Briefing

International review for April

Speed read

With the world already focused on US tariffs announcements, this month's update looks at key tax policy developments from across the Atlantic. A recent Advocate General's opinion, if accepted by the CJEU, may provide some much needed clarity on the VAT treatment of intra-group transactions and transfer pricing arrangements. The UN is pressing ahead with amendments to its model tax treaty, including the new Article 12AA, service fees paid to non-residents. Finally, Brazil has proposed a 10% withholding tax on dividends to foreign investors.

Tim Sarson
KPMG
Tim Sarson is a Tax Partner at KPMG and the UK Head of Tax Policy. He has worked in the international tax and transfer pricing field since 1998, in both practice and industry. Email: tim.sarson@kpmg.co.uk.

US tax update

America First Trade Policy report

With the eyes of the world on the Rose Garden on 2 April 2025 for the President's announcement on global tariffs, you may be forgiven for having missed the White House announcement on 3 April 2025 of the finalisation of a comprehensive report on the 'America First Trade Policy' (AFTP).

The report consists of 24 chapters containing the findings and recommendations pursuant to the President's AFTP Memorandum of 20 January 2025, and the Defending American Companies and Innovators from Overseas Extortion and Unfair Fines and Penalties Memorandum of 21 February 2025 (also referred to as the 'Digital Services Tax' Memorandum).

The White House has not released the full report, which means there is still a lot of uncertainty about what actions might ultimately result, but a summary of its contents was published. The summary highlights:

- the need to boost American investment, jobs, and growth domestically while reinforcing industrial and technological advantages;
- the persistent trade deficit, which reached $1.2 trillion in 2024, as a critical economic and national security threat; and
- recommended measures such as imposing tariffs on certain imports to achieve balanced trade and creating an External Revenue Service to optimise tariff collection.

The summary of Chapter 10 ('Investigation of Extraterritorial Taxes') reiterates the US Administration's view that Digital Services Taxes and Under-Taxed Profits Rules (UTPRs) are discriminatory, particularly for leading US technology firms. The summary states the need for further investigation of identified taxes to determine appropriate action by the US and the need for technical assistance to progress new 'legislative tools' to defend US interests.

Unfair Tax Prevention Act

Although no further details were provided in the White House release, references above to 'legislative tools' are likely to include the 'Unfair Tax Prevention Act' (UTPA), which was reintroduced by Republican members of the House Ways and Means Committee on 27 March 2025. The Bill would increase the US Base Erosion and Anti-Abuse Tax (BEAT) where foreign countries adopt Pillar Two's UTPR.

A Bill with the same name was introduced by Republican Ways and Means Committee members in July 2023. According to the related press release, the Bill would:

- define 'foreign-owned exterritorial tax regime entities' (FETR entities) as foreign-controlled entities connected with entities operating in jurisdictions with extraterritorial taxes aimed at US business operations, including the UTPR;
- strengthen anti-avoidance rules in the BEAT by eliminating the 3% base erosion percentage floor and the $500m gross receipts test for FETR entities;
- revoke the ability of FETR entities to disregard certain service payments and payments subject to withholding taxes;
- treat 50% of cost of goods sold as a base erosion tax benefit; and
- accelerate the scheduled BEAT rate increase and tax credit changes for FETR entities.

Readers should also refer to my February 2025 update for an overview of the Defending American Jobs and Investment Act (DAJIA), another Bill that has been recently reintroduced to Congress. This would allow for an increase in the rate of tax on the US income of individuals and entities located in a foreign jurisdiction that imposes discriminatory or extraterritorial taxes, such as UTPRs and DSTs.

Congress passes 2025 joint budget resolution

The question of if or when the UTPA and DAJIA will become law is linked to the ongoing budget reconciliation process. After weeks of earnest negotiations in the House and the Senate, on 10 April 2025 a budget resolution was agreed by Congress. This is the first step to 'unlock' the ability of Congress to pass tax legislation with a simple majority vote.

Readers should be aware that the Senate has stipulated a 'current tax policy' baseline for the purposes of budgeting, rather than the traditionally used 'current law' baseline. Current tax policy baseline assumes that current policy prevails, even if the policy was only intended to be temporary, i.e. it ignores sunset clauses that have been written into legislation. This has a major impact on the budgeting process. A continuation of existing policy is not considered 'new' spending for budget purposes: it is scored as zero cost so no need to find 'pay fors' elsewhere to offset the cost. The significance of this was highlighted by Senate Budget Committee Chairman Lindsey Graham (R-SC) who said this would allow the Tax Cut and Jobs Act 2017 tax cuts to be made permanent.

The House and Senate will now each need to draft a reconciliation bill, expected to include tax proposals, and pass identical legislation to be sent to the President for his signature. This process may sound straightforward in theory: in practice, it will be anything but.

AG opinion that transfer pricing adjustments are subject to VAT

On 3 April 2025, the CJEU published the non-binding opinion of the Advocate General (AG) in Case C-726/23, which, if followed by the CJEU, could have an important impact on the VAT treatment of intra-group transactions and transfer pricing arrangements.

