Winter 2023
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ITR

# The Global Tax 50

The most influential figures in tax

TIERED PARTNERSHIPS
**UK case law analysed**

TAX EVASION
**Indonesia's corruption crackdown**

DIGITAL TAX RETURNS
**The power of AI**

R&D RELIEF
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# A festive treat

Tom Baker
Editor

On the 12th day of Christmas *ITR* gave to me: a dozen tax leaders from ‘23.

That’s right, it’s that time of year again when we publish our Global Tax 50, celebrating those individuals who had the greatest influence on the tax world over the last 12 months. While the full list of 50 profiles, broken down into five categories (industry figures, tax authorities, public officials, noteworthy individuals and NGOs), will be available online later in December, those included within represent the best of the best.

Or do they? In a year mired by scandal, it would be remiss of us not to highlight those who exerted significant influence whether positively or not. After all, the PwC tax leaks fiasco has dominated our coverage for most of 2023, producing its fair share of heroes and villains.

Scanning the 50-strong list, the controversy theme remains strong. You’ll find a handful of individuals and companies who dared to take on the US Internal Revenue Service (with varying results); the head of the agency itself also makes the cut. Other combative highlights include barrister Richard Wright, who successfully prosecuted Bernie Ecclestone in one of the most audacious tax fraud cases seen in the UK for many years.

But cold-hearted cynics we are not – festive cheer can be found among the tax reformers, innovators and campaigners who feature prominently in our profiles. Whether it was KPMG’s new vice chair championing women in the tax workplace, or officials from numerous nations seeking to implement minimum taxes to achieve tax equality, there is plenty of positivity on offer.

> “Festive cheer can be found among the tax reformers, innovators and campaigners who feature prominently in our profiles”

As always in our PDF publications, you will also find our usual mix of expert analysis and local insights from a host of jurisdictions, ensuring you’re up to date on the latest tax developments wherever you are.

We wish you happy reading and, of course, a merry festive period.

Tom Baker
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## MEET THE EDITORIAL TEAM

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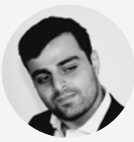
Editor-in-chief



Sam Sholli
Reporter

Tom Baker
Editor

Phil Myers
Commercial editor

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# CMS Mexico's new tax partner vows to strengthen European client base

**Ángel Escalante told *ITR* that leveraging CMS's European clients is key to him boosting the law firm's tax offering in Mexico**

His move came as Escalante's previous firm joined CMS Mexico, in a deal announced on October 1.

Escalante had been a partner at Escalante y Asociados, a boutique consultancy and litigation firm specialising in tax, foreign trade, and money laundering prevention, for over two years.

He is now a tax partner at CMS Mexico and is joined by his team of five lawyers and one certified public accountant.

CMS is less well-known in Mexico because it's mainly a European law firm, said Escalante, so the main purpose of his move is to help CMS's European clients invest in Latin America by providing local expertise.

"We really try to be proactive with the tax authorities and help them understand what the international standards are and give security to our clients," he explained.

Escalante pointed out that although Mexicans do invest abroad, Mexico is mainly a capital importer economy.

"So we export some capital but not that much," he said. "I'm looking for both [import and export work], but the capital importing is more relevant."

Escalante, who is both a lawyer and a certified public accountant, told *ITR* his typical day as a tax partner revolves mainly around consultancy and litigation.

CMS Mexico now has 10 partners since opening its tax offering in Mexico this year, Escalante told *ITR*.

### Hogan Lovells hires four tax specialists from collapsing US firm

Transatlantic law firm Hogan Lovells appointed four tax specialists from collapsing New York-based firm Stroock & Stroock & Lavan.

Stroock's partners voted to dissolve the firm in October after it reportedly suffered from a spate of partner departures and failed to secure a merger with a larger suitor. Stroock's dissolution has still yet to be made official.

The four tax specialists joining Hogan Lovells are partners **David Olstein**, **Steven Schneider**, **Jeffrey Uffner** (pictured) and special counsel **Thomas Zampino**.

They arrived at Hogan Lovells as part of a group of 28 partners and four senior counsel from Stroock.

### Kirkland & Ellis appoints senior tax partner in London

Global law firm Kirkland & Ellis bolstered its London tax team with the hire of partner **Ceinwen Rees** from Macfarlanes.

Rees' appointment helps replenish the firm's London tax bench, after the loss of two tax partners to rival Paul Weiss in September.

She advises clients on a range of corporate tax and structuring issues, with a focus on assisting investment fund managers with fund, house, carry and co-investment structuring.

Rees, who spent five years at Macfarlanes, was the second tax partner to join Kirkland in November, following the firm's announcement that James Morgan would be joining from Linklaters.

### Hamilton Locke hires ex-EY partner in Australia

International law firm Hamilton Locke has hired former EY tax and legal specialist **Damien Bourke**.

Bourke is one of five new partners Hamilton Locke welcomed to its Melbourne and Brisbane offices.

He joined Hamilton Locke's Brisbane office from Australian firm Holding Redlich, where he had been a partner for six years. Previously he had worked as a partner at EY in Australia between 2012 and 2014.

Bourke specialises in complex tax and commercial litigation and has brought across his team, which includes special counsel Joanne Casburn.

### Pinsent Masons bolsters London VAT team

International law firm Pinsent Masons has hired VAT specialist **Bryn Reynolds** as a partner in its London office.

Reynolds joined from competitor firm Simmons & Simmons, where he had been a tax principal since 2018.

Before Simmons, Reynolds had stints at 'big four' accountancy firms KPMG and EY.

His practice focuses on advising businesses on various VAT matters, including disputes with HM Revenue and Customs as well as alternative dispute resolution.

### Stewarts adds to London tax litigation division

Disputes-only law firm Stewarts appointed **Giles Salmond** to its London tax litigation and resolution team.

Salmond arrived from full-service firm Eversheds Sutherland, where he was a partner and head of the indirect taxes and tax dispute resolution team.

With over 25 years' experience, Salmond specialises in complex VAT litigation, also acting for clients in several disputes with HM Revenue and Customs.

Salmond's hire brings the number of partners in Stewarts' tax litigation team to five.

### Brown Rudnick boosts Washington DC office with tax partner hire

US-headquartered law firm Brown Rudnick added international tax partner **Peter Farrell** to its Washington DC office.

Farrell, who joined from fellow US firm Baker Botts, has a broad practice covering corporate tax, income tax planning, international tax, spin-offs and M&A.

He was previously a special counsel at Baker Botts.

# The uncertainty of tiered partnerships – expert analysis of UK case law

Guy Bud and Matthew Greene from litigation firm Stewarts review a dispute on tiered partnerships, which raises questions on corporation tax and partnership law

Guy Bud

Matthew Greene

'Tiered partnerships' are a common structure in international tax planning but they raise delicate issues and uncertainty regarding partnership law and tax. A decision in *BlueCrest Capital Management v HM Revenue and Customs (HMRC)* from October by the Court of Appeal in England and Wales provides valuable clarification.

### Background

BlueCrest is an investment management business that was conducted through a limited partnership (LP) in the UK and subsequently became a limited liability partnership (LLP) ('the UK partnership'). A share of the equity needed to be bought out.

As part of the planning, a complex tiered partnership model was set up, in essence, to allow this to be financed through pre-taxed profits from the UK partnership.

The buyers created an LP in the Cayman Islands ('the Cayman partnership') to hold the equity, with a limited company ('CaymanCo') as its general partner. CaymanCo became a member of the UK partnership in its capacity as general partner because the Cayman partnership itself had no legal personality under Cayman law.

A commercial lender was used to fund the buy-out. As part of the agreement, a financing company ('FinanceCo') joined the Cayman partnership and entered into a complex series of financing arrangements with CaymanCo and the other members to govern loan and interest payments.

The case focused on the mechanism for loan repayments. 'Superprofits' (profits above a given level set out in the agreement) arising to the UK partnership would be allocated to CaymanCo, which was required to make an equivalent payment to its holding company ('CaymanHoldCo'). CaymanHoldCo would put the funds back into CaymanCo by capital subscription and CaymanCo, finally, would make the payment to FinanceCo.

### The appeal

HMRC argued that the BlueCrest scheme was ineffective for UK corporation tax. It argued that CaymanCo was taxable on the superprofits allocated to it ('the profit allocation issue') and that no deductions were possible for the interest payments ('the interest deduction issue'). The taxpayers appealed unsuccessfully to the First-tier Tribunal (FTT) and Upper Tribunal (UT) before reaching the Court of Appeal.

The taxpayers raised two arguments in relation to the profit allocation issue. They argued that the superprofits had not been allocated through the UK partnership to CaymanCo but directly to FinanceCo, raising the wider question of the exact relationship created between the UK partnership and the Cayman partnership ('the partnership issue').

In the alternative, the taxpayers argued that the profits allocated to CaymanCo had actually been held as a fiduciary for the other members of the Cayman partnership in its capacity as general member and that this was not taxable profit ('the fiduciary issue').

### The partnership issue

The taxpayers' position was that the buy-out had created an 'omnibus partnership'

The Cayman Islands was central to the dispute

in which all members of the Cayman partnership, including, crucially, FinanceCo, became members of the UK partnership and that profits were therefore allocated to them directly without CaymanCo's involvement.

Rejecting this analysis, the FTT originally concluded that the Cayman partnership was actually a separate 'sub-partnership.' The UT broadly endorsed its reasoning.

After considering the position at some length, the Court of Appeal agreed. Some key points were emphasised:

- Although it was possible for members of one partnership to become part of another in similar circumstances, there was no legal presumption to this effect. The facts also provided no basis to believe that FinanceCo and the other members of the Cayman partnership had been intended to join the UK partnership or, in fact, did;
- Specific legal rules govern LPs and LLPs. Cayman law prevented members of a limited partnership other than the general member from being involved in its business. FinanceCo was, therefore, directly prohibited from involvement with the Cayman partnership's business, unlike CaymanCo; and
- CaymanCo had unambiguously fulfilled the necessary formalities and became part of the UK partnership. This was not the case for FinanceCo or the other Cayman partnership members.

CaymanCo had, therefore, unambiguously received the allocated profits from the UK partnership and not FinanceCo.

### The fiduciary issue

Profits received in a 'merely fiduciary or representative capacity' are not generally subject to corporation tax (section 6 of the Corporation Tax Act 2009 (CTA)). The taxpayers pointed out that the profits allocated to CaymanCo as general partner of the Cayman partnership were held in such a capacity for the other members as a matter of Cayman law. The UT rejected this argument on the basis that section 6 had no applicability to the specific rules for calculating corporate profits in a partnership context.

Although the Court of Appeal rejected the UT's analysis, it agreed with HMRC that CaymanCo was not acting in such a capacity based on a "realistic" analysis, drawing on the so-called Ramsay approach to statutory interpretation (which requires the court to take a realistic view of the facts). CaymanCo might receive profits in principle as a fiduciary, but it was also committed to participation in a pre-ordained series of transactions that would ultimately result in it receiving beneficial ownership through the capital subscription by CaymanHoldCo.

### The interest deduction issue

CaymanCo's entitlement to claim interest deductions depended on there being a trading loan. This meant a loan 'for the purposes of the trade' (section 297(1) CTA 2009) carried out by CaymanCo in the UK as a member of the UK partnership.

The FTT and UT had treated this as a factual issue. They pointed out that the loan had been used for the purposes of the Cayman partnership's investment in the investment-management trade rather than the UK partnership's underlying investment-management trade.

The Court of Appeal affirmed the position of the FTT and UT. It rejected the taxpayers' argument that the loan's purpose was a question of law and that the test was automatically satisfied.

### Conclusion

Although some of the conclusions will doubtless cause concern, especially around interest deductibility, given the earlier findings of fact, the overall outcome in the context of this arrangement and the application of Ramsay is perhaps unsurprising.

Many will welcome the court's rejection of the UT's approach, which could have the effect of imposing tax on profits received by corporate members acting in a genuinely fiduciary capacity. 'Tiered partnership' structures may need to be re-examined with particular care.

# Navigating Indonesia’s battle against tax evasion

Yusuf Akhmadi of Indonesia’s Directorate General of Taxation reports on the country’s latest domestic and cross-border initiatives to clamp down on tax evasion


Yusuf Akhmadi

The EU’s Global Tax Evasion Report for 2024 stated that major international initiatives have contributed to a decline in offshore tax evasion by around three factors in less than 10 years. In recent years, Indonesia has emerged as a major player in the global fight against tax evasion, particularly focusing on its wealthy population.

As the country solidifies its commitment to international standards, membership in organisations such as the Financial Action Task Force (FATF) and the Joint International Tax Shelter Information and Collaboration (JITSIC) has become integral to its strategy. This article delves into Indonesia’s endeavours to combat tax evasion, emphasising its capacity building initiatives and placing an additional spotlight on trusts.

### A strategic move

Indonesia’s decision to join the FATF and JITSIC underscores its dedication to combating financial crimes on a global scale. The FATF, established in 1989, is an intergovernmental body that sets international standards to combat money laundering and terrorist financing. By aligning with the FATF, Indonesia positions itself to adopt and implement stringent measures, ensuring the transparency and accountability of its financial system.

During the fourth Plenary of the FATF in October 2023, Indonesia was granted full membership after it underwent a mutual evaluation review (MER), which the Plenary discussed and approved in February 2023. The MER consisted of multiple stages, including filling out questionnaires, collecting evidence on the implementation of 40 FATF recommendations, assessing the effectiveness of the 11 immediate outcomes (IOs), and conducting an on-site visit to confirm the questionnaire and request additional evidence.

