Linklaters

International Tax Round-up.
August 2019

Below is an overview of key international tax developments across the Linklaters network.

For further information please get in touch with your usual tax contact.

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EU Developments

Commission notice on the recovery of unlawful and incompatible state aid

The European Commission has published a "*Notice on the recovery of unlawful and incompatible state aid*". The purpose of the notice is to explain the EU rules and procedures governing the recovery of state aid, and how the Commission works with member states to ensure compliance with their obligations under EU law.

The notice includes a section on the recovery of unlawful tax reliefs. Given the recent focus in this area, this may be of particular interest.

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Germany

Real Estate Transfer Tax reform

The reform of the German real estate transfer tax on share deals has been subject to a political discussion for nearly two years now. The ministers of finance of the federal states decided on the cornerstones of such a reform by the end of 2018. The German Federal Government now passed a draft bill presented by the Federal Ministry of Finance. The main amendments to the current legal situation, i.e. the lowering of the 95% thresholds for shareholdings to 90% and the extension of the current holding periods from 5 to 10 or even 15 years, were already known and expected.

The bill further provides for rules on the application of the new regime and transitional provisions. According to these, the new regime shall, in principle, apply as of 1 January 2020. However, various deviations from this principle apply due to which the new regime might also tie in with transactions prior to this date. Therefore, the contemplated reformed real estate transfer tax regime already needs to be considered in share deals prior to 1 January 2020.

Read more in our client alert.

Cum/Ex – Cologne tax court rejects action

In its decision announced in July, the Cologne tax court held that a multiple refund of withholding tax retained and paid only once shall be ruled out.

For the first time, the Cologne tax court heard the case in a so-called cum/ex proceeding. The legal dispute was based on over-the-counter share transactions in the context of a short sale. The share transactions had been concluded prior to the dividend record date with a claim to the expected dividend ("cum dividend") and proffered, as agreed, with shares without a dividend claim ("ex dividend") after the dividend record date. It was to be decided if the share buyer (short buyer) was entitled to a refund of withholding tax. This entitlement was now rejected by the tax court because in case of an over-the-counter short sale, the share buyer would not become the beneficial owner of the shares to be delivered at a later stage already through conclusion of the purchase agreement. Hence, he was not entitled to a credit of the withholding tax retained and paid with respect to the dividend. Apart from that, the multiple refund of withholding tax retained and paid only once was ruled out already for logical reasons.

The proceeding is of high relevance since it constitutes a model case proceeding for a number of comparable disputes pending before the Central Federal Tax Office (*Bundeszentralamt für Steuern*). The Senate approved an appeal to the Federal Court of Finance (*Bundesfinanzhof*).

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Italy

Tax ruling on Italian withholding tax exemption on loan interest derived by institutional investors

With tax ruling No. 76/E of 12 August 2019, the Italian tax authorities have provided clarifications as to the domestic withholding tax (WHT) exemption regime applicable to interest on medium-/long-term loans granted to Italian enterprises by certain qualifying foreign lenders, under Article 26, paragraph 5-bis, of Italian Presidential Decree No. 600 of 1973 ("Article 26, para. 5-bis").

Background

The tax ruling request has been filed by a management company having its legal seat in Guernsey ("Applicant"), that is authorized and supervised by the Guernsey financial authority, i.e. the Guernsey Financial Services Commission (GFSC), which manages UK investment funds established in the legal form of UK limited partnerships.

The Applicant has asked the Italian tax authorities to confirm whether the interest WHT exemption under Article 26, para. 5-bis applies to interest received by such UK limited partnerships (“Lenders”) in the context of a direct lending transaction whereby the Lenders have granted medium-/long-term loans to an Italian holding company (“Borrower”) incorporated to purchase a minority stake in an Italian target company and indirectly controlled by the Lenders through two intermediate Luxembourg companies.

