Winter 2022
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ITR

The
Global Tax 50

The most influential figures in tax

UNITED NATIONS
Global tax leadership

TAX DISPUTES
Top 10 TP cases

FINANCIAL SERVICES
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ITR

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Festive 50

Ed Conlon

Much as Christmas seems to roll around faster every year, so does our list of the Global Tax 50, a selection of which appears in the cover story of this PDF (the full version being available on our website). For those lucky enough to feature, you might even say "it's the most … wonderful tiiimmmeee … of the yeeeaaarrr".

Jokes aside, the people we profile must have done something truly influential, so their inclusion is genuinely something to celebrate. It's never an easy task sifting through and agreeing on all the names, but it's always a team effort and it really gets us thinking.

The full list is split into five categories – tax authorities; industry leaders; NGOs; noteworthy individuals; and public officials – and includes a profile for each entry.

It would be impossible to sum up the tax highlights of 2022, but, if one thing stood out, it would be the recent powerplay from the UN to seize control of global tax responsibility from the OECD.

> **"If one thing stood out, it would be the recent powerplay from the UN to seize control of global tax responsibility from the OECD"**

The Paris-based organisation has long been the supreme intergovernmental body for tax policy, but in November the UN made a bold move that lays the groundwork for a new tax convention. This could even lead to the creation of global tax institutions and cooperation frameworks or instruments.

It comes at a time when progress on pillars one and two, which were agreed by the OECD, appears to have ground to a halt (though, in December, EU member states achieved a historic breakthrough by agreeing to implement the OECD's global corporate minimum tax rate of 15% across the bloc). Perhaps that's exactly why the UN has sought to seize its opportunity now, while the future of the two-pillar solution remains unclear.

Whatever you do in 2023, make sure you're following developments in this space – we're going to be in for a fascinating watch.

In the meantime, you can catch up on all the usual expert analysis and local insights in this issue. And of course, we wish you a merry Christmas and a happy new year.

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MEET THE TEAM

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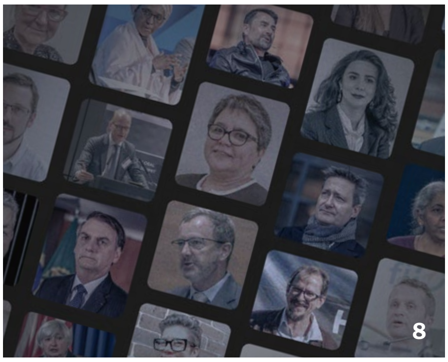
CONTENTS

Winter 2022

Volume 33 Number 5



COVER STORY

FEATURES

EVENTS

REGULAR SECTIONS

Market insight

WTP promotes TP director to managing director

US-based tax group WTP Advisors promoted one the of the directors in its transfer pricing practice to the role of managing director of transfer pricing and valuation services.

Jessica Rask has been with the Minneapolis-based firm for more than six years. Her work is focused on providing transfer pricing and international valuation services for multinational companies.

WTP Advisors calls Minneapolis home

Andersen bolsters US national tax offering in DC office

Andersen – the US arm of international tax consultancy network Andersen Global, announced the addition of a managing director to its office in Washington, DC.

Amber Salotto joins the practice from Deloitte, where she most recently had a 10-month role as a senior tax manager after spending two and a half years as an attorney advisor to the US Department of the Treasury. Prior to that she had spent more than nine and a half years with Deloitte.

Salotto brings with her more than 19 years' experience in the field. Her work is primarily centred around law and public accounting focusing on complex tax and regulatory matters.

VanLoman adds tax partner to practice in Amsterdam

Netherlands-based tax consultancy VanLoman announced the addition of a partner to it's office.

Gabriël van Gelder joins the team from DLA Piper, where he had worked as an international tax lawyer for almost four years. Prior to that, he had served for almost three and a half years with EY in roles as a senior transactional tax manager, as well as a number of roles in other law firms, including a previous three and a half year stint with DLA Piper.

Van Gelder's work has a particular focus on M&A and private equity transactions, tax litigation, international tax planning, corporate reorganisations and investment fund transactions, and he has worked with a number of multinational groups on such matters.

Brazilian firm FLH – Franco Leutewiler Henriques Advogados add tax partner

São Paulo-based law firm FLH – Franco Leutewiler Henriques Advogados announced the addition of a partner to its tax practice.

Tiago Espellet Dockhorn joins the firm from Madrona Advogados, where he had been a partner for more than three years. Prior to his role there, he had spent more than 19 years as a partner with Machado Meyer Advogados.

Dockhorn brings with him more than 25 years' experience in the field. While his work is primarily focused on tax consultancy, his prior practice has included work involving corporate reorganisations, M&A, structuring of foreign investments and national investments abroad and federal administrative proceedings.

King & Spalding welcomes tax partner to Paris office

International law firm King & Spalding announced the addition of a partner to its corporate, finance and investments practice in France.

Olivier Goldstein joins the firm from Reinhart Marville Torre, where he had served for 18 and a half years, as a partner since 2007. Prior to that he had held roles in a number of other firms, including two years with the Paris office of Magic Circle firm Allen & Overy.

Goldstein's work is primarily focused on domestic and cross-border transactions involving M&A and group restructurings, particularly in the pharmaceutical industry, as well as in new technologies and finance. He also serves as an external auditor for the Ligue de Football Professionnel, France's national football authority.

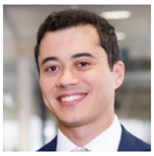
Farrer & Co expands private client team in London office

Independent UK-based law firm Farrer & Co announced the addition of a partner in its private client practice.

Jennifer Ridgway joins the team from Michelmores, where she also served as a partner. Her work is primarily focused on landed estates, tax, and trusts

Andersen bolsters: Washington DC, the centre of US tax policymaking and has extensive experience working with UHNWI on matters including trust, succession, and tax planning.

Pinheiro Neto elevates two tax practitioners to partnership



Brazilian firm Pinheiro Neto announced it will elevate two tax practitioners to the partnership, effective January 1, 2023.

João Rafael Gândara de Carvalho has been with the firm for more than 18 years. His work involves advising both local and international clients on direct and indirect tax, social security and customs matters, both on the litigation and advisory fronts.

Vinicius Pimenta Seixas has been with the firm since 2009, having held international roles with Stibbe in Luxembourg and Mori Hamada & Matsumoto in Japan. His work is focused on tax issues related to foreign investments in Brazil, business combinations, corporate reorganisation, real estate deals and M&A.

Sainz Abogados bolsters tax practice with experienced hire

Mexican firm Sainz Abogados announced the addition of an experienced tax practitioner to its team.

José Luis Rodríguez Domínguez joins the firm from Chevez Ruiz Zamarripa y Cia, where he had been a tax director for almost 11 years.

Rodríguez's brings with him more than 20 years' experience in the market, where his work is primarily focused on tax issues involving assets, transactions, public issues, corporate restructuring and support in compliance with tax obligations.

Mexico office of White & Case welcomes tax partner

International law firm White & Case announced the addition of a partner to its tax practice in Mexico City.

Carlos Martínez joins the firm from Creel Abogados, where he had worked for almost 19 years, having previously spent more than eight years as an associate with Pérez Chow y Asociados.

Martinez's work is primarily focused on tax advice to domestic and multinational companies on corporate transactions, joint ventures, restructurings and reorganisations. He also provides advice on international taxation, transfer pricing and tax litigation.

Andersen adds experienced managing director to national tax offering

Andersen – the US arm of international tax consultancy network Andersen Global, announced the addition of an experienced managing director to its office in the District of Columbia.

Roger Pillow brings with him more than 40 years of experience working in the public and private sector. He joins the team from the US Department of the Treasury, where he served as a senior counsel in the office of tax policy for more than two and a half years. Prior to that he had also worked as a special counsel in the office of chief counsel at the Inland Revenue Service. Before those roles he spent more than 17 years with EY.

Pillow's previous experience particularly relates to work in the real estate, private equity, life sciences and entertainment industries.

Andersen Global expands presence in Europe and Asia-Pacific regions

International tax network Andersen Global continues to expand its global reach, connecting with a number of different firms in several regions.

In Europe, the group signed a collaboration agreement with Icelandic firm Lagastod. The firm has a team of 12 partners led by managing partner **Sveinbjörg Birna Sveinbjörnsdóttir**. It has been present in the Icelandic market for more than four decades and covers a range of practice areas in addition to its tax work.

In the UK the network signed a collaboration agreement with appraisal and advisory firm European Valuations. With offices in London, Birmingham and Manchester, the team is led by **Gordon Titley** and **Dan Edgar** and assists clients across a range of industries, including asset-based lenders, financial institutions, private equity firms, corporations, debt and restructuring advisors.

The group has also expanded its global mobility capabilities by signing a collaboration with France-based firm Almenide Avocats. Led by **Céline Rang**, **Sébastien Rodriguez** and **Romain Loire**, the firm focuses on the tax and legal aspects of international mobility, including social security, compensation and benefits, individual tax, labour law, employee stock plans and payroll services.

Andersen has also expanded its presence in Eastern Europe, signing a collaboration agreement with Slovakian firm CLS Čavojský & Partners. Founded in 2006, the Bratislava-based team is led by managing partner **Peter Čavojský**.

In East Asia the network secured an important partner in signing a collaboration agreement with Lee & Co. Founded in 1977, the firm is one of the longest-established in the Korean market and includes more than 800 professionals and 300 partners on its roster.

Also in the region, the group strengthened its presence in Southeast Asia with a collaboration agreement with Thailand law firm Dherakupt. Led by managing partner **Anuphan Kitnitchiva**, the team has had a presence in the Thai market for almost two decades and provides a range of tax services to clients, including transfer pricing work.

In Australia the network announced the signing of a collaboration agreement with Cornwalls. Established in 1891, the firm can boast of being one the of oldest in the market and has a team of almost 100 lawyers led by CEO **Levent Shevki**.

Andersen Global expands: Andersen's network now reaches the shores of Iceland

‘Momentous’ UN resolution sets stage for tax clash with OECD

The UN’s decision to seek a leadership role in global tax policy could be a crucial turning point but won’t be the end of the OECD, say tax experts.

Siqalane Taho

The UN’s historic decision to establish a global tax body with greater international representation has set it on a potential collision course with the OECD over supremacy on tax policy.

The UN General Assembly unanimously agreed a resolution on November 23 that gives the organisation a mandate to begin intergovernmental talks on tax.

Significantly, it lays the groundwork for a UN convention on tax and the creation of new global tax institutions and cooperation frameworks or instruments.

