PKF International Limited

PKF worldwide tax update

DECEMBER 2021

LOCAL
KNOWLEDGE,
GLOBAL
EXPERTISE

The content of this PKF Worldwide Tax News has been compiled and coordinated by Stefaan De Ceulaer (stefaan.deceulaer@pkf.com) of PKF International. If you have any comments or suggestions please contact Stefaan directly.

Contents

Welcome

In this fourth quarterly issue for 2021, 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:

- VAT updates in Hungary, Italy, Romania and the United Arab Emirates
- ATAD transposition updates in Austria and Spain
- Internationally Mobile Employees in the United Kingdom
- Recent comprehensive tax changes in Chile, Ecuador, Mexico and Thailand
- International tax developments (CFC, CbC Reporting, BEPS, MLI, transfer pricing etc.) in Australia, the Netherlands, South Africa, Spain, Thailand and Uganda

We trust you find the PKF Worldwide Tax Update for the fourth quarter of 2021 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.

Australia

ATO's continuing focus on intangible assets

The Australian Taxation Office (ATO) has been more rigorously pursuing and issuing guidelines in relation to a broad range of international dealings connected with intangible assets. This is particularly relevant for global businesses with valuable intangible assets which are developed and used in multiple jurisdictions.

The increasing focus on intangibles by both the ATO and the OECD, combined with the immediate need to fund global COVID budget deficits has resulted in increased ATO activity around intangible arrangements.

Recently, the ATO issued draft Practical Compliance Guideline 2021/D4 on 20 May 2021 on intangible arrangements and draft Taxation Ruling TR 2021/D4 on 25 June 2021 on the classification of royalties in relation to software.

This guidance supplements the previous Taxpayers Alerts (TA) issued in 2018 (TA 2018/2 dealing with undivided payments for tangible goods, trademarks and know-how to a foreign entity with no Australian royalty withholding tax deducted/remitted) and in 2020 (TA 2020/1 on the mischaracterisation of Australian activities connected with the development, enhancement, maintenance, protection and exploitation ("DEMPE)" of intangible assets.)

Draft Practical Compliance Guideline 2021/D4

The ATO has been principally concerned with the bifurcation of intangible assets and the mischaracterisation of DEMPE activities, including among other things, the migration or centralisation of intangible assets, non-arm's length licensing and related research and development activities.

The draft PCG 2021/D4 outlines the ATO compliance approach and risk assessment framework to international arrangements associated with DEMPE activities. While the principal focus is on the potential application of the transfer pricing provisions, it also deals with other associated tax risks including withholding tax, capital gains tax, capital allowances, the General Anti-Avoidance Rule (Part IVA) and diverted profits tax (DPT).

The draft PCG also outlines the ATO's expectations for taxpayers to maintain a high level of analysis and documentation to support their intangible arrangements, as well as the type of documents the ATO expects to be kept to evidence the arm's ength outcomes.

Further, the draft PCG provides 12 examples of intangibles arrangements and their risk assessment under the new framework (being low, medium or high risk).

Broadly, there are four risk factors which focus on:

- Understanding and evidencing the commercial considerations and the decision-making process;
- Understanding the form and substance of the intangible arrangement (to be substantiated by documents such as legal agreements, internal guidelines, policy documents, manuals/procedures and governance documents);
- Identifying and evidencing the nature of the intangible assets and connected DEMPE activities (e.g. with intangible asset registers, financial statements, registration documents for intellectual property in Australia and other policies or procedures);
- Analysing the tax and profit outcomes of the intangibles arrangements, including whether these outcomes are consistent with the commercial and economic substance (e.g. with a valuation or financial modelling).

The level of ATO engagement will depend on the risk assessment of the intangible arrangements. In this regard, if the intangible arrangement exhibits one or more of the high-risk-factors, it may trigger further engagements such as an ATO review or audit.

Draft Taxation Ruling 2021/D4

The Draft Taxation Ruling (TR) 2021/D4 outlines the ATO's views as to when receipts from the licensing and/or distribution of software will be 'royalties' under Australia's domestic law definition. This ruling has replaced the Commissioner's existing guidance in TR 93/12, which has been withdrawn effectively from 1 July 2021.

In recognition of evolving technology and globalisation, the draft ruling has expanded the circumstances in which a payment for licensing and distribution of software may constitute a royalty.

Broadly, licences to reproduce, modify or adapt the software, or to otherwise do something in relation to the software that is the exclusive right of the copyright owner may constitute a royalty. Similarly, payments for the supply of know-how about the software, and payments for the owner of custom operating system software to provide ongoing assistance to a computer programmer will also constitute a royalty. In contrast, a payment made by a distributor that is granted the right to market and distribute packaged software (but not to sub-license the use of the software to end-users or to otherwise use the copyright in the software) should not be regarded as a royalty.

BACK

PKF Comment

Multinationals should be mindful of the ATO's potential reconstruction powers within Australia's transfer pricing provisions, particularly in relation to the assignment of intellectual property rights.

In light of the recent guidance provided by the ATO, it is increasingly important to proactively address potential transfer pricing issues and associated tax risks. As a general rule of thumb, a lack of tax governance and documentation creates a greater perception of non-compliance and may empower the ATO to have a closer 'look under the hood'.

Therefore, it is critical for businesses with intangible assets used or developed across different jurisdictions to consider the level of documentation currently in place and carry out any additional analysis required to support their outcomes and comply with the above guidance.

For further information or advice in relation to this, or with respect to Australian taxation, please contact Iain Spittal at **ispittal@pkf.com.au** or Emma Roulet at **eroulet@pkf.com.au** or call **+61 2 8346 6000**.

Austria

ATAD interest thresholds introduced

The EU's Anti-Tax Avoidance Directive (ATAD) provides for an interest barrier regulation, which was implemented in Austria on 1 January 2021.

The aim of the interest barrier is to avoid and limit tax advantages from a high level of debt financing of individual group companies and the shifting of profits from high to low tax countries.

This regulation affects corporations (AG, GmbH), private foundations and cooperatives. However, they are affected only to the extent that they

- are included in consolidated financial statements; or
- have an affiliated company that falls under the controlled foreign corporation (CFC) rules, i.e. retain essentially more than 50 % of the voting rights; or
- maintain a foreign permanent establishment.

The law now links the amount of the tax-effective interest deduction (total interest expense less total interest income) to the amount of the taxable EBITDA. Specifically, the interest surplus of a business year is now only deductible to a maximum of 30% of the taxable EBITDA of that business year. However, there is an allowance of EUR 3 million, up to which all interest is deductible regardless of EBITDA.

Existing contracts up to 17 June 2016 are exempt from this provision until 2025. Should the excess interest exceed 30%, the excess amount is deductible on application in subsequent years, again taking into account the above thresholds.

Subject to certain conditions, there are exceptions for corporate groups (equity ratio comparison) while special regulations exist for groups of companies.

The term “interest” was defined very broadly in the sense of the EU Directive; it includes any remuneration for external capital.

BACK

PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Austria taxation, please contact Michaela Moosbrugger at **mm@pkf-graz.at** or call **+43 316 826 082 15**.

Chile

New bill proposes to eliminate tax exemptions

In September 2021, the President sent a bill to the National Congress that seeks to reduce or eliminate tax exemptions in order to obtain resources to finance the improvement of the solidarity pillar of retirement pensions. This bill also gives the Internal Revenue Service the power to request information from taxpayers about their non-taxable income, which would provide the necessary information for the analysis of tax exemptions and complete the income information of taxpayers.

Among the tax benefits that the government has proposed to cancel are the following:

- **Sole income tax of 5% on gains obtained from the sale of certain instruments on the stock market.**

  Currently, gains obtained from the sale of certain instruments (corporations’ stock, shares in investment funds and mutual funds) listed on a stock market are not subject to income tax, regardless of the type of investor that carries out the operation. The bill proposes to tax the profit at a sole rate of 5%. The tax will be withheld by the acquirer, stockbroker or securities agent acting on behalf of the seller. The tax benefit would be maintained only if the gain is obtained by institutional investors domiciled in Chile or abroad (banks, financial institutions, insurance companies and other entities indicated by law or by the Financial Markets Commission).

  The gain on every operation will be determined as the difference between the sales price and (i) the official closing price of the instrument as of 31 December of the year of acquisition; or (ii) the acquisition cost in accordance with the normal rules. A temporary option is granted to consider as acquisition cost the official closing price of the securities as at 31 December 2021.

- **Special VAT credit for construction**

  Construction companies have the right to deduct from the amount of their monthly provisional payments they have to make on account of annual income tax 65% of the VAT debit that they must determine on the sale of real estate for housing. A cap of up to UF 225 (USD 8,450) per dwelling applies to properties with a value not exceeding UF 2,000 (USD 75,000). The benefit also applies to VAT-exempt sales of properties acquired by beneficiaries of housing subsidies. In this case, the profit is 12.35% of the sales value and subject to the same limit. The special credit is completely abolished for real estate construction contracts that are entered into and sales that are made from 1 January 2024. However, for the time being the amount they will be entitled to deduct from the monthly provisional payments is reduced to 32.5% of the VAT debit and to 6.175% of the sales value, respectively, applicable to real estate construction contracts and sales that take place from 1 January 2022.

- **Application of VAT to certain services**

  Currently, professional services, technical advisory or assistance and consultancy services are not subject to VAT. The bill would leave subject to VAT all services that are not expressly tax exempt. Among the latter are services provided by individuals and those related to health, education and passenger transport.

