, the ECON members support the view that inequalities and current challenges for European businesses can be partially addressed with a revision of the European Union's tax rules. In this respect, the ECON argues for a systematic review of tax policy in general and of corporate tax rules in particular.

The Tax Policy report entails recommendations for a more effective use of tax policy to facilitate redistribution, generate revenue and incentivize environmentally friendly behavior. Additionally, the report points out the challenges increased cross-border remote working entails for international tax systems. Furthermore, the Tax Policy report notes the low level of environmental taxation. Moreover, the report encourages Member States to make more effective use of existing legal and administrative instruments for combating tax avoidance, tax evasion and tax fraud in both direct and indirect taxation. Finally, the Tax Policy report suggests to the European Commission (EC) to conduct an analysis for a broader temporary excess profit tax with respect to future crises enhancing the overall competitiveness in the internal market.

The CT rules report entails several recommendations to ease current challenges faced by businesses, with a focus on small and medium-sized enterprises (SMEs). Key suggestions of the report include:

- Tax measures mitigating the impact of the rising energy costs.
- Offering targeted relief to both vulnerable citizens and SMEs with the allocation of additional revenues generated.
- Evaluating past initiatives in corporate taxation implemented since 2011 to identify the most effective approaches for reducing administrative burden on businesses and particularly SMEs.
- Assessing the utilization of new technologies to enhance tax-related administrative processes and reducing compliance costs and administrative complexity. In this respect, the EC could propose increased cooperation between tax authorities, ultimately creating a more business-friendly environment.

After having been adopted by the ECON, the resolutions are now subject to approval by the European Parliament. Both reports are set to be discussed in an indicative plenary sitting on December 11, 2023. Resolutions adopted by the European Parliament do not have a binding effect on the Council and the European Commission. However, those resolutions must be taken into account by the Commission and Member States when proposing or agreeing on new rules.

For previous coverage, please refer to E-News Issue 179 and E-News Issue 180.

OECD and other International Institutions and Research Centers

Organisation for Economic Cooperation and Development – OECD

Updated FAQs in relation to OECD reporting rules for digital platforms

In October 2023, the OECD published updated FAQs related to the Model Reporting Rules for Digital Platforms (MRDP), which aim to clarify definitions, due diligence procedures and reporting requirements under the MRDP and to ensure consistency in their implementation. Key clarifications that have been added or revised relate to:

- the coverage of pre-recorded digital content and pre-scheduled activities under the Personal Services definition;
- Reporting Platform Operator acting as counterparty (buyer) under the Platform definition;
- circumstances under which Consideration is considered to be known or reasonably knowable;
- indirect rental of immovable property as a Relevant Activity;
- e-commerce service providers under the Platform definition;
- verification of Seller information;
- treatment of vouchers for reporting purposes;
- treatment of barter transactions;
- use of local currencies;
- reporting on multiple parties jointly registered as Sellers.

Local Law and Regulations

Cyprus

Consent to OECD/G20 Inclusive Framework agreement on UTPR and QDMTT Safe Harbour (Pillar Two)

On October 30, 2023, the government of Cyprus published a press release announcing its consent to the design and application of the transitional Undertaxed Profits Rule (UTPR) Safe Harbour and the permanent Qualified Domestic Minimum Top-up Tax (QDMTT) Safe Harbour that were agreed by the OECD/G20 Inclusive Framework as part of the July Administrative Guidance. For more details, please refer to E-News Issue 181.

Under Article 32 of the EU Minimum Tax Directive, the top-up tax due by a group in a jurisdiction shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities located in that jurisdiction fulfils the conditions of an international set of rules and conditions which all Member States have consented to. Given that Cyprus is not a member of the OECD/G20 Inclusive

Framework, the consent of Cyprus is relevant for purposes of Article 32 of the EU Minimum Tax Directive.

In June 2023, the government in Cyprus had already announced that it consents to the design and application of the transitional Country-by-Country (CbyC) Reporting Safe Harbor that was agreed by the OECD/G20 Inclusive Framework as part of the GloBE Implementation Framework release on December 20, 2022. For previous coverage, please refer to E-News Issue 179.

