September 2022

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WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international financial services industry

Dear Sir or Madam,

We hope you find the latest version of the WTS Global Financial Services Newsletter presenting taxation-related news from nine countries with a focus on the international Financial Services industry of interest.[1]

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. the Indonesian taxation of crypto assets, foreign loans to Chinese high-tech firms, EU WHT refunds to third-country funds and several recent and important court decisions.

- Austria – ICON
- China – WTS China
- Czech Republic – WTS Alfery
- Finland – Castrén & Snellman
- France – FIDAL
- Germany – WTS
- Indonesia – consulthink
- Italy – WTS R&A Studio Tributario and Studio Biscozzi Nobili Piazza
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Thank you very much for your interest.

Frankfurt, 27 September 2022

With best regards,

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For details on WTS Global Financial Services:
https://wts.com/global/services/financial-services

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Austria

Changes in the taxation of investment income by way of the Austrian tax reform 2022

The Austrian tax reform 2022 (Abgabenänderungsgesetz 2022 – AbgÄG 2022) brings various changes to the taxation of investment income.

WHT deduction by foreign paying offices for certain derivatives

In Austria, income from non-securitised derivatives is generally subject to the progressive income tax rate of up to 55%. Austrian paying offices (especially credit institutions), however, can voluntarily deduct withholding tax (WHT) at the special rate of 27.5%, which then serves as a final tax for the taxpayer. This opt-in has not been possible for foreign paying offices so far. Based on a recent court decision, the AbgÄG 2022 will change this from 1 January 2023 onwards.

Foreign paying offices shall be allowed to deduct a tax comparable to the Austrian WHT on the income of non-securitised derivatives. The paying office must, however, be resident in a country where extensive administrative assistance in tax matters with Austria applies, and the correct withholding and remittance of the WHT must be ensured by an Austrian tax representative.

Tax loss reporting upon request

Before the AbgÄG 2022, depositories were required to automatically provide the deposit holder with a tax report regarding the loss compensation. From 1 January 2024 onwards, the requirement for the automatic report will be abolished and the deposit holder will have to request a tax report from the depositary, which will be more extensive than the current report. The minimum requirement of the report is detailed in the income tax law, which will be accompanied by further clarification through the Federal Ministry.

WHT refund for non-EU and non-EEA portfolio investors subject to corporate tax

At present, corporate taxpayers resident in the EU or EEA can apply for a total refund of Austrian WHT on dividends – including the share of WHT that Austria is entitled to under the relevant DTA – if the foreign entity is unable to credit the Austrian WHT in its country of residence. Considering recent jurisprudence, the AbgÄG 2022 extends this possibility to non-EU and non-EEA portfolio investors (shareholding of less than 10%), where extensive administrative assistance in tax matters applies between Austria and the investor's country of residence.

Withdrawal of assets from a deposit during a company reorganisation

The withdrawal of capital assets from a deposit or transfer to another deposit during a company reorganisation is currently subject to tax and brings with it WHT deduction. As far as the rules of the Austrian Reorganisation Tax Law (UmgrStG) apply to a restructuring, such deposit withdrawals shall no longer bring tax consequences with them. Therefore, the taxpayer must instruct the transferring depository to provide certain information to the tax office, such as their name and tax identification number, the transferred assets, the acquisition cost of the assets of the deposit holder and the recipient of the assets. Furthermore, the depository must be provided with information about the reorganisation. It shall be possible for the taxpayer to provide their own report for cases concerning non-Austrian depositories. This will apply from 1 January 2023 onwards.

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China

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China sets up green channel for foreign loans

As of 30 May 2022, tech firms in 17 provincial or city regions in China have been given a hassle-free channel to raise foreign loans. Following the release of the circular "Facilitation of Cross-border Financing for High-tech and Highly-specialised Firms" (Hui-fa [2022] No. 16) issued on 30 May 2022 by the State Administration of Foreign Exchange (SAFE), applicable tech firms are treated exceptionally in that they are no longer governed by the current loan quota tied to capital size or leverage ratio.

According to this new circular, 17 regions are enlisted to join the practice (nine have been added since 2020). They can now apply for a foreign loan quota within the limit of USD 10 million if located in one of the listed nine regions, or USD 5 million if located in the other eight listed regions. At the same time, the types of admissible tech firms have been expanded from just high-tech firms to high-tech firms and highly specialised firms.

Under the new policy, within the limit of either USD 10 million or 5 million (depending on the location), qualified firms can apply for a foreign loan quota based on their own requirements. No further reference is made to capital size or financial gearing as in the case of non-qualifiers. Applicable tech firms can raise foreign loans within the given quota, as a one-off or in instalments, based on the loan amounts stated in the loan agreements. Moreover, the registration procedures for foreign loans are considerably simplified.

The new programme is an encouraging move to support high-tech and highly specialised sectors, allowing them priority access to international and domestic means of financing. Attention should be paid to the existing loan registration requirement which remains obligatory, and SAFE's regulations on the use of the loan funds.

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Czech Republic

Czech Financial Administration focused on checks on the taxation of cryptocurrencies

Over the summer, the Czech Financial Administration announced that it had commenced an inspection campaign focused on the taxation of income related to cryptocurrencies, i.e. primarily Bitcoin and Ethereum.

When trading in cryptocurrencies, taxable income is the difference between the sale and acquisition cost of a cryptocurrency. In contrast to income from the sale of securities, in the case of profit on the sale of cryptocurrencies it is not possible in the Czech Republic, even for natural persons, to apply any targeted exemption conditional, for example, on a time test or a minimum value of profit.