- **Tax on amounts received for life insurance with inheritance and donations tax**

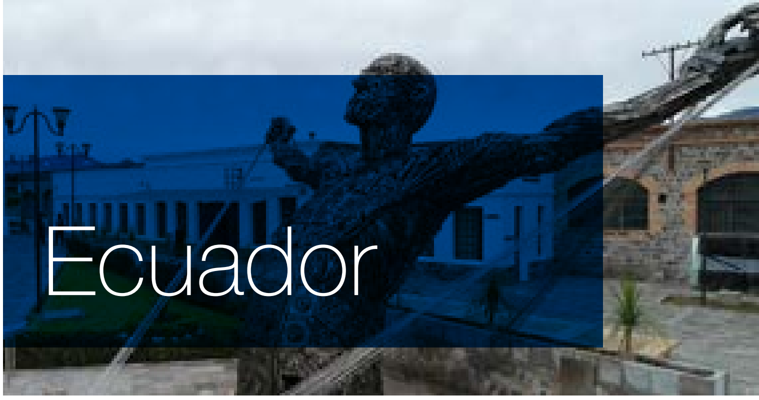
  Currently, amounts received by beneficiaries as a result of life insurance contracts are not subject to income tax nor to inheritance and donations tax.

  The exemption from inheritance and donations tax would be abolished affecting the benefits obtained from life insurance contracts entered into since the publication of the law.

BACK

PKF Comment

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



Ecuador

Various tax updates on foreign airline companies, the mining sector and a new economic plan

0% tax on the remittance of funds at the level of foreign airline companies

The President issued Executive Decree No. 182 dated 2 September 2021, establishing a 0% tax on the remittance of funds sent abroad by foreign airline companies (transport, cargo, and courier) authorised to operate in Ecuador.

Action Plan for the mining sector

The President issued Executive Decree No. 151 dated 5 August 2021, which contains the Action Plan for the Ecuador Mining Sector. The primary objective of this Plan is to:

1. Develop efficient and environmentally and socially responsible mining;
2. Determine the local geological potential;
3. Boost domestic and foreign investment;
4. Implement best practices for the use of these resources.

The Plan seeks to guarantee a framework of legal certainty foreseen in the Constitution through the execution of several actions by the Ministry of Energy and Non-Renewable Natural Resources and the other competent State entities as follows:

1. Prepare a report on mining rights under the regimes of large mining, medium mining, small mining, and artisanal mining, granted and in force in Ecuador.
2. Implement an action plan that allows the development of a technological tool for the correct exercise of mining rights management.
3. Develop an annual control plan with guidelines and schedules for all mining rights in the country.
4. Develop and implement a formalisation plan for artisanal miners.

5. Modify the instructions for the granting of metallic mineral mining concessions.
6. Expedite the execution of strategic and second-generation mining projects and prepare a report on the investments committed and effectively made in all these projects (including in the exploration phase).
7. Submit the draft formation of the Public–Private Mining Advisory Council.

These actions must be carried out within a period of between one and four months from the issuance of the Decree, which also contemplates the issuance of guidelines and other technical provisions required for the execution of the Plan, the review of the processes of granting permits, authorisations, records, audits, licences and other administrative acts related to the mining sector (which are in process and pending to be attended), the issuance of an interministerial agreement for the efficient and timely granting of environmental and water permits and the elaboration of a ministerial agreement for the granting of the administrative act provided for in article 26 of the Mining Law.

New economic plan subject to approval of the National Assembly

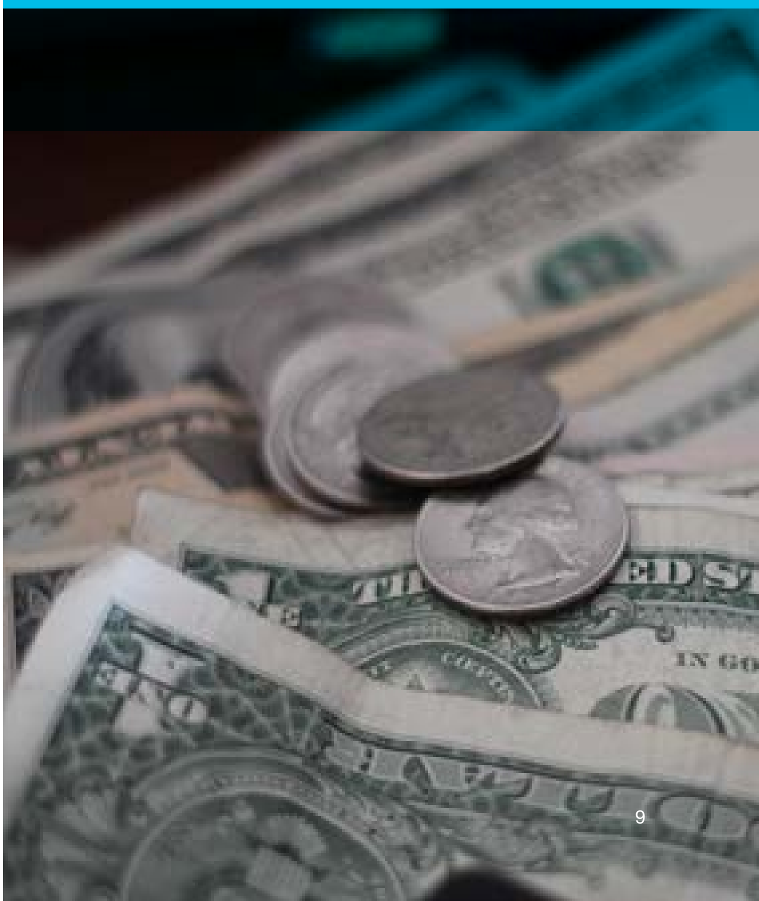
On 24 September 2021, the President delivered his economic package to the National Assembly, which includes several tax and labour reforms, the salient features of which are the following:

- A new labour regime;
- Temporary contributions, for individuals with net equity equal to or greater than USD 500,000, ranging from 0.5% to 1.5%; and for companies with net equity equal to or greater than USD 1 million, ranging from 0.6% to 0.7%. These contributions cannot be used as a tax credit nor are they deductible;
- A voluntary, unique, and temporary tax regime for the regularisation of assets located abroad as at 31 December 2020, applicable to individuals and companies. The tax rate is 5%. This tax cannot be used as a tax credit nor is it deductible;
- Occasional gains on the sale of real estate will be taxed at the level of companies;
- Income obtained from fixed rent investments with a maturity of 180 days or more will be exempt from income tax;
- Abolition of the income tax exemption on new and productive investments, public projects in government–private associations, new micro-entities and special economic development zones;
- New tax deductions for the use of sustainable construction equipment and technologies;
- Capital gains on the sale of shares will be taxed at a single rate of 10%;
- Abolition of the special tax on certain products and services;
- A new tax regime for entrepreneurs and popular businesses.

BACK

PKF Comment

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



Germany

Corporate income tax election for partnerships – pitfall: special business assets

Already in the June 2021 issue of the PKF Worldwide Tax Update we reported on Corporate income tax election for partnerships – '"Check the Box"' as from 1 January 2022. In principle, the change in taxation should be possible without affecting profit or loss. However, there is a pitfall that can lead to a complete realisation of the hidden reserves.

1. Background

By exercising the option, a partnership is taxed like a corporation. The transition to corporate income taxation sounds simple. However, for the system change to be tax-neutral, the special features of the taxation of partnerships under German tax law must be taken into account. Specific attention should be drawn to the so-called 'special business assets' of the partners.

2. Change in taxation

The transition to corporate income taxation is considered a fictitious change of legal form even if there is no change in legal form, but merely a change in taxation. For the sake of tax neutrality, no functionally essential business assets may be retained, which means that even the special business assets must be transferred in full to the opting company.

3. Pitfall: special business assets

Under German tax law, the term 'special business assets' refers to assets that a partner contributes to the partnership for a fee or free of charge. This may, for example, be a commercial building or a loan. If such an asset is important for the partnership, it is referred to as a special business asset.

A central prerequisite for a tax-neutral system change is that all essential special business assets are transferred to the opting company.

If assets that are not functionally essential business assets are retained or sold, withdrawn or transferred to another business asset in connection with the election for corporate income taxation, the assets can be valued at book value without any further requirements. However, all functionally essential business assets must be contributed to the opting company if the respective book values are to be continued. The retention of functionally essential assets necessarily leads to recognition at fair value and thus to the realisation of hidden reserves.

Even functionally essential business assets that are part of the special business assets of a shareholder must, in principle, be transferred to the opting company if the respective book values are to be continued. This is of particular practical importance, as these special business assets are often recognised for tax purposes in the shareholder's commercial balance sheet.

4. Problem-oriented example

A corporation is partner of a partnership and leases an operating building to the partnership. The commercial building is recognised in the commercial balance sheet of the corporation (partner). The building is a special business asset of the corporation in the partnership – the building thus belongs to the partnership for tax purposes. Until now, the commercial building has not been included in the tax balance sheet of the partner, but in a separate tax balance sheet (special balance sheet) of the subsidiary. If, in connection with the partnership option, the partner does not transfer the commercial building to the subsidiary for commercial and tax law purposes, then – in the opinion of the tax authorities – there is a risk that all hidden reserves may be realised. In such cases, the tax consequences should definitely be clarified with the tax authorities within the framework of an advanced ruling decision.

BACK

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**.

New court ruling confirms difficulties in classifying a foreign company for tax purposes

The tax classification of foreign companies is a recurring topic of discussion with the tax authorities. German tax courts apply a two-stage comparison of legal types drawn up in 1930 to classify foreign company forms in Germany as corporations or partnerships for tax purposes based on a catalogue of criteria. A recent court ruling shows that qualification conflicts always pose tax risks.

