PKF International Limited

PKF worldwide tax update

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Contents

AUSTRIA
Introduction of legislation to promote economic growth.

BELGIUM
New transfer pricing tax circular letter.

BULGARIA
New reduced VAT rates for certain goods and services.

CHILE
Law for COVID-19 emergency tax measures published.

CHINA
How Controlled Foreign Corporation rules work in China.

How China collects tax from an offshore indirect share transfer.

CYPRUS
Amendments to the Assessment and Collection of Taxes Law.

Cyprus IP Box regime amended.

Cyprus-Russia tax treaty amended.

CZECH REPUBLIC
VAT and DAC6 updates.

ECUADOR
Exceptional income tax advance payment for 2020 and rules on VAT on digital services.

FRANCE
A more flexible VAT option on leases for professional use.

GERMANY
Continuation of loss carry-forwards despite change of shareholder.

GHANA
Various changes in tax legislation.

HONG KONG
New Limited Partnership Fund Ordinance.

HUNGARY
ECJ ruling on VAT distance sales rules.

INDIA
Recent court cases and developments on investment and dividend law.

ITALY
Tax incentives for attracting human capital in Italy.

MALAYSIA
Changes to Labuan tax legislation.

MEXICO
Cancellation of VAT refund benefits for companies with VAT customs certification.

National and multinational corporations subject to tax and transfer pricing audits.

NEPAL
Recent tax updates.

NIGERIA
2020 tax updates.

POLAND
Transposition of EU Directive on regulation of call-off stock procedure.

SOUTH AFRICA
VAT on imported services.

The tax implications of subordination agreements.

Termination of the tax residence of a company: shareholders beware.

Proposed amendments to VAT legislation: Potential impact on cross-border leases of certain assets used in SA.

SPAIN
DAC6 update.

TURKEY
Recent 2020 tax changes.

UKRAINE
Introduction of Controlled Foreign Corporation (CFC) rules.

UNITED ARAB EMIRATES
Various tax updates – Economic substance regulations, CbC reporting and VAT and excise duties.

UNITED KINGDOM
Digital publications – Change in VAT treatment.

UK residence – Exceptional days in the UK due to Coronavirus.

Withholding taxes – Leaving the EU.

‘Blue light’ inheritance tax.

UNITED STATES
Are you prepared for an IRC Section 965 repatriation audit?

Final FDII regulations released: Is this a deduction you can use?

Welcome

In this fourth quarterly issue for 2020, the PKF Worldwide Tax Update newsletter again brings together notable tax changes and amendments from around the world, with each followed by a PKF commentary which provides further insight and information on the matters discussed. PKF is a global network with 400 offices, operating in over 150 countries across our five regions, and its tax experts specialise in providing high quality tax advisory services to international and domestic organisations in all our markets.

In this issue featured articles include discussions on:

- COVID-19 tax measures and guidelines in Austria, Chile, Ecuador and the United Kingdom
- DAC6 (reporting of cross-border tax arrangements) in the Czech Republic
- VAT developments in Bulgaria, France, Hungary, Mexico, Poland, South Africa and the United Kingdom
- Double tax treaty updates and related case law in Cyprus, India and Italy
- Recent comprehensive tax changes in Ghana, Nepal, Nigeria and Turkey
- International tax developments (CFC, CbC Reporting, BEPS, Transfer Pricing) in Belgium, China, Germany, South Africa Ukraine, the UAE and the U.S.

We trust you find the PKF Worldwide Tax Update for the fourth quarter of 2020 both informative and interesting and please do contact the PKF tax expert directly (mentioned at the foot of the respective PKF Commentary) should you wish to discuss any tax matter further or, alternatively, please contact any PKF firm (by country) at www.pkf.com/pkf-firms.

Austria

Introduction of legislation to promote economic growth

In response to the impact of the COVID-19 pandemic the Austrian government implemented a number of tax measures in order to boost the economy and promote investment.

Tax bands and thresholds
As from 1 January 2020 the income tax rate for the lowest tax band is reduced from 25% to 20%. With this measure the annual tax is reduced to up to EUR 350 per person. On the other hand, the highest tax band for income exceeding EUR 1 million remains at 55% until 2025.

Method for depreciation
Under Austrian tax law the declining balance method for depreciation was not allowed. For fixed assets acquired or created after 30 June 2020 one is allowed to choose the depreciation method, i.e. between the straight-line method and the declining balance method.

The depreciation rate for the latter can be chosen freely but is not allowed to exceed 30%. A switch from the declining balance to the straight-line method is allowed, but not vice-versa.

The new depreciation regime is not applicable to intangible and used assets, buildings, goodwill, certain kinds of cars as well as fixed assets used for the promotion, transport or storage of non-renewable energy sources and assets that make direct use of them (e.g. planes).

Reduced VAT rate
As from 1 July until 31 December 2020 a new VAT rate of 5% is temporarily introduced. Entrepreneurs are not obliged to pass on the price reduction to customers and will therefore benefit directly from the reduced VAT rate.

The reduction is intended to support the most affected sectors like restaurant services, hotel services, camping, publications (e.g. books), culture (e.g. paintings) as well as certain tickets (e.g. theatre/cinema).

Loss carry-back
For the assessment year 2020 a loss carry-back regime is introduced in Austrian tax law. A loss can be carried back to 2019 and where applicable to 2018. For companies with a tax year different from the calendar year, the loss carry-back regime can be applied in the assessment year 2020 or 2021. The loss carry-back is limited to EUR 5 million. For groups of companies this amount is available for the group parent and increases by EUR 5 million for each group member.

PKF COMMENT

If you believe the above measures may impact your business or require any advice with respect to Austria taxation, please contact Thomas Ausserlechner at thomas.ausserlechner@pkf.at or call ***+43 1 512 87 80****.*

»BACK

Belgium

New transfer pricing tax circular letter

In February 2020, the Belgium tax authorities issued an extensive transfer pricing (TP) circular letter with practical guidance on a big variety of topics. The main purpose of the circular letter is to provide an overview of the principles of the 2017 OECD TP Guidelines. Generally, the TP circular is applicable to transactions carried-out as of 1 January 2018.

The circular letter is fairly extensive and is structured as follows: (1) further guidance as to the at arm's length principle, (2) further guidance about the various TP methods, (3) practical guidance when doing a comparability analysis, (4) administrative approaches to avoid and resolve TP disputes, (5) documentation matters, (6) special considerations concerning intangible assets, (7) special considerations regarding intra-group services, (8) guidance when implementing cost contribution agreements, (9) TP aspects of business restructurings, (10) special considerations concerning financial transactions and (11) special considerations about permanent establishments and TP.

Some interesting key learnings can be summarised as follows:

- The circular letter explicitly confirms that any future changes to the OECD TP Guidelines can be assumed to be generally followed by the Belgium tax authorities
- The circular letter confirms that the actual conduct of the parties will prevail if it would deviate from any contractual wording
- In its section on group synergies, the circular letter states that a central procurement centre should be remunerated on a cost-plus basis, unless the taxpayer demonstrates the added value of the centre's activities and the benefits for the intercompany beneficiaries of those services
- The Belgium tax authorities confirm that there is no real hierarchy in the various TP methods. Still, the cost-plus method is preferred if it provides the same level of reliability as other TP methods
- If budgeted costs are used, the Belgium tax authorities will verify deviations from the actual costs and the at arm's length nature of such deviations
- The circular letter attaches great value to the quality of comparability rather than to its quantity
- A yearly update of the comparability analysis or benchmark is recommended, with a new study conducted every three years
- For limited risk profiles, the Belgium tax authorities do not accept comparable companies having more than two loss-making years
- The circular stresses that the Belgium tax authorities will cooperate to help resolve double taxation under the application of the mutual agreement procedure (MAP) in the relevant treaty or the EU Arbitration Convention
- For low value-adding services, a cost-plus 5% fee can be applied without the need for a

benchmarking study. However, if this approach is adopted, it should be applied by all related companies in all countries where such approach is also accepted

- It is emphasised that the notion “business restructuring” in particular focuses on the re-allocation of profit potential between affiliated entities
- The circular letter also states that the credit rating of a group member can in principle not be higher than the group’s credit rating
- It is remarkable that the Belgium circular letter is more specific than the OECD Guidelines when it applies a 12 month threshold rule for a potential reclassification of a “cash pooling arrangement” into a “term loan”
- The circular letter confirms that the Belgium tax authorities follow the Authorised OECD Approach (AOA) for the attribution of profit between a head-office and its permanent establishment.

PKF COMMENT

*Like in most other countries, TP is very high on the agenda of the Belgium tax authorities. As a result, and in particular as it addresses a number of important TP matters in a practical way, this administrative guidance of the Belgium tax authorities is highly welcomed by the Belgium business community. Belgium taxpayers are thus advised to take a proactive approach and duly prepare themselves for a future Belgium TP audit. If you believe the above circular may impact your business or personal situation or require any advice with respect to Belgium taxation, feel free to reach out to Kurt De Haen at kurt.dehaen@pkf-vmb.be or call **+32 2 460 0960**.*

»BACK

Bulgaria

New reduced VAT rates for certain goods and services

On 11 August 2020, further amendments to the Bulgarian VAT Act were implemented in response to the COVID-19 crisis. A reduced VAT rate of 9% will be applied to the following taxable supplies:

- beer and wine, if sold as part of restaurant or catering services
- the use of certain sport facilities
- tour operator services, including bus excursions.

The reduced rate for the abovementioned goods and services is temporary and will apply from 1 August 2020 until 31 December 2021.

PKF COMMENT

*The tax consultancy team of PKF Bulgaria has substantial knowledge and expertise and is in the position to provide assistance at each stage of Bulgarian tax planning and compliance procedures to both foreign and local individuals. We have successfully consulted our PKF clients who operate in various fields of business on how to be compliant with the rapid changes of the tax legislation in the everchanging business environment. For further information or advice concerning Bulgarian tax planning, please contact Venzi Vassilev at venzi.vassilev@pkf.bg or call **+359 2439 4242**.*

»BACK

Chile

Law for COVID-19 emergency tax measures published

Chile published Law No. 21.256 in the Official Gazette on 2 September 2020, which provides emergency tax measures in response to the COVID-19 pandemic.

Some of the salient features of said Law include:

- A temporary reduction of the corporate income tax rate from 25% to 10% applicable to medium-sized and small companies during tax years 2020, 2021 and 2022
- Medium-sized and small companies are granted a reduction of their monthly instalment payments required to be made as advance corporate income tax payments (calculated over total sales):
  - For taxpayers with sales not exceeding CLF 50,000 (approximately USD 1.73 million), the applicable rate is reduced from 0.25% to 0.125%.
  - For taxpayers with sales exceeding CLF 50,000, the rate is reduced from 0.5% to 0.25%
- A full amortisation regime for taxpayers that acquired capital goods from 1 October 2019 to 31 May 2020 and for taxpayers acquiring such goods from 1 June 2020 to 31 December 2022. The asset will remain recorded at CLP 1 for tax purposes
- The full amortisation regime will also apply in respect of intangible assets (intellectual property) acquired for the interest, development or maintenance of the company. They must be reported to the Internal Revenue Service, which will annually review the expense for amortisation of intangibles, provided that such disbursement corresponds to an amount greater than 30% of the taxpayer's net taxable income.
- the refund of VAT credits accumulated by the taxpayer (as stated by the VAT returns filed in July, August and September 2020), provided that taxpayers prove that their income decreased by at least 30% compared to the same period in the previous year.

PKF COMMENT

*If you believe the above measures may impact your business or require any advice with respect to Chile taxation, please contact Antonio Melys Alvarez at amelys@pkfchile.cl or call **+56 22650 4332**.*

»BACK

China

How Controlled Foreign Corporation rules work in China

Background

China's Controlled Foreign Corporation ("CFC") rules under Corporate Income Tax ("CIT") law have been in effect since 1 January 2008 in order to prevent China tax resident companies from retaining profits in low-tax jurisdictions through various arrangements without business substance. CFC rules were also introduced by the new Individual Income Tax ("IIT") law for China individual taxpayers effective from 1 January 2019.

Definition of CFC rules

A China resident shareholder (including resident enterprise, resident individual or resident enterprise and resident individual) is subject to income tax on undistributed profits kept without reasonable business purposes by a controlled foreign company incorporated in a low-tax jurisdiction.

Under the CIT law, the "low-tax" jurisdiction means its effective tax rate is less than 50% of China's CIT rate (i.e. less than 12.5%), while it remains unclear under the new IIT law.

Applicability of CFC rules

- A foreign company that is directly or indirectly owned by one or more China tax residents (individuals or entities) holding more than 50% of shares (with at least 10% or more shares of the voting rights), or
- Effectively controlled by one or more China tax residents by virtue of share ownership, funding, operations, or purchase and sales etc.
- Having an effective tax rate of less than 50% of the rate under China's CIT law, and
- Profit of the CFC is not repatriated back to China without reasonable operational needs for retaining it in the CFC.

The abovementioned assessment elements from CIT Law are important references for resident individuals to properly fulfil their compliance obligations until China's state tax authority has issued further provisions for "controlled foreign enterprises" under IIT Law.

Exceptions to CFC rules

- The CFC is registered in the UK, the USA, Canada, France, Germany, India, Italy, Japan, Norway, South Africa, Australia or New Zealand, or
- The CFC's income is mainly derived from active business operations, or
- The annual pre-tax profits of the CFC are lower than RMB 5 million, or
- An Overseas China-funded Enterprise identified as a Non-domestic Registered China Resident Enterprise.

PKF COMMENT

CFC rules are part of general-anti avoidance rules that are being implemented in China to protect the national tax base from being eroded. Compared to transfer pricing audit cases, the number of successful reported CFC audit cases is quite low, as it proves to be difficult for China's tax authorities to obtain information on taxable activities occurring outside of China. However, with the introduction of BEPS achievements and implementation of CRS, China's tax authorities have already started to pay more attention to CFC rules as a powerful general-anti avoidance tool, both from a regulatory and practical perspective.

Chinese companies or individuals investing abroad via offshore structuring, in particular through intermediate holding companies registered in low-tax jurisdictions such as the BVI or the Cayman Islands, will be exposed to increased CFC scrutiny in China. It is therefore recommended for Chinese taxpayers to carefully review their offshore structuring and operations in order to mitigate CFC risks.

*If you believe the above may impact your business or require any advice with respect to China taxation, please contact Allan Jiang at allan.jiang@pkfchina.com or call **+86 21 6076 0876**.*

»BACK

How China collects tax from an offshore indirect share transfer

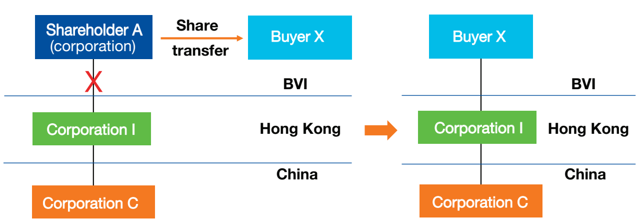
Like most other countries, China Enterprise Income Tax Law ("EIT Law") imposes EIT (at a rate of 10%) on gains derived by non-resident shareholders from the direct share transfer of Chinese resident enterprises.

As from 1 January 2008, if an offshore indirect share transfer of China resident enterprises is conducted without a bona fide commercial purpose, it may also be taxed by China's tax authorities under the "anti-tax avoidance" rule, according to the "Notice on Strengthening the Administration of EIT Concerning Equity Transfer for Non-resident Enterprises", Guo Shui Han [2009] No. 698 ("Circular 698").

On 6 February 2015, Announcement [2015] No. 7 ("Announcement 7") was issued to replace Circular 698, which provides more certainty in terms of compliance with respect to the China indirect share transfer rules for non-resident shareholders. The applicable scope of Announcement 7 is expanded from an indirect share transfer to an indirect transfer of China taxable assets, including shares in Chinese resident enterprises, immovable properties located in China and assets attributable to an establishment in China.

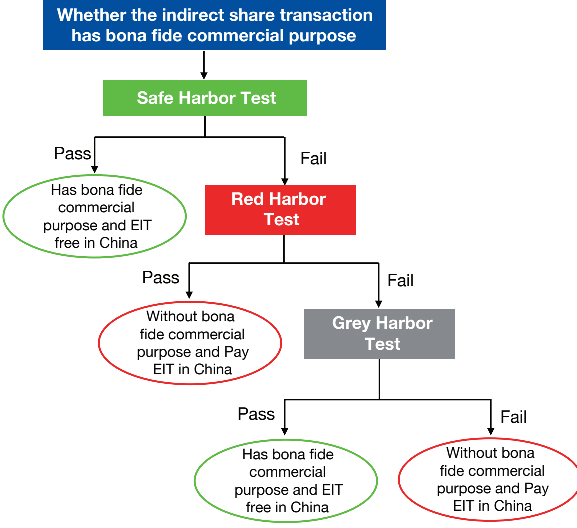
A simple example of an offshore indirect share transfer

The below figure 1 illustrates a two-tiered share ownership structure. In this scenario, non-resident shareholder A has a "direct" interest in the shares of non-resident corporation I (the intermediate holding company) and an "indirect" interest in the shares of corporation C, which is located in China. When shareholder A sells his shares in corporation I to buyer X, it follows that shareholder A also sells his indirect interest in the shares of corporation C.



