PKF International Limited

PKF worldwide tax update

JUNE 2021

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The content of this PKF Worldwide Tax News has been compiled and coordinated by Stefaan De Ceulaer (stefaan.deceulaer@pkf.com) of PKF International. If you have any comments or suggestions please contact Stefaan directly.

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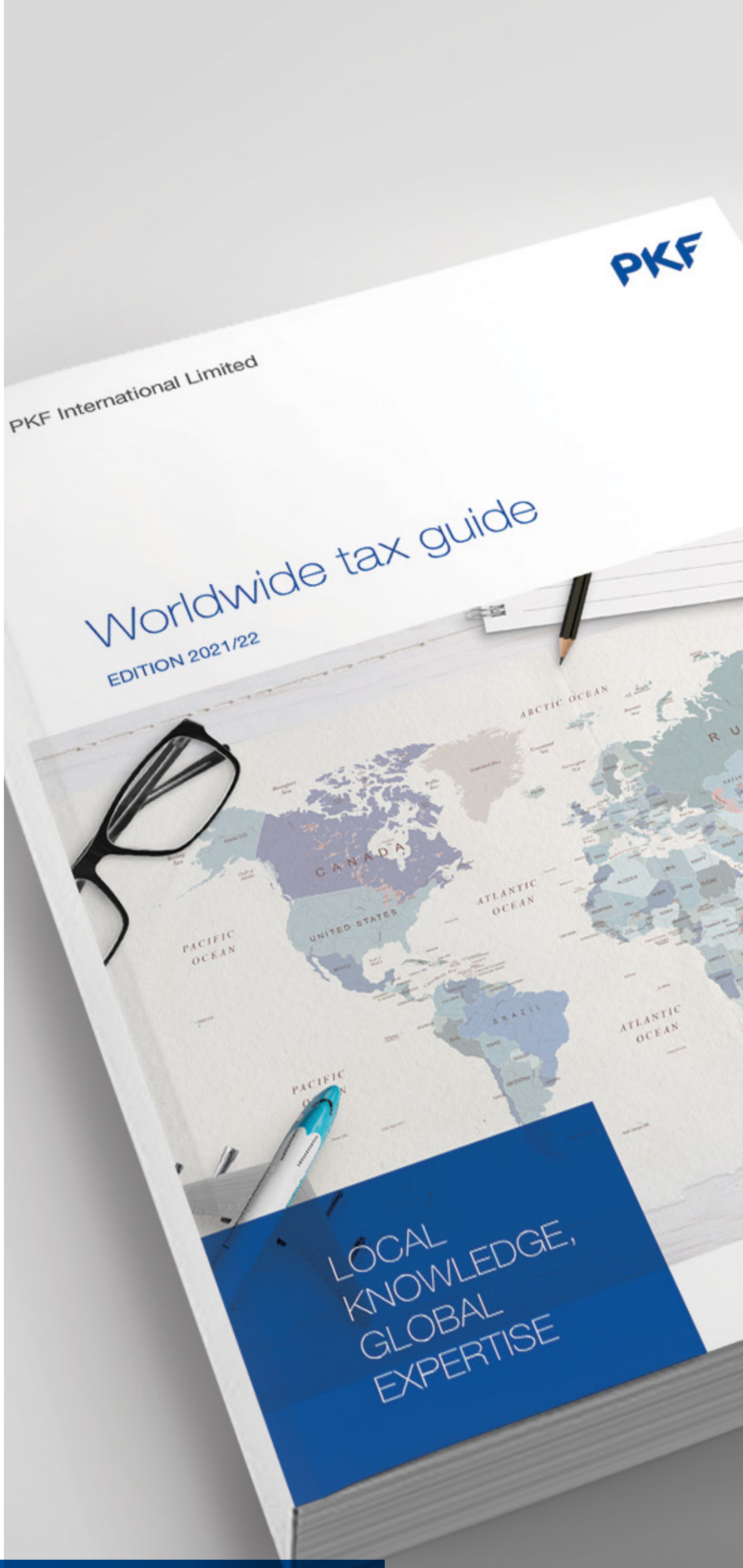
Welcome

In this second quarterly issue for 2021, the PKF Worldwide Tax Update again brings together notable tax changes and amendments from around the world, each followed by a PKF commentary that provides further insight and information on the matters discussed. PKF is a global network with 400 offices, operating in over 150 countries across 5 regions. Its tax experts specialise in providing high quality tax advisory services to international and domestic organisations in all our markets.

In this issue, featured articles include discussions on:

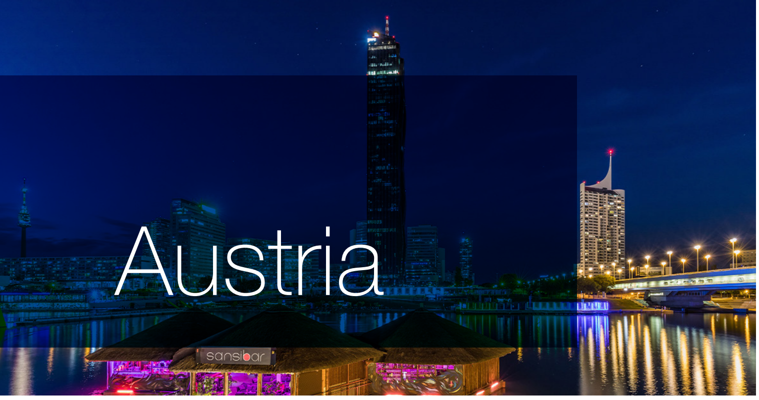
- COVID-19 tax measures and guidelines in Austria
- Double tax treaty updates and related case law in Belgium
- Recent comprehensive tax changes in Ghana, Romania, and the UK
- International tax developments (CFC, CbC Reporting, BEPS, Transfer Pricing) in Ecuador, Germany, Italy, Mexico, Qatar, Rwanda, South Africa, Spain, The Netherlands, Ukraine, and the U.S.

We trust you will find the PKF Worldwide Tax Update for the second quarter of 2021 both informative and interesting. Please do contact the PKF tax expert directly (mentioned at the foot of the respective PKF Commentary) should you wish to discuss any tax matter further or, alternatively, please contact any PKF firm (by country) at www.pkf.com/pkf-firms.



2021/22 Worldwide Tax Guide

The production of the 2021/22 Worldwide Tax Guide is underway comprising 148 jurisdictions for this edition and we look forward to your continued support.



Austria

Additional COVID-19 relief measures

In order to further mitigate the negative impact of the pandemic, the Austrian government introduced two additional measures at the beginning of January 2021:

- **Revenue shortfall bonus**

  Companies having their legal seat or permanent establishment and carrying out operational activities in Austria are eligible to apply, if the activities lead to income according to Art. 22 or 23 ITA. The granting of the bonus is subject to a revenue shortfall of at least 40% in the calendar month compared to the comparison period. The revenue shortfall bonus consists of a bonus and an optional advance payment of the fixed costs subsidy and can therefore amount up to 30% of the revenue shortfall. The earliest possible assessment period is November 2020 and the latest possible assessment period is June 2021. It is possible to apply from the 16th day of the calendar month following the assessment period until the 15th day of the third calendar month following the assessment period. For example, if February is the assessment period, then it is possible to apply until 15 May 2021.

- **Lost sales compensation (for indirectly affected companies)**

  In addition to the lost sales compensation for companies directly affected by the restrictions imposed by the government under the COVID-19 protective and emergency measures, with this instrument also indirectly affected companies are eligible to a lost sales compensation. The granting of the bonus is subject to a revenue shortfall of at least 40% in the calendar month compared to the comparison period. The rate of compensation depends on the applicable percentage rate as defined in the Guidelines for the relevant sector category to which the eligible revenues can predominantly be attributed.

Good tax behaviour as a prerequisite for future COVID-19 subsidies

The future granting of COVID-19 subsidies is not only tied to the requirements of the individual subsidy itself, but now also requires "good tax behaviour". These rules have already been part of the Guidelines of some relief measures and are now defined in a respective new law. Companies that are granted a COVID-19 pandemic subsidy must behave in a tax efficient manner, e.g. no tax abuse, application of CFC-taxation or fiscal penalties of more than EUR 10,000, for five years before the application for the subsidy. If the company does not fulfil this prerequisite, the application for funding is rejected or the funding has to be repaid with interest (4.5% above the base rate).

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PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Austria taxation, please contact Thomas Ausserlechner at **thomas.ausserlechner@pkf.at** or call **+43 1 512 87 80.**

Belgium

How to demonstrate business time spent abroad in case of salary split?

If an employee is put on a cross-border salary split, that person is taxable in more than one country and claims personal tax relief in his or her country of tax residence to mitigate double taxation. In order to be successful to claim such double tax relief, the employee will need to demonstrate physical business time spent abroad. On 15 May 2019, the Brussels Court of Appeal shed an interesting light on how those "foreign business days" need to be evidenced.

The facts were as follows: Mr. X is a Dutchman living in Belgium and is thus subject to Belgium personal tax on his worldwide income. He works as an employee for a German tax resident company (GerCo) where he is Marketing Director. GerCo puts an apartment at Mr. X's disposal in Frankfurt. Mr. X also regularly went on business travel outside Germany. According to the so-called 183-day rule laid down in tax treaties and Belgium (and German) domestic tax law, an employee is taxable in his country of tax residence, unless:

- The employee spends more than 183 days in the working State, or;
- The employee's salary is borne by an employer based in the working State, or;
- The employee's salary is borne by a permanent establishment of the employer based in the working State.

Summarised: if one of the exception cases applies, the employee is taxable in the working State "based on business time spent in that country" and claims personal tax relief in the State of residence. In Belgium, that tax relief is called the exemption with progression reserve.

Applied to the case at hand, Mr. X needed to evidence business time spent "in Germany" for the purpose of claiming personal tax relief in Belgium. Specifically, the Belgium tax authorities took a day-by-day approach and asked Mr. X to put forward evidence of physical presence per day spent "in Germany" to be able to exempt the corresponding salary in Belgium. Conversely: if that proof cannot be provided, the corresponding salary should be taxable in Belgium. On this point, it is the view of the Belgium tax authorities that salary corresponding with "business travel outside Germany" should be allocated to Belgium and is therefore subject to progressive Belgium personal income tax rates. However, the Brussels Court of Appeal qualified the view of the Belgium tax authorities as follows: (i) Referring to Belgium Supreme Court case law dated 28 May 2004 relating to international transport personnel, the Brussels judge emphasises that evidence of "business time in the working State" does not require continuous and permanent physical presence in that country; (ii) As a result, a taxpayer should not keep a logbook recording his whereabouts on a day-to-day basis; (iii) As a result, occasional business trips outside the working State that do relate to the employment contract concluded with the employer based in the working State should be considered business time spent in the working State; (iv) Referring to a circular letter dated 11 May 2006 from the Belgium tax authorities, if an employment contract defines a "working place" in a particular country, this contractual wording can be seen as a strong indication of business time spent in that country.

