WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international Financial Services industry

Dear Madam / Dear Sir,

we hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from 11 countries with a focus on the international Financial Services industry.[1]

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. WHT reclaims, VAT, digital assets, beneficial ownership, tax havens, investment funds, pension funds, securities lending, crypto fund units, OECD Pillar 2 ans recent CJEU decisions:

- Austria – ICON
- Belgium – Tiberghien
- China – WTS China
- Czech Republic – WTS Alfery
- France – FIDAL
- Germany – WTS
- Netherlands – WTS
- Poland – WTS Saja
- Portugal – VdA
- Sweden – Svalner Skatt & Transaktion
- UK – Hansuke Consulting

The editors would very much like to congratulate their good colleagues from WTS Global member VdA in Portugal for winning before the European Court of Justice their case C-545/19 *(AEVN)* dated 17 March 2022!

Thank you very much for your interest.

Frankfurt, 23 March 2022

With best regards,

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1 The editors would very much like to thank their WTS colleague **Amelie Inselmann** for her valuable support.

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Please find the complete list of all contacts at the end of the newsletter.

wts global

Hot topic

AllianzGI-Fonds AEVN: a landmark ECJ decision on the WHT suffered by foreign collective investment vehicles in Portugal

On 17 March 2022, the European Court of Justice ("ECJ") has issued a preliminary ruling on Case C-545/19 (AllianzGI-Fonds AEVN), confirming that the free movement of capital (article 63 of the TFEU) *"must be interpreted as opposing to the legislation of a Member State under which dividends distributed by resident companies to a non-resident collective investment vehicle (CIV) are subject to withholding tax, whereas dividends distributed to a resident CIV are exempt from such withholding".*

The case was filed in Portugal by AllianzGI-Fonds AEVN ("AllianzGI"), which is an open-ended regulated collective investment scheme established in Germany (Alternative Investment Fund - "AIF"). The AIF received investment income (dividends) paid by companies resident in Portugal. AllianzGI filed a full withholding tax refund claim in Portugal, on the grounds that the Portuguese withholding tax was incompatible with EU Law, taking into consideration that a Portuguese CIV (incl. UCITS and AIF) performing a similar investment in Portuguese companies would benefit from a withholding tax exemption – since Portuguese CIVs are exempt from CIT on investment income.

The claim was made on the basis that a situation where domestic legislation of a Member State provides for a withholding tax levied on the dividends paid to non-resident CIV, while giving only resident CIVs the possibility of obtaining exemption from that tax constitutes a restriction on the free movement of capital[2].

On the contrary, Portuguese Tax Authorities ("PTA") argued that Portuguese CIVs are not in a comparable position to AllianzGI, sustaining that such CIVs are subject to different tax provisions, which comprise an "autonomous taxation" on certain dividends and also a different tax – stamp duty – levied on the net asset value of the Portuguese CIV. PTA argued that Portuguese CIVs are merely subject to a different taxation mechanism, which should not be regarded as being in breach of EU Law[3]. This understanding was later on adopted in the opinion of Advocate General Kokott.

In our view, the position advocated by PTA and by AG Kokott is clearly flawed by the fact that the comparability analysis was performed on the basis of completely different types of taxes, taking into account that CIT/withholding tax would be levied on income (dividends), whereas stamp duty is levied on the net asset value of the CIV. This conceptual difference of taxation techniques was highlighted in their final pleadings submitted to the ECJ.

In this regard, the ECJ clearly states that the case at hand should be assessed in light of ECJ case Fidelity Funds, reiterating that by levying a withholding tax on dividends paid to non-resident CIVs while granting an exemption to resident CIVs, *"the national legislation at issue in the main proceedings treats the dividends paid to non-resident CIVs unfavorably"*[4] constituting a restriction on the free movement of capital – referring directly to Fidelity Funds Case (§44 and §45). Moreover, the ECJ clarifies that under the established case law, different taxing techniques could be admissible only when a *"difference in treatment relates to situations which are not objectively comparable"*[5]. Said reasoning was followed in ECJ case

2 See Case C-480/16, Fidelity Funds, §43-45.

3 In this regard, PTA claimed that the case could be ruled on the bases of Pensioenfonds Metaal en Techniek (C-252/14), §29 et seq.

4 See AllianzGI-Fonds AEVN, §38.

5 See AllianzGI-Fonds AEVN, §50, referring as well to Truck Center (C-282/07)..

Pensioenfonds Metaal en Techniek, given that the court recognizes that the difference in treatment resulted from a *"difference in the situation between those two categories of taxpayers in the light of the objective pursued by the national legislation at issue in that case and their subject-matter and their content"*[6]. In this regard, the ECJ underlines that the stamp duty levied on Portuguese CIVs is irrelevant for the comparability analysis between Portuguese and non-resident CIVs. As stressed by AllianzGI – and confirmed by PTA in the clarifications provided to the ECJ – *"stamp duty is a property tax, which cannot be equated with a corporation tax"*[7]. This is further evidenced by the fact that the stamp duty would be levied on accumulated income, but not on income immediately distributed – *"That aspect alone is sufficient to distinguish that case from that which gave rise to [Pensioenfonds Metaal en Techniek]"*, so stated the ECJ[8].

The ECJ also refuses the claim from the Portuguese Government that Portuguese CIVs are subject to an autonomous taxation on certain types of dividends. Under the Portuguese CIT Code, dividends paid to exempt entities are subject to income tax provided the shareholding is not maintained for a minimum period of 1 year. In the court's opinion, this provision has only a limited reach and is not deemed relevant for the comparability assessment which should be based on the general tax framework applicable to resident and non-resident CIVs.

Lastly, the ECJ considers an argument put forward by the Portuguese Government regarding the purpose of the Portuguese legislation to eliminate economic double taxation. This argument was challenged by AllianzGI in the national court proceedings and was rebutted again in the pleadings to the ECJ, given that the Portuguese legislation does not take into consideration (at all) the position of the investors in the CIV. AllianzGI illustrated this by referring to a situation where a Portuguese resident investor holds shares in a foreign CIV, which in turn invests in Portuguese companies. Whilst dividends paid to the foreign CIV are subject to withholding tax, upon receiving a distribution from the foreign CIV, the Portuguese investor is not entitled to claim any (indirect) tax credit for the withholding tax levied in Portugal.

The ECJ recognizes this point and establishes that, to the extent *"the criterion of distinction referred to in the national legislation at issue in the main proceedings, which relates solely to the place of residence of the CIV, does not make it possible to conclude that there is an objective difference in situations between resident and non-resident entities"*[9] and therefore resident and non-resident CIVs should be deemed comparable.

The existence of an overriding reason in the public interest

The ECJ refuses the claim from the Portuguese Government that this different treatment could be justified by the need to preserve the coherence of the Portuguese tax system. The fact that the Portuguese dividend taxation model is a "composite" one – as suggested by the Portuguese Government – has no bearing on the assessment of its conformity with EU Law.