During its inspection campaign, the Financial Administration based actions on an analysis of data from 2019 and 2020, and used data from an exchange of information with tax administrations in other countries. According to official information, the difference between ascertained income and data claimed by tax subjects on income tax returns for natural persons and legal entities – including cases where a tax return has not been filed at all – allegedly amounts to hundreds of millions of koruna.

The Financial Administration subsequently called on the affected entities to report their tax liability. In some cases, they did so also for fiscal years other than those that were the subject of the inspection campaign. The Financial Administration also selected taxpayers where they suspect that they have not recognised income from trading in cryptocurrencies. The area of cryptocurrencies will continue to be subjected to inspections. The Financial Administration has published explanatory material on its website that should help taxpayers to familiarise themselves with their respective tax duties.

Determining the amount of required capital of self-governed investment funds

As of 1 August 2022, an amended decree of the Czech National Bank states that when determining the amount of capital of a self-governed investment fund, only items and deductions that do not concern investment activities of a self-governed investment fund or sub-funds created by it are used.

Until now, there could have been doubts regarding the calculation of a SICAV's capital, and in the relevant reports sometimes regulatory capital was calculated for a self-governed investment fund as a whole. This means that the sub-fund and founder's part items were added together. Regulatory capital therefore included other equity account items containing the fund capital of the investment part (or sub-funds). This approach, however, does not make sense, as assets and capital in the case of the founder's part and in the case of the investment part (or sub-funds) have an independent purpose and a separate asset and accounting regime.

Regulatory capital should be placed only in the founder's part of self-regulated investment funds creating sub-funds (or self-governed investment funds with an investment and non-investment part). It is equity that should enable the proper management of investment funds and constant performance of activities. Assets and capital in the investment part (or in sub-funds) do not belong to the manager (founder's part or non-investment part of a self-governed investment fund) and are not assets and capital serving its activities.

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When determining the amount of capital in a self-governed investment fund, the following now applies:

- A SICAV that creates a sub-fund cannot now include elements concerning the sub-fund;
- A SICAV that does not create a sub-fund cannot include elements concerning the investment part;
- In the case of a SICAF (close-ended investment fund), items and deductions cannot concern investment activities.

The decree does not contain transitory provisions. Limits on the minimum amount of capital for a self-governed investment fund in accordance with the new rules therefore need to be complied with as of 1 August 2022.

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Finland

Exit tax proposed for individuals – proposal includes several problematic elements and would mean a major change in Finnish capital gains taxation

On 12 August 2022, the Ministry of Finance published a preliminary draft government proposal concerning a so-called exit tax on private individuals. The exit tax would significantly broaden Finland's taxing rights and change Finland's capital gains taxation. The law is to come into force and be applied as early as 2023.

The proposed exit tax in short

According to the proposal, the exit tax would affect individuals with significant assets who transfer their tax domicile from Finland to abroad. The tax base would represent the increase in value of movable assets that occurred while residing in Finland and the tax would be levied in accordance with the Finnish capital gains taxation. The capital gains tax rates in Finland currently vary between 30–34 per cent. The exit tax would be levied even in cases where the increase in value is realised only after the person already resides abroad.

Most movable assets would be included in the tax base for the new exit taxation – for example, company shares, shares in investment funds, options, futures, pension insurances and virtual currencies. The tax would not, however, apply to real estate assets, to which Finland already has broad taxing rights.

Furthermore, the new exit taxation only takes place when the individual moving from Finland has had their tax residency in Finland for at least 4 years within the last 10 years before moving away. This includes foreign citizens who have resided in Finland for the stated period.

Also, the value of taxable assets must be at least EUR 500,000 and the imputed capital gain must be at least EUR 100,000 on the date the individual moves from Finland. In practice, these thresholds mean that the tax would only affect wealthy private individuals, thus raising the question of whether such a narrowly defined tax would violate taxpayer equality and tax fairness.

The income subject to the exit tax would be considered income in the tax year in which the individual moves from Finland. However, the individual would have the right to postpone the payment of the tax until the assets in question are disposed of by way of sale or gift. This exemption would require that the individual files an annual notification to the Finnish Tax Administration reporting that the assets they owned when moving from Finland are still in their possession. Exit tax would no longer be applicable if the assets are not disposed of within eight tax years after the year of moving out of Finland.

The exit tax has caused a lot of public debate – the proposal bears the risk of adverse side effects and may not generate any significant tax revenue for the state

The proposed exit tax has already sparked widespread public debate and further discussion is expected as the legislative process continues in the government this fall. While the purpose of the exit tax is to prevent tax evasion, it is very likely that instead of solving problems of tax evasion, the tax would lead to undesirable side effects.

From the perspective of taxpayers, the proposed exit taxation is particularly problematic, as it could lead to the double taxation of private individuals in several ways. As mentioned above, another problematic aspect of the proposal is that the exit tax would apply only to a small, wealthy segment of individuals. Moreover, the proposed tax may have a negative impact on Finland's competitiveness in international markets. It could potentially make Finland a less attractive place to work and make it more difficult to attract foreign talent to Finnish companies.

According to the government draft proposal, the expected annual revenue for the Finnish state from the new tax would amount to approximately 0–70 million euros. At the same time, however, the tax would impose a significant additional administrative burden on the Finnish tax authorities. Given the low expected tax revenues and the potential adverse effects the tax may induce, it is particularly questionable whether it can be justified from a Finnish tax law perspective.

We will follow the legislative process and are happy to discuss the proposal in more detail.

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France

French Supreme Tax Court validates the possibility of charging foreign tax credits on the share of costs and expenses on dividends

Under the parent-subsidiary regime, dividends received by a parent company are exempt from corporate income tax (CIT), except for a share of costs and expenses (QPFC) set at 5% of their gross amount (or 1% in certain situations) which must be added back to the taxable income of the parent company (Article 216 of the French Tax Code).