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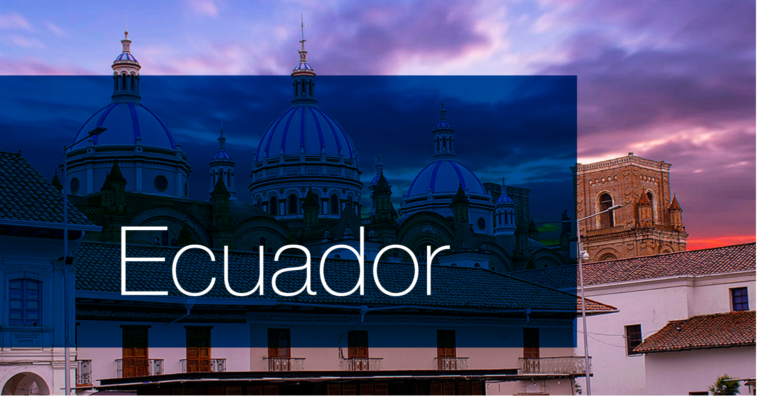
PKF Comment

This Court decision is highly welcomed by Belgium taxpayers as it provides practical guidance to reflect a cross-border salary split in a Belgium personal income tax return. More fundamentally, this Court case softens the rather stringent and burdensome day-to-day approach sometimes adopted by the Belgium tax authorities.

If you believe the above measures may impact your business or require any advice with respect to Belgium taxation, feel free to reach out to Kurt De Haen at **kurt.dehaen@pkf-vmb.be** or call **+32 2 460 0960**.



Ecuador

Changes to submission of requests for Advance Pricing Agreements

The Ecuador Tax Authority has introduced several amendments to the transfer pricing (TP) regime covering Advance Pricing Agreements (APAs). Administrative Resolution No. NAC-DGERCGC21-0000013 issued on 11 March 2021 modifies the requirements and documents that taxpayers must now include in a request for an APA.

The new resolution also clarifies that where the effects of an APA have been suspended as a result of inaccurate information submitted by the taxpayer, such suspension will apply for the tax year in which the cause for suspension of legal effects occurred and for the following tax years covered by the APA.

In addition, said resolution reduces the grace period for taxpayers that have omitted any formal requirements or documentation to 3 months from the submission of the request (previously, 4 months).

The request may be filed until the last working day of February of the tax period in which the application of a higher limit of deductibility is envisaged However, for fiscal year 2021, the request may be filed until 31 March.

The resolution also enacts two additional effects of the APA in the income tax return:

- if the APA provides for a methodology that requires a TP adjustment, such adjustment must be reflected in the taxpayer's income tax return; and
- substitute income tax returns need to be filed to replace those that did not take into account the effects of the APA and its limitation of the deducibility within 60 days from the notification of the ruling.

PKF Comment

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If you believe the above may impact your business or require any advice with respect to Ecuador taxation, please contact Edgar Naranjo at **enaranjo@pkfecuador.com** or call **+593 4 236 7833**.

France

Update on French list of tax haven countries

On 26 February 2021, a decree was published in the French Official Journal to modify the list of non-cooperative states and territories in tax matters defined by Article 238-0 A of the French Tax Code: the Bahamas and Oman have been removed from the list since that date, while Dominica and Palau have been added effective 1 May 2021.

This list takes into account modifications made by the European Council to the EU blacklist on 22 February 2021. We recall that the EU list includes jurisdictions that have not engaged in a constructive dialogue with the EU on tax governance or have failed on their commitments to implement reforms necessary to comply with a set of fiscal good governance criteria such as tax transparency, fair taxation, etc.

The jurisdictions which are on the French blacklist are: American Samoa, Anguilla, the British Virgin Islands, Dominica, Fiji, Guam, Palau, Panama, Samoa, the Seychelles, Trinidad and Tobago, the US Virgin Islands, and Vanuatu.

Transactions with those jurisdictions shall be impacted from a French tax perspective, in particular French withholding tax on dividends, interest, capital gains and royalties would be increased. It might also lead to different rules regarding transfer pricing tax audits, reporting under DAC6, tax deductibility exclusion of interest or other costs, and inclusion of profits from such territories into French taxable income.

PKF Comment

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For further information or advice concerning French taxation, please contact Vanessa Raindre at **vanessa.raindre@pkf-mdlegal.fr** or call **+33 1 78 09 75 25.**

Germany

Corporate income tax election for partnerships – "Check the Box" as from 1 January 2022

On 17 March 2021, the German federal government presented a draft bill to modernise corporate tax law (KöMoG). Its objective is also the internationalisation of corporate tax law. The focus is on the introduction of a corporate income tax election for most partnerships effective 1 January 2022.

1. New regulations at a glance

The bill aims to significantly improve the tax framework for medium-sized partnerships and family businesses and to further internationalise corporate tax law. The following new regulations serve this purpose in particular:

- Introduction of a corporate income tax election for commercial partnerships and partnerships (Sec. 1a KStG);
- Globalisation of parts of the German Re-organisation Tax Act that are relevant for the conversion of corporations (Sec. 1 UmwStG, Sec. 12 (2) and (3) KStG);
- Replacement of the adjustment items in case of additional and reduced transfers by corporate bodies (Sections 14 and 27 KStG) by the so-called deposit solution;
- Losses from exchange rate fluctuations in connection with shareholder loans become deductible expenses (Sec. 8b (3) KStG).

Only the salient features of the planned legal provisions on the option model will be addressed hereafter.

2. Motivation for the option model

In the quarterly tax update from September 2020, we had already discussed a possible introduction of the election for corporate income tax purposes at the level of partnerships (like the "Check-the-box" election) and analysed the possible advantages of said election. The election model had already been announced by the federal government as part of the economic stimulus, crisis management and future pact adopted on 3 June 2020, but was then not included in the second Corona Tax Assistance Act.

The election model goes back to the recommendations on the reform of corporate taxation from 1999. Although the overall tax burden of corporations and partnerships has largely converged since then, there are still considerable systemic deviations, also in the field of the taxation procedure. This affects in particular special business assets as well as supplementary balance sheets of the partners in a partnership. In an international context, these particularities of German tax law are largely unknown.

3. Key points of the regulations on the election model

(1) Treatment like a corporation: The election model allows partnerships as well as their partners to be treated like a corporation and their non-personally liable partners for income tax purposes and consequently also for procedural purposes.

(2) Exercise by application: The election for corporate income taxation must be submitted by means of an irrevocable application of the partners involved to the tax office. The application must be made prior to the beginning of the fiscal year from which the taxation as a corporation is to take place. A possibility for a retroactive election is not envisaged. The application has a direct effect on the taxation of all shareholders. To opt for corporation tax, a three-quarter majority decision of votes cast by the shareholders is required.

(3) Consequences for taxation: As a result of exercising the option, the company is treated like a corporation for tax purposes and under procedural law; its shareholders are classified like the non-personally liable shareholders of a corporation. Thus, in particular, all provisions of the German Corporation Tax Act (KStG), the German Income Tax Act (EStG), the German Reorganization Tax Act *(Umwandlungssteuergesetz)*, the German

Investment Tax Act *(Investmentsteuergesetz)* or the German Foreign Tax Act *(Außensteuergesetz)* which refer to corporations apply.

Note: The exercise of the option does not change the fact that the company, which for income tax purposes is to be treated "like a corporation", is still a partnership under civil law.

(4) Change of legal form and tax neutrality: The transition to corporation taxation is deemed to be a change of legal form within the meaning of the German Reorganization Tax Act. For the sake of tax neutrality, no functionally essential operating bases may be retained. This means that operationally essential special business assets must also be contributed.

(5) Civil law: Since the company continues to exist under civil law as a partnership, it does not have nominal capital, unlike a corporation. The equity capital to be shown on the tax balance sheet is recorded in the tax contribution account. Liabilities to the shareholder are not included in equity. Persons authorised to represent the company under commercial law or by virtue of the articles of association shall be deemed to be the legal representatives of the opting company.

(6) Taxation of the shareholders: The participation in an opting company is deemed to be a participation in a corporation. Remuneration paid by the company to the shareholder (e.g., interest, rent, wages/salary etc.) is to be treated as such and no longer as advance income allocation/special partnership income *(Sonderbetriebseinnahmen)*. Instead of commercial income, the shareholders now generate income from distributions/withdrawals, which qualify as income from capital assets.

Note: The corresponding exercise of an election is not provided for sole proprietorships.

You may also be interested in this edition's article under the US chapter hereafter on 'US tax implications of suggested "check-the-box" elections for partnerships in Germany'.

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PKF Comment

If you believe any of the above measures may impact your business or require any advice with respect to German taxation, please contact Daniel Scheffbuch at **d.scheffbuch@pkf-wulf.de** or call **+49 711 69 767 238**.

Implementation of ATAD widens scope of covered issues

On 24 March 2021, the government passed a draft law to transpose the Anti-Tax Avoidance Directive (ATADUmsG), intended to prevent or restrict tax avoidance practices such as aggressive tax planning and profit shifting. The ATADUmsG is based on the EU Directive of 19 July 2016 and will be applicable as from 1 January 2022.

1. Exit taxation of business assets

The transfer of an asset to Germany (inbound, a so-called reverse transfer) is considered by law as a hidden contribution. The asset is to be valued at fair market value. Through the implementation of the ATAD, the foreign exit taxation value is to be used as cost of acquisition in Germany, up to a maximum of the fair market value.

So far, exit taxation had only affected business assets leaving Germany (outbound). The asset must be transferred by a taxpayer subject to unlimited tax liability to another member state of the European Union. In future, taxpayers subject to limited tax liability will also fall within the scope of the regulation, as well as current assets and also situations with cross-border transfers to EEA states.

2. Exit taxation of individuals

The ATAD results in changes to the exit taxation of individuals who, for example, own shares in a limited liability company as private assets and move abroad. If Germany loses the right of taxation, there is a final taxation at the time of departure. In case of departure to a foreign country in the EU/EEA, extensive deferral regulations come into play.

In future, the unlimited, interest-free deferral option without security deposits, will no longer be possible in the event of departure to a foreign country in the EU/EEA. The regulations will be tightened to the effect that the tax owed must be paid in seven annual instalments and against security. The annual instalments will not bear interest. Individuals who have been subject to unlimited income tax liability in Germany for a total of seven of the last twelve years will be affected. So far, the statutory regulation has been based solely on the fact that the individuals were subject to unlimited income tax liability for at least ten years.

3. Hybrid arrangements

Irrespective of tax treaty provisions, hybrid arrangements are to be restricted in future by denying the deduction of business expenses in the event of non-conforming taxation. The provision applies to related parties or between taxpayers and their permanent establishments that use a structured arrangement to obtain a tax advantage. This may be the case if the taxation is not identical due to the different residences. This would be the case, for example, if the business expenses are deducted in the domestic country but not taxed in the foreign country.

4. CFC tax rules

The purpose of CFC taxation is to prevent profits of a company in a low-tax foreign country from not being taxed in Germany. This applies to the profits of a foreign company that is domiciled in a low-tax country and in which German residents hold a majority interest. A distinction is made between ‘passive’ and ‘active’ activities.

A reduction in the low-taxation threshold had been demanded by representatives from academic and business organisations, but this was not implemented. A limit of 25% continues to apply: from a German perspective, all countries with a tax rate below 25% are (still) ‘low-tax countries’.

