E-News from KPMG's EU Tax Centre

Key Insights of this E-News edition Issue 195

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 Commission:** Public consultation on the Directive on Administrative Cooperation (DAC)
- **Council of the EU:** Belgian Presidency reaches agreement on FASTER
- **OECD:** Consolidated commentary on Pillar Two rules, updated Pillar Two examples
- **Belgium:** Amendments to the Pillar Two global minimum tax rules adopted
- **Denmark:** Legislative proposal to amend Pillar Two legislation submitted to Parliament
- **Italy:** Tax authorities issue regulations on optional alternative to controlled foreign company taxation
- **Poland:** Consultation on legislative proposal to implement minimum taxation under Pillar Two
- **France:** French Supreme Administrative Court rejects claim for cross-border loss relief

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Key Insights

— EFTA Court decision on the concept of 'final losses' in the context of cross-border relief

EFTA

EFTA Court decision on the concept of 'final losses' in the context of cross-border relief

On May 13, 2024, the European Free Trade Association Court (the Court) issued a judgement in case E-7/23. The case concerns the compatibility of Norway's interpretation of the final losses exception in the context of cross-border loss relief with the freedom of establishment provisions under the European Economic Area (EEA) Agreement. The judgment also clarifies the case-law arising from the Court's judgment in case E-15/16.

The plaintiff, a parent company based in Norway, aimed to deduct the losses of its Danish subsidiary from its taxable income. However, the Norwegian tax authorities rejected the deduction, arguing that the subsidiary had not ceased its operations and continued to generate income in the subsequent year. Citing the Court's judgment in case E-15/16, the tax authorities deemed the losses incurred by the subsidiary as not 'final,' thus denying the cross-border loss relief. Upon appeal by the taxpayer, the Borgarting Court of Appeal sought clarifications from the Court. Specifically, it questioned whether the 'final losses' exception applies if a subsidiary receives even minimal income in the fiscal year following the deduction claim, or if a specific assessment is required to determine if the subsidiary's continued income would indeed reduce its losses, including the portion for which the deduction is sought.

Under the Norwegian group contribution regime, the compensation of losses between two group companies is allowed only if both the transferor and the recipient are liable to tax in Norway. Nevertheless, as an exception to this rule, cross-border relief of losses is possible in the case of 'final losses' incurred by a subsidiary resident in an EEA state. A difference in treatment between resident parent companies based on the location of their subsidiaries constitutes an obstacle to the freedom of establishment if it makes it less attractive for resident companies to establish subsidiaries in other EEA states. On these grounds, settled EFTA Court case-law had previously held that the Norwegian legislation at hand constitutes a restriction on the freedom of establishment.

The Court recalled that based on its judgment in E-15/16, the restriction at hand might in principle be justified. However, as an exception, such restriction would be disproportionate and incompatible with the EEA agreement if the loss was 'final', and the non-resident subsidiary had exhausted the possibilities available in its state of establishment to utilize it. The Court clarified that losses incurred by a non-resident subsidiary are considered final only if the subsidiary no longer earns any income in its EEA State of residence. As long as the subsidiary continues to receive even minimal income, there remains a chance that the losses incurred may be offset by future profits in the EEA State where it resides.

Based on the above, the Court concluded that the final losses exception does not apply if a subsidiary receives even minimal income in the fiscal year following the deduction claim. The Court also held that Norway's requirement that a formal liquidation process be decided after the end of the fiscal year of the claimed deduction to show that a loss is 'final' is compatible with the freedom of establishment provisions under the EEA Agreement.

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Infringement Procedures and Court Referrals

Key Insights

- CJEU referral on the French rules on taxing undeclared assets held abroad

CJEU referrals

CJEU referral on the French taxation of undeclared assets held abroad

On February 23, 2024, the Tribunal Judiciaire de Nanterre (the Court) made a referral (C-141/24) to the Court of Justice of the European Union (CJEU). The case concerns the compatibility of the French rules on declaring assets held abroad and related tax consequences with the free movement of capital.

