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CJEU rules aspects of Dutch fiscal unity regime violate EU law

The Court of Justice of the European Union (CJEU) issued a decision in joined cases on 22 February 2018 on two issues concerning the Dutch fiscal unity regime: the interest expense deduction limitation rule and the rule governing deductions for currency losses incurred on a participation. The CJEU concluded that the rules relating to the interest expense deductions are incompatible with the freedom of establishment principle in the Treaty on the Functioning of the European Union, but that the rules relating to currency losses are compatible with EU law.

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The CJEU generally followed the opinion issued by Advocate General (AG) Campos Sanchez-Bordona on 25 October 2017, in which the AG stated that the "per element" approach set out by the CJEU in its 2014 decision in the *Groupe Steria* case should be applied to the Dutch fiscal unity regime (for prior coverage, see EU tax alert, 30 October 2017). The court agreed, concluding that the Netherlands may not favor domestic groups by permitting them to avoid the application of restrictive legislative provisions by participating in a fiscal unity, when such a fiscal unity is not permitted in cross-border situations.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-european-union-30-october-2017.pdf

Background

The fiscal unity regime allows members of a Dutch group to be treated as a single entity for corporate income tax purposes. Benefits of the fiscal unity include the ability of the group to file one corporate income tax return and that the profits and losses of group entities can be consolidated and offset. However, a fiscal unity may be formed only by Dutch-resident companies.

The first case before the CJEU concerned the application of the interest expense deduction limitation under article 10a of the Corporate Income Tax Act (CITA). In certain circumstances, Dutch law restricts deductions of interest expense to prevent base erosion, without distinguishing between domestic and cross-border situations (*e.g.* where the loan relates to a "tainted" transaction, such as a capital contribution). However, in purely domestic situations, taxpayers can avoid the application of article 10a by creating a fiscal unity with a Dutch group company, which allows the members of the group to be treated as a single entity for tax purposes. By doing so, the tainted transaction (*i.e.* the capital contribution) will be disregarded for tax purposes, thus avoiding the limitation of the interest expense deduction.

The second case involved the rules for currency losses. In the Netherlands, currency gains from participations basically are tax-exempt, while exchange rate losses are nondeductible under the participation exemption rules. In this case, currency losses were incurred on a UK participation of a Dutch parent company during a group's restructuring process. The deduction of these losses was disallowed based on the participation exemption. However, the losses could effectively have been deducted if the Dutch parent company and the UK subsidiary had been able to form a fiscal unity, which would have permitted the UK subsidiary to be treated as a permanent establishment rather than as a participation.

The similarity between the two cases is that, in principle, the domestic rules apply equally to domestic and cross-border situations. However, Dutch resident taxpayers can avoid the impact of restrictive legislative provisions by forming a fiscal unity. Since fiscal unities may be formed only between Dutch-based companies, the taxpayers in these cases argued that the combination of the interest expense deduction limitation rules and the currency loss rule on the one hand, and the fiscal unity regime on the other could infringe EU law. (It should be noted that in the similar *Groupe Steria* case, the CJEU ruled that the relevant French rules constituted an infringement of the freedom of establishment (for prior coverage, see EU tax alert, 3 September 2015.))
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-europeanunion-3-september-2015.pdf

CJEU decision

The CJEU ruled that the Dutch interest expense deduction limitation rules are incompatible with the freedom of establishment under EU law when applied to EU/European Economic Area (EEA) relationships. In a purely domestic situation, all of the interest would be deductible because no tainted transaction would be considered to exist within the fiscal unity. Cross-border arrangements do not qualify for this benefit, and the interest expense deduction remains potentially limited because fiscal unities are available only for domestic groups. The court dismissed the Dutch government's argument that the interest expense deduction limitation is an anti-abuse rule, by noting that the Netherlands disregards anti-abuse rules in fiscal unities. The CJEU's decision does not mean that a fiscal unity will be allowed in a cross-border situation, but only that the interest expense deduction limitation rules may not be applied in cross-border EU/EEA situations. The impact of each restrictive component of a fiscal unity must be assessed separately (the "per element" approach); in other words, a separate assessment must be made regarding the individual tax advantages granted under the fiscal unity regime.

The court held that the Dutch currency loss rules do not violate the freedom of establishment. The CJEU referred to its 2015 decision in a Swedish case, in which it had ruled that the deduction of currency losses could be disallowed in a

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cross-border situation. In the present case, the CJEU seemed to base its decision particularly on its finding that a direct link between the rules on currency losses and those on fiscal unities was absent.