Assessment of a *bona fide* commercial purpose

If an indirect share transfer of Chinese resident companies is conducted without a bona fide commercial purpose, it will be treated as China-sourced income and be subject to 10% withholding tax in China. The below figure 2 shows the matrix of how to assess the bona fide commercial purpose.



(a) Safe harbour Test

If one of the following conditions is met, an offshore indirect share transfer shall have sufficient bona fide commercial purpose and will qualify for EIT exemption in China:

- Normal buy and sale of shares of the overseas listed company through normal trading on a recognised stock exchange
- If the non-resident enterprise directly holds and transfers the shares of Chinese resident enterprises, the gain derived from the transaction would be exempt from EIT under the applicable double tax treaty or arrangement
- Qualifying intra-group reorganisations.

(b) Red Harbour Test

If all of the following criteria are met, an offshore indirect share transfer shall be determined to be without *bona fide* commercial purpose and be subject to EIT in China if:

1) more than 75% of the equity value of the non-resident enterprise (like corporation I in figure 1 above) is derived directly or indirectly from Chinese resident enterprises (like corporation C in figure 1 above)

2) more than 90% of the asset value (excluding cash) or the income of the non-resident enterprise is derived from the Chinese resident enterprises during any moment within a one-year time period prior to the indirect share transfer

3) the functions performed and risks assumed by the offshore enterprise and its subsidiaries that directly or indirectly hold shares of the Chinese resident enterprises are limited and insufficient to justify the economic substance of the group structure

4) the income tax paid on the indirect share transfer outside of China is less than the Chinese income tax if a direct transfer of the Chinese resident enterprises would have taken place.

(c) Grey Harbour Test

In order to determine the existence of a bona fide commercial purpose for cases neither falling under the Red harbour nor Green Harbour test, all the facts of an offshore indirect share transfer should be considered, and the following criteria should be analysed on a comprehensive basis:

1) whether the equity value of the offshore enterprise (like Corporation I in figure 1 above) is mainly derived directly or indirectly from Chinese resident enterprises (like Corporation C)

2) whether the assets or income of the offshore enterprise are mainly derived directly or indirectly from Chinese resident enterprises

3) whether the functions performed, and risks assumed by the offshore enterprise and its subsidiaries that directly or indirectly hold shares of the Chinese resident enterprises can justify the economic substance of the group structure

4) the status of foreign income tax paid on the indirect share transfer

5) the status of a double tax treaty or arrangement applied to the indirect share transfer

6) the duration of the shareholding, the business model and the organisational structure of the offshore enterprise

7) whether the indirect share transfer of Chinese resident enterprises can be replaced by a direct transfer of Chinese resident enterprises.

Compliance requirements under Announcement 7
Announcement 7 encourages both the buyer and the seller of an indirect share transfer as well as the Chinese resident enterprise to voluntarily report the transaction to the in-charge tax authority of the Chinese resident enterprise within 30 days after signing of the Sale and Purchase Agreements ("SPA"), including the SPA, equity investment structure, financial statements of the offshore enterprise and its offshore subsidiaries for the last two fiscal years and an explanatory letter elaborating on the bona fide commercial purpose of the indirect share transaction.

If the reporting is successfully completed, a 5% punitive interest rate may be waived at the level of the seller and the penalty (50% and 300% of the underpaid EIT payable) for failed withholding obligations at the level of the buyer could be waived or receded as well in case the indirect share transfer is deemed to lack sufficient bona fide commercial purpose and would need to be subject to EIT in China.

PKF COMMENT

Although the indirect share transfer with sufficient bona fide commercial purpose could be exempted from EIT under Announcement 7, the overseas seller and buyer may have difficulty in determining whether the indirect share transfer has sufficient bona fide commercial purpose or not and in preparing the reporting documents within the 30-day time limit.

It is therefore recommended for the overseas shareholders to review their China investment structure before an indirect share transfer takes place and to assess potential EIT liabilities in relation to Announcement 7. From the buyer's side, they should take into account their withholding obligations and incorporate those obligations into the SPA in order to safeguard themselves just in case the deal is subject to EIT in China. If both parties agree that the indirect share transaction may have EIT implications in China, then it is highly recommended for both the seller and the buyer to report the transaction to the China tax authority according to Announcement 7 in order to get a waiver from said penalties.

The PKF Shanghai tax team has assisted many clients in completing Announcement 7 reporting throughout different locations in China. We could assist in assessing the EIT liabilities of the indirect share transfer, suggest possible reporting strategies and negotiate with the in-charge tax authority until due completion of the entire process.

*If you believe the above may impact your business or require any advice with respect to China taxation, please contact Allan Jiang at allan.jiang@pkfchina.com or call **+86 21 6076 0876**.*

»BACK

Cyprus

Amendments to the Assessment and Collection of Taxes Law

On 31 July 2020, the House of Parliament amended the legislation of the Assessment and Collection of Taxes Law with the objective to enhance the powers of the Commissioner of Taxation on the monitoring and collection of taxes.

On 28 August 2020, the Commissioner of Taxation issued Tax Circular No. 46, explaining the practical application of the Law. A summary of the amendments of the legislation as further explained in the above Circular are outlined below:

Submission of tax returns
From the tax year 2020 onwards, all individuals with a gross income that falls under the provisions of Article 5 of the Income Tax Law are obliged to submit a personal income tax return. Previously such obligation applied to taxpayers with a total annual gross income below the threshold of EUR 19,500.

Article 5 includes sources of income, inter alia, wages and salaries, rent, royalties, pensions, dividends, interest and profits from securities, some of which may be exempted from other articles of the income tax and/or special contribution for defence legislation.

The Council of Ministers may issue decrees which will specify which categories of taxpayers with a total annual gross income below the taxable threshold of EUR 19,500 will be exempted from the obligation to submit a tax return.

For tax years beginning as from 1 January 2020, the due filing and payment of taxes date for individuals is 31 July of the year following the tax year. For individuals and companies who are obliged to file tax returns based on audited financial statements, the due filing date is 15 months from the relevant tax year-end (e.g. for the tax year 2020, the due filing date is 31 March 2022) and the due payment date is 1 August of the year following the relevant tax year.

Cyprus-registered but non-Cyprus tax resident companies
Such companies must inform the Commissioner of Taxation of the state of their business affairs within 60 days of incorporation, which will include the nature of their activities.

Procedures on submission of a revised tax return
Taxpayers can submit a revised tax declaration for tax years 2020 onwards, within 3 years from the submission deadline of the relevant tax declaration if the revision arises:

- as a result of claiming a relief, deduction or tax credit, or
- as a result of correcting an error, or
- for the purposes of being consistent with the provisions of the tax laws.

A revised tax return cannot be submitted during a tax examination or a tax audit of the relevant tax year.

A taxpayer must settle any tax liability arising from the revision within 30 days from the submission of the revised return.

Employer's return
The filing date for submission of the Employer's Return (Form TD7), which has to be submitted electronically, is the end of February of the year following the tax year.

Accepting payments through credit cards
Any business carrying on an economic activity has to accept payments through credit cards, unless exempted by a Decree to be issued by the Council of Ministers.

In order to meet this requirement, they would need to have the appropriate equipment, made available from licenced credit card payment providers. A number of administrative fines will be implemented in case of non-compliance.

Powers of the Commissioner of Taxation
The Commissioner has the power to:

- request submission of tax returns and any supporting documentation as well as a detailed statement of assets and liabilities (capital statement) of a taxpayer, his/her spouse and of any dependents, covering a period not exceeding 6 years. The period under review can be extended to 12 years in case of fraud or wilful default
- release the obligation of submission of accounts for a taxpayer, even if requested by other articles of any tax legislation
- enter and inspect business premises at a reasonable time, without providing a notice to the relevant taxpayer.

No refund in case of non-compliance with VAT obligations
No tax refund will be paid until there is compliance with the filing of VAT returns for periods up to the end of the tax year during which the examination of the tax year of the refund was initiated.

PKF COMMENT

The amendments provide clarity on mandatory and procedural issues for tax returns, as well as enhancing the powers of the Commissioner to request information when needed.

»BACK

Cyprus IP Box regime amended

Cyprus tax legislation was recently amended with respect to the tax treatment of intangible assets providing increased flexibility to taxpayers benefiting from the Intellectual Property (IP) Box regime.

The amendments relate to the abolition of the requirement to prepare balancing statements and the tax treatment of capital allowances.

Summary of existing provisions
The capital expenditure of IPs is capitalised and capital allowances (tax depreciation) are claimed over the useful life of the asset, as determined by generally accepted accounting principles (with a maximum useful life of 20 years).

New provisions

- Preparation of balancing statement in case of disposal of the IP.
  The obligation to prepare a balancing statement on the disposal of an intangible asset is abolished. As such, no balancing addition or balancing deduction would be included in the taxpayer's taxable income in the year of disposal.
- Capital Allowances
  The taxpayer has the option not to claim capital allowances in a given year. Moreover, capital allowances that have not been claimed in a year are claimed over the remaining useful life of the asset. Consequently, the tax written down value of the IP at the beginning of each year will be recalculated over the remaining useful life of the IP.

The above amendments are effective as from 1 January 2020.

PKF COMMENT

The amendments provide clarity on ongoing issues in order to fine-tune a very successful IP Box regime implemented for a number of years already in Cyprus.

»BACK

Cyprus-Russia tax treaty amended

Cyprus and Russia have agreed on an amendment to their 1998 tax treaty. The amendments are highlighted below:

15% WHT on dividend and interest payments
According to the agreement reached, the existing withholding tax (WHT) rates on dividend and interest payments made from Russia to Cyprus will increase to 15% subject to certain exceptions noted below.

Exceptions to the 15% WHT
The two countries have agreed that a 5% WHT should apply where the recipient/beneficial owner of a dividend is:

- a regulated entity such as a pension fund or insurance undertaking
- a company the shares of which are listed on a registered stock exchange (subject to conditions)
- the Government or a political subdivision or a local authority
- the Central Bank.

In addition, the two countries have agreed that no WHT shall apply on interest payments if the beneficial owner is:

- an insurance undertaking or a pension fund
- the Government or a political subdivision or a local authority
- the Central Bank
- a banking institution.

Furthermore, no WHT shall apply in respect of interest earned on the following listed bonds:

- corporate bonds
- government bonds and
- Eurobonds.

Finally, where the beneficial owner of the interest is a company whose shares are listed on a registered stock exchange (subject to conditions), the WHT shall not exceed 5%.

No WHT on royalty payments
The nil WHT on royalty payments from Russia to Cyprus will not change.

Cyprus withholding tax rates remain at 0%
Cyprus will continue to apply no withholding tax on dividend and interest payments to non-residents of Cyprus as per the local domestic legislation.

Effective date
The intention of both countries is for the revised WHT rates to go into effect from 1 January 2021, through the signing of a protocol amending the existing tax treaty over the next few months.

PKF COMMENT

The amendment addresses Russia's efforts to amend its double tax treaties with popular holding jurisdictions and safeguards the ongoing relationship between the two countries.

*For further information or advice on any Cyprus tax matter, please contact Nicholas Stavrinides at nicholas.s@pkf.com.cy or call **+357 258 68000**.*

»BACK

Czech Republic

VAT and DAC6 updates

VAT
A long-awaited amendment to the VAT Act came into force on 1 September 2020. The amendment changes the rules for applying the tax exemption regarding the delivery of goods among EU Member States (i.e. the implementation of the so-called "quick fixes").

The conditions for applying the tax exemption for the delivery of goods to another Member State by the VAT payer have been extended. The new rules define the following conditions:

- having knowledge of the VAT number of the acquirer of the goods
- stating the delivery of goods in the VAT recapitulative statement
- goods are dispatched or transported to another Member State by the seller, acquirer or by a third party authorised thereto.

DAC6|
Bill No. 343/2020 was gazetted on 14 August 2020 transposing DAC6 (Council Directive (EU) 2018/822 of 25 May 2018) into Czech domestic law.

A cross-border arrangement qualifies as reportable if it contains at least one of the characteristics set out in Annex 3 of the Bill. Other definitions are also broadly in line with the Directive, including the definition of intermediary.

The reporting deadlines are extended a follows:

- cross-border arrangements where the first step was implemented in the period from 25 June 2018 to 30 June 2020: no later than by 28 February 2021
- cross-border arrangements that were made available or ready for implementation, or where the first step was implemented in the period from 1 July 2020 to 31 December 2020: no later than by 30 January 2021, and
- cross-border arrangements that were made available or ready for implementation, or where the first step was implemented as of 1 January 2021: no later than within 30 days after the decisive fact.

PKF COMMENT

*If you believe the above measures may impact your business or require any advice with respect to Czech taxation, please contact Jaroslava Hanková at hankova@apogeo.cz or call **+420 267 997 721**.*

»BACK

Ecuador

Exceptional income tax advance payment for 2020 and rules on VAT on digital services

Exceptional income tax advance payment for 2020
A new exceptional measure was gazetted on 3 September 2020 introducing the obligation for certain taxpayers to make an income tax advance payment in order to tackle the economic fallout of COVID-19.

Individuals and companies, including branches and permanent establishments of non-residents in Ecuador, are required to make an exceptional advance payment if the following conditions are met:

- they derive income subject to income tax
- they recorded gross income of at least USD 5 million during fiscal year 2019
- they obtained accounting profit during the period 1 January to 31 July 2020 (previously June), excluding, in the case of natural persons, employment income and social benefits.

The income tax advance is equal to 25% of 85% of the 2020 accounting profit (1 January – 31 July), less any creditable income tax withholdings from 2020 (1 January – 31 July) and is payable by 11 September 2020. The advance payment will act as a tax credit against the tax liability for fiscal year 2020.

This new exceptional measure does not apply to:

- micro, small and medium-sized enterprises
- regular exporters of goods (at least 50% of income from exports)
- taxpayers whose aggregate income is exempt from tax with respect to the 2020 fiscal year in accordance with the law
- taxpayers whose main tax domicile is in the Galapagos, and
- taxpayers carrying out activities in the tourism, agricultural and air transport services.

VAT on digital services
Effective from 16 September 2020, Ecuador will be taxing digital services supplied from abroad to residents in Ecuador at a 12% VAT rate.

Digital services include services provided and/or contracted through the internet or any adaptation or application of protocols, platforms or technology used over the internet or other network through which similar services are provided. Digital services, by their nature, are automated and require minimal human intervention, regardless of the device used for downloading, viewing or use.

If the foreign supplier is not registered in Ecuador:

- For business-to-consumer (B2C): the VAT will be withheld by the intermediary (for example, the bank). The bank statement will be considered as the withholding receipt.
- For business-to-business (B2B): the VAT will be assumed by the importer. The Ecuadorian resident should issue a local document called "liquidación de compra de bienes y servicios", adding the VAT to the service invoiced by the non-resident and then issue the withholding receipt for the 100% VAT. The VAT should be paid to the tax authority on a monthly basis through the VAT return.

The complete guidelines around this matter can be found in Executive Decree No. 1114 (gazetted on 4 August 2020). Also, the tax authority issued rules through Administrative Resolution NAC-DGERCGCC20-00000053, which was gazetted on 26 August 2020.

PKF COMMENT

If you believe the above may impact your business or require any advice with respect to Ecuador taxation, please contact Edgar Naranjo at enaranjo@pkfecuador.com or call ***+593 4 236 7833****.*

»BACK

France

A more flexible VAT option on leases for professional use

Leases of unfurnished premises for professional use are in principle exempt from VAT (Article 261 D of the French Tax Code). However, the taxpayer has the option to make the leases liable for VAT at his own request if he sends a VAT option letter to the tax administration (Article 260 2° of the French Tax Code).

Until now, such option was covering the building or group of buildings in its entirety. This was the position of the tax administration in its administrative doctrine BOI-TVA-CHAMP-50-10-20140404 § 120: “The option exercised by these taxpayers necessarily covers all of the premises (not excluded from the scope of such option) that a lessor owns in a given building. In practice, the option is therefore exercised building by building”.

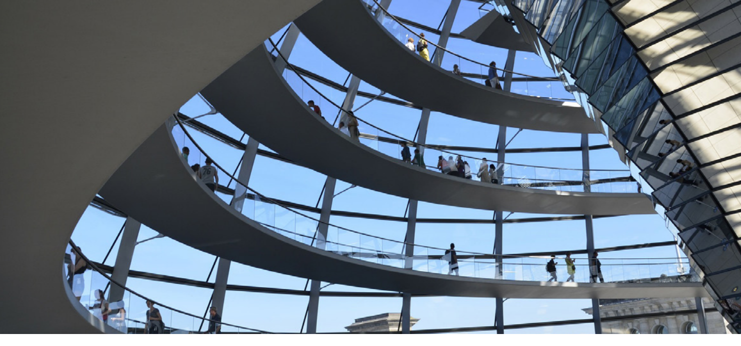
With its ruling SCI EMO dated 9 September 2020 No. 439143 8e and 3e ch, the French Council of State recently confirmed the possibility for the taxpayer to exercise the option on a lot-by-lot basis and no longer on a global basis per building or group of buildings. Its decision has been taken in light of articles 135 and 137 of Directive 2006/112/CE on the common system of value added tax dated 28 November 2006.

