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WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international FS industry in Europe and India

Dear Madam / Dear Sir,

we hope you may find interesting the June 2021 version of the WTS Global Financial Services Infoletter presenting news from fifteen countries with a focus on the international Financial Services industry.[1]

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. related to the taxation of crypto assets, investment funds, recent CJEU matters, WHT on dividends or VAT or beneficial ownership:

- Belgium – Tiberghien
- Czech Republic – WTS Alfery
- Denmark – Lundgrens
- France – FIDAL
- Finland – Castrén & Snellman
- Germany – WTS
- India – Dhruva Advisors
- Ireland – Sabios
- Italy – WTS R&A and Studio Biscozzi Nobili Piazza
- Luxembourg – Tiberghien
- Netherlands – WTS
- Poland – WTS Saja
- Spain – ARCO
- Sweden – Svalner Skatt & Transaktion
- United Kingdom – Hansuke

Thank you very much for your interest.

Frankfurt, 15 June 2021

With best regards,

Robert Welzel
(T +49 69 1338 456 80)

Steffen Gnutzmann
(T +49 40 3208 666 13)

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

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Contents

Hot topic: WHT reclaim by investment funds - CJEU Case C-545/19 ("AEVN") – Update 3

Belgium: New annual tax on securities accounts 4

Czech Republic: Taxation of capital gains, beneficial ownership & digital tax 6

Denmark: Rulings on beneficial ownership in dividend cases 8

Finland: Taxation of crypto assets, CJEU Case C-480/19 (SICAV-funds), contractual funds & potential WHT for real estate funds 10

France: French-Luxembourg DTT, consequences of Brexit on direct taxes & news on e-invoicing 12

Germany: Legislation on crypto assets, new fund types, WHT reclaims, ATAD & guidance on VAT 17

India: Tax incentives set to attract global investors 20

Ireland: Recent amendments to Encashment Tax 23

Italy: Revenue Agency rulings re tax exemption on dividends & partial redemption of Italian investment fund units 25

Luxembourg: New guidance on DTT mutual agreement procedure 27

Netherlands: Supreme Court decision of 9 April regarding dividend WHT refund claims & Draft legislation concerning limited partnerships and investment funds 30

Poland: WHT landscape – uncertainty and abeyance since 1 January 2019 33

Spain: Supreme Court on WHT exemption for sovereign wealth funds 36

Sweden: Taxation of crypto assets, CFC and upcoming legislation on WHT 37

United Kingdom: Reshaping UK's tax landscape: REITs, funds, TP documentation & reporting of uncertain tax treatments 39

Please find the complete list of all contacts at the end of the newsletter.

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Hot topic

WHT reclaim – CJEU Case C-545/19 ("AEVN") – Update

Please allow us to highlight the recent – important and interesting – opinion of European Court of Justice's Advocate General Kokott in the proceedings C-545/19 - *"AEVN"*, dated 6 May 2021.[2]

The subject matter of the proceedings is the application of the German investment fund AEVN, a regulated AIF, for reimbursement of WHT suffered on Portuguese dividends in 2015 and 2016.

The questions referred to the CJEU address whether a non-resident investment fund is discriminated against in violation of the free movement of capital, because the WHT suffered on Portuguese dividends would not be triggered, if said dividends were paid to a Portuguese investment fund.

The case affects not only a large number of investment funds holding Portuguese common stock, but – as the WHT reclaim in the case is based on the argument of discriminatory treatment according to EU law – has significance far beyond the specific fact pattern of the single case.

In a nutshell: the opinion dated 6 May 2021 attempts a general roll-back of the well-established WHT related jurisprudence of the CJEU. The opinion, in our view, does not present a convincing methodological concept which serves as the best deterrent against arbitrary discrimination and disguised restriction by means of national tax law (Art. 65 para. 3 TFEU).

It seems that the time is right for action by the EU Commission and to counter the still existing discriminatory treatment of investment funds in multiple jurisdictions in the EU, not by constantly seeing new cases being presented to the CJEU, but rather by an EU initiative regarding a harmonized WHT scheme applicable to investment funds, comparable to the VAT regime.[3]

We will separately comment on the interesting CJEU case in more detail.

If you wish to discuss these topics, please contact:
WTS Germany, Frankfurt

Robert Welzel
robert.welzel@wts.de
T +49 69 1338 456 80

Steffen Gnutzmann
steffen.gnutzmann@wts.de
T +49 40 3208 666 13

2 See also WTS Global Info Letter # 19 of 4 January 2021.

3 See Action 10 of the new Action Plan for a Capital Markets Union for people and businesses dated 24 September 2020 (COM(2020) 590 final).

Belgium

Tiberghien
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New annual tax on securities accounts introduced

With its Law of February 17, 2021, Belgium introduced a new annual tax on securities accounts (hereafter: *"ATSA"*), which replaces the previously annulled tax on securities accounts that the Constitutional Court in 2019 declared to be unconstitutional. The new ATSA entered into force on February 26, 2021. However, the specific and general anti-avoidance rules have retroactive effect as from October 30, 2020.

Highlights of the new tax

The new tax applies to securities accounts that hold financial instruments with an average value exceeding 1 million EUR during a given tax year. The tax is levied on the securities account itself, and not on the account holder. Therefore, the number of account holders is irrelevant. All financial instruments registered in securities accounts are taxable, including shares, bonds, turbos and speeders, but also cash that is held in the same account.

The tax rate is 0.15%. The average value is calculated over a 12-months taxable period from October 1 to September 30 and is based on the value on four reference dates: December 31, March 31, June 30 and September 30. When securities accounts are opened or closed, or if a taxpayer moves to another jurisdiction where the double tax treaty covers the taxation of wealth (see below), only the applicable reference dates are taken into account.

Application

The tax applies to Belgian residents, including both individuals and legal entities (e.g. companies, associations, foundations, etc.), regardless of whether the securities account is held in Belgium or abroad. Permanent establishments of foreign companies are also considered to be Belgian residents. Non-resident individuals and legal entities are subject if the securities account is held in Belgium.

It is important to note that financial institutions and collective investment undertakings (such as credit institutions, insurance companies, investment companies, brokerage firms and pension institutions) benefit from an exemption for securities accounts attributable to their own professional activities.

For example, both Belgian and foreign investment funds (UCITS and AIFs) are in principle exempt from the ATSA with their securities accounts, regardless of the financial instruments held in the securities accounts.

The exemption applies on the condition that no third party has a direct or indirect claim on the value of the securities account. If a third party has such a claim, then the ATSA applies, except when the third party also benefits from the tax exemption (since it is also an exempted financial institution). According to the Belgian legislator, an investment in a collective fund (with or without legal personality), grants no direct claim to the investor on the value (i.e. the assets) of the securities account held by the fund, so that the fund does not lose its exemption. The exemption does not apply for a dedicated fund since, in that case, the investor is considered to have a direct claim on the value of the securities account held by the fund.

Insurance wrappers

Insurance companies are exempt from the ATSA regarding the securities accounts attributable to their professional activities. The exemption does not apply for the securities accounts they hold for or on behalf of their clients. According to the Belgian government, this is the case for branch 23 insurance policies, i.e. life insurance policies linked to one or more investment funds. Interestingly, the policyholder is considered to have a direct claim on the value of the securities account held by the insurance company. Therefore, the tax will apply indirectly to insurance wrappers issued by Belgian insurance companies. Insurance wrappers issued by foreign insurance companies will in principle remain out of scope, certainly if the securities account is held abroad.

Double tax treaties

In principle, the tax also applies to non-resident individuals and legal entities, if the securities account is held in Belgium. However, the application of a wealth tax clause in double tax treaties ("DTT") may prevent Belgium from such taxation since the right to levy wealth taxes will in general be allocated to the residence state. For example, the DTT between Belgium and the Netherlands only allows the state of residence to tax the taxpayer's wealth. In contrast, the DTT with France does not contain a clause concerning wealth taxes; therefore, Belgium can tax the securities account held in Belgium by a French resident.

The DTTs that cover both taxation on income and on wealth are, for example, between Belgium and the Netherlands, Germany, Hong Kong, Switzerland, Luxembourg, Spain and the United Kingdom. DTTs that solely cover taxes on income (and not on wealth) are, for example, those with France, Greece, Italy, Portugal and the United States of America.