The administration has long considered that the QPFC does not constitute a taxation of dividends. No foreign tax credit could therefore be applied to these QPFCs.

In a recent decision (CE, 5 July 2022, No. 463021, SA AXA), the French Supreme Tax Court (Conseil d'Etat) ruled to the contrary by annulling, in the context of an appeal for exceeding its powers, the implicit decision of refusal of the minister to cancel the administrative doctrine.

It takes the view that, given the flat-rate nature of the QPFC, a parent company must reintegrate its profits under the parent-subsidiary regime without the possibility to limit this reintegration to the actual amount of the costs and expenses incurred in acquiring or retaining the corresponding income. The provisions of Article 216 of the French tax code must not be regarded as having the sole purpose of neutralising the deduction of costs relating to equity securities, the income of which is exempt from CIT, but rather as aiming to subject a portion of the income benefiting from the parent-subsidiary regime to this tax if the amount of the costs is lower than this fixed portion.

This favourable conclusion is comparable to the position of the Supreme Tax Court on the QPFC with regard to capital gains on equity securities (CE 15 November 2021, Société L'Air Liquide, no. 454105).

This decision of the Supreme Tax Court thus opens the way to the offset of foreign tax credits on the CIT due because of this QPFC. Nevertheless, some clarification is required to determine whether the tax credit could be offset against the full amount or only a portion of the CIT due on the QPFC. Despite these uncertainties, it is important to file claims before 31 December 2022.

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Germany

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German WHT – ECJ judgement in the case *"ACC Silicones"* – C-572/20

16 June 2022 saw the ECJ issue its judgement in the case C-572 – *"ACC Silicones"*, ruling that certain prerequisites under German tax law for a refund of German WHT are incompatible with the free movement of capital (Art. 63 TFEU).

ACC Silicones is a British company that in the years 2006 to 2008 held 5.26% of the shares of a German company, which distributed dividends. These dividends were subject to 20% WHT (plus 5.5% solidarity surcharge) in Germany. The WHT rate was reduced to 15% under the German-UK Double Tax Treaty (DTT). Such German-sourced dividends would have been fully tax exempt if they had been subject to the Parent-Subsidiary-Directive (PSD), i.e. the foreign receiving company had to hold more than 10% of the shares.

By contrast, at that time, German companies were fully tax exempt with their German dividend income, regardless of their stake in the paying company. Although WHT was levied on dividends paid to German companies, German companies could credit WHT against their corporate income tax and, if the WHT was higher than the CIT, receive a WHT refund. In its previous ruling C-284/09 dated 20 October 2011, the ECJ prescribes that the respective German tax rules – which effectively granted a WHT refund to German companies – were incompatible with EU law. In 2013, as a response to this previous ECJ judgement, the German legislator introduced a mechanism to reclaim WHT levied on German free float dividends for EU/EEA companies. Additionally, Germany subjected all free float dividends paid after 28 February 2013 to CIT. The incompatibility of the German dividend taxation with the free movement of capital was supposed to have been abolished as a result of this revision. The refund mechanism is therefore mainly applicable to dividends paid before 1 March 2013.

To obtain a WHT refund under the new system, EU/EEA companies must fulfil several conditions, among them proving that neither the company nor any direct or indirect shareholder of the company received a tax credit for the German WHT in their country of residence. A carryforward of the tax credit or a cost deduction shall be equivalent to an actual tax credit. The lack of tax credit must be proven via a certificate from the tax authorities of the company's country of residence. This condition of lack of tax credit is the specific subject of the recent ECJ judgement dated 16 June 2022.

The ECJ regards the condition to prove that no actual or potential tax credit was provided to the EU/EEA company in its country of residence as a breach of the free movement of capital, because a German company could obtain a WHT refund without having to prove any such condition. According to the ECJ, the additional prerequisite of the WHT refund solely for EU/EEA companies cannot be justified with preventing a double credit of the German WHT, because the same prerequisite was not made for German companies, even though a German company may also have a foreign shareholder, which might be able to credit the German WHT against its own tax liability. The additional prerequisite can also not be justified with safeguarding the balanced allocation of the power to tax between the member states.

The ECJ is very clear on the incompatibility of the above-described condition (proof of the lack of a tax credit) in order to obtain a WHT refund. Unfortunately, the court did

not have to comment on other aspects of the German WHT refund system. One further critical aspect of the German WHT refund rule set is the limited personal scope. The WHT refund is only admissible for EU/EEA companies, i.e. excludes third-country companies as well as other entity types, such as investment funds.

The ECJ explicitly did not answer the questions as to whether this limited personal scope is in line with the free movement of capital, because the British company concerned was – at that time – an EU company. However, the ECJ highlights that the scope of the free movement of capital also includes third countries, but *"the case law concerning restrictions on the free movement of capital within the European Union cannot be transposed in its entirety to movements of capital between member states and third countries, as such movements take place in a different legal context."*.

The ECJ also did not have to comment on the condition that the company seeking the refund must prove the prerequisites of the German Anti-Treaty-Shopping Rule, which is also considered to be incompatible with EU law in specialised literature.

Even though the ECJ decision is a step in the right direction and a positive sign for WHT reclaims not only in Germany but in the EU in general, its direct impact is limited as it only covers one aspect of the much-criticised German WHT refund provisions. The argument about the incompatibility of German dividend taxation until March 2013 – unfortunately – does not end here.