1. Comparison of legal types

A recent ruling by Germany's supreme tax court dated 18 May 2021 (Ref. I R 12/18) also applies the list of criteria to determine whether payments from a US sister company to a German GmbH are either tax-exempt remuneration or taxable interest income. The procedure is as follows:

- At a first stage, the corporate law characteristics of the foreign company are examined in order to make it comparable to a German company.
- At a second stage, a list of criteria is used to classify the foreign legal entity under tax law into a comparable domestic legal type.

In practice, however, the application of these criteria often proves to be difficult.

2. Criteria catalogue

Problematic in the application of the catalogue of criteria and the reason for divergent court rulings is the different weighting of the individual criteria. The following seven criteria must be examined on a case-by-case basis: (i) centralised management and representation; (ii) limited liability; (iii) free transferability of shares; (iv) distribution of profits; (v) raising of capital; (vi) unlimited lifespan of the company; and (vii) the formal requirements for formation. While the feature of centralised management and representation plays a significant role in the weighting of the individual criteria, the judges do not attribute any significant indicative effect to the criteria of free transferability of shares and the raising of capital for a specific type of company. The extent to which the individual criteria in their various forms are ultimately weighted in the comparison of legal types depends on the individual case.

3. Qualification conflicts

The previous classification of legal types was largely based on the fact that similar legal forms are predominantly used internationally. Risks may arise in the case of newly developed corporate forms because there are no comparable domestic legal forms. In the case of a hybrid form between a corporation and a partnership, there will regularly be a risk of a conflict of qualification. Examples of this are the US limited liability company (LLC) or the English limited liability partnership (LLP). Vice versa, an asset-managing partnership with a corporation as general partner or an operative partnership in which all general partners are corporations are often qualified differently for tax purposes abroad than for German tax purposes. A conflict of qualification must be regarded critically because it can lead to double taxation in Germany and the foreign country.

4. Conclusion

The comparison of legal types often leads to conflicts between the treatment abroad and in Germany. Even if the classification of a company may appear clear in its respective country of origin, the classification of the company in Germany may be different and lead to significant additional tax burdens.

BACK

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**.

Hong Kong

Hong Kong tax case – should company directors be personally liable for penalty tax for incorrect profits tax returns filed?

This is an appeal case concerning whether an individual is liable for additional penalty tax for signing an incorrect profits tax return for a company in which he/she holds a directorship.

The case was heard by the Court of Appeal (CA) of the Hong Kong Special Administration Region on 11 October 2019, with the written reasons for judgment being handed down by the CA's judges on 20 July 2021.

This article provides a brief background of the case as well as the ruling of the CA, followed by our comments regarding some areas that individual directors should be aware of when signing profits tax returns for their companies.

Background

Two directors ('the Applicants') of a Hong Kong incorporated company ('the Company') signed the Company's profits tax returns for the years of assessment 1996/97 to 1999/2000 in which the Company claimed deductions of management fees and professional fees paid to the Company's parent company.

In 2002, the Hong Kong Inland Revenue Department (IRD) commenced a tax audit of the Company's profits tax returns filed. At the conclusion of the tax audit, the IRD disallowed the deduction of management fees and professional fees and issued to the Company additional tax assessments for the relevant years of assessment, against which the Company lodged an appeal with the local tax tribunal, the Board of Review (BOR). The appeal was dismissed by the BOR. The Company did not pay the additional tax imposed by the IRD and was eventually wound up by the court on the petition of the Commissioner of the Inland Revenue (CIR).

Thereafter, the CIR issued additional notices of tax assessments to the Applicants under section 82A(1)(a) of the Hong Kong Inland Revenue Ordinance (IRO), alleging that the Applicants had made incorrect statements in the Company's profits tax returns which led to the understatement of the Company's assessable profits.

Under s.82A(1)(a) of the IRO, additional penalty tax can be imposed on a person who, without reasonable excuse, makes an incorrect return by omitting or understating anything in respect of which they are required by the Inland Revenue Ordinance to make a return, either on their behalf or on behalf of another person.

The IRD again imposed additional tax on the Applicants on the grounds that, having signed the tax returns for the Company in the capacity of directors, the Applicants had made incorrect tax returns within the meaning of s.82A(1)(a).

The Applicants appealed against the additional tax assessments to the BOR but the appeals were dismissed. They then appealed to the Court of First Instance (CFI), which ruled in the Applicants' favour and ordered that the additional tax assessments be annulled. However, the IRD was not satisfied with the CFI's judgment and lodged an appeal with the CA against the CFI's decision.

Judgment of CA

The CA upheld the CFI's decision and ruled in favour of the Applicants that s.82A(1)(a) does not permit the CIR to make a penalty assessment against an agent of a corporate taxpayer who assists the taxpayer to make a return on the grounds that (i) the return was not made by the directors in their personal capacity as agents for the Company, but by the Company alone acting through the physical agency of the directors; and (ii) the directors were not required by the IRO to make the returns on behalf of the Company. In particular, the CA viewed that the notices issued by the IRD were addressed to the Company and it was the Company that was required to make or furnish the returns, and therefore the directors who signed the returns should not be liable for additional tax under s.82A(1)(a) even if the contents of the returns were incorrect. According to the CA's judgement, although the directors were not required to make or furnish returns, they should be made answerable for doing so under s.57(1) of the IRO.

In the CA's view, to be answerable for doing acts required to be done by a company could best be understood as being under a duty to ensure that the act in question was done by the company – this is different to being under an obligation or requirement to do the act on behalf of the company.

This tax case has still not been finalised. The CIR has filed an application for leave to appeal against the decision of the CA to the Court of Final Appeal.

BACK

PKF Comment

In general, the judgment of the CA is in favour of the signing persons of corporations only. In other situations, the signing persons may be personally required to make the returns according to relevant laws. Moreover, it is worth noting that the signing persons should be made 'answerable' and should be fully conversant with the matters stated in the returns, and they should declare their belief as to the correctness of the returns when signing such returns. It is an offence if an answerable person fails to provide information with regard to the tax liabilities of a company without reasonable excuse. Accordingly, we recommend that the directors of a company should still exercise the greatest prudence and due diligence in performing their duties and reviewing the information contained in the returns.

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**.

Hungary

ECJ rules in favour of taxpayer in VAT deduction case

On 6 October 2021, the European Court of Justice (ECJ) ruled that Hungary is in breach of EU law with the conditions it imposes on Boehringer with regard to the VAT deduction of an amount that Boehringer has paid to the Hungarian managing body of the national health insurance (C-717/19 (Boehringer Ingelheim)).

Boehringer Ingelheim RCV GmbH & Co. KG Magyarországi Fióktelepe is the Hungarian subsidiary of a pharmaceutical company. Its main activity is the sale of subsidised pharmaceuticals to wholesalers. In that context, Boehringer concluded an agreement with the NEAK, the Hungarian managing body of the national health insurance. In 2018, Boehringer requested a VAT refund in connection with payments to the NEAK under the price-volume agreements. This concerned an ex post reduction of the taxable amount of the VAT. The Hungarian tax authorities rejected the request, because Boehringer's payments to the NEAK did not meet the conditions laid down in the VAT Act for the reduction of the taxable amount of VAT. The Hungarian court asked for a preliminary ruling in this case.

The ECJ ruled that Hungary is in breach of EU law with the conditions it imposes on Boehringer with regard to the VAT deduction of an amount that Boehringer has paid to the Hungarian managing body of the national health insurance. Furthermore, it is also contrary to EU law that a registered invoice is required for the retrospective reduction of the VAT taxable amount, even where such an invoice has not been issued and the execution of the transaction giving rise to the refund can be demonstrated by other means.

Tax treaty news

- On 18 September 2021, the Hungary–Kyrgyzstan Income Tax Treaty (2020) entered into force. The treaty generally applies from 1 January 2022.

- On 8 October 2021, Andorra and Hungary signed a tax treaty. On 11 November 2021, the General Council of Andorra ratified said treaty. The law on ratification is currently awaiting publication in Andorra's Official Bulletin.

PKF Comment

BACK

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**.

VAT registration in Italy does not preclude a 'direct' VAT refund to non-residents - grounds for rejection of the refund application

The European Court of Justice (ECJ), in line with Article 3 of Directive 2008/9/EC, has consistently ruled that the right to a VAT refund is not precluded by the fact that the taxable person:

- has a fixed establishment in the Member State of refund if no taxable transactions are actually carried out through that establishment;
- has appointed a tax representative for VAT purposes in that Member State, or has identified themselves there, for VAT purposes, or should have done so.

The Italian Revenue Agency had officially taken the position in 2010 that taxable persons directly identified for VAT purposes in Italy (or having appointed a tax representative there) could not claim a refund of the tax under article 38-bis2 (which in Italian law would be the article relating to direct refunds).

Therefore, unless the foreign taxable person (non-resident) has not carried out any active transactions for which they are liable for the tax (VAT) in Italy, they can submit the refund request, through the electronic portal procedure, for the purchase invoices registered under their foreign VAT number.

This does not affect the possibility of requesting a refund of the tax paid in Italy through the annual VAT return, which must include the transactions in reference to the Italian VAT number of the non-resident taxpayer (this aspect was also clarified in a recent official response of the Revenue Agency, No. 359/2021).

With regard to direct VAT refund applications, as far as procedural aspects are concerned, the ECJ has ruled that a VAT refund application may be rejected if the taxable person has not submitted, within the time limit set by the competent tax authority (usually 30 days), all the documents and information necessary to prove their claim, even if they were then produced in the context of the complaint or judicial proceedings brought against the decision rejecting the application.

Furthermore, according to another ruling, a refund application submitted in due time without attaching copies of the invoices or import documents requested cannot be rejected.