6 See AllianzGI-Fonds AEVN, §51, referring as well to Pensioenfonds Metaal en Techniek (C-252/14).

7 See AllianzGI-Fonds AEVN, §53.

8 See AllianzGI-Fonds AEVN, §54.

9 See AllianzGI-Fonds AEVN, §73.

In this regard, the ECJ states that there needs to be evidence of a direct link between the tax advantage given (the CIT exemption applicable to resident CIVs) and the compensating of that advantage by the disadvantage of a particular tax levy[10]. However, as pointed out by the ECJ, the exemption from withholding tax applicable to resident CIVs is not conditional on redistribution of dividends received by it and on the taxation applicable to the investors in the CIV. These circumstances are, in fact, disregarded by the Portuguese regime. *"Therefore, the need to preserve the coherence of the national tax system cannot be relied on to justify the restriction on free movement of capital introduced by the Portuguese legislation", states the ECJ[11].*

The balanced allocation of taxation powers between Member States

With regards to the preservation of the balanced allocation of taxation powers between Member States, the ECJ refers to previous cases to clarify that such a justification may only be accepted where, inter alia, the rules at issue are intended to prevent behaviors capable of jeopardizing the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory. However, as ruled out in Fidelity Funds Case, the option of applying a full CIT exemption on investment income received by Portuguese CIVs while non-resident CIVs are subject to withholding tax on the same type of income cannot be justified by the need to ensure the balanced allocation of taxation powers between Member States[12].

Comments and takeaways form this decision

1. This ECJ decision has a relevant harmonizing effect on previous case-law. The position of the Portuguese Government, seconded by AG Kokott, was to rule on this case on the basis of Pensioenfonds Metaal en Techniek (C-252/14). In our view, AG Kokott's opinion was hindered by the misleading information provided by PTA and the Portuguese Government in the court pleadings, as well as in some incorrect assumptions on the national provisions (which has already been highlighted in academic publications which followed the AG Opinion, see: Stoeber, European Taxation, 2022 (Vol. 62).

   In this respect, the ECJ clearly overturns AG Kokott's opinion, reiterating that the comparability analysis may only be performed by reference to taxes similar in nature, thus rejecting the comparability between withholding tax (tax on income) and stamp duty (tax on property).

2. This decision also clarifies that the comparability analysis should be made on the basis of the general national tax framework applicable to resident and non-resident entities. A special tax on dividends that is applicable only on short-term holdings (as it was argued by PTA) *"cannot be equated with the general tax of which the national-sourced dividends received by non-resident CIVs are concerned"[13].*

3. The court underlines that the transparent nature of foreign funds is not of importance, where the relevant national provisions do not take into consideration the position of the ultimate investors. In order to claim that a difference in treatment serves the purpose of avoiding tax abuse and/or eliminating economic double taxation, it is necessary that

10 See AllianzGI-Fonds AEVN, §78.
11 See AllianzGI-Fonds AEVN, §81.
12 See AllianzGI-Fonds AEVN, §83, referring as well to Fidelity Funds (C-480/16).
13 See AllianzGI-Fonds AEVN, §56.

such purpose is effectively pursued by the applicable provisions and not only intended. In the case at hand, the ECJ refuses to consider even the potential application of a foreign tax credit at the level of the non-resident (ultimate) investor, as it is clear that this effect has no bearing in the application of the different tax provisions at stake.

4. The fact that the ECJ ruling is made on the basis of the free movement of capital allows for non-EU CIVs to also pursue the recovery of withholding taxes.

5. Moreover, the fact that the regime applicable to CIVs in Portugal grants an exemption for all investment income, allows for a similar litigation strategy for withholding tax applied on interest payments.

Please note that the recent ECJ decision opens the opportunity for WHT reclaims in Portugal for the previous 4 years, as an exception to the general period of limitation of 2 years.

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Hot topic

OECD Inclusive Framework releases Commentary on Model Rules for Pillar Two

On 14 March 2022, the OECD/G20 Inclusive Framework on BEPS released its guidance on technical issues related to the 15% global minimum tax agreed in 2021 (Pillar Two). Pillar Two is part of the two-pillar solution to address the tax challenges arising from digitalization of the economy. Pillar Two consists of the Global Anti-Base Erosion (GloBE) Rules, which aim to provide for a coordinated system to ensure that Multinational Enterprises (MNEs) with revenues above EUR 750 million pay a minimum level of at least 15% tax on the income generated in each of the jurisdictions in which they operate. The GloBE Rules were agreed by 135 jurisdictions and released by the Inclusive Framework of the OECD on 20 December 2021. Two days later, the European Union followed with a draft directive to implement the GloBe Rules within the EU. According to the latest draft EU directive, the application of GloBe Rules in the EU shall be deferred to 1 January 2024.

The commentary published by the Inclusive Framework on 14 March 2022 ("Commentary") provides technical guidance and elaborates on the application and operation of the GloBE Rules. Please find some aspects of the Commentary important for the Financial Services industry outlined below.

General: dividends and capital gains on Equity

An important aspect of the GloBE Rules is the income computation (tax assessment basis). Comparable to many national tax regimes, dividends and capital gains on equity are excluded from the tax base. However, the conditions for exclusion from the tax base under Pillar Two may be stricter than under national tax regimes: a min. 10% holding threshold applies to dividends as well as capital gains and a holding period of one year before dividend distribution must be fulfilled. Especially, the minimum threshold of 10% for capital gains may significantly increase the Pillar Two tax base compared to national tax bases.

Investment funds

Investment Funds are out of scope of GloBE Rules if the Investment Fund is the Ultimate Parent Entity (UPE). In this case, the Investment Fund's SPVs and holding vehicles will also be out of scope. Thus, retail funds will generally not be in scope of Pillar Two. Controlled investment funds (non-retail) are in scope of Pillar Two, usually treated as "Investment Entities" of the fund investors. The fund's treatment largely depends on whether or to which extent the fund is considered a Tax Transparent Entity. An entity is a Tax Transparent Entity in so far as its income, expenditure, profit or loss are treated as if they were derived or incurred directly by the owner, in both the fund's jurisdiction as well as in the investor's jurisdiction. The transparency status of an entity is generally conserved under GloBE Rules, respective income is thus allocated directly to the investor.

On the other hand, the investor of an opaque fund may opt to treat an Investment Entity that is not tax transparent as being tax transparent, thus allocating the Investment Entity's income directly to the investor. This option is conditioned by a mark-to-market (or similar) taxation of the investor's income derived from the Investment Entity at a rate of at least 15%. A potential benefit of opting for transparency is that the investor may apply the Substance-based Income Exclusion with respect to its share of the income of the Investment Entity and thus deduct management costs borne by the investor.

Where the before described conditions for opting for transparency are not met, the investor may choose to include distributions received and deemed distributions from the Investment Entity in the computation of its GloBE Income or Loss ("Taxable Distribution Method Election"). The investor's share of the Investment Entity's income is excluded from the MNE Group's GloBE Income or Loss computations so long as it is distributed to the investor within four years (tax deferral) and subject to at least 15% taxation; this mechanism shall technically reduce the exposure to Top-up Tax.

Where neither of the before described options are applied by an investor holding an opaque fund, special rules for computing the Effective Tax Rate (ETR) and Top-Up Tax apply. As income from investment funds is usually subject to low or zero taxation, the fund's ETR is computed on a stand-alone basis in order to avoid a blending with income of other Constituent Entities. However, for multiple opaque Investment Entities within the same jurisdictions the ETR is computed uniformly. Additionally, taxes suffered by the investor on income from the investment fund is allocated to the investment fund for purposes of allocating the stand-alone ETR, potentially decreasing the risk of Top-Up Tax.

Pension funds

Pension funds, comparable entities as well as group-owned service providers will generally be out of scope of the GloBE Rules as "excluded entities".

Under Pillar Two, Pension Funds are entities that are established and operated (almost) exclusively to administer or provide retirement benefits and ancillary and incidental benefits to individuals. The autonomous Pillar Two definition does not only cover regulated pension funds but also non-regulated entities held by a trust or other fiduciary arrangement in order to meet pension obligations that are secured or otherwise protected by national regulation. This includes e.g. self-administered pensions funds. Additionally, unlike the OECD Model Tax Convention, Pillar Two - in order to allow for Pension Funds to be formed in different legal arrangements - does not require a Pension Fund to be taxable as a separate person in its home jurisdiction.

