WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international Financial Services industry

Dear Madam / Dear Sir,

we hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from nine countries with a focus on the international Financial Services industry.

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. a summary of recent FS tax news from Argentina, an evaluation of the interesting CJEU judgement dated 7 April 2022 (C-342/20) on Finnish WHT suffered by investment funds, a German administrative decree on the taxation of crypto assets, an Italian Tax Ruling and important expected changes in Dutch FS tax legislation.

- Argentina – Rosso Alba & Rougès
- Belgium – Tiberghien
- Finland – Castrén & Snellman
- France – FIDAL
- Germany – WTS
- Italy – WTS R&A Studio Tributario and Studio Biscozzi Nobili Piazza
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Thank you very much for your interest.

Frankfurt, 21 June 2022

With best regards,

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For details on WTS Global Financial Services:
https://wts.com/global/services/financial-services

1 The editors would very much like to thank their WTS colleague **Amelie Inselmann** for her valuable support.

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Hot topic

Please allow us to kindly draw your attention to the

2022 European Fund Tax Law Conference in Dublin on 23 June.

We hope you will find interesting the – complimentary and physical – seminar with the following Agenda items, e.g.:

- Regulation avalanche – thus it ever was: e.g. AIFMD review incl. UCITS, MiFID review, MMF review, IOSCO consultation on ETFs, sustainable finance

  Daniel Lawlor, Aquest (Dublin) and Aidan Garcia Diaz, Sabios (Dublin)

- UK Financial Services Tax Law, recent issues

  Ali H Kazimi, Hansuke Consulting (London)

- Austrian Financial Services Tax Law, recent issues

  Mag. Tatjana Polivanova-Rosenauer, LeitnerLeitner, (Vienna)

- Investment Fund Industry & Digitalization: Last exit "crypto funds"?

  Volker Braunberger, INTAS.tech (Frankfurt) and Ulrich Rogmans, Plutoneo Consulting (Frankfurt)

  This up-to date agenda topic presented on the upcoming European Fund Tax Law Conference in Dublin on 23. June coincides perfectly with the published Crypto Fund Unit Decree in Germany.

- Digitalization of tax: Managing data and information from multiple reporting regimes, esp. in the fund industry

  Marcus Haertling, WTS Global, (Frankfurt)

- Funds and WHT reclaims, CJEU WHT reclaim factory – recent decisions, implication and operational aspects

  Johann Hainzinger, Plutoneo Consulting and Katrin Classen, WTS Global (Frankfurt)

For your registration, please follow the link:
https://www.wmdaten.de/downloads/2022_Flyer_Dublin_European_Fund_Tax_Conference.pdf

We are looking forward to meeting you in Dublin on Thursday, 23 June 2022.

Argentina

ROSSO ALBA
Rosso Alba & Rougès

Financial Lease Transactions: Changes in the Tax Framework

The tax framework for leasing transactions – included in Decree No. 1038/2000 ("DL"), as amended – has recently been modified. It establishes four different categories of leases, each one subject to different tax effects: (i) lease agreements treated as financial transactions; (ii) lease agreement treated as asset rentals; (iii) lease agreements taxed as installment sales; and (iv) sale and lease back transactions.

For a transaction to qualify as a financial lease, DL takes into account certain aspects of the agreement, such as its length and contractual terms. Indeed, to qualify as a financial lease, the term of the agreement must exceed a minimum percentage of the useful life of the leased assets. According to the previous version of the DL such term was: (i) 50% of the useful life, in case of movable assets; (ii) **20% of the useful life, in case of real estate, other than housing;** and (iii) 10% of the useful life, in case of real estate for housing.

In addition to the length requirement, for a lease agreement to qualify as a financial lease, the lessee must be a financial entity, a financial trust, or an enterprise whose main activity is the celebration of these types of contracts. Also, the price must be fixed in a certain and definite amount at the moment of executing the agreement. Otherwise, the contract shall be deemed not a financial operation but rather an asset rental. This rule does not apply if the purchase option is executed by paying the fair market value.

The Argentine Federal Executive Branch enacted **Decree No. 152/2022,** which modifies the standard on (ii) lease agreement treated as asset rentals. In fact, the named decree relaxes the rule, so that lease agreements destined to real estate – other than housing – could qualify as a financial lease for income tax purposes if the agreement term **exceeds 10% of the useful life of the asset.** This modification works as an incentive for financial leases, a core product of Argentine banks and a tax efficient structure for lessees as well.

Financial Entities forbidden to offer or to intermediate with crypto assets

On May 5th, 2022, the Argentine Central Bank ("ACB") issued Communication "A" No. 7506 that is banning crypto assets transactions performed by licensed financial entities, which are regulated by Law No. 21.526 (the "Financial Entities"). Indeed, the ACB establishes that Financial Entities may not carry out or facilitate transactions with digital assets – including crypto assets and other assets whose yields are determined on the basis of the variations of crypto assets – which are not expressly authorized by an Argentine regulatory authority or by the ACB itself.

Communication "A" No. 7506 was issued only a few days after an Argentine Financial Entity started to offer to its clients the possibility to invest in certain crypto assets such as Bitcoin / Ether, either thru home banking or the bank's apps.

At the request of the Financial Entities, the ACB clarified the scope of Communication "A" No. 7506 and stated that the ban does not go as far as to forbid the purchase of crypto assets with funds held in accounts opened in Financial Entities. In fact, the Financial Entities are just forbidden to offer or to intermediate with crypto assets, but they are not obligated to prevent their clients from using their accounts to buy or sell crypto assets.

Digital assets and reporting to the Argentine Revenue Service

Digital assets are a concern also of the Argentine Revenue Service ("ARS"). The ARS intends to audit and be informed as to transactions with such assets.

To such extent, by means of General Resolution No. 4614/19, the ARS created an information regime concerning tools and/or electronic applications related to movements of virtual and non-virtual assets. Particularly, such regime applies to those who administer, manage, control or process asset movements through electronic or digital management platforms, on behalf of and by order of natural and legal persons residents in Argentina or abroad (the "Information Agents"). In this sense, the "exchanges" or platforms that facilitate the means for buying and selling crypto assets are one of the subjects affected by the information regime.