Reporting and payment

Belgian financial intermediaries are responsible for declaring and paying the ATSA (this is also the case for non-residents' accounts). Foreign financial intermediaries may (but are not obliged to) withhold the tax if they appoint a legal representative in Belgium to report the tax.

Financial intermediaries must pay the tax before 20 December following the tax year that ends in principle on 30 September. Belgian account holders with foreign securities accounts that are not yet reported by the foreign financial institution must file the tax declaration themselves within the same deadline as for their Belgian personal income tax returns.

If you wish to discuss these topics, please contact:
Tiberghien, Brussels

Yannick Cools
yannick.cools@tiberghien.com
T +32 3 443 20 00

Bart De Cock
bart.decock@tiberghien.com
T +32 3 443 20 00

Dirk Coveliers
dirk.coveliers@tiberghien.com
T +32 3 443 20 00

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Czech Republic

Taxation of capital gains of German and Liechtenstein tax residents

Recently, the Czech Ministry of Finance has focused its attention on the taxation of certain types of capital gains, to generate further financial resources for the Czech state budget. One of them is the taxation of capital gains according to double-taxation treaties (*"DTTs"*).

The Czech Republic concluded DTTs with Germany and Liechtenstein with a specific regulation of taxation of capital gains in comparison to other DTTs. In the case of the two DTTs mentioned, gains derived by a resident of a contracting state from the alienation of shares or other interests in a company which is a resident in another contracting state may be taxed in that other state.

Due to the fact that the Czech Income Tax Act requires the taxation from the sale of shares or other interests, investors with their tax domicile in Germany or Liechtenstein that earn such type of capital gains are subject to tax in the Czech Republic. The gains are taxed within the framework of their income tax return (not: via WHT). Therefore, the registration of the subject at the Czech tax authority is necessary. The registration obligations should be completed within 15 days after the shares or other interests were disposed.

The income tax return has to be filed by 1 April of the following calendar year. The deadline is automatically extended to 1 July, if the investor employs a tax advisor.

The tax base is defined as the profit from the disposal of shares or other interests. The income is reduced by related costs (acquisition price, disposal costs, etc.). The corporate income tax rate amounts to 19%; the personal income tax rate is 15%.

Beneficial owner

On 1 June 2021, a new Act on Records of Beneficial Owners came into effect in the Czech Republic. The Registration Act was adopted in connection with the requirements of the 5th EU AML Directive, intended to improve the transparency and efficiency of the legal regulation of records of beneficial owners. The Registration Act therefore imposes on 'registrants' (basically meaning every legal person with a registered office in the Czech Republic and the trustees of trust funds) the obligation to ensure that all natural persons who meet the definition of beneficial owner are registered.

According to the new definition, a beneficial owner is any natural person who is an 'end beneficiary' or person with final influence. If it is not possible to determine a beneficial owner even after the registrant has undertaken all efforts that can reasonably be required of them (while the performance of such steps must be documented demonstrably), every person in the senior management of a corporation will be considered a beneficial owner.

The new Registration Act also regulates the proceedings for registration in the records of beneficial owners performed by register courts. There will now be partial public access to records of beneficial owners, i.e. anybody will be able to obtain a partial extract from the records showing information about the beneficial owner.

The Records Act introduces penalties for missing or incorrect entries in the Records of Beneficial Owners. Fines of up to CZK 500,000 (ca. 20,000 Euro) can be levied on both companies and actual beneficial owners.

The new legislation also affects a company's internal relations and its members' rights in a revolutionary manner. In the event of non-compliance with the obligations regarding beneficial owners, a company cannot pay out a dividend. The payment of a share of profit in conflict with this prohibition would, on the part of the company's statutory bodies, be in conflict with the principle of diligence of a professional manager and would establish a personal duty to compensate for damage.

In a similar manner, if a company's beneficial owner has not been recorded at the time of the corporation's general meeting, the owner cannot exercise voting rights. A decision adopted in conflict with such prohibition would be invalid.

Digital Tax

The Czech Digital Tax Act is currently being discussed in Czech Parliament. The aim of the law is to settle the business environment in the digital services sector between companies based on so-called traditional models and companies based on digital models. The draft follows the original European Union concept of the draft Digital Services Tax Directive.

The tax would apply to selected Internet services provided in the Czech Republic, divided into 3 categories based on the Digital Services Tax model:

- placing targeted advertisement on the digital interface,
- use of a multifaceted digital interface,
- sale of user data.

The proposal originally provided for a uniform digital tax of 7% on internet services provided in the Czech Republic, with the proviso that it would be paid in the form of monthly advances, at a rate of 5%.

If you wish to discuss these topics, please contact:
WTS Alfery s.r.o., Prague

Jana Alfery
jana.alfery@alferypartner.com
T +420 221 111 777

Alena Křížová
alena.krizova@alferypartner.com
T +420 221 111 777

Denmark

LUNDGRENS

Danish High Court (Landsretten) issues two rulings in beneficial ownership on dividends

On 3 May 2021, the Danish High Court issued two rulings in the famous Danish beneficial ownership cases.

The Court of Justice of the European Union ("CJEU") had issued preliminary rulings in 2019 in the Danish cases that consisted of six cases; two on dividends and the remaining four on interest. The two rulings from the Danish High Court are known as the TDC case (C-116/16) and the NetApp Case (C-117/16) concern beneficial ownership on dividend payments.

TDC case

TDC A/S is a Danish phone company, that was listed at the time of the distributions. TDC A/S was owned by a chain of Luxembourg holding companies organized as partnerships limited by shares (SCA), which were ultimately owned by private equity funds resident in a non-EU/treaty state.

The question before the Danish High Court (and the CJEU) was who should be regarded as the beneficial owner of a dividend distribution in 2011 of DKK 1.8b, where TDC A/S distributed dividends up the ownership chain to its Luxembourg shareholders and ultimately on to the private equity funds.

TDC A/S argued that the Luxembourg company had its own separate management and a decision to pay a dividend could only be made by the management for which reason the company was the beneficial owner of the dividend. Based on limited information provided by TDC A/S regarding the activities carried out in Luxembourg, the Court found that the dividend paid to the Luxembourg parent company had been repaid to the private equity funds and potentially to the ultimate investors, and that the Luxembourg company had no additional separate functions.

In the case, a statement from the Luxembourg tax authorities according to which the Luxembourg parent company *"to the best knowledge ...is the beneficial owner of any dividends paid on the shares in TDC A/S"* was not provided any weight. The taxpayer had not disclosed the identity of each of the ultimate investors and had not asserted that the private equity funds would be able to invoke a DTT with Denmark if the dividends had been paid directly to the funds.

The High Court found that the Luxembourg holding companies were not the beneficial owners of the dividend payment as they merely redistributed the payments further up the ownership chain to the private equity fund.

Subsequently, TDC A/S could not claim tax exemption according to the Parent-Subsidiary Directive or the DTT with Luxembourg.

NetApp case

The NetApp decision concerned two dividend distributions made in 2005 and 2006 (of DKK 566m and DKK92m respectively) from NetApp Denmark ApS to its Cyprus parent company. The Cyprus parent subsequently used the dividends to pay principal and interest to its Bermuda parent company. The Bermuda parent company then used the proceeds to pay a dividend to its United States (US) parent company.

The Danish High Court held that the Cyprus company was not the beneficial owner of the dividend because it had no power of disposition over the dividend and the sole purpose of interposing the Cyprus company in the structure was to avoid payment of Danish WHT. As a result, the High Court found that neither the Danish-Cyprus DTT nor the EU Parent and Subsidiary Directive were applicable in the case.

However, with reference to paragraph 12.2 of the 2003 OECD Commentary on Article 10, the High Court found that no tax treaty abuse would exist if it would be possible to pay a dividend from NetApp Denmark ApS directly to the beneficial owner without triggering Danish WHT.

The High Court found that NetApp Denmark ApS had proved that the first dividend distribution of DKK 566m had ultimately been channeled to the US group parent company. On this basis, the High Court agreed that the Danish-US DTT could be invoked, whereby no Danish WHT was due on this dividend. The fact that the dividend remained in Bermuda for five months did not make a difference because this was a relatively short period and because there was an original plan to pay the funds to the US parent company.