The criteria for CFC taxation of the foreign company are that (i) the foreign company is controlled by persons subject to unlimited tax liability and that (ii) there is passive, low-taxed income. In future, however, ‘domestic control’ will no longer be a criterion, but instead de facto control in the sense of coordinated use by related parties. By derogation, shareholders subject to unlimited tax liability will no longer be ‘included’. On the one hand, this means that setups previously covered by CFC taxation will no longer be included, and on the other hand, existing structures could be included. Indirect participations must also be taken into account in order to determine whether a foreign company is controlled.

Although the ATAD provides for a so-called ‘passive catalogue’ for ‘harmful’ income, Germany will stick to the ’active catalogue’. The receipt of profit distributions in principle continues to be considered active. The application of the substance test continues to be limited to EU/EEA companies and, in case of third countries, only to intermediate income of an investment nature. If companies pass the substance test, income that is passive and therefore not included in the ‘active catalogue’ can also be exempted from CFC taxation. The amount resulting from the additional taxation is subject to trade tax and income tax.

BACK

PKF Comment

If you believe any of the above measures may impact your business or require any advice with respect to German taxation, please contact Daniel Scheffbuch at **d.scheffbuch@pkf-wulf.de** or call **+49 711 69 767 238**.

Ghana

Various tax updates

There have been six new tax legislations following the 2021 Budget Statement and Economic Policy presented to the Parliament of Ghana on 12 March 2021.

Revision of Transfer Pricing Regulation

The Transfer Pricing Regulation, 2020 (L.I. 2412) of 2 November 2020 replaced L.I. 2188. The provisions of L.I. 2412 are broadly aligned with the 2017 OECD Transfer Pricing guidelines, which took into consideration, among others, the Base Erosion and Profit Shifting (BEPS) Report specifically Actions 8-10 (Aligning Transfer Pricing Outcomes with Value Creation) and Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting).

The following are the new items introduced in Ghana's Transfer Pricing regime:

- **Comparability**
  L.I. 2412 introduces a comparability provision under regulation 3 to guide the conditions under which an arrangement in a controlled relationship can be compared to another arrangement.

- **Choice of Appropriate Transfer Pricing Method**
  Two or more controlled arrangements that are economically closely linked and as such cannot be analysed separately may be combined to perform the comparability analysis and apply the appropriate transfer pricing method.

- **Arrangements involving intangible property**
  L.I. 2412 introduces in regulation 7(3) a functional analysis in respect of intangibles.

- **Cost Contribution Arrangements**
  L.I. 2412 makes provision for cost contribution arrangements ("CCAs") in regulation 8. A CCA is a contractual arrangement to share the contributions and risks involved in a joint arrangement with the expectation to benefit from such arrangement. In this regard, the provisions on CCAs under L.I. 2412 is to ensure that such contributions are in line with the arm's length principle.

- **Financing Arrangements**
  Provisions on financing arrangements are introduced in regulation 9 of L.I. 2412 to ensure that loans or credit facilities transacted between associated enterprises are done at arm's length.

- **Business Restructuring**
  Regulation 10 of L.I. 2412 introduces a provision on business restructuring arrangements between persons in a controlled relationship and such an arrangement must be consistent with the arm's-length standard. Business restructuring is described by the Regulation to include the transfer of functions, rights, interests, assets and risks among persons in a controlled relationship.

- **Documentation**
  Following the recommendations under BEPS Action 13, which resulted in the Documentation provisions under the OECD Transfer Pricing Guidelines, the new Regulation adopts the three-tiered approach to transfer pricing documentation by requiring the filing of a local file, country-by country report and a master file.

- **Simplified Approach**
  The scope of the requirement to maintain contemporaneous documentation under regulation 12 is limited by setting a minimum transaction amount of USD 200,000 below which an arrangement with another person in a controlled relationship would be exempt.

  Parliament passed the following Bills into laws after receiving Presidential assent on 31 March 2021:

Financial Sector Recovery Levy Act, 2021 (Act 1067)

- This Act introduces the imposition of a 5% Fiscal Sector Clean-up Levy (FSRL) on profits before tax on banks other than rural banks or community banks, irrespective of any tax holiday or exemption from a direct or indirect tax on the bank
- This levy is not an allowable deduction in ascertaining the chargeable income for the bank
- The levy may be subject to review by the Minister of Finance at the end of 2024 Year of Assessment.

Penalty and Interest Waiver Act, 2021 (Act 1065)

- This Act offers waiver of penalties and interest on accumulated tax arrears up to 31 December 2020
- This applies only to persons who make arrangements with the Ghana Revenue Authority(GRA) for payment of the principal tax by 31 December 2020 or file outstanding tax returns up to 31 December 2020
- Aside waiver of penalties and interest, the defaulting person will also not be liable to prosecution or any other enforcement action with respect to the tax due for the relevant period
- A person may benefit from Act 1065 on meeting the following conditions:
  - A written application in a form and manner prescribed by the Commissioner-General together with the tax returns by 30 September 2021 to the Commissioner-General of GRA
  - Acceptance or approval of the application by the Commissioner- General within 30 days.

COVID-19 Health Recovery Levy Act, 2021 (Act 1068)

- The Act imposes a 1% Special Levy chargeable on the supply of goods and services made in Ghana and imported goods and services
- Exempted goods and services listed under the First Schedule of Value Added Tax Act, 2013 (Act 870) as amended, are exempted from this levy
- The levy is applicable to both the VAT Standard Rate and Flat Rate Scheme
- The levy is not subject to input tax deduction
- Increment brings the VAT Flat from 3% to 4% and the Standard Scheme from 12.5% to 13.5%.

Income Tax Amendment Act, 2021 (Act 1066)

- This Act suspends quarterly instalment payments by specified self- employed persons and owners of commercial vehicles and also provides for a rebate for selected industrial sectors
- The suspended quarterly income tax instalment payments apply to the following:
  - Category A, B and C self-employed persons listed in the Third Schedule to the Income Tax Regulations, 2016 (LI 2244)
  - An owner of a Taxi/ Private Tax (of class A2) and Trotro (of class A4, B3, B4, B5) as specified in the Second Schedule of LI. 2244
- The tax rebate of 30% is granted on the estimated chargeable income for the second, third and fourth quarters of 2021 of the following sectors as per the classification provided in the International Standard Industrial Classification of All Economic Activities (ISIC Rev.4.1)
  - Accommodation and food
  - Education
  - Travel and tours
  - Arts and entertainment
- A person may benefit from Act 1066 subject to the following conditions:
  - Registration with the GRA
  - Made instalment payments for the first quarter of 2021
  - Continues discharge of any other obligation in an enactment administered by the Commissioner-General of the GRA.

Energy Sector Levies Act, 2021 (Act 1064)

This provides for an Energy Sector Recovery Levy(ESRL) and Sanitation and Pollution Levy (SPL) to be imposed on the following petroleum products:

- ESRL: 20 Pesewas per litre on Petrol and Diesel, and 18 Pesewas per kilogram of Liquefied Petroleum Gas (LPG)
- SPL: 10 Pesewas per litre on Petrol and Diesel.

This will result in a total increment at ex-pump to about 5% if other petroleum taxes are included.

BACK

PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Ghana taxation, please contact Frederick Bruce-Tagoe at **fbrucetagoe@pkfghana.com** or call **+233 302 221 266**.

Italy

2021 Budget Law introduces advance pricing agreement (APA) rollback

An Advance Pricing Agreement (APA) is a procedure available to companies engaged in international activities, aimed at negotiating advance agreements with the Tax Administration, with particular reference to the following areas:

- transfer pricing regime
- determination of exit or entry values in the case of transfer of residence
- allocation of profits or losses to a permanent establishment (PE)
- preliminary assessment of the requirements that identify a PE
- payment or receipt of dividends, interest, royalties and other income components.

An APA is a tax compliance tool which enables taxpayers to determine the tax burden of certain cross-border transactions in advance, and represents, for the Treasury, a way to stabilise revenue derived from the same transactions.

We speak about a unilateral APA, when only one tax administration is involved, and bilateral or multilateral APAs, when the agreement is concluded by tax administration of more than one jurisdiction in which the taxpayer carries out its business activities.

Under domestic tax law, APAs bind the taxpayer and the tax authorities for the tax period during which they are stipulated and for the four subsequent tax periods, unless there are changes in the factual or legal circumstances relevant to the agreements signed and resulting from them.

From 1 January 2021, the effects of unilateral APAs may be extended to all prior tax periods (rollback) for which the assessment periods have not yet expired, subject to the following conditions:

- The same factual and legal circumstances underlying the agreement apply;
- Audits or other assessment activities of which the taxpayer has formal knowledge have not been initiated.

With respect to unilateral APAs, the previous regulations provided for the right to also retroactively extend the effects of the agreement to tax periods prior to the one in which it was signed, but not beyond the tax period in which the application to open the procedure was submitted.

From 1 January 2021, rollback is also possible in the case of bilateral and multilateral APAs. In order to be able to apply the rollback to previous tax periods:

- The taxpayer must have made an explicit request in the application to open the procedure;
- The other foreign tax authorities involved agree to extend the agreement to prior years;
- The same factual and legal circumstances underlying the agreement apply; and
- No audits or other assessment activities of which the taxpayer has formal knowledge have been initiated.

In addition, the new law provides that to obtain an APA the taxpayer must now pay the following fees:

- EUR 10,000 for turnover up to EUR 100 million
- EUR 30,000 if turnover is between EUR 100 million and EUR 750 million
- EUR 50,000 if turnover exceeds EUR 750 million.

BACK

PKF Comment

For further information or advice concerning the above or any advice with respect to Italy taxation, please contact Barbara Pollicina at **b.pollicina@pkf-tclsquare.it** or Fabrizio Moscatelli at **f.moscatelli@pkf-tclsquare.it** or call **+39 010 81 83 250** or **+39 06 86 358 612** respectively.

Jersey

Jersey's new register of beneficial owners and significant persons

The Financial Services (Disclosure and Provision of Information) (Jersey) Law 2020 and associated secondary legislation came into force on 6 January 2021. It establishes a new, central register of beneficial owners, controllers and 'significant persons' in Jersey. The financial services regulator for Jersey, the Jersey Financial Services Commission, is responsible for this register.

The legislation addresses the issues of the Financial Action Task Force's recommendations and the report published by MONEYVAL in 2016 on beneficial ownership of legal persons and enhanced Jersey's existing beneficial ownership and control requirements. The new beneficial ownership register also supports the development of a fully digital companies registry, which captures information on companies, foundations, and incorporated/limited partnerships and is open in part for public inspection.

The central register is divided into a public (open register) and a private (closed register) with information such as company director's details being made publicly available while beneficial ownership remains private. It is also possible for individual directors to apply for their details to remain confidential.

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The change and impact of the new law is relatively minimal as Jersey already had a central register of beneficial owners and controllers of entities. In fact, for those using professional advisers for the entities it is business as usual. The information on the register does however extend to all 'significant persons' including company directors and nominee shareholders. The new legislation centralises all mandatory disclosure information into one place. The information will be split into public and private sections so that some information will still be private and not open to public inspection.

For further information or advice concerning Jersey taxation, please contact Garry Bell at **garryB@pkfbba.com** or call **+44 1534 858 490**.