Under this regime, the Information Agents must provide the following information:
- The list of accounts with which each of the clients are identified (and the modifications that occur); and
- Total amounts (in Argentine pesos) of profits, expenses and the monthly final balance of the accounts indicated above.

Originally, such information had to be provided only with respect to the accounts that registered a yearly income equal or greater than AR$ 10,000 (lower than USD 100). However, the recently enacted General Resolution No. 5193/2022 has updated that threshold amount and has introduced a new threshold. Under these new circumstances, the reporting requirement concerns:
- Accounts with profits or losses (for the period to be reported) equal to or higher than AR$ 30,000 or
- Accounts with balances (as of the last business day of the monthly period) equal to or higher than AR$ 90,000. Positive and negative amounts shall be considered.

The thresholds remain quite low, so it is doubtful whether the ARS will be able to cope with all such information.

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Luxembourg treaty exemption for the Annual Tax on Securities Accounts at risk?

The Annual Tax on Securities Accounts (hereafter: "ATSA" – also known as de "Jaarlijkse Taks op de Effectenrekeningen", JTER or "Taxe annuelle sur les comptes-titres", TACT) is applicable (among other things) to securities accounts held in Belgium, even if they are held by non-Belgian residents/account holder.

Both the legislator and the administration had recognized the possible effects of a double taxation treaty, so that the securities accounts and their foreign account holders would not be subject to tax (a limitation of Belgium's taxing powers).

A central condition was of course that a double tax treaty was available that could effectively be invoked by the holder of the securities account and that the treaty also covered aspects of wealth taxation.

In the administrative FAQ (last amended as per 27 January 2022), an overview was included which made a classification per jurisdiction as to whether the ATSA could be levied in Belgium or not. This division was made based on an analysis of whether or not the applicable double tax treaty applied to wealth taxes. When applying double tax treaties, the ATSA is recognized as a wealth tax by both the legislator and the administration.

Based on the still current version of the administrative FAQ, the treaty with Luxembourg can still be found as a double treaty preventing the application of the ATSA.

The analysis was that Luxembourg grants exclusive taxing rights on wealth to the State of residence: thus the treaty prevents the application of the ATSA to securities accounts held in Belgium by Luxembourg residents (natural persons, legal persons, ...).

Until recently, there was no discussion of this principle.

However, two recent judgments of the Belgian Court of Cassation with regard to the so-called annual tax on collective investment undertakings (also referred to as "subscription tax") have called this reasoning into question.

In first instance, the French-speaking chamber of the Court of Cassation ruled on 25 March 2022 that the annual tax on collective investment undertakings did not constitute a wealth tax, so that the treaty with Luxembourg did not prevent it from being levied. However, in view of the Court's considerations, the outcome of this judgment can be strongly criticized.

On 21 April 2022, the Dutch-speaking Chamber of the Court of Cassation rendered a second judgment, this time qualifying the annual tax on collective investment undertakings as a wealth tax (...), but stating that the treaty with Luxembourg only contained an exhaustive list of which types of wealth taxes were covered by the treaty. Since the annual tax on collective investment undertakings is not included in this exhaustive list, Belgium could indeed proceed to taxation, according to the Court.

Although the Dutch-language judgment is certainly not without criticism and counterarguments can be found, there are now two judgments on short notice that allow Belgium's taxing power, at least with respect to the annual tax on collective investment undertakings.

The ATSA shows great similarities with the annual tax on collective investment undertakings, which has led to fears for some time that a conclusion would be drawn from the aforementioned decisions from the Court of Cassation. After all, the ATSA is also not on the – in the opinion of the Court of Cassation – exhaustive list of the double taxation treaty Belgium-Luxembourg.

The Belgian administration now appears to want to change its position and thus make securities accounts held in Belgium by Luxembourg residents subject to tax. This is clearly in contradiction with its previous position as stated in the FAQ.

This change of administrative position does not only affect the Luxembourg individual holding a securities account in Belgium, but also any legal person (e.g. the popular soparfi) or any other institution (e.g. a Luxembourg insurance company in the framework of its branch-23 insurance activities) holding securities accounts in Belgium.

Obviously, this raises new issues, especially as the first reference period has already ended (30 September 2021) and the second reference period has already been exceeded by half.

Moreover, the Dutch-language case has been referred to the Court of Appeal in Ghent. Consequently, the Belgian tax administration is acting prematurely.

Of course, we are always at your disposal for further questions and/or comments.

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wts global

Finland

CASTRÉN & SNELLMAN

The CJEU: The Finnish tax exemption criteria for investment funds is contrary to the free movement of capital

On 7 April 2022, the Court of Justice of the European Union issued its long-awaited judgment (C-342/20) on the Finnish tax exemption criteria. The ruling clarifies the Finnish tax treatment of foreign investment funds established in the form of a company (corporation).

The ruling concerns the tax treatment in Finland of a variable capital real estate investment company established under French law on the basis of the Section 20a of the Finnish Income Tax Act, which provides for the tax exemption criteria of investment funds in Finland. One of the tax exemption criteria of the said provision is that both domestic and foreign investment funds must be established in contractual form.

In its ruling, the CJEU holds that the comparability of a cross-border situation with an internal situation within a member state must be examined having regard to the aim pursued by the national provisions at issue as well as to the purpose and content of those provisions. The CJEU states that as regards the Finnish legislation's objectives of avoiding double taxation of investment income and of treating indirect investment, pass-through funds, in the same way as direct investments for tax purposes, the fact that a collective investment undertaking has been formed in accordance with statute does not necessarily place it in a different situation to that of a collective investment undertaking formed in accordance with contract law. The CJEU notes that such objectives may also be achieved where a collective investment undertaking has been constituted under statute but benefits, in the member state in which it is established, from an exemption from income tax or from a system of tax transparency.

The CJEU also finds that even a differentiation based on objective criteria may de facto place cross-border situations at a disadvantage. That is, inter alia, the case where national legislation which applies without distinction to resident and non-resident operators reserves a tax advantage in situations in which an operator complies with conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations, and non-resident operators which are comparable do not generally comply with those conditions or obligations.

