Linklaters

International Tax Round-up.
September 2019

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

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EU Developments

State Aid and Taxation update: General Court rules on Fiat and Starbucks appeals

On 24 September 2019, the General Court upheld the European Commission's ruling ordering Luxembourg to recover EUR 23.1 million from Fiat and annulled the Commission's ruling ordering the Netherlands to recover EUR 25.7 million from Starbucks. The Court held that while direct taxation falls within the competence of Member States, the Commission was entitled to consider whether the rulings were consistent with the EU state aid rules. Further, the Commission was permitted to use the arm's length principle as a tool to assess whether the transfer pricing rulings granted by the Member States in question conferred a selective advantage on Fiat and Starbucks.

In Fiat, the Court upheld the Commission's assessment that the tax ruling granted Fiat a selective advantage by reducing its tax burden in comparison with the normal rules of the Luxembourg tax regime. And in Starbucks, the Court annulled the Commission's decision on the grounds that it had failed to demonstrate that the tax ruling conferred an advantage, within the meaning of state aid rules, on Starbucks. While the outcome for the Commission is mixed, the Court seems broadly supportive of the Commission's approach in its state aid investigations into tax rulings. The decisions are likely to have implications for several ongoing cases, including appeals before the Court with respect to the Commission’s recovery orders against Apple (EUR 13 billion) and Amazon (EUR 250 million).

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Germany

Reformed real estate transfer tax regime: Comments of the Federal Council

On 20 September 2019, the Federal Council submitted its comments on the government draft (see also International Tax Round-up August 2019).

In essence, the Federal Council supports the Federal Government's initiative to tighten the real estate transfer tax treatment of transfers of shares in real estate-holding companies. However, the Federal Council calls for considerable clarifications and reliefs for the taxpayer in some sections, and encourages a more practicable version of the so-called group restructuring clause.

The Federal Council specifically suggests the following amendments to the government draft:

Pursuant to Sec. 1 para. 2a of the draft real estate transfer tax act, real estate transfer tax shall in future be triggered if at least 90% of the shares in a real estate-holding partnership are directly or indirectly transferred to new shareholders within a period of ten years. If a corporation holds partnership interest in a partnership, such corporation – even if it keeps a direct or indirect partnership interest in the partnership – will still be treated as a new shareholder, if at least 90% of the shares in such corporation are transferred to new shareholders. According to the tax authorities' view, this shall also apply if the ownership structure of the corporation which holds the partnership interest had not changed for ten years. The Federal Council now suggests that the ten-year period should also apply to these cases. A change in the ownership structure of corporations directly or indirectly holding a partnership interest in real estate-holding partnerships after ten years would then no longer lead to a qualification of the corporation as a new shareholder of the partnership.

Pursuant to Sec. 1 para. 2b of the draft real estate transfer tax act, the transfer of at least 90% of the shares in a real estate-holding corporation within ten years shall trigger real estate transfer tax. This shall also apply to corporations whose shares are traded on stock exchanges. Unlike the Federal Government, the Federal Council intends to disregard the transfer of shares in listed corporations for purposes of Sec. 1 para. 2b of the draft real estate transfer tax act, provided that the listed shares represent the predominant part of the affected companies' capital. Subject to the same prerequisites, also share transfers to listed corporations with a direct or indirect partnership interest in real estate-holding partnerships shall be disregarded for purposes of Sec. 1 para. 2a of the draft real estate transfer tax act.

Further, the Federal Council requests clarification to the effect that the transfer of shares in real estate-holding corporations prior to the entry into force of Sec. 1 para. 2b of the draft real estate transfer act shall be disregarded.

In addition, the Federal Council asks to review in the course of the legislative procedure, whether the so-called group restructuring clause could be structured in a more extended and practicable manner. It is the purpose of

Sec. 6a of the Real Estate Tax Act to facilitate real estate transfer tax-neutral group restructurings. The current version, however, proved to be too prescriptive and impracticable in many cases, thus often defeating its purpose. The current legislative procedure shall be taken as an opportunity to reform this rule as well.