Estonia

Legislative proposal to implement minimum taxation under Pillar Two

On October 27, 2023, the Estonian government published draft amendments to the Income Tax Act to implement the EU Minimum Tax Directive. Key takeaways include:

- Estonia is considering making use of the option to defer the application of the Income Inclusion Rule (IIR) and UTPR (Article 50 of the EU Directive).
- According to the explanatory notes, Estonia would not transpose the entire EU Directive at this stage but only those administrative aspects that are required for the application of Article 50. As such, the draft only includes an obligation for Estonian UPEs to designate a foreign constituent entity that would be required to submit the GloBE Information Return.
- Provisions on IIR and UTPR are not included in the draft and there is no indication yet as to when the government plans to start applying the rules (i.e. after December 31, 2029 or earlier).
- In addition, it has not been clarified whether the government plans to also apply a DMTT at a later stage.

For a state of play of the implementation of Pillar Two, please refer to KPMG's dedicated implementation tracker.

Finland

Reservations against proposed BEFIT, Transfer Pricing and Head Office Tax system Directives

On October 26, 2023, the Finnish government announced reservations in relation to the proposed BEFIT, Transfer Pricing and Head Office Tax system Directives following a short local public consultation process (for previous coverage, please refer to E-News Issue 184). Key takeaways include:

- The Finnish government supports the European Commission's proposals to harmonize corporate taxation across the EU, but is concerned about the potential impact on national tax sovereignty and the administrative burden on companies and the tax authorities.
- The Finnish government believes that the proposals may cause uncertainty in respect of the future tax revenue for Finland and that the impact of the proposals needs to be assessed more thoroughly.
- The Finnish government is particularly concerned about the BEFIT directive proposal and the proposal for small and medium-sized enterprises, which it believes could significantly limit

Finland's tax sovereignty.

- The Finnish government also believes that the proposed timelines for implementing the directives are challenging and that companies and the tax authorities need more time to prepare for potential harmonization of corporate taxation in the EU.

Germany

Draft updated guidance on the application of the German Reorganization Tax Act

On October 11, 2023, the German Federal Ministry of Finance published draft updated guidance on the application of the German Reorganization Tax Act. Key clarifications focus on the tax consequences in relation to:

- conversions and contributions;
- transfer of assets in the case of a merger with a partnership or with a natural person and conversion of a corporation into a partnership;
- splitting up, splitting off and transfer of assets (partial transfer);
- contribution of parts of a business to a corporation or cooperative and exchange of shares;
- contribution of a business, part of a business or business partner share to a partnership;
- conversion of a partnership into a corporation or cooperative.

Compared to the currently applicable 2011 version, key amendments include clarifications and specifications in relation to decisions of the Federal Tax Court as well as legislative changes to the German Reorganization Act and German Reorganization Tax Act that have occurred since 2011.

Feedback by associations is requested by December 6, 2023.

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

Greece

Public consultation regarding the implementation of the EU Public CbyC Directive

On October 19, 2023, the Greek Ministry of Development and Investments launched a public consultation to collect feedback on a draft bill to implement the Public CbyC Reporting Directive into local legislation.

Key takeaways include:

- The provisions of the Greek public CbyC bill are closely aligned with the text of the Directive.
- The bill does not provide the possibility to apply the “safeguard clause”, i.e. to allow in scope groups to temporarily omit for a maximum of five years information that would cause a significant competitive disadvantage to the companies concerned, provided they can justify the reason for the omission.
- Greece intends to adopt the website publication exemption, i.e. in-scope companies would

be exempted from publishing the report on their websites, if the report is already made publicly available to any third party located in the EU, free of charge, on the website of the commercial registry.

If adopted in the current form, the draft rules would be applicable for financial years starting on or after June 22, 2024.

Member States were required to implement the Public CbyC Reporting Directive by June 22, 2023. On July 20, 2023, the Commission sent Greece and thirteen other Member States letters of formal notice for failure to notify the transposition of the Directive into domestic legislation. For more details, please refer to E-News Issue 181.

Interested stakeholders had to send feedback by November 1, 2023.

Update of Greek list of non-cooperative jurisdictions

On October 25, 2023, the Greek list of non-cooperative countries for fiscal year 2022 was published in the Official Gazette. Compared to the previous list, i.e. valid for financial year 2021, the Greek government decided to add Angola, the British Virgin Islands, and Nicaragua and remove Barbados and the Maldives.