Belema Obuoforibo, director at the International Bureau of Fiscal Documentation (IBFD) in Amsterdam, has welcomed the decision as pivotal to the UN’s drive to be a key player in promoting international tax cooperation.

“This is a momentous decision,” she says, adding that there is clearly strong momentum moving the way of the UN on matters of global tax affairs.

History in the making

Alex Cobham, chief executive at the Tax Justice Network (TJN) in the UK, says the resolution mandates the UN to set a course for a global tax leadership role.

“History was made,” says Cobham, who commends the General Assembly delegates for moving rulemaking on global tax into the democracy at the UN as opposed to the confines of the rich nation-controlled OECD.

The UN’s landmark decision is likely to spell the beginning of the end of the OECD’s 60-year reign as the world’s leading rule-maker on global tax, stated the TJN in a statement on November 23.

The TJN also noted that it believed a power struggle would now take place between the Paris-based OECD and a potential new UN tax body.

The resolution enables countries to start intergovernmental discussions on possible reforms to international tax rules, including the establishment of new UN bodies. The measure also allows the UN to monitor, evaluate and decide global tax regulations.

Cobham has been critical of the role that the OECD has played in trying to counter the passing of this resolution in the General Assembly.

“The OECD has been unprecedently aggressive in its lobbying but could hardly have failed more completely as the resolution passed by unanimous consensus,” he says.

Western diplomats fiercely opposed the resolution behind the scenes, but ultimately the measure was passed by unanimous agreement.

Meanwhile, some OECD countries spoke in favour of the OECD’s role following the adoption of the resolution, says Cobham.

“A last-minute amendment by the US to make the scope of intergovernmental discussions much more vague was overwhelmingly rejected by member countries,” added the TJN in its statement.

Wait and see

Obuoforibo takes a more cautious view about the role that a potential new UN body might play.

"It is early days yet," she says, adding that there is still some way to go before there is clarity on how a future UN tax institution could look.

This view is also shared by a source at the UN who mentions that it would be premature to make any long-term predictions on the direction of the matter.

"Our tasks will become clearer over time," notes the source.

While the UN decision to take leadership in global tax affairs is pivotal, it is not expected to make the OECD obsolete, says Obuoforibo.

"I don't expect the OECD to slide into irrelevance; far from it," she explains.

She says that the OECD is likely to continue to play a powerful role in agenda setting and tax governance in the future.

"We're right at the beginning of this new development with the UN and I think sensitive times lie ahead," she adds.

There seem to be concerns from some UN member states, including Singapore and Japan, as well as the EU – in its capacity as an observer – about the potential conflict of interests between the OECD and any new UN-backed tax organisation.

"It remains to be seen how both bodies navigate their way through this development," says Obuoforibo.

Two-pillar troubles

The UN move comes as the adoption of the OECD's two-pillar solution has stalled. This is due to fierce opposition from political and business groups on both sides of the Atlantic.

"The OECD's two-pillar tax proposal is on life support, with even the organisation's own members struggling to defend its work," says Cobham.

The importance of tackling tax avoidance and boosting transparency cannot be overstated. Two recent reports by the OECD and the UN University World Institute for Development Economics Research (UNU-WIDER) have highlighted the scale of the base erosion and profit shifting problem.

Cobham emphasises just how serious the global issue is for tax administrations, saying that estimates point to countries losing as much as $483 billion in tax annually to tax havens.

Developing nations have also expressed some dissatisfaction about elements of the two-pillar solution.

It's perhaps unsurprising, therefore, that the UN resolution was brought by the African Group, which represents the 54-member African Union.

Pillar two's global anti-base erosion rules, which target companies with revenues of €750 million ($776.7 million), have come under fire in particular. These rules aim to ensure multinational enterprises pay a minimum level of tax on the income arising in each jurisdiction where they operate.

Developing countries have complained that the revenue threshold has been set too high and that it fails to capture enough multinational enterprises in the tax net.

This has been a particular sore point for emerging markets considering their heavy reliance on corporate tax revenues. In 2019, corporate tax incomes accounted for 18.8% of total tax revenues in Africa, 18.2% in Asia-Pacific, 15.8% in Latin America and the Caribbean, and 9.6% in OECD countries, according to an OECD report published on November 17.

Obuoforibo says: "A big part of the motivation for this UN development is the belief that the UN would provide a more inclusive and transparent forum to address these issues."

This view is also shared by campaigners and global superpowers such as the US.

The US agreed, at the General Assembly, that the world lacked a truly inclusive forum working to strengthen international cooperation on tax.

Meanwhile, the TJN has bemoaned the disadvantage faced by developing nations due to the dominant role played by the OECD over the global tax system. The Paris-based organisation, which is run by 37 of the world's richest nations, is seen as lacking global and fair representation for emerging markets.

There has also been criticism of pillar one for catching only a small number of multinationals and for its complexity.

Pillar one aims to ensure that multinational enterprises pay a fair share of tax in the countries in which they operate. Some countries have complained that the €20 billion revenue threshold and minimum 10% profitability target are too high, as they fail to capture enough companies in the tax net.

The UN resolution promises to turn the tables on the dominance of developed nations in the global tax system through the OECD. It aims to provide greater fairness in policymaking and a bigger voice to developing nations on tax matters.

Significantly, it also sets the scene for a potential clash between the OECD and the UN over supremacy on international tax matters. Whatever direction this duel takes, it is sure to make great viewing.

The Global Tax 50

The most influential figures in tax

ITR highlights the most influential individuals in the world of tax policy and business, from public officials to industry leaders.

Tax policy has seen many great changes in 2022 with the world racing to implement the OECD's pillar two proposal. Meanwhile, the global economy is still reeling from the impact of COVID-19 and trying to decide how to tax digital industry.

ITR has selected 50 people who stand out from the crowd – including industry leaders, policy officials, noteworthy individuals and the leading names in non-governmental organisations.

In some cases, we have decided to recognise the influence of people who have left their positions this year. Many crucial policymakers are leaving office, but some of them have a legacy that will last for years if not decades to come.

Instead of including all 50 profiles in this PDF, we have chosen 10 entries that we think should be highlighted; the full list can be read on *ITR*'s website.

If you think 2022 was eventful, all signs suggest that 2023 will be another year of great change in tax. And we'll be there to document it.

Zainab Ahmed

Minister of finance, budget and national planning, Nigeria

As finance minister, Zainab Ahmed presided over Nigeria's economic response to COVID-19. She now plays a key role in the country's economic recovery plan and efforts to reduce the national debt by bolstering tax collection.

The Nigerian government increased the VAT rate from 5% to 7.5% and Ahmed has focused on preventing 'leakage' from the tax system and cutting spending.

As Ahmed told a tax workshop at the Economic Community of West African States in October: "If we have more taxes and redirect the taxes to the right fiscal sectors of our economy, we will reduce our debt burden.

"It is not as if the debt is beyond what the government can handle," she added. "If you look at the ratio of the debt to the gross domestic product [GDP], I think the government is doing well."

Nigeria faces a high level of debt and tough demands from credit rating agencies. Raising taxes and sealing leakages is one strategy for fiscal consolidation.

Source: World Economic Forum/CC BY-NC-SA 2.0

But this strategy comes with its own problems.

The Nigerian government could reduce the debt, but this could come at the cost of the economic recovery. COVID-19 hit Nigeria's GDP growth rate hard and millions more people have been pushed into poverty. In short, Ahmed's job isn't getting any easier. ■

Jair Bolsonaro

Departing president of Brazil

Controversial leader Jair Bolsonaro is leaving office after just one term as Brazil's president, but he has set out the fundamentals for tax reform in Latin America's leading economy.

While Brazil's tax reform is still a work in progress, the Bolsonaro administration laid down much of the detail of the changes. Bolsonaro set out a plan for tax reform to align Brazil's complex transfer pricing regime with OECD guidelines.

He wanted Brazil to join the OECD, and taking the country back to the arm's-length principle was a part of the price of doing so. Brazil has to give up its formulaic system of taxation to comply with OECD standards.

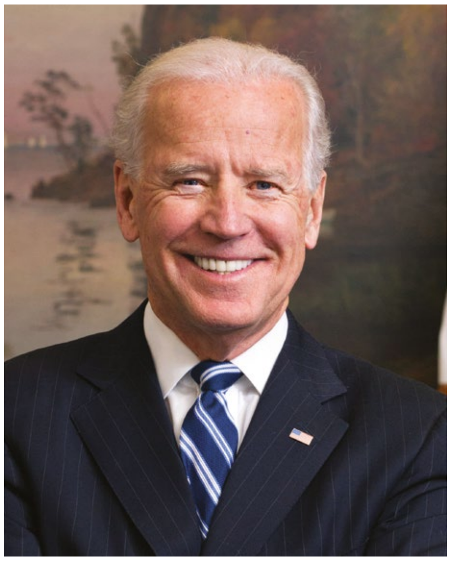
Bolsonaro will soon be leaving his role as president of Brazil. However, Brazil still hopes to join the OECD under his successor. The return of former President Luiz Inácio Lula da Silva, widely known as Lula, to power marks the end of the Bolsonaro years.

Source: Palácio do Planalto

Some tax directors are concerned the victory of Lula could delay the tax reform further, but others think he is unlikely to change course. Instead, Lula has set out proposals for raising more tax revenue – and the TP reforms could help achieve this. ■

Joe Biden

US president



US President Joe Biden came to power promising to reform the country's tax system as part of an ambitious economic platform. No Tax 50 would be complete without the US president, but especially this time as Biden was crucial to securing a global minimum corporate tax rate in 2022.

Biden favoured a global minimum rate of 21% back in 2021, but he eventually compromised with his opponents and settled on 15% in July 2022. This was a historic moment because the US has the power to make or break global agreements. It sent a message worldwide and helped secure broad support for the OECD's tax deal.

However, this was the easy part. Over the course of a year, US lawmakers squabbled over the details of a higher minimum rate. The US already had a minimum of 10.5% thanks to the Tax Cuts and Jobs Act, but the higher rate met strong opposition from conservative Democrats like Joe Manchin.

The Inflation Reduction Act was not approved until August 2022, but this secured the 15% minimum rate in the US and made it much more likely for pillar two to succeed worldwide. Since Biden may now face a divided Congress, this will go down in history as his legacy in tax policy.

President Biden faces the difficulty of securing wider tax reform to stop the rise of the digital services tax against US technology companies in countries such as France and India. But his work just got much harder going into 2023. ■

Raquel Buenrostro Sanchez

Secretariat of the economy, Mexico


Source: gob.mx

Known as Mexico's 'iron lady' of tax, Raquel Buenrostro Sánchez was recently promoted to economy minister and granted more power to build on this tough reputation.