It remains to be seen which of the Federal Council's suggestions will actually be taken up in the course of the legislative procedure.

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Italy

Italian tax authorities provide guidelines on the Italian domestic WHT exemption applicable to distributions made by Italian REIFs to foreign undertakings for collective investments

On 26 August 2019 and 18 September 2019, the Italian Tax Authorities ("ITA") have published two answers to tax ruling requests, answer no. 345 (the "Answer 345") and answer no. 385 (the "Answer 385"), regarding the eligibility of foreign undertakings for collective investments (the "UCI") for the Italian domestic withholding tax ("WHT") exemption on income distributions made by an Italian real estate investment fund ("REIF").

Italian tax law does not provide a clear definition of UCI nor does it refer to foreign laws. The ITA stated in the past that, for WHT exemption purposes, foreign entities qualify as UCI when the relevant entity, regardless of its legal form, has the same investment purposes and substantive features as an Italian UCI.

With Answer 345, the ITA has elaborated on the requirements that allow a real estate investment trust established in Singapore to qualify as foreign UCI for the WHT exemption purposes at hand.

With Answer 385, the ITA has provided further guidance as to the composition of the control chain in case the foreign UCI invests indirectly into the Italian REIF.

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Luxembourg

Publication of the draft bill of law implementing DAC 6 into Luxembourg domestic law

The draft bill n°7465 implementing Directive 2018/822/EU of 25 May 2018 (the "DAC 6 Directive") into domestic law (the "Draft Law") was submitted to the Luxembourg parliament on 8 August 2019.

By way of background, the DAC 6 Directive goes yet another step further in the administrative cooperation in tax matters in that, starting with the exchange of information upon request, then the automatic exchange of information in tax matters, followed by the exchange of tax rulings, it is now foreseen (i) to exchange information on potentially aggressive tax planning arrangements more generally and (ii) to rely on intermediaries involved in the structuring or the implementation of the latter to get access to such information.

Whilst the Draft Law may still be subject to change as it goes through the legislative process, our client alert gives insights on certain selected aspects of the Draft DAC 6 law.

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Netherlands

Budget Day 2019

On 17 September 2019, the Dutch Ministry of Finance presented the Dutch tax plan package for 2020. The 2020 tax plan – *inter alia* – includes legislative proposals on changes to the corporate income tax and real estate transfer tax rate, a thin-capitalisation rule for banks and insurers, and a withholding tax on interest and royalties. In addition, the current substance requirements to qualify for the (dividend) withholding tax exemption, will no longer function as "safe harbour". Furthermore, it is proposed to amend the domestic definition of permanent establishment in order to prevent cases of double non-taxation.

Tax rate changes in the Dutch corporate income tax act and real estate transfer tax act

> The corporate income tax rate for profits up to and including EUR 200,000 will be lowered from 19 percent to 16.5 percent in 2020, and to 15 percent in 2021. Contrary to earlier announcements, the CIT rate for profits exceeding EUR 200,000 will not be reduced until 2021. It is proposed to reduce this rate to 21.7 percent in 2021 (instead of 20.7 percent as previously indicated).

> In addition, the effective corporate income tax rate on profits derived from certain intangible assets included in the so-called "innovation box" regime, will increase from the current 7 percent to 9 percent as per 1 January 2021.

> The Dutch real estate transfer tax rate with respect to the acquisition of non-residential properties will be increased from 6 to 7 percent as per 1 January 2021. The rate applicable to the acquisition of residential properties will remain 2 percent.

Conditional withholding tax on interest and royalties

It is proposed to introduce a withholding tax on interest and royalty payments to affiliated entities (i.e. entities with a qualifying interest) or permanent establishments of such entities in low tax jurisdictions or in cases of abuse as of 1 January 2021. The withholding tax rate will be equal to the corporate income tax rate for profits exceeding EUR 200,000 and will therefore be 21.7 percent.