Finally, it should be borne in mind that if a VAT refund application does not contain a sequential invoice number, but another number which enables the document (and thus the goods or services concerned) to be identified, the tax administration of the Member State of refund is obliged to regard the application as submitted and to assess it. It remains possible to ask the applicant to communicate a sequential number that uniquely identifies the invoice.

BACK

PKF Comment

VAT refunds for persons not established in Italy (but VAT registered or with a tax representative) are recurring issues for clients, and consequently for PKF colleagues, carrying out cross-border transactions, taking into account that they are treated differently in each country.

For any queries related to VAT, you can reach out to Matteo Macciò at **m.maccio@pkf-tclsquare.it** or call **+39 010 81 83 253** (Genoa office).

VAT treatment of Italian warehouse stocks in case of foreign business transfer transactions

The Italian Revenue Agency, in response to tax ruling 637/2021 of 30 September 2021, has established that a transfer transaction of warehouse stocks held in Italy, as part of the transfer of the entire foreign business that exclusively owns goods in this warehouse in Italy, is liable to VAT in Italy, even though in all other cases the business transfer is not subject to VAT.

PKF Comment

BACK

You can reach out to Stefano Quaglia at **s.quaglia@pkf-tclsquare.it** or call **+39 02 9285 4246** (Milan office).

Mexico

2022 Economic Package approved

The Economic Package for 2022 was approved by Congress on 2 November 2021. The amendments to the Income Tax Law, VAT Law, the Federal Fiscal Code and the Federal Revenue Law were gazetted on 12 November 2021 and will enter into force on 1 January 2022.

Some of the salient features are as follows:

- Individuals who carry out business activities and small companies will have the possibility of accessing a 'simplified trust regime' with various tax benefits, highlighting the simplification of compliance with various formalities.
- Taxpayers carrying out activities that are not subject to VAT will not be able to credit the tax paid to suppliers or on the importation of goods when they are linked to such activities; VAT paid to suppliers will be considered a tax deduction for income tax purposes.
- Introduction of a simplified regime for legal entities with a taxable income of up to MXN 35 million.
- Withholding tax rate on interest payments made by financial institutions will be reduced from 0.97% to 0.08%.
- Certain taxpayers will need to obtain, keep and provide to the IRS information on their ultimate beneficial owners.
- Non-resident digital services suppliers will need to report on a monthly basis (instead of on a quarterly basis) services rendered to their customers located in Mexico.
- Introduction of a definition of activities that are not subject to VAT.
- Tax neutral mergers and spin-offs may be treated as taxable events when the IRS determines that they lack a business reason.
- For the purposes of thin capitalisation rules, net operating losses pending to be offset that have not been taken into account for determining the tax result should be included in the calculation of the tax equity for the year based on the tax balances. However, this option may not apply when the result of that operation exceeds 20% of the total accounting equity of the tax year in question, subject to certain exemptions.

BACK

PKF Comment

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

Netherlands

Various amendments to income and withholding taxes from 1 January 2022

Amendments to the statutory corporate income tax rate and applicable tax brackets

The 2021 Dutch corporate income tax rate for profits up to EUR 245,000 is 15% while taxable profits in excess of EUR 245,000 are subject to corporate income taxation at a rate of 25%. It has been announced that for 2022 the step-up rate of 15% will apply to an increased first bracket of EUR 395,000. In addition, the general corporate income tax rate will be increased from 1 January 2022 from 25% up to 25.8%.

Amendments to the tax loss carry forward conditions

Dutch tax law limits the term in which tax losses can be carried forward and/or carried back and set off against taxable profits. Currently, the carry back of losses is restricted to one year, whereas tax losses incurred in previous years can be carried forward and set off against future profits for a period of six years. However, new legislation will enter into force on 1 January 2022 based on which tax losses incurred in previous years will in principle be available for carry forward indefinitely, but whereby the carry forward possibility will be capped at 50% of the taxable profit in the underlying year, to the extent that the taxable profit exceeds an amount of EUR 1 million.

Limitation of the possibility to settle withholding taxes

Currently, dividend tax or gambling tax paid by a corporate taxpayer can be fully credited against the amount of corporate income tax payable; this also applies where the withholding tax exceeds the amount of corporate tax payable. In such a scenario, the settlement will effectively result in a tax refund.

It has been announced that from 1 January 2022, the possibility to credit withholding taxes will be capped at the amount of Dutch corporate income tax payable – without taking into account the tax credit. Consequently, a settlement of withholding taxes will no longer result in a tax refund. Any amount of withholding tax thus not credited can be carried forward indefinitely and credited against corporate income tax payable in future years.

BACK

PKF Comment

It may be worthwhile considering whether it could be feasible to defer a taxable transaction to 2022 to benefit from the increased amount of the tax bracket which is taxable under the step-up rate of 15%. On the other hand, for Dutch taxpayers that have losses available for carry forward, it may be beneficial to consider whether a taxable result can be brought forward and realised in 2021 so it can still be fully set off against the amount of losses. Your Dutch PKF advisor is happy to think along with you. For further information or advice with regard to the above, please contact Daniel Niesing at **danny.niesing@pkfwallast.nl** or call **+31 682 1986 45**.

Changes to the approach of cooperative compliance (Horizontal Monitoring)

In the Netherlands, the Ministry of Finance together with the Dutch tax authorities (DTA) have developed new guidelines with respect to their cooperative tax compliance programme called Horizontal Monitoring (HM). The DTA first introduced this approach to cooperative tax compliance using the HM method in 2006. HM refers to the principles of mutual trust, understanding and transparency between the taxpayer and the Dutch tax authorities.

Recently the Ministry of Finance and the DTA updated the guidelines for HM. By re-developing, companies will need to assess if they can comply with the new guidelines before 31 December 2022.

New guidelines

The new guidelines will have an impact on all companies under the HM programme. Our assessment is that not all companies will and can meet the new guidelines. This will lead to challenges for companies that are leaving this HM programme. For the companies that will meet the guidelines additional actions are in place in terms of monitoring and testing their tax control framework.

Overview of new categories

The following large companies are distinguished in the new approach of HM:

- The top 100 companies in the Netherlands. This will mean that current HM agreements concluded by the DTA with the 100 largest and most complex companies will end and an individual approach will replace these HM agreements.
- The HM agreements with large companies according to Dutch accounting law will also end and they can conclude an HM agreement under stricter requirements and for a limited duration of three years.
- All other mid-sized companies can only participate in HM through their tax advisor. Companies that already have an HM agreement in place will be assessed as to whether and how they qualify for HM via their tax advisor.

Annual risk analysis

The most important tightening of the programme is that companies under HM must conduct an annual risk analysis of the tax key risks (are they still up-to-date) and must monitor the operation of the control measures annually (and act on the results). The company must share the results with the DTA.

To be able to participate in HM, the company must have an adequately functioning tax monitoring system, at least regarding the control measures concerning the tax key risks.

Criteria for the new HM programme

Companies that participate in HM for the first time will have to meet the following six criteria using a self-assessment:

- Willingness to be transparent towards the DTA;
- A professional working relationship with the DTA that makes monitoring possible;
- The company has a documented tax strategy;
- A tax risk analysis (tax key risks in focus);
- Adequate annual monitoring (key risks and safety net for risks not identified);
- Sufficient quality of data for third-party taxation.

Already subject to HM

Companies already subject to HM have the possibility to agree upon an individual agreement and if they wish to continue doing so they do not necessarily have to carry out a self-assessment, but they do have to make a documented case for meeting these criteria or, in consultation with the DTA, prepare a plan of approach or self-assessment on how they are going to meet these six criteria. If the company is unable or unwilling to demonstrate this, the DTA will terminate HM with immediate effect.

BACK

PKF Comment

As discussed, HM in the Netherlands will change and companies will need to take action to determine whether they can and will meet obligations to agree upon a new HM agreement. We therefore recommend that organisations make an assessment and determine a way forward.

If you believe the above measures may impact your business or require any advice with respect to Dutch employment tax, feel free to reach out to Elmer van Lienen at **elmer.van.lienen@pkfwallast.nl** or call **+31 (6) 5132 6062** or Mathijs Gersie at **mathijs.gersie@pkfwallast.nl** or call **+31 (6) 82 57 87 41**.

Changes announced to the timing of taxation of employee stock options

In order to stimulate the use of employee stock option rights in the start-up/scale-up community in the Netherlands, the Dutch government has announced a proposal which will come into effect on 1 January 2022. The conventional way of taxing stock option rights was by imposing the tax at the moment of exercise (or alienation) of the stock option, which in some cases led to the problem that there wasn't enough cash to pay the tax due. For employees of start-up or scale-up companies and other non-listed companies, it is not always possible to immediately sell (part of) the shares to settle the relevant tax liability. As a result of this, the use of stock option rights would lose its appeal created by companies to strengthen the connection between them and their employees.

The proposition is to defer the moment of taxation until the shares become tradable. Although there is no definition of the term 'tradable/tradability', it should be the first moment that the employee actually has the possibility to sell the shares to any other person, even if this would only be a limited group of potential buyers. This approach will make it possible to generate cash at the time the tax payments need to be made. It is worth mentioning that this proposal does not only apply to start-ups and scale-ups, but to every employer offering stock option rights to his employees.

BACK

PKF Comment

This proposal aims at making the use of share option rights more appealing by deferring the moment of taxation. However, the cashflow issue remains unsolved for unlisted companies when the shares are formally tradable but there is no party willing to buy at market value. Even more, this proposal assumes there is a known market price which in the case of unlisted market shares is not always available. Finally, this bill merely focusses on the use of option rights and does not contain anything about positions wherein the shares are directly granted to an employee. This is remarkable because the same problem arises in those situations. For further information or advice on employee stock option rights in the Netherlands, please contact Ruud van der Linde at **ruud.van.der.linde@pkfwallast.nl** or call **+31 10 266 08 34**.