The definition of Pension Funds covers not only the fund as such but is extended to so-called Pension Services Entity. Pension Services Entity can be vehicles that (almost) exclusively invest funds for the benefit of Pension Funds, i.e. SPVs of a Pension Fund. Interestingly, Pension Services Entity are also entities that are established and operated (almost) exclusively to carry out activities that are ancillary to the regulated activities of the Pension Fund and which are part of the same MNE. This includes the group-owned pension fund manager, as well as further entities that advise the fund manager (e.g. a jurisdiction specific investment advisor). Hence, the service does not have to be provided to the Pension Fund directly.

As the Pillar Two definition of Pension Funds is rather material and not strictly applying national supervisory law, single-investor funds investing pension monies may possibly also be in scope of the definition of a Pension Fund and thus out of scope of Pillar Two.

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Austria

Income attribution to foreign trusts – guidance by the Supreme Fiscal Court

In its decision of 13 January 2021 (Ro 2018/13/0003), the Austrian Supreme Administrative Court decides the question whether a US Trust is eligible for withholding tax refund on Austrian profit distributions. The court also deals with the question whether a different treatment of foreign entities and Austrian corporations according to the investment fund law is in accordance with the free movement of capital (art 63 TFEU).

The appellant was a Delaware-based "trust" made up of seven "series" (sub-funds), each of which was treated as a taxable entity under US law (hereinafter referred to as the "US trust"). The US Trust could claim distributions as a business expense under US tax law, provided at least 90% of taxable income (excluding realized appreciation) was distributed to investors, effectively reducing US federal tax to zero. Hence, foreign withholding tax (WHT) could not be credited in the US. In 2013 and 2014, the US trust received dividends from two listed Austrian stock corporations. While the tax office reduced the Austrian capital gains tax to 15% (in accordance with the DTA between the US and Austria), the appellant applied for a full refund of the WHT. This request is based on a provision in Austrian corporate tax law that allows EU and EEA resident entities a full refund when the WHT cannot be credited in the country of residence. According to a decision of the Supreme Administrative Court (11 September 2020, Ra 2020/13/006) this provision can be applied by applicants from third countries due to the free movement of capital.

The Austrian Fiscal Court (lower court) dismissed the appeal against the tax office's rejection notice because the US trust has to be qualified as a foreign investment fund within the meaning of sec. 188 investment fund law and therefore the dividends are attributable to the shareholders, even if the US trust or the "series" are considered a taxpayer in the US. Thus, according to the Fiscal Court, the US trust could not apply for a refund.

According to the Austrian Supreme Administrative Court, three steps must be taken to determine whether a foreign entity is entitled to file a WHT refund request:

- Comparability test – the first step is the assessment of whether the US trust is comparable to an Austrian corporation. If it is not comparable, the owners of the US trust would be the recipient of the respective income and hence would have to file respective WHT refund requests.
- Attribution of income – in case the US trust is comparable to an Austrian corporation, the question is whether the relevant income is attributable to the US trust or the natural persons (investors) owning the trust. In case the US trust is not comparable, and the income is also not attributable to the natural persons owning the US trust, the US trust might qualify as special purpose asset *(Zweckvermögen).*
- Applicability of special provisions of the Austrian investment funds law (sec. 188 investment fund law) – if the US trust is comparable and the income can generally be attributed to it or if the trust is a special purpose asset, it must be assessed whether sec. 188 investment fund law would apply. This would still lead to the transparency of the US trust according to sec. 186 investment fund law; hence the owners of the trust would have to file a WHT refund in Austria.

The Supreme Administrative Court has referred the case back to the Fiscal Court to perform those tests. This decision is still pending.

According to the Austrian Supreme Administrative Court, the regulation in sec .188 investment fund law has been compliant with the free movement of capital since it was amended in 2014. For 2013, it is up to the Fiscal Court to assess the compliance with the free movement of capital.

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The Belgian ELTIF: ready for launch in 2022?

ELTIF introduced mid-2021

In 2021, the regime of a European Long Term Investment Fund (hereinafter "ELTIF") was introduced in the Belgian Act of 19 April 2014 on alternative undertakings for collective investment and their managers (Belgian Act of 27 June 2021, Belgian Official Gazette 9 July 2021). Although there was some initial confusion, the ELTIF can indeed exist as a separate entity (and not only as a "label").

The ELTIF is intended to promote long-term investments in the real European economy ('Europe 2020 strategy'). The main objective is to encourage investments in the public domain in order to stimulate job creation, infrastructure development, mobility projects, but also investments in certain unlisted companies or listed SMEs.

Eligible investments therefore include (i) infrastructure projects (transport, environmental and social infrastructure, public-private partnerships); (ii) financing projects for energy transition; (iii) digital transformation projects; (iv) real estate projects (retirement homes, schools, hospitals, prisons, social housing); (v) projects to support small and medium-sized enterprises.

An ELTIF may invest in a wide range of assets, provided that they are of a long-term nature and fit into the strategy of smart, sustainable and inclusive growth, as set out in the aforementioned Europe 2020 strategy.

Reasonable to say that the ELTIF will be able to play into the hype of so-called ESG funds. Moreover, the ELTIF will also be a suitable entity to compete for tenders by the Belgian Federal Transformation Fund (managed by the FPIM) in the context of the post-COVID recovery plan.

In order to qualify as an ELTIF, the fund must be managed by an AIFM, recognized by the FSMA and set up in the form of a statutory company (a fund in contractual form is not possible). A minimum of 70% of the fund's assets must be invested in eligible investments, the fund may not practice "short selling", and there are strict requirements regarding leverage and the use of derivatives.

Institutional and professional investors can get involved, but also certain qualifying private investors. This instrument is therefore intended to promote co-financing and partnerships between the public and private sectors.

ELTIF tax regime: an upgraded DRD-SICAV?

Although the ELTIF could thus start as a separate investment entity, until recently it was not very attractive since the Belgian legislator had not considered the taxation aspects of the entity. The EU Regulation does not regulate the taxation either.

Until recently, the analysis was that, as there were no special provisions regarding the corporate tax treatment, the ELTIF, as a domestic company, was subject to the normal corporate tax regime. This means a 25% taxation at fund level of both, in principle, the income derived from shares and the income derived from debt financing. Real estate revenues would in principle also be taxed.

Only income (dividends, capital gains) derived from shares could possibly be neutralized if the ELTIF could, under certain conditions, qualify as an investment company and thus benefit from a more flexible DRD-regime ("Dividends Received Deduction"). However, e.g. the income from debt financing or real estate revenue would remain taxable at 25% corporate income tax. These taxation aspects significantly diminished the attractiveness of a Belgian ELTIF.

With the law of 21 January 2022, the Belgian government reacts to the above analysis and wishes to promote various issues, including the introduction of a high-performance tax framework with regard to the Belgian ELTIF.

The new tax framework for the ELTIF aims to:

→ make the investment entity neutral from a corporate tax perspective;
→ eliminate economic double taxation for corporate investors; and
→ waive WHT for non-resident investors.

In order to do so, the Belgian legislator provides for the explicit application to the ELTIF of the regime of article 185bis I.T.C. 1992. This implies that the ELTIF is subject to a regime which deviates from the normal corporate tax regime: for example, income derived from shares (dividends, capital gains), income derived from debt financing and income from real estate are not part of the ELTIF's taxable base. In principle, therefore, no tax is due on such income, at least at the level of the ELTIF.

For the managers of the fund, in principle, nothing changes: they are taxed on the fees received for the management in accordance with the regime applicable to them.