A qualifying interest exists where definite influence is exercised, either directly or indirectly, encompassing in any case situations where the interest represents more than 50% of the statutory voting rights.

Low tax jurisdictions are jurisdictions which either (i) have a statutory profit tax rate of less than 9 percent, or (ii) are included on the EU list of non-cooperative jurisdictions.

An anti-abuse rule (which is comparable with the anti-abuse rule applicable to the dividend withholding tax exemption) is included for situations in which payments are not directly paid to an affiliated entity in a low tax jurisdiction, but through an intermediate holding company.

Finally, we note that the withholding tax may also apply in certain circumstances if the receiving entity is a hybrid entity.

Thin-capitalisation rule for banks and insurers

As announced in our International Tax Round-up of March 2019, the government intends to introduce a thin-capitalisation rule for banks and insurers as part of a package of measures concerning earnings stripping. The legislative proposal now published is largely in line with the consultation document described in our International Tax Round-up of March 2019. In short, the legislative proposal provides for an interest deduction limitation if, with respect to banks, the leverage ratio is less than 8 percent or, with respect to insurers, the equity ratio is less than 8 percent.

The non-deductible interest is computed on the basis of the following formulas:

> for banks: (8-L) / (100-L) * total interest expenses, whereby L stands for the leverage ratio of the bank calculated pursuant to the EU Capital Requirement Regulation; and

> for insurers: (8-ER) / (100-ER) * total interest expenses, whereby ER stands for equity ratio. The ER is calculated by reference to the equity of an insurer, which is adjusted on several points, and which is then divided by the balance sheet total of the insurer as calculated pursuant to the EU Solvency II Directive.

If adopted by Parliament, the thin-capitalisation rule will become effective as of 1 January 2020.

Definition of “permanent establishment”

Currently, the definition of a permanent establishment included in double tax treaties based on the OECD-model treaty differs from the Dutch domestic definition of a permanent establishment. As a result, there are circumstances in which the right to tax certain profits could be assigned to the Netherlands pursuant to a relevant double tax treaty, whereas the Netherlands cannot exercise such right to tax based on its domestic legislation.

Therefore, it is proposed to include a definition of permanent establishment in the Dutch corporate income tax, personal income tax and wage tax act which is in line with the most recent OECD Model Tax Convention and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. This definition will be used in non-treaty situations and includes anti-splitting rules, anti-fragmentation rules and rules regarding commissionaires. In case a double tax treaty applies, however, the definition of permanent establishment should be interpreted in line with the applicable double tax treaty.

The substance requirements in the Dutch dividend withholding tax act and corporate income tax act will no longer act as a safe harbour

As announced in our International Tax Round-up of June 2019, it is proposed to amend certain anti-abuse provisions in the corporate income tax act and dividend withholding tax act to align these with the decision made by the Court of Justice of the European Union in the Danish beneficial ownership cases (C-115/16, C-116/16, C-117/16, C-118/16, C-119/16 and C-299/16).

The existing anti-abuse provisions are amended such that fulfilling the substance requirements included in the Dutch controlled foreign company rules, the Dutch non-resident substantial interest rule, and the dividend withholding tax exemption is solely an indication that the arrangement is not artificial and will therefore no longer function as a safe harbour. Consequently, the substance requirements will divide the burden of proof between the taxpayer and the tax authorities, as meeting these requirements will lead to the presumption that the structure is not abusive, which presumption may be rebutted by the Dutch Tax Authorities. Also, in case the substance requirements are not met, the taxpayer is still allowed to provide evidence that the structure should not be considered abusive.

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Portugal

“Santander / Fokus Bank”-type Claims: WHT on dividends distributed to EU UCITS ruled discriminatory

On 23 July 2019, the Portuguese Tax Arbitration Court rendered a decision on case 90/2019-T which found that Portuguese withholding tax on dividends payable to an European Union (“EU”) undertaking for collective investment in transferable securities (“UCITS”) in comparable circumstances to those of a Portuguese UCITS is in breach of EU law, namely article 63 of the Treaty on the functioning of the EU on the free movement of capital.