Limitation in setting off dividend withholding tax

In response to the French Sofina case (CJEU decision C-575/17), the Dutch legislator has announced a draft proposal on a limitation of the ability to settle dividend withholding tax with corporate income tax due. Dutch domestic taxpayers can offset – among other items – Dutch dividend withholding tax that is withheld on their behalf in connection with their Dutch taxable income against their Dutch taxable profit. Even in the case of a net loss, such withholding tax could generally be reclaimed to the extent that there is insufficient Dutch taxable profit in a given year. Companies established in foreign countries that are not subject to Dutch corporate income tax in the Netherlands, but are otherwise in a comparable situation with these Dutch domestic taxpayers are limited as to these credits and/or reclaim possibilities. This distinction is in principle not allowed according to the Sofina case rendered by the European Court of Justice. Therefore, Dutch legislators are proposing to limit the possibility for Dutch domestic taxpayers and put them in the same position as foreign taxpayers.

The proposed change grants companies the possibility to deduct dividend withholding tax paid up to the amount of corporate income tax due. If the amount of dividend withholding tax is higher and cannot be set off completely, it can be carried forward and used in subsequent years. This amendment makes it impossible to obtain a refund of dividend withholding tax at the level of both domestic and foreign companies.

BACK

PKF Comment

The proposal brings about more limitations at the level of domestic companies instead of more possibilities at the level of foreign companies. This approach is remarkable as there was a policy decision put in place after the Court of Justice had ruled in the Sofina case. Under this policy foreign companies could file a claim to get their paid dividend tax refunded as could domestic companies. This solved the impermissible distinction by removing the difference between foreign and domestic companies. In contradiction to this, the proposal makes it impossible to obrain a refund of dividend tax at the level of both domestic and foreign companies. The discrepancy in treatment would now be solved by curtailing domestic taxpayers instead of extending the courtesy to foreign taxpayers. If you believe the above measures may impact your business or require any advice with respect to Dutch taxation, feel free to reach out to Eelco van der Vijver at **eelco.van.der.vijver@pkfwallast.nl** or call **+31 20 653 18 12**.

Romania

Amendments to income tax and social contributions and SAF-T inclusion in domestic legislation

Corporate income tax

Increasing the tax deduction percentage for adjustments for impairment of receivables

Starting from 1 January 2022, the deduction threshold for adjustments related to the impairment of receivables will be increased from 30% to 50%.

Fiscal consolidation for corporate income tax

Groups of companies that adhere to the calendar year as the fiscal year and want to apply the fiscal consolidation system starting from 2022 must submit applications in this respect to the tax authorities by 2 November 2021 at the latest, given that the legal provisions state that the requests should be made at least 60 days before the beginning of the period for which the fiscal consolidation would apply.

In order to be able to apply fiscal consolidation, companies must be part of a group (the minimum condition is to have the right to vote or a 75% shareholding for an uninterrupted period of one year, prior to the start of the fiscal consolidation period); apply to the same tax year and the same corporate tax return system; be payers only of corporate tax; not be part of another tax group in the field of corporate tax and not be in dissolution / liquidation.

The fiscal group can be constituted only by Romanian legal entities or with entities having a registered office in Romania, and the application period of the measure is five years, starting with the fiscal year following submission of the application.

SAF-T inclusion in Romanian legislation

The Standard Audit File for Tax is an international standard for the electronic exchange of reliable accounting data between taxpayers and tax authorities. This standard was developed by the OECD in 2005. The latest version is the OECD SAF-T 2.0, a version which the Romanian authorities would also rely on. The informative statement D406 (SAF-T) is an electronic file, based on XML, internationally standardised for sending tax reports, including VAT reporting, from taxpayers to tax authorities.

From 1 January 2022, SAF-T reporting shall become mandatory for large taxpayers, while others will be enrolled in the reporting system later during the year 2022 (for medium taxpayers) and 2023 (for the remaining taxpayers).

Taxpayers shall be able to submit the tax return monthly or quarterly, complying with the fiscal period applicable to VAT. Taxpayers who are not registered for VAT purposes shall submit the SAF-T quarterly.

However, given that this reporting requirement is complex and new, taxpayers will be given a three-month grace period for the first statements, from the date when the submission requirements become effective for each category of taxpayer.

Income tax and social contributions

Mandatory social contributions

The employer, a Romanian tax resident or a Romanian tax non-resident who is subject to the applicable European legislation regarding social security, now has the possibility of choosing to compute, deduct and pay mandatory social contributions (pension, health and work insurance) for individuals who obtain benefits in cash and/or in-kind from third parties that are not Romanian tax residents (this provision will be applied starting with income related to October 2021).

Technical unemployment

The measure of technical unemployment has been reintroduced and will remain in force until 31 December 2021, as follows:

- During the temporary suspension of the individual employment contract, at the initiative of the employer, as a result of the effects produced by COVID-19;

- During the period of temporary interruption of the activity, totally or partially, in the context of the increase of the number of COVID-19 cases and the prolongation of the alert state on the Romanian territory;
- During the period of suspension as a result of epidemiological investigations, with the exception of employees on sick leave and receiving the related social insurance allowance.

Employees' benefits are 75% of the basic salary corresponding to the job held and are supported by the unemployment insurance budget. However, this cannot exceed 75% of average gross earnings.

Guaranteed minimum gross basic salary from 1 January 2022

From 1 January 2022, the regulation on the minimum wage for employees with higher education shall be eliminated, and the level of the minimum gross basic salary shall be RON 2,550 per month.

BACK

PKF Comment

We recommend that all taxpayers (not just large taxpayers) begin preparations to ensure that they are able to comply with the new requirements, to analyse in detail their internal IT systems and to identify the best and most efficient solutions to collect the information needed to complete the D406 statement, i.e. the Standard Audit File for Tax.

If you believe the above measures may impact your business or require any advice with respect to Romanian taxation, please contact Florentina Susnea at **florentina.susnea@pkffinconta.ro** or call **+40 213 173 190/+40 722 209 753** or Narcisa Chirila at **narcisa.chirila@pkffinconta.ro** or call **+40 213 173 196/+40 786 073 526**.

South Africa

Interest deductions: beware of the limitation in section 23M

Section 23M was introduced into the Income Tax Act No. 58 of 1962 ('the Act') with effect from 1 January 2015 to limit interest deductions in certain circumstances where the creditor is not subject to South African tax on the interest income.

Accordingly, the amount of interest which may be deducted by a South African tax resident may be limited if the foreign lender is in a controlling relationship with the South African tax resident and the interest is not subject to tax in the hands of the non-resident lender. For example, this could be the case where a foreign holding company ('OffshoreCo') provides funding to its South African subsidiary ('SACo').

Should, however, OffshoreCo be subject to South African interest withholding tax in respect of interest paid or due and payable by SACo, the limitation rules provided for in section 23M would not apply as OffshoreCo would be regarded as being subject to South African tax in respect of such interest.

Interest withholding tax may be levied at a rate of 15% in respect of interest paid or due and payable to a non-resident – subject to the application of a double tax agreement ('DTA') concluded between South Africa and the foreign jurisdiction concerned.

In instances where a DTA provides the foreign jurisdiction with the exclusive taxing rights in respect of South African sourced interest income derived by OffshoreCo, no South African withholding tax would be triggered by SACo. As OffshoreCo would in such circumstances not be subject to South African tax in respect of its interest income, the interest deduction limitation in section 23M may be applicable.

In terms of current law, the limitation rules of section 23M will not apply should the foreign lender be subject to interest withholding tax at any rate. For example, where a DTA applies to reduce the interest withholding tax applicable in respect of interest paid by SACo to OffshoreCo to 5%, the limitation rules of section 23M will not be applicable.

In order to ensure a consistent treatment for all resident debtors paying interest to non-residents, National Treasury is proposing to amend section 23M to ensure its limitation rules are not dependent on which country the payment is routed through. Accordingly, the Draft Taxation Laws Amendment Bill, 2021 ('the Draft Bill') proposes to amend section 23M with the effect that, where SACo makes an interest payment which attracts withholding tax at any rate higher than zero, a portion of the deduction for interest expense will be subject to section 23M.

The amendment is proposed to enter into force with effect from 1 April 2022 in respect of years of assessment commencing on or after this date.

In terms of current law, the determination of the extent of the allowable interest deduction is to be considered in light of a complex formula provided for in section 23M which is to be determined on an annual basis with reference to the average repo rate for the year. Additional proposed amendments contained in the Draft Bill may simplify this calculation in due course, although it is noted that submissions to National Treasury in respect of the revised formula have highlighted some inconsistencies which are to be addressed prior to enactment.

On the basis of the complexities involved in the application of section 23M, it is advisable for taxpayers to seek advice regarding its application in respect of inward loan transactions from foreign holding companies.

BACK

PKF Comment

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

Transactions between associated enterprises coming into the transfer pricing net

The transfer pricing (TP) provisions, contained in section 31 of the Income Tax Act (ITA) of South Africa, are applicable to 'affected transactions'. Affected transactions are regarded as being cross-border transactions between 'connected persons' where any term or condition to that transaction differs from that which would have existed had those persons been independent and dealing at arm's length.

Connected persons in relation to a company include any shareholder that holds at least 20% of the shares where no other company holds a majority or any majority shareholder (i.e. with a shareholding of at least 50%) or where a company holds at least a 50% shareholding in the other company.