In general terms, under Article 26, para. 5-bis interest payments may be exempt from the ordinary 26% domestic WHT to the extent the following conditions are jointly met: (a) the lending transaction is in compliance with the Italian regulatory provisions; (b) the lender qualifies as, inter alia, foreign institutional investor established in White-listed countries and subject to regulatory supervision therein; (c) the loan has a medium-/long-term maturity; (d) the borrower is an Italian enterprise.

The clarifications of the Italian tax authority

With the tax ruling No. 76/E of 12 August 2019, the Italian tax authorities have confirmed that the WHT exemption under Article 26, para. 5-bis applies to interest paid by the Borrower to the Lenders based on the following remarks.

(a) In line with other tax rulings, the Italian tax authorities have clarified that the application of the WHT exemption regime at stake is always conditional upon compliance with the Italian regulatory framework in relation to professional lending activity to the public. In particular, the Italian tax authorities point out that, according to Article 3 of the Ministerial Decree No. 53 of 2015, the lending activity in Italy is restricted and requires license/authorisation from the competent authority whenever it is performed in favour of third parties on a professional basis. However, the lending activity performed exclusively in favour of “its own group” is out of the scope of the Italian regulatory restrictions. Therefore, in the case at hand, the loans granted by the Lenders to the Borrower (which is wholly indirectly controlled by the Lenders) meet the regulatory requirement for the purposes of Article 26, para. 5-bis.

(b) The Italian tax authorities have reiterated that the notion of "foreign institutional investors" includes investors which, irrespective of their legal status and their tax treatment, have as their object the carrying on and management of investments on their own or on behalf of third parties. With respect to the supervisory requirement, in line with other tax rulings, the Italian tax authorities have clarified that such requirement can be met (i) either at the level of the foreign institutional investor, or (ii) at the level of the management company, based on and in compliance with the relevant regulatory framework applicable in the respective state of establishment. On this basis, and assuming that the Lenders may be considered as undertaking for collective investments from an Italian perspective, the Italian tax authorities have confirmed that the Lenders can benefit from the Article 26, para. 5-bis exemption considering that (i) they are established in a White-listed country (i.e. UK) and (ii) the Applicant is established in a White-listed country (i.e. Guernsey) and subject to regulatory supervision there.

(c) Through a short sentence, the Italian tax authorities have also clarified that it is not possible to adopt a “look-through” approach in order to claim the application of the Article 26, para. 5-bis exemption in cases where the ultimate beneficial owner of the Italian-sourced interest, but not the lender itself, qualifies as a qualifying institutional investor for the purposes of interest WHT exemption at hand. In particular, the Italian tax authorities have also clarified that the “look-through” approach suggested by the same tax authorities with the previous Circular Letter no. 6 of 2016 in relation to tax litigations arising from leveraged buy-out transactions with an “Italian Bank Lender of Record” (IBLOR) financing structure cannot be extended to other cases.

(d) As to the medium-/long-term maturity of the underlying loan, the Italian tax authorities have clarified that the WHT exemption regime cannot apply to loans with a mandatory maturity lower than or equal to 18 months (and one day), even if such loans then actually exceed such maturity by an extension of their original maturity. In particular, in line with the view taken by the Italian Supreme Court with the Decision No. 7651/2018, the Italian tax authorities point out that any contractual provision whereby any lender would have the possibility to withdraw unilaterally from the financing agreement and without any notice even before the 18 months’ deadline expiry do not fall within the meaning of “medium-/long-term loans”.

(e) The Italian tax authorities have clarified that the WHT exemption regime is applicable only in relation to loans granted to entities which carry out in Italy a business activity under tax law, as provided by Article 73, para. 1, letters a) and b) of the Italian Presidential Decree No. 917 of 1986. In addition, the Italian tax authorities point out that the interest WHT exemption regime also applies to loans granted to Italian holding companies whose main purpose is the management of shareholdings. In the view of the tax authorities, undertakings for collective investments acting as borrowers should not meet the condition at hand.

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Luxembourg

Publication of the draft bill of law implementing ATAD 2 into Luxembourg domestic law

The draft bill implementing EU Directive 2017/952 of 29 May 2017 amending EU Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the “ATAD 2 Directive”) into Luxembourg domestic law (the “Draft ATAD 2 Law”) was submitted to the parliament on 8 August 2019.