During her four years as head of the Tax Administration Service (SAT), Buenrostro cracked down hard on tax evasion and avoidance, going after large businesses to raise revenue. She also made procurement spending cuts to save the SAT funding at the same time.

A close ally to the Mexican president Andrés Manuel López Oprador (known as AMLO), Buenrostro was given the task of boosting tax revenue through more efficient collection. The president was not afraid to scare businesses to do so, and neither was Buenrostro.

The president had so much faith in Buenrostro that he would often bypass the finance minister to talk to her about tax matters. In return for her hard work, Buenrostro was promoted to economy minister in October 2022.

She is now Mexico's voice in trade talks with Canada and the US as the three countries review the US-Mexico Canada Agreement, which may be up for a renegotiation from December. This could mean the North American trade deal will undergo face key changes in 2023.

Once the scourge of tax-dodgers, Buenrostro will have tariffs as her main weapon if negotiations don't go Mexico's way. The talks could redefine trade across North America. ■

Carmine Di Sibio

CEO and global chairman, EY

Carmine Di Sibio set out on a mission to overhaul EY's business structure in 2022. Nicknamed 'Project Everest', the EY plan will split the firm's faster-growing consulting business and its larger auditing business into two separate entities.

The firm's audit business is set to continue as a network of partnerships named AssureCo, whereas its consulting business will become a public company called NewCo. Project Everest is the biggest planned shift in the accounting industry in 20 years.

Not only does this fundamentally change EY, but the results of this split may also send a message to the other 'big four' firms. If Project Everest is successful, EY may become an example for Deloitte, KPMG and PwC to follow.

Tax advisers across the industry were surprised that Di Sibio would undertake such radical action. Nothing like this has happened since the collapse of Arthur Andersen in 2002. Back then, the remaining big four firms decided to


Source: World Economic Forum/CC BY-NC-SA 2.0

split-off their consulting businesses in response.

Over the next two decades Deloitte, EY, KPMG and PwC gradually rebuilt and reintegrated their consulting businesses. But Di Sibio has decided to reverse this integration.

Now in his fourth year as CEO and global chairman, Di Sibio faces a choice about the future: step down or stand again. Either way he will have set a precedent for an entire industry. ■

Paolo Gentiloni

European commissioner for the economy

Commissioner Paolo Gentiloni is one of the indispensable tax policymakers in the world. He has overseen the European Commission's response to COVID-19 and its ambitious work on corporate tax reform.

One of Gentiloni's key achievements has been developing the Business in Europe Framework for Income Taxation (BEFIT) plan to create an EU-wide corporate tax regime. The plan could see the EU turn away from traditional transfer pricing in favour of a more formulaic tax system.

However, the fate of the BEFIT plan is tied up with the pillar two proposal for a minimum corporate tax rate of 15%. The Commission may be able to build on this minimum rate to further EU integration, but this may be easier said than done.

Before joining the Commission in 2019, Gentiloni had a long career in Italian politics and served as prime minister from 2016 to 2018. In return, the Italian


Source: European Parliament

government backed Gentiloni to represent the country at the European Commission.

Going into 2023, Gentiloni can expect a political battle with European leaders over the BEFIT plan to establish a common corporate tax base across the EU. If pillar two is successful, Gentiloni may be able to win this battle. ■

Charles Rettig

Former IRS commissioner

Charles Rettig stepped down as commissioner of the Internal Revenue Service in November after four years in the role. During this time Rettig oversaw a crackdown on crypto-assets and administered much of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

Under Rettig, the IRS went after cryptocurrency transactions with expanded reporting requirements, setting the threshold at $10,000. He argued that the crypto market was costing the service around $1 trillion a year in tax revenue.

As part of his efforts to bolster tax collection, Rettig helped modernise the IRS and improve tax enforcement. The Biden administration has awarded $80 billion in funding to the IRS for the next 10 years to build on this work.

The role of IRS commissioner should be non-political and strictly administrative, but the office has been dragged into political rows. Rettig himself came under fire for refusing to release Donald Trump's tax returns.

He has also faced accusations of a conflict of interest over a stake in two rental units at a Trump-branded hotel in Hawaii. Rettig described the stake as a "Honolulu, Hawaii residential rental property".

Rettig stepped down as IRS commissioner on November 12 2022. Douglas O'Donnell is serving as acting commissioner until a successor is appointed in 2023. ■

Pascal Saint-Amans

Former director of the Centre for Tax Policy and Administration, OECD

Pascal Saint-Amans stepped down as the OECD's tax chief on November 1 2022 after more than 10 years of service. He leaves behind a legacy of hard-won reforms that have transformed international tax policy.

Before he retired, Saint-Amans was widely considered to be the most influential figure in international tax. He spent much of 2022 fighting to keep the momentum going behind pillar two implementation, while trying to settle the details of pillar one.

He brokered the October 2021 agreement on pillar one and two with innumerable stakeholders, from tax professionals to politicians, across 137 countries. This on its own was a landmark achievement.

The BEPS project secured in 2015 itself was enough of a legacy for any OECD tax director. Saint-Amans delivered the 15-point action plan of measures to tackle tax avoidance in just two years. This included a new multilateral instrument that has since been signed by at least 100 countries.

Pillars one and two have proven to be even more ambitious. Pillar two looks set to become part of the international order in 2024, while pillar one still faces significant political obstacles. There is a danger that the world will continue to drift into unilateralism if the latter fails.

Whatever happens, Saint-Amans will have a place in the history books. ■

Fumio Kishida

Prime minister of Japan

Source: Prime Minister's Office of Japan

After more than a year in power, Prime Minister Fumio Kishida has shown a cautious willingness to reform tax policy, but there is still a lot to do. He inherited a stagnant economy wracked by rising inflation and a mountain of government debt.

The Kishida government has pushed ahead with tax incentives for research and development, while it takes advantage of a windfall of tax revenue. This allowed Kishida to announce a ¥29 trillion ($197 billion) stimulus package in October to subsidise energy costs and help prop up the yen.

Going into 2023, the Japanese government still needs to raise more tax revenue from somewhere and it has very few options. Kishida has hinted that his government may have to raise corporate tax or capital gains tax.

The Kishida government surprised outsiders by supporting a carbon tax of $56 per tonne of CO2 emissions on shipping in May. He also shelved a national carbon tax in November over concerns it would worsen the energy crisis.

Meanwhile, the Kishida government has clashed with the US over tax credits for electric vehicle production. Japanese car manufacturers fear the US tax credits will put them at a disadvantage in the American market.

Kishida may have promised to restore dynamism to the Japanese economy, but 2023 may be the year when he has to deliver significant tax changes. ■

Nirmala Sitharaman

Minister of finance, India

Indian Finance Minister Nirmala Sitharaman has placed tax policy at the heart of the country's priorities for its one-year G20 presidency, which began on December 1 2022.

Sitharaman has highlighted building consensus on contentious issues including global policies, taxation and debt distress as key to multilateral cooperation. The Indian finance minister has also been critical of international financing institutions and suggested that they will likely be an issue of particular concern during India's reign.

Sitharaman's star has shone since joining Prime Minister Narendra Modi's Bhartiya Janata Party in 2008. She was first elected to the Parliament of India in 2014 and has since held various ministerial positions, including defence, commerce and industry, corporate affairs, and finance.

Aside from politics, Sitharaman's early career was forged in the UK. She gained experience as an assistant to the economist in the Agricultural Engineers Association and subsequently as a senior manager at PwC in London. She also briefly worked at the BBC World Service.

Tax dodgers and fraudsters have reason to be concerned following Sitharaman's instruction for the Central Board of Indirect Taxes and Customs to use artificial intelligence and data analytics to close tax leakages. ■

The Global Tax 50

1.	Zainab Ahmed	26.	Joe Manchin and Kyrsten Sinema
2.	Katherine Amos	27.	Tim McDonald
3.	Benjamin Angel	28.	Alan McLean
4.	Sune Hein Bertelsen	29.	Paul Monaghan
5.	Joe Biden	30.	Patricia Mongkhonvanit
6.	Jair Bolsonaro	31.	Richard Murphy
7.	Raquel Buenrostro Sánchez	32.	Richard Neal
8.	Alex Cobham	33.	Dan Neidle
9.	Kurt van Dender	34.	Aoife O'Leary
10.	Carmine Di Sibio	35.	David Parker
11.	Alex Dunnagan	36.	Grace Perez Navarro
12.	Kelly Phillips Erb	37.	John Peterson
13.	Bruna Futura	38.	Gustavo Petro
14.	Mathew Olusanya Gbonjubola and Liselott Kana	39.	Achim Pross
15.	Paolo Gentiloni	40.	Charles Rettig
16.	Bob Hamilton	41.	Gerard Ryle
17.	Catherine Harlow	42.	Pascal Saint-Amans
18.	Katie Hepworth	43.	Prem Sikka
19.	Sri Mulyani Indrawati	44.	Nirmala Sitharaman
20.	Janine Juggins	45.	Rishi Sunak and Jeremy Hunt
21.	Christian Kaeser	46.	Wang Jun
22.	Rusudan Kemularia	47.	Jason Ward
23.	Edward Kieswetter	48.	Logan Wort
24.	Fumio Kishida	49.	Ron Wyden
25.	Mark MacGann	50.	Janet Yellen

AUSTRALIA

DLA Piper Australia

Eddie Ahn

Application of general anti-avoidance rules to business restructure upheld by Australian court

Minerva Financial Group case

In September 2022, the Federal Court of Australia held In *Minerva Financial Group v Federal Commissioner of Taxation [2022] FCA 1092* that the general anti-avoidance provisions in Australia's income tax law applied to a pre-IPO business restructure that resulted in certain income of the Australian corporate group flowing to foreign residents via a trust structure, rather than being subject to corporate income tax in Australia.

The Australian corporate group conducted a financial services business in Australia that involved the establishment of various securitisation trust structures (for example, to hold loan receivables and securities), from which the Australian corporate group derived interest and related income. Under the relevant business restructure steps, a new parallel trust structure was established, such that the shares of the top company in the Australian corporate group and the units in the top trust of the new trust group were 'stapled' and held by the same Dutch parent entity.

Subsequently, the securitisation trusts were held under the trust group structure, rather than the corporate group. As such, the income from the securitisation trusts flowed through the new trust group structure (which were 'pass-through' vehicles for Australian income tax purposes). This meant that the net interest income derived by the securitisation trusts was ultimately subject to 10% interest withholding tax upon distribution by the top trust to the Dutch parent entity, rather than the 30% corporate income tax that was previously payable by the Australian corporate group in respect of such income.