French individuals, associations and non-commercial companies domiciled or established in France are required to disclose, together with their income tax return, details of any accounts opened, held, used, or closed abroad. Under the French Tax Procedures Code, if the taxpayer fails to comply with the disclosure obligation at least once in the preceding ten years, tax authorities are allowed to request information or evidence on the origin and manner of acquisition of the asset. If the taxpayer fails to respond or to provide adequate evidence, the assets would be deemed as acquired through donation or succession and taxed at the highest personal income tax rate, i.e., 60 percent.

The plaintiff was a French individual who, on December 19, 2019, received a request for information from the French tax authorities – in respect of assets held in two bank accounts opened with a Luxembourgish bank during the period 2010 to 2014. Following several exchanges between the taxpayer and the tax authorities, the latter concluded that the taxpayer failed to prove the origin of the assets. Consequently, they assessed individual income tax liabilities computed at 60 percent of the value of the assets.

The taxpayer challenged the assessment in front of the Court on the grounds that the assets were acquired in Georgia more than 30 years before, period which exceeds the general status of limitation for fraudulent activities under French law. The plaintiff also argued that it was impossible to obtain the banking records due to the political and administrative circumstances of the country during that period. Additionally, the taxpayer expressed doubts as to the compatibility of the rules under dispute with the free movement of capital, citing the CJEU decision in case C-788/19, and asked for a CJEU referral (if needed).

The Court noted that the French rules established a statute of limitation for the tax authorities' inquiries that is not connected with the acquisition date of assets held abroad or the years in respect of which the taxation of those amounts was normally due. Whilst the statute of limitation in itself – 10 years, does not appear, by virtue of its duration, to go beyond what is necessary to achieve the intended objectives, it nevertheless allows authorities to inquire about the origin of assets without any time limit. Therefore, the Court raised concerns about the compatibility of the rules at hand with the free movement of capital, as interpreted by the CJEU in case C-788/19, and referred a question regarding this matter to the CJEU.

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CJEU referral on the compatibility of the Belgian dividend received deduction with the Parent-Subsidiary Directive

On February 20, 2024, the First Instance Court of Liège (the Court) referred a question to the CJEU (case C-135/24). The case concerns the local rules implementing the corporate income tax exemption under the Parent-Subsidiary Directive (PSD) for dividends received ('dividends received deduction' or DRD).

The PSD was transposed into Belgian domestic law using the inclusion/deduction method – i.e., dividends distributed by the subsidiary are first included in the tax base of the parent company and then deducted from that tax base, provided that certain requirements are met. If the DRD is higher than the company's tax base, the surplus DRD may be carried forward to subsequent periods.

In parallel, Belgium has a group contribution regime, whereby profits can be transferred between group companies under strict conditions. In short, if certain requirements are met, Belgian companies that are profit-making are allowed to transfer some or all of their profits to companies in the same group that would have incurred losses during the same tax period. For the company making the transfer, the amount transferred is deductible for corporate income tax purposes. For the company receiving the transfer, the amount transferred is included in the tax base. Nevertheless, the group contribution regime does not allow companies to deduct DRDs for the current year from the intra-group transfer received.

The question referred to the CJEU is whether the interaction of the local implementation of the PSD with the Belgian group contribution regime, which results in the inability to offset the DRD against a group contribution received in the same tax year, is allowed under the PSD.

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EU Institutions

Key Insights

- European Commission launches public consultation concerning Directive 2011/16/EU on administrative cooperation (DAC)
- Belgian Presidency of the Council of the EU reaches agreement (general approach) on FASTER

European Commission

Public consultation on the Directive on Administrative Cooperation (DAC)

On May 7, 2024, the European Commission (EC) launched a public consultation concerning Directive 2011/16/EU, on administrative cooperation (DAC). This consultation forms part of a comprehensive evaluation aimed at assessing the effectiveness, efficiency, and ongoing relevance of the DAC and its subsequent amendments (DAC2 to DAC6). Additionally, it seeks to assess the Directive's alignment with other policy initiatives and priorities, as well as its contribution to the overall objectives of the European Union.