Comments

Immediately following the release of the AG opinion on 25 October 2017, the Dutch State Secretary for Finance announced that emergency remedial legislative measures would be taken to mitigate the government budgetary impact should the CJEU agree with the recommendations of the AG. When the CJEU decision was released, the state secretary sent a letter to parliament confirming that a draft bill will be submitted in the second quarter of 2018, and once both houses of parliament approve the bill, the measures will apply retroactively as from 25 October 2017.

Rather than extending the favorable treatment under the fiscal unity regime that applies in domestic cases to comparable EU cases, the state secretary is proposing to limit the application of some benefits of the regime in domestic cases; in other words, the beneficial treatment for domestic fiscal unities would be eliminated on some points. Under the proposed measures, a fiscal unity would be deemed not to exist for purposes of the application of certain Dutch provisions in the CITA where the presence of a fiscal unity otherwise would result in domestic situations receiving more favorable treatment than comparable EU cross-border situations. The affected statutory provisions are those relating to the participation exemption, the excessive participation interest expense deduction rules, certain interest deduction limitations and loss setoff relief rules upon a change in the ultimate beneficial interest.

However, there still seems to be a possibility for taxpayers to rely on the per element approach to claim that the fiscal unity rules should be deemed not to exist for purposes of assessments for periods ending before 25 October 2017 for which the statute of limitations has not yet expired, or for purposes of the application of statutory provisions not mentioned in the state secretary's letter. This should be true for both EU/EEA situations and possible in relation to non-EU/EEA countries, although additional conditions would apply in the latter case. A tax treaty would have to exist between the Netherlands and the relevant country that contains a nondiscrimination provision. In addition, there would have to be a parent company in the treaty partner country with a Dutch resident subsidiary that is taxed more heavily than in a purely domestic setting.

The planned remedial measures are interim measures until a new group scheme can be introduced, the final parameters of which still are unclear. However, in a response to the CJEU's decision, the State Secretary for Finance indicated that the concept of consolidation on which fiscal unities currently are based likely will be abandoned in the new scheme. It can take two years before introducing a new regime.

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Belgium:
Constitutional court annuls fairness tax

On 1 March 2018, Belgium's constitutional court issued its long-awaited decision on the controversial fairness tax on certain dividend distributions. The court annulled the tax in its entirety, following the decision by the Court of Justice of the European Union (CJEU) released on 17 May 2017 (for prior coverage, see EU tax alert, 19 May 2017).
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-european-union-19-may-2017.pdf

The fairness tax, which has applied since tax year 2014, is a separate tax imposed at a rate of 5.15% on dividend distributions by companies (other than small or medium-sized enterprises) to the extent such companies offset taxable income in the year of the distribution with a current-year notional interest deduction (NID) and/or tax losses carried forward. The fairness tax is levied on both resident companies and permanent establishments (PEs) of foreign companies.

Following various challenges to the fairness tax – including that it was incompatible with the Belgian constitution, the Treaty on the Functioning of the EU (TFEU), the EU parent-subsidiary directive (PSD) and Belgium's tax treaties – the CJEU was asked to rule on the compatibility of the tax with EU law. The CJEU concluded that, while the fairness tax is

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not a prohibited withholding tax, it violates the PSD requirement to refrain from taxation on dividends received in a situation where fairness tax is due upon a redistribution of dividends. The CJEU also instructed the Belgian constitutional court to examine whether, in all instances, a foreign company with a Belgian PE is treated less favorably than a Belgian company for fairness tax purposes; if less favorable treatment exists, this would violate the freedom of establishment principle in the TFEU.

The constitutional court now has decided to annul the fairness tax:

- The court annulled the fairness tax as it applies to PEs of foreign companies because the legislation lacks the necessary clarity on how to determine, in practice, the taxable base of the fairness tax in such situations.
- In line with the CJEU decision, the constitutional court cancelled the fairness tax for resident companies that redistribute dividends, because of the incompatibility with the PSD.
- The court decided that the calculation of the taxable base for fairness tax purposes for resident companies violates the nondiscrimination principle in the Belgian constitution. The violation arises because taxpayers with the same amount of profits, distributing the same amount of dividends and offsetting an NID or tax losses to the same extent, may be subject to different amounts of fairness tax, depending on whether they apply other tax deductions or have tax-exempt write-offs, provisions or capital gains.

Since the constitutional court's decision regarding the application of the tax to resident companies renders the fairness tax ineffective, the court decided to annul the regime in its entirety.

The court stated that its decision should take effect as from tax year 2019, to take into account budgetary and administrative difficulties and potential litigation that could ensue following its decision. However, the deferred enforcement will not apply if the fairness tax was levied on a redistribution of dividends because, in such circumstances, there is a violation of the PSD; in such cases, the annulment applies retroactively from the date the fairness tax was introduced.