In this case, the High Court accepts a so-called look-through approach where the Danish dividend WHT may be eliminated under a DTT with the resident country of the beneficial owner. This is also somewhat in line with the CJEU's ruling in 2019. However, this does require that the identity of each beneficial owner is disclosed, a certificate of residence is provided and that any intermediary companies are not regarded as the beneficial owners of the payments.

Now what?

It remains to be seen whether the cases will be appealed to the Danish Supreme Court, and we understand that this is yet to be decided.

The look-through approach applied by the Supreme Court in the NetApp case is good news for the taxpayers but does require that the identity of each beneficial owner is disclosed.

If you wish to discuss these topics, please contact:
Lundgrens, Copenhagen

Ingólfur Örn Ingólfsson
ioi@lundgrens.dk
T +45 54 55 23 24

Jakob Schilder-Knudsen
jak@lundgrens.dk
T +45 22 47 43 75

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Finland

CASTRÉN & SNELLMAN

Taxation of crypto assets

There have also been certain clarifying court cases regarding tax treatment of crypto assets in the Finnish market. The decisions clarified that transactions on crypto assets are regarded as taxable transfers and the tax treatment should be similar as trading on other movable objects. Basically, this means that unlike in previous guidelines published by Finnish authorities, potential losses should also be deductible in the taxation of the party investing into crypto assets. However, exchanging crypto assets for other crypto assets or cash are also treated as transfers and all the transactions give rise to tax liability in Finland. In practice, the declaration of crypto trades in Finnish tax returns may be time consuming and special attention should be paid to documenting all transactions properly.

CJEU-Case regarding SICAV-funds

The CJEU recently issued its ruling in the case C-480/19 dated 29 April 2021. The case concerns the tax treatment of a SICAV fund (UCITS), incorporated under Luxembourg law, in Finland and the taxation of a Finnish private person receiving income from such fund. However, the ruling may also have an impact on the taxation of investment funds in general. In the preliminary ruling request to the CJEU, the Finnish Supreme Administrative Court posed a question on whether a Luxembourg SICAV open-ended fund should be comparable to domestic contract-based funds for Finnish tax purposes. The case concerned the old section 20 of the ITA, but it is expected to also have an impact on the interpretation of the current section 20 a of the ITA.

According to the CJEU ruling, the fund's legal form is not a sufficient objective criteria to exclude a fund in statutory (incorporated) form from the scope of section 20 of the Finnish ITA, merely based on the fact that it does not entirely correspond to a Finnish contractual fund. Further, as the case concerns the comparability of SICAV funds, the ruling will most likely also have wider effect on the comparability assessment concerning SICAV funds. Finnish authorities have not yet issued their interpretations concerning the ruling.

Contractual funds and their tax treatment

The Finnish domestic provisions regarding taxation of investment funds were revised by clarifying the legislation which entered into force on 1 January 2020. The purpose of the legislative change was to further clarify the terms of *"investment fund"* and *"special investment fund"* and to further specify the criteria for tax exemption for investment funds and special investment funds as given in the Income Tax Act and in the Act on the Taxation of Nonresidents' Income. The provisions regarding tax exemption for investment funds and special investment funds shall also apply to equivalent foreign contractual funds. Provisions on the tax treatment of sub-funds were also enacted in connection with the legislative change.

Based on experience, the provisions remain subject to interpretation and the tax treatment of certain foreign funds remains rather uncertain. The legislative change specifies the criteria for foreign funds to qualify as comparable to Finnish (tax exempt) funds but it

appears that tax authorities are currently keen on receiving binding rulings from administrative courts, several cases are currently pending in the Finnish courts. Clarifying decisions are expected during the course of this year.

Potential WHT for real estate funds

Finnish government agreed in the budget negotiations that they are going to impose additional taxes to foreign real estate funds. This change would probably give rise to additional WHT in Finland. The amendments are supposed to enter into force from the beginning of 2023.

As imposing taxes only on foreign funds and foreign investors is naturally problematic, it is likely that the same additional tax could be imposed to Finnish institutional investors as well.

This change is currently a political high-level decision. There are no detailed draft provisions available, yet.

If you wish to discuss these topics, please contact:
Castrén & Snellman, Helsinki

Mikko Alakare
mikko.alakare@castren.fi
T +358 50 592 3112

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France

The new French-Luxembourg tax treaty: comments from the French tax authorities

Signed on 28 March 2018, the Treaty officially entered into force on 19 August 2019. The new provisions are applicable as from 1 January 2020.

This is the first French treaty signed according to the Multilateral Instrument (*MLI*) model. On 21 February 2021, the French tax authorities (*FTA*) published their related comments, providing useful interpretive guidance on this Treaty as well as other treaties based on the MLI model.

Guidance on the concept of residency

A first general limit is set. Even if a person qualifies as a resident within the meaning of the Treaty, a treaty benefit may still be denied on grounds notably of the principal purpose test (*PPT*) set forth in the MLI and incorporated into the Treaty. The Treaty also does not apply if one of the principal purposes of an arrangement or transaction is to obtain treaty benefits to get a more favorable treatment.

Moreover, the FTA adopts a restrictive approach to the concept of residency. Persons who are exempt from tax in Luxembourg or France under a tax regime based on their status or activities cannot benefit from the Treaty, following the respective position taken by the French supreme tax court. The FTA adds that persons who are subject to tax in a State only on income sourced in that State and on capital located therein are not considered residents of that State.

Characterization of residency of undertakings for collective investment

UCIs as such do not benefit from resident status. However, they can enjoy treaty benefits on the dividends and interest they receive and redistribute. For a UCI established in one of the contracting States that is comparable to a UCI under the legislation of the other State, the Treaty applies for the fraction of interest and dividends corresponding to the rights held by a resident of one of the contracting States or of a third State which has concluded a convention on administrative assistance to combat tax fraud with the income-source State.

An administrative tolerance is provided for *"couponing"*[4]. Income, whether of French or foreign origin, passing through a French UCI, may benefit from the reduced treaty WHT rate or from a tax credit reflecting that reduced rate.

Characterization of residency of partnerships

A distinction must be made between Luxembourg and French partnerships. In France, partnerships (*sociétés de personnes*) are considered as "translucent"; they are not transparent and are themselves a resident in the treaty sense. On the other hand, Luxembourg partnerships are generally considered transparent.

A French partnership should therefore be able to benefit as such from the Treaty, unlike a Luxembourg partnership for which the treaty benefits will depend on the residency of its individual partners. The FTA has established a typology of situations (location of the partnership, residence of the partners, origin of the proceeds) detailing, for each scenario, the conditions of application of the treaty provisions.

If you wish to discuss these topics, please contact:
Fidal, Paris

Yves Robert
yves.robert@fidal.com
T + 33 1 55 68 15 76

Inès Boiron-Chabadel
ines.boiron-chabadel@fidal.com
T + 33 1 55 68 14 17

4 Couponing consists of the issue of bonds or coupons by investment funds for the benefit of investors.

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France

Consequences of the Brexit on direct tax in France

On 11 March 2021, the FTA published their comments on the effects of the United Kingdom's withdrawal from the European Union on the tax benefits granted to individuals and legal entities in respect of investments made in the EU or the European Economic Area.

Temporary relaxing measures

As the tax benefits are generally subject to the condition that the investments are made within the EU or another EEA State, investments in the United Kingdom are no longer eligible. However, France adopted temporary measures to mitigate the effects of Brexit. These relaxing national measures are planned for a period of generally nine months, with few exceptions, from 1 January 2021 until 30 September 2021.

Impact on tax consolidation regime

Tax consolidation consists of consolidating, upon election, the tax results of member companies of a same group. Under French law, it allows those companies to form a group in which the parent company (holding at least 95% of the capital of the subsidiaries) is solely liable for French corporate income tax (*CIT*) on all the results of the companies within the consolidation scope.

This regime has been extended to groups that have sites in the EU / EEA:

- vertical tax consolidation: possibility for a French company to join a French tax group where said company is indirectly held through a company located in the EU or EEA (*intermediary company*). The intermediary company must itself be at least 95% held by the parent company (CJEU's *Papillon* decision of 27 November 2008).
- horizontal tax consolidation: possibility, under certain conditions, to form a French tax group between French sister companies whose common parent company (*non-resident parent entity*) is established in the EU or the EEA (also possible in case of indirect holding via a foreign company). The non-resident parent company and the foreign company are not part of the tax consolidation group.