The evaluation covers the functioning of the DAC during the period spanning from 2018 to 2022. A such, this assessment excludes DAC7 and DAC8, since the provisions of the two Directives did not yet apply during this period. A first evaluation of the DAC was conducted in 2018, with results published in 2019.

The 2024 consultation is split into two sections: a call for evidence on the impact of exchange of information under DAC and a targeted questionnaire which seeks input from stakeholders on the overall assessment of the DAC: its relevance, its contribution to its objectives and its functioning. In particular with regard to the mandatory disclosure rules under DAC6, the evaluation included an assessment of the hallmarks for the exchange of information on potentially harmful cross-border arrangements.

Interested parties have until July 30, 2024, to submit their feedback.

KPMG responds to public consultation on the Directive on tax dispute resolution mechanisms

On May 10, 2024, the KPMG member firms in the EU submitted a response to the EC's public consultation on the functioning of Directive 2017/1852 on tax dispute resolution mechanisms (DRM). The DRM entered into force on July 1, 2019 and provides a framework to help resolve cross-border tax disputes for companies and individuals in relation to double taxation.

Stakeholders were invited to provide feedback on whether the DRM improved the double taxation relief procedures in the EU as compared to pre-existing mechanisms, as well as on the application of Article 3 of the DRM (Complaint) and Article 4 (Mutual Agreement Procedure).

The KPMG member firms in the EU welcomed the EC's efforts for initiatives that result in greater tax certainty for taxpayers, noting that the DRM represents a significant improvement to the mechanisms for relief of double taxation available to taxpayers, not only in transfer pricing cases but in relation to other types of tax disputes as well. Although solving double taxation remains a lengthy process, having a binding solution, which is enforceable by taxpayers enhances legal certainty for taxpayers and is therefore a significant advantage.

The response also highlights a number of areas where there is room for improvement in the functioning of the DRM, including access and scope, transparency around the process and final decisions, late payment interest and interaction with proceedings under national law, timing and deadlines.

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DG TAXUD publishes work plan for 2024

On May 8, 2024, the Directorate-General for Taxation and Customs Union (DG TAXUD) of the European Commission issued the Taxation and Customs Union Management Plan 2024.

Key highlights include:

- *DAC review:* publication of analysis report on the functioning of DAC to be published in Q4 2024. DG TAXUD aims to finalize the evaluation of the DAC and its (first to fifth) amendments, building on recommendations received from the European Court of Auditors and the European Parliament.
- *Unshell:* continued support for the Council's work on the Unshell proposal.
- *Carbon Border Adjustment Mechanism (CBAM):* issuing of implementing and delegated acts for the CBAM, including for accreditation of verifiers, expected by Q4 2024
- *Cross-border mobile workers*: DG TAXUD will focus on addressing the tax implications of cross-border telework and mobile workers. According to the plan, the focus will be on exchange of best practices and knowledge on removing possible barriers to the free movement of workers in the Single Market.
- EC's annual Tax Symposium to be organised in Q4 2024.

The plan reflects DG TAXUD's commitment to supporting the EU's priorities to develop further actions related to tax, green energy, international cooperation and customs policy.

Council of the EU

Belgian Presidency reaches agreement on FASTER

On May 14, 2024, the Economic and Financial Affairs Council of the EU (ECOFIN) reached agreement (general approach) on the proposal for a "Faster and Safer Relief of Excess Withholding Taxes (FASTER)" Directive. Key takeaways include:

- a common EU digital tax residence certificate which will comprise of common content, regardless of the issuing Member State;
- two fast-track procedures complementing the existing standard refund procedure, including: (i) a relief at source system, and (ii) a quick refund system. In-scope Member States will be required to implement one of the two systems (or a combination of both) and to apply them on a mandatory basis for dividends paid for publicly traded stocks and on an optional basis for interest paid for publicly traded bonds;
- Member States which provide for a comprehensive relief-at-source system for dividends paid for publicly traded shares issued by a resident in their jurisdiction and that have a market capitalisation ratio below 1.5 percent will not be required to implement the fast-track procedures but could do so on a voluntary basis. In case the 1.5 percent ratio is exceeded for four consecutive years, all rules foreseen by the Directive will become irrevocably applicable to the Member State concerned;
- the introduction of National Registers for financial intermediaries that will be able to facilitate the fast-track procedures. Large (and optionally smaller and non-EU) financial intermediaries will have to register to be certified. In order to simplify this registration procedure, the Council agreed to create a European Certified Financial Intermediary Portal. Such financial intermediaries will be subject to additional due diligence and common reporting requirements.