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Canada:
Highlights of international tax provisions in federal budget

The key themes in Canada's 2018-2019 federal budget presented by the Minister of Finance on 27 February 2018 include growing the economy and innovation. While the budget did not respond with any specific measures, the government acknowledged the significance of recent US tax reform and current negotiations regarding the North American Free Trade Agreement. Notably, the budget does not include further measures to address recommendations from the OECD's BEPS project (for prior coverage, see *World Tax Advisor*, 8 April 2016).
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160408_1.html

The highlights of the international tax proposals in the budget are as follows:

- Effective for taxation years beginning in 2020, taxpayers would be required to file form T1134, *Information return relating to controlled and not-controlled foreign affiliates*, by the date on which the tax return for the year is due, instead of within 15 months after the end of the tax year.
- A series of additions would be made to the foreign affiliate (FA) rules, effective for tax years of an FA that begin on or after 27 February 2018, including the following:
    - A rule that deems the activities carried on by an FA to be a separate business, where the income from such activities accrues to the benefit of a specific taxpayer under a "tracking arrangement." (The rule is intended to prevent taxpayers from deferring taxation of passive income earned in an FA by pooling resources in a single entity that employs more than five full-time individuals in the active conduct of its business.);

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  - Similar rules that cause an FA to be a controlled foreign affiliate of a Canadian taxpayer in situations where foreign accrual property income (FAPI) accrues to the benefit of a specific taxpayer under a tracking arrangement that makes use of separate cells or segregated accounts; and
  - The introduction of a minimum capital requirement for FAs engaged in a business, the principal purpose of which is trading or dealing in indebtedness. If this requirement is not satisfied, the rule proposes to prevent such FAs from qualifying for certain exceptions from the FAPI rules.
- The reassessment period of tax years of a taxpayer that begin on or after 27 February 2018 would be extended by three years for income arising in connection with an FA of the taxpayer.
- A "stop-the-clock" rule would extend the reassessment period of a taxpayer by the amount of time taken to contest any requirement for information issued, or a compliance order sought, by the Canada Revenue Agency. Currently, such a rule exists only in respect of requirements for foreign-based information.
- In situations where a taxpayer incurs a loss in a tax year that begins on or after 27 February 2018 as a result of a transaction with a non-arm's length nonresident, the reassessment period would be extended for an additional three years in respect of the tax year to which the loss is carried back, to permit consequential reassessments.
- A series of look-through rules would be introduced to ensure that, as of 27 February 2018, Canada's existing anti-avoidance provisions pertaining to cross-border surplus stripping transactions cannot be circumvented through the use of partnerships and trusts.
- Various legislative amendments are proposed to facilitate the sharing of information in accordance with obligations under Canada's tax treaties, tax information exchange agreements and the Convention on Mutual Administrative Assistance in Tax Matters.

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Hong Kong: Budget 2018/19 contains measures to enhance competitiveness

Hong Kong's 2018/19 budget announced by the Financial Secretary on 28 February 2018 includes proposals aimed at enhancing Hong Kong's competitive edge as a financial hub for multinational corporations and the gateway to Mainland China and Asia, fostering the development of pillar industries, encouraging growth in the innovation and technology (I&T) and research and development (R&D) sectors and taking advantage of opportunities created under the direction and strategies for China's economic development (particularly under the Belt and Road initiative) by leveraging Hong Kong's distinctive advantages.

Specific budget measures affecting companies include the following:

- Measures would be introduced to create the "Guangdong-Hong Kong-Macau Greater Bay Area," under which Hong Kong, Macau, Dongguan, Foshan, Guangzhou, Huizhou, Jiangmen, Shenzhen, Zhaoqing, Zhongshan and Zhuhai would be linked to form an integrated economic and business hub. A "discussion unit" is expected to be set up to enhance cooperation among these areas.
- A one-time rebate equal to 75% of profits tax payable (subject to a maximum of HKD 30,000) would be granted for 2017/18.
- The Financial Secretary reiterated that a 300% tax deduction would be granted for the first HKD 2 million of qualifying R&D expenditure, with the remainder subject to a 200% tax deduction, without capping the amount of the enhanced tax deduction.
- Various tax measures affecting the financial services industry would be introduced, including an extension of the tax exemption under the qualifying debt instrument scheme. The government also will explore the feasibility of new tax and regulatory regimes for the insurance industry and private equity funds to foster the growth of the financial services industry in Hong Kong, and will continue to review the tax concession arrangements applicable to the fund industry in the context of international initiatives relating to tax cooperation.