Extension of the scope of the anti-hybrid mismatch rules

The Draft ATAD 2 Law aims at broadening the scope of the anti-hybrid mismatch provisions introduced into Luxembourg law earlier this year so as to also include hybrid mismatches with states outside of the EU and increase the situations targeted by the rules more generally (notably introducing rules regarding permanent establishments, hybrid transfers or imported mismatches).

In essence, in situations involving associated enterprises (or permanent establishments or a structured arrangement) where a hybrid mismatch results in a double deduction or deduction without inclusion, the effects of such mismatch are neutralised either by refusing the deduction or by including the payment. While the Draft ATAD 2 Law may still be subject to change as it goes through the Luxembourg legislative process, we would like to share with you our insights on certain selected aspects of the Draft ATAD 2 Law.

Associated enterprises

The new rules introduced by the ATAD 2 Directive aim at correcting hybrid mismatches between associated enterprises (or implemented in the context of a structured arrangement). Thus, the government has decided to introduce a new stand-alone definition of associated enterprise (point (17) of the first paragraph of the restated article 168*ter* of the Luxembourg income tax law ("ITL")) applicable only to the anti-hybrid mismatch provisions to be introduced as a result of the ATAD 2 Directive, the criterion being the holding of 50% or more of the voting rights, the capital interests or the rights to a share of the profits (except for hybrid financial instruments, where the relevant threshold is lowered to 25%).

Where different persons or entities are considered as "acting together", their participation in the voting rights, capital interests or profits are aggregated for the purpose of determining whether they can be considered as associated with the entity under review. This is to ensure that full effect is given to the anti-hybrid mismatch provisions in a situation where the effective control of a vehicle is split between different persons. In this context, it was debated whether the fact that the general partner of a fund was acting on behalf of all the limited partners in such fund could trigger the "acting together" rule. The point was of particular importance to Luxembourg due to the size of its fund industry. Given that in an investment fund context, the different investors generally do not have any effective control over the investments of the fund, it is suggested that investors in a fund which hold less than 10% (directly or indirectly) of the capital interests in a fund and are entitled to less than 10% of the profits are presumed not to be acting together with other investors in the fund, unless proven otherwise. As a result of such de minimis rule, payments to a tax transparent fund (e.g., in the form of a Luxembourg limited partnership (SCS(p))) should only become non-deductible in Luxembourg, if the limited partners in the fund located in jurisdictions which consider the fund as opaque hold (i) at least 10% of the interests in the fund each (or are each entitled to at least 10% of its profits) and (ii) together more than 50% of the voting rights, capital interests or profits.

Reverse hybrid rule

Whereas the application of the current anti-hybrid mismatch provisions may lead to a non-deduction or to the taxation of an income at the level of ordinary corporate taxpayers, the new reverse hybrid rule will - from 1 January 2022 - have the effect of submitting to corporate income tax entities that would otherwise be tax transparent for Luxembourg tax purposes. For the avoidance of doubt, a reverse hybrid entity is an entity treated as tax transparent in its jurisdiction of incorporation but opaque in the jurisdiction of (certain of) its investors.

Given Luxembourg's importance as an investment fund jurisdiction and taking into account the fact that numerous fund vehicles take the form of tax transparent entities (such as the SCS(p)), the Draft ATAD 2 Law proposes to limit the scope of the new reverse hybrid rule (new article 168*quater* ITL) so as not to detrimentally affect the fund industry. In line with the ATAD 2 Directive, the Luxembourg government thus excludes collective investment vehicles from such provision and suggests interpreting the notion of CIV so as to encompass not only UCITS but also other types of investment funds, notably specialised investment funds (SIFs), UCI Part II and reserved alternative investment funds (RAIFs), but also any AIF which is widely held, holds a diversified portfolio of securities and is subject to investor protection obligations.