As a mitigating measure, such entities are deemed to satisfy the conditions of eligibility for the consolidation scope for fiscal years opened before 31 December 2020. After the close of those fiscal years, the condition of residence in the EU or the EEA will no longer be satisfied, triggering the following implications:

- if the non-resident parent entity is established in the United Kingdom: termination of the group, unless a foreign company takes its place as the new non-resident parent entity;
- if the foreign company or intermediary company is established in the United Kingdom: exit from the group of all its subsidiaries and sub-subsidiaries, entailing all the tax consequences of a group member's exit.

Intragroup distributions

Dividends from subsidiaries established in the EU or EEA – satisfying all the conditions for tax consolidation as if they had been French – benefit from a 99% exemption from French CIT. This measure continues to apply to dividends received from UK companies until the close of the beneficiary company's last fiscal year opened before 31 December 2020.

As from 1 January 2021 (or from the start of the fiscal year following the one in progress as at 31 December 2020), these distributions will be subject to the parent-subsidiary regime. The dividends distributed by the UK subsidiary will be 95% exempt from CIT. Only a 5% portion (versus 1%) of the dividends received will be subject to French CIT.

Dividends paid by a French company to its UK parent company are exempt from WHT, provided that the parent company's stake in the French company is at least equal to 5%. This exemption applies to all distributions paid during a fiscal year opened before 31 December 2020. Thereafter, the French-UK DTT will still apply, which provides for an exemption from WHT on dividends paid to companies holding at least 10% of the distributing company's capital. If the ownership interest is smaller, 15% WHT apply.

Equity savings plans of individuals

The French equity savings plan (*plan d'épargne en actions or PEA*) is a savings product that allows to acquire and manage a portfolio of shares in French or European companies while benefiting from a tax exemption, subject to certain conditions. It is reserved for shares in companies whose head office is in the EU or EEA and for shares or units in collective investment undertakings (Sicavs, FCPs and European UCITS) whose assets are more than 75% invested in securities of European companies. As from 1 January 2021, British UCITS and securities are no longer eligible for PEAs.

As a mitigating measure, UK securities registered in PEA plans as at 31 December 2020 will remain eligible until 30 September 2021. If, at the end of this transitional period, the UK securities still appear in the PEA, the PEA will be closed and the resulting tax contributions will be immediately due.

Regarding French undertakings for collective investment (*organismes de placement collectif or OPCs*) holding UK securities, the securities acquired or subscribed before or after 31 December 2020 may continue to be taken into account in the investment quota until 30 September 2021. During this period, the OPC must modify its portfolio in order to comply with the 75% quota by the end of September 2021.

Impact on life insurance and capitalization contracts or bonds

Life insurance contracts and capitalization contracts invested mainly in shares for a certain period (*"DSK"* or *"NSK"* contracts) enjoy an exemption from French personal income tax if they are composed of a quota of securities in European companies.

Until 30 September 2021, securities in UK companies and UCIs and units in UCIs remain eligible. During this period, insurers must modify the composition of the portfolio.

Since 1 January 2021, capitalization contracts issued by a UK insurer no longer give entitlement to the tax advantages. However, the French tax administration will treat these contracts as contracts issued by EU or EEA insurers for a period of nine months as from:
→ 31 December 2020, if the contract has reached the age of eight years as at that date, or
→ the date on which the contract reaches the age of eight years in other cases.

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Other measures have also been implemented regarding:

- subscriptions to the capital of certain SMEs: the tax reduction is maintained provided that the investor holds the securities or shares in UK companies subscribed before 1 January 2021 for 5 years.
- life insurance contracts: contracts comprising investments made before 1 January 2021 in undertakings in the UK remain eligible for the favorable tax regime until 30 September 2021.
- subscriptions of units in French innovation mutual funds (*fonds communs de placement dans l'innovation* or *FCPI*) or proximity investment funds (*fonds d'investissement de proximité* or *FIP*): securities in UK companies acquired or subscribed before 1 January 2021 remain eligible within the quota, making it possible to maintain the tax reduction (5-year holding period).
- distributions and gains relating to securities in certain venture capital entities: the personal income tax exemption is maintained until 31 December 2021, provided that the investor holds the securities or units subscribed before 1 January 2021 for 5 years.
- carried interest: units acquired or subscribed until 31 December 2020 and issued by UK venture capital companies remain eligible without time limitation.

If you wish to discuss these topics, please contact:
Fidal, Paris

Yves Robert
yves.robert@fidal.com
T + 33 1 55 68 15 76

Prescilla Eliazord
prescilla.eliazord@fidal.com
T + 33 1 55 68 15 76

France

E-Invoicing & E-Reporting obligations in France

In accordance with European regulations, the scope of the e-invoicing obligation will be extended to all domestic transactions between companies starting 1 January 2023; details depend on their respective turnover/size.

The 2020 French Finance Bill (Article 153) sets four objectives for the introduction of this obligation:
- to strengthen the competitiveness of companies by reducing the administrative burden of preparing, sending and processing paper invoices, and securing commercial relations;
- fight against tax fraud and reduce the VAT gap by means of automated cross-checking;
- allow for ongoing knowledge of business activity in order to facilitate more precise management of the French Government's actions in terms of economic policy;
- eventually, facilitate VAT returns through pre-filling.

Moreover, the 2021 French Finance Bill (Article 195) further adds that the Government is authorized to adopt by way of an upcoming Ordinance any measure necessary to improve and modernize the management by businesses as well as the collection and control by the administration of VAT, by:
- Generalizing the use of electronic invoicing and modifying the conditions and modalities of this practice;

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- Instituting an obligation of dematerialized transmission to the administration of information relating to the operations carried out by VATable persons which are not resulting from the electronic invoices, either that they are complementary to those which result from it, or that they relate to operations not being the subject to the electronic invoicing or not being subjected to the obligation of invoicing for the needs of VAT.

A ratification bill shall be submitted to Parliament within three months of the publication of this Ordinance (from our latest news, the publication of this first text is expected end of September 2021).

Next Steps

Discussions are still ongoing as to the necessary data/format. Still, there is certainty of the fact that the paper invoice will no longer exist as an original: The only original will be a digital one, upon which the VAT deductibility rights will depend.

For the companies in the Financial Services sector, even if largely VAT exempt, this new development requires that the impact of the upcoming changes should be followed carefully, in order to anticipate potential adaptations to processes and IT systems. At the very least, the impact of the reform on the VATable activities should be scrutinized.

If you wish to discuss these topics, please contact:
Fidal, Paris

Yves Robert
yves.robert@fidal.com
T + 33 1 55 68 15 76

François Warcollier
francois.warcollier@fidal.com
T + 33 01 55 68 15 06

Germany

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Upcoming legislation on crypto assets, new fund types, WHT reclaims and ATAD

Digitized securities / crypto assets

In May 2021, after substantial discussion with the industry in late 2020, German parliament passed a bill covering the introduction of digital securities plus their civil and supervisory law aspects. The new rules will become effective in June 2021.

In contrast to previous German law - under which a paper-based representation of a security was required and to be stored by the (fund) custodian – the new law foresees the option that the digital security will be based on a digital register only. The register will usually be a central register, mainly transposing the current paper-based and electronically backed up registration and disposals to an actual digital system.

However and importantly, the bill also introduces the possibility for a decentralized crypto register (privately permissioned), without favoring any specific distributed ledger technology. The bill does not provide for a transitional arrangement for already existing tokens, i.e. they will have to be registered retroactively, if in scope of the new law.

Though the government's step towards the digitization of securities is well received in principle, the market impression is that the bill is lacking ambition. For example:

- The bill only refers to debt securities and fund units; shares of stock companies are not covered.
- The scope of the decentralized crypto register is limited to debt securities only.

Thus, the road for tokenized fund units is not open (yet). However, the bill allows for the Germany Ministry of Finance to expand the decentralized crypto register to tokenized fund units by way of regulation without a further time consuming parliamentary process.

Further, even though the bill foresees a decentralized crypto register, an institution that is formally responsible for the register is necessary. The role of the register keeping body can either be assumed by the issuer of the crypto asset itself or by a service provider. While it is understandable from a regulatory perspective that a responsible entity is necessary, this condition seems irritating, as the principle of a decentralized register is not to accumulate access and responsibilities in one hand.