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Notably, the budget does not contain any proposals on the anticipated regional headquarters tax concession regime to encourage multinational groups to set up their regional headquarters in Hong Kong.

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Netherlands:
Examination of international tax ruling practices uncovers deficiencies

The Netherlands' State Secretary for Finance announced on 18 February 2018 that the country's advance ruling process would be tightened and made more centralized. The state secretary's announcement was made following a review of the international tax ruling practice of the Dutch tax authorities that commenced in the fall of 2017, after press reports cited instances where the Dutch tax authorities failed to comply with internal procedures when issuing tax rulings with an international component.

The advance ruling regime – a hallmark of the Dutch tax system – allows a taxpayer to reach an upfront binding agreement with the tax authorities on the application of Dutch tax law to particular transactions, structures, etc.

Results of review

According to the state secretary, 4,462 rulings with an international component were examined as to whether they were in compliance with the applicable internal procedures. For six out of the 3,101 tax rulings issued by the APA/ATR team (the specialized advance pricing agreement/advance tax ruling team), it was not possible to definitively conclude whether the correct procedures had been followed.

Some of the 1,361 tax rulings issued outside the specialized APR/ATR team violated procedural regulations. Ruling requests in 63 instances had not been relayed to the APA/ATR team, and for several tax rulings, there was no verifiable documentation substantiating that more than one tax inspector reviewed the ruling (*e.g.* because a signature by a second authorized officer was missing). The substantive accuracy of the tax rulings that violated internal procedures also was examined: five tax rulings appear to be technically incorrect. These five tax rulings will be cancelled or amended, meaning that the taxpayers may no longer necessarily rely on the rulings.

The state secretary also indicated that further substantive examination is being undertaken by an independent committee of external experts into tax rulings issued by the APA/ATR team in 2017. The results of this research will be added as an appendix to the next semi-annual report of the Dutch tax administration.

European guidelines

In addition to compliance with internal procedures, the review included an assessment of whether the Dutch tax ruling practice complies with the guidelines of the EU Code of Conduct group. Nearly all of the tax rulings issued by the APA/ATR team were in line with these recommendations, but rulings issued outside that team were less compliant. As a result, the procedures for rulings with an international component will be tightened, particularly in terms of documentation requirements. Transparency about the contents of tax rulings also will be enhanced. In 2017, the APA/ATR practice published a memorandum focusing on frequently used forms and examples of APA and ATR tax agreements. The APA/ATR team now will publish an annual report (in addition to the semi-annual report published by the Dutch tax administration in general).

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Revision of ruling practice

To ensure the quality of the Dutch tax ruling practice going forward, the state secretary plans to revise the process for issuing a ruling and the content of tax rulings. He also believes that more centralized coordination of cross-border-related rulings is required. As regards the substance of tax rulings, the state secretary wishes to reconsider the relevance of providing advance certainty to companies that make only a limited contribution to the real economy. In this context, he is considering enhancing substance requirements for companies to obtain a ruling, although he acknowledged that limiting the scope of certainty in a ruling could lead to more protracted discussions when the tax authorities are examining tax returns. The state secretary also announced that the Netherlands will not exchange rulings with countries that do not issue tax rulings.

An advisory panel of independent experts will be set up to shape the changes to the tax ruling practice, and consultations will be held. The goal is to introduce the new tax ruling practice on 1 January 2019.

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Singapore:
2018 budget presented

Singapore's Minister for Finance presented the Budget 2018 on 19 February 2018. Budget 2018 addresses questions on how to raise tax revenue to meet rising expenditures over the long term: the Goods and Services Tax (GST) would be raised from 7% to 9% sometime between 2021 and 2025, and GST on imported services would be introduced via a reverse-charge mechanism and overseas vendor registration that would be introduced from 1 January 2020 (for prior coverage, see *World Tax Advisor*, 24 February 2017); for additional coverage of the GST on imported services, see the article in this issue. Budget 2018 also builds on the trend of the government favoring targeted assistance for businesses over broad-based schemes, with proposals that particularly would affect small and medium-sized enterprises. Some significant tax proposals from the budget for businesses are described below.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170224_2.html
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_7.html