The Australian Taxation Office (ATO) applied the general anti-avoidance rules in Part IVA of the Australian tax legislation to the restructure, having identified three schemes that were entered into for the sole or dominant purpose of obtaining a tax benefit for the taxpayer.

Federal Court ruling

The Federal Court held that Part IVA did not apply to the first scheme (the establishment of the trust structure). The court was satisfied that this step was primarily driven by commercial factors; in particular, the proposed IPO of the new stapled corporate and trust structure on the Australian Stock Exchange and related funding opportunities, notwithstanding that the IPO did not ultimately proceed due to market conditions.

However, the Federal Court upheld the ATO's Part IVA determinations for the second and third schemes (the arrangements that resulted in the income from the securitisation trusts flowing through the new trust structure, rather than the existing corporate group). On this basis, the ATO's cancellation of the tax benefits arising from these schemes was upheld by the Federal Court.

At the time of writing this article, no appeal had been filed by either party.

Lesson for multinationals

For multinationals, this case highlights that while Australia has in recent years introduced various anti-avoidance measures targeting cross-border arrangements, such as the multinational anti-avoidance law and the diverted profits tax, the general anti-avoidance rules are still an important consideration for any important business transaction.

As such, multinationals operating in Australia should be mindful of the general anti-avoidance rules, especially for any reorganisation that has the result of directing income offshore and out of the Australian corporate tax net.

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CHINA

KPMG China

Lewis Lu

China amends innovation tax incentives and Hainan free trade port requirements

In line with the goals of the 14th Five-Year Plan period (i.e., 2021–25), China's policymakers have recently made several enhancements to China's innovation tax incentives. This is with a view to moving up the value chain and strengthening technological self-sufficiency. While most are limited in duration to the final three months of 2022, they could be extended.

In parallel, efforts are being made to ensure the integrity and proper usage of existing tax incentives, including those offered by the Hainan free trade port (FTP).

Tax support for innovation and R&D activities

In September 2022, several Chinese government bodies, including the Ministry of Finance and State Taxation Administration, collectively issued Announcements No. 28 and No. 32. These provide for the following:

- Eligible high-and-new technology enterprises (HNTEs) can benefit from 100% immediate tax depreciation and a bonus deduction of 100% on equipment investments. This covers expenditures incurred between October and December 2022 in purchasing or self-constructing equipment or machinery, and excludes expenditure on buildings. An existing incentive provides for 100% tax depreciation on equipment with a unit value of less than RMB 5 million ($700,000). The new treatment means that in the three months to the end of 2022, much larger-value items can also benefit. The provision on bonus depreciation is also notable. Up to now, bonus depreciation was provided for in the context of the R&D super deduction incentive. This is now taken further, and HNTEs can claim 100% bonus depreciation on equipment unrelated to R&D activities. Any unused deduction can be carried forward to subsequent years.
- The R&D super deduction is enhanced for the final three months of 2022. At present, a bonus deduction of 75% is provided for R&D expenses, with a 100% rate provided to manufacturing enterprises and small and medium-sized scientific and technology-driven enterprises. Under the new provisions, the 100% bonus deduction will be provided for all eligible R&D expenditures incurred between October and December 2022. If it produces a better result, the taxpayer can instead prorate a quarter of its annual R&D spend to the October–December period.
- In a significant development linked to the national drive for technological self-sufficiency, new corporate income tax (CIT) incentives for fundamental research have been introduced. This provision is intended to operate on a standing basis and is not limited to three months. Benefits are provided at contributor and recipient ends. For

investors, the expense incurred on contributions to non-profit scientific research institutes, universities, and government-managed natural science funds for their fundamental research can be fully deducted for CIT purposes and is also given a 100% bonus deduction. At the level of the recipients, a CIT exemption on the contributions is granted to non-profit scientific research institutes and universities. This is retroactively applied to January 2022.

The innovation incentives provided by China could lead the effective tax rate of Chinese operations to drop below 15%, the trigger level for the GloBE minimum tax. With regard to the 2022 tax year, these incentives should not be affected by GloBE, as no country has, or intends to have, these rules in effect for the 2022 tax year. This analysis would need to be revisited as GloBE is rolled out across the world. Chinese tax policymakers are yet to provide a firm indication on whether, and when, they will adopt the GloBE rules.

Integrity provisions for Hainan FTP tax incentives

China rolled out its preferential income tax regime for the Hainan FTP in 2020,

> **“From 2025, the Hainan FTP will be treated as being outside China’s customs border”**

including the ‘double 15’ tax incentives. There is a reduced 15% CIT rate for enterprises registered in the Hainan FTP that are engaged in encouraged industries. There is also a maximum 15% individual income tax (IIT) rate for personnel with high-end and urgently needed skills who work in Hainan.

To ensure that these incentives are not abused, integrity provisions were included from the start.

For the CIT incentive, a Hainan registered company was required to earn at least 60% of its business income from encouraged industries and possess substantive operations in Hainan. This was designed to prevent domestic profit-shifting from highly taxed companies in, for example, Beijing or Shanghai to a Hainan entity.

For the IIT incentive, the individual was required to provide evidence of at least 183 days of residence in Hainan in a tax year. This was to prevent individuals from living and working in, for example, Beijing or Shanghai but claiming to be domiciled in Hainan and benefiting from the 15% rate.

To bolster these integrity provisions, the Hainan authorities set out the following requirements in September 2022:

- In order for individuals to access the 15% Hainan IIT incentive, their employers must also meet certain requirements. Specifically, employing companies need to meet the Hainan substantive presence requirements set for CIT incentive purposes. This requirement also holds where the individuals work for a partnership. While a partnership is not subject to CIT, the same test must be met by the partnership (in Hainan) for staff to claim the IIT incentive.
- The Hainan substantive presence requirements applied for CIT incentive purposes have been clarified, as follows:
  - Having fixed premises with the necessary equipment and facilities to carry out production and business operations in the FTP;
  - Having sufficient staff in the FTP;
  - Having accounting records retained in the FTP; and
  - Having assets (with ownership or use rights) situated and used in the FTP.

- Two circumstances are set out where an enterprise is deemed to fail the Hainan substantive presence requirements. A company lacking production and operation functions will not qualify. This is intended to exclude companies that just book buy-sell transactions, make tax filings, and issue invoices. A company whose operations are not at its registered address will also not qualify.
- More robust audit measures will be applied. Enterprises that are newly entitled to the double 15 tax incentives will be subject to follow-up review. A sample check will be applied to enterprises that already qualified for the incentives.

These measures will take effect from January 2023 to the end of 2024. From 2025, the Hainan FTP will be treated as being outside China's customs border (referred to as being 'sealed off'). Further implementation rules will be released in advance of that.

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HONG KONG SAR

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Lewis Lu and John Timpany

Hong Kong introduces interim measure to confirm compliance with economic substance requirements

As a response to the EU's concerns about Hong Kong's existing offshore regime for passive income, the Hong Kong SAR (HKSAR) Government will introduce a revised foreign-sourced income exemption (FSIE) regime effective from January 1 2023. The relevant tax bill is expected to be gazetted in late October or early November 2022 and has to be enacted into law by the end of 2022.

To help businesses in Hong Kong to better prepare for the changes brought by the revised FSIE regime before it becomes effective, the Inland Revenue Department (IRD) is going to introduce an interim arrangement under which taxpayers can seek the Commissioner of Inland Revenue's (CIR's) opinion (the 'Commissioner's Opinion') on whether they are in compliance with the economic substance (ES) requirements under the FSIE regime according to the draft legislation once the tax bill is gazetted.

The Commissioner's Opinion mechanism

The key features of the Commissioner's Opinion mechanism are set out as follows:

- The IRD would request certain information from the taxpayer to process the application, such as:
  a) The details of specified economic activities carried out in Hong Kong;
  b) The number of qualified employees;
  c) The amount of operating expenditures incurred;
  d) The amounts of turnover and profits; and
  e) The details of any outsourcing arrangements.
- The CIR will give an opinion on the taxpayer's compliance with the ES requirements based on the draft legislation in the tax bill and the information provided, normally within one month after the application and complete information are received.
- The Commissioner's Opinion is not an advance ruling made under Section 88A of the Inland Revenue Ordinance. The CIR will, however, apply the enacted ES requirements according to the Commissioner's Opinion provided that the arrangements and parameters stated in the opinion are adhered to and the enacted ES requirements are substantially the same as those proposed in the tax bill. The taxpayer can rely on the opinion to report on its compliance with the enacted ES requirements in its tax return.
- The application can be made to the IRD during the period between the gazettal of the tax bill and the coming into operation of the corresponding ordinance. After the ordinance comes into operation, the interim arrangement will no longer be available and taxpayers can apply for an advance ruling on their compliance with the enacted ES requirements if necessary.
- The application procedures and the detailed information required will be announced on the IRD's website when the tax bill of the revised FSIE regime is gazetted.

> "Taxpayers can apply for an advance ruling on their compliance"

KPMG observations

KPMG welcomes the introduction of the above interim measure for the revised FSIE regime, which is a novel mechanism offered by the HKSAR Government for providing greater tax certainty to taxpayers. The interim measure illustrates the HKSAR Government's commitment to promoting tax certainty in Hong Kong and facilitating businesses in Hong Kong to cope with the revised FSIE regime.

Multinational entity groups in Hong Kong relying on an offshore claim for non-taxation of offshore passive income should make good use of this interim measure if they are seeking certainty on their compliance with the ES requirements under the FSIE regime. Before submitting an application, these groups should perform a self-assessment on their current level of ES in Hong Kong and consider whether any changes to their holding structures or operating models are necessary to minimise the chance of getting an adverse opinion from the CIR. They should also consider how to best present the information requested in their applications to the IRD.

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INDONESIA

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Updated prices for the calculation of export duties in Indonesia

The Indonesian Minister of Finance (MoF) has issued Decree No. 29/KM.4/2022 ('KMK-29') regarding the Second Amendment to MoF Decree No. 28/KM.4/2022 ('KMK-28') concerning Determination of Export Prices for the Calculation of Export Duties. KMK-29 became effective from September 1 2022 until September 30 2022. However, these export prices remain valid until a new export prices regulation is issued.

The main changes under KMK-29 are as follows:

- Changes in the determination of the export price for export goods in the form of veneer wood, woodchips, processed wood, skin, cocoa beans, processed metallic mineral products, and metallic mineral products meeting certain criteria; and

- Changes in the guidelines for the types of export goods that are subject to export duties, including the amount of the export duty tariff referring to the Attachment of MoF Regulation 123/PMK.010/22 regarding the Second Amendment to MoF Regulation No. 39/PMK.010/22 concerning Decisions on Exported Goods Subject to Export Duties and Export Duty Tariffs, as referred to in GNV Consulting's Local Insights articles in July and September 2022.