The CJEU rules that, given the lack of harmonisation of the taxation of investment funds at Union level, the free movement of capital would be rendered ineffective if a non-resident collective investment undertaking, constituted according to the legal form authorised or required by the legislation of the member state in which it is established and which operates in accordance with that legislation, would be deprived of a tax advantage in another member state in which it invests solely on the ground that its legal form does not correspond to the legal form required for collective investment undertakings in that latter member state.

Now that the CJEU has given its preliminary ruling on the matter, the Finnish Supreme Administrative Court is expected to issue its final decision on the matter during the following months. We are aware that several cases have been pending in different judicial stages waiting for the CJEU to give the ruling in the matter C-342/20. We expect that the Finnish courts will issue several rulings on the taxation of foreign investment funds during 2022 after the Supreme Administrative Court has rendered its final decision on the matter.

Even though the named CJEU ruling concerns the legal form criteria, it may also be taken into ac-count when assessing whether the other tax exemption conditions set out in Section 20a of the Finnish Income Tax Act since 1 January 2020 (which include e.g. a condition on the number of unitholders in a fund and sets a mandatory annual profit distribution requirement for special investment funds) may be considered as being contrary to the EU law.

Castrén & Snellman monitors the status of the Finnish investment fund taxation continuous-ly and are happy to assist in case you would like to discuss the tax aspects in more detail. We recommend that foreign investment funds continue requesting for preliminary rulings, submit WHT reclaim applications and apply for tax-at-source cards to confirm their tax status in Finland.

The Finnish Tax Administration revealed identification of malicious companies set up for tax evasion "as a service"

On 8 June 2022, the Finnish Tax Administration published a bulleting stating that the Finnish Tax Administration's recent control action has revealed many operators that operate a malicious activity to enable investors evade Finnish taxes. The Tax Administration estimates that the tax evasion by such companies has resulted in a tax loss of 80 million euros in Finland in 2018 to 2021 every year because taxes have not been withheld at source.

According to the bulletin, deals have been uncovered where some 700 million units of corporate shares are suspected to have changed hands repeatedly between investors in back-and-forth trades and the deals have clearly no other purpose than evasion of taxes at source.

The bulletin states that schemes for avoiding source taxes, and cum/ex transactions and cum/cum transactions have caused major tax losses in other European countries as well. The Tax Administration has been able to identify such transaction by their close cooperation with other countries and exchange of fiscal information between other countries. According to the Tax Administration, there are several pending audits at the Finnish Tax Administration and new cases may surface in the future.

The Tax Administration will next concentrate on controlling refunds of tax withheld at source.

Pursuant to the Finnish legislation, if the payer of dividends has withheld too much tax at source, the beneficiary is entitled to request for refund from the Tax Administration. In the bulletin, the Tax Administration states that they will be starting to watch the operations connected to refunds of tax at source. The aim is to control possible fraudulent activities related to tax refunds in more detail.

The Tax Administration states that in the control activities, they can benefit from the OECD initiative TRACE (Treaty Relief and Compliance Enhancement). The TRACE model enables the Tax Administration to have better access to information regarding corporate stockholding under nominee registration, the custodial chains and the identities of dividend beneficiaries. The new reporting rules require that the authorised intermediary must pay the tax in situations where no tax at all has been withheld at source or where not enough tax has been withheld due to the authorised intermediary's neglect.

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France

FIDAL

Intra-group interest in France – improvements for taxpayers

Reminder of the French tax regime applicable to interest

In France, the rules concerning the payment of interest between a French company and an affiliate depend on the fact pattern:

- If the French company is the lender, and the related entity is established abroad, then usual transfer pricing rules apply. Specifically, this would mean that the burden of proof would be with the French Tax Administration ("FTA") if it were to challenge the interest rate applied.
- If the French entity is the borrower, the deduction of the interest expense may be limited by several rules. In particular, regardless of whether the related lending entity is French or foreign, the interest rate paid by the French entity is compared to a certain legal threshold (updated quarterly; as of Q4 2021, it was circa 1.15% and has been on a downward trend these past years):
  - If the rate paid by the French entity is below the legal threshold, no further effort is required on its behalf and the interest should be deductible unless other limitations apply (such as thin cap or "ATAD" rules).
  - If the rate paid by the French entity is above the legal threshold, then the French entity bears the burden of proving that the rate is a market rate.

While these rules were clear, what was far less clear was what constituted acceptable proof, vis-à-vis the FTA – and ultimately the courts – that an interest rate above the threshold was indeed at market rate.

To be more precise, article 212 of the French Tax Code ("FTC") requires that for interest paid to related parties by French entities in excess of the legal threshold to be fully deductible, the taxpayer must prove that the interest rate is at a rate he "could have obtained from independent financial establishments or organisations under comparable circumstances". The main difficulty for taxpayers here is that until very recently, the FTA, as well as certain courts, were extremely strict in what they accepted as proof that an interest rate was at a market rate. Practically speaking, they rejected most economic analyses and only accepted a binding, contemporaneous loan offer by an unrelated bank as proof. Naturally, this was extremely difficult for taxpayers to provide, insofar as a company which is asking a binding loan offer from a bank would go for a bank loan rather than an intra-group loan.

Recent and more favorable case law for taxpayers

Fortunately, the Supreme Administrative Court has recently eased the burden of proof for taxpayers by better defining what constituted adequate proof and by opposing the overly strict "binding contemporaneous loan offer" approach that the FTA and certain lower courts had endorsed. Of particular interest is the gradual acceptance – at first by the Supreme Administrative Court, then by lower courts – of the use of financial benchmarking studies and automated tools such as scoring calculators.

In one of these cases where Fidal was involved, the Administrative Court of Appeals of Versailles ruled in favour of a taxpayer who had used RiskCalc (among other items) to establish that the interest rate it had paid was at a market rate. In this case, the court followed an interesting, three-step reasoning:

- First, the court recognised that a scoring obtained by using automated tools such as RiskCalc is inherently less accurate than the actual rating a proper rating agency would have provided through an in-depth analysis.
- Then, the court nuanced this statement by pointing out that the fact such a scoring is less accurate does not mean that it is not accurate at all and that, especially considering the high – unaffordable to many corporate entities – cost of a full-blown rating by an agency, such a scoring could not be disregarded systematically.
- Finally, the court concluded that, in the absence of any valid criticism of the scoring in question by the FTA, it was an acceptable proof and therefore ruled in favour of the taxpayer.