To be qualified for FATF membership, Indonesia is required to fulfill four minimum requirements:

1. Achieve a ‘compliant’ (C) or ‘largely compliant’ (LC) rating on at least 33 of 40 FATF recommendations;
2. Achieve a C or LC rating on recommendations 3 (money laundering offenses), 5 (criminalising terrorist financing), 10 (customer due diligence), 11 (record keeping), and 20 (reporting of suspicious transactions);
3. Achieve a ‘high’ or ‘substantial’ level on at least five IOs out of 11; and
4. Only record a ‘low’ level for a maximum of three IOs.

The JITSIC, on the other hand, focuses on tackling cross-border tax evasion by facilitating the exchange of information among its member countries. The JITSIC network allows its 42 members to cooperate and share resources, experience, and expertise directly on a specific case. These features allow members to work together on following up on various offshore leaks.

In Indonesia, the JITSIC operation is coordinated by Mekar Sari Utama and

> "Indonesia is paving the way for a more secure and equitable taxation landscape"

Sanityas Jukti Prawatyani as the director and deputy director respectively of the International Taxation Directorate.

The cooperation has strict rules to ensure the confidentiality of information and the confidence of the taxpayer. To ensure the sharing of expertise is conducted in an agile and confident manner, each JITSIC member must appoint a single point of contact to be responsible for managing the country's JITSIC interaction.

As Indonesia becomes an active participant in the JITSIC, it gains access to a wealth of information crucial for identifying and addressing tax evasion schemes involving its wealthy population. It also allows Indonesia to exchange and analyse information under the double tax convention in a coordinated and collaborative way on a real-time basis.

The investigated cases under the JITSIC network include cross-border investment and financing arrangements, foreign tax credit schemes, and the exploitation of trust structures and offshore arrangements by high-net-worth individuals.

The collaboration with the FATF and JITSIC is not just a diplomatic move for Indonesia, it's a strategic alignment that enhances the nation's ability to track and combat global tax evasion. Through the exchange of information and cooperative efforts, Indonesia can tap into a vast network of intelligence, strengthening its position in identifying and countering potential tax evasion activities linked to its affluent demographic.

### Strengthening the arsenal

Recognising the complexity of tax evasion schemes and the need for a skilled workforce to combat them, Indonesia has prioritised capacity-building within its tax authorities. The government has invested in training programmes, technology, and collaboration with international experts to enhance the capabilities of its tax enforcement agencies.

In October, the Indonesian Directorate General of Taxation (DGT) conducted a joint DGT-OECD workshop on exchanging information as a tool to combat tax evasion. The four-day workshop invited more than 120 participants from diverse functions, including tax auditors, tax supervisors, and international tax specialists. The speakers came from the OECD, HM Revenue and Customs and the Australian Tax Office.

The capacity building initiatives in Indonesia are not merely about imparting technical skills; they encompass a broader strategy that involves fostering a culture of compliance, ethics, and vigilance. By investing in the professional development of its tax enforcement personnel, Indonesia is not only building a competent workforce but also instilling a sense of responsibility and dedication to eradicating tax evasion.

Efforts have been made to streamline communication and cooperation among the various agencies involved in combating tax evasion. This multidisciplinary approach ensures a holistic understanding of the issue and facilitates more effective prevention and enforcement measures.

### Unravelling the complexity

One area that has come under particular scrutiny in Indonesia's fight against tax evasion is trusts. Trusts, often utilised for legitimate financial planning, can also be exploited for illicit purposes, leading to tax evasion. The Indonesian government is intensifying efforts to understand and regulate trusts, striking a balance between legitimate wealth management and preventing their misuse for evading taxes.

Trusts are an instrument commonly found in common law countries but are rarely recognised by civil law countries. Indonesia, as a civil law country, does not recognise trusts in its tax system, which raises the issue of the treatment of offshore trusts declared by the resident settlor or beneficiary of Indonesia.

Trusts in Indonesia are becoming a central point during the public uproar over offshore leaks, the most recent of which were revealed as part of the Pandora Papers in 2021. The leaks show that many Indonesian high-net-worth individuals utilise hazy offshore structures that involve trusts. The non-existence of specific regulations for trusts has proven to be a hurdle to unraveling the complexities involving the trusts scheme.

To properly address the issue, the DGT actively communicates and coordinates through the JITSIC network, especially within the 'wealthy population expert' sub-group. The group tackles those evading tax by abusing trusts in a complex cross-border scheme. One of the discussed cases involves eight jurisdictions and trust-foundation-company arrangements. The group also discussed how to recognise trusts when there is no domestic regulation, how to treat the separation of trust assets, and the effect of trust residency shifts on income attribution.

The focus on trusts is not just a response to emerging challenges but a proactive step in anticipation of evolving strategies employed by those evading tax. By staying ahead of the curve and adapting regulations to address the potential misuse of trusts, Indonesia is positioning itself as a forward-thinking player in the global fight against tax evasion.

### A holistic approach

Indonesia's proactive stance against tax evasion demonstrates its commitment to upholding international standards and fostering a transparent and accountable financial environment. As Indonesia faces the dynamic landscape of financial crimes, its adaptability and proactive measures showcase a determination to protect its economic integrity.

Through a holistic approach that combines international cooperation, domestic capacity building, and targeted assessment, Indonesia is paving the way for a more secure and equitable taxation landscape. The battle against tax evasion is multifaceted, and Indonesia's multifaceted approach will hopefully ensure a fair taxation system for all.

# Global Tax 50 2023

***ITR* highlights the good, the bad and the ugly in tax figures from 2023, profiling politicians, in-house practitioners, public officials and more**

Where to start, then, after another whirlwind year in tax? On policy alone, jurisdictions across the globe have either embraced or rallied against international initiatives, such as the OECD's pillar two proposal. While many nations amplified efforts to adhere to this global minimum standard, notable stubborn exceptions remained, namely the US.

But if you thought the disagreements ended there, keep reading. The year 2023 will largely be remembered as one of scandal and dispute, after PwC Australia's headline tax leaks fiasco and numerous high-profile tax investigations internationally.

On that note, key players on all sides of the PwC tax scandal are profiled within our Global Tax 50 2023. These include Australian senator Deborah O'Neill, who has held the 'big four' firm to account all year, and former partner Peter-John Collins, whose regulatory rebuke in January sparked the entire controversy.

Elsewhere you will find testaments to positive tax achievements this year, including WTS Global chief executive Wim Wuyts' agenda-setting climate benchmarking project, not to mention KPMG's new vice chair for tax Rema Serafi's pioneering rise through the ranks.

Therefore, *ITR* celebrates the good, the bad and the ugly of the tax world in 2023. While their legacies may be fought over, one thing is for certain: they all made an undeniable mark this year.

We hope you enjoy reading 12 highlighted profiles from *ITR*'s Global Tax 50 2023.

# Wim Wuyts

Wuyts is the CEO of WTS Global, based in Belgium

Driving societal change is a lofty ambition, but it's exactly what Wim Wuyts vowed when unveiling WTS Global's new ESG measurement tool, the Tax Sustainability Index, in October.

Unique in the market, the TSi provides a benchmarking system for organisations to measure their tax sustainability. Firms can position themselves against their peers but also trace their own performance over years to track long-term ESG targets.

As the frontman for the tool, Wuyts spoke passionately about what he hopes the TSi can achieve: "We want to drive societal transformation through tax. We want to inspire organisations to accelerate their ESG drive," he told *ITR*. "But we don't want to be seen as a polarising group, we want to move the needle in a kind way."

For designing and eloquently introducing this timely initiative, Wuyts cements his place as one of the most influential tax leaders of 2023. ■

"As the frontman for the TSi, Wuyts spoke passionately"

# Wang Jun

Jun is commissioner of China's State Tax Administration

Wang Jun gains recognition once again after overseeing a programme of progressive tax changes in China.

Under his leadership, the State Tax Administration (STA) rolled out a series of tax incentives, cuts and refunds between January and August this year. In total, the tax breaks amounted to ¥1.15 trillion ($157.5 billion), three quarters of which benefitted the private sector.

In addition to bolstering economic growth through tax cuts, Jun has overseen a set of reforms to make the taxpaying process easier. The 'Spring Breeze Project' was implemented for the 10th successive year in 2023, streamlining a variety of reporting processes and promoting digital payment methods and e-invoices.

"In addition to bolstering economic growth through tax cuts, Jun has overseen a set of reforms to make the taxpaying process easier"

To this end, the STA held the 'High-Level Symposium on the Digitalization and Digital Transformation of Tax Administration' in October 2023. At the event, representatives from 20 countries and six international organisations discussed advancing smart taxation systems, benchmarked against international standards.

Jun retains his influential status for his integral role in reforming the tax policies of the world's second biggest economy. ■

# Sri Mulyani Indrawati

Indrawati is Indonesia's minister of finance

Indonesia has had a transformative year in terms of tax policy. Not only has the country laid the groundwork for implementing pillar two in 2024, it has undergone a series of domestic tax reforms. Sri Mulyani Indrawati, Indonesia's minister of finance, has been integral on both counts.

Indrawati was highlighted last year for her role in introducing the OECD's two-pillar solution, plans which were solidified this year. She oversaw efforts to implement a new 15% minimum corporate tax rate in line with the OECD's project.

But Indrawati made new strides in 2023. In April, she presided over new VAT regulation on the transfer of foreclosed assets, introducing an effective rate of 1.1%. That same month, she helped introduce legislation that aimed to centralise various provisions on certificates of origin and import duty tariffs.

"Indrawati made new strides in 2023. In April, she presided over new VAT regulation on the transfer of foreclosed assets, introducing an effective rate of 1.1%"

Perhaps the most progressive new policy, however, was the introduction of a VAT incentive for battery-based electric vehicles – with the rate cut from 11% to 1% for electric cars manufactured with at least 40% local parts. ■

# Rema Serafi

Serafi is KPMG's newly appointed vice chair for tax

Rema Serafi's appointment as KPMG's vice chair for tax in October 2023 was a ground-breaking achievement in more ways than one.

First, it marked the peak of a 27-year career at the 'big four' accountancy firm, as Serafi worked all the way up from an entry-level position to KPMG's top tax leadership role.

But New York-based Serafi also broke the mould by becoming the first woman to hold the tax vice chair role in KPMG's history. While an accolade in itself, it also validated a career spent advocating for women in business.

> "Serafi worked all the way up from an entry-level position to KPMG's top tax leadership role"

In a 2020 blog post, Serafi spoke of the intimidation she felt when encountering male-dominated boardrooms and how she overcame this feeling: "I ultimately shifted my perception to view this difference – and the leadership traits that come along with it, like empathy and the ability to read a room well – as one of the critical tools in my professional toolbox."

These traits have evidently propelled Serafi to a deserved position of influence. ■

# Gabriel Zucman

Zucman is an economist at the University of California, Berkeley

The John Bates Clark Medal, awarded annually by the American Economic Association, is second in prestige in the economics field only to the Nobel Prize. As this year's winner, influential academic Gabriel Zucman earns his place in the Global Tax 50.

Before receiving the award, *ITR* covered Zucman's high-profile UN research in March which outlined how multinational companies are using tax havens to shield profits from tax authorities despite the OECD's crackdown on tax avoidance.

In nominating Zucman for the medal, the AEA praised this kind of work, saying: "Through his entrepreneurial and creative pursuit of new data and methods for economic measurement, Gabriel Zucman has uncovered a range of fundamentally

important facts quantifying the importance of tax evasion and measuring the rise of top income and wealth inequality." ■

# Jeremy Hunt

Hunt is the UK chancellor

After little to cheer about economically in the UK for several years, chancellor Jeremy Hunt receiving endorsements from both tax professionals and business groups over his latest corporate tax break is a major achievement.

Confirmed in November, Hunt made 'full expensing' permanent. The policy allows companies to reclaim the cost of investments in various assets in the year they were purchased, rather than spreading it across multiple tax years.

Hunt said the policy will save companies up to 25p for every £1 spent and will cost the government £11 billion ($13.8 billion) per year.

Importantly for a government waning in public support ahead of a potential 2024 general election, full expensing went down well with the right people.

Marc Wright, head of entrepreneurs at wealth management firm Investec Wealth & Investment (UK), said it is "very welcome indeed" and should promote growth and productivity into 2024 and beyond.

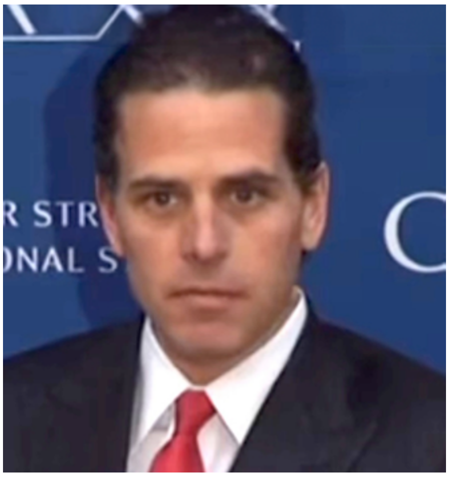
Pinsent Masons' head of corporate tax, Eloise Walker, similarly welcomed the move: "This should be good news for businesses, particularly those considering making significant capital investments. It may also encourage more businesses to make those investments."

> "Hunt receiving endorsements from both tax professionals and business groups over his latest corporate tax break is a major achievement"

A rare public relations win for the Conservative Party, then, which could go some way towards electoral success. ■

# Hunter Biden

**Biden is the son of the US president**



Hunter Biden went on both the offensive and the defensive in a 2023 dominated by controversy.

In September, US prosecutors indicted Biden on three gun charges, but it was a June plea deal in which he admitted to two counts of failing to pay taxes on time that led to a legal frenzy.

First, two IRS whistleblowers reportedly said the agency took "slow-walking investigative steps" in probing Biden, fuelling claims that he had benefitted from a 'sweetheart deal'. Then, days after the gun charge indictment, Biden sued the IRS for breaching his privacy.