Draft administrative guidance on duties of cooperation related to cryptocurrencies and other tokens

In July 2022, the German Ministry of Finance (BMF) submitted a draft administrative guidance on the duty of cooperation related to cryptocurrencies and other tokens. This recent draft guidance is supposed to amend the administrative guidance on income taxation of cryptocurrencies and other tokens dated 10 May 2022.[2]

Taxpayers in Germany are generally obliged to cooperate with tax authorities. This general obligation includes declaring all relevant facts honestly and submitting the available evidence. According to the draft guidance, this general duty to cooperate must be fulfilled also with regard to income from cryptocurrencies and other tokens.

Besides the general obligation, there is an increased duty to cooperate with respect to circumstances taking place outside of Germany. Under the increased duty to cooperate, the taxpayer does not only have to provide the evidence available, but also procure new evidence. If the duty to cooperate is not observed, tax authorities are allowed to estimate the tax base.

According to the draft decree, the increased obligation to cooperate must be observed in connection with (crypto) tokens traded on a platform run by a foreign, i.e. non-German, operator and with regard to (crypto) tokens traded on a decentralised trading facility (Decentralised Exchanges "DEX"), which enable the user to trade directly without the facility acting as intermediary. As most of the (crypto) tokens are traded via a DEX or a non-German operator, the increased obligation to cooperate will most likely be the standard case for (crypto) token transactions.

2 See our WTS Global FS Infoletter #25 of June 2022.

Besides the tax legal duty to cooperate, the general obligations to keep records under commercial and tax law for businesses must also be observed with regard to (crypto) tokens. The BMF emphasises the obligation to keep records of and track every single transaction. If no other evidence is available, taxpayers may also keep records with screenshots and printouts. If records are kept with a (special) software, a procedure documentation must be prepared and the requirements of immutability observed. If the recordkeeping runs on a blockchain (or other DLT), immutability will be observed, as it is one of the core strengths of this technology. Additionally, when setting up software for keeping records, one should bear in mind that in the event of a tax audit, access to the software for review must be granted to the tax authority.

As far as private persons are concerned, the draft guidance lists possible evidence that may be required by the tax authorities. This includes, for example, wallet addresses, a wallet inventory as per 31/12 of each calendar year, purchase- and disposal-related data (e.g. price in €, timing, type of purchase/disposal, etc.), documentation of determination method (e.g. FiFo, average method).

The draft decree is open for comments until 29 August 2022.

New regulation on crypto fund units

As of 18 June 2022, fund units in Germany can be issued as crypto assets. The third of June 2022 saw the German Ministry of Finance (BMF) and the German Ministry of Justice (BMJ) publish the respective regulation on crypto fund units. The regulation follows the introduction of digitalised and crypto assets in Germany in June 2021.[3]

The regulation allows for fund units or share classes of fund units to be issued as "crypto fund units". Crypto fund units are defined as digitalised fund units entered into a crypto register, meaning a decentralised and most likely DLT-based register. The scope of crypto fund units is limited to funds in a contractual format *(Sondervermoegen)*, i.e. units of funds in a corporate format may not be issued as crypto fund units. This prerequisite is in line with the scope of digitalised fund units and securities, which also do not permit the issue of shares of a company or of a fund in corporate format as a digitalised asset. However, the current German government – and especially the Ministry of Finance – emphasised its willingness to extend the scope of digital and crypto securities to stocks within the next three years.

Even though the law foresees a decentralised register, a so-called register-keeping body is necessary to fulfil certain regulatory tasks. The register-keeping body is usually the fund custodian. However, the fund custodian may appoint another institution – that has the supervisory law permission to operate a crypto register – as the register-keeping body. This is a fundamental difference to other decentralised registers, where the issuer appoints the register-keeping body. Furthermore, the fund custodian may only appoint another institution as the register-keeping body if the fund custodian ensures it remains compliant with its own supervisory legal obligations. It therefore needs to be seen whether a new business of crypto fund unit registrants will develop, or whether the register-keeping will remain with the well-established custodians.

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3 See our WTS Global Infoletter #21 of June 2021.

Indonesia

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Taxation of crypto asset transactions

The development of crypto assets ("CA") unavoidably changes the landscape of the financial industry sector. In Indonesia, CA are becoming a type of commodity which is tradable in the futures market to the extent that it follows the prevailing trade laws. Furthermore, CA transactions as well as the income resulting from such transactions are regulated specifically in the Ministry of Finance Regulation No. 68/PMK.03/2022 regarding value-added tax (VAT) and income tax on crypto assets transactions ("PMK 68") that came into force on 30 March 2022.

This important recent tax development should be relevant for both individuals and corporates doing business involving CA in Indonesia.

1. Terms used in PMK 68

Crypto assets ("CA") are defined as intangible commodities in the form of digital assets, using cryptography, peer-to-peer networks and distributed ledgers, to enable the creation of new units, verify transactions and secure transactions without interference from other parties. The CA transaction involves at least 4 (four) parties, they are:

- CA seller: individual or corporation that sells and/or exchanges CA.
- CA buyer: individual or corporation that buys and/or exchanges CA.
- CA physical trader: a party that has obtained approval from the competent authority in accordance with the prevailing laws and regulations on commodity futures trading, to conduct CA transactions either on its own behalf or to facilitate the transactions for CA sellers or CA buyers.
- CA miner: individual or corporation that verifies CA transactions in order to obtain compensation in the form of CA, either individually or in a group of CA miners (mining pool).

The CA transaction is highly reliable with the use of an "electronic system" (Sarana Elektronik). Such electronic systems facilitate communication, electronically, used in CA trading, and among others include statements, declarations, demands, notifications or requests, confirmations, offerings or acceptance of offerings, which contain the agreement of the parties for the establishment or implementation of the agreement. The systems are maintained by "system operators" (Penyelenggara Perdagangan Melalui Sistern Elektronik), including CA physical traders, to accommodate CA transactions.