The third point raised by the court is the most noticeable. Indeed, in the case at hand, the taxpayer had prepared an in-depth economic analysis to support the interest rate paid whereas the FTA kept arguing, over the whole procedure, that this was not acceptable evidence without presenting, from its side, any detailed criticism against the scoring obtained by the taxpayer.

Going forward

It is important to note that while there were several such favourable examples of case law in the past months, they all have in common that taxpayers relied on other items of proof beyond just benchmarking studies and automated scorings (for example, internal CUPs such as actual loans from third parties but granted in a different period of time). This does not mean that a taxpayer could not bring an acceptable proof via benchmarking studies alone; however these cases highlight how sensitive the matter of intragroup interest rates remains, and how important it therefore is to prepare a proper documentation.

In the opposite, the FTA can no longer, as it used to, outright and systematically reject benchmarking and scoring studies. As for the courts, while they do not yet seem entirely comfortable with such clues and tools, they must now follow in the steps of the Supreme Administrative Court and look at them as a potentially sufficient evidence of a market rate which cannot be disregarded in principle.

As for the taxpayers, they will of course have to explain why these clues do evidence that the rate they are paying is at arm's length.

Also of interest is the fact that the courts also explicitly refer to arm's length ranges of interest rates (intervals), rather than to the interest rate which would be the only acceptable one.

In conclusion, we recommend that groups with a French entity which pays interest to a related entity prepare an in-depth demonstration of the arm's length nature of the interest rate – including, importantly, detailed explanations of why the tools used to make this demonstration are valid and relevant.

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Germany

Administrative guidance on income taxation of crypto currencies and other tokens

On 10 May 2022, the German Ministry of Finance published its final administrative guidance on the income taxation of crypto assets, esp. crypto currencies. The final guidance was long awaited since draft guidance had been published in June 2021.[2]

After public consultation, the German Ministry of Finance picked up the criticism on the draft 2021 guidance by stakeholders in the crypto environment and clarified some of the points addressed. The administrative guidance mainly focuses on the income tax treatment of crypto assets for natural persons; it does not contain any specific provisions on investment funds, joint ventures or private equity funds investing in crypto assets. However, some conclusions relevant for these investor types can be drawn from the general remarks of the administrative guidance.

- The administrative guidance states that crypto assets fall within the tax-legal definition of "asset"; the precondition for taxing crypto assets is thus fulfilled according to the German tax authority.
- Further, it is important to note that the decree differentiates between crypto currencies and other tokens.
- The Ministry regards every incident that can happen during the life-cycle of a crypto currencies as a tax relevant event. This means that, among the purchase, sale or exchange for other crypto assets, events such as airdrops, hard forks, mining, staking and lending are also considered tax relevant events. For example: new crypto currencies resulting from a hard fork are considered as acquired; the acquisition cost of the "old" crypto currency is split between the "old" and the "new" crypto currencies based on the ratio of their market value at the time of the hard fork.
- The administrative guidance clarifies, that an investment in crypto currencies as well as the engagement in lending of such assets or staking without block-creation do not generally constitute a trade or business activity and thus do not trigger additional local trade tax consequences (added to income tax), which is generally good news for the respective investors.
- Income from the sale of crypto currencies is taxable as other income for private investors, if sold within a holding period of less than 1 year. The German Ministry of Finance performed a reversal with respect to the extension of the vesting period from 1 year to 10 years in case the crypto asset sold was staked or out on loan. Accordingly, private investors can use their crypto assets, e.g. for lending or staking, and still sell their assets tax-free after a 1-year holding period.

  Transferring the Ministry of Finance's tax-legal qualification of capital gains from crypto currencies as a specific item of other income to the taxation of Investment Funds, leads to the conclusion that income from the sale of such crypto assets is non-taxable on the level of the Investment Fund.

- With regards to other (esp. security) tokens, the administrative guidance distinguishes between security tokens that are equity- or debt-like. Income from security tokens shall be taxed like income from the "original" equity or debt asset.

2 With respect to the draft guidance, see also WTS Global FS Infoletter #22 of September 2021.

For a so-called Opaque (or Chapter-2) Fund from a German income tax law perspective, this means that income from debt-like security tokens should be tax-exempt. Current income (dividend-like) from an equity-like security token should only be subject to tax in Germany, if the underlying equity is German sourced, while capital gains from equity-like security tokens should be tax-exempt. The tax treatment on the level of a German tax law Special (or Chapter-3) Fund will depend on whether the fund opted for transparency or not. In the latter case, the current income from an equity-like security token with a German underlying equity should be subject to tax in Germany.

Decision by regional Tax Court in the ECJ case C-641/17 – "CPP"

On 13 December 2021, the regional Tax Court of Munich gave its decision in the ECJ case C-641/17 – "CPP" dated 13 November 2019. The case concerns a Canadian pension fund that invested into German equity assets via pooled investment portfolios and suffered German WHT on dividends.

In the prior decision by the ECJ of 13 November 2019, the ECJ holds that a German tax rule, which prevents a Canadian pension fund from reclaiming/crediting WHT on German dividends, whilst a German pension fund is allowed to credit WHT suffered on German dividends, is contrary to the free movement of capital.[3] The ECJ referred the case back to the German regional court to give its final decision, on whether German WHT will be reimbursed to the Canadian pension fund or not.

The Tax Court of Munich in its decision of 13 December 2021 denies the reimbursement of German WHT to the Canadian pension fund. The regional Tax Court holds that the Canadian pension fund is not comparable to the German pension fund, because it is not subject to accounting rules that provide for a profit reducing actuarial reserve, as is the case for German pension funds. According to the regional Tax Court, the lack of similarity of applicable accounting rules cannot be cured by the fact that the Canadian pension fund is obliged to use all of its net assets to fulfill pension obligations.