In the lawsuit, Biden alleged that the IRS whistleblowers "sought to embarrass" him, and that IRS agents discussed his case with members of Congress and reporters, violating his privacy rights.

For his high-profile misdemeanours and for taking on the IRS, Biden never left the tax conversation in 2023. ■

# Deborah O'Neill

**O'Neill is a senator with the Australian Labor Party**

The chairman of a parliamentary committee usually attracts little attention, except from political nerds.

However, when the PwC tax scandal blew up in Australia earlier this year, Labor Senator Deborah O'Neill became front and centre of the coverage.

O'Neill is chairman of the Joint Parliamentary Committee on Corporations and Financial Services, which is inquiring into the revelations. She has been a vocal critic of some of the practices that have come to light, and spoke exclusively to *ITR* about them in August.

The scandal kicked off on January 23 when the Tax Practitioners Board, the national body responsible for the registration and regulation of tax agents and practitioners, announced it would ban Peter-John Collins, a former PwC tax partner, for two years for a breach of integrity.

Collins was found to have told colleagues in the firm about the details of confidential discussions with the Australian Taxation Office concerning proposed reforms to stop tax avoidance and profit shifting by multinationals.

The Australian media released a string of stories about the revelations, also uncovering details of questionable behaviour by peer firms. This prompted O'Neill's committee to start an inquiry on June 22 into "recent allegations of and responses to misconduct in the Australian operations of the major accounting, audit, and consultancy firms".

The inquiry is still under way. Its verdict is sure to dominate the news in 2024. ■

> "O'Neill has been a vocal critic of some of the practices that have come to light"

# David Burt

**Burt is the premier of Bermuda**

David Burt makes *ITR*'s Global Tax 50 for this year confirming a plan to introduce a Bermudian corporate income tax in 2025.

This was especially significant because it would be Bermuda's first ever corporate income tax.

Burt stated that the new tax will be "the most fundamental tax reform in Bermuda's history".

Around 2,000 companies may fall within scope of the tax, it has been reported.

Burt's government on Wednesday, November 15 also took the notable step of introducing draft legislation to ensure the new tax would comply with the OECD's global minimum tax rules.

> "For overhauling Bermuda's tax policies while aligning with international standards, Burt has rightly gained recognition"

His government proposed a 15% statutory corporate income tax rate and also said it is developing a robust package of qualified refundable tax credits to "maintain Bermuda's attractiveness".

For overhauling his country's tax policies while aligning with international standards, Burt has rightly gained recognition. ■

# Jason Ward

**Ward is the principal analyst of CICTAR**

One of the biggest corporate tax stories of the year centred on Brookfield, a global asset management firm, which had been accused of tax avoidance.

At issue was a report by The Centre for International Corporate Tax Accountability (CICTAR), which claimed that the Canadian company operates through tax havens.

Perhaps predictably for a man who has made a career out of unearthing tax injustice, Australia-based Jason Ward, principal analyst at CICTAR, played a key role.

CICTAR, formed by a group of unions and organisations, aims to shed light on the tax policies of big corporations. To that end, Ward has commented on various companies over the years, including US oil giants and Uber.

Ward said in June: "Brookfield's claims of being a responsible investor and advancing a sustainable economy are in serious doubt. Extracting profits from privatised public infrastructure and aggressively denying governments of funding for health and education is by no means sustainable."

A Brookfield spokesperson responded that week: "Our effective tax rate is influenced by several factors, some of which are

not reflective of cash taxes paid, therefore can be significantly misleading."

By shedding light on these alleged practices, Ward kept up the fight for tax equality in 2023. ■

# The Global Tax 50

| | | | |
|---|---|---|---|
| 1. | Merete Agergaard | 26. | Sheikh Maktoum bin Mohammed bin Rashid Al Maktoum |
| 2. | Hunter Biden | 27. | Kevin McCarthy |
| 3. | Joe Biden | 28. | Michael McGrath |
| 4. | Fay Bou and Adrian Loader | 29. | Giorgia Meloni |
| 5. | Sebastiaan de Buck | 30. | Narendra Modi |
| 6. | David Burt | 31. | Dan Neidle |
| 7. | Marc Clercx, Mauro Faggion, Lukas Seemann | 32. | Olivier Roger Noël |
| 8. | Nushrat Chowdhury | 33. | Mohan Nusetti |
| 9. | Alex Cobham | 34. | Deborah O'Neill |
| 10. | Peter-John Collins | 35. | Vladimir Putin |
| 11. | Mathias Cormann | 36. | Vicente Hurtado Roa |
| 12. | Manal Corwin | 37. | Josephine Scalia |
| 13. | António Costa | 38. | Olaf Scholz |
| 14. | Bernie Ecclestone | 39. | Rema Serafi |
| 15. | Daniel Goff | 40. | Sanjay Shah |
| 16. | Nitin Gupta | 41. | Carmine Di Sibio |
| 17. | António Guterres | 42. | Jean Stephens |
| 18. | Jim Harra | 43. | Joseph Stiglitz |
| 19. | Jeremy Hunt | 44. | Kinjesh Thakkar |
| 20. | Sri Mulyani Indrawati | 45. | Jason Ward |
| 21. | Chris Jordan | 46. | Danny Werfel |
| 22. | Wang Jun | 47. | Richard Wright |
| 23. | Tasneem Kadiri | 48. | Wim Wuyts |
| 24. | Charles Littlejohn | 49. | Yoon Suk Yeol |
| 25. | Luiz Inácio Lula da Silva | 50. | Gabriel Zucman |

# Digital tax returns are evolving, not becoming extinct

Russell Gammon, chief solutions officer at Tax Systems, argues AI and other technology will positively transform tax processes, but old-fashioned returns will not disappear overnight

Russell Gammon

The digitalisation of the tax industry has been ramping up over the past couple of years, pushed forward by the implementation of initiatives like Making Tax Digital (MTD) and e-invoicing. To comply with these new schemes, tax and accounting teams have had to move away from their legacy processes towards a more digital approach, where automation plays a key part in capturing the data needed and returns are filed online.

Whilst this has changed how traditional tax processes, like the tax return, are completed and submitted, it doesn't mark the start of their impending demise. Rather than an attempt to get rid of tax returns for good, these advances aim to make it easier to interrogate and analyse the data within these returns for valuable insights.

That's not to say that digitalisation won't make a massive difference to the way data is collated and submitted over the next few years. In fact, tax returns look set to become more complicated, rather than disappear. The complexities and reconfiguration involved in making corporation tax fully digital are daunting. To start with, it requires corporation tax (CT) and VAT to be far more closely aligned. At present, the two are completely different, so bringing them together into a single platform would be near impossible, at least for now. They have stubbornly remained separate tax systems, with little commonality, often carried out by different teams of tax professionals, and will remain that way for at least the near future.

## Making digital progress with VAT and e-invoicing

While indirect tax has made progress, with businesses required to maintain digital records, digital links and use compatible software to submit VAT returns, there's no likelihood of major transformation in the UK until e-invoicing comes to the table. Once this gathers momentum in other jurisdictions over the next few years, then the UK tax office could require businesses to send digital transactional information to them in real or near real-time. In theory, this could remove the burden of making quarterly VAT calculations and give tax authorities better visibility of invoicing and payments, reducing mistakes on returns and making it harder to commit fraud.

However, UK VAT rules are not straightforward. Currently, e-invoicing solutions cannot handle anomalies such as partial exemptions, bike-to-work schemes or varying rates on fuel in commercial purchases; to name just a few. Unless the overall VAT regime is simplified, which has been advocated by businesses for years, or e-invoicing becomes more sophisticated, it is hard to imagine quarterly returns completely disappearing soon. However, making gradual changes, such as incorporating partial exemption into the digital links regime, would help to continue steady progress in manageable steps.

## CT is another ball game

CT is a process that has remained largely unchanged for decades and is another ball game altogether. With a new Finance Act annually and constant tinkering by

> Tax returns look set to become more complicated, rather than disappear

governments, the result is a mind-bending level of complexity!

For example, R&D tax credits alone are so complicated that they support their own specialist industry in the UK with dedicated software products to compute values. The effort expended generates large add-backs into CT returns, yet only contributes to a tiny fraction of the overall volume of data fields that must be completed in a CT filing.

In fact, a UK corporation tax calculation engine could have over 100,000 different input cells, such is the complexity. In some cases, a qualified tax professional can spend up to half of their working year completing a single return, given the volume of data and intricacy of adjustments that are in play. To replace this with a 'no return' system would require HMRC to receive data from customer networks and somehow work all of this out themselves, which isn't going to happen in a hurry. There are just too many complexities to handle if the tax return – and the tax professional – are taken out of the process.

### Tax returns will continue to evolve

AI and automation will bring much-needed relief from repetitive data input and categorisation tasks, freeing up tax professionals to focus on review, analysis, and decision-making. At the same time, tax authorities are likely to place more emphasis on the accuracy of information used to make calculations. Scrutiny will no longer be limited to the final tax judgements, instead supporting data could be routinely examined for discrepancies. Complying with these obligations will require additional effort from tax professionals to ensure data cleansing and accuracy is maintained throughout the accounting year. Initially, it could add more work to the compilation and review of a tax return rather than making things easier.

The options of whether to in-source or outsource work will continue to grow as more software as a service solutions make their way into the tax arena. The opportunity to co-source in a secure cloud environment, which was previously hampered by desktop technology, will allow firms to collaborate effectively with both third-party service suppliers and clients. This will bring greater efficiencies and enable firms to specialise in areas of expertise, while maintaining better control and visibility of work carried out by third parties and contractors.

New technologies and further advances in AI will introduce long overdue innovation to the UK tax system and the work of tax professionals. Inefficient and mundane tasks will be automated, but humans and their decision-making skills and judgement will be required for generations to come. So, automation won't make tax returns extinct just yet. They will continue to evolve and embrace change on the road to full digitalisation over the next two decades, if not longer.

Technology will transform tax processes

# Streamlining R&D tax relief: how will merging the incentive affect UK businesses?

**The UK government must get R&D tax relief reforms right the first time round, writes tax credit consultancy ForrestBrown's head of policy Jenny Tragner**

Jenny Tragner

HM Revenue and Customs statistics from September this year showed a welcome increase in R&D expenditure in the UK in 2021-22, totalling £44.1 billion ($53.8 billion), following a dip thought to be caused by the pandemic. But this does not tell the whole story, with plans afoot to change the face of the long-established incentive, seen by some as the government's flagship innovation tax policy.

For many years since its inception back in 2000, R&D tax relief remained relatively stable, but recent years have seen a series of piecemeal changes add complexity for companies making claims. And with the chancellor's Autumn Statement on the horizon (this piece was originally published in October 2023, a month before the Statement), innovative businesses in the UK are looking ahead to further significant reforms, with the potential merger of the two existing schemes into one tax relief.

Currently, the relief operates through an SME scheme for smaller businesses and a separate scheme for larger businesses, known as the research and development expenditure credit (RDEC). The government recently consulted on the merger of the two, having already adjusted R&D tax relief rates in last year's Autumn Statement to bring them closer together. This 'rebalancing' was seen as a stepping stone towards the now-proposed single scheme.

Draft legislation published in July brings such a merged scheme closer and proposes an implementation date as early as April 1 2024. This timescale raises questions about the ability of businesses to prepare and the impact this could have on their R&D investment plans.

## Winners and losers?

Currently, the SME and RDEC schemes have different rules, with notable differences in their approaches to contracting out of R&D. Therefore, whatever approach is adopted will result in changes for many businesses currently claiming relief. While the intention is to adopt an RDEC-style credit, the proposals would mean changes to the existing RDEC rule base to accommodate the merger. For example, some companies will gain the ability to claim for relief for R&D carried out by their subcontractors, while R&D subcontractors who can currently claim under RDEC in certain circumstances will lose their eligibility – with potential implications for supply chain relationships.

While there will be winners and losers in the short term, the single scheme proposals provide an opportunity to bring certainty to what is currently a contentious area. By ensuring that relief is targeted to the companies driving decision-making on R&D, the government can reconnect the incentive with its original aim of encouraging and increasing private sector investment in innovation. However, understanding exactly how this will play out for supply chain partners should be explored further before the single scheme gets the green light.

> R&D tax relief is vitally important to innovative UK companies as they face economic headwinds and global competition

### Reducing complexity?

While the current twin-track system has its advantages, it can be challenging for businesses to navigate it successfully. The first step in claiming is to confirm which scheme a business is eligible for, but this process isn't as simple as it may seem.

Aggregation rules on capital, as well as restrictions for subsidised expenditure and subcontracted R&D can affect firms that may operate as SMEs but fall into RDEC when considering R&D relief. The merger of the two schemes would theoretically make things simpler by removing a number of these complexities.

However, the additional rate introduced in the spring to enhance relief to 'R&D-intensive' SMEs (companies whose investment in R&D accounts for 40% or more of total business expenditure) is scheduled to run alongside the newly merged RDEC scheme. The aim of achieving simplicity by replacing two separate schemes with one does not sit well with the prospect of continuing with two schemes, albeit with a smaller number of businesses accessing the R&D-intensive SME scheme.

Because eligibility for the R&D-intensive rate is based on figures included in a company's tax return, it will always be confirmed retrospectively, meaning some businesses will be unable to forecast the relief they will be due, which may hamper the scheme's ability to influence decision-making. Some companies face moving between the R&D-intensive scheme and the merged RDEC scheme from year to year, making long-term planning even more difficult.

Moving R&D-intensive SMEs onto the single scheme is one possible solution to this issue, aligning the rules to achieve a simpler framework but preserving a higher credit rate for those businesses. The SME scheme has historically offered a more generous rate of relief because of the challenges SMEs face in accessing finance for risky endeavours such as R&D. To recognise this, the government should commit to reviewing this (somewhat hastily designed) measure after 12 months, and reduce the eligibility threshold to bring more companies into scope of the higher rate, which compares much more favourably globally to the RDEC rate.