2. VAT

VAT is imposed on the following deliveries:

- Intangible goods in the form of CA by CA seller, covering local delivery through an electronic system operated by system operator.
- Services in the form of the provision of an electronic system used for CA trading transactions by a system operator.
- Services in the form of a CA verification service and/or management service of a CA miners group (mining pool) by CA miners.

The above-mentioned CA deliveries cover the:

- Sale-purchase of CA using fiat money,
- Exchange of CA with another CA (swap), and
- Exchange of CA with goods other than a CA or service.

For VAT valuation and collection purposes, if a transaction uses currency other than the rupiah, the value shall be converted into rupiah using exchange rates as determined by the Ministry of Finance. If the transaction value takes the form of CA, the conversion rate shall follow either (i) a value as determined by a futures market maintaining CA trading, or (ii) a value in the system owned by the system operator, which either way shall be implemented consistently.

a) VAT treatment of CA delivery (being intangible goods)
VAT on CA delivery is collected, remitted and reported by the system operator. The system operator should at least perform the following activities:

- Sale-purchase of CA using fiat money,
- Exchange of CA with other CA (swap), and
- E-wallet includes deposits, withdrawals of funds, transfer of CA to other party accounts and provision and management of CA storage.

VAT is collected by means of the so-called "final VAT" mechanism at the following rates:

- 1% of the 11% standard VAT rate multiplied by the CA transaction value, if the system operator is a CA physical trader. Thus, the effective VAT rate is 0.11%.
- 2% of the 11% standard VAT rate multiplied by the CA transaction value, if the system operator is not a CA physical trader. Thus, the effective VAT rate is 0.22%.

The determination of transaction value depends on the type of transaction:

- Sale-purchase of CA using fiat money: the amount of money paid by CA buyer, collected upon receipt of payment by the system operator.
- CA swap: the value of each CA exchanged among transacting parties, collected upon the CA swap taking place.
- Exchange of CA with other non-CA: the value of CA transferred to the other party's account, collected upon the CA transfer taking place.

b) VAT treatment of the provision of CA electronic systems
VAT on the provision of CA electronic systems is collected, remitted and reported by the system operator. The system operator should at least perform the following activities:

- Sale-purchase of CA using fiat money,
- Exchange of CA with other CA (swap), and
- E-wallet that includes deposits, withdrawals of funds, transfer of CA to other party accounts and provision and management of CA storage.

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The VAT is calculated by multiplying the 11% standard VAT rate with the tax base. The tax base is the compensation in the amount of the commission (or reward in any name and in any form), including the commission or reward received by the system operator which will be forwarded to the CA miner.

c) VAT treatment of CA mining

VAT on CA verification services and management services of a CA miners group (mining pool) is collected, remitted and reported by the CA miner. The VAT is based on the 10% final VAT rate of the standard 11% VAT rate multiplied by the monetary value of the CA received by CA miners, including CA received from the CA system (block reward), resulting in an effective VAT rate of 1.1%.

3. Income tax

Income earned by the CA seller, system operator or CA miner in relation to a CA transaction is subject to income tax.

If the transaction uses currency other than the rupiah, the transaction value shall be converted into rupiah using the exchange rate as determined by the Ministry of Finance. If the transaction value is in the form of CA, the conversion rate shall follow either (i) the value as determined by the futures market maintaining CA trading, or (ii) the value in the system owned by the system operator, which either way shall be implemented consistently.

a) CA delivery (being intangible goods)

Income earned by the CA seller covers all types of CA transactions, including transactions using fiat money, CA swaps and other CA transactions, that are conducted through an electronic system maintained by the system operator. The income is subject to final income tax (Art. 22) at the rate of 0.1% of the CA transaction value (excluding VAT and Luxury Sales Tax/LST). The income tax shall be collected, remitted and reported by the system operator. If the system operator is not a CA physical trader, the final income tax (Art. 22) is 0.2%.

The system operator is exempt from income tax collection (Art. 22) if it only provides e-wallet services, connecting CA buyer and CA seller and/or does not facilitate CA transactions. Income from CA transactions from such system operators shall be self-collected by the CA seller at the rate of 0.1% of the CA transaction value if the system operator has obtained approval to conduct the trading of futures commodities, or 0.2% without such approval. The exemption applies when the CA seller is a resident of a treaty partner and can provide a certificate of tax residency.

Income from CA transactions earned by a system operator acting on its own behalf which is carried out through an electronic system provided by another system operator is also subject to the same income tax.

The determination of the transaction value depends on the type of transaction:

- Sale-purchase of CA using fiat money: the amount of money paid by CA buyer, collected upon receipt of payment by the system operator.
- CA swap: the value of each CA exchanged among the transacting parties, collected upon the CA swap taking place.
- CA transactions other than the above: the amount of payment received by the CA seller, collected upon receipt of payment by a system operator.

b) Provision of CA electronic systems
Income earned by a system operator including the provision of CA electronic systems, fund withdrawal services, deposit services, transfers of CA among e-wallets services, provision and management of CA storage or e-wallet and/or other services in relation to other CA transactions are subject to the normal income tax rate.

c) CA mining
Income earned by CA miners, including income from CA systems in the form of block rewards, transaction verification fees and other income is subject to the final income tax (Art. 22) at the rate of 0.1% and must be self-remitted by the CA miner.

4. Conclusion
PMK 68 attempts to achieve a level playing field between market participants in "conventional" financial industry sectors and those who already utilise CA in their business/activities, by imposition of VAT and income tax. PMK 68 also expands the current tax bases which require taxpayers who are conducting CA transactions to re-evaluate their tax compliance practice. Understanding that Indonesia adopts a self-assessment system, taxpayers are required to manage their tax compliance obligations pertaining to this new tax regulation on CA transactions as part of a risk mitigation plan, particularly in connection with tax audits.