The Tax Court of Munich upon first sight seems to implement a narrow understanding of comparability, by insisting on the application of similar – and not comparable – accounting rules. However, in the detailed analysis of the decision it appears that the facts which were presented to the ECJ – and thus led to the ECJ decision, which finds a breach of the free movement of capital in the German law applied to the case – turned out to be different than previously expected. The ECJ decision is based on the understanding, that the Canadian pension fund established an actuarial reserve comparable to that of a German pension fund. As this was indeed not the case for the Canadian pension fund, the Canadian pension fund is not comparable to a German pension fund *("Pensionsfonds")* but rather to a German pension scheme *("Pensionskasse")*. The German pension scheme – like the Canadian pension fund – suffers German WHT on German dividends. For this reason, the regional Tax Court denies a breach of EU law in the specific case.

The Canadian pension fund formally filed an appeal with the German Federal Fiscal Court against the decision of the Munich court. At present, it is uncertain, whether the German Federal Fiscal Court will admit the appeal on formal grounds.

3 See also WTS Global FS Infoletter #19 of January 2021.

The lesson learnt from the regional Tax Court's decision is that the comparability of a non-resident entity with a resident entity has to be examined carefully, especially whether the national law provides for similar legal concepts with different tax legal consequences.

Federal Fiscal Court on cum/ex transactions

On 2 February 2022, the German Federal Fiscal Court ("BFH") gave another ruling on the tax legal concept of economic ownership, this time in the context of cum/ex transactions.

In so-called cum/ex transactions, a person entitled to a full reimbursement of German WHT – in the case at hand a US pension fund entitled to benefits under the German-US double tax treaty ("DTT") – bought German equity assets cum (with dividend entitlement) but the equity assets were delivered ex (without dividend entitlement). After delivery of the equity assets, the assets were re-transferred to the former owner. The transactions were accompanied by multiple hedging and financing instruments. An alleged loophole in German tax law constructed out of the – to say the least: imprudent – mixture of an intellectual glitch by the Federal Tax Court, collaborative parts of academia plus much business greed seemed to – formally – allow for the reimbursement of German WHT in case of a cum/ex transaction, even though German WHT had actually not been levied. The resulting tax losses for the German treasury probably amounting to several billion euros. The alleged loophole was closed in 2012. Numerous players involved in the cum/ex scandal were charged with criminal offences in Germany, some of them already convicted, several lawsuits are still ongoing. Switzerland just extradited a German national, said to be the mastermind of the cum/ex scheme, based on charges of fraud.

The BFH decision of 2 February 2022 is the first decision of Germany's highest tax court in the context of the cum/ex scandal. As expected, the BFH denies the reimbursement of WHT on German dividends to the US pension fund – which according to the German-US DTT would be entitled to a full reimbursement of WHT – because the US pension fund is not the economic owner of the equity asset paying the dividend from a German tax law perspective.

As a general rule under German tax law, an asset – and the respective income streams – is assigned to the civil law owner of the asset. However, in situations where a different person is able to exclude the civil law owner from exercising ownership rights over the asset for the general operating life of an asset, the tax-legal ownership of the asset and its income streams are allocated to that different person, the so-called economic owner.

The BFH confirms that civil law ownership of a security is not transferred at the time of sale, but when the security is delivered, i.e. when the security is booked on the account of the recipient, usually within 3 business days after the purchase.

The core of the recent decision is that the BFH denies the transfer of economic ownership, not only at the time of the sales contract but also at the subsequent transfer of civil law ownership. The BFH argues that the US pension fund did not actually benefit economically from the equity asset transferred, and – most importantly – the US pension fund was not intended to economically benefit from the equity asset or dividend, according to the overall concept and all transactions included therein. For the time of the sale, the lack of economic entitlement of the US pension fund is – according to the BFH 'obviously' – due to the fact that the transaction was closed with dividend entitlement but settled without dividend entitlement. The lack of economic entitlement is further evidenced by the fact that risks and chances of the overall transaction were allocated to other parties. However, the BFH did not have to decide which other party involved in the overall concept is the economic owner of the equity assets.

The recent BFH decision is in line with previous case law, under which economic ownership has to be evaluated on a case by case basis, deciding whether the position of a civil law owner is a mere formal one, or whether the risks and chances of an asset were actually transferred. However, in previous decisions the BFH assessed economic ownership mainly in OTC transactions. The decision at hand applies the settled case law also to transactions settled via the stock exchange.

Another remarkable aspect of the decision is that the BFH – without apparent need – comments on the application of the principles of economic ownership differing from civil law ownership with respect to digital assets, such as crypto currencies. It might be a hint that the BFH agrees with the majority opinion that crypto assets or currencies qualify as "assets" within the German tax legal definition.

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Italy

Tax exemption is not applicable to proceeds paid to foreign investment funds not equated to Italian UCITS

In the Tax Ruling n. 162 dated 30th March 2022, the Italian Revenue Agency analyzes the tax regime applicable to proceeds distributed to foreign funds. The Agency clarifies that foreign investment funds, if not equated with an Italian UCITS, are not entitled to any tax benefit and, therefore, no exemption regime applies to proceeds paid by an Italian real estate fund to these foreign funds.

In the case under analysis, a foreign asset management company manages an investment fund, which holds 10% of the shares of an Italian closed-end real estate fund. The fund is established in the form of a "fond de placement contractuel". From a regulatory point of view, it is an investment fund under foreign law, without legal personality and intended for qualified investors; with regard to the tax profile, the fund is tax transparent. The fund is directly and wholly owned by a foreign pension fund.

Under the Italian tax law (art. 1, paragraph 1, letter j), Legislative Decree no. 58/1998 (TUF), a mutual investment fund is defined as a "*...UCITS with independent assets, divided into units, set up and managed by a manager...*". Furthermore, a collective investment scheme is defined as *"...the body set up for the provision of the collective asset management service, the assets of which are raised among a plurality of investors through the issue and offer of units or shares, managed in the interest of the investors and independently from them as well as invested in financial instruments, loans – including those disbursed, in favor of subjects other than consumers, out of the UCITS assets – shareholdings or other movable or immovable property, based on a predetermined investment policy...".*

The exemption from Italian WHT is applicable to those investment funds governed by foreign law which, regardless of their legal form, have the same investment purposes as Italian pension funds and UCITs.

In order to assess the equivalence of the foreign fund to an Italian UCITS for tax purposes, it is necessary to verify the existence of the above-mentioned requirements, characterizing a collective investment fund governed by Italian law, that is to say, the collective management of the savings collected from a plurality of investors and the autonomy of the management company's decisions with respect to the influence of the participants.