While businesses will welcome simplification of the scheme, there remain very real costs for companies adapting to such significant change. Many will have established systems for identifying R&D projects and expenditure and these proposals come alongside a tumultuous period of change for R&D tax relief. It is important that businesses are given time to review their processes and to adapt before a single scheme comes into play. Broader questions remain about the direction of travel in this policy area, particularly after the rebalancing of the rates last autumn signalled a potential declining enthusiasm for supporting SME R&D.

### Locking in restrictions on overseas R&D

Previously announced limitations on the availability of tax relief for overseas R&D expenses are locked into the latest proposals. That means expenditure associated with externally provided workers and subcontractors will generally no longer qualify for R&D tax relief. Narrow exceptions apply in cases where it is impracticable for the company to replicate the circumstances within the UK. These exceptions are limited in scope, and do not include cost or availability of skills, which are often cited as drivers for businesses to look overseas for input into their R&D. Businesses recruiting from a global talent pool are likely to be impacted, with knock-on effects for decision-making on the location of R&D projects.

### Getting it right first time

R&D investment requires significant resources and strategic planning, meaning the decision to invest is often made with long-term considerations. The flow of piecemeal changes announced since an initial consultation launched back in March 2021 has created considerable uncertainty that has an impact on the effectiveness of R&D tax relief as a tool to encourage investment in innovation.

Continued limited reforms would be challenging for businesses to navigate, necessitating constant changes to their internal strategies to adjust. More importantly, a lack of a clearly communicated end goal, timetable or clear strategy undermines confidence in the UK's ability to support the next generation of technology businesses. Clearly, the R&D tax relief scheme needs a longer period of stability following the significant proposed overhaul.

Equally, getting the design of the single scheme right first time will be essential to ensure success and avoid the need for future tinkering – which is why taking the time to consider all the implications first is so important. Tax consultations are not always easy for businesses to engage with, so proper outreach from policymakers to consult businesses on what positive change looks like gives the scheme the best possible chance of success. A well-functioning R&D tax incentive drives increased business investment in R&D, resulting in spillover benefits from an innovation culture.

'R&D' and 'innovation' are often terms that are used interchangeably, but one of the key challenges facing R&D tax relief is what we really mean by research and development. Taking the opportunity to modernise the definition of R&D would help the UK to futureproof its science and technology investment by establishing a much clearer framework with which to target government funding. This would also help to improve business understanding of what does and does not qualify as R&D, reduce errors and enable HMRC to focus its resources on tackling fraud.

### Worth the prize

R&D tax relief is vitally important to innovative UK companies as they face economic headwinds and global competition. As the country strives to achieve its ambition to be a scientific and technological superpower, an incentive that works for innovative businesses of all sizes is imperative. The single scheme proposals provide the opportunity to deliver this – if the government takes the time to listen to the voice of those innovative businesses.

# Unlocking opportunities in the quest for global tax parity: strategic career moves for tax partners in 2024

**Overall, 2023 saw the world of tax seek to solidify common standards via a significant legislative overhaul. Oleg Rak, managing partner of specialist tax recruitment firm Mason Rak, analyses current trends from the year, and what they mean for tax leaders looking to gain an advantage in a competitive market**

Oleg Rak

After a glowing 2022, 2023 was a year of consolidation with the global tax market under continuous pressure to deliver consistent growth. In emerging markets, legislation was amended to bring TP rules and tax regimes in line with global standards. In advanced jurisdictions like the US, there was a reinvigorated focus on tax enforcement.

However, there is still a high demand for great people and a war for tax talent is ongoing. But for those senior tax professionals who know how to build a successful business there are exciting prospects in the market.

Mason Rak identifies these senior professionals as 'Superstars' – those already playing in the highest league, partners or partners-in-the-making, with a specialist skillset, ready to take their career to the next level.

### Global tax trends: upheaval and scandal

A legislative deadlock did not prevent the US from being the centre of attention for many tax professionals this year. The OECD's pillar two project has still not been adopted in the region, and the Republican Party has heavily indicated that the initiative will be heavily scrutinised.

But it was the news that the IRS will be receiving significant additional funding for enforcement activities for large corporates and wealthy individuals that caught the eye. This increased pressure was matched by a growing range of alternative dispute resolution mechanisms which taxpayers and practitioners will need to come to terms with. Add in a highly active M&A market, and an election year on the horizon, and the US will continue to require advice from highly skilled tax professionals.

In Asia Pacific, many jurisdictions are still scrambling to meet international standards. Southeast Asia in particular has seen countries augmenting their TP capabilities, often via increased audits and compliance checks. This has led to stricter approaches in Indonesia, Thailand and Vietnam – the latter of which is increasingly adopting new technologies to assist in TP investigations. Such crackdowns will necessitate an influx of tax expertise in the region.

Meanwhile, jurisdictions like India have attempted to reach tax parity for resident and non-resident investors by amending direct tax laws, all while still trying to be attractive to foreign investment.

On the subject of investment – the Asia Pacific region has become a key growth market for private clients, as high-net-worth individuals seek to diversify their portfolios. China is and will remain an attractive jurisdiction for investment, but 2023 saw a flurry of wealth enter Singapore in particular. Such an influx of capital will likely entail a wave of new tax opportunities in the region.

Perhaps the story of the year however is the PwC tax leak scandal, which originated in Australia in May but quickly ignited global discussion. International regulators and tax authorities will be keeping an eye on the Australian response to the use of confidential client information for PwC's commercial gain, with further red tape for tax

advisers seeming a likely outcome. While undoubtedly a challenge, leadership opportunities will present themselves for intrepid tax professionals in this difficult period.

The story in Europe over the last year has been dominated by legislation, with a plethora of provisions already implemented and many still on the horizon. Opportunities will present themselves for indirect tax advisors as the EU's 'VAT in the Digital Age' proposal looms large, promising to crack down on VAT fraud and improve VAT efficiency through real-time reporting and e-invoicing.

Likewise, the focus on environmental regulation continued in Europe as the Carbon Border Adjustment Mechanism (CBAM) was phased in throughout the year. Companies that fail to comply with CBAM reporting requirements will be subject to a financial penalty of €50 per tonne of carbon emissions, making professional advice in this area invaluable.

It doesn't end there – the Business in Europe: Framework for Income Taxation has caused a stir among business groups over fears that the EU could be diverging from the arm's-length principle. Taxpayers will need high-level counsel on which TP rules to adopt amid this regulatory upheaval.

The Middle East has undergone significant changes in recent years as a tax jurisdiction, largely via a wave of corporate tax reforms. In fact, the UAE has introduced penalties for taxpayers that fail to register with the relevant authority for corporate tax purposes, underlining this increased pressure.

But the region has also increasingly embraced technology: 2023 saw Saudi Arabia implement e-invoicing mandates which require taxpayers to no longer store or generate paper invoices. As the Middle East continues to develop, as does its need for qualified tax professionals to help navigate the growing complexity.

From a global industry perspective, the oil and gas sector continues to be squeezed by international environmental commitments and tax scrutiny. For example, the UK's Energy Profits Levy has put a marginal tax rate of 75% on North Sea oil and gas production, and this is set to continue for the next five years. However international demand for oil and gas remains high, at least in the short-term.

And in financial services, unprecedented levels of regulatory complexity continue to present challenges, but global growth in this sector is inevitable as new payment methods and providers burst onto the scene to keep up with ever-increasing need. Upheaval in all industries will lead to opportunities for tax leaders who have a niche expertise.

## The war for talent

Despite the challenges ahead, 2024 is set to be a banner year with continuous growth in all facets of the tax market. Those Superstars with the specialist skillset and desire to push themselves further will find a tax world brimming with opportunity.

For tax leaders looking to make a strategic career move, these global trends should act as a guide to the qualities desired and required by businesses at this dynamic time.

Whether you are considering a local move, or exploring strategic tax opportunities overseas, our team at Mason Rak will be glad to support. Our mission is to help senior tax professionals reach their full potential and enjoy a career which befits their talent and professional acumen.

*To read case studies from tax professionals who have worked with Mason Rak and secured strategic tax roles, please visit the Mason Rak website.*

## Case study: navigating global tax markets – tax partner transition to Singapore

### Background

In the dynamic world of international tax markets, Mason Rak partnered with a seasoned tax partner from the USA. Together, they embarked on a strategic journey, leveraging Singapore's tax landscape. This collaboration thrived on Mason Rak's reputation for precision and excellence in executive placements.

### Challenge

The move from the USA to Singapore was more than a relocation—it was a deliberate step toward professional growth. The tax partner aimed to expand beyond borders, finding a platform that suited his established clientele and tapped into a global network of firms. The challenge was multi-faceted: aligning aspirations, bridging geographical gaps, and fostering an environment for substantial growth.

### Value addition

Beyond conventional placements, our role evolved into a strategic partnership. Armed with comprehensive market insights, we aligned the tax partner's ambitions with firms that matched his strategic goals. Our extensive global network facilitated meaningful discussions, allowing for a nuanced evaluation of potential options. Our focus was not just transactional but also on crafting a purposeful, seamless transition.

### Outcome

This collaboration culminated in the tax partner securing a pivotal role within a prestigious global law firm in Singapore. While specifics remain confidential, our ability to orchestrate this strategic evolution—breaking geographical barriers for professional growth—was key. The integration process, meticulously planned to suit the relocation, was made smoother by the firm's capabilities and our commitment to seamless integration.

In the tax partner's words: "Mason Rak's keen guidance and vast connections were instrumental in shaping this strategic move. They didn't just place me in a new firm; they amplified my strategic vision."

This case study underscores our role as facilitators, architects of transformative transitions that leverage our global network, ensuring seamless integration and collaborative success. It's a testament to our commitment to driving professional growth and enabling strategic career moves for tax partners globally.

**EGYPT**

**Saleh, Barsoum & Abdel Aziz – Grant Thornton Egypt**

Nouran Ibrahim and Hana Khalil

# Understanding when and how to charge for central/intra-group services

In the complex world of multinational corporations, central services play a crucial role in ensuring the smooth operation and efficiency of various business units. Central services are those services that are provided by one group member to another. These services can have a wide scope; for example, IT, HR, finance, and technical and legal support. While central services offer significant benefits in terms of cost optimisation, expertise sharing, and standardisation, the question of whether to charge these services out to the recipient often arises. The decision is not straightforward and requires careful consideration.

### Why charge for central/intra-group services?

From both an accounting and a tax legislative perspective, most countries will have a framework to encourage the correct alignment of revenues and costs. The matching principle, for instance, is a fundamental accounting concept that dictates matching expenses to revenues in the same accounting period to ensure accurate financial reporting.

In Egypt, the correct allocation of costs is essentially governed by articles 22 and 30 of Income Tax Law No. 95 of 2005. These articles address the premise of taxable profit determination after taking all relevant costs into consideration, and the commitment to the arm's-length principle – highlighting the Egyptian Tax Authority's right to adjust transactions that are not conducted at arm's length. Furthermore, Article 38 of the Executive Regulations of the same law includes central cost allocations among the transactions that the Egyptian Tax Authority would closely examine in the context of the arm's-length principle. It should therefore be construed that a lack of these charges would similarly be closely examined.



With this in mind, this article discusses the most common parameters of charging out central/intra-group services.

### Charge-out mechanism: a step-by-step approach

#### Step 1

The first step in determining whether to charge out a central service is to determine if a service has been rendered. This means that the service must provide commercial or economic value and benefit the recipient. This is referred to as the benefit test. The recipient needs to be willing to pay an independent party to perform the same activity, or be willing to bear the cost of performing the activity in-house.

Not all activities should be considered chargeable. Non-chargeable services may include shareholder activities performed solely for the benefit of the shareholder(s), such as consolidation of financial accounts, duplicative activities that provide no extra benefit to the recipient, and incidental benefits arising solely from group affiliation in the absence of deliberate actions leading to that benefit.

#### Step 2

Once it has been determined that a service has been rendered, the next step is to determine the cost of the service, after excluding non-chargeable services. This involves identifying all direct and indirect costs associated with the service, such as salaries, benefits, supplies, and equipment.

#### Step 3

Once the cost of the service has been determined, it needs to be broken down into directly allocable and indirectly allocable. Directly allocable costs are those that can be directly attributed to a specific legal entity, department, or business unit. Indirectly allocable costs are those that cannot be directly attributed to a specific legal entity, department, or business unit, and in these cases, costs can be attributed according to allocation keys.

An allocation key is a method of distributing indirectly allocable costs to the parties benefiting from the service. There are several allocation keys that can be used, such as number of employees, time spent, square footage, or revenue.

#### Step 4

Once the costs have been identified for allocation, depending on the transfer pricing method, an appropriate mark-up may need to be determined. The appropriate mark-up will vary depending on the service being provided. Third-party, or pass-through, costs representing expenses incurred on behalf of group members as an intermediary, with no addition of value, would not be expected to be charged to the relevant beneficiaries at a mark-up.

The OECD Guidelines set forth a simplified approach for low value-added services, where a safe harbour of 5% may be added to the costs without performing any additional benchmarking analyses. To utilise the simplified approach, the services need to fulfil the criteria included in the OECD Guidelines, where, essentially, the services should:

- Be supportive in nature;
- Not be part of the core function of the group; and
- Not involve any substantial or significant risk for the service provider.

### What about VAT considerations?

When charging out central services, it is important to consider the VAT consequences. This will involve determining whether the service is subject to VAT and, if so, the appropriate/applicable VAT rate.

In a scenario where the central services are provided by an Egyptian company, and the services include a third-party service portion and a portion performed by the Egyptian central service provider:

- Third-party costs passing through from one related party to another are generally considered a reimbursement of costs and are not expected to be charged at a mark-up; and
- Services performed by one related party for another with an addition of value/benefit are expected to be conducted at a mark-up according to Egyptian VAT law.