Formal adoption by the Council is expected once the European Parliament has given its opinion on the final text. Member States have until the end of 2028 to transpose the Directive into domestic law, with the rules to become applicable as of January 1, 2030.

For more information on the Directive, please refer to Euro Tax Flash Issue 541.

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OECD and other International Organisations

Key Insights

– OECD releases a consolidated version of the Commentary to the Pillar Two global anti-base erosion (GloBE) Model Rules that incorporates Agreed Administrative Guidance released by the Inclusive Framework up to December 2023

OECD

Consolidated commentary on Pillar Two rules, updated Pillar Two examples

On April 25, 2024, the OECD released a consolidated version of the Commentary to the Pillar Two global anti-base erosion (GloBE) Model Rules that incorporates into the initial Commentary released in March 2022 all Agreed Administrative Guidance released by the Inclusive Framework between March 2022 and December 2023. The OECD also updated the Pillar Two Examples to align with the available tranches of Administrative Guidance.

For more information on the consolidated Commentary, please refer to KPMG's Tax News Flash.

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

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Local Law and Regulations

Key Insights

- *Belgium:* Parliament adopts amendments to the Pillar Two global minimum tax law and bill reforming the investment deduction regime
- *Denmark:* legislative proposal to amend Pillar Two legislation submitted to Parliament
- *Italy:* tax authorities issue rules on optional alternative to CFC taxation
- *Netherlands:* Deputy Minister of Finance provides insights on 2025 Tax Plan Package
- *Poland:* public consultation on draft Pillar Two legislation
- *Saudi Arabia:* tax authorities publish guidance on the new Regional Headquarters program

Belgium

Amendments to the Pillar Two global minimum tax rules adopted

On May 2, 2024, the Belgian Parliament adopted amendments to the Belgian Law on minimum taxation implementing the EU Minimum Tax Directive (enacted on December 19, 2023).

The bill introduces a requirement for mandatory registration in the Belgian Commercial Register for all in-scope groups with Belgian Constituent Entities to receive a unique compliance registration number. Notification for registration is to be submitted within a short timeframe, which was expected to be between May 15, and June 30, 2024. However, the deadline and other details related to the registration requirement will be included in a Royal Decree, which is not yet published and is subject to the publication of the law in the Official Gazette.

It is understood that one of the reasons for the short deadline is the advance payment mechanism in the Law on minimum taxation, under which IIR and/or DMTT prepayments need to be made by December 20, 2024, to avoid tax increases. There will be a specific form for the notification for registration, which will require detailed information about the group, the consolidated financial statements, and the ownership structure. With respect to the ownership structure, in-scope groups will have to list group entities and characterize them for GloBE purposes (e.g., Partially Owned Parent Entity, Intermediate Parent Entity).

Details of the registration requirement will be provided in a Royal Decree, which is not yet published and is subject to the publication of the law in the Official Gazette.

Other changes suggested by the adopted legislation generally correspond to the draft Bill of March 2024. For more information, please refer to a report prepared by KPMG in Belgium and E-News Issue 193.

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

Parliament adopts bill reforming the investment deduction regime

On May 2, 2024, the Belgian Parliament adopted the bill on the tax reform of the investment deduction regime with the aim of promoting investments in the green transition. The bill had previously been submitted to the Parliament by the Belgian Government on March 6, 2024. Please refer to our previous coverage in E-News Issue 193.

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Cyprus

Introduction of enhanced capital allowances for certain green investments

On April 12, 2024, a bill increasing capital allowances for certain green investments was published in the Official Gazette. Key takeaways include:

- expenditures for improving the energy efficiency of buildings qualify for a capital allowance of 7 percent (3 percent under the previous legislation);
- technical systems used for improving the energy efficiency of buildings, renewable energy systems, and electric energy storage systems qualify for a capital allowance of 20 percent (10 percent under the previous legislation);
- electric vehicles qualify for a capital allowance of 33.3 percent (20 percent under the previous legislation).