The facts where such that a German UCITS in contractual form, subject to but exempt from Corporate Income Tax according to section 11, para. 1, s. 2, of the German Investment Tax Act, received dividends in 2016 from a Portuguese company. In the wake of the decision of the European Court of Justice in C-338/11 (*Santander Asset Management SGIIC and other joined cases*), the Portuguese Tax Arbitration Court ruled that there is a breach of EU law if dividends received by an UCITS resident in another EU State are liable for withholding tax, whereas such dividends are exempt from tax when received by UCITS resident in Portugal in comparable circumstances, underlining how such discrimination discourages the investments of foreign shareholders.

This is the first "Santander / Fokus Bank"-type case in Portugal following the already long pan-European trend of successful withholding tax reimbursement claims regarding distributions to investment funds. Even if noting that there is no precedent rule in Portugal and that it is too soon to know whether the Portuguese tax authorities will appeal, we would expect other similar claims to follow. For reference, taxpayers are generally allowed to request withholding tax reimbursements for two years following the end of the year in which tax was withheld.

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Sweden

Budget bill 2020

Government plans introducing bank tax from 2022

On 31 August 2019, the government announced its plans to introduce a bank tax from 2022. The tax is expected to generate tax revenue of EUR 470m in 2022. Such tax is needed as a financial crisis may give rise to prolonged periods of reduced production and employment, and deep declines in the asset markets. This, in turn, can degrade public finances through lower tax revenue and higher public spending. Taking into account the social costs that may arise in the event of a financial crisis, tax collection from the financial sector should be increased.

Despite the reasoning behind the introduction, the government already announced that the bank tax to be collected in 2022 will be used to provide further financing to the country's defence.

Although details of the bank tax are still unclear, it will be compatible with the EU state aid rules.

Government funding allocated to reimburse private healthcare providers for VAT costs

We have previously reported about hiring out of medical personnel being subject to Swedish VAT following a ruling from the Supreme Administrative Court in 2018 (see International Tax Round-up June 2019). In light hereof, the Government proposes that SEK 20m shall be allocated to county councils so that they can reimburse small private healthcare providers in rural areas for their increased VAT costs.

The Government also intends to investigate whether an alternative regime, where the VAT effects for private healthcare providers is neutralised, is possible.

Advertising tax reduced

The Government has proposed to phase out the advertising tax, starting with a reduction from the current tax rate of 7.65 percent to 6.9 percent of the price of the advertisement. The change is proposed to enter into force 1 January 2020.

Abolition of highest income tax bracket for individuals

Sweden has a progressive income tax for individuals, with tax rates ranging from 30-60 percent. The Government has proposed to abolish the additional state income tax of 5 percent on annual income in excess of EUR 65,000 starting 1 January 2020. The state income tax of 20 percent that is added on annual income in excess of EUR 46,000 remains.

Legislative changes

Hybrid mismatches

Hybrid mismatches can occur when different treatment in national legislation with respect to the tax treatment of financial instruments, companies and permanent establishments are used to avoid tax.

The Government's proposal means that the provisions of the Income Tax Act (1999:1229) on interest deductions for certain cross-border situations that came into force on 1 January 2019 are extended to include more situations with hybrid mismatches and that other expenses than interest expenses are also covered by the provisions. It is also proposed that the scope of these provisions be extended to include procedures that have been concluded with a view to providing a tax benefit. These changes are proposed to enter into force 1 January 2020.

The Government has also proposed that the rules for neutralising the effects of hybrid mismatches should be supplemented by rules relating to its tax treatment of certain transparent companies to counter tax planning through so-called reverse hybrid mismatches. These changes are proposed to enter into force on 1 January 2021.