Corporate tax rate, rebate and exemptions

- The corporate income tax rate would remain at 17%, but the rebate of 20% of tax payable that applies in addition to the partial tax exemptions (described below) would be increased to 40% for Year of Assessment (YA) 2018 (income year 2017), and the rebate cap would be increased from SGD 10,000 to SGD 15,000. The rebate would be extended to YA 2019, but at a reduced rate of 20% of tax payable, capped at SGD 10,000.
- The tax exemption available under the Start-Up Tax Exemption (SUTE) scheme to companies in their first three YAs would be adjusted as from YA 2020 for all qualifying companies: a 75% exemption (reduced from 100%) would be available on the first SGD 100,000 of normal chargeable income, and a 50% exemption on the next SGD 100,000 (reduced from SGD 200,000) of normal chargeable income.
- The Partial Tax Exemption scheme available to all companies (other than those that qualify for the SUTE scheme) and bodies of persons would be adjusted from YA 2020: a 75% exemption would be available on the first SGD 10,000 of normal chargeable income (unchanged from the current rules), and a 50% exemption on the next SGD 190,000 (reduced from SGD 290,000) of normal chargeable income.
- Various measures for the financial sector were announced. In particular, the Financial Sector Incentive scheme that grants concessionary tax rates ranging between 5% and 13.5% on income from qualifying activities, which is scheduled to expire after 31 December 2018, would be extended until 31 December 2023 and the scope of trading in loans and related collaterals would be expanded.

Corporate tax deductions

- The 150% tax deduction for staff costs and consumables incurred on qualifying R&D projects carried out in Singapore would be increased to 250%. The increase would apply from YA 2019 to YA 2025.

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- The 250% tax deduction for qualifying donations made to Institutions of a Public Character and other qualifying recipients would be extended for three years, to cover donations made on or before 31 December 2021.
- The deduction for qualifying costs to register intellectual property (IP), which is scheduled to lapse after YA 2020, would be extended until YA 2025 and the deduction would be increased from 100% to 200% for the first SGD 100,000 of qualifying costs incurred for each YA from YA 2019 to YA 2025.
- The deduction for qualifying IP in-licensing costs would be increased from 100% to 200% for the first SGD 100,000 of qualifying costs incurred for each YA from YA 2019 to YA 2025.
- The deduction for internationalization scheme, which allows businesses to deduct 200% of qualifying market expansion and investment development expenses, would be enhanced. The expenditure cap for claims relating to selected activities that do not require prior approval from the relevant authorities would be increased from SGD 100,000 to SGD 150,000 per YA, for qualifying expenses incurred as from YA 2019.

Other measures

- The wage credit scheme, which supports businesses embarking on transformation efforts and encourages employers to share productivity gains with workers by co-funding wage increases, would be extended for three more years (from 2018 to 2020). The government's co-funding would be 20% in 2018 and would be reduced to 15% in 2019 and 10% in 2020.
- The buyer's stamp duty rates for the acquisition of residential properties would be revised as from 20 February 2018, and the top marginal rate would be increased from 3% to 4% for residential properties with values exceeding SGD 1 million.
- Carbon tax would be introduced as from 2019 on all facilities producing greenhouse gases exceeding the prescribed threshold. A draft carbon pricing bill has been issued that would set the tax rate at SGD 5 per tonne of emissions from 2019 to 2023, and the final bill is expected to be introduced in the first quarter of 2018.

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Singapore:
GST to be levied on imported services

In the Singapore budget presented on 19 February 2018, the government announced that as from 1 January 2020, goods and services tax (GST) will apply to business-to-business (B2B) and business-to-consumer (B2C) imported services (for prior coverage, see *World Tax Advisor*, 23 June 2017); for additional coverage of the budget, see the article in this issue).
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170623_ib.html#Singapore
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_6.html

B2B services will be taxed via a reverse-charge mechanism that will apply to partly exempt businesses and non-GST-registered businesses that receive non-business receipts. Fully taxable businesses would be allowed to opt into the reverse charge.

For B2C services, the government has announced that it will put in place an overseas vendor registration scheme for digital services providers and electronic platform operators that are not established in Singapore but that supply services to Singapore consumers.

The scheme will take effect on 1 January 2020 and will require providers and operators with more than SGD 1 million in turnover globally and more than SGD 100,000 of sales in Singapore to register for GST and to collect the tax on their sales and remit it to the Inland Revenue Authority of Singapore (IRAS) via periodic GST filings.

The IRAS has released two draft e-tax guides for public consultation: one on the requirements and processes that businesses would need to follow to fully comply with the reverse charge, and one on the overseas vendor registration proposals. Both consultations are open until 20 March 2018.

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Ukraine:
Amendments to tax code affect transfer pricing and other corporate tax rules

Changes to Ukraine's tax code that generally apply as from 1 January 2018 introduce some important changes to the country's transfer pricing rules, as well as measures that affect the corporate income tax, the unified tax (a special tax regime under which qualifying small enterprises and agricultural producers are subject to tax at a lower rate), tax administration and VAT.