Mexico

2021 administrative and tax benefits gazetted

On 30 March 2021, the Mexican Authority gazetted a set of omnibus rules that contains tax and administrative benefits for tax year 2021 to taxpayers that carry out primary sector activities (agriculture, forestry, livestock farming or fishing) and ground transportation services of cargo or passengers.

Regarding the administrative benefits for taxpayers carrying out transportation services, there are two changes with respect to the 2020 omnibus rules:

- **Deduction benefit**
  - This administrative facility consists in taking a tax deduction for expenses incurred by using documentation that does not meet all formal requirements
  - Said deduction is subject to a threshold of up to 8% of total annual income, with a limit of MXN 1 million.
- **Tax credit against corporate income tax.**
  - The tax credit against corporate income tax corresponds to 50% of expenses for the use of toll road infrastructure.
  - Said tax credit is subject to a threshold of total annual income at the level of the taxpayer not exceeding MXN 300 million.

The omnibus rules will apply from 1 March to 31 December 2021.

Transfer pricing adjustments and non-binding criterion of the Mexican Income Tax Law (MITL)

Annex 3 of the Miscellaneous Tax Resolution (MTR) for 2021 describes the statutory non-binding criterion 40/ISR/NV for the application of the interquartile method. This makes it improper practice for taxpayers to modify considerations that are already within the adjusted range obtained by the interquartile method. This has the sole purpose of obtaining a benefit, in particular, when applying certain adjustments and/or modifications to transactions between related parties that erode the tax base.

Non-binding criterion 40/ISR/NV indicates that it is an improper tax practice to make adjustments or modifications to prices, considerations or profit margins agreed for transactions carried out with related parties when these amounts are already within the interquartile range market prices, manipulating such operations to the detriment of the Mexican tax base. Those who advise, provide services or participate in the performance or implementation of said practicescould be engaging in an improper tax practice by adjusting operations that are originally within the market range.

The tax authority considers that there is no legal basis to carry out any additional modifications to prices, considerations or profit margins, when they are within the adjusted range obtained by using the interquartile method (i.e. within the lower and higher limit), since that modification does not seek to comply with applicable tax provisions, but to obtain an undue benefit by increasing deductions or decreasing income at the level of the taxpayer residing on national territory.

According to the above, the adjustment to transfer prices referred to in rule 3.9.1.1. of the RMF (Miscellaneous Tax Rules) is only applicable when prices, considerations or profit margins, already adjusted by applying a statistical method, are outside the range referred to in article 180, second paragraph, of the MITL.

BACK

PKF Comment

If you believe any of the above measures may impact your business or require any advice with respect to Mexican taxation, please contact Antonio Garcia at **antonio.garcia@pkfmexico.com** or call **+52 (81) 8363 8311** and Jimy Cruz at **jimy.cruz@pkf.com.mx** or call **+52 (33) 3122 2081**.

Netherlands

New definition of a permanent establishment in the Dutch Corporate Income Tax Act

The threshold to consider a permanent establishment (PE) present has been much discussed on a national and international level. Following the adoption of the Multilateral Instrument (MLI), the Dutch Government decided to include a new PE definition in the Corporate Income Tax Act ("CITA").

As of 1 January 2020, article 3, paragraphs 4 to 12 state when a foreign company's activities constitute a PE in The Netherlands and are therefore considered foreign taxpayers under the CITA.

Article 3 distinguishes between the situation where a tax treaty applies and the situation where there is no tax treaty in place. If a tax treaty is in place in relation to the state in which the company is located, Dutch domestic tax law adheres to the definition of this treaty. This creates a chameleon effect: the definition differs depending on the applicable tax treaty and effective MLI provisions (e.g. the anti-fragmentation provision and preparatory or auxiliary activities provision).

If there is no tax treaty in place, a definition identical to the definition in article 5 of the OECD Model Tax Convention applies. Several activities of a preparatory or auxiliary naturer are explicitly excluded in article 3 CITA, provided that these activities are not fragmentated. This anti-fragmentation provision in the CITA slightly differs from the anti-fragmentation provision in the MLI, for example with respect to affiliation of companies.

While explicitly defining the threshold for a PE in the CITA the Dutch Governments aligns itself with the goal of the MLI, i.e. to prevent double non-taxation on cross-border activities. However, The Netherlands made some reservations about certain parts of the MLI.

[BACK](#)

PKF Comment

The Dutch Government aligned the PE definition in the Corporate Income Tax Act seamlessly with the recently internationally accepted thresholds in the MLI. It is intended to provide a broad and clear definition to prevent double non-taxation. For foreign companies with activities in The Netherlands, now is the time to examine whether these activities constitute a PE for Corporate Income Tax purposes. For further information or advice on the presence of a PE in The Netherlands, please contact Ruud van der Linde at **ruud.van.der.linde@pkfwallast.nl** or call **+31 10 266 08 34**.

Self-employed contractors: A rapidly changing issue

In The Netherlands, there is a long-running debate about the income tax status of self-employed contractors. In recent years, many employees have become self-employed contractors and in some cases employees actually quit their job one day and the next day were re-hired by their former employer as a self-employed contractor. Therefore, the debate is about whether the self-employed contractor is an actual entrepreneur or must (still) be considered an employee. This is important from an employment tax perspective as well as a labour law perspective.

After long discussions, the legislation changed on 1 January 2016. This new legislation (Deregulation Labour Relations Assessment Act or Wet DBA) was unclear and therefore there was strong resistance over the use of the new legislation. As a result, the Dutch government declared an enforcement moratorium which meant that organisations were no longer confronted with fines and corrections with respect to the hiring of self-employed contractors unless the organisation was qualified as malicious.

To date, the Dutch government is (still) discussing new legislation and how the issue can be solved. In this respect a pilot with a web module started in January 2021. This web module is designed to make clear under which circumstances a client and a contractor will work together based on approximately 40 questions. The pilot will last for 6 months and after evaluation the enforcement of the legislation will start as from 1 October 2021.

A recent Supreme Court decision made clear that (i) the intent of parties is not considered relevant and (ii) the facts and circumstances of the work performed based on the agreement between the client and the contractor show whether an employment relationship exists.

[BACK](#)

PKF Comment

The legislation concerning self-employed contractors in The Netherlands is constantly subject to change. The latest legislation was announced to enter into force as from 1 October 2021, after an enforcement moratorium of more than 5 years. We therefore recommend organisations to make an inventory of hired self-employed contractors and whether the contractors qualify as actual contractors. In addition, it must be assessed whether the current processes are in line with the new legislation.

If you believe the above measures may impact your business or require any advice with respect to Dutch employment tax, feel free to reach out to Elmer van Lienen at **elmer.van.lienen@pkfwallast.nl** or call **+31 (6) 5132 6062**.

Peru

Changes to interest deductibility

As from 1 January 2021, interest paid by a resident taxpayers is not deductible where the indebtedness exceeds 30% of the earnings before interest, taxes, depreciation and amortization (EBITDA) of the previous year. Interest that is not deductible, due to this limitation, may be carried forward for deduction to the subsequent four taxable years.

However, this rule does not apply to:

- the financial system, insurance companies and factoring companies required to register with the 'Register of factoring companies not covered by the Financial System Law'
- taxpayers whose net income in a year does not exceed 2,500 UIT (Annual Tax Unit; 2021 UIT equals PEN 4,400);
- taxpayers carrying out public infrastructure projects, public services and other related services, as well as applied research or technological innovation projects through PPP (public-private partnerships)
- loans contracted for purposes of developing public infrastructure projects, public services and other related services, as well as applied research or technological innovation projects, under the Projects in Assets mechanism provided by Legislative Decree 1424; and
- indebtedness arising as a consequence of the issuance of nominative debt securities, subject to certain conditions.

BACK

PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Peruvian taxation, please contact Renato Vila at rvila@pkfperu.com or call **+51 142 16 250**.

Qatar

Entities subject to GTA reporting

On 24 March 2021, the Qatar General Tax Authority (GTA) issued Circular No. 2 of 2021 mandating Qatari entities owned by Qatari residents or nationals of Gulf Cooperation Council (GCC) countries to file income tax returns starting from financial year 2020.

The aforementioned entities are typically exempt from income tax. However, if the following criteria are met, then income tax returns must be filed for FY 2020 onwards:

- Entities with share capital of QAR 1 million or higher, or annual revenue of QAR 5 million or higher, must submit an income tax return through the Dahreeba system along with audited financial statements; and
- Entities that are wholly owned by Qatari residents/ GCC nationals, whose share capital and annual revenue are less than QAR 1 million and QAR 5 million respectively, must submit a "simplified tax return format" in Dhareeba along with financial information (audited financial statements are not required).

The GTA has also extended the FY 2020 annual income tax return filing deadline by four months for entities meeting the above requirements.

A penalty of QAR 500 per day up to a maximum of QAR 180,000 maybe assessed if entities fail to submit their tax returns on time.

Contract reporting

Article 37 of the 2019 Executive Regulations addresses reporting requirements. As of January 2021, the GTA has activated a contract reporting model within the Dahreeba system.

The reporting requirements generally apply to all service and supply contracts completed by government authorities, companies, associations, philanthropic foundations and individual enterprises.

Contracts with non-residents that do not have a permanent establishment in Qatar are required to report all contracts regardless of their value.

Contracts with residents or non-residents that have a permanent establishment in Qatar are required to be reported if:

- the contract's Net Value reached a minimum of QAR 200,000 - for Services.
- the Contract's Net Value reached a minimum of QAR 500,000 - for Construction and Supply.

As of January 2021 contracts equal to or exceeding the aforementioned threshold should be filed on the Dhareeba Portal within thirty (30) days of their signature by both parties. A penalty of QAR 10,000 will be imposed for each contract that goes unreported by the taxpayer.

BACK

PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Qatar taxation, please contact Tareq Ayoub at **tareq.ayoub@pkf.com.qa** or call **+974 44 93 51 96**.

New transfer pricing requirements

Transfer Pricing requirements have been issued in February 2021, adding to the existing transfer pricing requirements that were introduced in December 2019.

Background key points

- Entities in Qatar are expected to conduct their transfer prices with related parties at arm's length and in accordance with the Comparable Uncontrolled Price (CUP) method or any other pricing method accepted by the Organization for Economic Co-operation and Development (OECD).
- All related-party transactions should be done on an arm's-length basis as if dealing with independent entities where certain procedures have be to followed to ensure said arm's-length principle.
- The financial statements and tax disclosures should include a "Functional Analysis" of the related-party transactions that describe the taxpayer's economic role with the related entities.
- The financial data of related-party transactions have to be maintained and recorded every year. Each related entity shall perform a new search for comparable independent providers in financial databases every three years, if and to the extent that the activities' circumstances remain unchanged.
- The Transfer Pricing requirements include four tiers of compliance:
  i. Transfer Pricing Form/Questionnaire to be provided with the Tax Return
  ii. Master file
  iii. Local file, and
  iv. Country-by-Country Reporting requirements (already introduced in 2018/2019).

Newly published key points

1. Disclosure Form

Entities in Qatar are required to submit Transfer Pricing Disclosure Forms if they have business transactions with related parties where the total turnover OR total assets in the financial year are equal to or exceed QAR 10 million (approximately USD 2.7 million).

The filing date of the prepared transfer pricing disclosure form is the same as the entity's tax disclosure date.