Also, given that the ATAD 2 Directive does not specifically require that reverse hybrid entities be subject to a tax other than the corporate income tax, it is currently not foreseen for these entities to also become subject to net wealth tax. We are further of the view that they should not be obliged to withhold tax on their distributions (for example dividend distributions).

Interplay of different anti-hybrid rules

In line with paragraphs (29) and (30) of the preamble of the ATAD 2 Directive, the anti-hybrid mismatch rules to be introduced by the Draft ATAD 2 Law will only apply provided that the hybrid mismatch is not already neutralised otherwise, for example by the application of the anti-hybrid mismatch rule already in place in article 166 (2-bis) ITL (i.e. no tax exemption on dividend income if deductibility was granted to the distributing entity).

Similarly, if the reverse hybrid rule is triggered and the relevant reverse hybrid entity becomes subject to corporate income tax in Luxembourg on all or part of its income, no other hybrid mismatch rule will apply.

Tax exempt status of an associated entity involved in a hybrid mismatch

The commentary to the Draft ATAD 2 Law expressly refers to paragraphs (16) and (18) of the preamble of the ATAD 2 Directive to exclude payments made under hybrid financial instruments or to hybrid entities from the scope of the anti-hybrid mismatch rules where the mismatch is not the consequence of the hybridity of the instrument or the entity, but merely the result of the specific tax status of the payee. The commentary in particular refers to payments made to tax exempt sovereign wealth funds or investment funds.

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Netherlands

Legislative proposal on the implementation of anti-hybrid mismatch rules (ATAD 2)

On 2 July 2019, the legislative proposal to implement the EU Anti-Tax Avoidance Directive 2 ("ATAD 2") into Dutch law was submitted to the Dutch parliament. The proposal is largely left unchanged compared to the consultation document that was made public on 29 October 2018. For the most part, the changes regard clarifications as a result of the internet consultation. Some of the most notable changes are the documentation requirement, the profit distribution between Dutch entities and their permanent establishments, the exemption for collective investment vehicles in the reverse hybrid rule and the reverse hybrid rule itself, and will be described hereunder.

General rule concerning hybrid mismatches

ATAD 2 addresses structures in which associated entities (or entities in a "structured arrangement") avoid taxes by abusing the differences in tax systems of states, so-called hybrid mismatches which result in either deduction without inclusion or double deduction. In the case of a deduction without inclusion, the deduction will be denied (this is the primary rule) or included in the tax base (the - in some situations optional - secondary rule). The Netherlands has committed itself to implement both the primary and the secondary rule in all situations covered. In the case of a double deduction, the Netherlands will deny the deduction (primary rule), but when the Netherlands is the payor state, the Netherlands will only deny the deduction if the payee state does not deny the deduction (secondary rule).

The covered hybrid mismatches include hybrid financial instruments (the transfer of or payments on financial instruments that result in a deduction without inclusion due to qualification differences of the financial instrument), hybrid entities (payments to or made by such an entity that result in deduction without inclusion or double deduction), imported mismatches (payments made on non-hybrid instruments that fund deductible payments in a hybrid mismatch situation, where none of the states involved makes a primary or secondary rule adjustment), dual resident entities (payments made by an entity that is a resident of two states, resulting in double deduction) and hybrid permanent establishments. The latter will be described in the "disregarded PE"-paragraph.

Documentation requirement

The legislative proposal introduces a documentation requirement, on the basis of which the taxpayer has to declare and substantiate in its tax returns whether the anti-hybrid mismatch rules apply to the entity. Such documentation could consist of a group structure chart, an assessment of the financial instruments and - if the anti-hybrid mismatch measures apply to the entity - a substantiated calculation of the correction applied as a result of the anti-hybrid mismatch measure.

If the Dutch tax authorities request for more information, the period that is given to hand over the information is in principle six weeks, which period may be extended in case of complex transactions. If the taxpayer does not (sufficiently) comply with the documentation requirement, while the Dutch tax authorities presume that the anti-hybrid mismatch measures apply, the burden of proof to demonstrate that the anti-hybrid mismatch rules do not apply to the transaction shifts to the taxpayer.