As a result, the 2022 list of non-cooperative countries includes the following jurisdictions: Algeria, Angola, Anguilla, Antigua and Barbuda, Benin, Belarus, British Virgin Islands, Botswana, Burkina Faso, Cambodia, Chad, Congo, Cote d' Ivoire (Ivory Coast), Djibouti, Dominica, Gabon, Ghana, Guatemala, Guinea, Guyana, Haiti, Honduras, Kazakhstan, Kingdom of Lesotho, Liberia, Madagascar, Mali, Mauritania (until July 31, 2022), Nicaragua, Niger, Palau, Panama, Papua New Guinea, Philippines, Rwanda (until November 30, 2022), Seychelles, Sint Maarten, Tanzania, Thailand (until March 31, 2022), Togo, Trinidad and Tobago, Vanuatu, and Vietnam.

In Greece, payments to tax residents of non-cooperative jurisdictions or tax residents of jurisdictions with a preferential tax regime are not deductible for tax purposes. Exceptions apply where the taxpayer can prove that these expenses relate to actual and usual transactions that do not result in tax avoidance.

For more details on the EU listing exercise, please refer to KPMG's summary of defensive measures applied by EU Member States against non-cooperative jurisdictions.

Ireland

Technical guidance on DAC7 reporting obligations updated

On October 23, 2023, Irish Revenue updated the Tax and Duty Manual on reporting obligations for platform operators (DAC7). Key updates include:

- confirmation of the average annual foreign exchange conversion rate to be used;
- insertion of an example of a business model indirectly connecting sellers and users on their platform;
- the registration portal for platform operators opened on November 1, 2023 (previously

scheduled for October 1, 2023);

- updates to the obligations on platform operators in relation to elections in Ireland as well as de-registrations in Ireland and in other Member States;
- clarifications with respect to a platform operators data protection obligations.

The rules are effective from January 1, 2023 with initial registration required by November 30, 2023 and initial reporting required by January 31, 2024.

For more information, please refer to eBrief No. 231 and E-News Issue 181.

Italy

Consultation on draft implementation rules for investment management exemption regime

On October 16, 2023, the Italian government released for public consultation a draft decree providing for implementing provisions in relation to the new so-called investment management exemption regime.

This regime was enacted effective January 1, 2023 and provides that foreign investment vehicles and its direct or indirect subsidiaries should not be deemed to have an Italian permanent establishment provided certain conditions are met in connection with the activities of an investment manager.

Key elements of the draft ministerial decree include clarifications on the definition of foreign investment vehicles as well as certain independence requirements.

Comments were requested by October 27, 2023.

Latvia

Updated list of non-cooperative jurisdictions published

On October 23, 2023, the Latvian government published amendments to its domestic list of non-cooperative jurisdictions in the Official Gazette.

In line with the conclusion adopted by the Council of the EU on October 17, 2023 (please see Euro Tax Flash Issue 526), the updated list includes the following sixteen jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, the Bahamas, Belize, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, the Seychelles, Trinidad and Tobago, Turks and Caicos Islands, the US Virgin Islands and Vanuatu. The updated list is effective from November 1, 2023.

Lithuania

Legislative proposal to implement minimum taxation under Pillar Two

On October 27, 2023, the Lithuanian government published a draft bill to implement the EU Minimum Tax Directive. Key takeaways include:

- Lithuania is considering making use of the option to defer the application of IIR and UTPR (Article 50 of the EU Directive).
- According to the explanatory notes, Lithuania would not transpose the entire EU Directive by December 31, 2023. Instead, the draft provides for certain limited administrative aspects that are required for the application of Article 50, including an obligation for Lithuanian UPEs to designate a foreign constituent entity that would be required to submit the GloBE Information Return.
- Failures to comply with the notification requirements may be sanctioned with a fine between EUR 1,800 to EUR 3,800 (if requirements are violated for the first time) or a fine between EUR 3,800 to EUR 6,000 (if violated repeatedly).
- Provisions on DMTT, IIR and UTPR are not included in the draft. While there is no indication yet as to when the government plans to start applying the IIR and UTPR (i.e. after December 31, 2029 or earlier), the government previously indicated the intention to introduce a DMTT that would apply for financial years starting January 1, 2025.

For previous coverage, please refer to E-News Issue 183.