Transfer pricing

Several changes are made to the transfer pricing rules, specifically, the determination of when a transaction is deemed to be a controlled transaction, the definition of related parties and tax administration for transfer pricing purposes.

Controlled transactions: The following rules now apply:

- If the volume of business transactions between a nonresident and its permanent establishment exceeds UAH 10 million in the relevant year, such transactions will be treated as controlled transactions for transfer pricing purposes. However, given that the nonresident and its permanent establishment constitute a single legal entity, there are questions regarding the applicability of this provision.
- To determine whether a taxpayer's business transactions are to be treated as controlled, the volume of the transactions must be calculated based on arm's length prices (instead of contractual prices, which previously were commonly used in practice). These changes are intended to eliminate possible abuses, such as a deliberate understatement of contractual prices, but they may give rise to disputes with the tax authorities regarding the determination of whether the transactions should be treated as controlled.
- The criteria are expanded for including countries on the list of low-tax jurisdictions (transactions with persons in such jurisdictions are treated as controlled transactions, regardless of whether such persons are related parties). The list will be based on whether preferential tax treatment is available and whether it is possible not to pay corporate income tax in such jurisdictions.
- Self-adjustments regarding controlled transactions carried out in 2015 and 2016 must be made in accordance with the regulations in effect at the time the adjustments are made. This allows the adjustment of 2015 and 2016 transactions according to the regulations that are now in effect (to the maximum/minimum market range value, rather than the median value).

Related parties: The definition of related parties for transfer pricing purposes is extended to include cases where the same individual is the ultimate beneficial owner of a legal entity or more than one legal entity, or where one person exercises the authority of a sole executive body.

Transfer pricing administration:

- The tax authorities will not request a taxpayer to file transfer pricing documentation until 1 October of the year that follows the year of the relevant controlled transaction. This aligns the request deadline with the deadline for filing a report on controlled transactions.
- Minor updates are made to the types of information on the taxpayer and related parties that must be included in the transfer pricing documentation.
- During routine audits, the tax authorities are allowed to examine non-controlled transactions to determine whether payments to nonresidents from low-tax jurisdictions, payments to nonprofits and royalty payments comply with the arm's length principle.
- The rules governing pricing agreements (APAs) are revised to provide that an APA may apply to prior periods; if a taxpayer fails to comply with the terms and conditions of an APA, the agreement will become void as from its effective date; and the terms and conditions of an APA remain unchanged if changes are made to the tax legislation.

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Corporate income tax

- The financial result before tax may not be reduced by the amount of dividends receivable from unified tax payers.
- Business relations with certain nonresidents may result in an increase in the financial results equal to 30% of the cost of goods/services purchased. Generally, such nonresidents include entities that are not subject to corporate income tax (including cases where income earned overseas is exempt from tax) and entities whose tax residence jurisdiction and jurisdiction of incorporation do not match. The precise list of organizational legal forms of such nonresidents is to be approved by the Cabinet of Ministers of Ukraine.
- The following are not deductible in calculating taxable income: (i) donations (cash or noncash) to nonprofit physical training/sports organizations, to the extent the amount/cost of goods or services exceeds 8% of the taxpayer's taxable income for the previous reporting year; and (ii) the amount of certain fringe benefits provided to an employee, unless such compensation is included in the employee's taxable income.
- Changes are made relating to provisions for the assets of banks and other financial institutions.
- The term, "syndicated financial loan," is defined, and a special provision is introduced regarding the possibility for the borrower to obtain a reduced tax rate on interest paid under the tax treaty with the lender's country of residence, even where the payment is made through the person that arranged the loan or another agent. (Beneficial ownership requirements still must be met.)
- It is clarified that payments for a transfer of the right to distribute intellectual property without the right to reproduce such intellectual property will not be treated as royalties (they will be treated as business income).
- Payers of unified tax are not required to make advance payments on the distribution of dividends.
- When distributing dividends to nonresidents, payers of the unified tax must apply withholding tax on such dividends, at the same rates applicable to payers of corporate tax.
- The deadline for filing the annual corporate income tax return for companies that prepare quarterly returns on a year-to-date basis is extended from 40 to 60 days following the end of the tax year.

Tax administration

Changes are made in the threshold criterion for major taxpayers: a taxpayer is considered a major taxpayer if its income exceeds EUR 50 million (previously, UAH 500 million) for four consecutive tax (reporting) quarters, or if its total payments of tax liability to the state budget for the same period exceed the equivalent of EUR 1 million (provided the specified amount exceeds EUR 500,000, exclusive of customs payments; previously the threshold was UAH 20 million). A major taxpayer may enter into APAs with the tax authorities.