Disregarded PE

Due to states having a different interpretation of the term permanent establishment ("PE"), a PE mismatch may arise if in the head office jurisdiction the activities are treated as being carried on through a permanent establishment in another jurisdiction and therefore the income is exempt in the head office state, while this other jurisdiction does not treat the activities as being carried on through a PE (the "disregarded PE"), resulting in an exemption without inclusion. Based on the legislative proposal, if the Netherlands is the head office jurisdiction it shall include the disregarded PE income in its tax base (i.e. the object exemption shall not apply to this income), and if the payer is a Dutch resident taxpayer the Netherlands shall not allow deduction of the payment in case the head office jurisdiction does not include the disregarded PE income in its tax base.

Under the relevant tax treaty, the Netherlands may not be entitled to tax the income of the disregarded PE. The legislative proposal clarifies that the implementation of ATAD 2 should not affect the allocation of taxing rights under tax treaties entered into by the Netherlands. This means that where the Netherlands is the jurisdiction in which the head office of the disregarded PE is located, but where the relevant tax treaty provides for an exemption for the business profits attributable to the disregarded PE, such exemption should continue to apply. However, the Netherlands aims to amend its tax treaties for these situations through treaty (re)negotiations.

Reverse hybrid rule

A reverse hybrid entity is an entity considered transparent in its jurisdiction of incorporation or establishment and non-transparent in the residence jurisdiction(s) of its participants. Contrary to the other measures, the reverse hybrid rule does not neutralise the tax benefit, but rather solves the qualification difference, since the hybrid entity will be considered to be a resident of the jurisdiction of incorporation or establishment.

It is announced that distributions by such reverse hybrid entities will become subject to Dutch dividend withholding tax. Another change compared to the consultation document is that - in line with ATAD 2 - the legislative proposal includes an exception to the reverse hybrid rule for regulated collective investment funds, provided that certain requirements are met. This exception was erroneously not included in the consultation document.

ATAD 2 should be implemented as per 31 December 2019, applying to book years starting on or after 1 January 2020. However, the reverse hybrid rule only has to be implemented two years later (31 December 2021), and will apply to book years starting on or after 1 January 2022.

Legislative proposal on the Netherlands implementation of the Mandatory Disclosure Directive published (DAC 6)

On 12 July 2019, the Netherlands government published the formal draft legislative proposal on implementing the EU Directive on mandatory disclosure (also known as “DAC 6”), following a public consultation of a previous version of the draft legislative proposal earlier this year. DAC 6 introduces an obligation for intermediaries, extended intermediaries, and taxpayers to report certain cross-border (tax planning) arrangements to the relevant tax authority of the EU Member States. The reporting obligation will take effect as of 1 July 2020. However, all reportable arrangements of which the first step of implementation has been taken on or after 25 June 2018 but before 1 July 2020 should be reported to the relevant tax authority as well, ultimately on 31 August 2020.

The draft legislative proposal contains few changes compared to the public consultation draft and closely follows the text of DAC 6. However, compared to the earlier public consultation draft, the formal legislative proposal contains some more clarity on how the Netherlands will interpret the obligations imposed by DAC 6.

Reportable cross-border arrangements

To constitute a reportable cross-border arrangement, the arrangement should fulfil one or more of the so-called “hallmarks” listed in DAC 6. The hallmarks represent certain typical features of cross-border (tax) arrangements which, according to DAC 6, are considered to potentially indicate tax avoidance or abuse. Some of the hallmarks only apply if the 'main benefit test' is fulfilled. The main benefit test is met if the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage. According to the draft legislative proposal, the main benefit test is fulfilled if there is a (series of) arrangement(s) with an (at least partially) artificial nature that is (at least partially) aimed at obtaining a tax benefit. However, if there are business reasons for an arrangement, and the arrangement does not contain artificial elements, it can be assumed that the arrangement is not aimed at obtaining a tax benefit for the purposes of this main benefit test.