The increased deduction rates apply to capital expenditures incurred from the tax year 2023 to 2026.

For more details, please refer to an alert prepared by KPMG in Cyprus.

Denmark

Legislative proposal to amend Pillar Two legislation submitted to Parliament

On April 30, 2024, the Tax Ministry of Denmark submitted a legislative proposal to amend the Danish Minimum Taxation Act which was adopted earlier in December 2023 to implement the EU Minimum Tax Directive. The purpose of the proposed bill is to ensure that the Danish Minimum Taxation Act fully complies with the OECD Model Rules and the OECD's Administrative Guidelines. Key takeaways include:

- *Safe Harbours:* the draft includes the permanent Simplified Calculation Safe Harbour for Non-material Constituent Entities. In addition, the draft contains anti-arbitrage rules in relation to the transitional Country-by-Country (CbyC) Reporting Safe Harbour that would apply to transactions after December 15, 2022.
- *Incorporation of additional Administrative Guidance*: the draft bill would incorporate further provisions from the OECD Administrative Guidance (for example, a requirement to refresh the Transition Year and to eliminate or re-state certain tax attributes for local Domestic Minimum Top-up Tax (DMTT) purposes when the GloBE rules become applicable to local Constituent Entities after the entry into force of the local DMTT, clarification on purchase price accounting adjustments in the qualified financial statements).
- *Corrections*: the draft provides for some amendments to existing provisions with a view to align with the wording of the EU Directive. For example, the draft provides for the application of the Undertaxed Profits Rule (UTPR) for fiscal years starting on or after December 31, 2023, only in cases where the UPE of the group is resident in an EU Member State that has opted for the IIR and UTPR deferral (i.e., Estonia, Latvia, Lithuania, Malta and Slovakia). By contrast, the current law refers to an application of the UTPR from 2024 in respect of low-taxed Constituent Entities that are based in an EU deferring jurisdiction.

Please note that the bill may still be subject to changes in the course of the further legislative process. The proposed bill is expected to enter into force on July 1, 2024.

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

Italy

Tax authorities issue regulations on optional alternative to controlled foreign company (CFC) taxation

On April 30, 2024, the Italian tax authorities issued regulations implementing the optional payment of a 15 percent substitute tax. This option was introduced through Legislative Decree No. 209/2023, published on December 28, 2023, and offers an alternative to the application of controlled foreign company (CFC) rules.

Under these rules, controlling individuals can choose to pay a 15 percent substitute tax based on the net income before taxes of the non-resident entity, excluding asset write-offs and risk provisions. This option is available if more than one third of the

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entity's revenues come from qualifying passive income and if its financial statements are certified by authorized auditors in the foreign jurisdiction. Once elected, this option remains in effect for three fiscal years and cannot be reversed.

The regulations provide instructions on how to make this election and its conditions, and outline the methodology for calculating the substitute tax amount.

Netherlands

Insights into 2025 Tax Plan

On April 16, 2024, the Deputy Minister of Finance sent a letter and the Tax Policy and Implementation Agenda to the Lower House of Parliament, providing, amongst others, general insights into the upcoming 2025 Tax Plan package. In the corporate income tax field, key proposals include amendments in relation to:

- overlap loss set-off and exemption for debt relief income tax;
- subject-to-tax tests in the Corporate Income Tax Act 1969;
- implementation of the general anti-abuse rule (GAAR) based on the Anti-Tax Avoidance Directive (ATAD I). The Netherlands has not transposed the GAAR into law on the grounds that the doctrine of fraus legis represented an equivalent anti-abuse provision. At the request of the European Commission, the Netherlands intends to implement the GAAR.
- earnings stripping measure in relation to real estate entities;
- withholding taxation, for which a new concept of group introduced.

Please note that the letter reflects the plans of the outgoing Dutch Deputy Minister of Finance and could be subject to changes due to the change in government.