The following should be included in the Transfer Pricing Disclosure form:

- Background information on Group activities.
- List of major intangible assets owned or used by the resident entity and country of related parties that own these assets
- General description of the group transfer pricing policy
- Information about the associated enterprise, including country, transaction amount, and transfer pricing method used
- A brief statement with details of the nature of the transactions, the amount of the transactions and the country of the related

parties if the aggregate value of transactions with related entities exceeds QAR 200,000.

2. **Master File**

Based on the GTA request, entities are required to submit the Transfer Pricing Master file, the contents of which are in line with the OECD's recommendations, to the GTA, including at least the following:

- A high-level overview of the company's business operations, description of the Group's five largest supply chain products or services, as well as service agreements between Group entities
- Main geographical markets and functional analysis describing the principal contributions to value creation by individual entities within the group;
- Significant transactions related to business restructuring, acquisitions and divestment operations; and
- Transfer pricing policies and information about intangible assets owned by Group entities, inter-company financial activities, and financial and tax positions.

3. **Local File**

Based on the GTA request, entities are required to submit the Transfer Pricing Local file, the contents of which are in line with the OECD's recommendations, to the GTA, including at least the following:

- A description of the management structure of the local entity, a local organisation chart, business strategy, whether the resident entity participated in business restructuring operations or transfers of intangible assets and information about the main competitors
- Description of controlled transactions (e.g. procurement of manufacturing services, purchase of goods, provision of services, loans, financial and performance guarantees, licences of intangible assets, etc.) and the context in which these transactions take place
- A functional analysis, copy of inter-company agreements, and transfer pricing methods used
- Information about bilateral advanced pricing agreements (APAs) and tax rulings; and
- A financial statement of the local entity, a schedule of the relevant financial data for comparison used in transfer pricing analysis and the sources from which that data was obtained.

BACK

PKF Comment

If you believe the above measures may impact your business or require any advice with respect to Qatar taxation, please contact Tareq Ayoub at **tareq.ayoub@pkf.com.qa** or call **+974 44 93 51 96**.

Romania

Various tax updates for 2021

Changes to corporate income tax:

- **Place of effective management**

  Starting 1 January 2021, the concept of effective place of management for a non-resident entity in Romania is modified subject to meeting at least one of the follwing conditions:

  - the economic-strategic decisions required for managing the activity of the foreign legal entity as a whole are taken in Romania
  - at least half of the executive directors/members of the board of directors of the foreign legal entity are resident in Romania.

  Entities meeting the conditions of effective place of management in Romania are liable for corporate income tax (CIT) on their entire activity regardless of whether performed in or outside of Romania.

- **Telework deductible expenses:**

  Expenses incurred by the employer related to the telework activity of employees working under this regime according to legislation are deductible for CIT computation purposes.

- **Fiscal consolidation for CIT purposes:**

  A fiscal consolidation system under corporate income tax will be established effective 1 January 2022. Certain cumulative conditions must be met, such as fulfillment of the holding condition for an uninterrupted period of one year, prior to the beginning of the fiscal consolidation period. The newly introduced provisions establish the rules for entrance to or exit from the fiscal group, the regime of fiscal losses, and the rules regarding the declaration and payment of CIT by the fiscal group representative.

- **Tax loss in case of reorganisation:**

  Tax losses in the context of legal reorganisations (merger/division/split operations) involving micro-enterprises may now be recovered.

- **Integral deductibility of provisions:**

  Subject to certain conditions (e.g. the receivables remain uncollected for a period exceeding 270 days from the due date) provisions will be fully deductible for CIT computation purposes (they are currently 30% deductible) - this provision becomes applicable effective 1 January 2022.

Changes to specific tax for hospitality sector

Taxpayers liable to pay the specific tax for some activities for 2021 (applicable for taxpayers active in e.g. accommodation, bars, restaurants) do not owe specific tax for a period of 90 days starting from 1 April 2021 (the suspension of the specific tax was in force for the first quarter of 2021).

Changes to micro-enterprise tax

Dividend income received by a micro-enterprise from a Romanian legal entity has been made non-taxable for the purposes of micro-enterprise tax.

Changes to withholding tax

The withholding tax rate has been reduced from 16% to 10% on certain types of income (interest, royalties, commissions, sports and entertainment activities in Romania, management or consultancy services and services provided in Romania) derived from Romania by individuals resident in an EU Member State or in a state with which Romania has concluded a double tax treaty.

Changes to income tax and social contributions

The deadline for submitting the single declaration for income tax and social contributions by income taxpayers, and the related payment of tax and contributions, is postponed from 15 March to 25 May of the year following the reference year.

Changes to VAT

- **Increase of threshold for VAT cash accounting system**

  The threshold for entities wishing to apply the VAT cash accounting system has increased to RON 4,500,000 (from RON 2,250,000).

- **Adjustment of VAT taxable base in case of deliveries to individuals**

  The VAT taxable base can be adjusted if the invoices issued to individuals have not been fully or partially collected within 12 months, except for the case where the supplier and the beneficiary are affiliated parties. The adjustment is allowed subject to proof that commercial measures have been taken for the recovery of receivables of up to RON 1,000, including legal proceedings for the recovery of receivables exceeding RON 1,000.

- **Increase of threshold for delivery of dwellings**

  The threshold for the delivery of houses subject to a 5% VAT rate was increased to EUR 140,000 (from RON 450,000) - this provision becomes applicable effective 1 January 2022.

- **Exemptions for certain imports**

  VAT is not actually paid to the customs authorities for certain imports of goods subject to simplification measures (for example, imports of cereals), performed by entities registered for VAT purposes (subject to certain conditions). VAT will be paid through the reverse charge mechanism.

- **Import followed by an intra-community delivery of goods**

  A taxable person not established in Romania and not registered for VAT purposes in Romania making an import in Romania followed by an intra-community delivery of goods may appoint an authorised fiscal representative to fulfil the VAT obligations arising from these operations. A person who appoints an authorised fiscal representative is held individually and jointly and severally liable for the payment of the VAT, together with his authorised fiscal representative.

- **VAT exemption**

  Deliveries of medical equipment for in-vitro diagnosis of Covid-19, vaccines against Covid-19, as well as related vaccination and testing services are VAT-exempt until 31 December 2022.

- **VAT refunds**

  Subject to certain conditions, VAT refunds are granted with subsequent tax audits until 31 January 2022.

BACK

PKF Comment

The recent changes made to legislation are, to a large extent, beneficial and necessary, all the more so at a time of instability in society and deep transformation of business. They adapt Romania to the new reality and align Romanian legislation with international standards in the current context.

If you believe the above measures may impact your business or require any advice with respect to Romanian taxation, please contact Narcisa Chirila at **narcisa.chirila@pkffinconta.ro** or call **+40 21 317 31 96**.

Rwanda

Rwanda issues long-awaited transfer pricing regulations

Ministerial Order No. 003/20/10/TC of 11 December 2020 Establishing General Rules on Transfer Pricing (TP) came into effect on 14 December 2020 with the publishing of Official Gazette No. 40 of 2020. For the first time, Rwanda now has elaborate TP rules that are consistent with international practice.

Scope of the new TP rules

The rules apply to entities in Rwanda which carry out controlled transactions with both domestic and foreign related persons.

By definition, related persons include family relatives up to the third degree, direct or indirect participation in the management, control or capital of another enterprise or a third party who participates directly or indirectly in the management, control or capital of two enterprises.

Dealings involving a permanent establishment located in Rwanda are also covered by these rules.

The scope also includes “deemed controlled transactions” which are transactions that may not be carried out between related persons but applies to transactions with third parties who are deemed to operate in a country that is considered to offer a beneficial tax regime. A detailed list of features which narrow down which countries are considered as offering such beneficial tax regimes includes countries that offer a headline corporate income tax rate of 20% or less.

Threshold for preparation of TP Documentation

A taxpayer with an annual turnover of less than RWF 600 million is not required to prepare TP documentation. However, a taxpayer with a turnover of less than RWF 600 million may still be required to submit documentation in the following two instances:

- Carries out a single controlled transaction of RWF 10 million or more

- Carries out aggregated controlled transactions of RWF 100 million or more.

Deadline for preparation and submission of TP documentation

Documentation for a relevant tax period must be in place before the deadline of income tax declaration. Consequently, taxpayers with a 31 December 2020 year-end must prepare the Local file for 2020 by 31 March 2021.

Upon request from the Tax Administration, the required documentation must be presented within seven days.

Documentation requirements

The rules provide that any person carrying out transactions that are within the scope of TP must have a TP policy and also prepare and maintain TP documentation (local file) that verifies that the conditions of the controlled transactions for a relevant tax period are consistent with the arm's-length principle. The local file format and requirements are mostly consistent with OECD TP guidelines.

BACK

PKF Comment

The new rules provide some level of certainty to MNEs operating in Rwanda as to the level of TP documentation they need to have in place. However, some of the rules regarding deemed controlled transactions can be viewed as impractical especially because it is difficult to obtain sufficient information from unrelated entities operating in so-called beneficial tax regimes.

For further information or advice concerning Rwanda taxation, please contact Erick Njuguna at enjuguna@rw.pkfea.com or call **+250 788 454 746 • +250 788 386 565**.

SARS spotlight clearly focused on Transfer Pricing

With the Minister having recently announced the ZAR 3 billion spending allocation towards the enhancement of SARS enforcement, with a particular focus on transfer pricing (TP), it is highly probable that we will be seeing more queries and audits in this area. This is further confirmed in the recent judgement handed down on 7 January 2021 in ABC (Pty) Ltd v C:SARS ((IT14305) [2021] ZATC1) which is now regarded as the second TP case in South Africa in under 3 years with the first being Crookes Brothers Ltd v C:SARS (judgment delivered on 8 May 2018, [2018] ZAGPHC 311).

Background

The Applicant (ABC (Pty) Ltd) is in the business of manufacturing, importing and selling chemical products. It has a catalyst division that is focused on manufacturing and selling catalytic converters (catalysts) which are used in the abatement of harmful exhaust emissions from motor vehicles. The catalysts are then sold to South African customers who are primarily motor vehicle manufacturers.

In order to produce such catalysts, the application purchases the metals required from a connected party known as the Precious Group of Metals (PGM) situated in Switzerland.

SARS conducted an audit in 2014 on the taxpayer's 2011 year of assessment and raised an additional assessment on 11 January 2016 to effect an adjustment to the Applicant's taxable income due to it holding the view that the purchase of metals from PGM did not meet the arm's length standard.

It is noted that the Applicant did not specifically test its transactions or document for TP purposes. At this point it is important to note that the tax period to which dispute relates was prior to the mandatory requirement for taxpayers to maintain a TP policy.

However, Practice Note 7 (PN 7) which existed at the time, recommended that taxpayers maintain such policy so as to support the arm's-length nature of transactions between connected persons and further states that where a taxpayer elects not to prepare TP documentation, it is at risk on two counts. The first being that it is more likely that SARS will examine a taxpayer's TP in detail and the second being in the event where SARS makes the determination of the arm's-length price that it will be difficult for the taxpayer, with a lack of adequate documentation, to rebut that substitution either directly to SARS or in the Courts.