In addition, the draft legislative proposal announces that a guidance note will be published with examples of arrangements that are covered by the hallmarks and examples of arrangements that are not covered by the hallmarks to relieve intermediaries and relevant taxpayers when assessing whether an arrangement is reportable or not. It is unclear when such guidance note will be published.

Intermediaries and legal privilege

In accordance with DAC 6, the Netherlands draft legislative proposal has recognised that certain intermediaries (such as attorneys-at-law) are exempt from the obligation to report reportable cross-border arrangements if such reporting obligation infringes upon their legal privilege. However, if the intermediary invokes legal privilege, that intermediary is obliged to then immediately notify other intermediaries involved in the same cross-border arrangement or, if there are no other intermediaries, to inform the relevant taxpayer(s) of their obligation to report that arrangement in the Netherlands or in another EU Member State.

Penalties upon non-compliance

Pursuant to the draft legislative proposal, a relevant intermediary or taxpayer that, intentionally or through gross negligence, fails to report a reportable arrangement, may be subject to an administrative fine of up to EUR 830,000 or, under certain circumstances, criminal prosecution.

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Portugal

Non-habitual tax residents' regime

The list of high added-value activities applicable to taxpayers subject to the non-habitual tax residents' regime was updated through the Ordinance no. 230/2019 of 23 July 2019.

Among other features, the non-habitual tax residents' regime allows for the application of a flat personal income tax rate of 20% to income derived by non-habitual tax resident individuals from listed high added-value activities performed in Portugal.

This new ordinance has generally reduced the number of listed high added-value activities, whilst adding a few, and provided some clarification on the scope of the regime.

The ordinance will take effect from 1 January 2020, in broad terms to individuals becoming subject to the regime as from that date and under certain circumstances to those already subject to the regime as of that date.

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Sweden

New tax ruling on permanent establishments

In a ruling dated 28 June 2019, the Swedish Supreme Administrative Court (the "Court") held that a Polish company's business operations at a building site had not been ongoing for more than twelve months, which in turn meant that the company did not have a permanent establishment in Sweden under the tax treaty between Sweden and Poland and, as such, was not tax liable.

The Polish company in question had performed work on the bottom plate of an ethane tank during about one and a half months (27 August - 8 October 2014). After a break of about four months, the company performed additional work on the roof dome of the same ethane tank during about eight months (16 February - 17 October 2015). The Court held that while the work had been performed for the same principal, on the same site and on the same object (the ethane tank), the break between both periods of work could not be seen as only a temporary interruption. The company had also been asked, after the completion of the first part of the work, to provide a tender for the second part of the work before it commenced. Therefore, according to the Court, only the time during which the company had been actively working were to be taken into account when determining how long its business operations at the site had been ongoing. Since that time only amounted to an aggregate of about nine and a half months, i.e. less than the twelve months stipulated in the tax treaty between Sweden and Poland, the company was not deemed to have a permanent establishment in Sweden and was not tax liable.

EU Tax Dispute Resolution Directive transposed into domestic legislation

On 19 June 2019, the Swedish Government presented a law proposal (prop. 2018/19:143) transposing the EU Tax Dispute Resolution Directive (2017/1852) of 10 October 2017 on tax dispute resolution mechanisms in the European Union into Swedish legislation. The law is proposed to enter into force on 1 November 2019.

Protocol to treaty between Sweden and Switzerland signed

On 19 June 2019, Sweden and Switzerland signed an amending protocol to update the 1965 tax treaty between Sweden and Switzerland, as amended by the 1992 and 2011 protocols.

Legislative changes

Facilitated generation shifts in close companies

The so-called 3:12-rules have been adjusted to abolish the difference in tax treatment when transferring a close company to a close/related person compared to a transfer to a third person. In short, the adjusted rules mean the following:

> Shares in a close company shall not be considered qualified solely because a close/related person other than the shareholder's spouse has been active to a significant extent in another close company or close partnership which carries out *the same or similar business*, provided that certain conditions are fulfilled.