The key changes in export prices between KMK-29 and KMK-28 are shown in Table 1.

For other changes in export prices, see the Attachment of KMK-29.

Table 1

No.	Description	Export price KMK-29	Export price KMK-28
I	Export price for wood		
	A. Veneer, veneer wood in the form of wooden sheets for packaging boxes	$850/m^3	$800/m^3
	B. Processed wood, merbau	$1,100/m^3	$1,000/m^3
II	Export prices for cocoa beans		
	A. Cocoa beans	$2,078/mt	$2,075/mt
III	Export prices for processed mineral products		
	A. Copper concentrate, copper concentrate with 15% grade ≤ Cu < 16% and with gold 0 ppm grade < Au ≤ 5 ppm	$1,131.16/WE	$1,155.98/WE
	B. Iron concentrate, iron concentrate (hematite, mag-netite) measuring 62% ≤ Fe < 63%	$86.10/WE	$94.13/WE

Luxury goods reporting for government business partners

On September 9 2022, the Directorate General of Taxes issued Regulation No. PER-13/PJ/2022 ('PER-13') concerning the Procedures of VAT/Sales Tax on Luxury Goods Reporting for Government Business Partners in relation to the Government Procurement Information System. The issuance of PER-13 was designed to provide clarity and legal certainty to ease the implementation of MoF Regulation No. 58/PMK.03/2022.

Government business partners (GBP) categorised as small entrepreneurs do not need to report VAT or sales tax on luxury goods that have been collected, deposited, and reported by other parties (i.e., marketplaces/retailers designated by the government).

GBP that are not categorised as small entrepreneurs are required to report the delivery of taxable goods or taxable services as VAT that is collected by the VAT collector.

GBP as mentioned above are entrepreneurs that provide goods and/or services through the Government Procurement Information System.

The criterion of 'small entrepreneur' is an entrepreneur that has deliveries of taxable goods and/or taxable services with a total gross turnover not exceeding IDR 4.8 billion ($313,000) for one fiscal year, as stipulated in MoF Regulation No. 197/PMK.03/2013 regarding the amendment of MoF Regulation No. 68/PMK.03/2013 concerning small entrepreneurs.

Customs and excise objections

On September 12 2022, the MoF issued Regulation No. 136/PMK.04/2022 ('PMK-136') regarding the amendment to MoF Regulation No. 51/PMK.04/2017 ('PMK-51') concerning Objections for Customs and Excise. PMK-136 will become effective on January 1 2023.

The highlight of the changes under PMK-136 is that the Directorate General of Customs and Excise (DGCE) will implement a new interface in CEISA, an official DGCE web-based portal, as a default channel to accommodate the objection process for customs and excise disputes.

Table 2 lists the key changes between PMK-136 and PMK-51.

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Table 2

Description	PMK-136	PMK-51
Default submission procedures of an objection letter and additional explanation/supporting documents	• Different formats of an objection letter for underpayment and zero payment; • Online letter submission, additional explanation/supporting documents, and receipt issued through the CEISA portal; and • Troubleshooting assistance can be provided by DGCE officers via phone call.	• Single objection letter format; and • Manual letter submission, additional explanation/supporting documents, and receipt issued through the DGCE office.
Cancellation procedures for the submitted objection letter	• Cancellation submitted through the CEISA portal.	• Cancellation submitted through the DGCE office.
Extraordinary submission and cancellation procedures of an objection letter	• The DGCE will inform when the portal is inoperable through digital media; and • The DGCE allows the submission, cancellation, and receipt issued of an objection letter manually through the DGCE office if the portal is inoperable, and the proof needs to be attached.	-
Issuance of an objection decision letter	• The objection decision letter will be issued by the DGCE through the CEISA portal; or • Manually, via a post office, in the event that the CEISA portal is inoperable.	• The objection decision letter will be issued by the DGCE manually.

Top 10 transfer pricing cases from 2022

***ITR* picks 10 cases that made the headlines, with McDonald's France, BlackRock, and Maersk Oil and Gas all making the list.**

Leanna Reeves

Siqalane Taho

It's time for *ITR*'s annual review of the biggest transfer pricing disputes of the year.

Once again, multinationals found themselves up against determined tax authorities in high-stakes cases across the world. In some instances, courts were asked to intervene and settle the issues in dispute.

All in all, it was a busy year for tax officials and judges, so here is a recap of the most important cases.

Australia v Rio Tinto

On July 20, Rio Tinto agreed to pay A$613 million ($424 million) to the Australian Taxation Office following a dispute concerning profit-shifting allegations against the global mining company.

This was one of the biggest tax settlements in Australian history.

The mining company was accused of moving profit to its marketing centre based in Singapore. The tax authority pursued the company in 2021 for its intra-group dividend financing after launching an initial investigation in 2017 over its 2020 tax returns.

The agreed sum was in addition to an already paid A$378 million, bringing the total cost to almost A$1 billion in tax.

The additional profits made from Rio's Australian-owned commodities are set to be taxed in the jurisdiction in the years to come, according to ATO's deputy commissioner Rebecca Saint.

"The resolution of these matters means that ordinary Australians can have confidence that even the biggest companies are held to account to pay their tax due," she said in a statement.

Peter Cunningham, CFO of Rio Tinto in London, at the time welcomed the end of years of disputes with the ATO.

"We are glad to have resolved these longstanding disputes and to have gained certainty over future tax outcomes relating to our Singapore marketing arrangements," he explained in a statement.

Denmark v Maersk Oil and Gas

The Maersk group was highly profitable during the financial years of 1986 to 2010, but its Danish parent Maersk Oil and Gas reported losses during that time.

The Danish tax agency – known as SKAT – blamed an aggressive transfer pricing (TP) arrangement, leading to a dispute (No BS-41574/2018 and BS-41577/2018).

According to the tax administration, the business model allowed the company to never make a profit from its operations.

Maersk Oil and Gas issued a know-how licence agreement to subsidiaries in Algeria and Qatar. When such a licence is obtained, expenditure is borne by the subsidiary and the company takes the revenue from the extraction in these areas.

The additional income received by the parent company came from a royalty rate of 1.7% from the subsidiaries.

> **“If you spoke to my litigating colleagues who have led or conducted these high-profile TP cases, they would probably conclude that the approach from the tax authorities is quite aggressive”**

In 2018, Maersk Oil and Gas appealed a decision from the Danish courts that said the transaction was a TP arrangement.

However, the courts recognised that there was no basis for annual remuneration in royalties from the entities in both countries. They also found that the controlled transactions should be at arm’s length and were not following the price that would have been set by independent parties.

In March, the Danish courts required the case to be reconsidered by the tax administration.

Jakob Krogsøe, partner at Bech-Brunn and the lawyer representing the Maersk group in its case, told *ITR* at the time that he was surprised by the toughness of the authorities.

“If you spoke to my litigating colleagues who have led or conducted these high-profile TP cases, they would probably conclude that the approach from the tax authorities is quite aggressive,” said Krogsøe.

On May 5, SKAT filed an appeal.

Fiat Chrysler Finance Europe and others v European Commission

In 2012, the Luxembourg tax authority approved a transfer pricing agreement made between the jurisdiction and Fiat Chrysler Finance Europe, previously known as Fiat Finance and Trade.

In October 2015, the European Commission concluded that Luxembourg had provided illegal state aid to the Fiat group. The Commission held that the European nation had used the wrong arm’s-length principle (ALP) to approve the advance TP arrangement.

In 2019, the EU General Court upheld the Commission’s ruling. Fiat and the Irish state, which was an intervener at first instance, then appealed the case (No C-885/19 P and C-898/19 P) to the Court of Justice of the EU (CJEU).

The CJEU set aside the General Court’s 2019 ruling and annulled the Commission’s original judgment on November 8.

The EU’s highest court affirmed that the Commission should rely on the national tax law of the member state – the reference framework in question – when deciding matters involving state aid.

This ran counter to the Commission’s argument that the ALP is an autonomous principle of EU law that is enshrined in Article 107 of the Treaty on the Functioning of the European Union.

While the *Fiat* ruling potentially opens the door for member states to develop their own TP rules, it does preclude the Commission from investigating whether countries have deviated from a particular national law, including the TP reference framework.

France v McDonald’s France

The US fast-food company agreed to pay €1.25 billion ($1.31 billion) to the French tax authority (‘le fisc’) on June 16 following an investigation into its transfer pricing arrangements.

It was one of the biggest tax settlements in French history.

Chief prosecutor Jean-Francois Bohnert called the €1.25 billion sum “a genuine punishment”.

McDonald’s pays up

Meanwhile, Stéphane Noël, president of the Paris tribunal, said it was a "case of importance" and added he was "very attached to the idea that financial justice must be a priority".

From 2009 to 2020, the company allegedly dodged €469 million in tax through transactions in Luxembourg and Switzerland, as well as in Delaware in the US.

After Judge Eva Joly's accusations in 2015, le fisc took a close look into the company's affiliates as the corporation was registering no profit despite years of growth.

The Parquet National Financier, a French judicial institution, found that royalties were increased from 5% to 10% in 2009. This enabled the fast-food business to shift profit abroad and avoid paying all its taxes.

A public interest fine of €508 million and €737 million in back taxes and penalties were included in the settlement.

France v ST Dupont

The French tax authority ('le fisc') issued a pricing adjustment following an audit of the French luxury pens and leather goods manufacturer ST Dupont. The company is owned by the Dutch firm D&D, which itself is owned by Broad Gain Investments in Hong Kong.

ST Dupont had subsidiaries located outside of France, including ST Dupont Marketing in Hong Kong.

In this case (No.19PA01644), the tax authority held that the prices at which ST Dupont sold its merchandise to ST Dupont Marketing were below the arm's-length level and that royalty rates were not at arm's length.

The investigation also showed that the manufacturer was making significant operating losses for the financial years from 2003 to 2009. Meanwhile, ST Dupont's wholly owned subsidiary in Hong Kong was making sizeable profits over the same period.

The tax administration adjusted the losses reported by ST Dupont for corporation tax in France over the 2009, 2010 and 2011 financial years. In response, the French manufacturer appealed the tax authority's decision to the Paris Administrative Court, which set aside parts of the tax assessment, including on royalty payments.

On April 13, the Administrative Court of Appeal of Paris dismissed the appeal of ST Dupont and upheld the ruling of the court of first instance.