PKF COMMENT

This important ruling offers greater flexibility to real estate players in the management of their investments. In practice, care should be taken to ensure that the letter of option specifically and precisely targets the premises concerned.

For further information or advice concerning French taxation, please contact Vanessa Raindre at *vanessa.raindre@pkf-mdlegal.fr or call* ***+33 1 78 09 75 25****.*

»BACK



Germany

Continuation of loss carry-forwards despite change of shareholder

On 14 August 2020, the German Federal Ministry of Finance (BMF) presented a draft letter that regulates the conditions under which loss carry-forwards can be retained despite a harmful change in shareholder.

1. **Principle: forfeit of loss carry-forwards**
   According to § 8c of the German Corporation Tax Act (KSt), a harmful acquisition of shares is deemed to have occurred if more than 50% of the shares are transferred directly or indirectly to a new shareholder within five years. As a result, all loss carry-forwards of the company are forfeited.

2. **Exceptions according to § 8c KStG**
   In accordance with the provision of § 8c KStG, the loss carry-forwards do not expire subject to three alternative exceptions:
   - if and to the extent that the buyer compensates for hidden reserves (difference between market value and book value) via the purchase price, which are taxable in Germany
   - in case of a group structuring, if the (new) owner already directly or indirectly holds 100% (group clause)
   - if the buyer restructures the company (restructuring clause).

3. **Exceptions according to § 8d KStG**
   As an alternative to § 8c KStG, there is an exception according to § 8d KStG. Since 2016, companies are able to apply for the exemption provision under Section 8d KStG to be used instead of Section 8c KStG.

   Pursuant to Section 8d KStG, the losses can be continued despite the harmful acquisition of shares if the business operations are continued. In the draft of a BMF letter, the prerequisites have now been specified for the first time on the basis of application examples:
   - the taxpayer has an option: if he determines that the hidden reserves according to § 8c KStG are insufficient, he can launch an application according to § 8d KStG
   - an application can be made as long as the tax assessment is still subject to change
   - the most important requirement is that a uniform business operation exists. This characteristic is examined in more detail hereafter.

4. **Uniform business operation**
   § Section 8d KStG is not applicable if there are several business operations without a mutual subsidy and factual connection. The BMF gives the following example. An enterprise operates a car dealership while a car repair workshop is operated in the outbuilding. In principle, there are two business operations. However, since the car dealership and the repair workshop are factually linked, § 8d is applicable.

   The business must not have been discontinued, not even temporarily. Furthermore, there must not have been a change of branch. Further requirements can be found in the BMF letter. In any case further and more precise vetting is required.

PKF COMMENT

*If you believe any of the above measures may impact your business or require any advice with respect to German taxation, please contact Daniel Scheffbuch at d.scheffbuch@pkf-wulf.de or call **+49 711 69 767 238**.*

»BACK

Ghana

Various changes in tax legislation

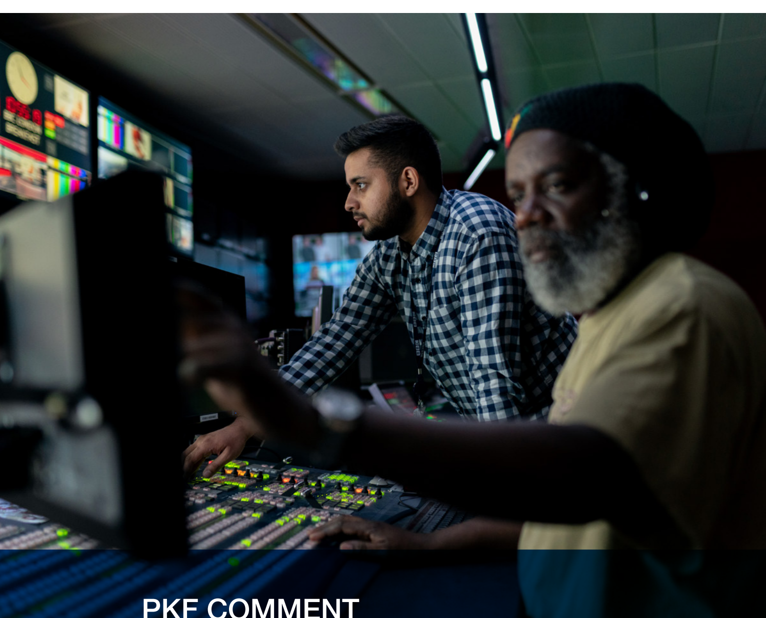
Revision of Communication Service Tax
The Communication Service Tax Act, 2008 (Act 754) imposed a tax paid .by consumers of communication service at the rate of 6%.

The Communication Service Tax (Amendment) Act 2019 (Act 998) increased the rate from 6% to 9% and also broadened the coverage of the tax to include the following:

- public/corporate data operators
- providers of radio (FM) broadcasting services
- providers of free-to-air television services.

The tax base for charging CST is the Service value excluding VAT, GetFund and National Health Insurance Levy.

In August 2020, the Government of Ghana reduced the rate from 9% to 5% to enable persons, businesses and households to communicate effectively using information, communication and technology tools to operate remotely amidst the COVID-19 pandemic. The amendment was affected by the Communication Service Tax (Amendment) Act, 2020 (Act 1025) and the effective date of implementation is 15 September 2020.



Tax exemption for health workers
On 5 April 2020, a three-month income tax waiver on personal emoluments of Health Workers from April to June 2020 was announced.

On 1 May 2020, Parliament approved a tax waiver on personal emoluments of all frontline health workers for the months of April, May and June 2020 and on additional allowances for frontline health personnel covering the months of March, April, May and June 2020. This has been extended to the end of September 2020.

Tax exemption for COVID-19-related retrenched workers
On 1 May 2020, Parliament approved Income Tax Amendment Bill 2020 to waive taxes on withdrawals from third-tier provident funds and personal pension schemes.

Before then, withdrawals from those funds before retirement were subject to 15% income tax if withdrawn before 10 years by a contributor in the formal sector and before 5 years for those in the informal sector.

Government is also exempting withdrawals from tax deductions to provide some relief to employees who have lost their jobs permanently or whose businesses collapsed as a result of the COVID-19 pandemic.

Tax exemption for donations to fight COVID-19
Donations of stock of equipment and goods as relief for the fight against COVID-19 will not attract 15% VAT, 2.5% NHIL and 2.5% Getfund levy.

PKF COMMENT

*For further information on this matter or any advice on Ghana taxation, please contact Frederick Bruce-Tagoe at fbrucetagoe@pkfghana.com or call **+233 302 221 266**.*

»BACK

Hong Kong

New Limited Partnership Fund Ordinance

The new Hong Kong Limited Partnership Fund ("the New LPF Ordinance") Ordinance (Cap. 637) came into effect on 31 August 2020, establishing a new regime for private funds to register in Hong Kong in the form of limited partnerships. The New LPF Ordinance provides a streamlined process for an existing fund established under the old Limited Partnership Ordinance (Cap. 37) to register as an LPF provided it meets the eligibility requirements. Please note that a statutory mechanism for re-domiciliation of overseas funds to Hong Kong has yet to be introduced in Hong Kong.

In addition, LPFs that satisfy certain conditions would be eligible for tax exemption under the Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Ordinance 2019 ("the Unified Fund Exemption"). The Unified Fund Exemption came into effect on 1 April 2019 and extends Hong Kong Profits Tax exemption to all investment funds, regardless of their form, size, purpose or location of its central management and control, provided that certain conditions are met. On 30 June 2020, the long-awaited Departmental Interpretation & Practice Note No. 61 ("DIPN 61") was published by the Hong Kong Inland Revenue Department to set out interpretations and guidelines for the Unified Fund Exemption regime.

PKF COMMENT

Through introducing the New LPF Ordinance and extending tax exemptions to different types of funds, Hong Kong is forming an increasingly friendly environment for investment funds to be established or operated here. It is advisable for fund managers to consider setting up their funds in Hong Kong and to seek proper advice in advance to confirm the proper structure and potential tax benefits.

*For further information or advice concerning the above or any advice with respect to Hong Kong taxation, please contact Henry Fung at henryfung@pkf-hk.com or call **+852 2806 3822**.*

»BACK

Hungary

ECJ ruling on VAT distance sales rules

On 18 June 2020, in KrakVet Marek Batko (C-276/18), the European Court of Justice (ECJ) found that the VAT distance sales rules currently only apply where goods are dispatched or transported "by on or behalf of the supplier", and not where the supplier intervenes directly or indirectly in the dispatch or transport.

A taxable person established and registered for VAT purposes in Poland sold pet food to Hungarian customers through its website and simultaneously offered the possibility for customers to conclude a contract with a transport company established in Poland for the purposes of delivering the goods marketed by it, without itself being a party to that contract. Pet food was subject to 8% VAT in Poland while being subject to 27% VAT in Hungary.

According to the Polish tax authorities the distance sales rules did not apply. However, the Hungarian tax authority did not agree.

Answering the questions of the local court the ECJ ruled as follows:

- in case of a distance sale, if goods are delivered by a company recommended by a supplier (but the customers have the possibility to choose another transporter), the goods must be considered as dispatched or transported by or on behalf of the supplier, if the role of the supplier is predominant in initiating and organising the essential stages of the transport. In this regard the address and the language of the website of the supplier, and the number of the recommended transporters may be decisive factors, as well as the circumstance whether the customer must take independent steps to contact the transportation company or who bears the burden of the risk related to the transport
- the above practice cannot be considered as abusive from a VAT perspective as taxable persons are free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purpose of limiting their tax burden. Furthermore, in the case at hand none of the evidence demonstrated that the transporter and the supplier constitute a single economic entity or carried out a genuine economic activity.

PKF COMMENT

The case will be referred to and continued before local court. However, distance sellers carrying out an activity from a Member State where the VAT rate is lower than in Hungary should take into account the ECJ's considerations and review their current practice as the tax authorities are free to treat the transaction differently from the one under which it has already been taxed in another Member State.

*For further information or advice concerning the above or any advice with respect to Hungarian taxation, please contact Krisztián Vadkerti at vadkerti.krisztian@pkf.hu or call **+36 1 391 4220**.*

»BACK

India

Recent case law and developments on investment and dividend law

Investment by specified persons in infrastructure sub-sectors under section 10(23FE) to qualify for income-tax benefits

The Government, vide Finance Act, 2020, had introduced a new section 10(23FE) under the Income-tax Act, 1961 (the Act), to provide an income-tax exemption to specified persons from dividend, interest and long-term capital gains income, which would be derived from certain investments (made in India during the period from 1 April 2020 to 31 March 2024), subject to certain conditions.

The specified persons who have been provided this exemption are:

- A wholly owned subsidiary of the Abu Dhabi Investment Authority
- A foreign sovereign wealth fund, and
- A foreign pension fund.

The investments by such specified persons should be in India in the form of debt or share capital or unit of:

- An entity carrying on a business of developing, or operating and maintaining, or developing, operating and maintaining specified infrastructure facility (such as road, highway project, water supply project, water treatment system, solid waste management system, irrigation project, port, airport, inland waterway, etc.) or an entity carrying on a business as specified by the government
- Category-I or Category-II Alternative Investment Fund (AIF) 100% investment in the above mentioned entity/entities, and
- Infrastructure Investment Trust.

The Central Board of Direct Taxes (CBDT) vide notification dated 6 July 2020 has expanded the infrastructure sub-sectors from which investment income (i.e. dividend, interest and long-term capital gains) earned by specified persons would be exempt.

Accordingly, now investment by the specified persons in:

- Indian entities engaged in the specified infrastructure sub-sector, and
- Category-I or Category-II AIF (which has 100% investment in an entity/entities engaged in infrastructure business as above or in specified infrastructure sub-sector)

should be eligible for the purposes of exemption under section 10(23FE) of the ITA, subject to certain conditions.

PKF COMMENT

Consideration and relaxation given to non-resident investors by the Indian Government encourages overseas investors to invest in India

The Central Board of Direct Taxes, India amends rules to exempt dividend payment to non-residents from higher deduction of tax in the absence of a Permanent Account Number (PAN) in India

Any person who is entitled to receive any amount on which tax is deductible at source, shall furnish his PAN to the deductor, failing to which the payer is liable to deduct tax at 20%.

As per the amended rule, if a non-resident shareholder does not hold a PAN but furnishes TRC and other specified information to the company, the company can deduct tax at the 'rates in force' (which includes a lower tax treaty rate, if applicable).

If tax is to be deducted at 20% (plus applicable surcharge and cess) as provided in Section 115A and a non-resident shareholder does not have any other taxable income in India (other than income covered by section 115A which meets similar conditions), then the non-resident shareholder is not required to file the income return.

However, if the tax is deducted on dividend at a lower tax treaty rate, then the non-resident shareholder will be required to file an income return.

PKF COMMENT

Consideration and relaxation given to non-residents by the Indian Government comes in as a relief to overseas investors.

Key rulings

DIT vs. Samsung Heavy Industries Co Ltd (Supreme Court)

Recently, the Supreme Court had an occasion to examine whether a project office set up for non-core activities constitutes a 'fixed place' PE in India.

The SC held that a fixed place PE (as under Article 5(1)) of a foreign enterprise in India exists only when the establishment is one through which the business of the enterprise is wholly or partly carried on. However, if an enterprise simply maintains a fixed place of business in India, which is auxiliary or preparatory in nature in the business or trade of the enterprise, then it is not a PE as per Article 5(4)(e). The SC held that the profits of the foreign enterprise will be taxable in India only when the enterprise conducts its core business through an India PE. Further, only those profits which are attributable to the PE can be taxed in India.

PKF COMMENT

With this ruling the Supreme Court emphasised the importance in ascertaining the nature of services performed to determine the presence of a permanent establishment. Accordingly, article 5 of the India-Korea tax treaty was considered for determining the permanent establishment status of Company in India.

DDIT vs. Yum Restaurants (Asia) Pte. Ltd (ITA No.6018/Del/2012)

The Delhi Tribunal held that a Singapore company does not constitute a service PE in India under the India-Singapore tax treaty on deputation of its employee to an Indian company.

The deputed employee was under the direct control and supervision of the Indian company and the Singapore company had discharged the employee from all obligations and rights whatsoever, including lien on employment.

The deputed employee was permanently moved to the payroll of the Indian company. Therefore, the Singapore company does not constitute a service PE in India.

PKF COMMENT

The Tribunal showed the significance in ascertaining the roles of the employee with respect to the employer of the Country to determine the presence of a permanent establishment of the foreign Company in India. However, considering that this is a tribunal ruling it may be questioned at a higher judicial level.

DIT & ITO v. Sasken Communications Technologies Ltd. [ITA No. 241 of 2011, AY 2006-07]

The Karnataka High Court held that the non-compete fee paid to key employees in the U.S. is salary or profit in lieu of salary. Since the employees rendered services outside India, i.e. in the U.S. and payments were also made in the US, article 16 of the tax treaty applies and therefore such fee was taxable only in the U.S.

Therefore, the employer was not under any obligation to deduct tax at source. Further, it was held that where the payments are in nature of salary, the payer does not need to approach the tax officer under Section 195(2) of the Income tax Act.

PKF COMMENT

The High Court in the case under consideration has observed that under article 16 of the India-U.S. tax treaty, the services rendered outside of India and payments received for such services outside of India are to be taxed outside of India.

*If you believe the above measures may impact your business or require any advice with respect to india taxation, please contact Sudha Ashok at sudha.a@pkfindia.in or call **+91 44 2811 2985**.*

»BACK

Italy

Tax incentives for attracting human capital in Italy

In Italy there exists a favorable fiscal provision that excludes 90% of remuneration from the taxable income amount (from employment or self-employment income) and which is not only aimed at Italian citizens, but can also be taken advantage of by foreigners.

An example can be given of an individual acquiring tax residency in Italy at 1 January 2020 in order to carry out research activities at an Italian university. In the case at hand, he could benefit from the tax relief provided for by the framework of the so-called "return of brains" provisons.

The aim of these rules is to attract highly qualified or specialised workers, such as professors, researchers and managers, who, through their scientific knowledge, can support the economic, technical and cultural development of Italy.

This interpretative tax clarification is illustrated by ruling No. 307 of the Tax Agency published on 3 September 2020 (at the outset it seemed like a law aimed only at compatriots).

Said legislation has been subject to repeated changes and modifications, generally in the direction of a constant expansion of the beneficiaries. In particular, the latest regulatory step applies to subjects who acquire tax residency in Italy starting from tax period 2020. Professors and researchers can get a 90% exemption on income from self-employed and employed work for 4 years starting from the year of acquisition of the residency for tax purposes in Italy.

In order to benefit from the fiscal relief, a researcher or professor must comply with certain requirements:

- have been resident abroad, not occasionally
- holding a university degree or equivalent qualification
- having carried out documented research and course activities abroad for at least two consecutive years, at public or private research centers or universities
- acquiring tax residency in Italy
- carry out teaching or research activities in Italy.

Moreover, the Tax Agency also highlights that individuals resident in Italy are those who, for the majority of the tax period (at least 183 days (or 184 days in case of a leap year)), are enrolled in the registers of the resident population or have their domicile or residence on the territory of the Italian State.