Invoices from an Egyptian central service company should be issued for each beneficiary separately and charged at the relevant VAT rate.

### Takeaways

The decision of whether to charge out central services is a complex one that should be made on a case-by-case basis. Broadly, services should be charged if they provide economic or commercial benefit to the recipient. There are several factors to consider, such as:

- The benefits to the departments or business units that utilise the service;
- Whether a profit should be made from conducting the service; and
- The VAT consequences.

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**ITALY**

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# Italian Supreme Court stumbles regarding the taxable base of interest payments

In its judgment No. 26204/2023, the Italian Supreme Court of Cassation ruled on a complex case in which the Italian Revenue Agency had requalified under the anti-abuse rule the financial fees paid in favour of a non-resident company under an interest rate swap agreement as interest expenses, and, consequently, challenged the failure to apply withholding taxes on the interest payments.

The taxpayer opposed several grounds of appeal, including that, in any case, the withholding tax would have to be applied on an amount determined net of the relevant costs, as "the failure to recognise the costs incurred in the production of interest paid by a resident company to a non-resident company restricts the free movement of services and capital, granted by the Treaty on the Functioning of the European Union [TFEU]."

The court rejected the claim on the following grounds:

- The positions of a resident and a non-resident company are not comparable because they realise income of a different tax nature. For resident business corporations, interest does not represent income from capital but business income, included in the relevant taxable base; for non-resident corporations, instead, interest is considered as income from capital, for the determination of which no deduction is allowed.
- In any case, the different tax base cannot affect the fundamental freedoms, since the two items of income are differently qualified and identified. Indeed, the different treatment provided for by the tax legislation (i.e., the different tax mechanism), depending on whether the beneficiary companies are resident in Italy, addresses situations that are not comparable, by reason of the different nature of the interest income (see (a) above) and the different 'position' of the taxing state, which acts as the taxing body for resident entities, and as the source of the interest for non-resident companies.

## Analysis

Although the Italian Supreme Court has recently endorsed an EU-compliant approach in interpreting some debated rules (for example, the recent jurisprudence in favour of the application of the participation exemption to non-resident companies; decision No. 27267/2023 of September 25 2023), in this case the Supreme Court's position is openly illegitimate and mistaken in its premises and conclusions.

Firstly, the income always has the same nature – i.e., it is interest income – regardless of the category of income in which it falls for the recipient. Specifically, interest is considered as business income for resident taxpayers engaged in business activities and for non-resident taxpayers with a permanent establishment in Italy to which interest income is attributable. It is qualified as income from capital in the hands of non-resident taxpayers with *no* permanent establishment in Italy just for taxation purposes. The Italian tax law is structured on the assumption that a non-resident entity with no permanent establishment in Italy never carries out a business activity in Italy, which is true for the identification of the Italian category of income but not from an EU perspective. Indeed, the non-resident entity could carry out a business activity abroad, which is a condition that must be considered for understanding the comparability of the positions.

Secondly, the different taxation technique (withholding tax versus inclusion in the taxable business income) has nothing to do with fundamental freedoms but is simply derived from different collection requirements. If an income considered territorially relevant – such as interest income – is paid to a non-resident recipient, the application of withholding tax at source represents the final levy and ensures that the state of source collects the taxes due on the income. Conversely, if the payment is to a resident taxpayer, there is no risk of revenue loss since the latter is required to include any proceeds in its taxable income. The role of the state as the taxing entity is the same: for the sole purpose of collection of taxes. In the first case, it requires the intervention of the Italian resident payer of the income acting as a withholding agent and in the second one, it collects taxes directly from the taxpayer itself.

### Key question on tax bases

The question is whether it is correct to use two tax bases in respect of two recipients of income, both carrying on business activities within the EU, for the sole reason that one is resident in the same state of the paying entity and the other is not (and does not operate through a permanent establishment). Obviously, the answer can only lead to non-compatibility with EU law.

National legislation violates EU law every time it discriminates or restricts European freedoms, as provided by the TFEU. Taxes levied by European states must not prevent or restrict the free movement of goods, persons (including the freedom of establishment), services, or capital among EU member states. Discrimination exists if a member state treats a cross-border transaction less favourably than it would the same domestic transaction. If the treatment seems discriminatory, the freedom that has been limited by the discrimination should be identified to evaluate whether a justification can be invoked.

### Case law

The case under investigation is the following:

- Article 26 of Presidential Decree No. 600/1973 provides that interest paid to non-resident recipients is subject to a 26% domestic withholding tax on the gross amount paid; but
- For resident companies, the interest income qualifies as business income and, therefore, is not subject to domestic withholding tax.

This difference violates fundamental freedom. It is crystal clear that a non-resident taxpayer has a detrimental treatment to that accorded to resident entities, with no valid justification.

What is surprising in the case at hand is that the illegitimacy of the Italian tax law (and of the Supreme Court's decision) is not questionable as it has been confirmed by several decisions of the European Court of Justice (ECJ).

The leading case is *Gerritse* (C-234/01), concerning the freedom to provide services in relation to a self-employed individual, where the ECJ ruled that the taxable amount of the professional income derived by the non-resident individual had to be determined in a similar manner as for resident individuals carrying out the same activity, as their positions were considered comparable, concluding that non-residents should also be allowed to deduct costs incurred to produce taxable income.

The main principle has been ruled in further decisions (among others, C-290/04, the *Scorpio* case; C-345/04, the *Centro Equestre* case; and the very recent C-461/21, the *Cartrans* case, on September 7 2023). The *Brisal* case (C-18/15) clearly states the incompatibility with Article 49 of the TFEU of a national legislation that "taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions".

For the sake of completeness, a domestic case (Decision No. 363 dated April 15 2019 issued by the Regional Tax Court of Abruzzo) ruled in favour of the 'net taxation' of Italian-source royalties accrued by a non-resident company without a permanent establishment in Italy; i.e., considering as taxable the royalties net of the direct costs of production. For this purpose, the tax court disapplied the Italian domestic tax law as it has been considered incompatible with the prevailing principles enshrined in the European treaties and with their interpretation provided by the ECJ.

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# How to manage ESG, value chains, and transfer pricing considerations

ESG considerations are transversal in all value chains and impact not only companies captured within the threshold set forth in new regulatory initiatives such as the Corporate Sustainability Reporting Directive (CSRD) but also SMEs.

SMEs play a vital role in the value chain of larger companies, serving as suppliers, subcontractors, or business partners and providing goods or services. With the introduction of the CSRD, SMEs will be required to disclose and adhere to sustainability standards set by the large enterprise they collaborate with.

Major corporations and multinational organisations already demand their suppliers meet specific ESG criteria, including environmental standards, ethical labour practices, and transparent policies.

Non-compliance with sustainability requirements not only exposes SMEs to legal and financial risks but can also result in their removal from the supply chain, leading to significant social consequences. On the other hand, adhering to these standards opens up substantial opportunities for development throughout the value chain.

Due to the impact of ESG considerations within the value creation process, transfer pricing plays a key role and cannot be left out.

This article explores the relationship between transfer pricing and ESG, and how its interconnection can help to foster a more sustainable approach within multinational groups.

## Functional, assets, and risk analysis

Companies should conduct a comprehensive assessment of sustainable development goals. This usually involves the creation of a sustainability risk exposure map throughout the value chain, taking into account a company's geographic presence and key markets risk (focusing on environmental risks, risks related to governance issues, or social-related risks).

Furthermore, it is important to understand the contributions made by the company throughout its process and whether they are aligned or misaligned with sustainable development goals.

Considering the above, transfer pricing policies and documentation need to adapt and cope with ESG considerations.

Functional, assets, and risk analysis requires a detailed ESG analysis, so as to clearly identify:

- New transactions deriving from ESG topics;
- Potential changes to the company business model;
- The potential impact on, or changes to, the brand value or intangible property of the company; and
- Changes to the value chain operating models.

### Functional analysis

The scope of the functional analysis should include the evaluation of ESG-related functions conducted by each entity, such as:

- The identification and documentation of tasks related to environmental conservation;
- Social impact;
- Corporate governance compliance with environmental regulations;
- Sustainability reporting; and
- Employee welfare programmes.

The functional analysis will need to determine whether the costs incurred by one or more entities in the group provide benefits to other companies in the group. In such a case, a recharge of such cost, plus an arm's-length mark-up, should be evaluated.

### Assets

In terms of assets employed, it is essential to identify the tangible and intangible resources that play a role in generating value within the ESG area, which might include:

- A change to renewable energy infrastructure;
- Patented sustainable technologies;
- Trademarks associated with environmentally friendly products; or
- A company's reputation for ethical business conduct.

Investments in ESG activities will be able to bring benefits to the value of the group's intangible assets as well. In such cases, a detailed DEMPE analysis could help in the allocation of profits or costs between the group's companies.

### Risk

It is important to focus on the identification and evaluation of the potential influence of ESG-related risks on the financial performance and value generation of companies within a group. ESG-associated risks might relate to:

- Climate change;
- Ethical considerations within the supply chain; and
- Regulatory compliance in ESG-related sectors.

Traditionally, these risks could be collectively categorised as reputational risk.

The implementation of ESG initiatives cannot be conducted in a siloed environment within a company or a group, considering its impact on a company's profit allocation and transfer pricing model.

## An Italian perspective

Italy, like many countries, has been integrating ESG principles into its business landscape.

Companies operating in Italy are expected to align their transfer pricing policies with ESG goals, not only to comply with regulatory requirements but also to contribute positively to the environment, society, and governance in the country, and avoid potential risk exposure.

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# Debt capacity analysis across Europe: emergence of a new TP reality

Three years since the publication of Chapter X of the OECD transfer pricing guidelines in February 2020 ("transfer pricing aspects of financial transactions"), we observe a growing trend among tax authorities, requesting a debt capacity analysis for loan transactions in addition to the standard debt pricing exercises.

Consequently, we examined current market practice, and local requirements in particular, for the way debt capacity is conducted across Europe. To this end, we surveyed the transfer pricing practices of 36 Deloitte member firms specialising in financial transactions in Europe to gather their insights, perspectives, and practices regarding debt capacity analysis.

The survey was submitted to Deloitte member firms in:

- Albania;
- Austria;
- Belgium;
- Bulgaria;
- Croatia;
- Cyprus;
- The Czech Republic;
- Denmark;
- Estonia;
- Finland;
- France;
- Germany;
- Greece;
- Hungary;
- Ireland;
- Italy;
- Kosovo;
- Latvia;
- Lithuania;
- Luxembourg;
- Macedonia;
- Moldova;
- The Netherlands;
- Norway;
- Poland;
- Portugal;
- Romania;
- Slovakia;
- Slovenia;
- Spain;
- Sweden;
- Switzerland;
- Turkey;
- Ukraine; and
- The UK

The survey focused on five questions related to the impact of thin capitalisation ("thin cap") regimes on arm's length indebtedness, common methodologies applied, and changes in tax authorities' attitudes. Thin cap rules define the amount of allowed interest deduction based on predetermined (statutory) financial ratios, such as ratios of fixed debt-to-equity or maximum interest coverage. The key takeaways regarding the interaction between transfer pricing rules (economic analysis of maximum indebtedness) and thin cap rules are as follows:

- In eight countries (Bulgaria, Greece, Hungary, Italy, Luxembourg, Portugal, Sweden, and Switzerland), transfer pricing rules generally take precedence over thin cap rules;
- In six countries (Albania, France, Germany, Macedonia, Serbia, and Turkey), the thin cap regime overrules the transfer pricing regime. This means that, even though potentially more interest could be deducted under arm's length conditions, the thin cap rules prevail;
- In 14 other countries (Austria, Belgium, the Czech Republic, Denmark, Estonia, Ireland, Latvia, Lithuania, Norway, Poland, Slovenia, Spain, Ukraine, and the UK), there is no distinct thin cap regime separate from transfer pricing rules;
- In Croatia, Cyprus, Finland, Kosovo, Moldova, Netherlands, Romania, and Slovakia, the legal practice either limits the application of transfer pricing or thin cap rules, or the practice is still evolving; and
- Cyprus and Finland reported changes in transfer pricing regulations as from 2022, and Moldova plans similar changes in 2024, indicating a move toward transfer pricing rules prevailing in these jurisdictions.

Therefore, in countries where the thin cap rules result in a mechanically calculated debt-to-equity ratio, limited economic analysis is needed for debt capacity purposes, unless the taxpayer exceeds the thin cap ratio and an economic analysis supporting a higher indebtedness can be used to justify a higher interest deduction.

## Is there an increased demand for debt capacity analysis?

Tax authorities have increased scrutiny in 10 countries, with more jurisdictions expecting a similar focus in the coming years. Notably, respondents reported changes in their local audit practices, with tax authorities verifying the application of either the thin cap rules or debt capacity analysis during transfer pricing audits. For example, Polish practitioners have seen a significant demand for economic analysis regarding debt capacity during transfer pricing audits, especially in real estate. The Polish tax authorities' standard approach is to not only analyse whether the level of interest is at arm's length, but also whether the level of debt can be considered to be at arm's length, particularly for heavily indebted special purpose vehicles.

In reaction to and following Chapter X's guidance, many taxpayers are reconsidering their current practices. Given tax authorities' limited resources on this matter in most countries, combined with increased audit scrutiny, taxpayers may face uncertain and difficult interactions. Therefore, many are taking measures to ensure defensible debt capacity positions well before being approached by the tax authorities.