> Shares in a close company are qualified even when the shareholder or a close/related person, during the tax year or any of the preceding five tax years, has been active to a significant extent in a company which carries out *the same or similar business* as the company in which the shareholder indirectly owns shares.

> The exception regarding *the same or similar business* shall be disregarded when applying the adjusted rules to third parties.

The adjusted rules apply to a share, a business or a branch of a business transferred after 30 June 2019.

The adjusted rules on *the same or similar business* in an indirectly owned company will apply for the first time for tax years beginning after 31 December 2019.

Increased RUT-deductions

The so-called RUT-reduction is doubled from SEK 25,000 to SEK 50,000 per person and calendar year. The change apply from 1 July 2019 but will apply retroactively for the entire tax year 2019.

Reintroduction of tax reduction for gifts to non-profit organisations

Tax reductions for gifts to non-profit organisations are reintroduced to monetary gifts of at least SEK 2,000 during the calendar year. The recipients of a gift must be approved by the Swedish Tax Agency. Maximum reductions amount to SEK 1,500 per calendar year.

Lowered VAT on e-publications

The VAT rate for electronic publications is lowered to 6% from 25%. This means that e-publications receive the same tax rate as books, newspapers, magazines and similar. Products for use mainly in advertising or consisting of moving image or audible music are not included.

Increased road tolls for heavy vehicles

The road toll for heavy vehicles is extended to include more EURO classes. The change means that the road toll is increased for most heavy vehicles from 1 July 2019.

Due to the new legislation, the Swedish Tax Agency has developed new regulations on the withdrawal of road tolls for vehicles without information of its EURO class in the Road Traffic Register. The regulations state how the road toll shall be determined for vehicles that do not have a EURO class.

Higher environmental taxes

The reduction of energy tax and carbon dioxide tax for diesel used in industrial vehicles in the manufacturing process in industrial mining is abolished from 1 August 2019. Furthermore, the reduction of energy tax for fossil fuels used to produce heat in combined power and heating plants is abolished, while the carbon dioxide tax is increased.

Special income tax abolished for persons above the age of 65

For employees, income paid after 1 July 2019 is no longer subject to the special income tax.

For income from business activities, income shall generally be split so that income belonging to the time before 1 July 2019 is subject to the special income tax of 6.15%, and income belonging to the time after is not.

Lowered employer contributions for persons between the ages of 15 and 18

The total employer contributions for compensation to persons who at the beginning of the year have turned the age of 15 but not 18 are being lowered. For these persons, the employer contributions and the general payroll tax amount to 10.21%, which shall be paid on compensations up to SEK 25,000 per calendar month. This applies to compensation paid after 31 July 2019.

Extension of the growth-support from 12 to 24 months

One-person companies that take on their first employee will continue to be entitled to a reduction of: (i) the employer contributions; (ii) the general payroll tax; and (iii) the special income tax. Only old-age pension contributions shall be paid for a maximum of 24 consecutive calendar months. The change will apply to employments that have begun after 28 February 2018.

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United Kingdom

Publication of draft clauses for Finance Bill 2019-2020

Draft clauses to be included in the UK's Finance Bill 2019-20 were published on 11 July 2019. These are now subject to a period of technical consultation: comments are invited by 5 September 2019.

The number of clauses published this year was small, and most were pre-announced. Nevertheless, there were some that are noteworthy for large business. These include:

> The new digital services tax (DST), which is likely to be the biggest headline-grabber. In very broad terms, a new 2% tax will be imposed on the revenues of search engines, social media platforms and online marketplaces which derive value from UK users.

As already announced, the DST will come into force on 1 April 2020. However, the UK government has reiterated its commitment to disapply it once "*an appropriate international solution is in place*".

> An extension of the stamp duty and SDRT market value rule to the transfer of unlisted securities to connected companies in certain circumstances. In the UK government's words, "*the measure is narrowly targeted to only apply where contrived arrangements are used to minimise tax in circumstances where stamp duty relief is not available"*. In particular, it only applies if some or all of the consideration for the transfer consists of an issue of shares. It seems that a more general market value rule, as previously mooted, will not be pursued at this time.