In the Circular Letter no. 2/2012, the Italian Revenue Agency clarifies that the definition of UCITS – contained in the TUF and consistent with the European regulatory framework – highlights, as essential characteristics, the economic function of the fund, i.e. the collective management of the savings collected from a plurality of investors, and the autonomy of the decisions of the asset management company with respect to the influence of the participants.

As stated in the Bank of Italy regulation on collective asset management, the requirement of "plurality of investors" can be considered satisfied even in the presence of a single investor, if the investment is made in the interest of a plurality of investors (eg. funds of funds).

In addition, the Resolution no. 137 / E clarifies that a fund needs a plurality of subscribers, unless the sole holder represents a plurality of interests so as to represent a collective management.

As far as the "autonomy" of the asset manager is concerned, this prerequisite constitutes the principle on the basis of which the fund participants cannot have direct competence connected to the management of the fund and to the assets in its portfolio. As for the investment policy, it is an essential part of the fund regulations and is therefore necessarily predetermined for the execution of the investments themselves.

In the tax ruling under analysis, the question concerns the possibility that the fund, despite being managed by an asset management entity subject to supervision, does not act in total autonomy with respect to the fund participant, i.e. the foreign pension fund, as the latter is also the delegated investment advisor with respect to three portfolios within a sub-fund of the fund. This circumstance, according to the Revenue Agency, does not ensure the condition of the total autonomy of management decisions by the asset management company with respect to the influence of the participating pension fund.

This circumstance does not ensure the condition of the total autonomy of management decisions by the management company with respect to the influence of the participating Pension Fund. Therefore, since the fund at hand cannot be equated with an Italian UCITS, it is not included in the aforementioned article 7, paragraph 3 of Legislative Decree 351/2001. Consequently, the exemption regime does not apply to the proceeds paid by the Italian real estate fund to the foreign fund at issue.

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Expected changes and developments in Dutch tax legislation

The Dutch Government communicated to Parliament its fiscal agenda for the year 2022. The following items should be of particular interest to the Financial Services industry.

Qualification of foreign entities

In March 2021, the Dutch government started a public consultation with respect to draft legislation concerning the qualification of (foreign) entities for tax purposes. The initial intention was to have the legislation come into effect on 1 January 2022, but the legislative process was postponed due to the many reactions on the consultation. Recently, the government communicated its intention to introduce the legislative proposal into Parliament in the Spring of 2023. The legislation should come into effect on 1 January 2024. Hopefully, the flaws in the legislation that were exposed in the consultation round will then have been addressed and repaired. But as the (lack of) quality of tax legislation is a continuing issue with Dutch tax practitioners, the final legislation may well be a source of trouble for taxpayers. In our Infoletter of June 2021 (#21-2021), we summarized the main features of the initial legislation that was published for consultation purposes.

Additional increase of Dutch Real Estate Transfer Tax (RETT)

Of particular interest for (foreign) real estate investors should be the intended raise of the Dutch RETT rate. Currently, the RETT rate is 8%, since 1 January 2021. Before that date, a rate of 2% for residential real estate and 6% for other real estate applied. Since the legislative change, the 2% rate now only applies to private homes (but only the main home, second homes are excluded) with a one-time exemption for taxpayers between 18 and 35 years of age that acquire their private home. For professional investors, the general 8% rate applies. It was already communicated at the time the current government started its term that the rate would be raised to 9%. It is now intended to raise the general rate to 10%. Two reasons are given for this increase, i.e. raise more money and discourage investors to invest in residential real estate. What comes to mind is that the first reason seems the more powerful one, as the second reason would not require the higher rate to apply also to non-residential real estate.

Dividend stripping

In our previous Infoletter (#24-2021 of March 2022), we commented on the consultation that the Dutch government started with respect to curbing dividend stripping. The government expects that it will be able to inform Parliament before the end of the current Parliamentary year (so before 8 July 2022) with respect to the outcome of the consultation, accompanied by the official government response to this matter. Furthermore, possible follow-up steps will also be outlined then.

Refund of dividend WHT: report on a lost rearguard action regarding single-investor funds

Following the Dutch Supreme Court decision in the Deka case (CJEU case C-156/17; Dutch Supreme Court case of 23-10-2020, ECLI:NL:HR:2020:1674) and the decision of 9 April 2021 regarding a US fund (Dutch Supreme Court case of 09-04-2021, ECLI:NL:HR:2021:506), the Dutch Lower Court at Breda started to clean its docket from the thousands of dividend WHT cases that were lodged by foreign investment funds. The basis of the claims was the EU comparability (and applicability of the freedom of capital movement) of these funds to Dutch 'FBI' funds, that could either directly claim a refund of Dutch dividend tax paid on portfolio dividends received (until 2007/2008) or since 2007/2008 could indirectly claim a refund via a mechanism where the WHT on dividends to investors could be reduced with the amount of dividend tax paid by the fund itself on dividends received (see also our Infoletter #21-2021 of June 2021 for a commentary). Many cases have already been denied since last year.

Mass verdict case regarding hundreds of cases

In March 2022, a mass verdict was passed by the Lower Court at Breda regarding 75 funds, mostly with multiple refund requests, so concerning a few hundred cases in all. In these cases, a desperate attempt was made to win the day, but it eventually resulted in nothing more than a lost rearguard action, as the Court denied all cases. Interesting, however, was the argument that the funds thought could be the game-changer.

A special feature of the case is that all funds were German Sondervermögen that had only one investor. In principle, such funds are deemed to be transparent for Dutch tax purposes (see our commentary in the Infoletter #20-2021 of March 2021). However, the funds argued that the number of investors in a fund would not be relevant to determine whether a fund could be regarded as a 'doelvermogen'. A doelvermogen is a rest category in the catalogue of possible foreign tax payers known in Dutch tax law. The Dutch Supreme Court defines a doelvermogen as an amount of capital ('vermogen') that is separated for a certain purpose, which has no legal personality and which does not belong to a (legal) person either. Such a separate pool of assets (amount of capital) is treated as an independent entity for tax purposes. According to the Supreme Court, an amount of capital cannot be regarded as a 'doelvermogen' if it belongs to one or more (legal) persons, for example because they have a claim on the capital by means of participation certificates.