Malta

2024 Budget statement announces deferral of Pillar Two implementation

On October 30, 2023, as part of the 2024 Budget release, the Maltese government announced its intention to defer the application of the minimum taxation rules under Pillar Two. Key takeaways include:

- Malta will make use of the option provided for in the EU Minimum Tax Directive, allowing Malta to defer the implementation of the Pillar Two rules. As such, IIR, UTPR and DMTT will not be introduced in 2024.
- There is no indication yet as to when the government plans to start applying the IIR and UTPR (i.e. after December 31, 2029 or earlier). In addition, it has not been clarified whether the government plans to apply a DMTT.
- Malta is developing measures and incentives, such as grants or refundable tax credits, which conform with EU and OECD regulations in order to safeguard Malta's competitiveness on an international level. In addition, it was announced that the current full imputation tax system would be retained.

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

DAC7 guidelines updated and technical reporting clarifications issued

On October 27, 2023, the Maltese tax authorities published further clarifications on the Maltese DAC7 reporting framework for platform operators.

The amendments concern changes to the date by which a platform operator must register with the Maltese authorities. These were extended from October 31, 2023 to November 20, 2023. In addition, the Maltese authorities issued the reporting XML schema as well as guidance on the data elements and the submission process.

For previous coverage, please refer to E-News Issue 183.

Netherlands

Lower House of Parliament adopts amended 2024 Tax Plan and Minimum Profit Tax Act 2024

On October 27, 2023 the Lower House of the Dutch Parliament adopted the 2024 Tax Plan package, the Minimum Profit Tax Act 2024 and the Tax Miscellaneous Provisions Act 2024. The Lower House also adopted a considerable number of tax amendments and motions. Key amendments include:

- *Minimum Profit Tax Act 2024:* Several elements of the OECD Administrative Guidance have been incorporated into the legislative text, including the transitional UTPR Safe Harbour and the permanent QDMTT Safe Harbour. For previous coverage on the Dutch implementation of Pillar Two, please refer to E-News Issue 183.
- *2024 Tax Plan:* CFC rules have been amended to allow for a credit for a Pillar Two QDMTT paid by a CFC in another jurisdiction. In addition, Pillar Two top-up taxes are treated as non-deductible expenses for corporate income tax purposes. For previous coverage on the 2024 Tax Plan, please refer to E-News Issue 184.

As a next step in the legislative process, the adopted amendments will be incorporated into the bills and debated in the Upper House of Parliament. Unlike the Lower House, the Upper House cannot make any changes, but can only adopt or reject the bills in their entirety. The Upper House will vote on the bills in mid-December 2023.

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

Portugal

Draft budget law for 2024 submitted to Parliament

On October 10, 2023, the Portuguese government submitted the Budget Law for 2024 to the Portuguese Parliament. Key direct tax measures include:

- Introduction of a reduced corporate tax rate of 12.5 percent for certain eligible start-ups, to be levied on the first EUR 50,000 of taxable income.
- Amendments to the tax incentives for capitalization of companies, such that the annual deduction would be determined based on the amount of eligible net increases in equity that is calculated with reference to the tax year concerned, as well as the six previous tax years (currently the tax year concerned and the nine previous tax years). The net increase in equity would be multiplied by a variable rate corresponding to the average 12 month Euribor rate in the tax year concerned, increased by 1.5 or 2 percentage points depending on the size of the company (currently fixed deduction rate of 4.5 or 5 percent). In addition, the deduction would be increased by 50 percent in 2024, 30 percent in 2025, and 20 percent in 2026.

- Increased deduction of goodwill (acquired in a business combination) over a period of 15 tax years (currently 20 years), which would be applicable to intangibles that are recognized for the first time after January 1, 2024.
- The temporary support regime allowing for a 20 percent increased deduction of electricity and gas costs (i.e. in total 120 percent) would be extended and be applicable also in 2023 and 2024.

As a next step, the proposed measures will be subject to approval by the Parliament. As such, amendments may still occur in the course of the legislative procedure.