With regards to taxation, it is noteworthy that neither the above legislation nor other specific tax provisions cover crypto assets, except for currencies: the VAT treatment of Bitcoin and comparable crypto currencies is dealt with in administrative guidance. The tax administration recently announced guidance on the income taxation of crypto currencies. There is no primary wording of the law or administrative guidance or court decision – directly – applicable to the income taxation of crypto assets in German tax law yet; the German tax law results have to be derived from (comparable) general tax law rules.

New fund types

On 22 April, the German legislator passed several measures to enhance Germany's attractiveness as a location for the establishment of collective investment schemes.[5] The rules should become effective by August 2021. Some of the highlights are as follows:

- Introduction of closed-ended master-feeder structures
- Crypto-assets become permissible assets for all kinds of Special AIFs, from a regulatory and tax-legal perspective
- Introduction of new fund types such as Infrastructure Funds *(Infrastruktur-Sondervermoegen)* and Development Funds *(Entwicklungsfoerderungsfonds)*
- Investment management services delivered to venture capital funds are exempt from VAT
- Streamlining of the communication with the BaFin, communication shall predominantly be electronic, not paper-based.

German WHT reclaims in the future

The third legislative project is the streamlining and digitization of WHT reclaim procedures, mainly aiming at the prevention of potential tax-fraud. The main body of the new rules will come into effect with the beginning of 2024. The key measures include the following:

- Centralization of competence for all WHT relief at source applications and retroactive refund claims with the German Federal Office of Finance (*"BZSt"*), regardless of their legal nature (national law, DTT rules, CJEU case law). This change in competence will come into effect with the adoption of the act in June 2021, not in 2024 like the other provisions.
- Centralized collection of WHT related data with the BZSt
- Data collection is supplemented with an increase of reporting obligations for paying agents of dividends and their increased liability
- Obligation of stock companies to identify all of their shareholders to the BZSt; the legislator reacted to substantial criticism of the industry and prolonged the entry into force until 2025.

For more details, please see our WTS Global Financial Services Infoletter # 20 of March 2021: https://wts.com/global/services/financial-services

ATAD implementation

In June 2021, Germany will finally adopt the implementation of ATAD into national law.

The bill contains good news for the fund industry, as investment funds will generally not be subject to CFC rules if they are in scope of the German Investment Tax Act (GITA), at least in the case of retail funds. The bill aims to maintain the exclusive applicability of the beneficial German investment tax law to foreign funds that are comparable to German mutual funds, like UCITS, and retail AIFs. This approach prevents foreign mutual funds from being disadvantaged compared to German domiciled funds via adverse taxation under the German controlled foreign company (CFC) regime.

5 See also WTS Global Info Letter # 19 of 4 January 2021.

An important exception might affect especially international AIFs, if a German investor or a group of affiliated German persons controls the fund entity. The controlling investors as such will be disregarded the applicability of the preferential GITA rules, if the fund income generated with affiliated investors exceeds a threshold of more than 1/3; only the disadvantageous CFC rules will apply.

In addition, it should be noticed that controlled investment funds, i.e. those that stay below the 1/3 threshold named, can no longer serve as a blocker concerning CFC-income which occurs on subordinate level, unlike under the current German CFC provisions. Subordinate CFC entities of investment funds should be analyzed and possibly restructured before the new rules will come into effect.

The rules described above are expected to come into effect from 1 January 2022.

VAT treatment of services provided by stock exchanges and other trading platforms

On 3 May 2021, the German Ministry of Finance published an administrative decree regarding the VAT treatment of services provided by stock exchanges and other trading platforms for financial products, incl. virtual currencies (e.g. Bitcoin). In a nutshell, the decree contains the following:

- → The technical connection of market participants to the stock exchange operation and the provision of the stock exchange programs - unlike the service provided as a CCP – are part of the uniform service rendered by the stock exchange. This service is usually exempt from German VAT.
- → Matching, clearing and settlement constitute one uniform service, if executed by a single service provider. This service is usually exempt from German VAT.
- → If the stock exchange operator as a technical provider makes available the IT stock exchange programs and operates them without connection to a trading transaction, these are other services, which are not exempt from VAT.

The decree is applicable to all open cases.

If you wish to discuss these topics, please contact:
WTS Germany, Frankfurt

Robert Welzel
robert.welzel@wts.de
T +49 69 1338 456 80

Steffen Gnutzmann
steffen.gnutzmann@wts.de
T +49 40 3208 666 13

India

Tax incentives set to attract global investors

The Government of India introduced various amendments earlier this year vide Finance Act, 2021 in the domestic tax laws in order to further incentivize the financial services sector. The amendments include making the International Financial Services Centre (*IFSC*) located in Gujarat (*GIFT City*) more attractive for the fund industry and aircraft leasing business. Also, there are relaxations of certain conditions for sovereign wealth funds (*SWFs*) and pension funds (*PFs*) to ensure long-term stable capital participation.

Setting up a Category-III Alternative Investment Fund ('AIF') in IFSC

With a vision to make India a hub for international financial activities, the Government of India had established GIFT City, a global financial and IT services hub, as India's first IFSC in 2015. GIFT City caters to India's large financial services potential by offering global firms world-class infrastructure and facilities and aims to bring back those financial services that are currently carried on outside India.

Category III AIFs are not granted pass-through status under the Indian domestic tax law, consequently, taxability could arise in the hands of the AIF. Recently, the tax laws were amended to provide tax exemption from inter-alia the following incomes in the hands of Category-III AIF which are set-up in IFSC, subject to the condition that all units of Category III AIF are held by non-residents (other than units held by its sponsor or manager):

- any income accrued or arisen to, or received by a Category III AIF in IFSC from transfer of specified securities (other than shares in a company resident in India)
- Income from securities issued by a non-resident (not being a permanent establishment of a non-resident in India) and where such income otherwise does not accrue or arise in India
- Income from a securitization trust, which is chargeable to tax business income

The domestic tax laws also provide other tax incentives to units located in an IFSC, including reduced minimum alternate tax, concessional WHT on interest income, tax holidays etc.

Relocation of offshore funds to IFSC

Prior to the amendment, any relocation by an offshore fund to IFSC was subject to tax in India. Also, if offshore funds relocate to India, such offshore funds would lose the tax exemption (i.e. grandfathering provisions) provided under the tax treaties for any incremental gains on subsequent sale.

The Government of India has introduced a tax neutral relocation of foreign funds to IFSC. The amendment makes relocation from another country to IFSC tax neutral, i.e. the transfer of capital asset by an *"original fund"* (from a tax treaty jurisdiction) to a *"resultant fund"* in IFSC in *"relocation"* will be exempt from tax, subject to certain conditions.

A tax exemption has also been provided from capital gains tax on transfer by a shareholder/unit holder, in a relocation, of capital asset being share/unit held by him in the original fund in consideration for shares/units in the resultant fund.

Further, and more importantly, it has been proposed that the resultant fund in IFSC will continue to get capital gains exemption, otherwise available under the respective tax treaty for the original fund in respect of subsequent transfer of shares of an Indian company.

Aircraft leasing in IFSC

With a view to develop a self-reliant aviation industry and to enter into aircraft financing and leasing activities from Indian shores, the Government of India has provided tax exemption to offshore aircraft lessors.

Currently, aircraft leasing is being undertaken by original equipment manufacturers *(OEM)*/ aircraft lessors from jurisdictions such as Ireland. Income earned by such OEM / aircraft lessors from Indian lessees are not being subject to tax by placing reliance on tax treaties.

The amendment exempts royalty and interest income from aircraft[6] leasing earned by a non-resident from unit in IFSC (subject to certain conditions). Additionally, a deduction is provided in respect of gains arising on the transfer of an aircraft by an IFSC unit, engaged in aircraft leasing, to a person. This amendment should motivate non-resident lessors to lease aircrafts in India through IFSC units, thereby reducing reliance on tax treaties and reducing tax litigation.

ADIA, sovereign wealth and pension funds

Prior to the amendment vide Finance Act, 2021, income earned by Abu Dhabi Investment Authority *(ADIA)* or SWFs or PFs on investment made by them, were subject to tax exemption on fulfilment of certain conditions.