Nothing is specified regarding the nature of the employer (public or private university, an institution or even a research company).

PKF COMMENT

We would like to highlight this topical issue because the tax advantage for a person moving to Italy for professional reasons can be very relevant and significant. PKF Studio TCL is available for any clarification and support in this regard with offices in Genoa, Milan and Rome. You can contact Barbara Pollicina at b.pollicina@pkf-tclsquare.it or call ***+39 010 8183250****.*

»BACK

Malaysia

Changes to Labuan tax legislation

Labuan is an island in the South China Sea off the coast of Sabah in East Malaysia. In 1990, Labuan was established as an international offshore financial centre (IOFC) in a bid to attract international financial activities.

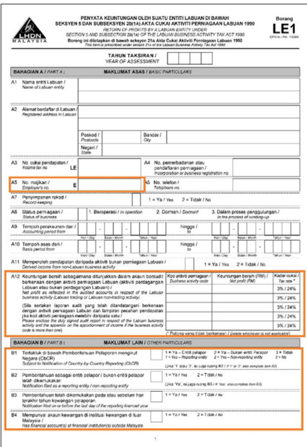
In line with Malaysia's commitment as a member of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) to address tax evasion and harmful tax practices under BEPS Action 5: Harmful Tax Practices, significant changes have been made to Labuan tax legislation including the increase of substantial activities requirements in Labuan. As a result, the following tax legislation has been enacted:

- Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 ("Regulations") which became effective from 1 January 2019, and
- Labuan Business Activity Tax (Amendment) Act 2020 ("LBATAA") which was gazetted on 10 February 2020 and became effective on 11 February 2020.

The major changes to Labuan tax legislation can be summarised as follows:

Compliance and reporting for Labuan entities

- **Form LE1** - Return of Profits by A Labuan Entity Under Section 5 And Subsection 2B(1A) of the Labuan Business Activity Tax Act 1990



LHDN MALAYSIA

PENYATA KEUNTUNGAN OLEH SUATU ENTITI LABUAN DI BAWAH SEKSYEN 5 DAN SUBSEKSYEN 2B(1A) AKTA CUKAI AKTIVITI PERNIAGAAN LABUAN 1990

RETURN OF PROFITS BY A LABUAN ENTITY UNDER SECTION 5 AND SUBSECTION 2B(1A) OF THE LABUAN BUSINESS ACTIVITY TAX ACT 1990

Borang ini ditetapkan di bawah seksyen 21A Akta Cukai Aktiviti Perniagaan Labuan 1990

This form is prescribed under section 21A of the Labuan Business Activity Tax Act 1990

Borang **LE1**

TAHUN TAKSIRAN / *YEAR OF ASSESSMENT*

BAHAGIAN A / *PART A*: **MAKLUMAT ASAS** / *BASIC PARTICULARS*

A1 Nama entiti Labuan / *Name of Labuan entity*

A2 Alamat berdaftar di Labuan / *Registered address in Labuan*
Poskod / *Postcode* — Bandar / *City* — Negeri / *State*

A3 No. cukai pendapatan / *Income tax no.* LE

A4 No. pemerbadanan atau pendaftaran perniagaan / *Incorporation or business registration no.*

A5 No. majikan / *Employer's no.* E

A6 No. telefon / *Telephone no.*

A7 Penyimpanan rekod / *Record keeping* — 1 = Ya / *Yes* 2 = Tidak / *No*

A8 Status perniagaan / *Status of business* — 1. Beroperasi / *In operation* 2. Dorman / *Dormant* 3. Dalam proses penggulungan / *In the process of winding-up*

A9 Tempoh perakaunan dari / *Accounting period from* — hingga / *to*

A10 Tempoh asas dari / *Basis period from* — hingga / *to*

A11 Memperoleh pendapatan daripada aktiviti bukan perniagaan Labuan / *Derived income from non-Labuan business activity* — 1 = Ya / *Yes* 2 = Tidak / *No*

A12 Keuntungan bersih sebagaimana ditunjukkan dalam akaun beraudit berkenaan dengan aktiviti perniagaan Labuan (aktiviti perdagangan Labuan atau bukan perdagangan Labuan) / *Net profit as reflected in the audited accounts in respect of the Labuan business activity (Labuan trading or Labuan non-trading activity)*

(Sila sertakan laporan audit yang telah ditandatangani berkenaan dengan aktiviti perniagaan Labuan dan lampiran pecahan pendapatan jika kod aktiviti perniagaan melebihi daripada satu / *Please enclose the duly signed audit report in respect of the Labuan business activity and the appendix on the apportionment of income if the business activity code is more than one*)

Kod aktiviti perniagaan / *Business activity code*	Keuntungan bersih (RM) / *Net profit (RM)*	Kadar cukai / *Tax rate* *
		3% / 24%
		3% / 24%
		3% / 24%
		3% / 24%
		3% / 24%

(* Potong yang tidak berkenaan / *Delete whichever is not applicable*)

BAHAGIAN B / *PART B*: **MAKLUMAT LAIN** / *OTHER PARTICULARS*

B1 Tertakluk di bawah Pemberitahuan Pelaporan mengikut Negara (CbCR) / *Subject to Notification of Country-by-Country Reporting (CbCR)* — 1 = Ya – Entiti pelapor / *Yes – Reporting entity* 2 = Ya – Bukan entiti Pelapor / *Yes – Non-reporting entity* 3 = Tidak / *No*

B2 Pemberitahuan sebagai entiti pelapor / bukan entiti pelapor telah dikemukakan / *Notification filed as a reporting entity / non-reporting entity* — 1 = Ya / *Yes* 2 = Tidak / *No*

B3 Pemberitahuan telah dikemukakan pada atau sebelum hari terakhir tahun kewangan pelaporan / *Notification filed on or before the last day of the reporting financial year* — 1 = Ya / *Yes* 2 = Tidak / *No*

B4 Mempunyai akaun kewangan di institusi kewangan di luar Malaysia / *Has financial account(s) at financial institution(s) outside Malaysia* — 1 = Ya / *Yes* 2 = Tidak / *No*

1

The main changes to the Labuan tax return form and its tax implications are the following:

	New LE 1	Old LE 1	Our Comments
A5 – Employer's no.	Applicable	N/A	Effective from YA 2020, a Labuan entity is required to comply with substantive requirement (i.e. minimum number of employee). Thus, a Labuan company is now required to submit the employer's tax return (Form E).
A 12 - Net profit as reflected in the audited accounts in respect of the Labuan business activity (Labuan trading or Labuan non-trading activity)	Applicable	N/A	A Labuan company may have more than one trading and/or non-trading activities that generate its business income. Hence, there is a new requirement to ensure the selection of the correct business code for each business activity and the applicable tax rate as per the new LE 1 Form. The selection of the correct business code is not reference to its principal activity. Thus, segregation of the income and the allocation of expenses for each business code must be computed correctly based on acceptable methodology by the Malaysian Inland Revenue Board to derive at a net profit for each business code in order to complete the LE 1 Form and reporting the correct tax liability.
B1, B2 and B3 – Notification of Country-by-Country Reporting (CbCR)	Applicable	N/A	A Labuan entity is required to comply with proper notification and declaration of the Country-by-Country Reporting (CbCR).

Form LE 4/LE 5 - Statutory Declaration Under Sections 5 / 10 of the Labuan Business Activity Tax Act 1990

4. Keuntungan bersih * **termasuk / tidak termasuk** pendapatan yang diperoleh daripada royalti dan pendapatan lain yang diperoleh daripada pengeksploitan secara komersial **hak harta intelek**.

*4. The net profits * **include / do not include** any income derived from royalty and other income derived from the commercial exploitation of an **intellectual property right**.*

5. Entiti Labuan tersebut menjalankan suatu aktiviti perniagaan Labuan iaitu **selain aktiviti pemegangan ekuiti tulen** dan telah * **mematuhi / tidak mematuhi** Peraturan-Peraturan Cukai Aktivti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2018 [P.U. (A) 392/2018] sepanjang tahun taksiran seperti berikut:-

*5. The said Labuan entity carries on a Labuan business activity which is **other than pure equity holding activity** and has * **complied / not complied** with the Labuan Business Activity Tax (Requirements For Labuan Business Activity) Regulations 2018 [P.U. (A) 392/2018] throughout the year of assessment as follows:-*

5.1 Bilangan pekerja sepenuh masa tahunan di Labuan: …………………… pekerja; dan
Number of annual full time employees in Labuan: …………………… employees; and

5.2 Amaun perbelanjaan operasi tahunan di Labuan: RM ……………………………
Amount of annual operating expenditure in Labuan: RM ……………………………

6. Entiti Labuan tersebut menjalankan suatu aktiviti perniagaan Labuan iaitu **aktiviti pemegangan ekuiti tulen** dan telah * **mematuhi / tidak mematuhi** syarat-syarat berikut:-

*6. The said Labuan entity carries on a Labuan business activity which is **a pure equity holding activity** and has * **complied / not complied** with the following conditions:-*

6.1 Keperluan pengurusan dan kawalan di Labuan * **dipatuhi / tidak dipatuhi**; dan
***Has * complied / not complied** with management and control requirements in Labuan; and*

6.2 Amaun perbelanjaan operasi tahunan di Labuan: RM ……………………………
Amount of annual operating expenditure in Labuan: RM ……………………………

DAN * SAYA / KAMI MEMBUAT AKUAN INI dengan kepercayaan bahawa apa-apa yang tersebut di dalamnya adalah benar, serta menurut peruntukan-peruntukan Akta Akuan Berkanun 1960.

*AND * I / WE MAKE THE SOLEMN DECLARATION conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1960.*

	New Form LE 4 / LE5	Old Form LE 4 / LE 5	Our Comments
Paragraph 4 - To confirm there is no income derived from royalty and other income derived from the commercial exploitation of an intellectual property right	Applicable	N/A	The Labuan entity is required to make a self-declaration in the New Form LE 4 / LE 5 that it has no income derived from royalty and other income derived from the commercial exploitation of intellectual property right.
Paragraph 5 – To confirm the Labuan entity has complied with the substantive requirement	Applicable*	N/A	The Labuan entity is required to make a self-declaration in the New Form LE 4 / LE 5 that it has complied with the substantive requirement for each income stream. **Applicable to entities operate business other than pure equity holding activity.*
Paragraph 6 – To confirm the Labuan entity has complied with the substantive requirement	Applicable	N/A	The Labuan entity is required to make a self-declaration in the New LE 5 that it has complied with the substantive requirement by each income stream. **Only stated in Form LE 5 and applicable to entity operate pure equity holding activity.*

Enforcement and Operation

A summary of the new provisions and the corresponding tax implications from the amendments made to LBATAA effective from YA 2020 are as follows:

No.	Provision under LBATAA	Subject	Our Comments
1.	Subsection 6(2)	Power to raise assessments/ additional assessments	IRBM is authorised to conduct routine tax audit periodically as part of the new feature in the Labuan tax system similar to the provisions under Income Tax Act 1967 ("ITA"). The purpose of conducting tax audit is to ensure the compliance with the new tax legislation under LBATAA and the substance requirement.
2.	Section 6D	Right of appeal against assessment	Aggrieved towards assessment made by the IRBM, a taxpayer may appeal to the Special Commissioner in the same manner under the ITA.
3.	Section 17C	General anti-avoidance provision	The IRBM may disregard and make adjustments in relation to certain transactions of altering the incidence of tax, relieving, evading or avoiding liability to pay tax. This is an anti-avoidance provision to avoid aggressive tax planning structure of a Labuan entity without any substance.
4.	Section 17D	Adjustment of transfer pricing	This provision is introduced to closely scrutinise transactions with related parties. With this amendment, the IRBM may substitute the price in a related transaction if the transaction was not made at arm's length. Moving forward, the IRBM may issue similar guidelines than those under the ITA including the preparation of transfer pricing documentation in order to justify the arm's length principle in respect of related party transactions.
5.	Sections 22B, 22C and 22D	Power to the DG to access to company's information, premise and record keeping	IRBM can call, access and inspect record, premises and necessary documents to facilitate the conduct of tax audit/investigation.

PKF COMMENT

In light of the above changes to Labuan tax legislation, international companies having Labuan entities within their group are recommended to examine their tax position in order to closely manage any possible adverse tax implications.

*If you believe any of the above measures may impact your business or require any advice with respect to Malaysia/Labuan taxation, please contact Owen Tan at owen.tan@pkfmalaysia.com or call **+603 6203 1888**.*

»BACK

Mexico

Cancellation of VAT refund benefits for companies with VAT customs certification

On 24 July 2020, the Tax Administration (SAT) announced the cancellation of certain benefits regarding VAT refunds for certified companies, usually with temporary imports under IMMEX and similar programs such as Maquila companies, which are companies established in free zones in Mexico and producing goods for export purposes. The duration of this certification ranges from 1 to 3 years.

The cancelled benefits consisted - depending of the level of certification – of the recovery of VAT refunds within 10 to 20 days instead of 40 days as stipulated in the Law. However, if the certification was granted to a company before the entry into force of the rules that contain the cancellation of the benefits, it can continue with the expedited refunds until the day their specific permission allows them to.

In addition, said certified companies will have to pay dues to the SAT for every year since 2015 that they have been renewing the refund certification according to the following cost per year:

Year	Fee (MXN peso)
2015	$24,506.67
2016	$25,048.27
2017	$25,874.86
2018	$27,590.36
2019	$28,889.87
2020	$29,747.90

PKF COMMENT

Regardless of the cancellation of the VAT refund benefits, it is important for companies with temporary importation of goods status to keep the VAT customs certification from a cash flow perspective because this certification grants a tax credit for VAT purposes under the temporary importation of goods.

»BACK

National and multinational corporations subject to tax and transfer pricing audits

Further to the current pandemic which started in the first months of 2020 and due to the need to increase economic resources, the Tax Administration (SAT) has reinforced strategies for tax collection in Mexico by strengthening the current tax system and focusing the economic groups on industrial sectors with the highest likelihood of carrying out tax avoidance, evasion or fraud practices.

The amount of taxes collected by way of taxpayer audits was approximately USD 12 billion in the first half of 2020, i.e. three times higher than what was collected in 2019 all things being equal, with many of the audits originating from the review of inter-company operations. Some of the companies that were part of these audits were América Movil, FEMSA (Coca-Cola), Walmart, IBM, and other large corporations, who after going through a rigorous audit process came to an agreement with the SAT on the amount of debt due, plus fines, updates and surcharges.

According to the head of the SAT, the increase in tax collections that was observed in the first semester of 2020 is a result of enhanced audit efficiency, not of an increase in audits, as well as a better co-ordination between the different areas, optimising the use of tools, information and available resources.

PKF COMMENT

If you believe any of the above measures may impact your business or require any advice with respect to Mexican taxation, please contact Antonio Garcia at antonio.garcia@pkfmexico.com or call ***+52 (81) 8363 8311*** *and Jimy Cruz at jimy.cruz@pkf.com.mx or call* ***+52 (33) 3122 2081****.*

»BACK

Nepal

Recent tax updates

Online system for small taxpayers
On 16 July 2020, the first day of the new FY 2020/21, the Nepali Government has introduced an online payment method for small taxpayers.

With the new system rolled out by the Inland Revenue Department (IRD), small taxpayers who have annual transactions of up to NPR 2 million and income tax of up to NPR 200,000 will be able to file their tax details and pay income taxes through mobile apps or other electronic mediums or directly to the designated bank branches. Furthermore, an arrangement for small taxpayers to get a tax clearance certificate immediately after submitting the tax and income details through the bank has been established.

PKF COMMENT

The facility announced through the budget speech of the current fiscal year 2020/21 has been brought into implementation from the first day of the start of the new fiscal year.

This new system will end the requirement for small taxpayers to visit tax offices to fill up income tax related forms and manually complete the process of tax clearance. Henceforth, taxpayers will be able to make tax filings as well as tax payments through mobile apps or other electronic mediums.

Extension of deadline
The IRD has extended the dates for filing the monthly/bimonthly VAT returns, excise returns, withholding tax returns, education service fees, telephone ownership fees, telecommunication service fees for Falgun, Chaitra 2076 & Baisakh 2077 and payment to 21 June 2020 (7 Ashad 2077). Further, the due date of submission and payment of second instalment of advance income tax (70% of the estimated tax for FY 2076-77) has been extended to 29 June 2020 (15 Ashad 2077).

PKF COMMENT

Considering inconvenience caused by the COVID-19 pandemic, this is the third time IRD has extended deadline to pay taxes as the country continues to remain in lockdown to prevent the spread of Covid- 19.

Notice for brand registration

The IRD has issued notice requesting taxpayers to compulsorily register their brand before filing monthly excise returns. The IRD has provided facility of registration and verification of brand through its official website https://ird.gov.np/ for more details on procedures of brand registration.

PKF COMMENT

Brand registration will authenticate the right of dealing with the products.

Extension of deadline for attestation of sales and purchase register

The IRD has extended the due dates for attesting the VAT purchase and sales register under section 16(3) of the VAT Act 2052 by the respective tax officers until Poush end 2077 for taxpayers filing VAT returns on monthly, bimonthly and quarterly basis from the existing dates of end of Shrawan and Kartik, respectively.