SARS conducted its own TP analysis based on PN 7 and the Transfer Pricing Guidelines (TPGs) which included a benchmarking study using external companies it considered comparable to the Applicant and concluded that the Transactional Net Margin Method (TNMM) with a Full Cost Mark-up (FCMU) of 1% as applied by the Applicant in its 2011 financial statements fell between the minimum and lower quartile of the range of comparable companies. Accordingly, SARS argued that the pricing of the transaction was not at arm's length and adjusted the FCMU to the median arm's length range. This resulted in an increase in the Applicants taxable income of ZAR 114,157,077 in the 2011 year of assessment.

Issue

The Applicant sought a separation of issues order to the effect that SARS had incorrectly applied the provisions of section 31(2) by adjusting its profits and effectively the price it charged to the third-party customers as opposed to adjusting the pricing of the metals purchased from PGM hence the additional assessment is invalid.

A separation of issues order effectively allows a separation of a question of law or fact to be decided prior to dealing with the main issue. For the sole purpose of the court dealing with the application for a separation of issues the Applicant accepted, on a without prejudice basis, that the transaction with PGM was not at arm's length.

Arguments made by the Applicant and SARS

SARS opposed the separation of issues on various grounds, one of which was that the issue is inextricably bound to the main issue of the appeal being the determination of the arm's-length price.

Part of the Applicant's argument included a dispute on the methodology adopted by SARS in arriving at the arm's length price as it was of the view that the CUP method should have been applied rather than the TNNM. The CUP method being a direct comparison to the pricing of the transaction as opposed to the TNNM method which focuses on the net profitability of the transaction.

The Applicant also argued that SARS cannot place reliance on PN7 and the TPGs as issued by the OECD as section 31 does not make reference to such documents, and accordingly, these have no legal status. The powers of SARS "must be established only by reference to the statute itself". In this regard the Applicant placed reliance on the decision in Marshall and Other v C: SARS (SARS [2018] ZACC 11) where it was held that the statute may not be determined with reference to how the administrative agency responsible for implementing it understands it.

The Applicant further sought to place reliance on the fact that section 31 was amended in April 2012 to shift from the adjustments being made to a specific transaction but to rather focus on the overall arrangements driven by an overarching profit objective. Thus, proving that the legislation as it applied in respect of the Applicant's 2011 year of assessment did not allow for SARS to adjust profits but only the pricing of the specific transaction.

SARS's counter argument to this was that the "amendments were effected to clarify what the legal position always had been" and "merely highlight what has always been in the legislation".

Analysis and Judgement

Consideration was first given to paragraph 1 of Article 9 of the OECD Model Tax Convention which effectively states that where transactions conducted between associated enterprises are not at arm's length the profits of that enterprise must be adjusted and taxed accordingly. Three international TP cases were then analysed and concluded that regardless of the methodology used to arrive at the arm's length price, the "adjustments are made to the profits of the taxpayer to ensure that tax is levied on the correct amount of taxable income".

The court dismissed the application on the basis that there was no cogent point of law to be tested in what the Applicant was raising. Besides arguing that SARS ought not to have adjusted its profits the Applicant did not make any practical suggestion as to how the adjustment ought to have been done in order to determine its taxable income.

The court further noted that the Applicant also made reference in its representations, primarily via its response to the audit findings, to the authoritative statements, TPG and PN7 and accordingly envinces a practice that is internationally accepted and applied by both SARS and the Applicant. Hence, the Applicant's reliance on the Marshall case is misplaced.

The court also makes mention of the SCA judgement in Natal Join Municipal Fund v Endumeni Municipality ((920/2010) [2012] ZASCA 13) where it was held that consideration must be given to the language used, the context in which the provision appears, the apparent purpose to which it's directed and the material known to those responsible for its production.

In this regard PN7 and TPGs were known materials responsible for the production of section 31 (2). The court also makes reference to the report from the Davis Tax Commission's Base Erosion and Profit Shifting sub-committee (Report released in May 2016: accessed at www.taxcom.org) which confirms that "South Africa needs to align itself with the OECD standards or regulations on Transfer Pricing".

Based on the above the court concluded that SARS's reliance on TPGs and PN7 make the point sought for the separation of matters and that ordering such separation "would be a waste of resources." In a TP matter the establishment of the arm's length nature of the transaction is the first step and an overriding principle which cannot be receded to the back. Therefore, ordering a separation will not achieve any practical benefit. On the contrary it will lead to piecemeal litigation, increase costs and delay finalisation of the matter.

Important lessons to be learnt

Where a taxpayer enters into cross-border transactions with connected persons (i.e., affected transactions), it is imperative that it tests the arm's length nature of these transactions and documents this by way of proper TP policy. For years of assessment commencing 1 October 2016, where a taxpayer's affected transactions exceed ZAR 100 million, it is mandatory for the TP policy to be submitted to SARS with the tax return.

As suggested in PN7, where a taxpayer does not have a TP policy in place, they will be on the back foot in defending the arm's length nature of the transaction and have difficulty in rebutting the amount determined by SARS or the Courts. Therefore, whilst this case did not actually deal with whether the transaction was at arm's length, an important lesson to take from this is that even where affected transactions do not exceed the ZAR 100 million threshold, it is recommended that some level of testing and documentation be retained to confirm the arm's length nature of the transaction. This avoids unnecessary assessments being raised which will likely lead to costly disputes/litigation.

BACK

PKF Comment

If you believe any of the above measures may impact your business or personal situation or require any advice with respect to South Africa taxation, please contact Kubashni Moodley at **kubashni.moodley@pkf.co.za** or call **+27 31 573 5000**.

Spain

Transposition of anti-hybrid rules into Spanish law

On 10 March 2021, the Royal-Decree-Law (RDL) 4/2021 was published. As result, Spain transposed into its domestic legislation, the anti-hybrid rules contained in the ATAD II Directive (EU) 2016/1164. The new amendments are applicable to fiscal years starting on or after 1 January 2020, which have not concluded by 10 March 2021 (before the RDL was passed and entered into force. This will lead to retroactive effects in certain instances where the fiscal year differs from the calendar year. However, if the fiscal year corresponds to the calendar year, these rules will only apply as from 1 January 2021.

These regulations are aligned with BEPS Action-2 and the EU anti-tax avoidance plans, and their implementation aims to prevent "hybrid" disparities or mismatches, i.e. situations that lead to non-taxation or double deduction scenarios due to different interpretations among numerous jurisdictions. In previous years Spain had already transposed several anti-hybrid rules into domestic law, with the approval of said RDL Spanish legislation. This will now cover the entire spectrum of hybrid mismatches arising between Spain and other jurisdictions.

Anti-hybrid implementing regulations, mostly addressed to related parties, amend both Spanish Corporate Income Tax (CIT) and Non-resident Income Tax (NRIT) legislation while specifying which expenses, as the case may be, are deductible at the level of entities and individuals subject to tax in Spain. The concept of related or associated parties refers to:

- Related parties as per Spanish Transfer Pricing (TP) provisions (new amendments under article 18.6-7 of the CIT Law and article 15.bis of the NRIT Law);
- Additionally:
  - An entity that holds, directly or indirectly, at least 25% of voting rights and/or is entitled to receive at least 25% of profits of the taxpayer.
  - A taxpayer/entity that acts together with another individual or entity in relation to voting rights or its ownership of the capital of the taxpayer.
  - An entity in which the taxpayer has a significant influence on management (power to take part in decisions on financial policy and operations).

In summary, expenses will not be deductible from CIT and NRIT taxable bases when the following "hybrid" cases or patterns are present:

- Deduction without inclusion: an expense treated as deductible in one jurisdiction and not taxable in the other.
- Hybrids leading to a double deduction: an expense treated as deductible in both jurisdictions.
- Hybrid permanent establishments (PEs) and disregarded PEs: situations in which the different treatment of revenues and expenses between legislations result in no taxation in either of the countries or territories (even including mismatches about the recognition of a PE, double non-inclusion situations).
- Imported mismatches, referring to situations in which tax treatment divergencies in a third territory generate a deductible expense in Spain as a result.
- Structured arrangements: double deduction, deduction without inclusion or double non-inclusion scenarios coming from arrangements intended to generate a tax advantage or tax avoidance as their main purpose.
- Double use of tax withholdings: hybrid mismatches regarding international double taxation deductions.
- Double tax residence giving rise to a deductible expense in both territories.

On the other hand, the anti-hybrid provisions would not be applicable to certain mismatches:

- When the payee is exempt from Spanish CIT
- resulting from a financial agreement or instrument subject to a special tax regime

- caused by valuation differences, including those resulting from TP rules.

Other recent tax changes or developments in Spain:

- Exemption regime for dividends and capital gains from domestic and foreign subsidiaries limited to 95% of income (5-year transition period) - (CIT)
- Higher threshold for deductibility of financial expenses. Earnings from dividends where the investment acquisition value exceeds EUR 20 million will not be added to operating profit - (CIT)
- Exemption on interest and capital gains obtained by EU residents will henceforth also cover European Economic Area (EEA) residents. Exemption will be applied in the hands of shareholders holding at least 5% of capital - (NRIT)
- Increase in personal income tax rates applicable to high earners and limitation to the exemption applied to contributions to social security systems ("pension plans") - (PIT)

BACK

PKF Comment

Multinational groups and businesses with interests in Spain should review current and future investments and corporate structures in order to identify potential hybrid mismatches. Anti-hybrid regulations could have a significant impact on restricting the deducibility of expenses and/or subjecting certain income streams to tax. In addition to the anti-hybrid regulations, the reduction on the exemption of dividends (to 95%) should also be taken into account by international businesses.

If you believe the above measures may impact your business or personal situation or require any advice with respect to Spanish taxation, please contact Santiago González at **sgonzalez@pkf-attest.es** or call **+34 915 561 199**.

Ukraine

New tax rules for non-residents having permanent establishments/representative offices in Ukraine

New tax rules for non-residents and their Permanent Establishments (PEs) in Ukraine are introduced by Law of Ukraine No.1117 of 17 December 2020 (Law No.1117).

From 1 January 2021, non-residents that operate in Ukraine through representative offices or PEs are obliged to register with the tax authorities and become corporate income tax (CIT) payers in Ukraine as follows:

- A non-resident is required to register with the tax authorities at its PE`s location before starting to carry on a business activity through the PE (for new PEs);
- Non-residents that already have a PE in Ukraine as of 1 January 2021 and/or are carrying on a business activity in Ukraine are required to submit documents to the tax authorities for registration as CIT payers until 31 March 2021.

It is worth noting that a non-resident that is carrying on a business activity in Ukraine through a PE and is not registered as a CIT payer in Ukraine should be considered a tax evader, while his income will be considered hidden from taxation. After 1 July 2021, the State Tax Service of Ukraine will start tax audits on non-residents that should register as CIT payers in Ukraine but failed to do so, subject to a penalty of UAH 100,000 (approximately EUR 3,000).

The non-resident`s new registration differs from the registration of a PE or representative office. In order to become a CIT payer, a non-resident must submit (at the PE's location) the following documents with the local tax authority:

- special application;
- extract from business (trade, commercial, court etc.) register that contains the non-resident's registration data;

- document that confirms the authorities of the non-resident's representative submitting the application;
- certificate that confirms the accreditation of the PE in Ukraine, if any.