One of the conditions was that investment should be made in a company or enterprise carrying on the business of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility. The benefit of the exemption is also allowed if ADIA/SWFs/PFs made investment through Infrastructure Investment Trust *(InvITs)*, Real Estate Investment Trust *(REITs)* and AIFs. In the case of AIFs, the exemption is allowed to ADIA/SWFs/PFs, if their investment has been made through Category I/II AIFs that have 100% investment into entities engaged in *"infrastructure facility"* as defined under the Indian domestic laws.

Additionally, in order to claim the tax exemption, SWFs and PFs were not allowed to undertake any commercial activity whether within or outside India.

The Government of India has earlier this year rationalized certain conditions for such funds to make further investments in India. The proposed key amendments are as follows:

- Tax exemption for ADIA/SWFs/PFs extended to:
  - Investments made into a domestic holding company set up and registered after 1 April 2021 which in turn will have a minimum 75% investment in infrastructure entities;
  - Investments in NBFC-Infrastructure Debt Fund/infrastructure finance company (NBFC IDF / IFC) provided it should have minimum 90% lending to infrastructure entities; and

6 Aircraft is defined to mean aircraft, helicopter or an engine or part thereof.

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  - Investment in Category I/II AIF with minimum 50% (earlier 100%) investment in aforementioned domestic holding company or NBFC-IDF/IFC or in specified infrastructure entities or InvIT;
- Condition for not undertaking commercial activity is replaced by non-participation in day-to-day operations of investee entities;
- Exemption is not available, if investments in India are made out of direct or indirect loans and borrowings. Loans and borrowings are specifically defined; and
- Earlier, a PF could take benefit of the tax exemption, inter alia, if it is not liable to tax in its home jurisdiction. It has now been clarified that PFs who may be "liable to tax" but entitled to exemption in their home country are also eligible for tax exemption on qualifying investments.

The relaxations introduced by the Government of India will provide the desired impetus to SWFs / PFs to invest in India.

If you wish to discuss these topics, please contact:
Dhruva Advisors, India

Punit Shah
punit.shah@dhruvaadvisors.com
T +91 22 6108 1000

Vishal Lohia
vishal.lohia@dhruvaadvisors.com
T +91 22 6108 1054

Ireland

sabios.

Encashment Tax in Ireland – a recent amendment

Encashment tax impacts the financial services sector operating in Ireland. There have been some recent amendments to this tax, so it is useful to outline the present position with regard to the operation of the tax.

Encashment Tax may apply on interest, dividends, or other annual payments payable in respect of stocks, funds, shares, or securities of any non-Irish resident persons which are entrusted to persons based in Ireland for encashment of the payment to Irish resident persons. It can apply to foreign dividends when paid by paying agents in Ireland or when received or realised by banks, brokers or other receiving agents in Ireland on behalf of the legal or beneficial owner of the income.

Under these rules, where an agent in Ireland is so entrusted with the encashment, it is obliged to deduct income tax from such payments and account for it to the Revenue Commissioners.

Where a sub-custodian arrangement exists, the obligation to deduct encashment tax lies with the sub-custodian. However, Revenue is prepared to enter into an arrangement whereby the custodian may receive this income without deduction of encashment tax on the basis that the custodian will act as the person entrusted with the payment and will accept the obligation to deduct the encashment tax.

The chargeable person is required to return completed encashment tax forms to Revenue together with a remittance for the tax payable. The return must be filed within one month of being required to do so by a Revenue notice published in Irish Official Gazette. Compliant payers receive remuneration for operating encashment, calculated at 0.0675% of the tax withheld.

Any foreign dividends that have not otherwise been subject to Irish WHT are in certain circumstances subject to Irish encashment tax. These circumstances are:

- when such dividends are entrusted to any person in Ireland for payment to any person in Ireland;
- when any agent in Ireland obtains payment of any foreign dividends outside of Ireland on behalf of another person;
- when a bank in Ireland realises any foreign dividends and pays over the proceeds to any person; or
- when a dealer in coupons in Ireland purchases coupons for any foreign dividends from anyone who is not bank or a dealer in coupons.

Changes

Rate

Up until 1 January 2021, the tax rate of encashment tax was based on the standard rate of income tax (20%). The Finance Act 2020 has now increased the rate of encashment tax to 25%, with effect from 1 January 2021.

Encashment tax is creditable against the recipient's Irish income tax/corporation tax liability (excess being refundable) so the increase in the rate will only represent an incremental cash-flow cost for taxpayers rather than an absolute cost. Therefore, with careful planning of the timing of payments any adverse cash flow implications can be mitigated.

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Exemption for companies

The encashment tax legislation empowers the Revenue Commissioners to relieve agents of their obligation to deduct encashment tax on payments to Irish residents in certain circumstances. In this regard, the Revenue Commissioners currently exempt payments to Irish investment undertakings, credit unions, banks, building societies, life-assurance companies, pension schemes, securitisation vehicles and charities.

The Finance Act 2020 also introduces a statutory exemption from 1 January 2021 from encashment tax for payments made to companies who are beneficially entitled to and within the charge to Irish corporation tax in respect of those payments.

This exemption is a positive change and provides administrative simplification and reduction of cash flow costs for these companies.

Brexit

Relief from encashment tax was previously granted in respect of Sterling Dividends of British commercial companies. This exemption has been withdrawn as and from 1 January 2021. This is a good example of how Brexit will have ongoing implications to the Irish Direct Tax code, in addition to VAT and customs.

Record Keeping

The Finance Act 2020 amends the record keeping requirements and information reporting returns which agents are required to make to the Revenue Commissioners. This also provides symmetry with the WHT obligations for Irish companies.

The changes include a requirement to automatically report details such as the amount and type of the payment, the amount of tax deducted from the payment and the name and address of the recipient.

Conclusion

These amendments prompted by representations for the Irish Tax Institute in its pre-budget submission of July 2020, provide greater clarity, in particular in the context of certain financial institutions that may be moving to Ireland as a result of Brexit and may now be within the remit of encashment tax.

The impact of the increase in the rate of encashment tax to 25% should largely be on cash-flow rather than a real cost to taxpayers, as encashment tax is creditable against the Irish income tax/corporation tax of the recipient, with a tax refund available for any excess.

For companies that meet the exemption criteria, there will be a cash-flow benefit, in addition to the removal of administrative requirements.

The fact that the updates to the reporting and record-keeping requirements are subject to a Ministerial Commencement Order should allow companies time to update systems to report/record the correct information.

If you wish to discuss these topics, please contact:
Sabios, Dublin

Rachel Gaffrey
rachel.gaffrey@sabios.ie
T +353 1 5980 800

Italy

wts r&a
Studio Tributario

Italian tax exemption on dividends paid to foreign investment funds: Italian Revenue Agency Ruling n. 327 of May 11, 2021

Following the 2021 Italian Budget Law,[7] dividends and capital gains deriving by certain foreign EU/EEA UCIs are not subject to Italian taxation, either by way of WHT or substitute tax, starting from January 1, 2021.

Ruling 327/2021 has confirmed that the Italian WHT exemption applies in respect of dividends paid to foreign UCIs established in EU/EEA States which allow a satisfactory exchange of information with Italy, as long as (i) they are regulated by the UCITS IV Directive (Directive 2009/65/EC), or (ii) the fund's manager is subject to regulatory supervision in its State in accordance with the AIFM Directive (Directive 2011/61/EU).

Consequently, the Italian Revenue Agency stated that no Italian dividend WHT was applicable to Dutch investment funds having their investment manager established in the Netherlands and subject to Dutch regulatory supervision under the AIFM Directive, irrespective of the fact that such funds were considered transparent for Dutch tax purposes.

Tax treaty entitlement for Italian dividends paid to a Swiss fiscal transparent Fond Commun de Placement ("FCP") held by a Swiss foundation: Italian Revenue Agency Ruling n. 258 of April 19, 2021

On April 19 2021 the Italian Tax Authority issued an interesting ruling (n.258) about the application of the reduced WHT, under the DTT Italy-Switzerland – the "Treaty" – (article 10), to dividends paid by an Italian company to a Swiss FCP which is fiscally transparent under Swiss tax law.

The member of the fiscally transparent entity is a foundation tax resident in Switzerland, even if exempt from income taxes. The member invests in Italian companies through an FCP which attributes its income to the member, regardless of an actual distribution.