Furthermore, arrangements have also been made for taxpayers with registered offices outside of Kathmandu valley to attest those records from the nearest Inland Revenue Office (IRO) or Taxpayer Service Office (TSO) in case of taxpayers registered in Medium & Large Taxpayers Office.

PKF COMMENT

Considering the inconvenience caused by the COVID-19 pandemic, the IRD has issued notice on 7 August 2020 (23 Shrawan 2077) for an extension of the deadline of attestation of the sales and purchase register. The process of attesting the VAT register during the pandemic was causing fear and pressure to taxpayers so the IRD has extended deadlines to prevent the spread of Covid-19.

Upgrade of IRD's website

The Inland Revenue Department has started online electronic services from 31 August 2020 by updating its website with new and updated features like tax calculations, tax clearance certificate, Slider/ Carousel, Standard Operating Procedure, IRD Chatbot etc. The website offers relevant information and clarifications through the FAQs and the latest amended laws and regulations including the English version have been uploaded.

PKF COMMENT

Updating the IRD website will reduce downtime and increase security. The updated features will simplify the use of the IRD website. This can be taken as a new approach of moving towards a digital Nepal.

Gain on disposal of Non-Business Chargeable Asset (NBCA)
On 2077/03/04 the IRD has issued notice to the Securities Board of Nepal (SEBON) clarifying the tax treatment and its implications on gain on disposal of the NBCA income. As per the notice the applicable tax rate for natural persons on gain on disposal of NBCA is 5%, which is a final withholding tax. As per the Income Tax Act 2058, a person deriving only final withholding income is not required to file an income tax return, which is clarified in the notice.

Also, after obtaining clarification, SEBON has instructed to treat gain on disposal of securities as final withholding income to the relevant authorities.

PKF COMMENT

The notice of the IRD clarifies that the person is not required to file an income tax return as it is derived as final withholding income.

Amnesty on withdrawal of appeals on disputed taxes
The taxpayer withdraws all appeals made to the Director General of IRD, Revenue Tribunal or in the appellate Courts on account of disputed taxes up to Ashad 2075 (except cases relating to false and fake invoices) under the Income Tax Act, 2058, Value Added Tax Act, 2052 and Excise Act, 2058. The taxpayers have to pay applicable taxes and interest assessed by the tax officer as per the final assessment order.

The applicable fees, additional charges and penalties will be waived.

PKF COMMENT

This amnesty provides an opportunity for taxpayers to review their petition at various appellate authorities and consider withdrawing such cases where there is a likelihood that the decision will not be in their favour thus saving on the payment of applicable fees, additional fees and penalties.

Amnesty to unregistered persons by submitting returns for two fiscal years
If any taxpayer registers and obtains a permanent account number (PAN) and submits the tax returns for FY 2074-75 and 2075-76 and deposits the applicable tax by the end of Falgun 2077, the interest and penalty for FY 2074-75 and 2075-76 will be waived as well as the taxes, interest and penalties for earlier years.

PKF COMMENT

This one-time opportunity should be opted for by unregistered persons having taxable income earned from legal sources as the GoN – in order to meet its challenging revenue targets – would adopt stringent measures to collect taxes, including interest and penalties in future. The GoN has provided this amnesty with the aim of broadening its tax net rather than increasing tax rates for the sake of increasing revenue collection.

Major changes of finance bill

On 28 May 2020, the Minister of Finance presented the full budget for the FY 2020-21. The salient features can be summarised as follows:

1. Income Tax
   - Tax concession for micro, cottage and small industries has been provided based on their annual turnover
   - Period of tax exemption for micro enterprises, travel and tourism industry, special industry has been increased
   - Income tax is exempted for Drinking Water and Sanitation Consumer Groups operating as per their objectives. Income tax waived on tax assessed up to FY 2019- 20
   - Rebate on tax rate in case of hotel, travel, trekking, transport and airline industry
   - The contributions made to the Corona Fund shall be deductible for computation of taxable income for the FY 2019-20
   - Income tax exemption granted to cooperatives operating in rural municipality whereas tax rate has been revised in case of cooperatives operating in areas other than rural municipality
   - Waiver in tax applicable on retirement payment if approved retirement fund operating in different institutions is transferred to Social Security Fund
   - Requirement of PAN for daily wages and expenses has been revised
   - Amnesty has been provided to non-registered and non-filers for registration in tax.

2. Value Added Tax

- Exemption of VAT imposed on micro enterprise insurance
- Submission of VAT returns and payment on a trimester basis allowed for tourism, transportation and movie theatres
- VAT exempted on import of raw material by pharmaceutical industries and VAT refund to be provided if the raw materials are procured locally.

3. Customs duties

- Reduction of applicable customs duties on import of machineries and raw material by micro, cottage and small industries, animal husbandries, veterinarians and industries producing masks
- Reduction of applicable customs duties on import of equipment imported by agricultural firms as well as paddy, corn, wheat and vegetable seeds
- Reduction of applicable customs duties on import of raw material for ayurvedic medicines
- Increase in applicable customs duties on import of petroleum products (except aviation fuel and LP gas), gold and gold ornaments.

4. Excise Duties

- Exemption of excise duties on internal production of ethanol (to be used as raw material for production of sanitisers) and PPE
- Excise duties applicable on items over a dozen removed
- Excise duties imposed on import of all furniture goods.

PKF COMMENT

The government of Nepal (GoN) through the budget speech and finance act has changed direct and indirect tax laws which may affect individuals and entities in Nepal. Nepal taxpayers should take into account the new tax rules effective for the FY 2020-21.

For further information or advice on Nepal tax laws or if you have any specific query about your particular tax situation, please contact Shashi Satyal at shashi.satyal@pkf.com.np or call ***+977 01 441 0927****.*

»BACK

Nigeria

2020 tax updates

The Finance Act 2019 was introduced by the Government of Nigeria in the year 2020 to majorly promote the ease of doing business in the country for Small and Medium Enterprises and align with best practices around the world. Significant changes were made to the Company Income Tax Act, VAT Act and Capital Gains Tax Act.

Below is a summary of the highlights of the Finance Act 2019.

Nigeria issues circular informing the public on what constitutes Significant Economic Presence (SEC) for Non-resident companies in the country for the purpose of tax

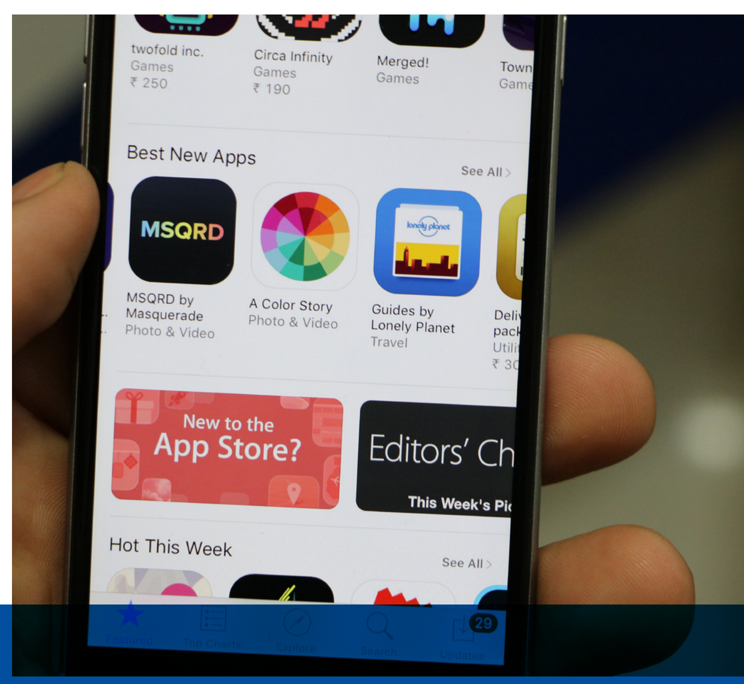
The Minister of Finance, Budget and National Planning in the first quarter of the year 2020 issued the Company Income Tax (Significant Economic Presence) Order to support the Finance Act 2019.

Some of the activities now recognised as taxable transactions are electronic commerce, app store, e-data storage, participative network platform etc. Also, any trade or business which entails the receipt of services from persons outside Nigeria to a person resident in Nigeria.

Amidst the identification of products or services which constitute transactions in Nigeria, their taxable nature is still dependent solely on the company having Significant Economic Presence in Nigeria.

For clarity, some of the criteria which help determine Significant Economic Presence as provided for in the SEC Order are listed below.

- Any company that derives gross turnover or income of above NGN 25 million or its equivalent in other currencies in the relevant accounting year from transactions which are listed under section 13 of the Company Income Tax Act.
- Any company which has a purposeful or sustained interaction with persons in Nigeria by customising its digital page or platform to target persons in Nigeria, including reflecting the prices of its products/services in Nigerian currency or providing options for billing or payments in Nigerian currency.



PKF COMMENT

Notably, the Nigerian tax environment is taking considerable steps to ensure that all types of transactions are captured for income tax purposes without making it difficult for non-resident companies dealing on a one-off basis within the Nigerian Tax Base.

Also, the country is more aware of the economic benefits attached to the digital industry and is more prepared and equipped to spread the tax net.

Non-resident companies in Nigeria need to ensure that they get clarity on their statuses for tax purposes in Nigeria. This is especially true for companies, which prior to now were unsure of their level of economic presence in Nigeria.

Commencement and Cessation rules are modified to eliminate overlaps and gaps to avoid double taxation and complication during commencement

Prior to now, the basis of computing the assessable profit of a company commencing business in Nigeria gave rise to possible gaps and profits, overlapping different years of assessment. The relevant section of the law as amended by the Finance Act 2019 now provides that the basis of taxation will be the preceding year basis, which effectively means that tax will be assessed in arrears.

PKF COMMENT

This reduces the cumbersome nature of the previous law which sometimes makes companies pay tax as much as three times on a single accounting period profit. This should encourage investors to set up companies in Nigeria.

A change to the basis on which a company in Nigeria is deemed to be exempt from Minimum Tax for a relevant tax year.

The provisions of CITA prior to the introduction of the Finance Act 2019 required companies with no assessable profit in any year of assessment to compute Minimum Tax as guided by the Law with exception to companies which met the criteria below:

- companies within the first four calendar years of commencement of business
- companies carrying on agricultural trade or business as defined in Section 11 of the Act
- companies with at least 25% foreign equity.

However, the Finance Act 2019 has amended the provision by replacing the availability of at least 25% foreign equity with any company having gross turnover of less than NGN 25 million (small companies).

PKF COMMENT

This is in line with the Government's continuous efforts to increase the ease of doing business for SMEs.

Dividend distributed from petroleum profits to attract 10% withholding tax

Section 60 of the Petroleum Profits Tax Act (PPTA) was repealed. It previously exempted deduction of withholding taxes on dividends paid out of petroleum profits.

PKF COMMENT

This means that players in the oil and gas sector now must remit withholding taxes on dividends declared.

Insurance companies can now carry forward tax losses indefinitely, deduct reserves for unexpired risks on a time apportionment basis and also the special calculation of minimum tax attributed to the insurance industry has been abolished

The computation of income tax for insurance companies in Nigeria has always had somewhat of a "special status" attached to it. For instance, taxable losses could not be carried forward for more than 4 years of assessment. Also, the basis of computing minimum tax for insurance companies differed from companies in all other industries.

PKF COMMENT

This addresses some of the complex issues which arise in the computation of the company income tax for Insurance companies and also the benefits of being able to carry forward tax losses indefinitely just like other companies operating within other industries.

Amendment to Stamp Duties Act (SDA)

The Nigeria Stamp Duties Act was amended as part of the comprehensive amendment to the various tax laws by the Finance Act 2019 which was signed into law in the early part of the 2020 calendar year. The amendment covers the scope of instruments and transactions liable to Stamp Duty.

The schedule to the SDA lists instruments and transactions that are liable to include, among others, agreements, appraisements or valuations, promissory notes and bills of exchange, bills of lading, bonds, deeds of assignment duties on share capital etc.

These Stamp Duties take 2 types of form:

- Fixed Duties – duties that do not vary with consideration; or
- Ad-valorem – duties that vary with consideration.

In June 2020, an Inter-ministerial Committee on Audit and Recovery of back years stamp duties was inaugurated to recover backlog of unremitted stamp duties.

PKF COMMENT

This goes to reinforce the belief that the Federal Government through the Federal Inland Revenue Service (FIRS) has identified stamp duty as having significant potential for revenue generation, especially given the impact of Covid-19 on oil earnings.

If you believe the above measures may impact your business or require any advice with respect to Nigeria taxation, please contact Tajudeen Akande at tajudeen.akande@pkf-ng.com or call ***+234 9030 001351****.*

»BACK

Poland

Transposition of EU Directive on regulation of call-off stock procedure

On 1 July 2020, the provisions of the VAT Act governing the rules of settlements related to the transfer of goods under the call-off stock procedure entered into force. These regulations are a transposition of Directive 2018/1910 of 4 December 2018. Regarding the simplification of VAT settlements for intra-community supply of goods (VAT) and intra-community acquisition of goods (VAT), the consignment warehouse procedure was in place in the Polish legal framework.

The application of this mechanism allowed the economic entity to avoid the obligation to prove the intra-community acquisition of goods in the country of destination of the goods and then to prove the domestic supply to another entity, which consequently made it possible to avoid registration for VAT purposes in the country where the consignment warehouse was located. An additional advantage was the postponement of the obligation to prove the intra-community supply of goods and intra-community acquisition of goods until the time of collection of the specified quantity of goods.

The consignment warehouse procedure could only be used if certain conditions were met:

- the business entity was not registered as an active or exempt VAT taxpayer on the territory of the country in which the consignment warehouse was run
- the goods stored in the consignment warehouse were intended for the production or service activity of the other entity, excluding commercial activity
- submitting in writing to the head of the tax office a notice of the intention to run a consignment warehouse containing specific data
- keeping a record of goods entering this warehouse, including the date of their entry, the date of removal of goods from the warehouse, data allowing the identification of goods, as well as data concerning the return movement of goods.

New regulations have now transposed the call-off stock procedure, which is applicable when the following conditions are jointly met:

- the goods are shipped or transported by a VAT payer or by a third party acting on his behalf from the territory of an EU country to the territory of Poland for their delivery at a later stage and after their entry into the warehouse in the call-off stock procedure to another taxpayer, entitled to acquire the right to dispose of these goods as the owner, in accordance with an agreement concluded earlier between these taxpayers
- the VAT payer sending or transporting the goods does not have a registered office or a permanent place of business in the territory of Poland
- the taxpayer to whom goods are to be delivered in Poland is registered as an EU VAT payer, and his name and the tax identification number preceded by the PL code are known to the VAT payer sending or transporting the goods at the time of commencement of shipment or transport
- the VAT payer sending or transporting the goods registers the movement of goods in the records specified by Council Implementing Regulation (EU) 282/2011 and submits to the tax authorities the VAT-EU Summary Information in the country of dispatch, at the time of the movement of the goods, providing the VAT number of the future buyer of the goods.

Importantly, the new regulations introduced the following simplifications:

- no need to notify the head of the tax office about the intention to run a call-off stock warehouse before the first introduction of goods to the warehouse; however, there is an obligation to notify within 14 days of the first introduction of goods to the warehouse
- the direct contractor may be replaced by another entity during the call-off stock procedure and this will not affect the application of simplification resulting from the procedure
- the maximum period of storage of goods in the warehouse without the tax obligation is 12 months, which is a setback, as until 1 July 2020 it was 24 months
- expiry of the maximum storage period, loss or destruction of the goods requires the TNT to be proved for the movement of own goods by the entity
- if, within 12 months, there has been no transfer of the right to dispose of the goods as owner and they have been re-dispatched to the Member State from which they were originally dispatched and the entity has registered their re-dispatch, the intra-community acquisition of the goods is deemed not to have taken place.

PKF COMMENT

Summarised, it is noteworthy that goods stored in a call-off stock warehouse can be intended for any activity, and not only for production or service activities, with the exception of commercial activities. Moreover, the call-off stock warehouse can be run by a third party, which should significantly expand the circle of entities that will be able to benefit from these regulations. The introduction of the possibility of replacing the recipient and re-exporting the goods is also a significant simplification.

Consequently, these legislative changes should be evaluated in a positive manner as they aim to increase the range of entities which will be able to benefit from the VAT settlement facility in question. It should be taken into account that in case of call-off stock, the maximum period of storage of goods in the warehouse without triggering a tax obligation was reduced to 12 months.

*If you believe the above measures may impact your business or require any advice with respect to Polish taxation, please contact Agnieszka Chamera at agnieszka.chamera@pkfpolska.pl or call **+48 609 331 330**.*

»BACK

South Africa

VAT on imported services

The VAT Act requires any person who imports a service to pay VAT on the higher of the amount paid or the open market value of the service imported. The VAT on imported services is to be calculated and paid over to SARS where the services imported are to be used in the making of exempt supplies. The imported services envisaged here would include items such as technical fees paid to non-residents as well as electronic services provided to a resident by a non-resident supplier that is not liable to register for VAT in South Africa.