VAT

- A temporary VAT holiday is introduced on exports of certain industrial crops.
- A VAT and excise duty holiday (until 31 December 2018) is introduced on the import and sale of certain electric vehicles (including those made in Ukraine).
- All registered pharmaceuticals, medicinal products and medical devices are subject to VAT at a reduced rate of 7%.
- The list of supplies of software that are VAT exempt is expanded to include additional copies of computer programs and their parts and components (either in physical or electronic form), updates, applications, extras/plug-ins and the rights to such extras/plug-ins. The VAT exemption applies to all transactions involving such software, except royalty payments.
- Installment payments (up to 24 months) of VAT on the import of certain categories of machinery and equipment are permitted until 1 January 2020.

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In brief

Botswana: The Minister of Finance and Development Planning presented his budget speech for 2018/19 to the National Assembly on 5 February 2018. The strategic aims for the budget are to promote growth, enhance economic diversification and create job opportunities. Although the budget does not include any specific tax proposals, the minister announced that the government will be proposing new legislation and undertaking a review of certain existing legislation during the next financial year. The government aims to obtain approval from parliament during the course of 2018 on legislation relating to tax administration, transfer pricing, the international financial services center tax regime and the financial intelligence act and regulations.

Brazil: The government published a decree on 2 March 2018 that increases the financial transactions tax (IOF) rate applicable to foreign exchange transactions on the transfer of funds from a Brazilian bank account to a foreign bank account held by a Brazilian resident (whether a legal entity or individual), from 0.38% to 1.10%. The increase, which applies as from 3 March 2018, is designed to equalize the IOF rate on these transactions with the rate that applies to the purchase of foreign currency in kind, which was increased from 0.38% to 1.10% on 3 May 2016. The IOF rate on foreign exchange transactions on the transfer of funds from Brazil to nonresidents remains unchanged at 0.38%.

Czech Republic: Proposed amendments to the Income Taxes Act would implement the EU anti-tax avoidance directives (ATAD 1 and ATAD 2) into domestic law, by revising the deductibility of interest expense, and introducing controlled foreign company rules, exit taxation rules and legislation to address hybrid mismatches. The proposals also include the introduction of a new general anti-abuse rule. Measures that would affect individuals include the abolition of the “super-gross salary” concept and the 7% solidarity tax surcharge as from 1 January 2019 and an increase in the standard personal income tax rate, with the existing 15% rate replaced by a 19% rate on income of up to CZK 1.5 million per annum, and a 24% rate on income in excess of that amount.

European Union: Advocate General (AG) Campos Sánchez-Bordona of the Court of Justice of the European Union issued an opinion on 17 January 2018, concluding that Danish legislation permitting a resident company to deduct the losses of resident permanent establishments (PEs) from its taxable income, but not the losses of nonresident PEs situated in another EU member state unless the company has opted into the international joint taxation scheme, violates EU law. The AG opined that the “Marks & Spencer exception” – under which a parent company must be able to make use of a loss that originates from a nonresident subsidiary situated in another EU member state, when the subsidiary has exhausted the possibilities for utilizing the loss in its home country – also should apply to losses of PEs that cannot be utilized in their home countries. The AG did not find the possibility of the election for international joint taxation that would allow a deduction for losses from foreign PEs to be sufficient to prevent a violation of the freedom of establishment principle in the Treaty on the Functioning of the European Union.

Kazakhstan: A new tax code that generally applies as from 1 January 2018 introduces numerous changes in the areas of corporate and individual taxation, VAT and tax administration, including amendments that affect multinational groups that are resident or operating in Kazakhstan and subsoil users. Among the relevant provisions for corporations are changes relating to the taxation of dividends and capital gains, the controlled foreign company rules, the definition and creation of permanent establishments, the concept of the beneficial owner of income for tax treaty purposes, the VAT place-of-supply rules and the statute of limitations for tax liabilities.

Netherlands: On 23 February 2018, the State Secretary for Finance sent his tax policy agenda to the House of Representatives (for prior coverage of the government’s tax policy goals for the coming years, see Netherlands tax alert, 13 October 2017). The cornerstones of the agenda – tackling tax avoidance and tax evasion – will be implemented by introducing measures to protect the tax base and enhance the transparency and integrity of the tax system. The tax base will be protected in various ways: preventing base erosion, addressing tax avoidance involving hybrid mismatches, countering abuse of the international dimension of the Dutch tax system and supporting various EU initiatives on transparency and integrity. These would include the implementation of the EU anti-tax avoidance directives (ATAD 1 and ATAD 2) into Dutch law, including the introduction of a controlled foreign company regime. In some areas, the Dutch implementation of ATAD 1 will be stricter than that required by the directive. The state secretary also intends to introduce emergency remedial measures relating to the Dutch fiscal unity regime. See the article in this issue.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-netherlands-13-october-2017.pdf
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_1.html

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OECD: On 28 February 2018, the OECD and the Brazilian tax authorities launched a joint project to examine the differences in the cross-border taxation standards adopted by Brazil from those prescribed by the OECD. The project is expected to last 15 months, and will analyze strengths and weaknesses in the Brazilian transfer pricing approach and assess the potential for Brazil to move closer to the OECD transfer pricing guidelines. A greater alignment of Brazil's tax policies with the OECD's standards is viewed as an important step for the future accession of Brazil to the organization.