Changes will also be made to ensure that most capital reduction partition demergers are only subject to a single stamp duty/SDRT charge.

> A corporate capital loss restriction that will mean that for accounting periods ending on or after 1 April 2020, companies making chargeable

gains will only be able to offset up to 50% of those gains using carried-forward losses.

> Rules to shift the responsibility for operating the off-payroll working rules from an individual's personal service company to the organisation or business that the individual is supplying their services to in certain cases. This will have the effect of extending the rules currently operational in the public sector to the private sector (where the organisation or business receiving the services is large or medium sized).

> A new option that will enable the corporation tax due on an intra-group transfer of assets to an EU or EEA group company to be deferred over a period of up to five years. This is apparently a reaction to a recent UK First-tier Tribunal decision (presumably *Gallaher v HMRC*, see UK Tax News Issue 10 (2019)). It is designed to ensure that any restriction on the right to freedom of establishment imposed by the residence requirements in the rules for intra-group transfer relief (such as in Section 171 TCGA 1992 and the loan relationships, derivative contracts and intangibles equivalents) is proportionate and so compliant with EU law.

  This measure may be short-lived: it includes an ability for the UK Treasury to withdraw the deferred payment option. This may be used if the Treasury determines that the immediate payment of corporation tax would not infringe any EU rights (for example following a final judgment to that effect by a UK court in the *Gallaher* case, or following Brexit).

> Changes to protect tax in insolvency cases by making the UK tax authority, HMRC, a secondary preferential creditor in relation to VAT and other taxes collected by way of deduction (such as PAYE, employee NICs, student loan deductions and CIS deductions).

> Some technical and procedural amendments to the GAAR.

In terms of next steps, following the consultation period, the expectation is that these measures will be included in the Finance Bill 2019-2020. This bill should be introduced into the UK Parliament after the autumn Budget (and the final content of the bill will be confirmed at that event).

Draft rules to implement the DAC 6 obligations to disclose cross-border tax planning arrangements

The UK has published draft regulations that will introduce new reporting requirements in relation to tax planning schemes with a cross-border element. The rules are required to implement recent changes made to the EU Directive on Administrative Co-operation (widely known as "DAC 6"). The draft regulations are accompanied by a consultation document.

Comments are invited by 11 October 2019, with a view to the rules being made before the end of the year. Taxpayers and intermediaries that may be within scope will need to consider their obligations carefully.

There has been a lot of concern about DAC 6, both in the UK and elsewhere in the EU. The drafting is broad and has led to various difficult points of interpretation. The UK draft regulations draw heavily on the definitions and concepts contained in DAC 6 (at their heart, both require "*intermediaries*" that are participating in "*reportable cross-border arrangements*" to disclose certain information to relevant tax authorities). However, the UK tax authority, HMRC, has added a gloss to the rules through both the implementing legislation and the approach to interpretation it has outlined in the consultation document. Overall, therefore, whilst areas of uncertainty remain and further work will be required, HMRC seems to be taking a pragmatic approach in seeking to ensure that the rules can be operated in practice.

UK challenge to CFC state aid finding

Outline details of the UK's challenge (T-363/19 *United Kingdom v Commission*) to the EU Commission's finding that the finance company exemption from its CFC rules constitutes state aid in part are now available in the Official Journal (OJEU C 263/68). The Commission decision itself was published in the Official Journal on 20 August 2019. For details of the Commission's findings, see UK Tax News Issue 13 (2019).

The UK's challenge is based on four grounds:

> First, that the Commission used the wrong reference system (and should have used the UK's corporation tax system as a whole, rather than only the CFC rules).

> Second, that the exemptions from the CFC rules for certain financing income are not derogations. Instead they are a method of identifying those arrangements that present a high risk of abuse/artificial diversion.

> Third, that the Commission made a manifest error of assessment regarding selectivity.

> Fourth, that finance company exemption has no effect on intra-EU trade.

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