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Update on WHT reclaims – recent Supreme Court decisions

On 6 and 7 July 2022, the Italian Supreme Court ruled in multiple cases that Italian WHT levied on Italian dividends distributed to non-Italian investment funds is incompatible with EU law.

The important decisions give fresh impetus to WHT reclaims in Italy. It is thus advisable for non-Italian investment funds with Italian-sourced dividends to (re)consider further steps in connection with filing WHT reclaims in Italy.

Facts of the Supreme Court cases

The cases concern a German open-end investment fund and six US investment funds which suffered WHT on Italian dividends in the year 2003 (German fund) and in the years 2007–2010 (US funds). The standard Italian WHT rate was 27% during this time. However, all seven funds benefited from a reduced WHT rate of 15% under their Double Tax Treaty (DTT). On the other hand, Italian dividends paid to Italian investment funds were not subject to WHT. Instead, Italian investment funds were subject to a taxation of 12.5% on their net income (measured based on their annual NAV increase), which could be reduced to 5% or 0% under certain conditions.

Decisions of the Supreme Court

Regarding the German open-end investment fund, the Italian Supreme Court holds that the German investment fund is comparable to an Italian investment fund, both from a legal and a regulatory perspective. The Supreme Court highlights that the German investment fund fulfils the criterion of multiple investors, even though the German fund was fully owned by a German insurance company. This is because the insurance company in any case represents a plurality of interests.

Having established the comparability of the German fund with an Italian fund, the court holds that levying WHT on dividends in the case of a German fund was only due to the German fund not being resident in Italy and thus constituted an infringement of the free movement of capital under Art. 63 of the Treaty on the Functioning of the European Union (TFEU). The German fund has been granted a full refund of the WHT incurred.

With regard to the US investment funds, the Italian Supreme Court as a preliminary remark highlights that the Italian dividend taxation has already been scrutinised by the EU Commission, with a special remark to dividends received by investment funds. The EU Commission's assessment led to the abolition of dividend WHT for EU qualified investment funds with effect from 1 January 2021. The fact that the Italian legislator changed the dividend taxation thus strengthened the claimant's position.

Further, the Supreme Court confirms that the free movement of capital is also applicable to non-EU fund entities, and thus the Italian dividend taxation constitutes an infringement of the free movement of capital with respect to the US-domiciled investment funds, too. The US investment funds are thus granted a refund of the difference between the 12.5% statutory taxation for Italian investment funds and the DTT rate of 15% previously applied to the US investment funds.

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Context

The recent decisions of the Italian Supreme Court mark the provisional ending of a long discussion regarding the (in)compatibility with EU law of Italian WHT on dividends paid to foreign investment funds. This discussion can be divided into three periods.

- The **first** period concerns tax years until and including 2010. Italian investment funds were not subject to WHT on Italian dividends, instead they were taxed at 12.5% on – effectively – their annual NAV increase, which under certain conditions could be reduced to 5% or 0%. Non-Italian investment funds incurred 26% WHT on Italian dividends, which could be reduced to the (usual) rate for portfolio holdings of 15%, if a DTT was applicable.

- The **second** period concerns tax years from 2011 until and including 2020. Italian investment funds were fully tax exempt – thus did not incur any tax on Italian dividends – while non-Italian investment funds were subject to 20–26% WHT on Italian dividends, respectively 15% as usual under a DTT.

- The **third** period concerns tax years starting from 1 January 2021. Italian investment funds continue to be tax exempt. The tax exemption is extended to EU/EEA-resident UCITS as well as EU/EEA-resident AIFs, if comparable to an Italian investment fund. Based on national tax law, investment funds from third countries are still in any case subject to WHT on Italian dividends.

Although the recent decisions of the Italian Supreme Court and their facts only concern the first period (before 2011), the decisions are expected to strengthen the position of WHT reclaims also in the subsequent periods, especially for the second period (2011-2020).

Furthermore, the decision of the Supreme Court is in line with a decision of the **Pescara Court of First Instance dated 7 February 2022,** in which the court granted a refund of WHT incurred on Italian dividends in the years **2014 to 2016** to a Luxembourg SICAV (UCITS). The decision of the Pescara Court is interesting, because the same court had previously rejected WHT refund claims of foreign investment funds, which led to the above-mentioned decisions of the Italian Supreme Court. Moreover, it is remarkable that the decision of the Pescara Court concerns the taxation of investment funds after 2011, and thus strengthens the positions of claimants in the second period as described above.

Finally, the recent Supreme Court decisions – especially the one relating to the German investment fund – must be observed within the context of a recent tax ruling of the **Italian Revenue Agency dated 30 March 2022.**[4] In this ruling, the Italian Revenue Agency for the first time states its position on the comparability of foreign investment funds with Italian investment funds under Italian tax law applicable in the third period (from 1 January 2022), especially with regard to the criteria "autonomy" and "plurality of investors".

The tax ruling of March 2022 indicates that tax courts and tax authorities seem to have a mutual understanding of what is regarded a plurality of interest (fund investors). They seem to take a substance-over-form view: this criterion can be fulfilled by single investor funds if the single investor represents a plurality of interests.

4 See our WTS Global FS Infoletter # 25 of June 2022.

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The way forward/recommendation by WTS Global

Generally speaking, the Supreme Court decisions are very good news for investment funds (UCITS and AIFs and comparable non-EU fund vehicles) as the decisions strengthen their filing position, irrespective of whether it is an existing reclaim or a future filing of a WHT reclaim.

For EU investment funds (UCITS and AIFs) as well as non-EU investment funds (if comparable to UCITS) that incurred WHT on Italian dividends in the last 48 months, it is advisable to pick up the process now and file WHT reclaims in order to safeguard the rights to a refund against the statute of limitations.