If the funds could be regarded as doelvermogens and it could be established that such doelvermogens would be comparable to a Dutch 'FBI' fund, then the funds would have a foot back in the door to claim their dividend WHT refund. To argue their case, the funds referred to a recent case of the Appeals Court at 's-Hertogenbosch – which we commented on in the Infoletter #23-2021 of December 2021 – regarding a German real estate investment fund (Immobilien-Sondervermögen).

Skirmish around the 'doelvermogen' concept

In that case, the Appeals Court at 's-Hertogenbosch came to an interpretation of the definition of a doelvermogen, which appears to be that the fund is not a doelvermogen only if the fund investors have a direct claim on the capital of the fund, because – according to the Court – there would be no separation between the capital and the participants. As the fund in question had issued participation certificates that were freely transferable, no such direct claim was deemed to exist. Consequently, the Fund qualified as a 'doelvermogen'.

As mentioned, the funds in the mass verdict case at the Lower Court at Breda argued that – based on the Supreme Court definition of a doelvermogen – the number of fund participants would not matter. Therefore, the fact that in the Appeals Court case there were several participants and in the mass verdict case there was only one participant per fund, should make no difference to the applicability of the Appeals Court ruling on the current mass verdict case. Consequently, the funds in question should also be regard as doelvermogens.

The Lower Court, however, disagreed with that reasoning. It argued that one cannot conclude from the Appeals Court case the opinion that in general a German Spezial-Sondervermögen should be considered a doelvermogen. On the contrary, the Lower Court believes that the Appeals Court means that a Spezial-Sondervermögen could be regarded as a doelvermogen only in exceptional cases. But in the current cases there was insufficient factual evidence that such an exceptional case existed and, besides, the Lower Court ruled that this was not relevant anyway. Even if a fund with a single investor could be deemed a doelvermogen, the Lower Court found that such a fund would not be comparable to a Dutch 'FBI' fund for the following reasons.

The Lower Court found a way to escape the 'doelvermogen' discussion

A Dutch 'FBI' fund can only exist if it has a certain legal form that permits investors to participate directly in the fund. A Spezial-Sondervermögen with only one participant would not qualify. The funds argued, however, that the purpose of the 'FBI' fund regime was to prevent economic double taxation so that also other legal forms from other EU states should be allowed under the 'FBI' regime.

The Lower Court did not accept this argument. Instead, the Lower Court referred to the raison d'être of the Dutch 'FBI' fund regime, i.e. to allow for private investors to participate in a collective investment fund without suffering less favourable fiscal consequences than if the investors would directly invest in the investment objects of the fund. The 'FBI' fund acts as a link between the investors and the investments and must therefore allow the investors to participate directly in the fund. In the case of a doelvermogen, investors would be incapable to participate in such way, as a doelvermogen would not issue shares that gave the participants the right to a share in its equity. A fund that is a doelvermogen is therefore not objectively comparable to an entity with a legal form that is allowed for the 'FBI' regime status.

The Lower Court also mentions a second reason for denying comparability, i.e. that because it has only one investor, the fund cannot meet the shareholder requirements of the 'FBI' regime. This argument is a bit cryptic, but it probably comes down to the reasoning that the fund is transparent because it has only one investor and as a transparent fund has no shareholders, it cannot meet any shareholder requirements.

Concluding comments

The decision named reflect an interesting development around the doelvermogen discussion. Where the fund in the Appeals Court case wanted not to be a doelvermogen, the funds in the mass verdict case wanted the opposite by using the Appeals Court verdict to their advantage. However, the Lower Court neatly skirted around the doelvermogen issue, found an escape hatch in the comparability issue and fled the scene, leaving the funds with empty hands.

What is interesting to note is that the Lower Court admitted that it was not really possible to explain exactly why a fund with multiple investors should be a doelvermogen, while a similar fund with only one investor should not be a doelvermogen. The Supreme Court ruling, that was made based on prejudicial questions asked by the Appeals Court (the same court as the case mentioned above) in a case concerning a fund with a single investor, makes no distinction between one or multiple investor situations to explain its understanding of the doelvermogen concept. The Supreme Court may clarify this issue in the appeal lodged against the Appeals Court case.

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Supreme Administrative Court decisions on cryptocurrencies and interest on overpayment

In the judgment dated 22 March 2022 (II FSK 1688/19), the Polish Supreme Administrative Court presents its standpoint on the taxation of exchange of a cryptocurrency for another cryptocurrency.

First, the taxpayer applied for a private ruling, indicating in the application that he does not run a business but trades in cryptocurrencies. He was exchanging one cryptocurrency for another on online exchanges and asked for the confirmation that, in the case of an exchange, the obligation in personal income tax arises only at the moment of obtaining traditional money or at the moment of payment with cryptocurrency for goods or services.

The tax authority did not share the taxpayer's position and stated that income arises also when there is an exchange of one cryptocurrency for another, since the exchange of virtual currencies should be treated like the exchange of any other property right.

The taxpayer appealed against the negative ruling, and the Provincial Administrative Court in Wrocław upheld the taxpayer's complaint (I SA/Wr 906/18). The Court:

- agreed that the income arises at the moment of its conversion into a traditional currency, when the taxpayer receives certain monetary values or at the moment of payment with a cryptocurrency for goods or services,
- referred to the amendment of the Personal Income Tax Act of 23 October 2018, which introduced a comprehensive regulation on the taxation of cryptocurrency trading – the legislator included the paid disposal of virtual currency in the income from monetary capitals and explicitly indicated that a paid disposal of cryptocurrency is understood as its exchange for legal tender, goods, services or property right other than cryptocurrency or regulation of other obligations with it,
- confirmed that the mere exchange of cryptocurrencies does not create an obligation in personal income tax.

Finally, the position presented by the Provincial Administrative Court was accepted on 22 March 2022 by the Supreme Administrative Court, indicating in its reasoning that:

- no tax obligation arose due to conversion of cryptocurrencies because the taxpayer did not obtain any gain,
- the conversion of a cryptocurrency into another cryptocurrency is not subject to income tax, and – what is particularly important – that this was also the case before 2019 (i.e. before the law was clarified within this scope).

Please note also the decision taken by the Polish Supreme Administrative Court on 15 March 2022 in a different case (II FSK 1602/19).