South Africa: The Minister of Finance presented the 2018 budget on 21 February 2018. The most notable tax proposal is the raising of the VAT rate from 14% to 15%, the first change in 25 years. The proposed effective date of 1 April 2018 does not leave much time for vendors to amend their systems and procedures to properly implement the VAT rate increase from that date. Among other proposals, the carbon tax is expected to be implemented from 1 January 2019. The minister's budget speech also announced that amendments proposed in the 2017 budget speech to expand the tax base and address BEPS have been drafted to broaden the scope of electronic services supplied by nonresidents to residents that are subject to VAT (for prior coverage, see *World Tax Advisor*, 10 March 2017). The draft regulation would amend the definition of electronic services to include "any services supplied by means of an electronic agent, electronic communication or the internet," other than certain educational services and telecommunication services. Comments on the draft regulation are requested by 22 March 2018.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170310_1.html

Taiwan: The president signed and approved the amendments to the Income Tax Act on 7 February 2018, with the following changes among those applicable retroactively for taxable years beginning as from 1 January 2018 (for prior coverage, see *World Tax Advisor*, 26 January 2018): (i) an increase in the corporate income tax rate from 17% to 20%; (ii) a reduction of the corporate surtax from 10% to 5%; and (iii) abolition of the imputation system. The withholding tax increase on dividends from 20% to 21% already had become effective based on the revised withholding tax rates published by the Minister of Finance.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180126_ib.html#Taiwan

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BEPS corner

In each issue that provides updates on developments in the OECD BEPS initiative, the *World Tax Advisor* includes a "BEPS corner" covering these developments.

Czech Republic: In a 31 January 2018 financial bulletin, the tax authorities released a list of countries that will be automatically exchanging country-by-country (CbC) reports with the Czech Republic. In most cases, Czech companies required to comply with the CbC reporting rules already have had to notify the Czech tax authorities of the company that will be filing the CbC report for the group for reporting periods beginning on or after 1 January 2016 (the deadline was 31 October 2017 for all reporting periods ending before this date, and is the end of the fiscal year for subsequent periods). The recently published list may require taxpayers to correct their previously filed CbC reporting notifications (*e.g.* where a Czech entity has notified the tax authorities that the CbC report will be filed by an ultimate parent entity that is resident in a country that is not on the list). The relevant changes must be reported in a "notification of a change," which must be filed electronically with the Specialized Taxation Office via the electronic tax portal on a specific form.

India: The extended due date for the first year of submission of the master file is approaching. See Global Transfer Pricing Alert 2018-005, 6 March 2018.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-18-005-6-march-2018.pdf

Netherlands: The tax policy agenda sent to the House of Representatives on 23 February 2018 includes measures to prevent base erosion. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_ib.html#Neth

OECD: The OECD announced on 6 March 2018 that Anguilla has joined the inclusive framework for the global implementation of the BEPS project. Under the inclusive framework, all OECD state and non-state jurisdictions that commit to the project will participate as BEPS associates of the OECD's Committee on Fiscal Affairs. Countries joining the inclusive framework must implement four minimum standards: countering harmful tax practices, preventing treaty

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abuse, transfer pricing documentation and enhancing dispute resolution. There now are 113 jurisdictions participating in the inclusive framework.

The OECD and the Brazilian tax authorities have launched a joint project to examine the differences between Brazil's cross-border taxation standards and those prescribed by the OECD. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_ib.html#OECD

South Africa: The Minister of Finance's budget speech announced that amendments to expand the tax base and address BEPS have been drafted to broaden the scope of electronic services supplied by nonresidents to residents that are subject to VAT. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2018/Tax/WTA/180309_ib.html#SA

Global tax alerts

India
India's master file due date approaches
The master file rules released by the Central Board of Direct Taxes require companies to provide additional information not covered under BEPS action 13. The due date for the first year of submission of the master file (financial year ending 31 March 2017) has been extended to 31 March 2018.
Issue date: 6 March 2018
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-18-005-6-march-2018.pdf

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