The importer is required to account and pay the VAT amount within 30 days of the earlier of when the service provider issues an invoice, or any payment is made. If the invoice is in a foreign currency, the relevant invoice must be converted to Rand using the exchange rate prevailing at invoice date. Thereafter VAT at 15% is to be calculated on the Rand amount.

In instances where a registered vendor imports services for use in the making of exempt supplies VAT on imported services must be declared on the VAT 201 form. Likewise, persons that are not registered VAT vendors will also have to account for and pay VAT on imported services.

PKF COMMENT

In terms of the recently issued guidance issued by SARS, importers of services that are currently not registered for VAT are required to obtain, complete and keep in their possession a VAT 215 form for a period of five years. Such a form can be obtained on the SARS website. The payment of VAT should be made on the SARS efiling system with the Income Tax Number of the importer of the service being used as a reference.

»BACK

The tax implications of subordination agreements

Due to the ongoing covid-19 pandemic and the impact of the lockdown measures implemented many South African entities have found themselves in financial distress. As a result, companies may enter into subordination agreements whereby they subordinate related party loans in favour of third-party loans. Such subordination agreements may also be entered into on the advice of auditors in order to avoid the issuing of a modified audit opinion or an emphasis of matter on the basis that the company is not a going concern. Subordination is essentially where a related creditor agrees to make no claim for payment of their loans until the assets (fairly valued) of the company exceeds its liabilities.

Subordination agreements fall within the scope of section 8F of the Income Tax Act which deals with hybrid debt instruments. The aim of this section is to re-characterise loans which have equity or dividend-like features.

Paragraph b of the definition of a hybrid debt instrument states that a hybrid debt instrument includes an arrangement whereby "the obligation to pay an amount so owed on a date or dates falling within that year of assessment has been deferred by reason of that obligation being conditional upon the market value of the assets of that company not being less than the amount of the liabilities of that company".

Where companies have entered into such agreements the Income Tax Act prescribes that two things must happen. Firstly, the interest payable on the debt is re-characterised and is deemed to be a dividend in specie declared and paid by such a company on the last day of the year of assessment. Secondly such interest will not be deductible for income tax purposes.

It should be noted however that whilst the dividend in specie may be exempt from dividends tax for declarations deemed to have been made to South African resident companies the same will not apply to declarations deemed to have been made to non-resident entities. In such instances the obligation to declare and pay the dividends tax will be on the South African resident company declaring the dividend.

Where a subordination agreement has been entered into solely because of going concern problems section 8F of the Income Tax Act will not be applicable (i.e. the debt re-characterisation rules will not apply). This will only be the case if the company is in receipt of certification by a person registered as an auditor in terms of the Auditing Profession Act. Such certification must state that the subordination agreement was entered into due to going concern problems. The 2016 explanatory memoranda states that "It is envisaged that the auditor's certification of the subordination of the related party debt for purposes of this exclusion should be evidenced in a separate letter".

Taxpayers that are in possession of such certification may deduct the interest incurred on the subordinated loans and such interest will not be re-characterised into a dividend in specie.

PKF COMMENT

It is therefore important that where taxpayers have entered into subordination agreements due to going concern difficulties documentation in the form of certification by a registered auditor is maintained and kept so as to avoid the application of section 8F to such loans. The burden of proof that an amount is deductible is on the taxpayer and as such appropriate documentation should be kept at all times.

*If you believe any of the above measures may impact your business or personal situation or require any advice with respect to South Africa taxation, please contact Henico Schalekamp at henico@pkfoctagon.com or call **+27 (0)10 003 0150**.*

»BACK

Termination of the tax residence of a company: shareholders beware

In terms of current legislation, when a company ("ExitCo") ceases to be a tax resident of South Africa, the following tax implications arise:

- ExitCo is regarded as disposing of all its assets at market value – thereby triggering a capital gains tax at an effective rate of 22% of the deemed capital gain so realised, and
- ExitCo is deemed to have declared and paid a dividend in specie to its shareholders as a result of which, depending on the circumstances, ExitCo could trigger dividends tax immediately before ceasing to be tax resident.

The above tax implications triggered by ExitCo would indirectly impact on the shareholders of ExitCo – as the value of their shares may decrease due to the potentially significant South African tax consequences which may arise.

Despite the above, National Treasury is concerned about the possible tax avoidance a South African shareholder of ExitCo may benefit from subsequent to the migration of such entity. This potential tax avoidance arises due to the operation of the so-called "participation exemption". In short, the participation exemption provides that, in certain circumstances, where a South tax resident shareholder of a foreign company disposes of such shares to a non-resident of South Africa, the South African tax resident shareholder may be exempt from capital gains tax provided the shareholder held at least 10% of Exitco's shares. In the context of "ExitCo", National Treasury is concerned that the shareholder effectively avoids capital gains tax on the disposal of shares in ExitCo where such entity migrates offshore prior to the disposal of shares in such entity by the South African shareholder.

On the basis of the above, the Draft Taxation Laws Amendment Bill, 2020 proposes to amend the Income Tax Act No. 58 of 1962 so as to provide that, where a person holds shares in ExitCo and ExitCo ceases to be resident, such shareholder must be treated as having disposed of (and re-acquire) each of his/her shares in ExitCo on the date immediately preceding the date upon which ExitCo ceases to be SA tax resident at market value.

This therefore means that the shareholders of ExitCo may trigger capital gains tax when ExitCo ceases to be a South African tax resident without such shareholders actually disposing of any assets (and being in the cash position to make payment of such capital gains tax).

PKF COMMENT

PKF South Africa has made submissions to National Treasury inter alia indicating the undue negative impact which the above may have on shareholders of a South African company wishing to cease its South African tax residence. Hopefully, the proposals will be revised to, in the least, address the potentially drastic cash flow implications it could give rise to for shareholders.

»BACK

Proposed amendments to VAT legislation: Potential impact on cross-border leases of certain assets used in SA

In terms of the Value-Added Tax Act No. 89 of 1991 ("the VAT Act") a person is required to register for value added tax ("VAT") if, broadly speaking:

- it carries on an "enterprise", and
- the total value of its taxable supplies exceeds, or is expected to exceed, ZAR 1 million in a 12-month period.

"Enterprise" is defined in section 1 of the VAT Act to mean any activity which is carried on continuously or regularly by any person in, or partly in, South Africa, and in the course or furtherance of which goods or services are supplied to any other person for a consideration – whether or not for profit.

The definition of "enterprise" may give rise to uncertainty in relation to the VAT registration requirements where foreign-owned ships, aircraft or other equipment are leased for use in South Africa. In particular, the foreign lessor may have no physical presence in South Africa (other than as respects the leased goods), and the lessee may be obliged in terms of the lease agreement to import the goods into South Africa. In such instances, it is unclear whether the foreign lessor is conducting an "enterprise" in South Africa.

Historically, the Commissioner addressed the above uncertainty by issuing VAT rulings to foreign lessors indicating that they are not required to register as vendors, but confirming that the South African lessee is required to declare and pay VAT on the importation of goods, the value of which was determined with reference to the term of the lease agreement. Due to recent legislative amendments, however, these VAT rulings will no longer be valid after 31 December 2021.

Accordingly, the Draft Taxation Laws Amendment Bill, 2020 ("DTLAB, 2020") proposes for the VAT Act to be amended with effect from 1 April 2021 to address the above uncertainty on a more permanent basis. As such, it is proposed for the definition of "enterprise" in section 1(1) of the VAT Act to be amended so as to exclude such a foreign lessor from the requirement to register for VAT in South Africa in circumstances where the lessee imports the goods for use in or partly in South Africa. The lessee would, however, be compelled to declare VAT on the importation of the goods.

PKF COMMENT

The information as contained in this article is based on proposals as contained in the DTLAB, 2020. It should be noted that submissions have been made to National Treasury in relation to the above-mentioned proposed amendments to VAT legislation, further to which we understand these proposals may be reconsidered so as to address unintended consequences which it may otherwise give rise to.

If you believe any of the above measures may impact your business or personal situation or require any advice with respect to South Africa taxation, please contact Alexa Muller at alexa.muller@pkf.co.za or call ***+27 21 914 8880****.*

»BACK

Spain

DAC6 update

On 22 May 2020 the Spanish Parliament approved the transposition into domestic law of Council Directive EU 2018/822 (DAC6) regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border agreements. This legislative update was enacted in alignment with the EU plan on Administrative Cooperation among member states and with Action point 12 of the OECD BEPS Plan.

With the adaptation of Spanish General Taxation Law new reporting obligations have been introduced, in particular mandatory disclosure rules and reportable cross-border arrangements, also called “potentially aggressive tax arrangements”. The stated purpose of these obligations is to improve transparency, enabling tax authorities to obtain complete information at an early stage and dissuading the implementation of aggressive tax structures.

Generally, tax intermediaries (“any person that designs, markets, organises or makes available the implementation or manages the implementation of a reportable cross border arrangement”) will be responsible for reporting information commitments. Taxpayers will rarely find themselves confronted with these reporting obligations, except in cases of professional secrecy when the intermediary´s job merely consists in providing “neutral advice” (evaluate adherence to the tax framework of an operation, but not design nor implementation). In spite of this rule, it is noteworthy that the intermediary and taxpayer could sometimes be one and the same legal person, for example multinational companies having their own legal departments.

In order to determine whether an arrangement or transaction must be reported or not, Spanish legislation has adopted several “hallmarks” defined in DAC6 (Art. 3.18/Annex IV and Art. 3.24). These hallmarks act as indicators classified according to (i) main benefit test, (ii) cross-border transactions, (iii) automatic exchange of information and beneficial ownership, and (iv) transfer pricing.

In this context, both DAC6 and Spanish law focus on two main elements: (i) tax advantage as a principal effect and (ii) a cross-border feature, meaning the latter affects at least two member states or one member state and a third country. The fact that an arrangement or transaction is subject to a reporting obligation does not mean it is illegal or unlawful.

Effective application date

DAC6 entered into force on 25 June 2018 and its transposition into Spanish national law is applicable as from 1 July 2020. However, the European Commission has recently approved a three-month extension of the optional deferral of time limits due to the COVID-19 pandemic.

However, certain member states including Spain could likely allow delayed reporting that would result in a six-month deferral in the application deadline of the new rules. They might therefore now fall in early 2021.

Summarised, and given this scenario, reporting obligations must be submitted by intermediaries and taxpayers with a presence in Spain within the following reporting deadlines:

- cross-border arrangements where the first step was implemented in the period from 25 June 2018 to 30 June 2020: no later than by 28 February 2021
- cross-border arrangements that were made available or ready for implementation, or where the first step was implemented in the period from 1 July 2020 to 31 December 2020: no later than by 31 January 2021, and
- cross-border arrangements that were made available or ready for implementation, or where the first step was implemented as of 1 January 2021: no later than within 30 days after the decisive fact.

PKF COMMENT

If you believe the above measures may impact your business or require any advice with respect to Spanish taxation, please contact Santiago González at sgonzalez@pkf-attest.es or call ***+34 915 561 199****.*

»BACK

Turkey

Recent tax changes

On 8 August 2020, the banking and insurance transactions tax (BITT) rate got reduced from 1% to 0% for selling foreign exchange to non-resident financial institutions carrying out any activity listed in article 4 of the Turkish Banking Law (Law No. 5411).

On 30 August 2020, The VAT rate for teaching and education services provided by private schools got temporarily reduced from 8% to 1% in light of the ongoing Covid-19 pandemic.

The withholding tax on capital gains from free foreign exchange funds was increased from 10% to 15% by Presidential Decree of 3 June 2020 (and entered into force on the same date).

On 31 July 2020, Presidential Decision No. 2812 amending the Decree on VAT Rates (Decree No. 2007/13033) was gazetted. The Decision reduces the applicable VAT rates from 18% to 8% until 31 December 2020 on the following goods and services:

- workplace rental service
- congress, conference, seminar, concert, fair and amusement park entrance fees
- organisation services provided in wedding, wedding, ball and cocktail halls

- barber and hairdressing services and services provided in beauty parlours
- tailoring, repair and repair of clothing and home textile products
- shoe and leather repair and shoeshine services
- dry cleaning, laundry, clothing and other textile ironing services
- carpet and rug washing services
- maintenance and repair of bicycles, motorcycles and motorised bicycles (excluding materials)
- maintenance and repair of household electrical appliances (refrigerator, oven, washing machine, dishwasher, air conditioner, etc.) (excluding materials)
- maintenance and repair of consumer electronics products (TV, radio, CD / DVD players, home video cameras, etc.) (excluding materials)
- maintenance and repair of home heating products (water heater, water heater, bath boiler, combi etc.) (except central heating boilers) (excluding materials)
- maintenance and repair of home and garden equipment (except materials)
- maintenance and repair of furniture and home furnishings (excluding materials)
- maintenance and repair of computers, communication tools and equipment, clocks (except materials)
- maintenance and repair of musical instruments
- locksmith and key duplication services and porter services
- lubricating, washing, polishing services of motor vehicles and maintenance and repair of their seats and upholstery (excluding materials)
- housing maintenance, repair, painting and cleaning services (excluding materials) provided to household residents
- accommodation and food and beverage services
- passenger transport services,

On 31 July 2020, Presidential Decision no. 2813 was gazetted amending Decree No. 2009/14592 on withholding tax rates and reducing applicable withholding tax rates for the following payments from 20% to 10% until 31 December 2020 (with entry into force on the same date):

- payments made for leasing of property or rights listed in article 70 of the personal income tax law
- payments made for leasing of property and rights owned by foundations and associations
- payments made for leasing of properties owned by foreign states, foreign public administrations, institutions, and international organisations which do not have diplomatic status, and
- payments made for leasing of properties owned by co-operatives.

PKF COMMENT

If you believe any of the above measures may impact your business or require any advice with respect to Turkish taxation, please contact Emrah Cebecioğlu at e.cebecioglu@pkfistanbul.com or call ***+90 212 426 00 93.***

»BACK

Ukraine

Introduction of Controlled Foreign Corporation (CFC) rules

As part of the 2020 Ukraine tax reform, Controlled Foreign Corporations (CFC) rules are introduced in domestic tax legislation. The rules will come in to force at the final stage of the Reform – as from 1 January 2021.

A Controlled Foreign Corporation (CFC) is any legal entity (or an entity without legal personality like a trust, partnership etc.) registered abroad and controlled by a tax resident of Ukraine – natural person or legal entity – Controller.

A foreign company will be considered a CFC if its owner (tax resident of Ukraine):

- holds a share of more than 50% in the foreign company, or
- holds a share in a CFC of more than 10%, provided that several Controllers (Ukrainian tax residents) own shares in the foreign company of more than 50% in aggregate, or
- solely or jointly with other related Ukrainian residents effectively has control over the foreign company.

Controller is obliged to file a CFC report (along with the annual tax return) and to notify the Ukrainian tax authorities about the acquisition or liquidation of a shareholding in a CFC at every instance. The CFC`s financial statement copies should be added to the CFC report.

Failure to submit a CFC report will lead to a penalty of UAH 210,200 (approximately USD 7,500). Failure of notification about the acquisition or liquidation of a CFC will lead to a penalty of UAH 630,600 (approximately USD 22,600).

Taxable CFC profits will be taxed in Ukraine at a rate of 18% at the level of companies and 19.5% (general rate) or 10.5% (if profits are distributed as dividends) at the level of individuals.

The CFC's profits will not be subject to Ukrainian tax if at least one of the following conditions is met:

(a) Ukraine has a double tax treaty with CFC's country of residence and either one of the following criteria is met:

- CFC's profit is subject to corporate income tax at a rate of at least 13%, or
- CFC's passive income does not exceed 50% of CFC's total income amount;

(b) the total income of all CFCs controlled by the controller does not exceed EUR 2 million at the end of the reporting period;

(c) CFC is a publicly traded company listed on a recognised stock exchange;

(d) CFC is a charitable organisation and its owners do not receive any income from CFC.

PKF COMMENT

Many countries have already implemented CFC rules, which have proved to be quite effective. Ukraine continues to introduce and implement international approaches and best practices into its domestic legislation. In line with the BEPS Action Plan Ukraine has therefore introduced domestic CFC rules, with effect as from 1 January 2021. Taxpayers thus have sufficient time to assess possible risks and to prepare for new upcoming reporting.