The FCP being a fiscally transparent entity is not subject to Swiss income tax so that it cannot be considered as Swiss resident "person" for the Treaty purpose. However, its member can benefit from the Treaty's reduced WHT rates under the 1999 OECD Report on "The Application of the OECD Model Tax Convention to Partnerships".

The same principles have been applied by the Italian tax authorities in Resolutions (n.17/E/2006 and 167/E/2008) about the tax treatment of dividends paid by Italian companies to foreign funds that qualify as transparent for tax purpose. It has been clarified that participants in a fund investing in Italy can enjoy the Treaty benefits providing that the operating profits are attributed to them for tax purposes in their respective State of residence. This condition is considered to be fulfilled in the two following cases: (1) the State of residence qualifies the fund as fiscally transparent and taxes the profits of the investors regardless of the actual distribution (so-called *"fiscal transparency"*); (2) the fund is a mere vehicle, through which the income flows in favor of the members of the vehicle, to which they are distributed at least annually pursuant to specific bylaw provisions and taxed in the State of residence (so-called *"economic transparency"*).

7 See also our WTS Global Info Letter # 19 (January 2021) and # 20 (March 2021) https://wts.com/global/services/financial-services

However, it should be noted that the Swiss foundation is *"entitled to Treaty's benefit"* only if it qualifies as: (1) a Swiss resident person under the Treaty; and (2) the beneficial owner of the dividends.

The first requirement has been met with a tax residence certificate issued by the Swiss Tax Authorities, the assessment of the beneficial owner requirement needs a factual analysis that is out of the scope of a standard ruling procedure.

Partial redemption of Italian investment fund units: Italian Revenue Agency Ruling n. 197 of March 19, 2001

Under Italian tax law, Italian investment funds are considered as opaque entities not subject to income taxation, and profit realized on fund level are generally taxed upon distribution by way of 26% WHT, although exemption can be available to certain white listed foreign investors. Based on general tax principles of Italian opaque corporate taxpayers, capital repayments are not subject to WHT, although distributions are deemed to be made out of profits and reserves first.

However, Ruling 197/2001 has taken an opposite and more favorable approach in respect of partial redemptions made by an Italian closed-end alternative investment fund, as the fund regulations provided that such distributions should firstly be considered as a capital redemption up to the amount of the investment made. The Italian Revenue Agency also added that payments made as a partial redemption should reduce the average weighted cost of the investment, while the fund regulations require treating any excess amount as a profit distribution subject to Italian WHT, to the extent applicable to the investor.

No further clarification has been given in respect of income deriving from a special class of units which the investment manager represented to satisfy the conditions required for the special carried interest tax treatment.

If you wish to discuss these topics, please contact:
WTS R&A and Studio Biscozzi Nobili Piazza, Milano

Oliviero Cimaz
oliviero.cimaz@sbnp.it
T +39 02 7636931

Marina Lombardo
marina.lombardo@ra-wts.it
T +39 3479 3108 63

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Luxembourg

Tiberghien
Advocaten / Avocats / Lawyers

New guidance on DTT mutual agreement procedure

Most DTTs provide for a mutual agreement procedure *("MAP")* aiming to eliminate juridical and economic double taxation situations arising from their application. The MAP provisions are in principle drafted in accordance with article 25 of the OECD Model Tax Convention. In the case of "covered tax agreements", certain provisions of the Multilateral Convention *("MLI")* may also apply.

On 11 March 2021, the Luxembourg tax authorities published Circular LG Conv. D.I. n°60 *("the Circular")* which replaces the former Circular LG Conv. D.I. n°60 dated 28 August 2017. This new Circular updates the guidance and provides useful information on the MAP, from its initiation to its conclusion.

Scope

The MAP request shall concern a case where decisions of Luxembourg and another Contracting State lead (or may lead) to a situation that is not in accordance with the provisions of the DTT.

The Circular emphasizes that the scope of the MAP is very broad and that it covers most situations which include for instance multilateral disputes (provided a DTT has been concluded between Luxembourg and each State concerned) or transfer pricing adjustments (including those made further to an initiative of the taxpayer itself).

The Circular also indicates that the MAP should only be denied in specific circumstances (which include taxpayer's foreclosure). In this respect, the Circular clearly states that access to the MAP cannot be denied either on the sole ground that the MAP request was initiated following the application of domestic or treaty anti-abuse provisions, or that, further to a tax audit, adjustments made by the tax authorities were accepted by the taxpayer.

Initiation of the MAP and main conditions

The Luxembourg competent authority is the Ministry of Finance. In practice, the request is to be sent to the relevant tax authorities' Directorate, depending on the matter of the MAP.

To initiate a MAP, several conditions must be met, notably (and subject to specific DTT provisions):

- The MAP must be initiated by a person (including a company) that is a tax resident of Luxembourg (not always required – depending on the DTT provision) and the taxation of which is subject to a dispute.
- The MAP must be initiated, in principle, within 3 years following the reception of the first notification of the decision that triggered the dispute (for instance: notification of a tax assessment or tax audit of a taxpayer where it is likely that it will result in a taxation not in accordance with the DTT).

Based on the Circular, the starting point of the deadline is to be interpreted in the way least restrictive for the taxpayer. The Circular also mentions that the taxpayer who wishes to wait for the result of a procedure initiated based on domestic law provisions can file a "protective" MAP to make sure that the deadline is met.

Progress of the MAP

Further to the filing of the MAP, the Luxembourg tax authorities will review the request and, if incomplete, may invite the taxpayer to provide additional information. They must also inform the authorities of the other Contracting State within 2 months.

Provided the MAP initiated is admissible, the Luxembourg tax authorities will first determine whether a unilateral settlement of the dispute is possible. It may be typically the case when the dispute originates from a decision taken by the Luxembourg tax authorities.

When not possible, the international phase starts and the Luxembourg tax authorities then communicate with the competent authority of the other Contracting State in order to resolve the case mutually.

Outcome of the MAP

In case the result of the MAP provides for a modification of the Luxembourg taxation, any adjustment (decided unilaterally or not) is subject to the taxpayer's approval. In this respect, downward adjustments are possible, irrespective of the procedural delays provided for by Luxembourg internal law, whereas upward adjustments are only possible within these delays.

The Circular indicates that interest and penalties, while in principle not considered as taxes under a DTT and therefore not falling into the scope of the MAP, are in principle cancelled or adjusted accordingly in Luxembourg when they relate directly to the taxation impacted by the MAP.

In any event, the taxpayer is informed in writing of the outcome of the MAP by the Luxembourg tax authorities.

Although both states endeavor to find a satisfying solution, they are not bound by an obligation of result. In this scope, one of the possible outcomes of the MAP is an absence of agreement between the Contracting States, in which case the double taxation remains.

In the event that no consensus is reached, depending on the provisions of the DTT, the taxpayer may request that the Luxembourg tax authorities and the authorities of the other Contracting State submit the unresolved dispute to a binding arbitration procedure. This clause is notably provided by the Multilateral Convention, and therefore included in several DTT to which Luxembourg is party.

Articulation between the MAP and other procedures

First of all, the Circular clearly indicates that the MAP cannot be denied to a taxpayer that has been subject to a tax audit.

Moreover, being a non-judicial procedure, the MAP can be initiated irrespective of any other procedure provided by the internal law of the Contracting states. In this case, both procedures can be conducted separately.

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In case a solution is proposed under the MAP, it can however only be implemented provided the taxpayer renounces to all other ongoing appeals.

In case a final decision under an appeal is rendered before the outcome of the MAP is known, then the Luxembourg tax authorities can pursue the MAP, but that decision needs to be taken into consideration and the outcome of the MAP cannot then aggravate the taxpayer's situation.

The MAP is not incompatible with the European Arbitration Convention which can be pursued concomitantly with the MAP. In practice, when both requests are admissible, the instruction and discussion are carried out globally with the other Contracting State.

However, the initiation of a mutual agreement procedure under the law of 20 December 2019 implementing Directive (EU) 2017/1852 on tax dispute resolution mechanisms (to which the Circular does not apply) terminates any other ongoing agreement procedure, including a MAP, provided it relates to the same matter.