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

Poland

Consultation on legislative proposal to implement minimum taxation under Pillar Two

On April 25, 2024, the Polish Ministry of Finance issued a draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive. With the exception of the date of entry into force, the substantive minimum tax rules would closely follow the text of the EU Directive. Key features include:

- *IIR / UTPR:* The IIR would apply for financial years starting on or after December 31, 2024. As such, the timeline is deferred by one year compared to the EU Directive requirements unless an irrevocable election is made by the taxpayer to apply the rules from January 1, 2024. The UTPR would generally be applicable one year later, i.e., for financial years starting on or after January 1, 2025. The UTPR top-up tax would be collected as an additional top-up tax.
- *DMTT:* Similar to the IIR, the DMTT would apply for financial years starting on or after January 1, 2025, unless an irrevocable election is made to apply the DMTT from January 1, 2024. The DMTT would generally be calculated in accordance with the regular GloBE rules. However, the DMTT would need to be imposed with respect to 100 percent of the Top-up Tax calculated for local Constituent Entities (i.e., it cannot be limited to the UPE's ownership percentage in the local Constituent Entities). In line with OECD Guidance on qualified DMTTs, foreign covered taxes (e.g., CFC taxes) that would be allocated to local constituent entities under the regular GloBE rules, would also need to be excluded for Polish DMTT purposes. In addition, the draft requires for the DMTT computations to be based on a local financial accounting standard (Polish accountings standards or IFRS) subject to conditions in line with the OECD July Administrative Guidance. Please note that – subject to EU approval – an election would be available to use the financial accounting standard of the ultimate parent entity for a period of up to 5 years (no longer than for fiscal years that end on or before December 31, 2029).
- *Safe Harbours and additional OECD Guidance:* The draft incorporates the transitional CbyC Reporting Safe Harbour, the QDMTT Safe Harbour, the transitional UTPR Safe Harbour and the Simplified calculation for Non-Material Constituent Entities Safe Harbour, as agreed in the OECD Administrative Guidance. The draft bill further incorporates into the legislative text key elements of the February, July and December Administrative Guidance that adapt the OECD Model Rules / EU Directive provisions.
- *Administration:* The GloBE Information Return (GIR) would need to be filed within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year). In addition, self-assessment tax returns would need to be

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filed within 18 months after the end of the Reporting Fiscal Year (21 months for a transitional year). Penalties for non-compliance with the administration of the GloBE rules would vary depending on the type of violation and may in certain cases reach significant amounts.

- *Tax certainty:* The draft bill provides for the possibility to apply for advance rulings on the application of the Polish Pillar Two rules, subject to initial fees of PLN 25,000 (approximately EUR 5,850) and final fees of PLN 75,000 (approximately EUR 17,500).

The public consultation on the draft bill will continue until May 17, 2024.

For more information, please refer to a report prepared by KPMG in Poland. For a state of play of the implementation of Pillar Two, please refer to KPMG's dedicated implementation tracker in Digital Gateway.

Slovakia

Ministry of Finance issues guidelines on transfer pricing documentation

The Ministry of Finance released guidelines on the content of transfer pricing documentation for 2023. The guidelines envisage three types of transfer pricing documentation:

- Full-scope documentation: Master file and Local file (in which taxpayer must demonstrate that the applied transfer prices are in line with the market conditions).
- Basic documentation: Master file (but not as complex and detailed as the full-scope requirement) and Local file (but not mandatory to demonstrate the market setting of transfer prices).
- Simplified documentation: Information according to a structured form.

Transfer pricing documentation is due within 15 days of receipt of a request from the tax authority or financial directorate. Such a request may be sent no earlier than the first day following the tax return filing due date, which for calendar year taxpayers is April 2, 2024.

Please refer to the report prepared by KPMG in Slovakia for more information.

United Arab Emirates

Launching of a public consultation on the potential introduction of R&D tax incentives

On April 19, 2024, the Ministry of Finance launched a public consultation on the potential introduction of research & development (R&D) tax incentives in the United Arab Emirates (UAE). As outlined on the consultation webpage, the government is contemplating the introduction of an R&D tax incentive under corporate tax law and is seeking input from stakeholders to assist in its design.