In certain circumstances, two companies under common control may not be connected persons as defined in terms of current legislation, such that the transactions between such companies would not be regarded as being affected transactions. Accordingly, the TP provisions, technically speaking, do not apply to these transactions. However, there is a view that SARS may still attempt to apply the doctrine of 'substance over form' to argue that these transactions should still be conducted at arm's length as the OECD regulations on TP do include transactions between common control companies (referred to by the OECD as 'associated enterprises'). This is supported by the fact that South Africa generally does follow the recommendations of the OECD particularly in the area of taxation.

The 2019 Taxation Laws Amendment Act made an amendment to the definition of 'affected transaction' to include transactions between 'associated enterprises' as described in Article 9(1) of the OECD's Model Tax Convention (MTC). The MTC is the basis on which most of the South African tax treaties have been drafted. The expansion of the affected transaction definition to associated enterprises effectively expands the TP provisions to transactions between companies that are under common control/management.

This amendment was initially intended to commence on 1 January 2021 but in terms of the 2020 Taxation Laws Amendment Act this amendment has been postponed to years of assessment commencing 1 January 2023.

The TP regulations in South Africa require a mandatory comprehensive TP policy (local file and master file) to be submitted to SARS annually where the affected transactions for the year of assessment exceed ZAR 100 million.

BACK

PKF Comment

It is our recommendation that where affected transactions are below this threshold but still significant that a mini/micro TP policy be maintained to ensure that should a query from SARS arise, one is able to support the basis of the transactions being conducted at arm's length. While the TP provisions do not require a comprehensive TP policy to be maintained in such circumstances, it must be ensured that all transactions that fall within the ambit of section 31 comply therewith and can be suitably evidenced.

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 Kubashni Moodley at **kubashni.moodley@pkf.co.za** or call **+27 31 573 5000**.

Spain

Tax fraud prevention: ATAD provisions transposed into domestic law

The recently adopted Law 11/2021 of 9 July 2021, on measures to prevent and combat tax fraud, transposes into the domestic legal system two of the anti-abuse measures included in Council Directive (EU) 2016/1164, of 12 July 2016, introducing rules against tax avoidance practices that directly affect the functioning of the internal market, known as the Anti-Tax Avoidance Directive (ATAD).

The Directive included three anti-abuse provisions, firstly, a general anti-abuse rule that did not have to be transposed as it was already incorporated into domestic legislation; secondly, a rule to limit the deductibility of interest that Spain must transpose before 2024; and thirdly, provisions to combat hybrid asymmetries, the transposition of which has been carried out recently. It also included two provisions that are now incorporated in the abovementioned law, i.e. the exit tax and the international tax transparency rule.

Exit tax

The exit tax was already included in domestic legislation. However it is modified in order to adopt its regulation to the provisions of the Directive. The law amends the Corporate Income Tax Law so that in those cases in which the taxable event is generated because there has been a change of residence of an entity to another EU Member State, the possibility of deferring the debt is eliminated and replaced by an option to spread the payment over five years.

The Non-Resident Income Tax Law is also modified, since a new case is introduced in which the tax is payable when the activity carried out by a permanent establishment is transferred. Also, in relation to the cases of exit taxation that were already foreseen in this law, when the exit takes place into another EU member state, the option to defer the debt is eliminated and allowed to be spread over five years.

International fiscal transparency

As with exit taxation, the international tax transparency rule was already included in the Corporate Income Tax Law. The amendment maintains the regulation in those matters in which the domestic regulation was more demanding than the Directive, such as the taxation threshold from which the rule applies (75% lower than that which would have applied in Spain, whereas the Directive places it at 50%), modifying those provisions in which the Community rule is stricter.

In this sense, firstly, the possibility of international tax transparency affecting a permanent establishment abroad of a resident entity is regulated, which until now was only applicable to subsidiaries.

Secondly, the list of passive income to which international tax transparency applies is extended to include income derived from financial leasing transactions or from insurance, banking and other financial activities, unless it is related to income obtained in the exercise of an economic activity (previously it was only in the event that it involved a deductible expense in Spain) and income from transactions on goods or services with related persons to which the non-resident entity (or permanent establishment) adds little or no economic value.

For insurance, credit, leasing and other financial activities carried out by the non-resident entity with related persons, the minimum threshold for the non-inclusion of income is raised to two thirds of the entity's income.

Finally, the exemption provided for holding entities is cancelled, so that these entities are subject to the general regime and their income may be transparent subject to certain prescribed conditions. The impact of this amendment is relevant as it implies making first-level holding companies abroad transparent if their taxation is less than 75% of the 1.25% that would have been levied in Spain, a situation that – as the exemption for dividends has been limited to 95% – may occur in many instances as such holding companies used to a greater extent will be exempt from taxation at the level of the dividends they receive.

Non-cooperative jurisdictions

The law modifies the regulation on tax havens, changing first of all their name as they become non-cooperative jurisdictions. More relevant than the change of name is the change in criteria for a territory to be considered a non-cooperative jurisdiction, approaching the European criteria that – contrary to what the change of name would seem to indicate – move away from mere cooperation to include others related to 'tax justice' and the level of taxation in the territory.

The law indicates that the list will be approved by Ministerial Order and will be renewed periodically, so that until then the 1990 list remains in force, taking into account the jurisdictions that have been removed since then. It is also foreseen that a specific regime of a given jurisdiction may be included in the list.

Finally, and this may end up being most relevant, the door is opened to consider a country with which Spain has concluded a double tax treaty in force as a non-cooperative jurisdiction, in which case the aforementionedsaid anti-haven measures that are not contrary to the provisions of the treaty may be applied. This issue may be relevant if the list is finally closer, as the modification of the criteria would seem to indicate, to the European list, since the latter includes countries with which Spain has concluded a treaty such as Panama and Trinidad and Tobago.

BACK

PKF Comment

If you believe the above measures may impact your business or personal situation or require any advice with respect to Spanish taxation, please contact Juan Carlos Sanchez Ahumada at **jcsanchez@pkf-attest.es** or call **+34 915 561 199**.

Transposition of ATAD CFC rules into domestic law

On 10 July 2021, Spain's Anti-Tax Fraud Law (Law 11/2021, dated 9 July 2021) was gazetted, entering into force on 11 July. This law includes, among other things, certain amendments to the existing controlled foreign companies (CFC) rules in order to align the Spanish standards with the EU ATAD.

Amendments included in the corporate income tax (CIT) regime

- The income obtained by a foreign permanent establishment (PE) is included in the Spanish CFC rules. The Spanish branch participation exemption does not apply in the case of a PE. A foreign tax credit may still be applicable, should the branch be subject to any taxation.
- The safe harbour condition for EU resident subsidiaries is amended to require 'the existence of an economic activity' rather than 'valid business reasons for the incorporation and operative of the subsidiary' as before.
- The safe harbour clause for holding companies is abolished. In accordance with this clause, companies owning more than 5% in foreign subsidiaries during more than one year were not subject to CFC rules if they had human and material resources to manage the participation and did not qualify as 'companies merely passively holding assets'.
- The treatment applicable to open-ended investment companies (SICAVs) is amended to enhance its control, introducing with effect from fiscal years starting on or after 1 January 2022 stricter requirements for the application of the reduced 1% rate.
- Spanish REITs are now subject to tax on the retained profit of the year (being profits which are not distributed) if they have not been subject to the standard CIT rate and are not used for reinvestment. The information obligations are strengthened to allow tracking of sources of income and retained earnings.

Other measures adopted

- The standard regulation is amended to refer to 'non-cooperative jurisdictions', which now not only includes States and territories, but also preferential tax regimes. A new tax haven list will be issued taking into account these criteria.
- Surcharges and arrears interest are increased. Surcharges for late payments will amount to 1% per month during the first year, and a flat 15% surcharge plus interest when the delay is more than 12 months.

BACK

PKF Comment

The measures introduced have a relevant impact on multinational structures and cross-border transactions with Spain. It is therefore recommended to review holding structures with a presence in Spain as well as those in which there is an entity in one of the jurisdictions classified as non-cooperative by the European Union.

If you believe the above measures may impact your business or personal situation or require any advice with respect to Spanish taxation, please contact Esther Martin Garcia at **esther.martin@pkf-attest.es** or call **+34 945 137 426**.

Thailand

The golden age of investment

Against the backdrop of temporary COVID-19 measures being introduced to protect and stabilise the economy of Thailand, the government has also launched a whole raft of great investor-business incentives to dramatically boost the economy going forward, including years of being able to earn tax-free profits.

The numerous incentives have created an air of excitement and energy and are primarily focussed on attracting investment and business into Thailand from overseas; positioning Thailand as a hub from which all business and commercial activities in Asia can be conducted. Not surprisingly, this is being referred to as the 'golden age of investment' in Thailand.

With most incentives being administered by the Thai Board of Investment, the broad areas where incentives are available include:

- Incentives to develop new industries;
- Activity-based incentives;
- Merit-based incentives;
- Incentives to boost growth in the Eastern Economic Corridor;
- International Business Centre (IBC) incentives which make Thailand an attractive location for a holding company, regional headquarters or finance centre;
- Corporate income tax 'double deductions';
- General Industrial Zone (GIZ) and IEAT Free Zone (FZ) incentives; and,
- Petroleum industry related investment incentives.

The above list includes 'incentives to boost growth in the Eastern Economic Corridor (EEC)' which is an area of Thailand earmarked for significant development, and, as such, has some major projects coming up for tender.

Large infrastructure projects on the EEC development list include:

- Digital Park Thailand (EECd);
- Double track railway (USD 2.1 billion);
- Eastern Economic Corridor of Innovation (EECi);
- Genomics Thailand (EECg);
- High speed train (USD 2.1 billion);
- Laem Chabang deep sea port (USD 1.1 billion);
- Medical Hub Thammasat University (Pattaya) (EECmd);
- Motorway (USD 1.1 billion);
- The Map ta Phut deep-sea port expansion (USD 330 million);
- U-Tapao airport expansion. (USD 7.1 billion) / Eastern Airport City (EEC-A).