In order to avoid that the income from underlying investment companies would be taxed a second time when distributed to a corporate investor (once taxed on the level of the ELTIF target company and again on the level of the ELTIF investor), a deviation from the normal rules of the DRD-regime is foreseen so that income from so-called "good" shares is eligible for the DRD-regime.

This is a regime similar to that of the well-known "DRD-Sicav", but with the exception that an ELTIF is not required to provide an annual distribution of at least 90% of its net income. Considering that this lack of a mandatory distribution allows for a full accumulation of the investment income with the right to the Belgian DRD-regime, this tax treatment of the ELTIF makes it a very interesting new investment vehicle.

In addition, unlike an ordinary DRD-SICAV, the DRD-exemption can also apply to (the part of) the dividend that originates from real estate income that is taxed abroad.

However, special conditions and obligations must be met to apply / offer such a "DRD-regime" to the investor companies (e.g. a tailor-made break-down obligation is indispensable).

In order to make the fund fully attractive to EU investor companies (and because EU law obliges to do so), WHT is waived on those incomes derived from "good shares" of Belgian origin.

In principle, the Belgian ELTIF can also benefit from the wide network of double taxation treaties that Belgium has concluded, which will facilitate international investments and the entry of international investors.

Once registered with the FSMA, the fund will also be subject to the annual tax on collective investment undertakings of 0.0925% (the so-called "subscription tax"). Since an ELTIF can also create share classes, a separate share class for institutional and professional investors can be provided for, for which this subscription tax can be reduced to 0.01%.

Finally, the Belgian legislator has authorized the government to issue a specific accounting framework for the ELTIF by Royal Decree.

The tax aspects here discussed entered into force on 7 February 2022.

With the ELTIF, the Belgian legislator intends to promote long-term investments and therefore provides for a highly interesting taxation framework.

Naturally, we are prepared to assist in launching this new interesting investment fund.

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Claiming back Belgian WHT on Belgian dividends – Opportunities for foreign investment vehicles and foreign pension funds

Investment vehicles which either benefit from exemption from corporate tax or from a deviating reduced tax base

The majority of the Belgian corporate (statutory) investment vehicles subject to a regulated financial regime (either UCITS or AIF) can benefit from a reduced corporate tax base. Investment income is not included in their corporate income tax base. In the CJEU decision of 25 October 2012 (C-387/11), the CJEU considered Belgian WHT legislation to be contrary to EU-law. Even though Belgium sourced dividends paid to both Belgian and foreign investment funds might be subject to Belgian WHT, the total tax burden on these dividends received by a qualifying Belgian investment fund was virtually nil, as the qualifying Belgian investment fund was allowed to credit WHT against the limited corporate tax base of the fund, and a refund of the excess amount could be received. On the other hand, the Belgian WHT on dividends paid to a foreign investment fund formed the total and final tax burden for these foreign entities. The CJEU's decision resulted in the possibility for foreign investment funds to request a reimbursement of Belgian WHT on Belgian dividends.

Further to the CJEU decision named, Belgian legislation was amended by the Law of 30 July 2013. As from tax year 2014 (i.e. financial years ending on 31 December 2013 and further), WHT on Belgian dividends paid to Belgian investment companies qualifying for the limited tax base (article 185bis ITC) can no longer be set off against the corporate tax of the Belgian investment company. This eliminates the discrimination between Belgian and foreign investment companies. Hence, as of said tax year, WHT on Belgian dividends can no longer be reclaimed by foreign funds on that basis.

However, there still are situations in which - in our opinion - foreign EEA-based investment fund vehicles would be entitled to reclaim WHT on Belgian dividends.

If a foreign EEA-based opaque investment vehicle subject to a tax regime deviating from the general corporate income tax regime holds minimum 10% in a Belgian company, it does not qualify for exemption of Belgian WHT. The foreign EEA-based investment company will therefore suffer 30% WHT, or a lower rate if such lower rate is available on the basis of a double tax treaty (provided the foreign investment vehicle is entitled to treaty benefits). However, a Belgian Sicav or qualifying Belgian private equity fund (subject to the limited tax base of article 185bis ITC) would qualify for the WHT-exemption if it holds at least 10% of the shares of the Belgian company. Consequently, discrimination persists in such a situation, and it should be possible to claim a refund based on EU law. This has already been confirmed by the Court of appeal of Brussels in a decision of 13 March 2019.

Investment companies not benefitting from a deviating tax regime

Subject to a number of conditions (such as plurality of investments; plurality of investors and the company holds exclusively assets in view of making investments and trying to achieve profits and gains for its investors), Belgian "investment companies" which are not subject to a regulated financial regime, and are (therefore) not subject to a deviating tax regime, are entitled to apply 100% "dividends received deduction" and to 100% exemption of realized capital gains relating to shares qualifying for the "taxation requirement", without having to meet any minimum threshold with respect to the shares. Although Belgian dividend distributions collected by investment companies are subject to Belgian WHT (if the participation is below 10%), such companies do not pay any tax on Belgian dividends at the end of the day. The dividends are 100% exempt, and WHT will generally be creditable, and reimbursable if the WHT exceeds the final corporate tax liability.

Consequently, foreign companies subject to the common tax rules in their residence State, and which would qualify as an "investment company" if located in Belgium (cfr. plurality of investments and plurality of investors etc.) should in our opinion have a case to claim back the Belgian WHT. Please note that if the foreign company is compliant with the rules implementing the EU Directive 2011/61, this aspect should further substantiate the argumentation in favour of the reclaim of WHT.

Qualifying pension funds

Belgian qualifying pension funds also benefit from the same limited tax base as e.g. Belgian Sicavs (Article 185bis ITC). When the Belgian legislation was amended by the Law of 30 July 2013 further to the CJEU's decision of 25 October 2012, the limitation of setting off Belgian WHT on Belgian dividends was not inserted into the law concerning Belgian qualifying pension funds. We assume that the rationale behind this different treatment of Belgian qualifying pension funds is the fact that, subject to a number of conditions and formalities, dividend distributions by Belgian companies to foreign pension funds benefit from an exemption from WHT tax on the basis of Belgian domestic law (a limited number of Belgian double tax treaties also provide a treaty-exemption; we do not expand further this topic here). For the application of the domestic exemption from WHT, it is required that the foreign entity has an exclusive non-profit purpose to collect and hold funds destined to pay out pensions and retirement schemes. Moreover, it is also required for the domestic exemption that the foreign pension fund is exempt from income taxation in its residence State. If the shares have not been held in full ownership during at least 60 days, a rebuttable presumption applies that the transactions are abusive and therefore the exemption is not applicable.

First of all, where a foreign pension funds has collected Belgian dividends and incurred Belgian WHT because the exemption was overlooked, it should be entitled to reclaim WHT within five years, starting on January 1st of the year during which the WHT was paid to the Belgian Treasury.

In our opinion, the conditions of the exemption from WHT provided by domestic law imply that foreign (EEA-based) qualifying pension funds which do not qualify for the exemption provided by Belgian domestic law (e.g. because they are not fully exempt from income tax on the Belgian dividend distributions) are still being discriminated against. In such situations, it would be worthwhile to reclaim WHT on the basis of a similar EU-law based argumentation as the argumentation that was applied by the CJEU in the decision of 25 October 2012. Similar arguments could in our opinion be invoked if a qualifying foreign pension fund incurs Belgian WHT on interest paid out by a Belgian debtor.