The taxpayer, a Romanian entity that was part of a crane rental group, faced a tax dispute over the VAT treatment of invoices from its Belgian head office. The issue arose from a transfer pricing study conducted in December 2010, which led to an agreement ensuring the Romanian entity a specific profit margin range, with adjustments through annual invoices if margins exceeded set limits. In 2011, 2012 and 2013, the Romanian entity, having recorded profits exceeding the expected range, received three invoices excluding VAT from the Belgian head office, which ultimately classified them as service transactions. The Romanian group entity declared the first two invoices as intra-community service purchases and applied the reverse charge mechanism, but it considered the third invoice as related to transactions outside the scope of VAT. The Romanian tax authority denied the Romanian group entity's right to deduct VAT on the invoices, arguing that the company failed to justify the provision of the invoiced services or their necessity for taxable operations due to the lack of supporting documentation.

Two key questions were put before the CJEU:

- Should Article 2(1)(c) of the VAT Directive be interpreted to mean that an amount billed by one company to a related company, which aligns the operating company's profit with its activities and assumed risks according to OECD margin principles, constitutes a payment for a service and is therefore subject to VAT?
- If so, can the tax authority require documentation beyond the invoice, such as activity reports or work statements, to justify the use of purchased services for taxable activities, or if the assessment of VAT deduction rights should solely rely on the direct link between the purchase and the taxable transaction or the overall economic activity of the taxpayer?

In respect of the first question, the AG observed that the determination of whether a transfer pricing adjustment falls within the scope of VAT needs to be made on a case-by-case basis. The AG has recommended the CJEU to rule that Article 2(1)(c) of the VAT Directive should be interpreted in the sense that the remuneration of intra-group services, provided by a parent company, assuming commercial responsibilities, to a subsidiary and detailed contractually, which is calculated according to the transactional net margin method recommended by the OECD principles, should be considered as the counterpart of a service provided for a fee, within the meaning of this provision, and should be subject to VAT.

In respect of the second question, the AG affirmed that tax authorities may request further evidence beyond invoices to substantiate the use of services for taxable operations, provided that these documents are requested in accordance with the principle of proportionality and that they are capable of proving the existence of the services in question and their use for the needs of the taxable person's taxed operations, which is for the national court to verify.

The VAT treatment of transfer pricing adjustments has for a long time been elusive and subject to several in-depth papers from the EU VAT Committee and the EU VAT Expert Group, arriving at slightly different conclusions. EU tax authorities have so far only published limited guidance on the matter. This case as well as other pending cases before the CJEU (for example, Case C-603/24) may therefore provide some long-sought clarity on the VAT treatment of transfer pricing arrangements in the EU.

If the CJEU follows the AG's recommendations, businesses should review inter-company agreements (prioritising agreements using the transactional net margin method, which were the focus of this case) to determine if the transaction is subject to VAT. If so, supporting documentation should be reviewed to ensure sufficient evidence exists to support the tax treatment of the transaction.

UN Tax Committee meeting

The United Nations (UN) continued its efforts to play a greater role in global taxation during its 30th Session, held in New York on 24 to 27 March 2025. The meeting focused on updates to the UN Model Tax Convention and the UN Transfer Pricing Guidelines, which offer an alternative to similar guidance provided by the OECD.

Discussions included taxation of the extractives industries (which may signal potential changes to tax incentive programs in response to Pillar Two), taxation of cryptoassets and transfer pricing guidance, but perhaps the most noteworthy topic on the Committee's docket was finalizing Article 12AA (previously known as Article 'XX').

Article 12AA expands source countries' rights to tax service fees paid to non-residents. It significantly broadens the types of services fees that source countries can tax under the UN Model Tax Convention, which were previously limited to technical services (under Article 12A) and independent person services (under Article 14). Article 12AA will purportedly help to avoid disputes between taxpayers and tax authorities, particularly in developing countries.

The intention is for Article 12AA to be incorporated into the UN Model Tax Convention from 2025. However, the Tax Committee deferred discussions on certain paragraphs, including the taxation of remote workers, to its next session which takes place in Geneva from 21 to 24 October 2025.

The decision to include Article 12AA is unlikely to be widely welcomed by the business community, which had significant concerns about its potential impact, in particular the risk of double taxation. Businesses will need to monitor whether this provision is included in new or amended tax treaties going forward or if countries decide to incorporate parallel provisions into their domestic law. The absence of a specified tax rate leaves room for potentially high and varied rates across countries, adding to business uncertainty

Brazil proposes 10% withholding tax on dividends to foreign investors

Finally, on 18 March 2025 the Brazilian government submitted to Congress draft legislation that would introduce a 10% income withholding tax (WHT) on dividends paid to foreign investors from 2026.

Under current Brazilian domestic law, dividends paid out of retained earnings and certain reserves are not subject to income WHT if related to profits generated after January 1996.

The draft legislation provides for a credit mechanism for foreign investors when the distributing Brazilian legal entity's effective tax rate (ETR) plus 10 percentage points exceeds Brazil's nominal corporate income tax (CIT) rate (i.e. typically 34%, though financial institutions are subject to 40% or 45%). The Bill is subject to Congressional review and potential amendments.

Readers may recall a double tax agreement (DTA) has been negotiated between Brazil and the UK, but it is not yet in force. Progress on ratification of the DTA appears to have stalled following the recent change of government in Brazil. However, the DTA generally caps dividend WHT at 15%, only reducing it to 10% if the investor has a direct ownership interest of at least 10%. Multinational groups with operations in Brazil should therefore carefully assess the impact of these proposals and closely monitor the progress of this legislation. ■

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- International review for February 2025 (T Sarson, 28.2.25)
- The trump effect: US foreign tax policy (T Velling, 23.2.25)