The consultation comprises two components: a questionnaire and a Guidance Paper detailing internationally recognized R&D principles, including the definition, characteristics, and typical activities of R&D functions.

Key design elements being considered for the potential R&D tax incentive include:

- definition of R&D;
- qualifying businesses, R&D activities and expenditure;
- type(s) and form(s) of incentive;
- how unutilized benefits will be treated; and
- administrative measures.

Interested stakeholders were invited to submit their comments by May 14, 2024, and encouraged to provide examples, data or any other type of information to support the views expressed in their submission.

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Saudi Arabia

Saudi tax authorities release guidelines on the new Regional Headquarters program

On April 15, 2024, the Saudi tax authorities published guidelines on the new Regional Headquarters (RHQ) program adopted in February 2024. Key elements covered in the guidance include:

- a general overview of the RHQ program, detailing eligibility requirements, mandatory and optional activities to be performed by RHQs, available incentives, and the registration mechanism;
- a thorough description of the economic substance requirements;
- examples of when incentives apply and when they do not;
- clarifications on tax residency and permanent establishment provisions in relation to the RHQ program, as well as information on how double tax treaties apply to cross-border transactions of RHQ;
- precisions on the application of withholding tax, VAT, Zakat (religious net-worth tax imposed on Saudi and Golf Cooperation Council nationals), transfer pricing, and real estate transaction tax to RHQ;
- tax procedures applicable to RHQs, including tax registration, return filing and tax payment, record keeping requirements, tax assessments as well as penalties for non-compliance.

For previous coverage, please refer to E-News Issue 191.

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Local Courts

Key Insights

- The Czech Supreme Administrative Court issues decision on the definition of beneficial owner of royalties
- French Supreme Administrative Court rejects claim on cross-border loss relief on the basis that income derived by the permanent establishment incurring the final losses was not taxable in France

Czechia

Supreme Administrative Court decision on the definition of beneficial owner of royalties

The Czech Supreme Administrative Court (SAC) issued a decision confirming the key criteria for determining a beneficial owner in the context of licensing agreements (SAC 6 Afs 56/2023). The court clarified that a beneficial owner can be determined during tax proceedings, even if they differ from the person listed as the recipient of royalties in a licensing agreement.

The plaintiff paid royalties to distributors of television programs within its corporate group, who subsequently passed on the payments in full to the program producers. The tax authorities argued that the reduced rate specified in the double taxation treaty between Czechia and the distributors' jurisdiction should not have been applied, as the distributors were not the beneficial owners of the royalties. Instead, the taxpayer should have applied the standard domestic withholding tax rate of 15 percent.

It should be noted that the case concerns a period before the CJEU issued its rulings in the so-called "Danish cases[1]". However, the SAC emphasized that even these subsequent sources of law can serve as interpretative aids to correctly understand the concept of beneficial ownership.

Recent Czech case law defines the beneficial owner of royalties by the following characteristics:

- *Receipt of income into the sphere of disposition*: the beneficial owner must actually receive the income and have control over it.
- *Freedom to dispose of income*: the beneficial owner must be free to dispose of the income. This includes the right to control, use and enjoy it without being restricted by contractual or legal obligations to pass on the income to others.
- *Economic benefit*: the beneficial owner should benefit economically from the income, which means that they can benefit from the income without having to pass it on.

During the proceedings, it became apparent that the beneficial owner had probably been the producer of the programs, a resident of a state whose double tax treaty provided for more favorable withholding tax rates to Czechia than the treaties of the distributors' states. However, the SAC confirmed that the tax authorities were not required to take this into account (i.e., apply a look-through approach) without explicit evidence provided by the taxpayer. The court highlighted that the burden of proof in this matter lies with the taxpayer, and they must prove that the royalty payments were passed on to a beneficial owner within the meaning of the international treaties.