HM Revenue and Customs v BlackRock

Most would remember the *HMRC v BlackRock* case (2022 UKUT 00199 (TCC)) not only because of the significant sums involved but also because of the tax authority's firmness.

The dispute between HM Revenue and Customs (HMRC) and the American multinational investment corporation involved BlackRock's inter-company loans that were carried out as part of the company's acquisition of Barclays Global Investors in December 2009.

BlackRock had issued a short-term loan of $420 million (£353 million) at 2.2%, which was followed by $1.6 billion at 4.6%, then $1.4 billion at 5.2% and $500 million at 6.6%.

Questioning whether these loans were compliant with the arm's-length principle, HMRC decided to revise three of them in 2012. In November 2020, the First-tier Tribunal (FTT) allowed BlackRock to appeal against HMRC.

But on July 19 2022, the Upper Tribunal (UT) ruled against BlackRock. It confirmed HMRC's decision that denied the shareholder loan interest deductions involving $4 billion of loans.

The UT's decision overturned the FTT's ruling, handing victory to HMRC.

India v Kellogg India

The Income Tax Appellate Tribunal of India in Mumbai ruled in favour of Kellogg India (case ITA 7342/Mum/2018) – a licensed manufacturer of the Kellogg group in charge of selling and manufacturing certain products for the brand.

Based in Mumbai, Kellogg India began distributing Pringles products following a deal with AE Pringles International Operations, based in Singapore. The products were manufactured by a third-party contractor and distributed in India with cost-plus pricing of 5%.

In a transfer pricing report, Kellogg India said it considered itself a distributor of Pringles products and was responsible for the strategic and overall management of the Pringles business in India. AE was chosen as the tested party for benchmarking the international transaction of the import of finished goods.

The profit level indicator was determined at 50.07%. Yet, the revenue authorities disregarded the benchmark approach made by Kellogg India and decided that the Indian entity would be used as the tested party instead.

The Indian tax authority, the Income Tax Department, considered the transactional net margin method (TNMM) as the most appropriate method to be used for this transaction. The TNMM compares the net profit margin of a taxpayer arising from a non-arm's-length transaction with the net profit margins realised by arm's-length parties from similar transactions.

Having selected eight comparable companies, the Indian tax authority determined the arm's-length profit margin to be 4.33% using the TNMM.

On February 16, the tribunal concluded that AE should be considered the tested party and therefore ruled in favour of the Indian entity, stating that no adjustment to the ALP was required to be made.

India v Olympus Medical Systems India

The case (No 838/DEL/2021) involved Olympus Medical Systems India, a subsidiary of medical equipment supplier Olympus.

India's Income Tax Department – the tax authority – conducted a transfer pricing audit after the company reported financial losses between 2012 and 2013. The audit led to an assessment being issued by the tax authority.

The tax office also initiated an audit investigation into Olympus India. This was due to the company's failure to provide audited financials of its affiliated entities to help determine overall group profits and pricing levels.

In its appeal, Olympus argued that tax authorities were wrong to use the residual profit split method when defining the arm's-length principle (ALP). It also suggested that authorities could not demand an adjustment of the price if they did not have all the information about the group's profits.

The hearing took place on February 1, with the ruling following on April 20.

The Income Tax Appellate Tribunal, the second appellate authority for direct taxes, held that Olympus India should submit audited financials of its associated companies. Failure to do so would deem it necessary for the tax authority to use the residual profit split method to determine the ALP.

Norway v ConocoPhillips Skandinavia

ConocoPhillips Norway, which provides petroleum exploration and production services, owns the subsidiary ConocoPhillips Skandinavia (Copsas). The case (No LG-2021-38180) concerned a loan agreement between Copsas and ConocoPhilips Norway Funding, carried out in May 2013.

The agreement was a five-year loan with a limit of 20 billion kr ($2 billion). The interest rate on that loan was the Norwegian interbank offered rate (Nibor) of six months + 1.25%, and was based on an analysis made by the 'big four' firm PwC.

In March 2019, the Petroleum Tax Office of Norway, which is responsible for the taxation of Norwegian and international companies involved in oil and gas exploration and production, decided that the interest rate of the loan made in 2013 should have been Nibor six months plus 75 basis points, and was not at arm's length.

As a result, Copsas filed a lawsuit against the adjustment and later an appeal with the Court of Appeal.

However, the court ruled in favour of the tax office on March 16, saying there was nothing wrong with its procedure for ensuring the agreed interest rate for the five-year loan followed the arm's-length principle.

Volotea v Commission, and easyJet v Commission

Spanish airline Volotea and British budget carrier EasyJet's cases (C-331/20 P and C-343/20 P) concerned the European Commission's investigation into an Italian regional law after airports in Sardinia were granted state financing. The funding was intended for the development of air routes on the island.

In July 2016, the Commission ruled that the measures were unlawful and that Volotea and easyJet had benefited from illegal state aid. The government assistance was deemed incompatible with the internal market in connection to activities at Cagliari-Elmas and Olbia airports.

The General Court dismissed actions by the airlines to annul the Commission's decision. In May 2020, the two carriers followed up with an appeal to the CJEU to set aside the General Court's decision.

On November 17, the CJEU annulled the Commission's decision in the two cases on the basis that the EU executive body had made errors of law. The court said that the Commission had failed to determine that the transactions in question had given the airlines an advantage.

The CJEU set aside and annulled the General Court's judgment concerning the two airlines. It held that the aid granted to the carriers was legitimate.

More to come

It's fair to say that these TP rulings show that global tax authorities will not shy away from taking disputes to court.

Whether it's navigating complex issues about the arm's-length principle or responding to detailed information requests, there is little doubt that taxpayers encounter ever more stringent scrutiny from tax administrations.

All eyes will now be on 2023 – who knows what the year will bring?

Taxpayers are facing more challenges over transfer pricing

Hansuke conference

How to rebuild trust in international tax policy

Hansuke's 2022 Financial Services Tax Conference addressed how to rebuild trust in an increasingly complex international tax system undergoing digitalisation.

Danish Mehboob

Hansuke Consulting's 2022 Financial Services Tax Conference in London on Friday, October 14, highlighted a variety of ways to rebuild trust and efficiency in the international tax system.

Conference delegates shared their views on certain crises in the EU financial services sector and a variety of working patterns that govern compliance across administrations and industries.

The event was aimed at FS professionals to take part in discussions with other senior European experts.

Ali Kazimi, managing director of Hansuke Consulting and former head of tax at Blackrock in London, said his practice is only focused on FS tax and the conference is purposefully designed to give a broader view of global market developments as they relate to his industry.

"The pandemic has given me a lot of perspective of who I want to be and how to build trust," he said.

With a fast-growing number of attendees, professionals are calling Hansuke's fourth event one of the best open-access opportunities to connect with the FS industry on a broad range of legal topics.

Here are some of the top corporate insights *ITR* found at the conference.

Cum-ex lessons

The 'cum-ex' dividend stripping scandal that defrauded EU financial hubs of billions of euros is the biggest destroyer of trust between intermediaries and tax authorities in the FS industry. The scheme may still exist in other forms in Europe.

Richard Collier, professor at the University of Oxford Faculty of Law in London, said cum-ex industrialised fraud still has market effects.

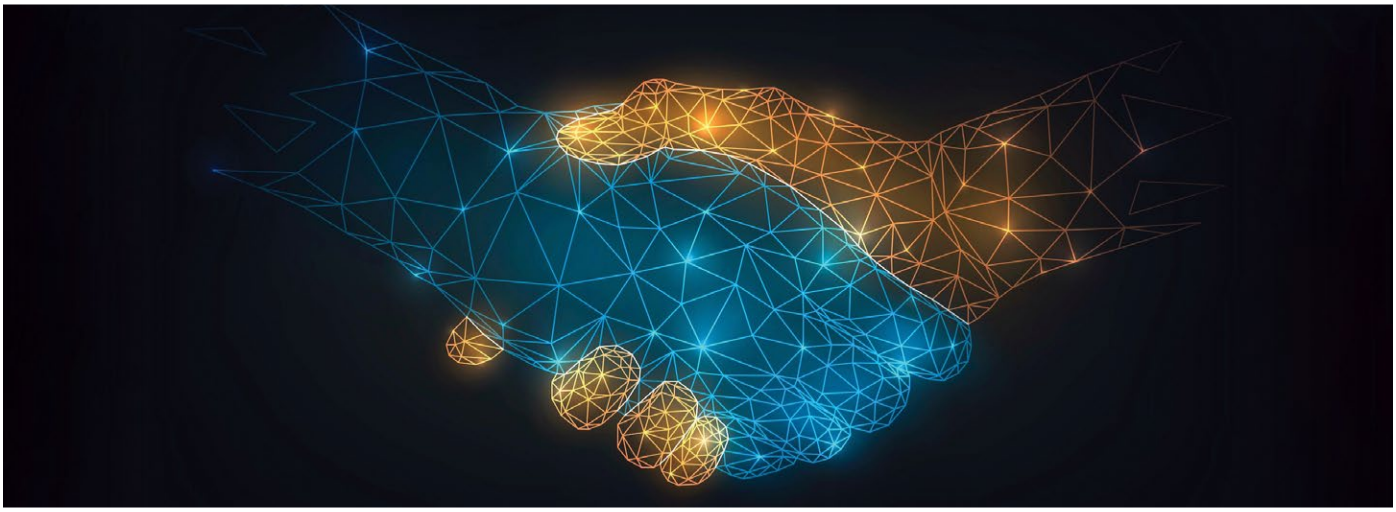
"Cum-ex produces too many tax credits, thus taking advantage of a flaw in the system," he said.

"There are legacy effects coming from cum-ex, including political calls to simplify withholding tax systems in the EU… The scheme has been a catalyst to address dividend arbitrage issues," he added.

"However, cum-ex is a cross-border issue that is trying to get solved with national authorities that are only allowed to operate in their own borders, which makes this hard to fix at scale," he explained.

One longer-term solution is to redefine the working relationship between regulators and authorities, introduce new systems, and confirm who is best to oversee the new systems and regulations.

Aggressive schemes like cum-ex arise because authorities are frequently shuffled between different departments to monitor compliance in separate industries. However, banking and other financial institutions have teams of dedicated in-house experts who work in the same niche compliance area.



Rebuilding trust is crucial for the future of tax

The different work patterns between administrations and the FS industry exacerbates knowledge gaps. This allows schemes as extreme as cum-ex to start with little oversight, according to delegates.

Managing taxes globally

Delegates also discussed how every multinational group must find a unique appetite for risk based on their budget. Both digitalisation and globalisation have created new challenges for taxpayers.