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wts global

China

wts

Deemed-income IIT filing rescinded

Using a deemed-income approach in individual income tax (IIT) filings is no longer allowed for investment-holding sole proprietorship and partnership owners, effective from 1 January 2022, per Announcement 41 issued by the Chinese tax authority. Instead, a booked-income approach must be used and their equity holding status must be reported by a specific deadline.

The deemed-income approach had been used by the said individuals to file IIT based on a flat IIT rate and a deemed income, without making reference to their accounting record. The practice faced intense criticism following the outbreak of some serious tax avoidance cases lately.

Anti-tax abuse

For some years, holding investments via sole proprietorship or partnership has been so popular that their portfolio scale has grown substantially beyond expectation.

Compared to limited liability companies, sole proprietorship and partnership entities are taken as a convenient equity-holding vehicle to register or de-register, and flexible to re-allocate the controlling right among the owners. Especially for their unique tax filing method, they are often used by high-net-worth individuals to hold equity investments, sometimes in combination with a trust vehicle.

Tax equality

However, the new policy has now set out that their tax base (or taxable income) for IIT filings has to be based on the actual profit, using the standard IIT rate scheme.

It is understood that Announcement 41 aims at removing tax abuses or inconsistency in the income-deeming practice, and at resolving the issue that natural person investors were paying less tax than corporate investors.

Implications

The following table illustrates how IIT burden could vary under two different IIT filing approaches when a natural person is selling a five-million-worth equity as an example. Between the deemed-income and the booked-income approach, the IIT burden can vary from CNY 109,500 to 634,500.

Filing method	**Deemed income –** Case 1 (old)	**Booked income –** Case 2 (new)
Sale price vs. cost	5,000,000 vs. 3,000,000	5,000,000 vs. 3,000,000
Tax base	500,000 (sale price*deemed profit rate)	2,000,000 (sale price – cost)
Profit rate	10% (deemed profit rate)	67% (actual profit rate)
IIT rate	30%	35%
IIT outcome	109,500	634,500

Announcement 41 represents another measure to safeguard a fair taxation environment and to put sole proprietorship and partnership operations under the same tax governance regime. Investors holding investment via a sole proprietorship or partnership entities are advised to re-evaluate the rationality and compliance requirements.

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wts global

Czech Republic

ALFERY

New government in the Czech Republic

The parliamentary elections held in October 2021 resulted in a new government in the Czech Republic. Its main objectives include stabilization of public budgets, reduction of the state budget deficit and putting a stop to state indebtedness.

The state debt of the Czech Republic has increased from CZK 1.6 trillion to CZK 2.5 trillion over the past two years. The new government aims to end this. The first step therefore is the revision of the 2022 state budget and the reduction of the deficit proposed by the previous government.

The new government wants to stabilize public budgets using the following means, among others:

- maximizing the use of EU resources,
- adjusting the expenditure rule so that government spending cannot be increased regardless of reserves and the economic situation,
- creating a tax brake rule, i.e. setting a maximum ceiling on the tax burden, above which any further tax increase would be automatically excluded,
- enforcing the implementation of a global agreement on two-pillar taxation at the OECD level, which will ensure that multinational companies pay taxes where they actually do business and generate profits.

In its program, the new government also focuses on industry and trade. The main objective of the government is to strengthen the competitiveness of Czech industry, reduce the burden on companies and self-employed persons, support the development of nuclear and renewable energy sources with a view to climate goals and energy security. In accounting, the plan is to introduce the possibility of keeping accounting and tax records in euros and to reduce the burden of bureaucracy.

Interest rate increase due to inflation

The Czech National Bank's Bank Board has increased the basic interest rate several times in succession. The basic rate is therefore the highest since 2008, currently around 4%. By raising the basic interest rate, the Czech National Bank is trying to dampen down inflation expectations and intends to continue rate increases in 2022. According to expert estimation, the basic interest rate could climb up to 5%.

The basic interest rate increase has resulted in the strengthening of the Czech koruna, but also in more expensive loans, especially mortgage loans for new clients and for clients whose fixed interest rate term is coming to an end. The Czech koruna is now the strongest against the euro and the dollar since February 2020. In 2022, the Czech crown can be expected to strengthen even more significantly to CZK 24 to the euro.

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France

FIDAL

Finance Bill for 2022: Tax measures on gains from the sale of digital assets

The French tax regime governing crypto-assets continues to advance. This year, many proposals were put forward to amend the tax rules through the 2022 Finance Bill. They aim to make investment in crypto-assets more attractive. Most of them were rejected, but two new provisions have been introduced concerning gains from the sale of digital assets.

The first one provides for the possibility for individuals to opt for the progressive income tax scale in case of capital gains on the sale of digital assets. Today, such gains are subject to a single flat rate of 12.8% for income tax and 17.2% for social security contributions, without the possibility of an option, unlike other types of capital gains.

The second provision modifies the tax treatment of digital asset sales when people carry out such sales on a regular basis, thus conferring a professional character on their operations. Currently, such gains are taxed as industrial and commercial profits. In order to be in line with the regime for other professional operations, the draft law provides that such gains would be taxed as non-commercial profits, as is the case for mining income. The professional nature of the activity would then be characterized as soon as *"the transactions are carried out under conditions similar to those characterizing an activity carried out by a person engaging in this type of transaction on a professional basis."*

These provisions would only be applicable as of 1 January 2023, in particular to allow time for the regulatory authority to define the conditions under which the transactions will be considered as similar to professional transactions. This could, for example, concern taxpayers who benefit from preferential transaction fees in return for a commitment to trade a certain volume of digital assets per month, or who use professional tools or complex trading practices.

French 2022 Finance Act: splitting a UCI into a "side pocket" and a "mirror" fund becomes tax neutral again

Article 21 of the French 2022 Finance Act retroactively adjusts certain tax rules to re-establish the tax neutrality which, until the legal modification introduced by the PACTE Law of 22 May 2019, had benefitted shareholders and unitholders in demergers of UCIs aimed at segregating their illiquid assets.

The former scheme consisted of splitting up, then liquidating, the initial UCI and creating two new UCIs:

- a "mirror" or "replica" UCI to receive the healthy assets, which the management company could then continue to manage normally;
- a "side pocket" in the form of a specialized professional fund to isolate the illiquid assets (such assets have 3 characteristics: high transaction costs, a complexity requiring special legal or other expertise and, lastly, difficulty in finding a purchaser). Once created, this side pocket was managed in run-off mode, meaning that the management company would gradually liquidate the assets as market conditions allowed, until the pocket was completely emptied.

In exchange, holders would receive units or shares of the two new UCIs. This exchange of units or shares benefited from the tax deferral applicable to individuals or legal entities, under certain conditions.

The PACTE Law brought this illiquid asset segregation scheme into compliance with the UCITS Directive, by prohibiting UCITSs that are subject to the UCITS Directive *"from being converted into collective investment undertakings [that are not subject thereto]."*

Under the new legal scheme, the new fund resulting from the split-off receives the "healthy" assets, whilst the illiquid assets remain inside the original UCITS, which is placed into liquidation. This inversion of the procedure was extended to side-pocket AIFs.

The change introduced by the PACTE Law consequently eliminated the tax neutrality that unitholders/shareholders had enjoyed on true split-up transactions. Indeed, the absence of a split-up, and therefore of an exchange of securities, meant that they no longer benefitted from the tax deferral. The delivery of the new UCI's securities constituted an in-kind distribution of investment income or a taxable profit in the result of the fiscal year.

Now, Article 21 of the 2022 Finance Act retroactively re-establishes the tax neutrality for both individual and corporate unitholders / shareholders.

For individuals, the distribution of the mirror fund's units or shares will no longer be treated as a taxable in-kind distribution under new Article 112 8 (for Sicavs or AIFs of this form) and amended Article 137 bis I (for FCPs or AIFs of this type) of the French Tax Code (FTC).