After the non-resident tax registration, the PE:

- with respect to CIT – should be deregistered as a CIT payer in Ukraine (unconditionally), meaning that the non-residents become CIT payers themselves and are required to submit appropriate tax filings; and
- with respect to other taxes:
  - continues to be a taxpayer/tax agent of other taxes in Ukraine like personal income tax, military tax, unified social contribution and VAT (if the PE is an accredited unit in Ukraine and has special registration (EDRPOU or USREOU) code), or
  - should be deregistered as a taxpayer in Ukraine (if the PE is not accredited as a separate unit of a non-resident in Ukraine and only has a tax number).

Apart from this, Law No.1117 postponed by one year an effective date for the right of non-residents to recognise themselves as CIT payers based on the place of effective management on the territory of Ukraine. The foreign company will be able to recognise itself as a tax resident of Ukraine because of its place of effective management on the territory of Ukraine no earlier than 1 January 2022.

BACK

PKF Comment

If you believe any of the above measures may impact your business or personal situation or require any advice with respect to Ukraine taxation, please contact Sviatoslav Biloblovskiy at **s.biloblovskiy@pkf.kiev.ua** or Dmytro Khutornyy at **d.khutornyy@pkf.kiev.ua** or call **+380 44 501 25 31**.

United Arab Emirates

Various tax updates – Economic substance regulations, and VAT and excise duties

ECONOMIC SUBSTANCE REGULATIONS ('ESR') - UPDATES

Compliance under UAE ESR

The majority of Licensees covered under ESR (and having financial years starting on or after 1 January 2019) undertook their first round of ESR Report filing in the first quarter of FY 2021.

Given below is a summary of compliance requirements under UAE ESR which are two-fold:

- **Notification Filing:**
  - Licensees/Exempt Licensees who undertake relevant activity are required to submit the notification on the UAE Ministry of Finance ('MOF') portal made available;
  - Time frame for compliance with the requirement of Notification Filing is on or before expiry of six months from the relevant financial year-end;
  - MOF has published the template of 'Information Notification' and related guidance on its website.
- **Reporting:**
  - Licensees carrying out a relevant activity and earning income therefrom are required to submit a report containing requisite information and prescribed documentation;
  - Report is required to be submitted within 12 months from the financial year-end of the Licensee;
  - MOF has published the template of 'Substance Report' and related guidance on its website.

The above compliance is required to be filed on an annual basis. Accordingly, the Licensees in the UAE will have to re-evaluate the applicability of ESR every year and undertake the prescribed compliance as mentioned above.

Amended FAQs

The UAE MOF had issued amended FAQs in January 2021. These FAQs were further amended in April 2021 to include the section on 'Regulatory Authority designated contacts for ESR enquiries'.

Link to access MOF website

The notification template, reporting template, related guidance and amended FAQs can be accessed on the following link:
https://www.mof.gov.ae/en/StrategicPartnerships/Pages/ESR.aspx

UAE VAT AND EXCISE TAX UPDATE

The UAE Federal Tax Authority ('FTA') has issued several important user guides and public clarifications since our last tax update. Some of these updates recently released by the FTA are listed below:

Date	Tax	Type of Update	Particulars of Update
December 2020 (w.e.f. September 2020)	VAT	Cabinet Decision	Application of Tax at the Zero Rate on Certain Medical Equipment
December 2020	VAT	Public Clarification	Temporary Zero-rating of Certain Medical Equipment
December 2020	Excise Tax	User Guide	Excise Tax Administrative Exceptions User Guide
January 2021	Excise Tax	User Guide (Updated version)	Excise Tax Refund
January 2021	Excise Tax	User Guide (Updated version)	Excise Stock Movement Guide for Warehouse Keepers who are Registered for Excise Tax
January 2021	Excise Tax	User Guide (Updated version)	Excise Stock Movement Guide for Warehouse Keepers who are not Registered for Excise Tax
February 2021	Excise Tax	User Guide (Updated version)	Excise Tax Return User Guide
March 2021	VAT	Basic Tax Information Bulletin	Artists and Social Media Influencers
March 2021	VAT	Public Clarification	Adjustment on Account of Bad Debt Relief

Some of the above key updates are discussed hereafter:

- **Cabinet Decision No. (9/12 O) of 2020 on Application of Tax at the Zero Rate on Certain Medical Equipment**

  This decision stipulates that the supply or import of Personal Protective Equipment (PPE), which is used for the protection of Covid-19 and specified by the Ministry of Health and Prevention, is zero-rated for six months from the effective date of the Decision, i.e. between 1 September 2020 and 28 February 2021. After 28 February 2021, the supply or import of PPE shall be taxable at the standard rate.

- **VAT Public Clarification on Temporary Zero-rating of Certain Medical Equipment (VATP023)**

  It has been clarified that a supply or import of certain medical equipment may be zero-rated where the supply or import occurs within six months from the effective date of Cabinet Decision No. (9/12 O) of 2020. In addition, it clarifies the rules for determining which medical equipment is covered by the zero-rating rules and the timeframes for the application of the rules.

- **Administrative Exceptions Excise Tax User Guide**

  The FTA has issued the User Guide on Excise Tax Administrative Exceptions along with an application form. The guide specifies what Excise Tax Administrative Exception is, the eligibility criteria, and the process for submitting a request.

- **Basic Tax Information Bulletin on Artists and Social Media Influencers**

  The FTA has issued a basic tax information bulletin addressing specific issues relating to artists and social media influencers from a UAE VAT law perspective. This bulletin provides clarity on the following:

  - Persons who must read such bulletin (i.e. Artists and Social Media Influencers (SMIs));
  - Instances where services provided by Artists and SMIs would be subject to VAT;
  - Requirement to register for UAE VAT and deriving the quantum of taxable supplies;
  - Applicability of VAT on barter transactions;

— Provisions concerning deemed supplies where Artist/SMI does not charge any consideration for their services;

— Applicability of VAT on supplies where the Artists/SMIs also own a management company;

— Clarity on VAT implications concerning agent and principal relationship when an Artist/SMI operates through an intermediary;

— Clarity on VAT implications where services are provided to resident customers but are performed outside the UAE.

- **VAT Public Clarification on Adjustment on Account of Bad Debt Relief (VATP024)**
  This public clarification discusses the conditions which must be met in order to benefit from the Bad Debt relief scheme. Accordingly, the FTA has specified that the following four conditions must be met:

  a. The goods and services should have been supplied and VAT on the supply should have been charged and accounted for;

  b. The consideration for the supply should have been written off in full or in part as a bad debt in the accounts of the supplier;

  c. More than six months should have passed from the date of the supply;

  d. The supplier should have notified the customer of the amount of consideration for the supply that has been written off.

Mechanism to claim bad debt relief:
The FTA has specified that any adjustment on account of bad debt relief should be made in the "Adjustment column" of Box 1 of the VAT Return".

Such adjustment amount should be the VAT amount only and should be reported for each Emirate (as may be applicable), in accordance with the respective Output Tax amount being adjusted.

Source: https://www.tax.gov.ae/en

BACK

PKF Comment

Businesses in the UAE which have identified themselves as in-scope for the purposes of UAE ESR, are required to comply with the prescribed filing requirements within the timelines provided by the MOF.

VAT and Excise tax user guides and public clarifications continue to provide valuable guidance in assessing the VAT and Excise Tax implications of various transactions and provide further clarity thereon.

Contact us
For further information or advice concerning taxes in the UAE, please contact Ms. Sarika Dhameja at **sdhameja@pkfuae.com** or Mr. Chaitanya Kirtikar at **cgk@pkfuae.com** or call **+971 4 3888 900**.

UK Budget 2021 – Corporate & Business Tax - A summary

- UK main corporation tax rate to rise to 25% from 1 April 2023
- Loss carry back extension
- UK R&D Tax Reliefs consultation
- Investment in the 'Future Fund: Breakthrough'
- Super-deduction & 50% First Year Allowance
- Freeports and enhanced allowances
- Changes to the hybrid and other mismatches regime for Corporation Tax

- WHT: Repeal of provisions for the EU Interest and Royalties Directive.

Corporation Taxes

UK main corporation tax rate to rise to 25% from 1 April 2023

To commence recovering finances after the Covid-19 pandemic, the UK government announced an increase in the rate of corporation tax from 19% to 25% on profits over GBP 250,000 from 1 April 2023.

The tax rate for profits under GBP 50,000 will remain at 19% with the corporation tax rate being tapered up to 25% for profits falling between the upper and lower limits. Close investment holding companies will not be eligible for the lower rate of corporation tax.

The new rates have yet to be substantively enacted and legislation will be introduced in Finance Bill 2021 to set the corporation tax rates.

Loss carry back extension

Businesses (both companies and unincorporated) will be afforded increased flexibility with the carry back of trading losses that have arisen during the Covid-19 pandemic. At present, the period over which businesses may carry trading losses back for relief against profits of earlier years is 12 months. The temporary extension will allow for losses incurred in 2020/21 and 2021/22 to be carried back three years.

The amount of trading losses that can be carried back to the preceding year remains unlimited however the following restrictions apply to the extended period:

- Unincorporated businesses and companies can carry up to GBP 2 million of trading losses back for relief in each year
- Group companies can carry up to GBP 200,000 of trading losses back for relief in each year, without any group limitations
- Group companies can carry up to GBP 2 million of trading losses back for relief in each year, subject to a GBP 2 million cap across the whole group.

Research and Development Tax Credits

UK R&D Tax Reliefs consultation

The UK government is committed to incentivising innovation as part of their post Covid-19 plans. With the aim of ensuring the UK remains competitive and that R&D schemes are well-targeted and remain relevant, a wide-ranging consultation on the UK R&D tax credit schemes has been launched.

Investment in the 'Future Fund: Breakthrough'

The UK government have committed GBP 375 million to the UK-wide 'Future Fund: Breakthrough', encouraging private investors to co-invest in high-growth, innovative companies, aiming to raise at least GBP 20 million of funding.

Capital Allowances

Super-deduction & 50% First Year Allowance

Additional capital allowances will be introduced from 1 April 2021 until 31 March 2023 in the form of a new super-deduction (130%) and a temporary 50% first year allowance (FYA) to encourage capital spend by companies over the next two years.

The super-deduction will apply to expenditure on new plant and machinery that would ordinarily qualify at the main pool writing down allowance rate of 18%. Companies investing in new plant and machinery typically qualifying at the special rate pool writing down allowance of 6% can claim the 50% FYA.

Freeports and enhanced allowances

The UK government announced plans for eight new English Freeports, to be based in East Midlands Airport, Felixstowe & Harwich, Humber, Liverpool City Region, Plymouth, Solent, Thames and Teesside.

Businesses incurring qualifying expenditure on plant and machinery for use in freeports will be able to qualify for 100% enhanced capital allowances until 30 September 2026. This will enable 100% tax relief to be achieved for substantial capital spend after the super-deduction ends in March 2023.

Freeports will also benefit from an enhanced rate of structures and buildings allowance (SBA) available for businesses on qualifying expenditure on new non-residential structures and buildings constructed in freeport tax sites. Ordinarily, tax relief is achieved at 3% per annum, but freeports can benefit from a 10% straight line tax deduction, effectively achieving full tax relief on the cost of the building after only 10 years.