One partner at WTS Global in Germany, said risk strategy is crucial for businesses because EU tax authorities are likely to scrutinise in-house policies.

"When you think about resourcing to satisfy risk appetite, you have to identity the level of risk with which the organisation is comfortable and be clear about the outcomes," he said.

Simon York, director of HM Revenue and Customs' (HMRC) Fraud Investigation Service in London, said his work is becoming increasingly international making it necessary to collaborate with other tax authorities.

"Data is key and a huge part of what we need to carry out all parts of administration, especially corporate risk assessments," he said.

"We need to accommodate cross-border tax information, and we need data protection requirements and standard filing processes to lower the compliance burden on taxpayers too," he added.

However, managing responsibility without accountability can easily be misused by authorities, and the WTS tax partner argued that the EU is at risk of losing the free movement of capital by overregulating corporate tax.

Transaction taxes

One adviser at one of the largest European asset management associations in Brussels, said an EU-wide financial transaction tax (FTT) is an important development that shapes the future management of financial instruments including stocks, bonds, and derivatives.

"There is no agreement on an EU FTT yet, so the Commission's plan is to deliver their own resources package that still needs to be approved to finance bloc-wide budget recovery plans," he said.

An FTT could be part of the EU's own resources package, but it needs to be proposed by 2024 to be implemented by 2026. "This means the Commission will have to start working on this file as we speak," he added.

The Commission delivered a carbon border adjustment mechanism and an emissions trading system as part of the EU's own resources agenda so far, and lawmakers are expected to deliver pillar one and an EU-wide FTT under the same policy package.

"After the Commission delivers its first basket of own resources, then there is a second basket of policies to come that may include the FTT," explained the senior adviser, who said that the FTT will be modelled on available national legislation from France, Hungary, Italy, and Spain.

One tax director a multinational bank in London, said the Hungarian FTT has been causing a lot of cautious discussions among peer groups in recent months.

"I have some qualms about the securities side of the Hungarian FTT because the authorities expanded the scope to include foreign brokers in July, which was really challenging to hear at the time," she said.

"As you can probably imagine, finding advisers during the summer holiday season is quite hard and all EU entities with a Hungarian branch are in scope, which means any international bank would have several obligations to deal with," she added.

Most versions of an FTT in member states deal with equities, but the Hungarian FTT model handles bonds too.

Industry delegates told *ITR* that an EU FTT could target a wide scope of financial instruments. This includes bonds, but it will be difficult for the European Council to adopt and be tough for the FS industry to accept because it could create a competitive disadvantage for European investments.

"In a crisis, revenue-raising proposals are normal and we need to prepare… but some revenue raising proposals could drive business and investment away," added the tax director.

Transparency pros and cons

Three key transparency trends affecting FS are automatic exchange of information (AEOI), beneficial ownership registers, and country-by-country reporting.

Lauren Griffin, head of tax transparency at HMRC in London, said there are many AEOI programmes following the OECD's common reporting standard (CRS).

"CRS revolutionised tax transparency of offshore income and institutions automatically exchange information to determine non-compliance… but this is an expensive endeavour," said Griffin.

One operations manager at an insurance company in Edinburgh, said his firm designs its own standardised forms to simplify tax filings to lower costs.

"Some authorities are reluctant to accept it, but others are open minded and like the extra data," he said. "Tax data is useful, but we need more of it to address more technical issues… so more of our processes need to change to capture this data.

"We go through a long and complicated process with other stakeholders to see who is responsible for data gathering and retention – a lot of this work could be outsourced to third parties too," he explained.

Many delegates support more digital innovation to address issues such as errors on forms. System upgrades could simplify the validation processes involved in reporting via automation and data analysis.

Tomorrow's solutions

Paul Aplin, board member of the Office of Tax Simplification in London, said it would be great if tax rules could be better built directly into reporting systems.

"It only works if the tax rules were not embedded in an opaque and overly complex way so that some positions are less controversial," he said.

"Blockchain solutions for withholding taxes are like marmite, you either love it or you absolutely hate it and do not want it in the house," he added, as an example of ongoing mixed market responses to digitalisation efforts.

Robert Welzel, managing director at WTS Global in Frankfurt, said digital transformation provides more granular information and authorities are creating an increasingly transparent global framework.

"With FATCA [Foreign Account Tax Compliance Act], CRS, and the emerging CARF [crypto asset reporting framework] standards, we see authorities trying to capture more and more granular transactions per investor," said Welzel.

The uptick in transparency and digitalisation efforts could bridge information gaps between tax administrations and businesses. However, these efforts previously led to several queries and investigations that ultimately harmed group trust.

From forward-looking lessons based on Europe's cum-ex scandal to mismatches in transaction taxes, the Hansuke conference seamlessly merged political and technical topics to explain the more elusive issue of how to rebuild trust in FS.

NETHERLANDS

DLA Piper

Wouter Kolkman and Jesse Peeters

Supplies between a head office and fixed establishment no longer out of VAT scope?

The VAT treatment of charges between a branch and head office has been a debated topic in recent years. On July 5 2022, the Dutch secretary of finance amended the Dutch VAT fixed establishment decree (*Besluit Omzetbelasting, vaste inrichting*, or the 'Decree') in the wake of the Court of Justice of the European Union (CJEU) cases *Skandia* (C-7/13) and *Danske Bank* (C-812/19).

The amendment entails that, effective from January 1 2024, supplies between a head office and its fixed establishment may no longer be out of the scope of VAT. The impact of recent CJEU case law and the Decree amendment is discussed in more detail below, as well as the broader impact the amendment could have on businesses operating in the Netherlands and other EU member states.

Amendment of the Dutch decree

In recent years, the Dutch government consistently applied a policy under which transactions within a legal entity were not subject to VAT. This policy was based on a Dutch Supreme Court decision in 2002.

The decision states that transactions within a legal entity cannot be subject to VAT if the foreign legal entity is part of a Dutch VAT group. According to the state secretary of finance, the case law from the Dutch Supreme Court can no longer be followed in light of the *Skandia* and *Danske Bank* cases. Therefore, the Dutch government issued an amendment to the Decree that entails the following changes:

- As a general rule, supplies between a head office and branch are (still) not subject to VAT as the branch and head office constitute a single taxable person.
- The general rule does not apply if a foreign branch or head office is part of a VAT group in an EU member state. In this case, the supplies between a head office or branch (being part of a VAT group) will be subject to Dutch VAT.
- The concept of VAT group contains a territorial limitation that implies that only legal entities that have been established in the Netherlands or Dutch branches of foreign legal entities can be included in a Dutch VAT group. For the sake of completeness, the head office of a non-Dutch-established legal entity can no longer be part of a Dutch VAT group.

> "Businesses may need to update their invoicing systems and ERP systems"

Impact of the amendment

The amendment of the Decree may have a significant impact on businesses that operate in the Netherlands. The Dutch policy, as enacted in the Decree, that states that supplies between a head office and branch are not subject to Dutch VAT will no longer apply.

Furthermore, foreign legal entities and their Dutch branch can no longer both be part of a Dutch VAT group. As the policy change will enter into force as of January 1 2024, businesses still have some time to assess the impact of the Dutch policy changes on their business, and (re)structure accordingly.

Considering that the supply of services by a head office to a branch could become subject to VAT, this may trigger an obligation for the head office and/or branch to register locally for VAT purposes. Furthermore, the supplier of the services must include VAT-able services rendered to its branch in its VAT return and may even be required to submit additional VAT filings (for example, EC sales listings). Finally, businesses may need to update their invoicing systems and ERP systems at the level of the head office and branch. In this respect, the question would need to be raised on the amount of costs attributed to the branch.

Conversely, for some businesses the amendment of the Decree may be beneficial as support services to branches will now be considered as VAT-able revenue. Where certain costs become VAT-able, this would affect the pro rata applied by the branch and/or head office, as the case may be. The taxable persons that provide said services may increase their VAT deduction right and improve their VAT-able position overall.

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NORWAY

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A Norwegian interpretation of shipping income in double tax treaties

The statement from the Norwegian Ministry of Finance, issued on July 5 2022, concerns whether rental payments under time charter agreements are covered by both Articles 8 and 12 of the DTT between Norway and Singapore, and which of the provisions should take precedence in such cases.

Although the statement was prompted by an inquiry concerning the DTT between Norway and Singapore, the statement is important for all DTTs with a shipping clause that Norway has entered into. Furthermore, although it concerns Article 12 on royalties and so on, the argument is more general, meaning that it should also apply to interest payments falling within the scope of both Article 8 on shipping income and Article 11 on interest.

Key takeaways

Article 12 covers bare boat lease payments under time charter contracts

The Ministry of Finance assessed whether Article 12, covering rental payments for equipment under the DTT, covered payments under time charter contracts. In legal theory, the traditional view has been that only bare boat payments (leasing ships without a crew) would fall under Article 12 as an equipment lease, while time charter payments (leasing ships with a crew) fall out of scope of the provision.

The time charter payments on their side are covered by Article 8 on shipping income. (See page 982 in 'Klaus Vogel on Double Taxation Conventions' (2015) for further reference). Despite this, the Ministry of Finance used statements about 'mixed contracts' in the OECD commentaries to do a decomposition of time charter arrangements into a bare boat lease on one side, and the lease of crew on the other. In turn, it was concluded that the payments on the bare boat part of the arrangement could be taxed in accordance with Article 12.

On this basis, a portion of the rental payments was covered by both Article 12 and Article 8. A separate question was therefore which Article takes precedence.

Article 12 takes precedence over Article 8 in case of conflict

As a starting point, Article 8 regulates income from shipping and is a specific rule that precedes the general business profits-provision in Article 7. It follows explicitly from Article 7, that other specific provisions in the DTT can take precedence, such as Article 8 (shipping income), Article 10 (dividends), Article 11 (interest) and Article 12 (royalty income etc.). The last three provisions do not always take precedence over Article 7. It follows from these provisions that, if the income can be allocated to a permanent establishment, the income may be taxed in that state.

This is not the case for Article 8, which in its wording exhaustively regulates the taxation of shipping income. In contrast to Article 7, it does not state that other articles in the DTT may take precedence. It also differs from Articles 10, 11 and 12 as it does not open for taxation of income that is allocated to a permanent establishment. The wording and systematics of the DTT dictate that Article 8 should take precedence over Article 12. This is also implied by the OECD Commentaries.

To avoid this solution, the Slovak Republic has reserved its right to tax the leasing of ships, aircraft and containers under Article 12. Meanwhile, Greece has retained its freedom of action with regard to the provisions in the convention relating to profits from the operation of ships in international traffic.