For legal entities as well, the delivery of units or shares will not be included in their taxable income (Art. 38, 5 ter new para. 1 of the FTC).

This measure is applicable to splits carried out as from the effective date of Article 77 of the PACTE Law, i.e. 24 May 2019. UCI shareholders and unitholders who may have been taxed on a "split" carried out between 24 May 2019 and 31 December 2021 can, in our view, submit a refund claim for the personal or corporate income tax they may have paid in this respect.

For individual unitholders / shareholders, the Finance Act also provides clarifications on the tax treatment in the case of:

→ distribution of capital gains by the "mirror" UCI, and
→ sale, acquisition or dissolution of UCIs resulting from the split.

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Germany

wts

Federal Fiscal Court on economic ownership and securities lending

On 29 September 2021, the German Federal Fiscal Court (*"BFH"*) gave a ruling on the tax legal concept of economic ownership in the context of securities lending. The German tax authority in two recent decrees shows a tendency to allocated securities out on loan to the lender (not: the borrower) under its concept of economic ownership. The BFH's decision can be interpreted as limiting an over-shooting practice of tax authorities.

The case recently decided by the BFH concerned an insurer that entered into global securities lending agreements with multiple banks, according to which both parties could be the lender as well as the borrower. The court's ruling however concerns the tax treatment of securities out on loan as well as the corresponding receivable from the viewpoint of the lender.

As a general rule under a securities lending transaction, German tax law assigns an asset - and the respective income streams - to the civil law owner of the asset (i.e. to the borrower of the asset). However, in situations where a different person is able to exclude the civil law owner from exercising ownership rights over the asset for the general operating life of an asset, the tax-legal ownership of the asset and its income streams are allocated to that different person, the so-called economic owner (i.e. the lender of the asset).

In its recent decision and in line with the before described general rule and settled case law, the BFH holds that the lender usually loses the civil law ownership through a securities lending transaction and also loses (tax legal) economic ownership of the security out on loan. The court emphasizes that the allocation of economic ownership for tax legal purposes differing from civil law ownership is the exception, not the rule. The exception has to be identified on a case by case basis. In the decision at hand, the exception did not apply, i.e. the economic ownership did not remain with the lender, as the economic risk and chances of the security out on loan were transferred to the borrower. The court highlights that the borrower does not have to effectively use the risks and chances, it suffices that the borrower has the possibility to do so. Further, the short notice period of 3 or 5 bank working days for the termination of the securities lending agreement by the lender does not erode the economic opportunity and risk of the borrower. This is due to the fact that listed shares - especially in today's stock exchange trading - may face considerable price volatility at short notice.

Additionally, the court does not apply the German general anti-abuse rule (GAAR) to the securities lending transaction. German GAAR applies when the main economic background of a transaction is obtaining a tax benefit. The BFH emphasizes that generating a lending fee from a securities lending transaction is a valid economic reason for the transaction. Especially, if the two parties involved in the securities lending transaction are - as was the fact in the case at hand - institutional investors, for which it is common to enter into securities lending agreements.

Since the security out on loan in the case at hand was not allocated to the lender, the lender instead had to activate a corresponding receivable. The BFH confirmed the practice of activating the receivable with the book value (not: the market value) of the underlying security. The court also confirmed the possibility to partially write off the receivable, if the underlying security's value decreased more than 5%. The partial write-off does not have to be corrected off balance sheet for tax purposes.

The above described BFH decision is interesting especially in the context of recent administrative decrees. In July 2021, the German Ministry of Finance ("BMF") published two administrative decrees on economic ownership and securities lending transactions, one general decree and one covering specifically so called cum-cum transactions.[14] The decrees describe under which circumstances tax authorities will usually assume that the economic ownership of a security out on loan remained with the lender. One of the indicators is a weak economic position of the borrower, which – according to the BMF – is the case if the loan agreement can be terminated by the lender on short notice of 3 to 5 business days. As the notice period of 3 to 5 business days is market standard, the BMF's indicator was criticized as too narrow, as it would cover most standard lending agreements. The recent BFH decision now fuels this argument, possibly leading to an overhaul of the tax authority's view on what qualifies as a 'weak economic position' of the borrower.

The BMF's decrees also cover the application of German GAAR to securities lending transactions. In last year's decrees, the BMF gave up its previous opinion that German GAAR does not apply to securities lending, if the borrower obtained a positive pre-tax return from the transaction. The BFH's recent decision clarifies that a mere assertion of a lack of profitability of a securities lending transaction without a tax benefit is not a sufficient argument to question the transfer of the economic ownership of the securities to the borrower.

WHT on German crypto fund units

In 2021, Germany introduced the possibility to issue fund units on a DLT (e.g. blockchain) without physical certificates. The implementation in the market is now facing difficulties because the German tax authority is concerned of losing WHT on the crypto fund's output side (fund investor side). This is due to the fact that the German crypto fund units do not necessarily have to be deposited with a German custodian that can be held liable for levying WHT.

The issue at hand is only the tip of the iceberg, it is not limited to fund units on DLT but exists for all other assets in the case of which the deduction of WHT is outsourced to an agent in the current world of assets. The potentially disruptive effects of the blockchain technology within the FS sector are not limited to securities trading or the safe custody business, but concern WHT issues too.

WTS is working with market players towards an efficient solution that might include tax data relevant for levying WHT directly on the DLT.

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14 See also WTS Global FS Infoletter # 22 of 15 September 2021.

Netherlands

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Developments in the Netherlands to curb dividend stripping

The Dutch government intends to introduce measures to (better) curb dividend stripping with respect to portfolio shares. Recently, the Dutch government started an online consultation round, to provide an opportunity for interested parties to give their opinion on the possible measures to reach this goal. Nine reactions were published, among them letters from leading industry and consultancy associations as well as leading pension investors.

In the consultation, the government presented six alternatives, on which it wanted to hear the opinion of the public:

Alternative A	Legal ownership and economic ownership of shares mandatory for reduction, crediting or refund of dividend tax.
Alternative B	Introducing a holding period for the full legal and economic ownership of shares before and after record date[15] to determine who is the 'owner' of the dividend.
Alternative C	Introducing a net return / base approach for settlement or refund of dividend tax: The effect would be that dividend tax can only be credited insofar as there is corporate income tax to be paid on the dividend, after deduction of expenses. Pension funds would be exempt from this requirement.
Alternative D	Documentation obligations: To support a system where it can be proven that only one dividend note / voucher is issued for a particular dividend payment, dividend notes must be registered with the Dutch tax authorities and shareholders are required to show a dividend note when claiming a credit, refund or reduction of tax.
Alternative E	Codification record date: Make it a legal requirement – instead of a policy – that only the person who has the right to receive the dividend on record date is the person with a right to credit, refund or reduction of tax.
Alternative F	Include affiliated entities: Only full economic ownership, possibly together with affiliated persons / entities, will be legally sufficient to show that a person has economic ownership.

The measures should meet the following (pre) conditions:

- good feasibility (for the tax authorities and the market);
- attention to impact on regular stock exchange trading and consequences for citizens and companies; and
- international and European legal sustainability.

15 record date: the date where the right to a certain dividend is determined.

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Comments of the interested parties

The interested parties differ in their comments, which is of course in part due to their different backgrounds, but some similarities in opinion can be discerned from the comment letters. Clearly, alternatives A and B are not favoured, as they are seen as unworkable and / or ineffective. The same is more or less the case with respect to alternative C, which is seen as very complex, too broad, disruptive in the market, unworkable.