BACK

PKF Comment

Thailand has always recognised the importance of foreign investment and the development, skills and benefits which this can bring into the country. Hand-in-hand with this recognition is the desire to strengthen and significantly boost its economy and the number of incentives and benefits currently on offer send a clear message that 'Thailand is open for business and, in particular, is very welcoming of business from foreign enterprises, companies and organisations'.

Notably, described as the 'golden age of investment', the current investment climate in Thailand is very attractive for new or expanding foreign business operations, especially if they are to be based in one of the many decentralised industrial areas.

For advice and information on establishing a business in Thailand or applying for one of the many infrastructure projects (and applicable incentives), please contact Philip Bond at **philip.bond@pkf.com** or call **+66 621 455 799**.

The perfect location

Thailand's economy and markets are rapidly developing, not least because it is geographically placed in the centre of Asia where more than half of the world's population reside. This makes Thailand a perfect location from which to operate a global finance centre, position a holding company or park the global headquarters.

This realisation has hit many multinational groups with the result that more and more groups are relocating or repositioning activities in Thailand. Not surprisingly, this activity has not escaped the attention of the Thai government who have responded by creating a new special type of business entity with some very attractive incentives and benefits from which such activities can be operated. The newly created business entity is known as an International Business Centre (IBC).

Notably, the tax exemptions and benefits obtained by operating as an IBC include:

- A special business tax exemption which applies to income (gross receipts) from financial management services (a treasury centre) provided to associated enterprises in Thailand or overseas;
- A corporate income tax exemption on dividends received from associated enterprises in Thailand or overseas;
- A reduced rate of corporate income tax which applies to IBC income and can be as low as 3% (this might include income derived from providing administrative services, technical services, support services or financial management services to associated enterprises in Thailand or overseas and royalties received from associated enterprises in Thailand or overseas arising from technological R&D carried out in Thailand);
- An exemption from withholding tax on:
    - Dividends paid by the IBC to companies (or juristic partnerships) incorporated under foreign laws and not carrying on business in Thailand;
    - Interest paid by the IBC to companies (or juristic partnerships) incorporated under foreign laws and not carrying on business in Thailand (but only on loans taken out by the IBC to relend to its associated enterprises in Thailand or overseas for the purpose of providing financial management services); and,
- A reduction in the personal income tax rate to 15% for qualifying expatriate employees working for the IBC.

BACK

PKF Comment

The new IBC entity is a new business entity with incentives and reliefs to encourage and house certain activities including management, technical, support and treasury management services. To find out more about relocating these activities to Thailand and benefitting from the IBC reliefs and incentives available, or establishing a business in Thailand, please contact Philip Bond at **philip.bond@pkf.com** or call **+66 621 455 799**.

In step with BEPS transfer pricing rules

Thailand is currently going through a period of rapid improvement and development which is creating opportunities and benefits for foreign businesses. Improvements are being made in many areas, including changes to its tax laws to implement certain international tax standards. Notably, Thailand has adopted the OECD's Inclusive Framework on 'Base Erosion and Profit Shifting' (BEPS) and now has Country-by-Country Reporting, exchange of information on request, and the automatic exchange of financial account information (the 'Common Reporting Standards').

Against the background of the OECD BEPS measures, one of the key areas Thailand has focussed on is the development of its transfer pricing legislation and practices.

- Companies with an annual income of THB 200 million or more (approximately USD 6 million) must file an online transfer pricing 'disclosure form' with their annual corporate income tax return (with penalties resulting from inadequate or inaccurate information).

- The Thailand Revenue Department (TRD) has recently provided its tax assessment officers with detailed guidance on the basis, procedures, rules and conditions to be followed in performing adjustments to the revenue and expenses of companies where transactions, including commercial and financial arrangements between related parties, are not conducted on a third-party arm's length basis and believed to be in the nature of profit shifting.

- A Director-General Notification has now set out the pricing methods acceptable for comparability in determining the arm's-length price for benchmarking and respective financial indicators, which are:

  — The price established under the comparable uncontrolled price method (CUP method);

  — The rate of profit from cost plus (for the cost-plus (CP) method);

  — The rate of profit from resale (for the resale price (RP) method);

  — The rate of net profit (for the transactional net margin method (TNMM));

  — The share of profits from operations (for the transactional profit split (TPS) method; and,

  — Any other appropriate method where the above methods cannot be applied.

For service transactions in particular, it is additionally required to consider and demonstrate the 'need and requirement' for such services in addition to a benchmarking analysis.

- A function, asset and risk analysis is required for transactions associated with intangible assets (with the functional analysis disclosing the responsibilities of each contracting party to the development, enhancement, maintenance, protection, and exploitation (DEMPE analysis) of the intangible asset). Depending on the nature of the transaction(s) additional considerations may be required such as geographical limitations, expected benefits, etc.

- Certain multi-national enterprise (MNE) groups doing business in Thailand now have to submit a Country-by-Country (CbC) transfer pricing report with their annual corporate income tax return for accounting periods beginning on or after 1 January 2021. The report must be in line with the OECD's CbC reporting template and forms part of a three-tier structure, together with a global master file and a local file. As well as other information, it provides the names and main business activities of each group member and key information about the group's financial results and how they break down by tax jurisdiction.

BACK

PKF Comment

The saying 'fail to prepare, prepare to fail' is very relevant to the increasing transfer pricing requirements and practices in Thailand, not least by ensuring contemporaneous transfer pricing documentation is available. Notably, it is important that the information contained within the CbC report is consistent with the positions and characterisations adopted in the local file and master file because the information contained within the report could potentially be used by the Thai Revenue Department (TRD) to assess other BEPS-related risks of the multinational enterprise in Thailand, as well as transfer pricing.

PKF Thailand helps companies meet their Thailand transfer pricing obligations, including responding to TRD correspondence and completing the required annual files and reports. For help and advice on any transfer pricing matter, please contact Philip Bond at **philip.bond@pkf.com** or call **+66 621 455 799**.

Uganda

Revised definition of beneficial owner

In Uganda, the government introduced many new tax changes that took effect on 1 July 2021.

With specific relevance to international tax, there is a revised definition of a ‘beneficial owner’ under the Income Tax Act and this mostly impacts any tax residents (of a treaty country) that would want to benefit from either exemption or reduced taxes under the double tax agreements to which Uganda is a party.

Generally, it is a set condition that a taxpayer must be a beneficial owner of income in order to enjoy the benefit from either exemption or reduced tax rates under double tax agreements that Uganda has with other countries.

The new definition of a ‘beneficial owner’ clarifies that a beneficial owner should be a ‘natural person’ with final ownership or control of another person (like a company). The term ‘beneficial owner’ is enlarged to include specified persons in relation to trusts, and other legal persons similar to trusts.

The definition serves to limit the enjoyment of tax benefits (of tax exemption or tax reduction) under double tax agreements to only instances where the natural persons that will have final ownership of the income are, in fact, actual tax residents of the country that has a tax treaty with Uganda.

BACK

PKF Comment

For any further information or advice on Ugandan tax matters, please contact Charles Oguttu at **coguttu@ug.pkfea.com.tw** or call **+256 312 305 800**.

Ukraine

Regulations on the circulation of virtual assets

On 8 September 2021, the Ukraine parliament adopted Law No. 3637 *On Virtual Assets* (the Law), stating the legal regulations for circulation of virtual assets in Ukraine.

The Law defines a virtual asset as an intangible asset, regulated by civil law, of a certain value and expressed as a data set in electronic form. The existence of a virtual asset and its ability to circulate is ensured by a system providing for circulation of virtual assets. A virtual asset may confirm proprietary rights, e.g. a right of legal claim to other objects of civil rights.

The Law applies to legal relations in connection with the circulation of virtual assets having a Ukrainian element, which is connected with any of the following criteria:

- Provider or recipient of services, related to circulation of virtual assets, registered in Ukraine or having a permanent representative office in Ukraine;
- Parties agree that their contract related to virtual assets is regulated by Ukraine law;
- Both parties under the contract or at least the receiver of a virtual asset is a Ukraine resident(s).

The Law includes four types of businesses requiring a licence for their operations:

- Custody/administration of virtual assets or keys of virtual assets;
- Provision of services of exchange of virtual assets for other virtual assets or currency;
- Provision of services on transfer of virtual assets;
- Provision of intermediary services related to virtual assets.

The Law offers a description of the above businesses and explains which businesses are not required to be licensed.

Virtual assets may be exchanged for other virtual assets, national currency of Ukraine (hryvna) and, in cases to be set by the National Bank of Ukraine, for foreign currency, securities and other foreign exchange assets.

Virtual assets cannot be used as money in Ukraine and they cannot be exchanged for property, goods, works and services.

The Law on virtual assets sets the following requirements for companies applying for licences to provide services related to the circulation of virtual assets:

- Minimal stated capital of a company;
- Payment of fee for application for a licence;
- Compliance criteria at the level of a company with the Law;
- Presentation of a schedule of information to be processed together with application for a licence.

A mandatory fee is due for a licence application. Depending on the type of activity, the fee ranges from UAH 68,000 to UAH 136,000 for resident companies and from UAH 340,000 to UAH 680,000 for non-resident companies.

The respective agency will have 30 days for review and taking a decision on the issuance of a licence or refusal to issue it as of the day of filing the application and all other required documents.

The validity of a licence shall be one year.