## Which methods can be applied to demonstrate an arm's length quantum of debt?

Various methodologies are applied across Europe. In general, tax authorities have not provided any guidance on methods, nor indicated preferences for any method or sources of market data. In jurisdictions where the tax authorities are familiar with certain databases and have access to tools, practitioners are not restricted to following the same local choice of database. Local practitioners make the assumption that, as long as the analysis applying the arm's length principle is sound and well supported, the method should be acceptable. The most widespread methodology is peer analysis observing the level of indebtedness of comparable entities measured through financial ratios, such as debt-to-equity or loan covenants. Financial modeling to assess the borrower's capacity to borrow in light of current and projected cash flows is relevant as well.

Overall, Chapter X emphasises the importance of accurate delineation of transactions that advance funds, including justification for the classification of a financial instrument as debt, as well as a borrower's ability to repay the advance by having sufficient capacity for debt service.

Across jurisdictions, we observe increased requests for debt capacity analysis. There is no clear guidance for Chapter X application, either from the OECD or local jurisdictions. However, many taxpayers are taking measures to build sustainable positions, before the tax authorities approach them.

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# Pillar two rules potentially only weeks away in Norway

## The IIR and QDMTT in Norway with effect from 2024

The Norwegian Ministry of Finance published a proposal for the introduction of global minimum taxation rules (pillar two) for consultation on June 6 2023. A new Chapter 20 to the Norwegian Tax Act has been proposed, converting the OECD model rules into Norwegian law. The rules are expected to be enacted before the end of 2023, and they are proposed to enter into force from January 1 2024 with effect for fiscal year 2024.

Norway has proposed to implement the income inclusion rule (IIR) and a qualified domestic minimum top-up tax (QDMTT). The latter ensures that Norway picks up any top-up tax from Norwegian entities. QDMTT is prioritised before the IIR, meaning that a jurisdiction with QDMTT becomes the first in line to receive any top-up tax.

The Norwegian Ministry of Finance has not yet proposed the undertaxed payments rule (UTPR) that operates as a backstop rule to the IIR. However, it has been announced that the UTPR will be introduced later, presumably with effect from 2025. Transitional, permanent, and QDMTT safe harbour rules are also proposed.

## Norwegian entities captured

The IIR will apply where the ultimate parent entity of a multinational group is Norwegian and the group meets the consolidated revenue threshold of €750 million in two of the four preceding years. The IIR will ensure that top-up tax is paid to the Norwegian ultimate parent entity in cases where constituent entities have an effective tax rate below 15%. As in the global anti-base erosion (GLoBE) rules, the term 'constituent entity' is broad, capturing not only subsidiaries but also permanent establishments and branches.

The IIR may also affect:

- A partially owned Norwegian intermediate parent entity with more than 20% of the ownership interests held by a third party; or
- A Norwegian intermediate parent entity where the ultimate parent is located in a jurisdiction that has not implemented the IIR.

The proposed rules will also apply to wholly Norwegian groups. Hence, pure Norwegian groups with no possibility of base erosion and profit shifting since all the entities are resident in one country (Norway) may be captured by the pillar two rules and subject to detailed calculations and significant pillar two compliance burdens.

QDMTT will be relevant for Norwegian entities that are part of non-Norwegian-headquartered groups if the Norwegian entities are considered low taxed under the GLoBE rules. Although Norway has a statutory tax rate of 22%, top-up taxation and reporting obligations may arise where a Norwegian subsidiary mainly has exempt dividends and gains from short-term portfolio investments (that do not qualify as exempt under the GLoBE rules).

Based on the current suggested rules, Deloitte Norway has experienced Norwegian companies covered by special tax schemes within the petroleum and energy sector potentially ending up with full pillar two reporting and pillar two taxation liability. Furthermore, Norwegian shipping companies under the tonnage tax regime may be captured by the rules, although shipping income is explicitly exempt under the GLoBE rules. This will occur if such an entity owns, for example, windmill ships or drilling ships that are physically located at a fixed place and not transporting passengers or cargo in international traffic.

## Significant compliance obligations in Norway

Under the IIR, the ultimate parent entity will have to report a standardised GLoBE information return (GIR). The GIR is a separate form from the Norwegian corporate income tax return. As part of the pillar two rules, payment and reporting of top-up tax shall, as a starting point, be carried out by the ultimate parent company as a one-stop shop.

To minimise the complexity of detailed GLoBE calculations and ease the compliance burden, safe harbour rules have been introduced. However, in practice, several jurisdictions will implement QDMTT, ensuring that the top-up tax is paid to their jurisdiction.

The consequence of QDMTT being introduced in many countries is that the compliance burden is not eased. Compliance becomes even more complicated since multinational groups have to keep track of what type of QDMTT rules each jurisdiction within a group implements.

Although QDMTTs need to be in line with the OECD model, jurisdictions are free to implement local rules that are stricter than the OECD model rules. Thus, a group that is covered by the pillar two rules would need to understand the content of each jurisdiction's QDMTT and ensure compliance with local QDMTT reporting obligations. For multinational groups, this may entail having to carry out multiple pillar two calculations and reporting obligations.

It is understood that pillar two will be administratively handled by the ordinary tax authorities and governed by the Norwegian Tax Administration Act with required adjustments. Thus, ordinary rules on penalties for late filing and tax appeals, etc. would apply. There will not be a possibility to request a binding ruling from the Norwegian tax authorities related to pillar two.

Although the first GIR might not be due in Norway before 2026, information concerning the impact of pillar two shall be disclosed in the financial statements for 2023 for the Norwegian ultimate parent entity. The financial statements for 2024 shall contain information about tax cost under the pillar two regulations.

## Next steps

If you have not already started assessing the impact of the pillar two rules for your group, it is highly recommended that you start planning for the significant calculations and reporting obligations that lie ahead. Identifying if any safe harbour rules can be applied would be a good place to start.

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# Guide to the Polish minimum CIT rules to be applied from 2024

Polish minimum corporate income tax (CIT) regulations will come into effect from January 1 2024. This 10% minimum tax will be applicable to companies with Polish tax residency and domestic tax capital groups if, during the tax year:

- They incurred a loss from a source of income other than capital gains; or
- Their non-capital gains profit was lower than 2% of their total income from sources other than capital gains.

The law includes a guideline for determining a loss for minimum tax purposes, meaning that an accounting loss might not always lead to minimum taxation.

The tax result shall be adjusted by, among others, depreciation write-offs, leasing costs, and 20% of employment costs. These items should be excluded from the calculation of the tax result for minimum tax purposes. Consequently, after reducing the costs by these expenses, the taxpayer's income will increase. If the tax profit calculated after these inclusions results in a profitability higher than 2%, then the minimum tax will not apply.

But if the company is still in the red, it will have to calculate a tax basis for minimum income tax.

### The basic and simplified calculation methods

Every taxpayer subject to the minimum tax will be obliged to determine the tax base, for which the regulations provide two methods:

- The basic method; and
- The simplified method.

The choice of method depends solely on the taxpayer's decision; therefore, it is recommended that it be preceded by calculations using both methods.

The tax base determined according to the basic rules consists of the equivalent sum of:

- An amount corresponding to 1.5% of the revenues earned by the taxpayer from sources other than capital gains;
- A related parties debt financing cost exceeding 30% of tax EBITDA; and
- Expenses due to (directly or indirectly) related or unrelated entities with management or headquarters in countries considered as tax havens for the acquisition of intangible services, rights to use intangible assets, and the transfer of insolvency risk exceeding by PLN 3 million 5% of the tax value of EBITDA.

The sum of the aforementioned will constitute the minimum tax base under the basic method.

The tax base determined according to the simplified method is the equivalent of 3% of the revenues earned by the taxpayer from sources other than capital gains.

### Timing of payment and offsetting

The minimum tax shall be paid once a year, at the time of submitting an annual tax return. There is no obligation to pay minimum tax advances.

It is possible to offset the minimum tax against the CIT paid under general rules, which is beneficial for taxpayers with profits from capital activities and losses from operational activities. Once paid, the minimum tax can be deducted from the CIT paid under general rules in the following three tax years. Therefore, if one year does not go as planned, there is no loss – the minimum tax paid once will reduce the obligation to the tax authorities in subsequent years.

### Sector-specific issues

The minimum tax could create a burden for companies operating in industries characterised by low profitability or occasional losses. These sectors include:

- Hotels, restaurants, and cafés;
- Transportation;
- Real estate;
- Industrial;
- Processing;
- Wholesale and retail trade; and
- Construction.

### Final thoughts

It is crucial to note that tax simulations conducted in 2022 when the regulations were issued might not align with the updated rules applicable from January 1 2024. Amendments have been made to the calculation of losses and profitability levels. Additionally, the list of entities exempt from minimum taxation has been expanded.

Taxpayers that have a tax year different from the calendar year will begin applying these minimum tax provisions from the tax year commencing after December 31 2023.

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## Same products, different VAT rates: CJEU addresses a consuming issue

On October 5 2023, the Court of Justice of the EU (CJEU) issued a judgment (Case C-146/22, YD) on the power of member states to apply reduced VAT rates to certain supplies of goods and services.

### Background to the case

The case in question concerned the application of different VAT rates to the supply of apparently the same type of goods; specifically, the delivery of a milk-based drink.

The drink was delivered hot and ready for immediate consumption at the request of customers. According to the applicant, the VAT rate to be applied to that supply was the reduced rate laid down by the VAT rules for supplies of milk-based beverages (5%).

However, the local tax authority found that the sale of the beverage prepared for customers for its consumption had to be regarded as a supply of goods accompanied by services (the preparation of the beverage and serving thereof to customers for immediate consumption), and, therefore, could not benefit from that reduced VAT rate. The correct VAT rate, according to the tax authorities, was 8%, which is the applicable VAT rate for "food and beverage serving services".

The question referred to the CJEU therefore sought to resolve the described controversy.

### Ruling of the CJEU

The court concluded that the distinction made for the application of different VAT rates based on whether the supply of foodstuffs is accompanied by ancillary services is not contrary to EU law. Therefore, it may be regarded as valid in so far as it complies with the principle of neutrality.

Indeed, the fact that these ancillary services exist may lead to the transaction being classified as a supply of services and not as a supply of goods. This, in principle, would justify the application of different VAT rates. EU law attaches decisive importance to the supply of services accompanying the supply of a foodstuff; such services must be sufficient for the immediate consumption of that food.

Going back to the principle of neutrality, it should be recalled that said principle precludes similar supplies of goods or services that are in competition with each other from being treated differently for VAT purposes. This includes the application of different VAT rates. In other words, similar goods or products cannot be treated differently for VAT purposes.

In this regard, goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers. In the event of differences between them, these differences cannot have a significant influence on the decision of the average consumer to use one or other of those goods or services.

In light of the foregoing, the CJEU considered that the beverages marketed by the applicant are being prepared specifically at the request of customers and served hot, for immediate consumption, whereas that is not necessarily the case for dairy beverages marketed in a general manner (not adapted to the customer's request) in shops or supermarkets. The court concluded, therefore, that these are two different situations with different purposes. This difference seems to be decisive with regard to the consumer opting for one product or another.

All this led the CJEU to consider that it is not contrary to EU law to establish a difference of rates in the delivery of a product in a general way and the delivery of the same product but prepared in accordance with the customer's requested method of consumption. This is because, for VAT purposes, the first situation deals with a mere supply of goods, while the second deals with a supply of services. Both are different things in the field of VAT and therefore their different treatment would seem to be justified.

### Summary

The situation described in Case C-146/22 is now very common, since we have many different options to consume products. In this sense, an average consumer who wants to consume a certain foodstuff may go to a supermarket to purchase it, they can go to an establishment at street level to have it prepared for immediate consumption, or they can even ask for it to be delivered to their home. In all three situations, the food product is the same; however, the way of acquiring it is different. In the CJEU´s view, this difference is significant enough for these situations to be treated differently in VAT terms.

In accordance with all the above, we can see how it is possible that the delivery of the same product may be subject to different VAT rates. This is so because although we may be dealing with the delivery of the same type of product, we may not be dealing with the same type of transaction in the field of VAT.

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## Swedish VAT pro rata rule found to be in violation of EU law

The Swedish VAT Act has a provision for the proportion of residual input VAT in a business with taxable and tax-exempt transactions. The provision states that residual input VAT should be proportioned based on 'reasonable grounds' (*skälig grund*).

The prevailing view of reasonable grounds, based on lower-court case law and the Swedish Tax Agency's (STA's) public guidelines, has been that turnover is the starting point, but that any other method that results in a more precise determination of the deductible proportion can be used.

### A notable case in the Supreme Administrative Court

A company with taxable and tax-exempt transactions claimed an input VAT deduction for residual input VAT using a turnover-based method. The STA rejected the claim, arguing that the deductible proportion should be calculated based on the usage of the acquired goods and services, which is permitted under Article 173.2c of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the Directive). The STA held that this provision is implemented in the Swedish VAT Act, through the provision of proportion based on reasonable grounds.

The company appealed the STA's decision through the Swedish administrative court system. The lower courts rejected the appeals.

With the representation of KPMG AB, and with the author as part of the team, the company appealed against the Administrative Court of Appeal's decision to the Supreme Administrative Court (SAC) and requested that the deductible proportion of residual input VAT should be calculated according to the turnover-based method, which is the main rule for partial exemption calculation according to the Directive.

The company argued that the Swedish VAT Act's reasonable grounds provision is not compatible with the Directive, as it neither states the turnover-based method as a main rule nor specifies alternative methods that can, or shall, be applied. The company argued that the turnover-based method in articles 173.1 and 174 of the Directive has a direct effect and that the company therefore should be allowed to determine the deductible portion based on this method.

The SAC granted leave to appeal regarding the question of whether a company with VAT mixed activities can be prevented from using a turnover-based method to determine the deductible proportion of residual input tax and instead be obligated to determine the deductible proportion of input tax using a usage-based method.