The commenting parties mainly found that the alternatives D, E and F will not be effective as stand-alone measures. Only in combination with other measures they might be effective, but it will depend on the combination.

Overall, not one of the six alternatives seems fit to reach the goal set by the government. Maybe there are more workable alternatives. The Dutch Association of Tax Advisors made some practical suggestions in that respect:

- await the outcome of a securities lending case that is currently pending at the Supreme Court, and which may yield a firmer grip on how dividend stripping can be challenged under current law;
- to leave the current status of the law as to what constitutes dividend stripping as it is, but only strengthen the formal position of the tax authorities to give them a better position to challenge possible dividend stripping cases;
- possibly introduce a reporting obligation, similar to DAC 6, based on 'hallmarks' that are deemed to be typical for dividend stripping transactions. This should be implemented on an EU wide basis as dividend stripping is an international problem.

It is understandable that tax authorities want to eradicate 'real' dividend stripping activities, where transactions are implemented with the sole goal of achieving a tax advantage. However, there are many instances where a transaction - that could be seen as a potential dividend stripping - is in fact based on a substantive business transaction and the tax effect is just a consequence and not the goal of the business transaction.

The current financial system and financial transactions are complex and diverse. But this has the effect that many measures to challenge dividend stripping can be disruptive and interfering with real business transactions and may damage the financial system. In our view, this means that it would be preferable that measures against dividend stripping are taken on an EU or on a global (OECD) level. The net result of anti-dividend stripping rules may be negative if they cause more damage than the loss of tax-revenue through dividend stripping is worth. Hopefully, the Dutch government will strive for an international solution that is both effective and causes minimal harm to bona-fide transactions involving portfolio shares. We will, of course, be closely monitoring the developments with respect to this issue.

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Poland

wts saja

1. Supreme Administrative Court's jurisprudence on the obligation to examine the status of the beneficial owner when paying dividends

As of 1 January 2019, Polish law requires Polish WHT agents to exercise due diligence and verify the applicability of any tax rates other than the standard rate (preferential WHT rates) or of any exemption or forbearance of tax, which may apply under special regulations or a double tax treaty. Whether or not due diligence has been exercised is to be assessed with account taken of the nature and scale of the remitting agent's business as well as any related party status within the meaning of transfer pricing regulations.

One practical effect of that obligation is that - whenever any payment is to be made which under the Polish CIT Act is subject to WHT but which may also enjoy preferential taxation under special provisions, such as a DTT - the Polish tax authorities require the Polish WHT agent to verify whether the recipient is the beneficial owner of the payment (beneficial owner test).

Such a radical approach has generated an avalanche of disputes over when exactly Polish WHT agents must carry out the beneficial owner test.

Formally, the Polish CIT Act imposes a clear duty to do so on agents who wish to apply exemptions under IR Directive. But the Polish tax authority derives this duty "impliedly" also from law that does not expressly regulate such matters.

That gives special importance to Polish case law on beneficial owner testing in the case of other kinds of payments and tax preferences than those under IR Directive, i.e. in the case of dividend payments and payments for management / professional services.

In its judgment of 27 April 2021 in case no. II FSK 240/21, the Supreme Administrative Court takes the side of Polish WHT agents in a dispute with tax authorities. The case involves the question of whether a Polish WHT agent paying a dividend is required to test the recipient for beneficial owner status. The court holds that the Polish implementation of PS Directive does not require a dividend recipient to be its beneficial owner, thus conclusively resolving that the Polish dividend tax exemption is not conditional on the recipient being the beneficial owner of the dividend. The court further rules that, in the context of income tax on dividends or other corporate profit distributions (dividend tax), it is unacceptable for the authority to exceed the limits of statutory interpretation based on linguistic approach by implying the beneficial owner status as a condition for dividend tax exemption where there is no such condition in the wording of the law that enables the exemption. The court also makes clear that the dividend recipient's beneficial owner status is expressed as a condition only for the IR Directive exemption.

In addition, the Supreme Administrative Court holds that such a requirement is not provided for anywhere in the CIT Act and that what is necessary for dividend tax exemption to apply is only that the given case meets the statutory test for such exemption and that the Polish agent verifies this with due diligence.

This judgment is a good sign for taxpayers, with the Supreme Administrative Court's stance being expressed clearly and unequivocally.

However, it remains to be seen whether the court's interpretation will be shared by other courts to develop into a consistent body of case law that will change the current stringent practice of tax authorities which want WHT agents to run the beneficial owner test on any cross-border payments.

2. The tax haven presumption for TP purposes regarding "indirect" transactions with tax havens

By way of introduction, Poland requires transfer pricing documentation to be issued also for transactions with unrelated parties who are resident (i.e. have their seat, residence or management) in territories or countries applying harmful tax competition ("tax havens" and "transactions with tax havens", as appropriate).

Direct transactions with tax havens are sales or purchases made to or from unrelated parties based in tax havens, if their value exceeds PLN 100K (ca. EUR 22K) during a tax year.

With effect of 1 January 2021, Polish law extends the documentation requirement also onto the so-called "indirect" transactions with tax havens.

Indirect transactions with tax havens are transactions which are made by your counterparty with related or unrelated parties, if their value exceeds PLN 500K (ca. EUR 110K) during a tax year and the beneficial owner is based in a tax haven. In such cases, the beneficial owner is presumed to be based in a tax haven if the counterparty makes "settlements" during the tax year with an entity based in a tax haven. The circumstances of such presumption must be established with due diligence.

The presumption may be illustrated as follows:

Ever since its entry into force, this law has been opposed by the consulting industry and businesses. The reason is that it effectively requires Polish taxpayers to fulfil administrative duties of an investigative nature, forces them to obtain trade secrets from their counterparties, and can ultimately mean that the TP documentation requirement will extend to a number of transactions with unrelated parties, whether domestic or foreign.

As the new law on "indirect" transactions with tax havens has generated much controversy among taxpayers, in March 2021, the Finance Ministry started public consultations on a proposed tax guidance document explaining how to apply the tax haven presumption. However, the first such proposed tax guidance came under fire from consultants and businesses who argued that it was "detached" from business reality.

In December 2021, the Finance Ministry published a new, more elaborate tax guidance proposal. According to that proposal:

- the term beneficial owner should be understood according to the statutory definition, i.e. as the entity entitled to amounts due under the transaction;
- the disclosure duty on indirect transactions with tax havens applies only to purchase transactions whose value exceeds PLN 500K;
- the counterparty and a tax haven resident should make a transaction of a substantial value, i.e. at least PLN 500K.

Even though the second guidance proposal makes the controversial regulations more rational in their application, it has also been criticized by taxpayers and tax advisors. In addition to urging for numerous changes to the guidance, tax advisors again recommended that the law should be repealed, temporarily suspended or at least amended.

If the second proposal is enacted without substantial changes over the published draft, taxpayers may be required to obtain beneficial owner representations from their counterparties or, in their absence, carry out a beneficial owner test. Also, where a supplier's status as a beneficial owner is not sufficiently established, the Polish taxpayer should obtain a representation that the supplier does not make purchases over PLN 500K in tax havens.

Work on the guidance was supposed to be finalized until late March 2022. So far, neither has the final guidance proposal been published nor the controversial law suspended.

Note that:

- the controversial law has formally been in effect since 1 Jan 2021, and
- the transfer pricing documentation for 2021 must be ready by the end of September 2022.

Consequently, to be ready for transfer pricing compliance, Polish taxpayers are formally required to apply the beneficial owner test to their domestic and cross-border suppliers above PLN 500K and, if in doubt about their BO status, must enquire if they engage in relevant transactions with tax havens.