*If you believe any of the above measures may impact your business or personal situation or require any advice with respect to Ukraine taxation, please contact Sviatoslav Biloblovskiy at s.biloblovskiy@pkf.kiev.ua or Dmytro Khutornyy at d.khutornyy@pkf.kiev.ua or call **+380 44 501 25 31**.*

»BACK

United Arab Emirates

Various tax updates – Economic substance regulations, CbC reporting and VAT and excise duties

Economic Substance Regulations - Amendments

- **Background**
  - The UAE Ministry of Finance ('UAE MOF) introduced Economic Substance Regulations (the "Regulations") on 30 April 2019 vide Cabinet Resolution No. 31 of 2019 supported by Ministerial decision No. 215 of 2019 (the "Guidance") and Frequently Asked Questions ("FAQs")
  - The Regulations and Guidance were followed by Cabinet Resolution No. 58 of 2019 designating Regulatory Authorities and Relevant Activity Guide (the "Guide") providing additional guidance on the Relevant Activities and related Core Income Generating Activities ("CIGAs").
- **Amended Regulations**
  - On 10 August 2020 and 19 August 2020, the UAE MOF has replaced the Regulations and the Guidance vide Cabinet Resolution No. 57 of 2020 ("Amended Regulations" or "UAE ESR") and Ministerial Decision 100 of 2020 ("Amended Guidance") respectively, thereby repealing and replacing Resolution No. 31 of 2019, Ministerial decision no. 215 of 2019, Cabinet Resolution No. 58 of 2019 and amending the Guide and FAQs
  - The amendments shall apply retrospectively from 1 January 2019
  - It is reiterated in the Amended Guidance that the objective and genesis of introducing UAE ESR is to focus on entities undertaking 'geographically mobile business activities' and these entities need to have adequate substance in the jurisdiction where the activities are being carried out.
- **Key amendments in specific areas**
  Given below are certain key amendments for your quick reference.

Particulars	Remarks
Objective of the Regulations	• Objective of introducing UAE ESR is clearly specified in the Amended Guidance and it is stated that the focus is on the entities undertaking 'geographically mobile business activities' which has potential to shift profits.
Amendment to the definition of the term 'Licensee'	• Definition is amended to only cover juridical persons (corporate legal entities) and unincorporated partnerships. • ***Natural persons, sole proprietorship concerns, trust and foundations are not considered as Licensees***.
Treatment of the 'branches' of legal entities	• Branches registered in the UAE shall be regarded as an extension of their 'parent or 'head office' and thus, shall not be considered to have a separate legal status. • Inbound branches not required to file 'Substance Report' provided income from Relevant Activity ***subject to tax outside UAE***. • Outbound branches' income not required to be reported in Substance Report provided such income ***subject to tax outside UAE***.
Licensee under liquidation	• Licensees or Exempt Licensees shall be subject to the relevant provisions of the ESR ***as long as they are in existence***.
Connected Person	• Connected Person is defined as an entity that is a ***part of the same 'Group'*** as the Licensee or the Exempted Licensee. • A ***Group*** is defined as two or more entities related through ownership or control such that they are ***required to prepare consolidated financial statements for financial reporting purposes*** under the accounting standards.
Extended scope of 'Distribution and Service Center' Business	Definition of Distribution and Service Center Business is widened with the removal of: • With respect to goods, condition of ***'importing' and 'storing' in the UAE and*** subsequent ***resale*** of goods ***'outside' UAE***; • With respect to services, condition that supplies should be related to recipient foreign connected persons business 'outside' UAE. Therefore, following transactions shall now be covered in-scope for UAE ESR: • Third-port / direct shipments, where goods are purchased from foreign connected persons; • Local re-sale of goods purchased from foreign connected person. • Provision of services to foreign connected person for latter's business within UAE.
Exempt Licensee	• Below Licensee are considered to be 'exempt licensees' and thus, not required to file 'Substance Report' in UAE: - Investment Funds - Entity which is tax resident outside the UAE - Local entities not part of MNE group and having business activities restricted to UAE only - Branches of foreign entities subject to tax outside the UAE • Entity which pays withholding tax in foreign jurisdiction will not be considered as "tax resident" of such jurisdiction solely on that basis. • Prescribed documents / evidences required to be submitted (along with the notification form) to enjoy exempt status. • Erstwhile exemption provided to entities owned directly or indirectly by Government is no longer available.
High-Risk IP Licensee	• Definition of High-Risk Intellectual Property (IP) Licensee is rationalized and following condition is removed: *"(b) the Licensee does not carry out research and development, or branding, marketing and distribution as part of its State Core Income-Generating Activity"*
Notification Filing	• Notification is required to be submitted within 6 months from the end of financial year of the Licensee / Exempt Licensee
Substance Report	• ***Financial statements*** required to be submitted along with 'Substance Report'

- **Compliances:**
  - Notification Filing:
    - For FY 2019, licensees who have already submitted their annual notifications with their respective Regulatory Authorities are now required to re-submit the same on the UAE MOF portal once the functionality is available
    - Time frame for compliance with the requirement of Notification Filing is on or before expiry of six months from the end of the relevant financial year.
  - Reporting:
    - Entities carrying out a Relevant Activity are required to submit a report containing requisite information and prescribed documentation
    - Report is required to be submitted within 12 months from the end of the financial year of the licensee.

  The Amended Regulation, Amended Guide and other guidance concerning UAE ESR can be accessed via the following link: https://www.mof.gov.ae/en/StrategicPartnerships/Pages/ESR.aspx

Country-by-Country reporting

- **Background**
  - The UAE MOF vide Cabinet Resolution No. 32 of 2019 (referred to as 'the Resolution') issued a regulation in July 2019 with respect to submission of reports by multi-national companies, i.e. Country-by-Country Reporting.
  - This was introduced as an important step towards aligning with OECD's BEPS Action Plans and affirming its commitment in addressing concerns around the shifting of profits to "no or nominal tax jurisdictions" without corresponding local economic activities.
- **Amended Regulations**
  - On 4 June 2020, the UAE MOF has amended the Resolution vide Cabinet Resolution No. 44 of 2020 ("UAE CbCR"/"Amended Resolution"), thereby repealing the Resolution
  - It is further provided that the UAE MOF shall issue necessary Executive Resolutions for the implementation of provisions of the UAE CbCR.
- **Applicability of UAE CbCR**

  The Amended CbCR shall be applicable only to a UAE headquartered Multinational Enterprise Group ('MNE Group') whose consolidated revenues exceed AED 3,150,000,000 in the Fiscal Year ('FY') immediately preceding the Reporting Fiscal Year.
- **Notification and Reporting Obligations**
  - Notification Filing:
    - Each Ultimate Parent Entity ('UPE') of the MNE Group whose tax residence is located in the UAE shall notify the UAE MoF that it is the Reporting Entity
    - Such Notification is required to be filed no later than the last day of Groups Reporting Fiscal Year;
  - Reporting:
    - Each Reporting Entity shall submit a Report to the UAE MoF concerning its Reporting Fiscal Year
    - Such Report is required to be submitted no later than 12 months grace period subsequent to the last day of Reporting Fiscal Year of the MNE Group
    - The obligation of filing of the CbC Report shall take effect on 1 January 2019.
  - Obligations of Constituent Entity ('CE') of the MNE group (other than UPE):
    - Amended Resolution has done away with the requirement of secondary filing of the CbC Report by CE of the MNE group which is tax resident in the UAE

- On similar lines, CE of the MNE group which is tax resident in the UAE may also not be required to file the annual notification with the UAE MoF.

- **Consequences of non-compliance**

  Non-compliance with CbCR Resolution may result in levy of administrative penalties which are quite significant.

  The Amended Resolution and related guidance concerning UAE CbCR can be accessed via the following link: https://www.mof.gov.ae/en/StrategicPartnerships/Pages/Country-by-Country-Reporting.aspx

VAT and excise tax

The UAE Federal Tax Authority ('FTA') has issued several important user guide and public clarifications since our last tax update. Some of these updates released recently by the FTA are given below:

Date	Tax	Type of Update	Particulars of Update
June 2020	VAT	Executive Regulations	Amended Executive Regulations with crucial changes in conditions for Zero-rating of export of services
July 2020	VAT	Public Clarification	Zero-rating of export of services
August 2020	VAT	User Guide – Updated Version	Refund for UAE Nationals Building New Residences
August 2020	VAT	User Guide – New	E-Commerce
September 2020	VAT	Business Bulletin	Basic Tax Information Bulletin - Higher Education Sector
July 2020	Excise	User Guide – Updated Version	Excise Tax Clearing Company (Registration and Amendments)
September 2020	Excise	User Guide – New	Excise Tax Clearing Company User Guide Imports, Release & Consumption
September 2020	Excise	User Guide – Updated Version	Excise Tax User Guide (Registration, Amendments and De-registration)

Some of these key updates are discussed hereunder:

- **Amended Executive Regulations with changes in conditions for zero-rating of export of services**
  - The Federal Tax Authority ("FTA") has published an updated version of the VAT Executive Regulations - Cabinet Decision No. (52) of 2017 on The Executive Regulation of the Federal Decree - Law No. 8 of 2017 on Value Added Tax in the form of Cabinet Decision No. 46 of 2020, issued on 4 June 2020 ('Amended VAT Executive Regulations')
  - Amended VAT Executive Regulations has introduced a crucial change in the conditions of zero rating of export of services;
  - This change effectively narrows the scope and to invoke the benefit of zero rating, it requires that the recipient of services should only have a short-term presence in the UAE of less than a month ***and*** such presence should not be effectively connected with the supply of services by the UAE based service provider.

Taxable persons will need to assess the applicability of zero rating on export of services on the basis of revised conditions.

- **VAT Public Clarification - Zero-rating of export of services**
  - The Public Clarification provides a high-level clarification of the FTA's view of the zero-rating conditions, regarding provisions relating to 'export of services', in relation to the residency and location of the recipient of services
  - In accordance with the above provision, a supply can only be zero rated in cases where:
    - Recipient of the services does not have a place of residence in an Implementing State (currently to be read as in the UAE), and
    - Recipient of the services is outside the UAE at the time the services are performed by the supplier
  - In order to determine whether both these conditions are met, the supplier will be required to consider all available facts in order to identify the residency status and the location of the recipient at the time of performance of services by the supplier
  - Where the recipient has multiple establishments, the supplier must also determine which establishment of the recipient is most closely related to the supply

- Clarification also provides guidance on transactions with Head office/branches of foreign companies.

- **VAT User Guide – E-commerce - VATGEC1**
  - FTA has released a VAT Guide to provide clarity and guidance to taxable persons with respect to taxability of E-commerce transactions ('E-commerce Guide')
  - The E-commerce Guide primarily discusses the following types of transactions and discusses a number of scenarios and related VAT treatment for each of them:
    - Goods purchased through an electronic platform, and
    - Services supplied by electronic means.
  - Summary of clarity provided in the E-commerce Guide on certain key aspects of the UAE VAT Law includes:
    - where a supply is made by a non-resident supplier to a non-taxable person in the UAE, it would not be subject to the reverse charge mechanism and there shall be an obligation on the non-resident supplier to register and apply the relevant VAT treatment to the transaction.

      However, when the same non-resident supplier provides services to a VAT registered recipient, VAT is required to be accounted for by the VAT registered recipient;
    - Place of supply of telecommunication and electronic services is the place where these services are 'used and enjoyed'. For the purposes of determining such location, the VAT Guide has provided some of the factors which may be indicative of the recipient's location:
      - Internet protocol ("IP") address of the device used by the recipient to receive the electronic service
      - Country code stored on the SIM card used by the recipient to receive the electronic service
      - Place of residence of the recipient
      - Billing address of the recipient, and/or
      - Bank details used by the recipient for the payment.
    - It is further clarified that services shall be classified as Electronic Services for the purposes of UAE VAT Law only in case where these are automatically delivered over the internet, an electronic network, or an electronic marketplace with minimal or no human intervention. Small degree of human intervention is acceptable to enable or complete a supply, however, such intervention should not change the nature of the delivery of a service as being essentially automated.
    - With respect to Electronic Marketplaces, the E-commerce Guide has clarified criteria for determining the nature and corresponding VAT implications in case of Principle/Agency arrangements giving reference to the possibilities of an electronic marketplace acting as a disclosed or undisclosed agent of the actual supplier.

- **Business Bulletin - Basic Tax Information Bulletin - Higher Education Sector**
  - FTA has released a Business Bulletin providing a synopsis of basic tax information relating to the Higher Education Sector
  - This bulletin is issued to provide following clarity to Universities and Higher Education Institutions:
    - Taxability of various supplies made, which includes zero-rated supplies, exempt supplies and standard-rated supplies
    - Obligation to register for UAE VAT
    - Requirement to issue tax invoices
    - Recoverability of input-tax

- The bulletin also addresses specific issues in the Higher Education Sector, among others taxability of extra-curricular activities, supplies from vending machines, pick-up and drop-off facility for students, renting of grounds and conference halls, research services for external entities etc.

- **Excise Tax - User Guide – New - Excise Tax Clearing Company User Guide Imports, Release & Consumption**
  - FTA has released this User Guide for Excise Tax Clearance Companies in order to help them navigate the e-Services portal from a systems perspective. This user guide is required to be read in conjunction with the Excise Tax Clearing Company User Guide on Registration & Amendments, which is also updated in September 2020
  - Registered Excise Tax Clearing Companies having a TINCE are required to declare the Excise Goods:
    - Imported into the UAE, on behalf of the actual importer
    - Consumed in the UAE, on behalf of the actual importer
  - For such declaration, FTA has prescribed the following forms:
    - EX201A - Excise Tax Suspension – Import Declaration
    - EX201B - Excise Tax Suspension – Consumed Goods & Release Declaration
  - The user guide provides a step-by-step guidance on completing the abovementioned declaration forms.

- **Excise Tax – User Guide – Updated Version - Registration, Amendments and De-registration**

  FTA has released an updated version of the User Guide on Excise Tax User Guide (Registration, Amendments and De-registration). Apart from other changes, this guide provides a step-by-step approach for making an application for Clearance Certificate and its renewal.

Source: https://www.tax.gov.ae/en

PKF COMMENT

International tax perspective

Businesses in the UAE are now required to undertake an ESR impact assessment analysis again in order to (re-) analyse the impact of Amended Regulations on their existing businesses. On the basis of such revised analysis, businesses are required to resubmit the annual notification on the UAE MOF portal once such functionality is made available.

Businesses also need to examine whether they will be covered under the provisions of Amended CbCR Resolution and identify whether they are required to undertake any compliance as per such revised regulations.

VAT & Excise tax Perspective

VAT user guides, public clarifications and business bulletins continue to provide valuable guidance in assessing the VAT and Excise Tax implications of various transactions and provide further clarity thereon.

Considering the Amended VAT Executive Regulations and other updated guidance made available by the FTA, businesses in the UAE need to keep monitoring the impact of such amendments and guidance on their businesses to avoid any adverse implications/penalties under the UAE VAT and Excise Tax laws.

Contact us

*For further information or advice concerning taxes in the UAE, please contact Ms. Sarika Dhameja at sdhameja@pkfuae.com or Mr. Chaitanya Kirtikar at cgk@pkfuae.com or call **+971 4 3888 900**.*

»BACK

United Kingdom

Digital publications – Change in VAT treatment

The government-backed change in the VAT treatment of certain digital publications from standard to zero rated has been brought forward from 1 December 2020 to 1 May 2020. A recent ruling in the Upper Tribunal could open the door to publishers of digital publications making historic claims for significant recoveries of VAT.

Zero rating VAT treatment was applied to printed newspapers in 1973, when VAT was introduced in the UK, to help keep newspapers as affordable as possible. As technology has developed, news has increasingly become available online and the supply of digital publications has been subject to the standard rate of VAT of 20%.

This has often been a contentious issue, with printed publications being determined for VAT purposes as being a supply of zero-rated goods but their digital counterparts being treated as a supply of standard rated services. This conflicting treatment was also apparent across various EU member states.

News Corp UK & Ireland Ltd VAT case
News Corp, publishers of The Times and The Sun newspapers, argued that 'fiscal neutrality' should apply – that the VAT treatment of the same or similar supplies in competition should be identical. HMRC rejected the claim but News Corp appealed and took its case to the First-Tier Tribunal which supported HMRC's view that digital newspapers could not be classed as zero rated. News Corp appealed the case to the Upper Tribunal which found in News Corp's favour in December 2019.

The tribunal ruled that zero rating could include both good and services, and that the supply of digital newspapers fell within this. The Upper Tribunal recognised the 'always speaking' doctrine to take account of technological advances when interpreting what the law intended. Digital newspapers did not exist when the zero rating was introduced, but the tribunal reasoned that the zero-rating intentions originally introduced to aid the population's literacy

should be interpreted to include digital newspapers in UK VAT law. The judgment allows for equal VAT treatment of digital versions of newspapers, therefore fiscal neutrality.

While HMRC has been granted permission to appeal the decision to the Court of Appeal, this is a major ruling that could result in many businesses launching protective claims against HMRC to recover historic overpaid VAT on digital supplies - something that was not addressed when the Government announced the VAT rate change effective from 1 May 2020.

HMRC is likely to try to overturn the ruling and has been granted permission to go to the Court of Appeal. The March 2020 Budget announcement by Chancellor, Rishi Sunak bringing forward the zero-rate implementation date from 1 December 2020 to 1 May 2020 is unlikely to help HMRC's appeal. It is unlikely that claims will be processed by HMRC until the News Corp appeal has been resolved, but we would advise businesses to make a protective claim to HMRC to safeguard their position pending the conclusion of the case.

Potential recovery
Businesses should now review their digital publications and prepare to launch a claim if the potential recovery is significant, subject to a 4 year cap. Providers of digital publications may also face the prospect of recipients of such supplies wishing to reclaim the VAT they have paid historically, so a protective claim will also prevent any further losses.

This may be a significant opportunity for those who sell digital publications, and those who purchase these for business purposes but cannot recover VAT in full on their costs, such as charities, not for profit entities/membership organisations, and partially exempt businesses.