Romania

Minimum tax on turnover for large companies and other fiscal measures enacted

On October 27, 2023, new fiscal budgetary measures were published in the Official Journal of Romania. The final law is largely in line with the previous draft bill covered in E-News Issue 184, i.e. no significant changes were made. As previously noted, the new law establishes:

- a minimum tax on the turnover of large companies, if their turnover exceeds EUR 50 million in the preceding year of calculation (for example, in 2023 for tax assessment in 2024). The tax applies if the corporate income tax computed for the assessment year is lower than the minimum turnover tax. In that case, companies would need to only pay the minimum turnover tax. Certain exemptions apply.
- a supplementary tax for banks: 2 percent of turnover in 2024 and 2025, and 1 percent of turnover from 2026.

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

Slovenia

Draft amendments to corporate income tax law published by government

On October 17, 2023, the Slovenian government published a draft proposal for amending the domestic Corporate Income Tax Law. Key measures entail:

- *Permanent Establishment (PE):* the draft would introduce provisions to prevent circumventing the PE status through, for example, commissionaire agreements . In addition, the threshold for a PE construction site would be reduced from 12 months to 6 months. The scope of relying on activities of a preparatory and ancillary nature for avoiding the PE status would be restricted, particularly with regards to the artificial splitting of activities.
- *Interest deduction limitation:* the draft proposal would introduce the EBITDA rule from the Anti-Tax Avoidance Directive (ATAD). In this respect, excess borrowing costs, defined as the amount by which a taxpayer's deductible borrowing costs exceed the taxable income from interest and other equivalent taxable income, are to be recognized for tax purposes only up to a maximum of 30 percent of the EBITDA or up to EUR 1 million. In case the taxpayer does not disclose the excess borrowing costs, it is presumed that the interest is fully deductible for tax purposes.

Subject to adoption by the Parliament, the law will enter into force fifteen days after its publication and will become applicable from January 1, 2024 onwards.

Sweden

Reservations against EC Transfer Pricing Directive proposal

On October 17, 2023, the Swedish government issued an assessment of the Transfer Pricing Directive proposal (for more details, please refer to Euro Tax Flash Issue 521). Key takeaways include:

- The Swedish government raises concerns regarding the proposal's compatibility with the principles of subsidiarity and proportionality.
- The Swedish government does not share the European Commission's view that disputes over transfer pricing within the EU are mainly due to differences in member states' interpretation and application of the arm's length principle.
- Instead, the Swedish government takes the view that transfer pricing disputes would often arise because different states make different assessments of the circumstances in the specific case.
- The government believes that the arm's length principle is an internationally accepted principle that should not be rigidly codified at EU level, as this could limit its flexibility and hinder the ability of member states to reach mutual agreements with third countries.
- The government also believes that global solutions are preferable to EU-level solutions, as transfer pricing is applied globally.

Uganda

Guidelines for implementation of digital service tax issued by government

On October 20, 2023, the government of Uganda issued a public notice providing guidelines in relation to the 5 percent digital service tax, which came into effect on July 1, 2023 (for previous coverage, please refer to E-News Issue 181). Key clarifications include:

- in-scope non-residents taxpayers must register through the Uganda Revenue Authority website, unless they already registered for value added tax purposes;
- registered taxpayers must file quarterly returns to disclose their income from digital services provided to customers in Uganda.
- non-resident taxpayers who fail to register may face a 15 percent withholding tax on in-scope payments from resident taxpayers.

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

Ukraine

Proposal for increased corporate income tax rate on banks

On October 19, 2023, the government of Ukraine published a proposal to increase the corporate income tax rate applicable to banks from 18 percent to 36 percent in the period from January 1, 2024 to December 31, 2025. Loss carry forwards relating to previous periods would not be allowed to be utilized in the 2024-2025 period.

The proposal would replace the draft bill that was previously submitted to the Ukrainian Parliament proposing the introduction of a 5 percent windfall tax on the amount of net interest income generated by banks (please refer to E-News Issue 183).

Local Courts

Finland

Estonian distribution tax creditable against Finish profits (ruling)

On June 20, 2023, the Central Tax Board of Finland (the Tax Board) issued its decision in case KVL:025/2023. The case concerns a Finnish company (FI Co), which conducted business in Estonia through a permanent establishment (EE PE). The profits generated by EE PE were included in FI Co's taxable profits in Finland. In 2022, FI Co transferred the accumulated earnings of EE PE to its head office in Finland and paid corporate income tax in Estonia. FI Co sought an advance ruling from the Central Tax Board to determine whether the company could credit the tax paid in Estonia against the taxes paid in Finland for the same income. The taxpayer also sought clarifications on the method of allocating the credit to different tax years, considering the accumulation of earnings in EE PE over multiple years.