For investment funds that filed WHT reclaims (and refreshment letters) in the past, WTS Global recommends that further steps such as court proceedings should be considered on a case-by-case basis.

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Interest on overpaid WHT for third-country investment and pension funds – Supreme Administrative Court requests CJEU ruling (case C-322/22)

Polish law on corporate income tax (CIT) has yet to address the matter of WHT exemption for investment or pension funds from third countries (non-EU and non-EEA). Still, both tax authorities and courts in Poland do give such funds the right to exemption in relation to their Polish-source passive income, provided they are able to show that they are comparable to exempt Polish investment or pension funds. Polish authorities and courts are aware of the conflict between national law and community law, as confirmed by CJEU in case C-190/12 (judgement of 10 April 2014) involving a US investment fund.

Third-country investment fund or pension funds claim refunds of overpaid tax following the CJEU case law and/or the incompatibility between national law and community law. The further issue is how to compute interest on such tax refunds. In practice, funds file their claims with delays, one reason being the need to collect plenty of evidence for procedural purposes. In addition, sometimes the claims are only granted after a judicial review process, which can be lengthy.

There is a detailed regulation in the rules of procedure in Poland concerning interest where tax overpayment arises as a result of a breach of community law confirmed by a CJEU judgement, i.e. where the tax exemption is not provided for in national law.

In such situations, Article 78(5) of the tax code confers the right to interest accruing:

› from when the tax was overpaid (withholding date) until the overpaid tax is refunded, on the condition that the taxpayer files its claim within 30 days from publication of the operative part of CJEU's judgement in the Official Journal of the European Union; or
› from when the tax was overpaid (withholding date) until the 30th day after publication of the operative part of CJEU's judgement in the Official Journal of the European Union, if the claim was filed more than 30 days after the publication.

This regulation is supposed to discourage taxpayers from delaying their overpaid tax claims and make sure that the tax refund mechanism does not turn into an investment opportunity.

In this context, the issue is the end date of the period for which the third country funds are entitled to interest.

Given that plenty of the disputes are resolved by reference to case C-190/12, where the operative part of the judgement was published on 10 June 2014, the construal problems Article 78(5) attracts can be illustrated with an example where case C-190/12 is relied upon by a third country investment fund to claim a refund of overpaid Polish tax.

On literal construal, the subject law (tax code Article 78(5)) appears to mean that:

- if the refund claim was filed on or before 10 July 2014, interest accrues from when the tax was overpaid (withholding date) until its refund;
- if the refund claim was filed after 10 July 2014, interest accrues from when the tax was overpaid (withholding date) until 10 July 2014;
- if the refund claim was filed after 10 July 2014 but the tax was withheld also after 10 July 2014, no interest accrues at all; given the passage of time, this is typically the case with disputes initiated in these times.

However, no interpretation of the regulations concerning interest on overpaid tax may circumvent the CJEU case law, such as cases C-397/98 and C-410/98 (judgement of 8 March 2001), case C-524/04 (judgement of 13 March 2007), case C-591/10 (judgement of 19 November 2012), case C-565/11 (judgement of 18 April 2013) or case C-331/13 (judgement of 15 October 2014). In light of this body of case law, if an infringement of a rule of community law is attributable to a member state, the rule is a source of rights for an entity, the infringement is sufficiently serious and there is a direct causal link between the infringement and the loss or damage, the member state is required by the principles of equivalence and effectiveness to compensate for the loss or damage that the given entity incurred by being unable to use its own money. In particular, CJEU made a point of noting in case C-524/04 that, in order to quantify the loss, the national court may enquire if the injured person has in a timely way availed themselves of all the legal remedies available to them.

During overpayment interest litigation, third-country investment or pension funds argue that they are entitled to interest accruing from when the tax was withheld all the way up to when it is refunded, relying on non-discrimination, free movement of capital, the principle of sincere cooperation and said CJEU case law.

By contrast, Polish tax authorities usually claim that interest should accrue only from when the tax was withheld until the 30th day after publication of CJEU's judgement, which currently means third-country funds are practically without the right to any interest at all.

SAC judgement of 14 January 2022

Typical overpayment interest litigation may be illustrated with a Supreme Administrative Court (SAC) case which ended with SAC's judgement of 14 January 2022 relating to a US pension fund (case no. II FSK 1968/19):

28 December 2017 saw the US pension fund file a claim for interest on overpaid tax relating to years 2012 to 2014 (with some of the tax having been remitted in 2014 after publication of CJEU's judgement in case C-190/12), seeking interest for the time from when the tax was overpaid until its refund.

On 22 June 2018, the tax authority ordered payment of interest that accrued from when the tax was withheld until 10 July 2014 and refused to pay interest for the entire time from withholding until refund.

The fund appealed seeking judicial review. On 14 January 2022, SAC dismissed the appeal on the following grounds:

- Once the fund can successfully file for a tax refund, it is no longer unable to use its financial resources (this fund filed its refund claim more than two years after the tax was withheld and two and a half years after expiry of the 30 days' time from publication of CJEU's judgement in case C-190/12). Thus, there were no legal grounds to conclude that late 2017, which is when the refund claim was filed, was the first reasonable and possible date for the filing. Given the procedural autonomy of national law, the fact that the fund delayed with its filing for so long after the deadline prevents it from being entitled to interest for the period from when the tax was overpaid until it was refunded.
- To claim the contrary would mean to agree that tax interest can be used for gain as funding received due to a fully deliberate financial calculation by the fund, rather than as compensation for economic detriment arising from a breach of the EU principle of free movement of capital.
- The following applies when withholding tax is considered overpaid due to incompatibility between national law and EU law **after publication of the operative part of CJEU's judgement** in case C-190/12:

  - It is reasonable to apply by analogy the rules governing interest on tax considered overpaid following CJEU's judgements (Article 78(5)(1) and 78(5)(2) of the tax code).
  - In such a case, after the formal statement of incompatibility between national law and community law, the fund's intention and degree of care for its own interests are the only decisive factors determining the length of time during which the fund is unable to use money paid by way of tax that was not due and owing.
  - In such cases, the incompatibility between Polish national law and Union law should be considered to have been found on the date on which the tax was withheld by the withholding agent even though it was not due and owing.
  - After publication of the CJEU judgement, the fund could no longer file its claim within the 30-day time limit, but in such a case a modification of the national procedure is allowed such that interest on overpaid tax is then payable for a time from when the tax was withheld until its actual refund, **HOWEVER, on the condition that the fund files its claim within a time of 30 days, counting not from the CJEU judgement publication date but from the tax withholding date.**

Interestingly, SAC maintained there was no basis for asking CJEU for a preliminary ruling on the question of compatibility with EU law of the contested national provisions regulating the interest on overpaid tax reclaimed by third-country pension funds.

Recent SAC request for CJEU preliminary ruling

However, two months later another panel of SAC justices did ask CJEU for a preliminary ruling on the question of compatibility with EU law of Polish national provisions regulating the right to interest on tax considered overpaid as a result of CJEU case law (on the backdrop of case C-190/12).

SAC asks CJEU to respond to the following question: whether the principles of effectiveness, sincere cooperation or equivalence, as expressed in Article 4(3) of the Treaty on the European Union, or any other relevant principles provided for in Union law, preclude a national law, such as Article 78(5)(1) and 78(5)(2) of the tax code, under which interest on overpaid tax withheld by a withholding agent in breach of Union law is not due to the taxpayer for any period following the 30th day after publication of

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CJEU's judgement confirming such breach, if the claim for a refund of the tax was filed by the taxpayer after that day and the national law applicable to withholding tax remains incompatible with EU law despite the CJEU's judgement.

The case outcome may be materially relevant for disputes initiated by third-country funds' claims for tax refunds with interest. The reasons are as follows:

- Any claims filed now are obviously filed after more than 30 days following publication of the operative part of CJEU's judgement in case C-190/12, and often a long time after the tax was withheld.
- Between 2014 and 2022, tax interest in Poland ranged between 10% and 16% p.a.

We will report the outcome of this case.

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UK consultation on sovereign immunity from direct taxation

On 4 July 2022, the UK Government released a consultation outlining an updated approach sovereign immunity from direct taxation. The aim of the consultation is to pass legislation that will provide transparency and clarity, whilst at the same time encouraging investment in UK and ensuring different investors are treated fairly.

The consultation process closed on 12 September 2022. During this period, the Government consulted with relevant stakeholders. The new regulations are expected to take effect for organisations subject to corporation tax on 1 April 2024 for income recognised in accounting periods ending on or after that date, and for sovereign natural persons on 6 April 2024.

Sovereign investments in UK real estate are currently free from tax related to rental income and gains. The proposed changes would eliminate this benefit but retain sovereign immunity on UK source interest income, capital gains tax and interest from passive investment, however, the Eurobond exemption would still apply.

The elimination of sovereign immunity would affect the ability of Sovereigns to reclaim the withholding tax (WHT) on property income distributions. This would potentially lead to the establishment of tax treaties to either reduce or eliminate the rate of WHT applied.

A further potential impact is to Foreign Government UK offices/branches, which could come into the scope of UK direct tax. Additional tax implications may also arise for investment managers and other agents.

The Investment Management Exception

The Investment Manager Exemption (IME) allows non-UK resident investors to appoint UK-based investment managers to manage certain investment transactions for them outside of the scope for UK tax. The Investment Transactions List (ITL) establishes the types of transactions that may qualify for the IME.

On 4 April 2022, the government announced its intention to expand the ITL used for the IME to include crypto assets, with the aim of providing certainty of tax treatment and to encourage new crypto asset investment management businesses to base themselves in the UK.

The main purpose of the consultation is to understand (quote[5]):

- "The types of crypto assets which should be included within the IME"
- "Whether there is a case for extending this change to other tax regimes which also use the Investment Transactions List (ITL)"

Amendments to the qualifying asset holding companies regime

On 1 April 2022, the government introduced amendments to the qualifying asset holding companies (QAHC) regime.

5 https://www.gov.uk/government/consultations/expanding-the-investment-transactions-list-for-the-investment-management-exemption-and-other-fund-tax-regimes/expanding-the-investment-transactions-list-for-the-investment-management-exemption-and-other-fund-tax-regimes

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The QAHC must satisfy the ownership criteria, which stipulates that the proportion of relevant interests in the firm held by non-category A investors cannot be greater than 30% for it to be eligible for inclusion in the regime. The most frequent way to meet the ownership requirement is if a qualifying fund has a large enough relevant interest. The rules are complicated when it comes to identifying the pertinent interests, measuring them, and applying them to the relatively common structures seen in practice.

Transfer pricing

From April 2023, new requirements for transfer pricing (TP) documentation for UK businesses have been proposed with the aim of standardising TP documentation in accordance with the Organisation for Economic Co-operation and Development (OECD) BEPS action plan.

Country-by-country reporting (CbCR) is already standard practice in the UK, however, the use of a standardised master file and local file is yet to be incorporated. Due to the differing approaches taken by UK businesses to reporting, it is unclear which TP documentation should be kept. The regulations aim to provide more clarity on the preservation of transfer pricing records. The regulations will also make reference to penalties for inaccurate record keeping.

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