Deferred withholding tax on dividends

The Government is proposing a new system of deferral payment of withholding tax on dividends to foreign legal persons that show deficits for the current tax year. The possibility is proposed to be open to foreign legal entities resident in the EU and certain treaty states. The new system is proposed to apply starting 1 January 2020.

Tax rules for occupational pension companies

The Government proposes that Directive 2016/2341 is transposed into Swedish legislation through a new Occupational Pension Companies Act.

It is proposed that occupational pension companies as well as Swedish European companies and European cooperatives that conduct similar activities shall apply the special provisions for life insurance companies in the Income

Tax Act (1999:1229). It is also proposed that occupational pension companies are equated with insurance companies for tax purposes, that mutual occupational pension companies are equated with mutual insurance companies and that occupational pension associations are equated with economic associations. An insurance issued by an occupational pension company is proposed to be classified as a pension insurance for tax purposes. These changes are proposed to take effect on 1 December 2020.

Ruling on representative liability for VAT

In its ruling in case 5695-18 dated 20 September 2019, the Supreme Administrative Court (the “Court”) held that the fact that a representative of a legal entity had not in person provided incorrect information, does not exclude that the representative can be held responsible under the Swedish representative liability (Sw. *företrädaransvar*). Under this responsibility, a representative of a legal person can, together with the legal person, be obliged to pay for the legal person’s excess input VAT, if the representative with intent or gross negligence did not pay the legal person’s tax.

The legal entity had submitted a tax return in which deductions were claimed for input VAT with an amount that later appeared to be incorrect. The representative in question had not signed the tax return. The Court held that the provision of representative liability needs to be understood with regard to its purpose. Given that the purpose of the provisions is to secure the Swedish Tax Agency’s claims, the Court held that it was not reasonable to apply the representative liability only when the representative in person submitted the incorrect information.

The Swedish Tax Agency’s position on VAT for lease of a surgical function

The Swedish Tax Agency (the “STA”) has published its position on whether a lease of a so-called surgical function should constitute a single supply or several supplies and whether it should be exempt from VAT. A surgical function usually includes a prepared room where one can perform surgery and equipment for the operation. Also often included are the preparation of the patient for surgery, aftercare by the patient and personnel other than the surgeon.

According to the STA’s assessment, the letting of a surgical function should be considered a single supply of service.

In determining whether a service is covered by the exemption from the tax liability for health care or dental care, it is decisive whether the service provided by the seller to the buyer is covered by the exemption. The STA considers that the leasing of a surgical function does not mean that health care or dental care is provided.

Hiring a surgical function can still be exempt from tax liability if the rental has a close connection to health care or dental care. Hiring a surgical function is a complex service of a special nature that can be assumed to be demanded only for its unique property. As a rule, the service is only provided by healthcare providers. Therefore, the STA considers that the leasing of an operating function that is carried out by an operator who runs a reception to another operator who normally operates such a reception is not done to gain additional income in competition with commercial companies that have to pay VAT.

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United Kingdom

Draft regulations to amend NRCGT rules for collective investment vehicles

The UK’s Finance Act 2019 introduced new rules which brought gains realised by non-resident investors on disposals of UK land and of certain UK property-rich companies within the scope of UK capital gains tax. The new rules apply to disposals made on or after 6 April 2019.

Alongside the general provisions, Finance Act 2019 introduced a set of rules (set out in Schedule 5AAA TCGA 1992) specifically dealing with collective investment vehicles (“CIVs”) and their investors. These rules are intended to ensure that investing through a CIV does not result in additional taxation for an investor, and (*inter alia*) allow elections to be made to treat CIVs as partnerships, or as exempt entities.

The UK tax authority, HMRC, has now published for consultation draft regulations that will make certain changes to the rules for CIVs and their investors in Schedule 5AAA. These follow representations made by stakeholders after the rules were introduced. They are designed to ensure the legislation will work as intended.

CIVs that fall within the scope of the new rules will want to consider the proposed changes carefully.

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