[1] Joined cases N Luxembourg 1 (C-115/16), X Denmark (C-118/16) and C Danmark 1 (C-119/16) and Z Denmark case (C-299/16) on the Interest and Royalties Directive and joined cases T Danmark (C-116/16) and Y Denmark (C-117/16) on the Parent-Subsidiary Directive.

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This SAC decision therefore indicates that during tax proceedings, it is possible to determine the actual owner of the royalties even if they are not the same as the entity stated as the recipient of the royalties in the agreement. The Court therefore confirmed that when assessing beneficial ownership, the broader context of the transactions and their economic implications must be considered, not just the formal data stated in the contracts.

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

France

French Supreme Administrative Court rejects claim for cross-border loss relief

On April 26, 2024, the French Conseil d'Etat (the Supreme Administrative Court) issued its decision in case n° 466062 and denied the claim made by a French group for cross-border loss relief.

The French parent company of a multinational group sought to allocate the final losses incurred in 2015 by a Luxembourg branch (Lux PE) to one of its subsidiaries. The Lux PE ceased operations in April 2015 and was deregistered from the local trade register in December 2015. However, the French tax authorities dismissed this request on the grounds that the profits of the LuxPE were not taxed in France. As such, under the Luxembourg-France double tax treaty (DTT) applicable at that time, the method of eliminating double taxation in France was exemption and the profits of a foreign PEs were only taxable in Luxembourg. The administrative decision was challenged by the taxpayer. The case was first considered before lower courts, which ruled in favour of the taxpayer. However, following appeals by the tax authorities, the case reached the Supreme Administrative Court.

The Supreme Administrative Court rejected the findings of the Administrative Court of Appeal, which were based on the CJEU decision in case C-650/16 and had held that cross-border relief should be granted under the freedom of establishment. Instead, the Supreme Administrative Court recalled that a difference in tax treatment does not necessarily infringe on the freedom of establishment if it concerns situations that are not objectively comparable or if it is justified by a compelling public interest and proportionate to that interest. The Supreme Court concluded that, in the case at hand, the two situations were not comparable given that France waived its power to tax the profits of a non-resident PE based on the relevant DTT. Consequently, the Supreme Administrative Court overturned the lower court rulings and dismissed the taxpayer's claims. Additionally, the Court concluded that there was no ambiguity in interpreting the relevant rules, and thus decided against referring the matter to the CJEU for a preliminary ruling.

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EU Financial Services Tax Perspectives Webcast – June 11, 2024

On June 11, 2024, KPMG will hold a new EU Financial Services Tax perspectives session as part of the Future of Tax & Legal webcast series.

Countries and regions across Europe continue to operate in an ever-changing environment. In a year that will see several jurisdictions run national parliamentary elections, the potential outturn may result in multi-national institutions operating in a very different environment. With tax so often intertwined in negotiations and debates on policy, trade, strategy and business transformation, will the landscape across Europe and beyond become even more volatile in the future, and what could this mean for financial services? Please join us as our panel of KPMG tax professionals share their insights with respect to some of the latest proposals that are likely to impact financial services institutions in the year ahead, including a closer look at:

- The current geopolitical environment, "the year of the elections" and the potential impact of future tax policy across financial services.
- European Union (EU) FASTER proposals – state of play, including reporting obligations and broader implications for countries across the EU.
- Pillar 2 implementation – a financial services institution's' journey.

Please access the event page to register.

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With each new episode, KPMG Talking Tax delves into a specific topic of interest for tax leaders, breaking down complex concepts into insights you can use, all in under five minutes. Featuring Grant Wardell-Johnson, KPMG's Global Head of Tax Policy, the bi-weekly releases are designed to keep you ahead of the curve, empowering you with the knowledge you need to make informed decisions in the ever-changing tax landscape.

Please access the dedicated KPMG webpage to explore a wide range of subjects to help you navigate the ever-evolving world of tax.

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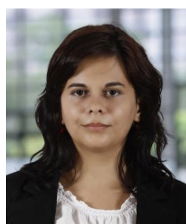

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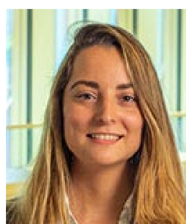

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