### The SAC's conclusion

In its judgment, the SAC found that the reasonable grounds provision does not state the turnover method as a main rule, nor does it specify for which transactions another method must, or may, be used. Therefore, the SAC concluded, it does not meet the requirements for clarity, precision, and transparency set by the Court of Justice of the European Union for it to be considered an acceptable implementation of the Directive into national law. According to the SAC, this insufficient implementation cannot be remedied by interpreting the Swedish law in accordance with the Directive.

Furthermore, the SAC concluded that it is not possible to apply a usage-based method in accordance with Article 173.2 c of the Directive, against the taxpayer's will, since such a method has not been implemented in Swedish law.

Finally, the SAC stated that articles 173.1 and 174 of the Directive have direct effect and that a taxpayer therefore can rely directly on these provisions to calculate the deductible input tax using the Directive's turnover-based method.

### Commentary

The SAC's ruling is very important because it provides guidance on the issue of determining the deductible proportion of residual input VAT, clearly stating that a taxpayer with taxable and tax-exempt transactions who wants to apply a turnover-based method should be allowed to do so by invoking the provisions of the directive. Under such circumstances, the STA cannot decide that another, more reasonable, method should be applied, because there are no other methods implemented in Swedish law.

The SAC's ruling is also significant from the point of view of legal certainty in that the vague reasonable grounds provision was rejected by the SAC. The ruling clearly underscores that the individual taxpayer affected by a provision must be able to be fully informed of their rights and obligations, and that provisions must therefore be implemented in a sufficiently clear, transparent, and precise way for the requirements of legal certainty to be met.

The decision will lead to changes in the Swedish VAT Act, with the reasonable grounds provision abolished and provisions compatible with the directive introduced. The content of such provisions remains to be seen, but it is clear that the main rule, the turnover-based method, must be implemented into Swedish law.

The STA has published an official commentary to the ruling, explaining, for example, its view that reasonable grounds should still be applicable for the proportion of input VAT between economic and non-economic activities. Considering the statements from the SAC regarding the incompatibility of the reasonable grounds provision with the requirements for legal certainty, the STA's view could, in the author's opinion, be questioned.

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# Australian Taxation Office issues guidance on new corporate collective investment vehicle regime

On November 1 2023, the Australian Taxation Office (ATO) issued its first formal guidance on the new Australian corporate collective investment vehicle (CCIV) regime by way of Draft Law Companion Ruling 2023/D1.

The draft ruling outlines the operation of the CCIV regime, particularly the deeming principle and its effect on the tax treatment of the key stakeholders/participants, including the CCIV, a CCIV sub-fund trust, and the investors.

The Corporate Collective Investment Vehicle Framework and Other Measures Bill 2022 established the CCIV regime from 1 July 2022, which is now set out in Subdivision 195-C of the Income Tax Assessment Act 1997.

## The CCIV regime explained

Briefly, under the new CCIV regime, an eligible CCIV is a company limited by shares but which (including sub-funds) is deemed as having a trust relationship and governed by the broader trust (including Division 6 of the Income Tax Assessment Act 1936) taxation rules (the deeming principle). The purpose of the regime is to provide eligible CCIVs with the same tax treatment as attribution managed investment trusts.

The deeming principle deems a trust relationship to exist between the CCIV, the business, assets and liabilities referrable to a particular sub-fund, and the relevant class of members. The principle operates for the purposes of all taxation rules (unless expressly excluded). Importantly, the relevant members of the CCIV are treated as beneficiaries of the relevant CCIV sub-fund trust. Furthermore, the flow-through tax treatment ensures that amounts derived and attributed to members/beneficiaries retain the character they had in the hands of the trustee of the relevant CCIV sub-fund trust.

The adoption of trust principles should be noted throughout the new CCIV regime, including for double tax treaty purposes.

- The objective is to leverage the existing trust taxation framework and existing flow-through regime.
- The CCIV is a company vehicle limited by shares; however, it is effectively treated as a trust where eligible for taxation purposes, and it is intended to be a viable alternative investment vehicle to the existing trust-based managed investment schemes (MITs).
- Members of each CCIV sub-fund trust are generally taken to have a vested and indefeasible interest in a share of the income and capital of the trust (akin to present entitlement).
- A distinction is made between retail and wholesale CCIVs for purposes of determining the income of the trust estate.
- This regime links into withholding tax concessions for MITs, withholding MITs, and related vehicles.
- A CCIV sub-fund does not have a separate legal personality.
- The tax policy objective is to ensure that members/beneficiaries secure flow-through status of income entitlements, including by way of deeming the trust relationship.
- The deeming rule provides a concessional mechanism for determining when a beneficiary is taken to be "presently entitled" to a share of the trust income for an income year.
- Although not dealt with in the draft ruling, Australian double tax treaties are, in principle, prioritised where any inconsistency arises with the domestic Australian tax rules. However, the CCIV provisions clarify that the deeming principle has priority in these circumstances, giving rise to the current double tax treaty protection and recognition issues. Accordingly, these treaty recognition issues will need to be addressed on a treaty-by-treaty (and/or case-by-case) basis, including by reference to case law, OECD guidance, and the overlay of the Multilateral Instrument.
- The ATO draft ruling discusses important limits on the deeming principle related to capital returns and the resettlement concept, and provides guidance on goods and services tax, and related issues.

It is important to note that the CCIV regime is integral to the Asia Region Funds Passport, which is a multilateral framework to facilitate the cross-border marketing of managed funds across participating jurisdictions in the region, including Australia, New Zealand, Japan, South Korea, and Thailand.

## Next steps for the draft ruling

The ATO has invited comments on the draft ruling on or before December 15 2023 and it is expected that the ruling will be finalised shortly thereafter.

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# Implementation of excisable goods and credit account books spearheads Indonesian tax changes

On October 5 2023, the Minister of Finance (MoF) promulgated Regulation No. 106/2023 concerning the Implementation of Excisable Goods and Credit Account Books.

The excise goods account book is a record containing entries related to the quantities of specific excisable goods – namely, ethyl alcohol and beverages containing ethyl alcohol (MMEA) – that are produced, imported, or exported, along with the deductions, shortages, and overcount resulting from a factory or storage location.

The credit account book contains records of excise duties whose payments have been facilitated and their settlement.

The features of the excisable goods and credit account books are as follows:

## Customs, excise, and tax provisions for imports and exports of consignment goods

On October 16 2023, the MoF issued Regulation No. 111/2023 to amend MoF Regulation No. 96/2023 (MoF-96). The regulation addresses a broad range of arrangements that specifically relate to customs, excise, and tax provisions for imports and exports of delivery goods. It has 76 articles and seven chapters that address various customs matters.

The regulation revokes MoF Regulation No. 199/PMK.010/2019, although most of the concepts are still in line with it. Furthermore, MoF-96 sets forth several new provisions, such as the following:

- A postal operator carries out arrangements for fulfilling customs obligations for the importation and exportation of consignment goods. Previously, this was regulated only for the importation of consignment goods.

| Feature | Excisable goods account book | Credit account book |
|---|---|---|
| Obligation to | Customs and excise officer | Customs and excise officert |
| Intended for | 1. Every ethyl alcohol factory enterprise;<br>2. Every storage place enterprise, for ethyl alcohol that still owes excise duty and is in storage; and<br>3. Every MMEA factory enterprise. | 1. Every factory enterprise that benefits from the convenience of periodic payments;<br>2. Every factory enterprise that receives a postponement of excise payments; and<br>3. Every importer of excisable goods with delays in excise payments. |
| Function | To record the amount of excisable goods in the form of ethyl alcohol and/or MMEA that are made, imported, entered, destroyed/damaged, mixed, paid for, issued, or deducted, as well as shortages and excess results of enumeration, which are still subject to excise duty and at the factory or storage area. | To record the amount of excise that receives payment facilities or is given a postponement and its settlement. |
| Recording media | Electronically through the excise system or manual form | Manual form |

The regulation came into force on the date of its promulgation; i.e., October 5 2023.

- A postal operator acts as a customs services enterprise in managing the importation and/or exportation of consignment goods.
- Consignment goods include those traded via electronic systems (*Penyelenggara Perdagangan Melalui Sistem Elektronik*, or PPMSE); i.e., through an online retailer or marketplace. The PPMSE is required to form a partnership with the Directorate General of Customs and Excise (DGCE), unless the import transactions do not exceed 1,000 consignments in a period of one calendar year.
- An appointed postal operator (*Penyelenggara Pos Yang Ditunjuk*) cannot postpone the payment of import duties, excise, and/or taxes. Previously, these could be postponed up to 60 days.
- The exportation of consignment goods may be subject to export duties.
- The provisions for the exportation of consignment goods as intended in this regulation shall be implemented no later than one year from when the regulation comes into effect.

As amended by MoF Regulation No. 111/2023, MoF Regulation No. 96 of 2023 became effective from October 17 2023.

## Implementation guidelines for customs re-examination

The DGCE issued Regulation No. 18/BC/2023 on October 20 2023, regarding the Implementation Guidelines for Customs Re-examination. This revoked a regulation most recently amended by DGCE Regulation No. 25/BC/2019.

The DGCE can perform re-examination on import/export documents. Similar to the previous regulation, this regulation stipulates the procedures for re-examination. However, there are salient new provisions related to the following:

- An import and/or export notification that has been issued for more than 30 days can be re-examined within two years after its registration date;
- Re-examination procedures include planning, implementation and monitoring, and evaluation and quality assurance (monitoring and quality assurance are new procedures); and
- The implementation of the re-examination can be extended for no longer than 15 days, and only once.

This regulation became effective from October 21 2023.

## Organisation of the industrial sector

On September 25 2023, the Indonesian government issued Government Regulation No. 46 of 2023 as an amendment to Government Regulation No. 28 of 2021 regarding the Organisation of the Industrial Sector. One of the areas regulated is the importation of materials.

The government is now aiming to provide further ease of importation for business entities that utilise their business identity number (*Nomor Induk Berusaha*, or NIB) as general importer identity numbers (*Angka Pengenal Impor-Umum*, or API-U), while ensuring the availability of materials for domestic industry, to prevent any national economic disruption. The importation of materials may be carried out not only by business entities whose NIBs effectively function as producer importer identity numbers (*Angka Pengenal Impor-Produsen*, or API-P) but also by business entities that utilise their NIB as an API-U.

As previously established, the objective of the amendment is to make the importation of materials easier for API-U holders. In this regard, the amendment states that imports of materials may be carried out by API-U holders, in addition to being carried out by API-P holders. However, API-U holders are still limited to imports of certain materials, as specifically addressed under relevant laws and regulations.

The amendment allows materials suppliers that have secured an API-U to import materials for small- and medium-scale industries in cases where said industries have been unable to independently complete their imports.

Furthermore, the amendment allows industrial companies to import products for complementary purposes, market testing, or after-sales services, with the objective of enhancing investment. This new initiative was not provided for in previous regulations.

Government Regulation No. 46 of 2023 became effective from September 25 2023.

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# China simplifies reporting for outbound investments and income

In 2014, with the increasing scale and number of Chinese companies making investments abroad, the State Taxation Administration (STA) introduced Announcement No. 38. This required regular reporting on outbound investments and annual reporting of income earned overseas. The reporting requirements apply to PRC tax resident enterprises, as well as those non-PRC tax residents that have an establishment or a place of business in China and derive overseas income that is effectively connected with such establishment or place of business.

Recently, the STA issued Announcement No. 17, titled: "Announcement on Optimizing Tax Services and Simplifying Reporting Requirements for Resident Enterprises Regarding Overseas Investments and Income Information." This announcement simplifies the reporting obligations for resident Chinese enterprises when it comes to their overseas investments. This is part of the ongoing efforts to cut red tape in the tax field and to improve tax services.

Compared to Announcement No. 38, Announcement No. 17 makes the following improvements:

- Reducing the number of reporting forms: announcement No. 17 combines the "Report on Resident Enterprises' Investments in Foreign Companies" and the "Report on Controlled Foreign Companies" from Announcement No. 38 into a single report named "Report on Resident Enterprises' Overseas Investment Information";
- Reducing reporting frequency: investment reporting is no longer required at the time of corporate income tax (CIT) prepayment and is now just needed at time of the annual CIT filing. This significantly reduces the number of times enterprises need to report such information; and
- Simplifying data entry: the data items required to be reported has been reduced from 57 to 28, making it easier for taxpayers to complete the report.

In the official interpretation of Announcement No. 17, the STA further sets out examples illustrating which enterprises shall fulfil the reporting obligation:

- A case is highlighted of a foreign enterprise that is directly (and indirectly) held by multiple tiers of PRC tax resident enterprises (i.e., PRC Co A holds PRC Co B, and then PRC Co B holds PRC Co C, which in turn holds the foreign enterprise). If the PRC resident enterprise's holdings in the issued equity capital or voting rights of the foreign enterprise's shares exceed 10% at any point during the tax year, then the reporting needs to be completed by the resident enterprise which directly holds the foreign enterprise (i.e., PRC Co C); and
- Where a resident enterprise holds the issued equity capital or voting rights in a foreign enterprise through a Chinese partnership, and reporting is required, then the partners themselves have the reporting obligation. For instance: PRC Co A and PRC Co B hold shares in Foreign Co D through Chinese Partnership C. PRC Co A is entitled to 60% of the equity and profit distributions arising from the partnership. The partnership holds 20% of Foreign Co D's shares. Resident Company A is considered to hold 12% (60% × 20%) of Foreign Co D's shares and should complete the reporting. The partnership is not required to complete the reporting.

Special rules apply to determine if the 10% threshold is exceeded:

- Where multiple tiers of ownership are involved, the holding of the shares is determined by multiplying the shareholding percentages at different tiers. However, If the intermediate holding is more than 50% of the shares, it will be calculated at 100%. Where PRC Co A 100% holds Foreign Co B, which in turn 60% holds Foreign Co C which in turn 10% holds Foreign Co D, PRC Co A is considered to hold 10% (100% x 100% x 10%) of Foreign Co D. Then PRC Co A should complete the reporting for Foreign Co B, C and D; and
- If an ownership transfer occurs within a tax year and results in the year-end ownership of the foreign enterprise falling below 10%, the reporting of the foreign enterprise is still required.