BACK

PKF Comment

Although the aforementioned Law covers the basics, while the actual opening of a virtual assets market with well-defined mechanisms, rules and procedures requires the establishment of specific agencies and the introduction of subsequent amendments, the first step has been taken for the use of virtual assets in legal circulation in Ukraine.

If you believe any of the above measures may impact your business or personal situation or require any advice with respect to Ukrainian 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**.

United Arab Emirates

Various tax updates – Economic Substance Regulations, and VAT and excise duties

A. ECONOMIC SUBSTANCE REGULATIONS

The Government of United Arab Emirates ("UAE"), introduced the Economic Substance Regulations (the "Regulations") on 30 April 2019 vide Cabinet Resolution No. 31 of 2019. The said Regulations were amended retrospectively vide Cabinet Resolution No. 57 of 2020.

The Regulations (as amended), inter-alia, prescribes two types of annual compliances namely, (i) submission of the 'Information Notification' within six months from the end of the accounting year and (ii) submission of the 'Substance Report' within twelve months from the end of the accounting year.

The Regulations also prescribes penalties and other consequences for non-compliances. However, the Regulations also provides an opportunity to file an appeal before the Federal Tax Authority ("FTA") against the levy of the penalties.

While the Regulations provide the boarder framework on filing an appeal and it's disposal, detailed guidance was awaited for the administrative procedures in connection with the same.

The FTA has now published detailed Appeal Guide in August 2021 thereby providing detailed guidance on the appeal procedures. The key highlights of the Guide are as under:

Objective / Reason for filing the appeal:

The appeal could be filed in following situations:

- The licensee did not commit the violation;
- The penalty imposed is not proportionate to the violation;
- The penalty imposed exceeds the limits prescribed.

Other key observations / considerations as per the guide:

- The appeal shall be submitted **only in English**;
- **Separate appeal** shall be submitted for **separate category of penalty**;
- **Option to follow up with the FTA** in relation to appeal submitted has been provided;
- Additional information / documents / details shall be submitted to the FTA **within 5 working days**;
- **Additional time** may be requested from the FTA **vide special request** for submission of the additional information / documents / details;
- Request for cancellation of duplicate filing / amendments to be submitted to the respective Regulatory Authority.

Key timelines prescribed:

Particulars	Timeframe
✓ Appeal submission	40 working days from the date of imposition of the penalty
✓ Issue of decision of the appeal	40 working days from the date of receipt of all details/ documents/ information by the FTA
✓ Notification to the licensee about the decision of the appeal	5 working days from the date of issuance of the decision
✓ Payment of the penalty	40 working days from the date of levy of administrative penalty subject to outcome of the appeal

B. INTERNATIONAL-TAX DEVELOPMENTS

Double Taxation Avoidance Agreements

The UAE has entered into and concluded the Double Taxation Avoidance Agreements ("DTAA" / "Tax Treaties") with over 115 countries. The list of the countries / jurisdictions with whom UAE has entered and concluded the DTAA can be found at: https://www.mof.gov.ae/en/StrategicPartnerships/DoubleTaxtionAgreements/Pages/DoubleTaxtion.aspx

Pursuant to the improvement in the bilateral relationship with Israel, the UAE has also signed the DTAA with Israel in May 2021. However, the same is yet to enter into force.

Further, the UAE's DTAA with Egypt, Cameron, Costa Rica, Zimbabwe and Brazil enters in force in 2021.

Other developments

- The UAE has recently issued detailed Mutual Agreement Procedure (MAP) Guidance dated January 2021.
- The UAE has also given its endorsement to the BEPS 2.0 Pillar 2 (Global Minimum Tax) approach, as an Inclusive Framework member.

C. UAE VAT AND EXCISE TAX UPDATE

With respect to VAT, the UAE Federal Tax Authority ('FTA') has issued taxpayer bulletins capturing a brief about recent updates made through user guide and public clarification. It also provides details of upcoming events and workshops run by FTA in addition to certain other UAE VAT related statistics.

With respect to Excise Tax, FTA has issued a decision on Implementing the Marking of Tobacco and Tobacco Products Scheme on 30 August 2021.

Summary of some of the key updates is hereunder:

- **Implementing the Marking of Tobacco and Tobacco Products Scheme**

  FTA published a decision on implementing the marking of tobacco and tobacco products scheme, which will be effective from 01 October 2021.

  As part of this decision, the FTA has mentioned that marks with a new design shall be approved, and approval is withdrawn from marks with the old design. The decision does not detail the changes made to the design of the marks.

  Further, the decision has given below timeline:

  — By 1 October 2021, requests for marks with the new design must be received from local markets and duty-free markets in arrival terminals.

  — By 1 January 2022, requests for marks with the new design must be received from duty-free markets in departure terminals.

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

BACK

PKF Comment

Businesses in the UAE which have identified themselves as in-scope for the purposes of UAE ESR, are required to continue to comply with the prescribed filing requirements within the timelines provided by the MOF.

VAT and Excise tax user guides and public clarifications continue to provide valuable guidance in assessing the VAT and Excise Tax implications of various transactions and provides further clarity thereon. Taxpayers should always keep themselves updated to comply appropriately.

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 Mr. Vinit Gala at **vgala@pkfuae.com** or call **+97143888900**.

United Kingdom

Changes to right to work checks for EU, EEA and Swiss citizens from 1 July 2021

Following the 30 June 2021 deadline for applications to the EU Settlement Scheme in the UK, the process for completing right to work checks on EU, EEA, and Swiss citizens has now changed.

Employers can no longer accept EU passports or ID cards as valid proof of right to work, with the exception of Irish citizens. Instead, employers need to check a job applicant's right to work online.

To carry out an online right to work check, the applicant's date of birth and their share code are required, which they will have obtained when they proved their right to work online.

There may be situations in which you identify an EU citizen in your workforce who has not applied to the EU Settlement Scheme by the deadline and does not hold any other form of leave to remain in the UK. Where an EU citizen has reasonable grounds for missing the application deadline, they will be given a further opportunity to apply.

Employers should carry out a right to work check for every individual employed. Employers can face a civil penalty of up to GBP 20,000 for each illegally employed worker who does not have the right to work in the UK and where correct checks were not undertaken.

BACK

PKF Comment

If you believe the above measures may impact your business or personal situation or require any advice with respect to UK global mobility, please contact Louise Fryer at **lfryer@pkf-l.com** or call **+44 (0)20 7516 2446**.

United States

US state and local tax – Multistate Tax Commission updates

The Multistate Tax Commission (MTC) is an intergovernmental state tax agency whose mission is to ‘promote uniform and consistent tax policy and administration among the states, assist taxpayers in achieving compliance with existing tax laws, and advocate for state and local sovereignty in the development of tax policy’. This article provides a brief overview of current MTC activities. MTC suggestions do not become law on a state level automatically but have to be adopted by the state legislature. Thus, the topics that are discussed in this article serve as an overview of issues that are discussed in the US at this time.

Sales tax on digital products

MTC staff will draft an outline of a white paper on state sales taxation of digital products. Internal reporting is planned for November 2021. This activity is in line with actions on a state level where there is an increase of changes to the law to make digital products subject to sales tax. As more and more transactions become digital, states are responding to the possible erosion of the tax base.

State taxation of partnerships

Taxation of partnerships can be a complex matter, especially when partnerships operate in multiple states. Thus, the MTC has started a project to discuss the following topics:

- Sourcing of partnership operating income and partnership items for state tax purposes;
- Sourcing and taxation of gains and losses from the sale of partnership interests;
- Entity level taxation issues including transfer pricing or combined filing issues;
- Other administrative and enforcement issues, including information reporting and withholding.

Public Law 86-272

Public Law 86-272 does not allow a state to impose its net income tax when out-of-state company sales to customers in the state are limited to sales of tangible products and in-state activities are limited to solicitation of orders that are accepted and delivered from outside the state. However, some states – like Nevada, Ohio, Texas and Washington State – do not apply the law as they take the position that the tax they impose is not an income tax but a tax that is calculated based on gross receipts. As the sales of digital products and services is increasing rapidly, the MTC is now proposing substantial changes to its ‘Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272’ (‘the statement’) to address common activities done by businesses online and has concluded that those activities are unprotected.

The suggested changes would result in income tax registration and obligation requirements for many businesses that offer services online but have no physical presence in the US. Some proposed revisions to the statement that defeat the business’ Public Law 86-272 immunity are as follows:

- Post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business’ website.
- The business places internet ‘cookies’ onto the computers or other electronic devices of in-state customers. The cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale.
- The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other instructions to those products via the internet.
- The business contracts with a marketplace facilitator that expedites the sale of the business’ products on the facilitator’s online marketplace. The marketplace facilitator maintains inventory, including some of the business’ products, at fulfilment centres in various states where the business’ customers are located. When using marketplace facilitators, the immunity is defeated in all states where the fulfilment centres are located.

- The business contracts with in-state customers to stream videos and music to electronic devices for a charge. In this case, the MTC takes the position that streaming does not constitute the sale of tangible property for purposes of Public Law 86-272 but is a service. Public Law 86-272 is not providing protection for the sale of services.

The MTC takes the position that all of these activities are not entirely ancillary to the in-state solicitation of orders for sales of tangible property and defeat the business' Public Law 86-272 immunity.

BACK

PKF Comment

PKF O'Connor Davies' advice: Businesses, whether foreign or domestic, need to consult with their tax advisor on a regular basis on state updates related to sales and local taxes (SALT) to make sure that they are in compliance with registration and filing requirements.

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

right people
right size
right solutions

PKF International Ltd.
Studio 215-216, Great Western Studios, 65 Alfred Road, London, W2 5EU, United Kingdom
Telephone: +44 20 3691 2500

www.pkf.com

TAXNQ42021