Other tax incentives have been announced in respect of Freeport locations including: SDLT relief on purchases of land and buildings until 30 September 2026 subject to conditions; business rates relief for new business and some existing businesses for five years; and a proposed relief for employers national insurance contributions in respect of certain employees in Freeport locations from April 2022.

Changes to the hybrid and other mismatches regime for Corporation Tax

The UK government has confirmed that the Finance Bill 2021 will introduce several changes to the hybrid and other mismatches regime following previous consultation on the regime. Only some of the proposed changes will have retrospective effect from 1 January 2017.

The proposed revisions to the legislation include amending the definition of dual inclusion income to "include income that is fully taxed but not subject to any corresponding deduction in any territory which has a tax akin to corporation tax", clarification of the meaning of dual inclusion income and provisions to allow for the allocation of dual inclusion income within a group where certain conditions are met.

There is suggestion of a possible widening in scope of the 10% investor provision, with new provisions ensuring that counteractions are disapplied if they arise in respect of participants in transparent funds that hold investments of less than 10% in those funds. Other changes have been proposed in favour of limiting the size of the counteraction in certain circumstances thus removing some of the penal effects of the current rules.

The hybrid and other mismatches regime is complex and the efficacy of the proposed revisions will depend on the final detail which, for the most part, is pending the publication of the Finance Bill 2021.

Withholding Tax

Repeal of provisions for the EU Interest and Royalties Directive

Following the exit of the UK from the European Union and the end of the transition period, the UK Chancellor announced as part of his budget statement on 3 March 2021, that provisions for the EU Interest and Royalties Directive to potentially mitigate withholding tax (WHT) risks on interest payments, would be removed from UK legislation with immediate effect. The Directive provided an exemption from WHT in respect of intra-group interest and royalty payments between UK and EU companies.

UK legislation giving effect to the Directive will no longer apply to payments of annual interest and royalties made to EU companies from 1 June 2021. An anti-forestalling provision is in place for payments made on or after 3 March 2021. It should be noted that any exemption notices issued by HMRC confirming that the Directive applied to payments will cease to apply from 1 June 2021.

As a result, the tax treatment of interest and royalty payments from EU companies to the UK will be governed solely by domestic law and reciprocal obligations in relevant double taxation agreements. Some treaties may offer a less favourable outcome than has previously been the case under the EU directives.

Depending on the terms of the treaty, some EU companies can apply for WHT relief under the provisions of their relevant double taxation agreement either by way of relief at source or a repayment claim. To claim a reduced rate of UK WHT on interest under a double taxation agreement, HMRC clearance must be sought to confirm that, for a specified period, interest may be paid at a lower rate of WHT specified in the relevant tax treaty. Where an exemption notice has previously been issued, notice should be requested from HMRC that they accept that the relevant treaty conditions continue to apply.

To deduct a reduced treaty rate UK WHT on royalties, the company must have a reasonable belief that the beneficial owner of the payment is entitled to the reduced rate under a double taxation treaty.

BACK

PKF Comment

If you believe the above measures may impact your business or personal situation or require any advice with respect to UK taxation, please contact Adam Kefford at **adam.kefford@pkf-francisclark.co.uk** or call **+44 13 9235 1804**.

United States

The American Rescue Plan – Key details of the new stimulus package

The House of Representatives passed a final version of H.R. 1319, the American Rescue Plan Act of 2021 (ARPA), on 10 March 2021. This version of the bill has now passed both the House and Senate and was signed by President Biden on 11 March 2021. Among a broad array of stimulus provisions, the legislation includes an extended timeframe for the employee retention credit through the end of 2021, as well as credits for paid family and sick leave for employees and dependent children. There are also enhancements to the PPP loan program, and additional assistance availability to shuttered venue operators and restaurant businesses.

A brief summary of the tax highlights of ARPA follows.

Expanded Employee Retention Credit

The Employee Retention Credit (ERC) is a refundable credit against employment taxes paid by employers whose businesses experienced and are still experiencing a full or partial shut down by government order or a significant decline in gross receipts. The ERC was part of the initial CARES Act legislation and received a broad expansion under the Consolidated Appropriations Act of 2021 at the end of 2020. It was set to expire at the end of the second quarter of 2021, but is now extended by ARPA through the end of 2021. The credit remains fully refundable.

ARPA places a limit on the ERC at USD 50,000 per quarter for “recovery start-up businesses” (businesses which began operations after 15 February 2020 and which meet a gross receipts threshold). ARPA also clarifies that amounts used from proceeds of shuttered venues assistance and restaurant revitalisation grants are not eligible for the ERC.

Small Business Relief Provisions

ARPA increases the funds available for the Paycheck Protection Program by USD 7.3 billion and extends it to additional non-profit organisations, including 501(c)(5) labour organisations, 501(c)(7) social and recreational clubs and 501(c)(8) fraternal societies with not more than 300 employees per location and that receives and spends less than 15% of its revenue and expenses on lobbying activities. It also expands eligibility to charitable and certain other non-profit organisations with not more than 500 employees per physical location (the prior limit was 500 employees, including affiliates). Internet-only publishing companies that were not previously eligible for a PPP loan, with a NAICS code of 519130, that are engaged in the collection and distribution of local or regional and national news and information, will also become eligible under ARPA as long as they employ not more than 500 employees per physical location.

ARPA appropriates USD 15 billion to Targeted EIDL (Economic Injury Disaster Loan) Advances. Of the total appropriation, USD 10 billion is allocated to small businesses with fewer than 300 employees that are located in a low-income community and suffered a 30% or more economic loss over a comparable 8-week pre-pandemic period and that did not receive a full EIDL advance payment under the Economic Aid to Hard-Hit Small Businesses, Non-profits, and Venues Act (Economic Aid Act). The remaining USD 5 billion is allocated to small businesses with not more than 10 employees that are located in a low-income community and suffered a greater than 50% loss. These businesses will be eligible for an additional advance of USD 5,000.

ARPA also establishes a USD 28.6 billion Restaurant Revitalisation Fund to provide grants to restaurants, food trucks, caterers, bars and similar establishments with not more than 20 locations. The grant is equal to the decline in gross receipts from 2019 to 2020 (the pandemic-related revenue loss), not to exceed USD 5 million per physical location and USD 10 million for an affiliated group. The funds may be used to cover payroll costs, mortgage principal and interest, rent, utilities, maintenance, supplies and certain construction costs incurred between 15 February 2020 and 31 December 2021. During the first 60 days after enactment, grants will be available only to eligible entities with 2019 gross receipts of not more than USD 500,000. After the initial 60-day period, grants may be made to any eligible entity regardless of annual gross receipts.

Extension of Credits for Enhanced Paid Sick Leave and Family Leave

ARPA extends the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (Expanded FMLA) provisions of the Families First Coronavirus Response Act (FFCRA) through the end of September, while also extending the tax credits provided to employers who make payments to employees under those programmes. Leave days for COVID vaccinations are now eligible for the credit.

ARPA also allows an increase in the amount of the maximum credit per employee in a year, from USD 10,000 to USD 12,000, and resets an employee's maximum number of leave days after 31 March 2021.

Other Provisions

ARPA also includes:

- For 2020, up to USD 10,200 of unemployment benefits are excluded from taxable income for individuals or married couples with adjusted gross income under USD 150,000;
- Additional stimulus checks of USD 1,400, with eligibility for individuals with adjusted gross income below USD 80,000 (USD 160,000 for married couples);
- Exclusion from income for discharges of student loan indebtedness from 2021 through 2025;
- Expansions to the Child Tax Credit, Earned Income Tax Credit, and Dependent Care Tax Credit;
- Extension of key unemployment programs through 6th September, past their current 14th March expiration date, at USD 300 per week.

BACK

PKF Comment

It is worth noting what ARPA does not include – there are no increases in the individual or corporate income tax rates, no increases to capital gains tax rates, and no changes to the estate and gift tax transfer tax rules. While President Biden has made proposals regarding these areas, they do not appear to be a part of any immediate legislation.

ARPA also does not include an increase in the federal hourly minimum wage. While it was a part of the original House bill, it has been removed from the final version.

If you believe any of the above measures may impact your business or require any advice with respect to US taxation, we invite you to contact your PKF O'Connor Davies advisor or either of the following: Leo Parmegiani at **lparmegiani@pkfod.com** or call **+1 646 699 2848** or Alan S. Kufeld at **akufeld@pkfod.com** or call **+1 646 449 6319**.

US tax implications of suggested "check-the-box" elections for partnerships in Germany

This article provides a brief overview of US tax implications of proposed rules for 'check-the-box' elections for partnerships in Germany. On 24 March 2021, the German Government agreed on a bill suggesting the implementation of a 'check-the-box' system so that certain entities can change the entity classification for tax purposes. Approval of the Federal Council (Bundesrat) is expected end of June 2021.

According to the proposal, certain partnerships incorporated under German law will be eligible to be taxed as a corporation in Germany and the members of the partnership will be taxed like shareholders of a corporation. The election would be available for fiscal years ending in 2022 or later years. The election can be reversed.

The following key US tax implications need to be considered.

1. **Impact on US entity classification**

   When foreign entities invest in the US, a determination must be made as to how the entity should be treated for US income tax purposes. Entities can be treated as flow-throughs and their income, losses, and credits flow through to their owners and are subject to tax at the owner level. Other entities, such as corporations are subject to income tax at the entity level.

The question is: Will the 'check-the-box' election for a partnership in Germany have an impact on the US entity classification?

Under US regulations, an entity is a deemed corporation if it is so formed under federal or state corporate statutes, or is a type of foreign entity found on a comprehensive list in Treasury Regulations and classified automatically as a corporation ('per se' foreign corporations). 'Per se' foreign corporations are not eligible to elect their classification. For Germany, this is the case for an AG (*Aktiengesellschaft*).

All other business entities might be eligible to elect their classification. If no election is made, a default classification will apply, depending on the number of owners, and for a foreign entity, whether the owners have limited or unlimited liability.

As the regulations refer to the foreign federal or state corporate statutes, the classification under foreign tax law will not be considered. This could mean that a German partnership will be considered a flow-through entity for US tax purposes and an entity to be taxed as a corporation in Germany after 'checking the box'. This outcome will trigger the application of tax rules for hybrid structures and can be avoided if the partnership is 'checking the box' in the US as well.

2. Impact on structuring US investments

Certain structures for German investments in the US provide a tax advantage of up to 20% at the moment with regard to the overall US-German tax burden. The calculations do not consider a potential tax hike in the US. For instance, the US administration is considering an increase of the federal corporate tax rate from 21% to 28%. Checking the box in Germany and having a flow-through partnership treated as a corporation for German tax purposes can have a negative impact on the overall US-German tax burden for investors.

Note: You may also be interested in this edition's article under the Germany chapter above on 'Corporate income tax election for partnerships – 'Check the Box' as from 1 January 2022'.

BACK

PKF Comment

PKF O'Connor Davies advice: US investors in Germany using a partnership structure should carefully consider whether they want to make use of the German 'check-the-box' rules once implemented into the German tax code.

If you believe the above measures may impact your business or require any advice with respect to cross-border US-Germany taxation, please contact Ralf Ruedenburg at **rruedenburg@pkfod.com** or call **+1 646 965 7778**.

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