PKF COMMENT

*If you believe the above measures may impact your business or personal situation or require any advice with respect to UK VAT, please contact Luigi Lungarella at llungarella@pkf-littlejohn.com or call **+44 (0)20 7516 2228**.*

»BACK

UK residence – Exceptional days in the UK due to Coronavirus

With the effects of Coronavirus (COVID-19) causing the cancellation of many flights along with the closure of several international borders, individuals can find their travel options severely restricted which can have unexpected consequences for their UK tax position.

HM Revenue & Customs (HMRC) has recently updated their Statutory Residence Test (SRT) guidance regarding the impact the COVID-19 pandemic may have on an individual's ability to move freely to and from the UK, or where they have been required to remain unexpectedly in the UK.

Under the SRT an individual's UK residence status is often determined by the number of days spent in the UK in a relevant tax year. A day spent in the UK is normally counted if the individual is present in the UK at midnight of that day. For some of the tests of residence there are a maximum number of days an individual can spend in the UK during a tax year without becoming UK resident for that tax year.

There is an exemption in the SRT for up to 60 days due to "exceptional circumstances" being spent in the UK as a result of events beyond an individual's control, preventing him or her leaving the UK, provided the individual intends to leave the UK as soon as those circumstances permit. In some cases, excluding these exceptional days will mean that the individual does not exceed the maximum day count and remains non-UK resident for the relevant tax year. Examples of exceptional circumstances include: national or local emergencies such as war, civil unrest or natural disasters and, for example, HMRC previously confirmed exceptional circumstances would cover the 2010 Icelandic volcanic ash cloud that cancelled multiple flights.

HMRC's new guidance needs to be considered in conjunction with their current published guidance on exceptional circumstances, and it remains the case that whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.

As noted above, for a day to be discounted, the individual must intend to leave the UK as soon as the exceptional circumstances permit. If an individual has been quarantined in the UK for a period, and depending on his or her overall position, it may be necessary to leave the UK as soon as possible after the end of quarantine, in order to avoid becoming UK tax resident in a tax year.

This may prove problematic if an individual is able to leave the UK but is not at that point permitted to return to his or her country of residence. We currently do not know if HMRC will enforce this position and whether it may be necessary for an individual to leave the UK and go to a third country for the exceptional circumstances provisions to apply. HMRC has noted their guidance may be subject to review and further change, so this may become clearer in due course.

When does relief for exceptional circumstances not apply?
There are certain elements of the SRT where relief for exceptional circumstances cannot be taken into account.

One of these is the "Country tie", which is only relevant to those individuals who have been resident in the UK in at least one of the previous three tax years. Where an individual's UK tax residency position is determined by virtue of the "Sufficient Ties Test", having an additional "tie" to the UK can significantly reduce the number of days that can be spent in the UK before becoming UK resident.

The Country tie is applicable if the individual is present in the UK at least as much as any other single country during the tax year. Although up to 60 days in the UK may be disregarded as exceptional circumstances for some parts of the SRT, an individual may nevertheless acquire a Country tie, which reduces the number of days they can spend in the UK before becoming resident.

There are also other parts of the SRT where exceptional circumstances cannot be taken into account and which will be relevant to some individuals depending on their specific circumstances. Please contact us if you would like to discuss how this may affect you.

Working in the UK against COVID-19
In a separate measure, the Chancellor of the Exchequer, Rishi Sunak, has announced further changes to the SRT specifically for highly skilled individuals coming to the UK to work on COVID-19 related activities.

The Chancellor has stated that time spent in the UK by individuals working on COVID-19 related activities between 1 March and 1 June 2020 will not be counted towards the residency tests. Whilst final details are awaited, the Chancellor references "anaesthetists through to engineers working on ventilator design and production."

Finally..
Although the 60-day limit for exceptional circumstances is unlikely to be an issue for the tax year ended 5 April 2020, this is likely to be more relevant for the tax year ending 5 April 2021 as the pandemic continues. The 60-day limit for the year ending 5 April 2021 will have already been exceeded by many of those individuals currently in the UK, who will therefore need to carefully assess their plans for the rest of the year.

It is possible HMRC may change this guidance at short notice as the situation develops, or the Government might consider increasing the 60-day limit depending on how the pandemic continues.

PKF COMMENT

Importantly, individuals need to also be aware that if they are currently outside of the UK and unable to return due to the pandemic, there may be tax implications in the jurisdiction where they have been residing. If this is something that may affect you, please contact us and we will be able to introduce you to one of our PKF International member firms to assist you.

If you would like to discuss how the rules for exceptional days in the UK may affect your personal circumstances, please contact Jonathon Collins at jcollins@pkf-littlejohn.com or call ***+44 (0)20 7516 2226*** *or Phil Clayton at pclayton@pkf-littlejohn.com or call* ***+44 (0)20 7516 2412*** *for more information.*

»BACK

Withholding taxes – Leaving the EU

As we all know, the focus of the last few months has been on Covid-19, not Brexit. However, let's not forget that the UK left the European Union on 31 January 2020 and will end its transition period on 31 December 2020. During the transition period the UK is still following EU rules and trade agreements.

It is possible that at the end of the transition period, we will leave without a deal, which will mean leaving without a withdrawal agreement. With lots of commentary around at the moment about a no-deal Brexit, we thought it would be a good time to remind companies about the impact that this could have in relation to withholding taxes in respect of cross border payments of intra- group interest, royalties or dividends.

Today, the UK is able to make use of three EU Directives in relation to the above, which provide an exemption for withholding taxes. These Directives are used by the UK to ease cash flow, by ensuring that any payments made to the UK from an EU group company can be paid gross, without the application of withholding taxes where they may otherwise apply.

Equally, for payments made by UK companies to EU group entities, the UK can use the Directive to pay interest and royalties gross. The UK of course does not apply withholding tax on payments of dividends.

If we leave with no deal, the default position will revert to the relevant double tax treaty that the UK has in place with the relevant EU Country, in order to establish the relevant rate of withholding tax. Although the UK has an extensive range of treaties with EU countries, not all permit zero withholding tax, for example Portugal and Italy. In addition to this, where relief has been applied for under the EU Directive historically, additional paperwork will need to be completed to ensure that the relevant treaty rate can be applied.

PKF COMMENT

Although we do not know for certain if the UK will leave with no deal, now is the time to start reviewing your cross-border payments and receipts to identify how a no deal Brexit might affect you and what steps you can take to manage this.

If you believe the above measures may impact your business or require any advice with respect to UK taxation, please contact Catherine Heyes at cheyes@pkf-littlejohn.com or call ***+44 (0)20 7516 2237****.*

»BACK

'Blue light' inheritance tax

The estate of medical staff who died due to COVID-19 contracted during their work may be able to claim an Inheritance Tax (IHT) exemption.

The exemption was originally introduced to support the families of soldiers who died in active duty, but since 2014 it has been extended to cover the deaths of emergency responders when responding to emergency circumstances.

Inheritance tax

In normal circumstances, on the event of an individual's death, the estate would need to assess their liability to IHT. Each estate would benefit from the Nil Rate Band of GBP 325,000, which could be increased up to GBP 650,000 for married couples or those in civil partnership, as well as the Residence Nil Rate Band if the estate transfers a property directly to descendants (such as children). After deducting further available allowances the balance will be liable to IHT at 40% (36% if at least 10% of the net estate is left to charity).

If the estate qualifies for 'blue light' relief, the normal IHT provisions will not apply to the estate; instead, the estate will be exempt from paying IHT.

When does it apply?
The 'blue light' IHT exemption can apply to an estate when:

- an individual dies from an injury sustained, accident occurring or disease contracted at a time when that individual was responding to emergency circumstances in that individual's capacity as an emergency responder; or
- an individual dies from a disease contracted at some previous time, the death being due to, or hastened by, the aggravation of the disease during a period when that individual was responding to emergency circumstances in that individual's capacity as an emergency responder.

Since the pandemic began thousands of NHS workers have contracted COVID-19 with many of them sadly losing their lives. Many more have contracted and survived the disease. The long-term health consequences of the disease on some of these individuals may not yet be apparent, but for those that have been badly affected by the disease, the exemption could be of relevance in the future.

With the COVID-19 pandemic ongoing, the disease will continue to have an impact on our lives for the foreseeable future and this exemption may become more relevant for certain individuals.

Who qualifies?
'Emergency responders' is defined in the legislation, but importantly does not need to be paid employment and can be unpaid volunteering work. It covers individuals working in:

- fire services or fire and rescue services
- search services or rescue services
- medical, ambulance or paramedic services
- services for police purposes
- services for the transportation of organs, blood, medical equipment or medical personnel.

The definition also includes providing humanitarian aid.

The legislation has not been tested sufficiently as to what jobs can be covered by medical services, but this would apply to doctors and nurses. We do not know whether support staff or care home workers, for example, would currently be included in the definition.

Other key workers continuing to support the country throughout the pandemic are not included within this definition. It has been reported that there have been 43 COVID-19 related deaths of transport workers. They would not be covered under this 'blue light' IHT exemption yet continue to provide essential services to the country.

Within the legislation it states that the Treasury has the power to extend the definition of 'emergency responder', we wait to see whether the government considers making amendments to the existing legislation.

A small but welcome comfort
The rules around IHT have become increasingly complex, so we would suggest you seek professional advice to support you in dealing with any estate administration.

Less than 5% of UK deaths result in an inheritance tax charge, but there may be some estates that could benefit from the 'blue light' exemption. An exemption from IHT will never make up for the loss of a life, however, it is a small acknowledgment of the sacrifice made by the emergency services and will remove a layer of officialdom at a time of great sadness.

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*If you would like to discuss how the 'Blue light' inheritance tax rules may affect your personal circumstances, please contact Phil Clayton at pclayton@pkf-littlejohn.com or call **+44 (0)20 7516 2412** for more information.*

»BACK

United States

Are you prepared for an IRC Section 965 repatriation audit?

As part of the growing IRS compliance review campaign, there is now a direct focus on high-net-worth individuals, especially those who have formed private foundations and also those with international business activities. In addition, the IRS has announced they will be examining individuals and corporations that were required to pay a transition tax related to foreign earnings that were deferred from U.S. taxation. This tax became law as part of the Tax Cuts and Jobs Act (TCJA) passed at the end of 2017.

Although most U.S. individuals and companies have complied with the requirements, much guidance was released well after the initial attempts to comply. Accordingly, companies should re-examine their calculations and compliance and be prepared if the IRS comes knocking on the door.

Background

Pursuant to Internal Revenue Code §965, U.S. shareholders, including individuals, that directly or indirectly own at least 10% of the stock of a specified foreign corporation (SFC) are required to include in gross income their share of the SFC's accumulated post-1986 deferred foreign income as of the end of 2017 (generally referred to as their accumulated earnings and profits). The tax is included in the last taxable year of the SFC beginning before 1 January 2018, and the taxpayer must report this amount on their returns for the taxable year in which or with which their SFC's taxable year ends (generally, 2017 and/or 2018).

Effective tax rates differed between E&P related to cash assets vs. non-cash. Corporations, but not individuals, were able to use foreign tax credits to reduce their income inclusion.

Prior to the implementation of §965, U.S. tax on earnings of foreign corporations could generally be deferred until the foreign corporation paid a dividend. §965 essentially created a deemed dividend at the end of 2017, and was part of the transition to the new international tax system that allows free repatriation of foreign earnings, but also makes deferral more difficult.

The IRS recently announced it will address non-compliance through soft letters and examinations. In a recent communication, Douglas O'Donnell, Commissioner of the IRS's Large Business and International Division, stated the following:

- "We believe that there's a high likelihood of noncompliance in this space …"
- "The new code section is complex, and the taxpayers may have difficulty obtaining the information they need to compute shareholder liability, which may lead to errors"
- "In addition to audits, the division expects to send thousands of taxpayers letters this fall suggesting that they take a second look at what they've reported to the IRS and consider filing an amended return."

Implications

The §965 campaign aligns with the IRS's heightened focus on TCJA compliance. IRS representatives have indicated that the IRS will be looking closely at taxpayers' earnings and profits calculations, the classification of assets as cash versus non-cash, and how taxpayers determined their foreign tax credits, among other issues. Exam personnel will also look at how §965 intersects with other TCJA provisions, such as BEAT, GILTI and FDII. This is particularly significant given the extended six-year statute of limitations on assessments that applies to §965 liabilities.

PKF COMMENT

If you believe the above measures may impact your business or require any advice with respect to US taxation, please contact Leo Parmegiani at lparmegiani@pkfod.com or call ***+1 646 699 2848*** *or Peter Baum at pbaum@pkfod.com or call* ***+1 914 341 7088****.*

»BACK

Final FDII regulations released: Is this a deduction you can use?

The Treasury recently released final regulations regarding the application of the deduction for foreign derived intangible income (FDII). The regulations are generally taxpayer-friendly, loosening the extensive documentation requirements required to take the deduction that had appeared in the proposed regulations.

In addition to detailing key changes in the proposed regulations, this article will explain the FDII rules, which are a welcomed deduction that may be underused. While the name refers to "intangible income," the calculation does not require that the income be derived from intellectual property to qualify for the deduction. Sales of goods or provision of services to foreign persons could also qualify. All businesses with foreign customers should consider their potential eligibility.

What is FDII?

Enacted as part of the Tax Cuts and Jobs Act (TCJA), IRC §250 provides a deduction on intangible income earned from U.S. sales to foreign customers, known as FDII. The deduction is 37.5% of FDII, bringing the net effective tax rate on this income to 13.125%. (After 2025, the deduction is 21.87%, for a net effective tax rate of 16.41%.) The intent is to make it more desirable to develop and continue to own intangible property in the United States.

Whether income is derived from intangibles is not determined using any sort of tracing method. Instead, FDII is the product of a formula:

(Foreign Derived Deduction Eligible Income / Deduction Eligible Income) * Deemed Intangible Income

- **Foreign Derived Deduction Eligible Income (FDDEI)** is income from the sale of property to a foreign person for a foreign use or the provision of services to a person (or with respect to property) outside the United States.
- **Deduction eligible income** is simply a taxpayer's income, with certain exceptions.
- **Deemed intangible income** is deduction-eligible income over a 10% return from a taxpayer's tangible assets. (If this looks familiar, that's because deemed intangible income is calculated in basically the same way GILTI is calculated for the income of foreign corporations.)

For example, let's say that a corporation has FDDEI of 100 and total deduction eligible income of 200. If deemed intangible income is also 200, then FDII is 100 (100 of FDDEI over 200 of deduction eligible income, multiplied by 200 of deemed intangible income). The corporation's FDII deduction is 37.5, reducing their taxable income to 62.5. The corporation's tax on that income would be 13.125.

FDDEI must be derived from sales (or services provided) to unrelated parties, although a sale to a foreign related party which is followed by a sale to unrelated parties does qualify. Sales may include licenses or leases.

Taxpayers with foreign sales attributable to their U.S. entity should consider whether they could be eligible for the FDII deduction. Unless the foreign sales are generated from a very significant base of tangible assets, a taxpayer is likely to have some FDII deduction eligibility. However, properly documenting the sales that generate the FDII deduction is a key component in taking the deduction. That's where the regulations come in.

The Final Regulations

The proposed regulations, issued in 2019, created specific documentation requirements to establish that a transaction generated FDII. The taxpayer taking the deduction needed written documentation that the purchaser was a foreign person and that the property would be subject to foreign use. Many comments to the proposed regulations noted that the documentation requirements were burdensome and would likely disqualify otherwise eligible taxpayers. Essentially, taxpayers needed to have planned out their documentation procedure in advance before being eligible for the deduction.

The final regulations remove the specific documentation requirements for establishing that the purchaser of property is foreign, and that non-intangible property or services are purchased for foreign use when the purchaser is an unrelated party. Taxpayers need only to meet the general tax law requirements of showing their eligibility for a deduction. For example, under the prior regulations, a taxpayer needed a written statement or proof of a purchaser's foreign person status; under the final regulations, foreign person status for the purchase can be presumed if the billing address is outside the United States.

The final regulations relax, but do not remove, the specific documentation requirements for establishing foreign use on sales of property for resale or further processing outside the U.S., as well as foreign use of intangible property. While taxpayers must substantiate these points, the required documents are far less onerous than in the proposed regulations. Under the final regulations, credible evidence obtained in the ordinary course of business can be used to substantiate foreign use if, for example, there is not a written contract stipulating that the property can only be used outside the U.S. Notably, though, the substantiating documents must be in existence as of the FDII filing date and must be provided to the IRS upon request.

These changes eliminate many of the concerns that the documentation requirements could exclude eligible taxpayers. While the substantiating documents must be in existence on the FDII filing date, they are far more likely to be things that the taxpayer already collects in their ordinary course of business, as opposed to the more specific required documents in the proposed regulations.

The regulations apply for tax years beginning in 2021, although transition rules do apply for prior years.

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*If you believe the above measures may impact your business or require any advice with respect to US taxation, please contact Leo Parmegiani at lparmegiani@pkfod.com or call **+1 646 699 2848** or Ralf Ruedenburg at rruedenburg@pkfod.com or call **+1 646 965 7778**.*

»BACK

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