Furthermore, beneficial owner testing may also become a practice pursued in purchase transactions by Polish taxpayers on the financial services market as they may strive to check the BO status of their vendors (e.g. foreign lenders, sellers of real estate or other assets) in case they should be engaged in purchases from tax haven-based entities.

We will keep you updated on these developments in our subsequent Infoletters.

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Sweden

SVALNER

Infringement procedure concerning free movement of capital and withholding tax

The European Commission has sent a reasoned opinion to the Swedish government regarding the Swedish legislation on taxation of dividends paid to public pension institutions. In the opinion, the Commission argues that the legislation infringes the free movement of capital.

Swedish public pension funds are, as state agencies, entirely exempt from tax liability. Dividends paid by a Swedish company to such fund will thus not be taxed. However, dividends paid by a Swedish company to a comparable non-resident public pension institution are subject to WHT. The tax rate is 30% but it is limited to 15% in relation to most EU/EEA countries due to double taxation treaties. Such a scheme constitutes a violation of the free movement of capital, the Commission argues.

The infringement procedure was initiated in February 2021 when the Commission sent a letter of formal notice to the Swedish government regarding the same question. The government responded in April 2021, arguing that the situation for the Swedish public pension funds is not objectively comparable to that of public pension institutions in other EU/EEA countries due to the motives behind the exemption of Swedish state agencies.

Notwithstanding the objection of the Swedish government, the Commission stands by its opinion that the legislation is in violation of EU law. In the past, Swedish Administrative Courts have had the opportunity to request preliminary rulings from the CJEU on this matter, but have not yet done so. The Courts' negligence is criticized by the Commission.

In its response, issued 2 February 2022, the Swedish government argues that the exemption of public agencies from tax liability cannot be considered to discourage non-residents from making investments in Sweden. The government also repeats its previous objection that the situations of the Swedish public pension funds and non-resident public pension institutions are not objectively comparable, considering the role of the Swedish public pension funds in the Swedish social security system. Finally, the government asserts that the exemption in any case can be justified by an overriding reason in the public interest. Thus, in the opinion of the Swedish government, the legislation does not infringe the free movement of capital.

Interchange fees in Sweden fall within the scope of VAT

According to a recent Swedish Supreme Administrative Court judgment, any amount transferred between a card issuer and a network operator for consideration qualifies as a supply of services and therefore interchange fees should no longer be considered out-of-scope for VAT purposes.

In Sweden, interchange fees have historically been considered as out-of-scope for VAT purposes. However, on 7 January 2022, the Supreme Administrative Court delivered a judgment which establishes that any amount transferred between a card issuer and a network operator for consideration qualifies as a supply of services. Following this judgment, the Swedish Tax Agency's former position, which stated that interchange fees are out-of-scope, will no longer be applied.

The judgment concerned American Express Europe (Swedish branch) in its capacity as a card issuer in Sweden. This card issuer transferred amounts corresponding to the cardholder's payments to a network operator. In accordance with the agreement between the parties, the amounts transferred from the card issuer to the network operator were reduced by the card issuer's fee ("billing credit"). The Supreme Administrative Court rules that there existed a direct link between the amounts transferred from the card issuer to the network operator and the billing credit. Hence, the card issuer supplied a service to the network operator for consideration.

The Swedish Tax Agency has clarified that the Supreme Administrative Court's ruling in the American Express judgment applies to other networks, i.e. the judgment is not limited to the business model used by American Express, which involves five parties in connection with each card transaction. Interchange fees for networks, such as VISA and MasterCard, will therefore also be in scope of VAT.

The Swedish Tax Agency has not commented on whether these transactions qualify as taxable or VAT exempt services, but has stated that such supplies will be assessed based on its general guidance on VAT for payment services. We advise Swedish businesses who receive or charge interchange fees to review their VAT treatment, for example to determine whether their interchange fees are taxable or VAT exempt and how this could affect their right to deduct input VAT.

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United Kingdom

Hansuke

HMRC launches consultation on the UK's implementation of the Pillar Two Model Rules

On 11 January, HMRC launched its consultation on the implementation of Pillar 2 Rules in the UK, this is part of the OECD's BEPS 2.0 project, which relates to the taxation of the digital economy.

The consultation verifies the UK's intention to introduce the Income Inclusion Rules (IIR) and the implementation of the Undertaxed Profits Rule (UTPR) as well as the domestic minimum tax rate from 2024. The IIR is envisaged to apply to multinational enterprises (MNEs) with a consolidated annual revenue of over €750 million, and who are headquartered within the UK.

In jurisdictions where the MNE group has entities where the effective tax rate is below 15% a top-top tax would apply under the new rule. MNE groups with a revenue over €750 million will be subject to the UTPR, but this is limited to UK entities of groups headquartered outside the UK and applies to the group's overseas profits that are not subject to a minimum level of tax.

The consultation closes on 4 April 2022 and the government expects to publish a draft legislation this summer.

HMRC issues call for evidence on ISA compliance by ISA managers

The government has published a call for evidence on proposals to enhance Individual Savings Account (ISA) compliance which they hope will help determine how the current approach can be strengthened and modernised. As HMRC tightens the rules, ISA brokers will need to be more careful as significant fines can be imposed.

HMRC releases a revised draft guidance on Uncertain Tax Treatment

HMRC have recently published a revised draft guidance on the obligation to notify them of Uncertain Tax Treatment (UTT). The revised draft guidance comes as a response to comments on the original draft published in August 2021 as well as a reduction in the number of reference triggers from three to two. The revised guidance covers a number of issues in greater detail, these include:

- International scope
- Expectations in relation to knowledge of HMRC's position
- The general exemption which applies when HMRC are aware of uncertainty
- The relevance of court decisions contrary to HMRC's published position
- The interaction between the UTT regime and other regulatory and administrative regimes.

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Review of the UK funds regime: a call for input

In February 2022, HM Treasury published a summary of responses to its January 2021 'call for input' on a review of the UK funds regime. The review is part a plan made by the U.K. Government to make the U.K. a more attractive location for asset management. Currently, the UK's asset management industry is the largest in Europe and the government is committed to taking further steps to bolster and build on this position. In the review respondents identified three priorities which forms a more definite list for the government to act on.

One area for priority is the introduction of The Long-Term Asset Fund (LTAF) as a new fund vehicle. This aims to support investor access to longer-term, less liquid assets such as venture capital, private equity, private credit, infrastructure, and real estate.

Secondly, respondents wanted the government to prioritise addressing gaps in the UK's current offering of fund structures for professional investors. These gaps could be filled by creating an internationally attractive onshore professional investor regime of unauthorised fund structures, available in the key internationally recognised legal forms.

Lastly, respondents found a review of the VAT treatment of fund management services to be a priority. Specifically, to ensure that the treatment of fund management fees is competitive, uncertainties or complexities are removed; and that the case for zero-rating management fees are considered.

Other areas respondents cited as top priorities were:

- → Reforming the REIT rules
- → Improving efficiency within the Financial Conduct Authority's (FCA's) fund authorisation process
- → Simplifying the fund tax regime
- → Clearer marketing of the UK funds regime
- → Developing future growth in financial services
- → Strengthening the double tax treaty network

Interestingly, the consultation discussed that depending on the particular jurisdiction, fund managers will need to consider the level of tax reporting they can offer to retail investors. Taking into account whether the fund sleeve elects into fund tax reporting regimes such as the UK's reporting fund regime for offshore funds will become increasingly important. As a consequence of this, managers should take special care ensuring that they will be able to cope with the additional formal tax reporting obligations and prepare for associated tax nuances accordingly.

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