Announcement No. 17 also requires resident companies to self-determine whether an overseas invested enterprise qualifies as a controlled foreign company and to report relevant information. Announcement No. 17 comes into effect from October 10, 2023, and will apply to information to be reported for fiscal years starting from 2023 and beyond.

The Chinese government is committed to reducing the tax burden on enterprises making outbound investments. Tax treaties have been proven to provide strong support in eliminating double taxation, providing tax certainty, and resolving tax disputes in this regard. China has continuously expanded its tax treaty network and as a further effort, it recently signed new tax treaties with Senegal and Cameroon. This brings China's tax treaty network to 114 jurisdictions, further covering major destinations for outbound investments for Chinese enterprises.

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## Guide to Hong Kong's proposed patent box regime

As announced in the 2023-24 Budget speech, the Hong Kong SAR government will introduce a patent box regime to provide tax concessions for onshore profits from qualifying intellectual properties (IPs). The aim is to foster local development in the innovation and technology sector and enhance Hong Kong's competitiveness as a regional IP trading centre.

The government launched a consultation on the proposed patent box regime and sought views from stakeholders on the key features and, in particular, the tax concessionary measure of the regime.

### The proposed patent box regime

#### The tax concession

Under the proposed regime, a concessionary tax rate (the government is seeking views on the level of the concessionary tax rate) would be applied to a portion of the onshore eligible IP income derived from eligible IP assets calculated under the nexus approach, that is to be computed based on the nexus ratio (the eligible expenditures divided by the overall expenditures incurred by the taxpayer to develop the eligible IP asset).

#### Eligible IP assets

Only patents and other IP assets that are functionally equivalent to patents would qualify as eligible IP assets under the proposed regime. They include registered patents, copyrighted software, and plant variety rights.

Regarding patents and plant variety rights:

- Those where the applications are filed under Hong Kong's original grant patent (OGP) system would also be considered eligible IP assets. Nevertheless, if the OGP applications fail subsequently, the relevant tax concessions claimed would be clawed back.
- Taxpayers would have to comply with the relevant local registration requirements – a transitional measure is proposed to extend the eligibility

scope to applications made and granted outside Hong Kong if the date of filing of these two types of IP assets is within 24 months after the commencement of the patent box regime.

### Eligible IP income

The eligible IP income will include:

- Income derived from an eligible IP asset in respect of (i) the exhibition or use of, or a right to exhibit or use (whether in or outside Hong Kong), the asset; or (ii) the imparting of, or undertaking to impart, the knowledge directly or indirectly connected with the use (whether in or outside Hong Kong) of the asset;
- Income arising from the sale of an eligible IP asset; and
- The portion of income, determined on a just and reasonable basis (for example, based on transfer pricing principles), attributable to the eligible IP asset's element included in a sale of a product or service.

### Treatment of losses

Considering the requirements of the BEPS Action 5 report, where any tax losses associated with income benefiting from a preferential IP regime should be used in a manner that is consistent with domestic legislation and that does not allow the set-off of those losses against income that is taxed at the ordinary rate, the government proposes to allow a loss in relation to income benefiting from the proposed patent box regime to set off against the taxpayer's other assessable profits, after being adjusted with reference to the tax rate difference (if any).

### Record-keeping requirements

As one of the essential requirements of the nexus approach, taxpayers would need to track and trace the historical R&D expenditures and income derived from each individual eligible IP asset.

A transitional measure will be introduced to ensure that taxpayers would have sufficient time to adapt to the tracking and tracing requirements (on individual sets of data), under which a taxpayer will be allowed to apply a nexus ratio where qualifying expenditures and overall expenditures are calculated on a three-year rolling average. After the transition period, the taxpayer will need to adopt the cumulative nexus ratio (i.e., to include the expenditures from the first applicable year to all subsequent years).

## Implementation timeline

The government plans to introduce a bill with the necessary legislative amendments into the Legislative Council in the first half of 2024.

## KPMG observations

KPMG is glad to see that the Hong Kong SAR government has taken commendable initiative in introducing a patent box regime aimed at promoting the local development of R&D activities and the commercialisation of the R&D results.

By providing the tax incentive, KPMG believes that a conducive environment can be created for businesses to invest in R&D endeavours, which could be crucial for stimulating economic growth and bolstering the overall competitiveness of Hong Kong as a regional IP training centre. In addition to the incentive, related measures would also have to be looked into to enable R&D activities to be undertaken in Hong Kong; for example, talent strategy, subsidies, and other non-tax support.

Businesses would also welcome a relaxation in various aspects relating to the proposed regime; for example, to cover more types of IP assets as eligible IP assets, and providing deductions for the acquisition of IPs (or so-called black-hole expenditures).

Businesses closely connected with IP investments should monitor the future developments in this area and be aware of the eligibility assessment and other compliance concerns arising from claiming the tax concessions, and the ongoing tracking and tracing of the relevant figures of each and every eligible IP asset.

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# Navigating the tax implications of working remotely in Thailand

In recent years, the concept of remote working has transcended traditional boundaries, offering individuals the freedom to work from virtually anywhere in the world. Employers are realising, too, that by leveraging technology, they can access talent across the globe in a hybrid working world.

Among the many destinations that have emerged as magnets for foreigners and, more recently, digital nomads, Thailand stands out as an exceptional choice. With its captivating landscapes, rich cultural heritage, and modern infrastructures, Thailand has become an attractive destination for foreign workers seeking to combine productivity and adventure.

## New visa class to attract remote workers post pandemic

Thailand's laws have traditionally been structured around more conventional work arrangements and business activities. However, that changed with the introduction of the long-term resident visa scheme, or LTR visa, in September 2022.

One of the four types of LTR visa offered is a work-from-Thailand professional visa, which aims to attract foreign workers to work remotely from Thailand, and at the same time allow them the flexibility to travel to and from the country as they wish, without the need to relocate to Thailand on a permanent basis.

To obtain an LTR visa, there are minimum income requirements to be met and the applicant must have at least five years' work experience in a field relevant to their current employment in the last 10 years.

In addition, their foreign employer needs to be a public company listed on a stock exchange, or if it is a private company, it must have been in operation for at least three years and have total combined revenue of more than $150 million in the last three years.

## Taxation of remote workers in Thailand

Under Thailand's Revenue Code, individuals are liable to personal income tax in Thailand in respect of income received from a post held in Thailand, regardless of whether such income is paid in or outside Thailand and regardless of whether the individual is a Thai resident.

Moreover, if one is considered a tax resident of Thailand, as a result of being present in the country for a period of 180 days or more in a year, income from an employment abroad that is brought into

Thailand within the same tax year would be subject to Thai income tax.

A tax exemption has been introduced for work-from-Thailand professional LTR visa holders in respect of income from an employment abroad that is brought into Thailand.

There are no guidelines on whether foreigners working remotely in Thailand for a foreign employer will be considered to have employment or a post held in Thailand, and therefore possibly be liable to tax.

Thailand has double taxation agreements (DTAs) with over 60 countries and jurisdictions, including Australia, China, France, Germany, Hong Kong, Japan, the UK, the US, and Singapore.

The general rule for the taxation of employment income under these agreements is that the income will be taxable in the country where the employment is exercised; i.e., where the employee is physically present when performing the activities for which the employment income is paid.

An exception to this rule applies if the employer is a foreign company and does not have a permanent establishment in Thailand. In such a case, the employee will not be subject to Thai tax on income from their employment performed in Thailand if they are in Thailand for less than 183 days or similar in the relevant period.

## Managing risks for foreign employers

Thailand's Revenue Department has yet to issue guidelines on the taxation of foreign employers with staff working remotely in Thailand.

The Revenue Code does not stipulate a minimum period that an employee must spend in Thailand before they could be deemed to create a taxable presence for their foreign employer.

An applicable DTA helps to provide more certainty. Under Thailand's DTAs, in general, business income derived from activities performed in Thailand by a foreign enterprise would not be subject to Thai income tax if the enterprise does not have a taxable permanent establishment in the country.

Despite the presence of a DTA, certain ambiguities have to be considered. The concept of a 'fixed place of business' test, as outlined in any DTA, raises questions regarding whether an extended stay in a 'home office' in Thailand constitutes a sufficient degree of permanence to create a taxable presence.

The duration of the employee's presence in Thailand could also impact the potential establishment of a permanent presence. In certain situations, it might be prudent for a foreign remote worker in Thailand to limit their stay in the country to help to mitigate the risk of creating a taxable presence for their employer.

## Potential tax reforms

While Thailand has made strides in accommodating remote work with its introduction of new visa categories, the government may need to consider issuing guidelines on the tax obligations of remote workers and their foreign employers, to further attract foreign professionals to choose Thailand as their base.

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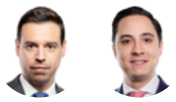

Santiago Llano Zapatero and Diego Guerrero Segura

# E-invoicing: Mexico's pioneering path creates complex terrain for taxpayers

In an era of digital transformation, e-invoicing has emerged as a pivotal component of tax compliance. The adoption of e-invoicing and e-reporting by tax authorities is gaining momentum worldwide. This shift is driven by the need for increased transparency, reduced tax evasion, and streamlined tax processes. This article delves into the global trends in e-invoicing, highlights Mexico's pioneering role, discusses its relevance in M&A transactions, and explores a groundbreaking Mexican legal precedent that challenges traditional constraints on e-invoicing.

## Background

E-invoicing is the digitalisation of the invoice creation, delivery, and management process. It allows businesses and tax authorities to seamlessly exchange information electronically, eliminating paper-based invoices. The adoption of e-invoicing is driven by several factors, the most relevant of which are the following:

- Tax evasion reduction – e-invoices leave a clear digital trail that tax authorities can easily track, making it harder for businesses to manipulate their financial records;
- Efficiency and cost reduction – e-invoicing streamlines the invoicing process, reducing administrative costs and errors associated with manual data entry;
- Transparency – real-time data is accessible to tax authorities, improving transparency and enabling quicker identification of irregularities or discrepancies; and
- Environmental considerations – e-invoicing is environmentally friendly as it reduces paper usage and waste, contributing to sustainability goals.

## E-invoicing in Mexico

The experience of Mexico with e-invoicing (CFDI, based on its initialism in Spanish) has been remarkable. The CFDI system led to improved tax collection, reduced tax evasion, and streamlined business operations. The Mexican tax authorities played a pivotal role in implementing and regulating e-invoicing in the country. Over time, the CFDI system has evolved, incorporating more information and functionality, ensuring a comprehensive and detailed view of economic transactions.

However, while e-invoicing has undoubtedly brought several advantages to the tax landscape in Mexico, it is not without its challenges for taxpayers.

One significant issue that taxpayers may face is the complexity and ever-evolving nature of the regulatory framework surrounding e-invoicing. The Mexican tax authorities have established numerous rules, guidelines, and requirements to ensure compliance with e-invoicing standards. Keeping up with these regulatory changes can be a daunting task for businesses, requiring continuous monitoring and adjustment of their invoicing processes to remain in compliance.

In addition, e-invoicing in Mexico has led to increased scrutiny by tax authorities. Real-time access to transaction data allows for more frequent audits and tax inspections.

## E-invoicing in M&A transactions

The significance of e-invoicing in Mexican M&A transactions is undeniable, yet it brings to the forefront numerous complexities that often fuel discussions. Having an e-invoice is mandatory for both parties involved in an M&A deal; for the seller, it serves as the substantiation used to justify the sale price, while for the buyer, it becomes the supporting document for the tax cost basis of the acquired assets.

A prominent challenge in the context of e-invoicing for M&A transactions is the potential for foreign entities to assert that they are not obligated to adhere to the requirements outlined in Mexican e-invoicing regulations. This issue can give rise to complications in cross-border transactions, requiring a sophisticated approach to ensure compliance and smooth transactions.

Adding another layer of complexity, the existence of lists that pinpoint providers of fraudulent invoices (colloquially known as the '69-B list') underscores the need for businesses to exercise vigilant caution. Inadvertently engaging with entities on this list can result in severe legal repercussions, making it imperative for businesses to maintain a robust due diligence process to safeguard against such risks.

Furthermore, the inflexible rules governing the cancellation of CFDIs present an additional challenge. With their limited flexibility, these rules can create uncertainty for taxpayers, impacting the overall efficiency of M&A transactions.

## Recent precedent on CFDI cancellation rules

Regarding the rules that regulate the cancellations of CFDIs, a pivotal reform was introduced to the Federal Tax Code in Mexico in 2021. This reform stipulated that unless tax provisions establish a shorter term, CFDIs could only be cancelled in the fiscal year of issuance, provided that the recipient accepts the cancellation.

However, the Mexican Supreme Court of Justice has recently issued a decision declaring the temporary limitation as unconstitutional. The court argued that this limitation fails to align with the practical dynamics of commercial operations, as the significance of CFDIs only becomes evident when the transactions they represent generate their fiscal effects upon filing the corresponding returns and settling the associated tax liabilities. This often occurs beyond the fiscal year in which they were initially issued.

The Supreme Court also pointed out that the rigidity of this temporal restriction overlooks the complexity of real-world business operations, where not only the issuance of CFDIs but also unforeseen events such as premature termination, contract breaches, or service cancellations can disrupt the intended timelines.

Additionally, the Supreme Court criticised the provision's lack of congruence with the legal framework for the temporal compliance of tax obligations. The fact that tax regulations could potentially establish even shorter cancellation periods further contributes to the uncertainty faced by taxpayers.

This legal precedent from the Mexican Supreme Court of Justice highlights the need for a more adaptable and practical approach in the world of tax compliance and e-invoicing in Mexico.

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