The Court addressed to the Court of Justice of the European Union (CJEU) a preliminary question concerning the compliance of the Polish provision limiting the right to interest on overpayments (art. 78 paragraph 5 point 1 and 2 of the Tax Ordinance).

Here, a foreign investment fund with its registered office in the United States claimed a refund of interest on an overpayment of withholding tax. The overpayment arose as a result of the landmark judgment of CJEU of 10 April 2014 (C-190/12) Emerging Markets Series (the "EMS Judgment").

The essence of the matter is the (currently) limited right of taxpayers to interest on tax, if the tax collection is contrary to EU law. The legal basis for taxpayers to obtain interest is art. 78 par. 5 points 1 and 2 of the Tax Code. This provision limits the end date of the interest accrual period for taxpayers whose overpayment arises as a result of a CJEU judgment to 30 days after the publication of the judgment.

This is in conflict with CJEU jurisprudence, which requires taxpayers to be remunerated with interest for the entire period of deprivation of their right to dispose of capital when the tax was collected in breach of EU law.

The need to refer the question to the CJEU for a preliminary ruling was agreed upon by the Supreme Administrative Court, indicating in the oral justification of the decision that foreign funds from third countries have no basis in the CIT Act to prevent the taxpayers from collecting the tax themselves. Additionally, there was a high number of cases of such funds claiming interest on overpayments collected after the EMS Judgment, which ultimately prompted the Court to refer the case to the CJEU.

The CJEU response will be of great importance for funds from non-EU countries that overpay taxes in Poland, in the context of the interest they are entitled to on the tax unduly withheld.

Furthermore, the CJEU judgment will be relevant even if the taxpayers' proceedings have already ended with a final decision of the tax authority or a final judgment of an administrative court. In such a case, taxpayers may apply for the resumption of proceedings in their case regardless of the stage at which the cases have ended, within deadlines specified by the law.

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The key changes to the Economic Crime (Transparency and Enforcement) Act 2022

The UK's Economic Crime (Transparency and Enforcement) Act 2022 came into force on 15 March 2022. The government enacted the legislation to introduce new measures to try to tackle "illicit finance" in the UK real-estate market. The Act represented a significant shift in the disclosure requirements for foreign companies who hold real-estate interests in the UK.

One key component of the Act is the creation of a new public Register of Overseas Entities, which will require the disclosure of those beneficial owners who own UK real-estate through non-UK entities which was purchased on or after 1 January 1999, and in Scotland since 8 December 2014. A beneficial owner needs to be registered if they hold more than 25% of the shares or voting rights in an entity; can appoint or remove a majority of its directors; or have some other significant influence or control over it (including through a trust or partnership structure).

A six-month transitional period has been given to allow overseas entities to either sell their real-estate or to register. In addition to the initial registration, there is an annual compliance requirement to file a confirmation statement notifying of any changes to registrable beneficial owners or confirmation that the beneficial owners have not changed.

Furthermore, the Act makes changes to the existing Unexplained Wealth Order regime by now including company directors and owners of real-estate held both in trusts and offshore. Real-estate for which there are reasonable grounds to suspect that it has been obtained through unlawful contact will also be included in the Unexplained Wealth Order regime. The requirement that those breaching sanctions laws must have known or suspected that they breached the law will no longer be in place and can now be imposed a monetary penalty.

The future plans of HMRCs Business Risk Review

In 2019, HMRC updated its approach to assessing the risk posed by large businesses via its revised Business Risk Review ('BRR+') process. By updating its process, HMRC aimed to increase its ability to influence taxpayer behaviour to adopt a lower risk approach to managing their tax affairs as well as more accurately reflecting the risk profile of taxpayers. The new approach also intended to align different UK tax governance measures including Senior Accounting Officer ('SAO'), Corporate Criminal Offences for facilitating tax evasion ('CCO'), Automatic Exchange of Information (CRS/FATCA) and UK Tax Strategy.

HMRC has indicated that it will be increasing their Business Risk Review activity during 2022/3 from 480 to around 600. HMRC aims to provide an annual conversation with taxpayers who will not have a BRR during the year. The key areas for 2022/3 BRR's include (i) Corporate Criminal Offence, (ii) Making Tax Digital, (iii) Supply chains and (iv) Uncertain Tax Treatments.

HMRC will likely focus on taxpayer specific issues and additionally attempt to increase the level of training provided to Customer Compliance Managers which aims to improve the level of consistency applied across different BRRs.

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Crypto asset developments, changes to the CRS and the introduction of the CARF

Given the growing importance of crypto assets across a range of investment and financial activities, the Organisation for Economic Co-operation and Development (OECD) has initiated its work on the development of a new tax transparency framework for crypto-assets, referred to as the 'Crypto-Asset Reporting Framework' (CARF). The OECD seeks to put in place a formal framework through a consultative process.

Alongside the CARF, the OECD is also seeking to overhaul the Common Reporting Standard (CRS) regime. The CRS refresh will be the first revision undertaken by the OECD and draws on the experiences of the past seven years since it was first adopted. The CRS proposals seek to extend the scope of the CRS to cover electronic money products and Central Bank Digital Currencies.

Changes to the US Qualified Intermediary Agreement

The US Internal Revenue Service (IRS) has issued Notice 2022-3 which includes proposals to update the Qualified Intermediary (QI) Agreement. The amendments set out a QI's commitment to comply with the provisions of section 1446(a) of the Internal Revenue Code regarding distributions from Publicly Traded Partnerships (PTPs) and section 1446(f) with respect to the transfer of interests in a PTP.

The expected changes will now allow a QI to assume primary withholding responsibility on a distribution from a PTP, depending on whether the QI assumes primary withholding responsibility for the entire distribution. However, clearing organisations have indicated that they will not embrace withholding responsibility for PTP payments and consequently non-withholding QIs may have to adopt primary withholding responsibility to continue offering these products to their account holders.

It is important to note that the ability to rely on documentary evidence to support treaty benefits is not available with regards to payments of PTP income. In order to support reduced withholding on PTP income, a QI will be required to obtain Form W-8BEN or W-8BEN-E. The W-8 must mention the PTP for which the account holder claims reduced withholding.

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About WTS Global

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