No such reservations or observations have been made by Norway, although the Ministry of Finance also disagreed with the dictated solution. The Ministry concluded that, since Article 7 opened for exceptions in other articles, the same should apply to Article 8, because both articles regulate the taxation of business income. Thus, it was concluded that Article 12 takes precedence over Article 8.

Legal sources are used in different parts of the statement. International sources, such as Klaus Vogel, are referred to, as well as Norwegian legal theory. When assessing which provision should take precedence, the Ministry of Finance chooses to disregard international theory and important Norwegian theory (the Naas *et al.* international tax law) and instead emphasise just one statement in Norwegian theory (the Skaar *et al.* Norwegian tax treaty law from 2006). In our view, the statement is not convincing.

Consequences

In the case that prompted the statement from the Ministry of Finance, the conclusion probably resulted in more Norwegian tax. This would also affect similar cases due to non-discrimination. Furthermore, it appears to be unfortunate for the Norwegian shipping industry if other source states follow Norway's example and start imposing withholding tax on interest and lease payments.

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POLAND

MDDP Poland


Monika Marta Dziedzic and Paweł Wyciślik

Nine key Polish corporate income tax changes for 2023

In January 2023, an amendment to the Polish Corporate Income Tax Act will come into force. Pro-fiscal changes as well as solutions that are favourable for taxpayers will be introduced, making certain tax instruments more challenging and some more attractive.

The most important amendments are outlined below.

1. Minimum income tax

Although minimum income tax provisions came into force in 2022, they have been suspended until December 31 2023, giving taxpayers another year to prepare for their application.

Also, the profitability ratio that makes a company subject to minimum income tax has been increased from 1% to 2%. In addition, the formula used to calculate the tax base has been adjusted.

2. Capital gains participation exemption

The conditions for the application of the capital gains exemption for Polish holding companies have been simplified.

Till the end of 2022, a capital gains exemption does not apply if the sold company owns at least 5% of the shares in another company. This limitation will not apply from 2023. The exemption will also apply if the subsidiary benefits from an exemption on income from activity conducted in a Special Economic Zone or within a Polish Investment Zone, which is not possible till the end of 2022.

Another improvement is the replacement of the 95% exemption for dividend income earned by a qualifying Polish holding company with a 100% exemption.

An adverse change is the requirement of having to own the shares of the disposed company for two years (in 2022, this period was one year).

3. Withholding tax

The rules of the pay and refund system have been simplified. The new mechanism includes restrictions on withholding tax on certain payments above PLN 2 million ($400,000). Above this amount, withholding tax must generally be charged by the remitter without applying an exemption or a reduced tax rate, even if the recipient qualifies.

From 2023, the application of an exemption or a reduced withholding tax rate for the entire tax year (regardless of the amount of the payments) will be made possible through a statement filed once in the tax year. In the statement, the remitter will declare that the conditions for the application of this preferential rate are met. The amendment also significantly extends the deadlines for filing these statements.

4. Tax on 'shifted income'

Clarifying amendments have been made to tax on shifted income, which partly change the mechanics of calculating this tax. Firstly, when calculating whether a related party receives at least 50% of its revenues from passive income, revenues received from all Polish entities that are related parties should be included. Secondly, only expenses included in tax-deductible costs will be subject to this special tax.

5. Thin capitalisation

The provisions regarding the limit on debt financing costs have been clarified. A taxpayer will be able to recognise as deductible costs PLN 3 million of such costs or 30% of tax EBITDA, depending on which amount is higher.

6. Transfer pricing

There is a retroactive repeal of the regulations on indirect transactions with entities in tax havens, which imposed excessive counterparty verification obligations on Polish companies.

Furthermore, the documentation thresholds for transactions carried out directly with tax haven entities have been increased – to PLN 2.5 million for financial transactions and PLN 500,000 for non-financial transactions.

> "Changes of a clarifying nature are being introduced for tax payment deadlines"

7. 'Estonian CIT'

From January 2023, 50% of expenses related to the use of personal cars will be considered as non-business (taxable) expenses if the car is also used for private purposes.

The minimum employment requirement (at least three persons) will also be met by an entity taxed with so-called Estonian corporate income tax (CIT) if the employees cooperating on the basis of a contract of mandate benefit from an exemption from taxation or an exemption from social contributions.

Several changes of a clarifying nature are also being introduced for tax payment deadlines and there are other changes of a formal nature, making this tax instrument even more attractive.

8. Hidden dividends

The provisions on hidden dividends – which, under last year's amendment to the Polish Corporate Income Tax Act, were due to come into force from January 2023 – have been repealed and will not come into force.

9. Controlled foreign companies

Under the amendment, when calculating the income of a controlled foreign company under Polish regulations, a Polish taxpayer should disregard any tax reliefs and exemptions that would apply if the foreign company were a Polish tax resident, especially a dividend or capital gains participation exemption.

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ROMANIA

EY Romania

Costin Manta

Change is afoot for Romania's 5% VAT rate for social housing

The odyssey of the reduced 5% VAT rate in Romania continues. The rate's introduction in 2008 was one of the instruments meant to encourage the real estate industry.

The impact of the Romanian real estate industry on the economy is a well-known positive one, as well as on the standard of living conditions. However, according to the latest statistics from Eurostat, published in 2021, although most Romanians own a house, things do not seem so positive when we look at the quality of the living conditions, as most homes are overcrowded. So it would seem natural for the Romanian authorities to try to make houses more affordable, at least from a VAT perspective.

Although the 5% reduced VAT rate for social housing has been in place for more than 14 years, the conditions for applying it are continuously changing. There are two price thresholds at present and it is possible to purchase multiple houses, depending on the applicable threshold. Although these rules have been in place only since the beginning of 2022, they will change again at the start of 2023.

Main change

From January 1 2023, the 5% VAT rate applies for a single purchase of a house for a price of no more than RON 600,000 ($119,000), exclusive of VAT. Compared with the present rules (two price thresholds of RON 700,000 and RON 450,000, and a single purchase under the higher threshold or multiple under the lower threshold), the new rules seem simpler. The other rules remain relatively unchanged.

What drove this change? It can be argued that one of the reasons is an increase in revenue for the tax authorities and, perhaps, a reduction in the appetite of individuals to invest in multiple 'social' houses subject to the reduced VAT rate (which is possible at present). If we also consider the recent changes to individual taxation in the case of revenues derived from the rental of immovable property (under which a deduction of 40% of the rental revenue was eliminated, thus increasing the taxable amount, and the number of potential purchases subject to the reduced VAT rate was limited), it may seem that the tax authorities have a tendency to limit such investments by individuals.

It remains to be seen if these investments will shift from individual level to a corporate level, where other tax incentives such as a VAT reverse charge and tax deductions on cost are still available.

On the other hand, the previous increase of the price threshold had the purpose of aligning the threshold with the new reality of the housing market, with prices having increased year on year. The decrease of the price threshold by approximately €20,000 ($19,500) will potentially reduce the accessibility of social housing, even for those who most need it.

Key questions

What will happen to downpayments received during 2022 for houses delivered in 2023? How will they be taxed?

The transitory rules provide that the present conditions will still apply in the case of houses delivered in 2023 if a downpayment was received in 2022. So clients who made downpayments in 2022 for houses that will be delivered in 2023 can breathe easy, as they will not have to pay an increased tax price. Also, the purchase of a house for a price below RON 450,000 performed before 2023 will not be taken into consideration for purchases in 2023, when a single purchase will be possible subject to the reduced VAT rate.

As there is some time left until 2023, it is still possible to take advantage of the more favourable VAT conditions by benefiting from the higher RON 700,000 price threshold for a single purchase or the possibility to purchase multiple houses under the RON 450,000 price threshold.

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SPAIN

Garrigues


María Cenzual and Marta Gràcia

Is the debate over Spanish companies' debt levels closed?

The corporate income tax treatment of interest charged on financing obtained to perform certain types of corporate transactions – including distributing dividends, paying out share premiums, or purchasing own shares – has been a point of contention with the Spanish tax authorities in the past. Their view was that if there was no direct and immediate relationship between those borrowing costs and the entity's revenues, they had to be treated as gratuities and therefore were not deductible.

The interpretation supported by the Spanish tax authorities had been confirmed, using identical arguments, by the National Appellate Court and by various regional high courts of justice.

Supreme Court ruling

The above view was overturned by a Supreme Court judgment on March 30 2021. The court concluded that borrowing costs are paid as a result of a loan agreement for consideration. Therefore, they could not, under any circumstances, be characterised as a gratuity, and it is irrelevant whether they had a more or less direct relationship with the entity's revenues.

The Supreme Court confirmed the principle determined in its March 30 judgment in a ruling delivered on July 21 in a cassation appeal, led by lawyers from the Garrigues tax litigation department, and adopting a principle that was reiterated in two judgments delivered on July 26. The Supreme Court added that borrowing costs paid under a loan agreement cannot be characterised generally as remuneration of equity.

Consequently, according to the July 21 judgment, if the borrowing cost is adequately recorded in the accounts and supported, it will be deductible, subject in all cases to the limits set out in the Corporate Income Tax Law for expenses of this kind (the general financial expense limit). This is regardless of whether the received funds are used to distribute a dividend, pay out a share premium, or purchase own shares.

It did not stop there. In the July 21 judgment, the Supreme Court accepted

> "Careful analysis of these types of transactions is necessary before they are performed"

that it falls within the freedom of business judgement to choose financing structures with greater or lesser debt, and they cannot be questioned simply because of the impact they may have on the corporate income tax base (in the case examined in the judgment, the foreign parent of the Spanish subsidiary provided a loan so that the subsidiary could distribute a dividend to it).

The Supreme Court acknowledged that the decision to take on debt is "a decision for the company's managing bodies, and the conditions for deduction of the costs cannot in any way be made subject to the value judgement that the tax authorities are seeking to impose".

However, despite acknowledging the business owner's freedom of choice, the Supreme Court left open the option to question transactions of this kind where it is considered that the transaction is fraudulent or contrived.

Final considerations

It needs to be remembered that in September 2022, in the context of a tax audit on a Spanish company, a report was published by the Consultative Committee on Conflict in the Application of Tax Provisions (Conflict No. 9) that declared the existence of a conflict regarding a number of transactions that resulted in the use of financing from third parties for the distribution of an amount of share premium from a Spanish entity. This finding was used to deny deduction of the borrowing costs incurred by this Spanish entity.

The debate, therefore, does not appear to have ended completely, although it is likely that any future disputes of this kind with the tax auditors will be more restricted. They may be expected to centre on the types of transactions causing the borrowing costs and their potential contrived nature. This means that careful analysis of these types of transactions is necessary before they are performed.

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