Under Estonian tax legislation, in effect since 2000, profits are only taxable upon distribution. The same is applicable to profits transferred by an Estonian permanent establishment to its head office. The Estonia - Finland Income and Capital Tax Agreement includes corporate income tax in Estonia as a covered tax.

The Tax Board referred to the Finnish Supreme Administrative Court's case law in KHO 2014:147, which established that the tax imposed in Estonia on the earnings of a PE is similar to the tax covered by the tax treaty. Therefore, in the Tax Board’s view, Finland is required to provide relief to avoid double taxation. The Tax Board also took the view that, considering that the transferred earnings of EE PE included profits from previous years, the tax paid in Estonia in 2022 had to be allocated to the tax years in which the head office in Finland included the foreign positive net income in its taxable result. In the case at hand, the tax paid in Estonia had to be allocated to years going back as far as 2001. Once the Estonian tax has been allocated to different tax years, the taxpayer could determine how much of the tax paid in Estonia could be credited in Finland.

Ruling on the applicability of the CFC exemption with regard to a Luxembourg investment company

On September 9, 2023, the Tax Board issued its decision in case KVL:041/2023, concerning the applicability of the Finnish CFC rules with respect to a Luxembourgish family wealth management company (*Société de gestion de patrimoine familial*, "SPF"). The SPF was 90 percent held by a Finnish company.

Since the effective tax rate of the SPF in Luxembourg, computed in accordance with the Finnish CFC rules, was less than three-fifths of the Finnish statutory corporate income tax rate, the Luxembourg company would, in principle, be subject to the Finnish CFC rules. Nevertheless, the Finnish CFC legislation includes an exemption for entities located in the European Economic Area (EEA) if the entity has genuinely been established in the EEA state, it resides there and engages in economic activities supported by staff, equipment, assets, and premises.

The Tax Board noted that the SPF rented a 38.5 square meter office space equipped with necessary equipment, employed one part-time worker responsible for administrative tasks and one full-time investment manager who managed the investment portfolio. Based on these elements, in the Tax Board's view, the SPF could independently conduct its business activities in Luxembourg, despite the fact that strategic substantial investment decisions had to be approved by the Finnish parent company. As a result, the Tax Board concluded that the SPF could qualify for the exemption and not be considered as a CFC for Finnish tax purposes.

Germany

Ruling on the application of the loss deduction limitation rule regarding change of control

On August 23, 2023, the Münster Tax Court (the court) issued a ruling (9 K 2166/21 K,G,F) on the application of the German loss deduction limitation rule with respect to an acquisition of equity interest, which does not lead to a change of control.

The plaintiff was a corporation (M-GmbH), which was subject to changes in the shareholder structure as well as to a capital increase, with one shareholder (C-GmbH) remaining majority shareholder over that time. The tax authorities considered those circumstances being in scope of the loss deduction limitation rule, according to which unused tax losses become non-deductible in case more than 50 percent of a corporation's shares are transferred to a purchaser within a five-year period. In this respect, the authorities argued that this threshold had been exceeded through the acquisition of the shares in combination with the capital increase, i.e. more than 50 percent of M-GmbH's shares had technically been transferred. Therefore, the deductibility of unused tax losses was denied by the authorities for the corporate income assessment of the fiscal year 2018.

In the ruling, the court confirmed that more than 50 percent of M-GmbH's shares had been transferred as a result of the outlined actions. However, according to the court, this did not result in a change of control of M-GmbH as C-GmbH always remained the majority shareholder. With the fundamental basis of the loss deduction limitation rule being the change of control, the court denied the application of the loss deduction limitation rule (i.e. allowed the deduction of unused tax losses). However, an appeal to the Federal Tax Court was admitted.

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

Spain

Ruling on what constitutes a tax advantage in the context of the neutrality regime of restructurings

On July 27, 2023, the General Directorate of Taxes (DGT) issued a ruling concerning the tax implications of a restructuring operation. The applicant was an individual who intended to transfer a 60 percent shareholding in a company (ACo) to another company wholly owned by the same individual (BCo). The ownership transfer would be achieved through a securities swap transaction. Two years after the transaction, ACo would distribute profits corresponding to periods before the swap transaction to BCo. Under certain conditions, the restructuring could be treated as tax neutral, and the subsequent profit distribution could benefit from the Spanish participation exemption.

First, the DGT analyzed whether deferring the taxation, under the tax neutrality regime, of the latent capital gains from the shares to be contributed could be classified as a 'tax advantage.' This is relevant because, under Spanish rules, restructurings are not tax-neutral if they are not carried out for valid economic reasons, but mainly with the purpose of gaining a tax advantage. The DGT referred to the Supreme Court's ruling 1503/2022 dated November 16, 2022, which clarified that obtaining a tax advantage is inherent to the deferral regime itself, as it is characterized by tax neutrality. Therefore, the prohibited tax advantage, pursued beyond other economic motives, needs to be separate from the tax deferral itself. As such, only the subsequent applicability of the participation exemption could be considered as the tax advantage sought by the taxpayer.

The DGT also noted that, in line with the CJEU decision in case C-14/16, the tax advantage sought could only be rectified in cases where it is proven that the primary intent of the transaction was tax evasion or avoidance. Eliminating the tax advantage requires a case-specific analysis, establishing that the restructuring operation was primarily aimed at tax fraud or tax evasion, or it was one of its primary objectives.

Switzerland

Swiss Federal Administrative Court denies refund claim for withholding tax on government bond interest due to cross-currency swap

On September 4, 2023, the Swiss Federal Administrative Court (Administrative Court or the Court) issued a decision in a case concerning the withholding tax treatment of interest related to bonds subject to a cross-currency swap. The plaintiff was a Danish financial institution, which held CHF 250 million (approximately EUR 260 million) worth of bonds issued by the Swiss Confederation. At the same time the plaintiff engaged in a cross-currency swap with another party in the market.

The Administrative Court held that as a result of the cross-currency swap the plaintiff was not the beneficial owner of the bond. Therefore, the Court held that the plaintiff was not eligible for a refund of the 35 percent withholding tax applied to the bond coupons. The decision was based on recent case law of the Federal Supreme Court developed in the context of several perceived "dividend stripping" cases.

The taxpayer has appealed the decision to the Swiss Federal Supreme Court.

For further information, please refer to a report prepared by KPMG in Switzerland.

KPMG Insights

Where are we on BEPS 2.0?

On November 9, 2023, a webcast will bring together our leading global experts to speak about the latest developments and releases in respect of the OECD's BEPS 2.0 project.

The webcast will provide an update on the recent OECD releases on Pillar 1 Amounts A & B, the Subject to Tax Rule, Guidance on the GloBE rules and a status report on where various jurisdictions are on Pillar 2.

Please access the event page to register.

Illustrative disclosures – Guide to annual financial statements

KPMG's 2023 guides to annual financial statements are now available. They comprise Illustrative disclosures and a Disclosure checklist in accordance with IFRS Accounting Standards.

These updated guides reflect standards in issue at August 31, 2023 that are required to be applied by a company with an annual reporting period beginning on 1 January 2023.

In particular, they illustrate amendments to:

- IAS 12 *Income Taxes* relating to the initial recognition exemption and Pillar Two top-up taxes; and
- IAS 1 *Presentation of Financial Statements* relating to disclosure of material rather than significant accounting policies. Please also refer to our high-level visual guide for further guidance.

For more information, please refer to a dedicated KPMG web article.

EU tax perspectives session

On October 4, 2023, KPMG held a new EU tax perspectives session as part of the Future of Tax & Legal webcast series.

European Union (EU) Member States and institutions continue to have full agendas that include the implementation of international initiatives and the advancement of upcoming EU-specific proposals. Against this backdrop a panel of KPMG specialists will share their insights on some of the latest developments from across the EU affecting multinational groups operating in Europe. The session will focus on:

- BEPS 2.0 in the EU: state of play on the implementation of the EU Minimum Tax Directive (Pillar Two)
- Business in Europe: Framework for Income Taxation (BEFIT): Commission's proposal and the way forward
- Unshell (ATAD 3): state of discussions and what can be expected in the future
- Navigating the EU Public Country-by-Country Reporting Directive: implementation across the EU and practical insights
- Looking ahead: state of play and updates on other EU tax initiatives.

For a replay of the session, please access the event page.

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Key links

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