If you wish to discuss these topics, please contact:
Tiberghien, Luxembourg

Maxime Grosjean
maxime.grosjean@tiberghien.com
T +352 27 47 51 11

Madeline Morel
madeline.morel@tiberghien.com
T +352 27 47 51 11

Netherlands

Dutch Supreme Court of 9 April 2021 regarding Dutch dividend WHT refund claims

On 9 April 2021, the Dutch Supreme Court (*"Hoge Raad der Nederlanden" or "HR"*) ruled in a landmark case that will decide all pending cases where foreign investment funds claim the refund of Dutch dividend WHT suffered in years starting from 2008.

Facts of the case

The case concerned a refund request from a US fund with respect to Dutch WHT that the fund suffered on dividends paid on Dutch portfolio investment shares.

The HR had parked the case until it would have received answers from the CJEU regarding the Deka-case (CJEU case C-156/17) that concerned the previous legislation until and including 2007.

Under the 'old' pre-2008 legislation, a Dutch FBI fund could claim a refund of dividend WHT, independent from the amount of WHT it would have to levy on its own profit distributions to investors. To be eligible for a refund under the old legislation, a foreign fund had to accept the concept of a *"replacing payment"* (generally 15% of the fund's annual profit) which aims to capture the dividend tax that the fund should have paid on the profits distributed to its investors, if it would have been a Dutch fund. The fictional replacing payment was deducted from the dividend tax actually suffered by the foreign fund in the book year concerned. If a positive amount remained, it was to be refunded to the foreign fund. Additionally, a foreign fund had to prove that it meets the shareholder requirements for FBI-status as well as the annual profit distribution requirement, which can also be met via a deemed distribution in the country of residence of the foreign fund.

In comparison, under the current system from 2008, the Dutch FBI fund can claim a reduction of the dividend WHT it has levied and must remit to the Dutch State (*"remittance deduction"*). The reduction is in principle equal to the dividend WHT and similar foreign taxes suffered, though there are some restrictions. Briefly, under the current system the WHT suffered is refunded insofar, as there is dividend WHT payable on the fund's profit distributions.

9 April 2021 decision

In the 9 April case, the HR declared that a refund is not possible for foreign funds under the current system, because a Dutch and a foreign fund are not objectively comparable. In essence, the HR decision rejects that the current system of remittance reduction is also a refund system, only using a different mechanism.

In short, the HR denies that the remittance reduction system is a restriction of the freedom of capital.

WTS Netherlands' assessment of the decision

It is questionable, whether the Dutch legislator intended to employ a systematic change with the new dividend WHT scheme in 2008. From the Parliamentary discussions and documents, it appears more convincing, that the legislator wanted the current system to have the same effect as the previous one, i.e. (full) compensation at fund level of Dutch and foreign WHT suffered on (dividend) income.

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This assumption is not altered by the fact that the schemes employ different mechanisms for achieving this goal. The fact remains that the amount of the allowance is primarily determined by the dividend tax and other WHT charged to the fund. Only the amount of the compensation differs over time, because in the pre-2008 refund scheme the entire amount is returned each year (at least for the dividend tax) and in the case of the current remittance reduction system, the amount is annually limited by the tax withheld from the profits distributed by the investment fund. However, the right to compensation is not cancelled out, but can be redeemed in a later year. This reduces the difference to a timing difference. In the end, both mechanisms achieve the same result: (complete) relief from the WHT. Accordingly, the conclusion should be the same – i.e. that the freedom of capital is arbitrarily restricted – under both, the old and the new Dutch system.

However, as the HR is the highest court of the Netherlands in tax matters, it is to be expected that the Dutch tax authorities and courts will follow the decision named and consequently deny all refund claims for years starting in 2008.

Should it become clear in the future that the ruling of the HR is contrary to EU law, then claims that were denied might – under certain circumstances – be eligible for redress.

Draft legislation concerning limited partnerships and investment funds

In March 2021, the Dutch Ministry of Finance started a public consultation with respect to draft legislation concerning the qualification of entities for tax purposes.

It was initially expected that the introduction of the legislative proposal to Parliament would be in September 2021 and that the bill would enter into force per 1 January 2022. On 2 June, however, the Dutch Government announced that due to the many reactions to the consultation they will postpone the further legislative process to the coming winter. No intended (new) date of entry into force was communicated, but the most likely date seems to be 1 January 2023.

The draft legislation concerns the Dutch method of qualifying foreign entities for Dutch tax purposes. In a nutshell, this method requires that a foreign entity is compared to a domestic entity and, if sufficiently comparable, will then be treated the same as its domestic look-a-like for Dutch tax purposes. A change to this *comparison-of-types* method is proposed with respect to special situations where the result appears flawed:

- Limited partnerships
- Mutual funds
- Other foreign entities that cannot be qualified using comparison-of-types method.

If the legislative change is implemented, far-reaching consequences for certain fund structures and other investment structures are likely.

Changes regarding limited partnerships

Currently, limited partnerships (Dutch: *"CV" – "Commanditaire Vennootschap"*) can qualify as either *"closed"* (transparent for Dutch income tax purposes) or "open" (non-transparent for Dutch income tax purposes), depending on whether the entry of new partners or transfer of ownership of CV shares is subject to the consent of the other partners. If the consent of all partners is required, then the limited partnership is regarded as closed. In all other cases, the partnership is deemed to be open. An open CV is deemed to have a capital divided into shares concerning all Dutch taxes levied by the central government.

It is now proposed to erase the difference in tax treatment between closed and open limited partnerships. In the future, all limited partnership will be treated as transparent entities for Dutch tax purposes.

Changes regarding mutual funds

Dutch mutual funds (*"FGR" – "Fonds voor Gemene Rekening"*) can also be either *"closed"* or *"open"*. The difference in qualification is linked to the transferability of the participation in such a fund. Funds are regarded as open, if the participations can be transferred without consent from other participants.

The proposed legislation changes this criterion to distinguish between closed and open funds. In the future, an open fund is a fund that collects capital for collective investment against the issuance of participations in the fund. The participations must either be traded on a stock exchange or similar platform, or the fund must have the obligation to redeem its participations upon demand by its participants.

A fund that is not regarded as open will be treated as closed.

Changes regarding non-comparable foreign entities

Foreign but Dutch resident entities that do not have a comparable Dutch counterpart, will be qualified as non-transparent for Dutch tax. If not a Dutch resident, the foreign entity will be qualified by following the qualification for income tax purpose of its home jurisdiction.

Possible impact of the legislation – transitional measures

Where the proposed legislation changes the qualification of an entity, this can have far-reaching consequences. In case an entity is a Dutch taxpayer (either resident or non-resident) and changes into a transparent entity, such change will in principle trigger exit taxation in the Netherlands. With respect to open CVs (and foreign open CV look-a-likes), specific transitional measures are included in the proposed legislation. These specific rules aim to ensure a tax neutral treatment in case the limited partners in the CV transfer their shares in a share-for-share merger transaction to a non-transparent entity that will in fact replace the CV. In case the partners do not restructure this way, they are deemed to have taken over the business of the CV, which can also be done in a tax neutral way. Certain conditions (that are mostly similar to those currently applicable to tax neutral legal mergers) need to be fulfilled in order to be eligible for the transitional tax neutral measures. Should the tax neutral treatment, for whatever reason, not be claimed, then it would be allowed to pay the resulting taxation over a ten-year period.

It is noteworthy that the draft bill focuses solely on the corporate income tax consequences, though with respect to dividend WHT (*"dividendbelasting"*) and the special WHT on certain payments to certain tax haven companies (based on the *"Wet bronbelasting 2021"*) the open CV will no longer be required to withhold these taxes. The effect of the legislation for other taxes (like Real Estate Transfer Tax) were not mentioned.

It is advisable to anticipate possible negative consequences of the proposed legislation by reviewing structures involving partnerships and funds that are Dutch (resident or non-resident) taxpayers or are in any way connected to Dutch investments.

If you wish to discuss these topics, please contact:
WTS Netherlands, Rotterdam

Dennis Pouw
denis.pouw@wtsnl.com
T +31 10 217 9173

Poland

wts saja

Polish WHT landscape – uncertainty and abeyance since 1 January 2019

Effective from 1 January 2019, income tax legislation was amended to introduce revolutionary changes in the Polish WHT framework.

The changes include:
- modifying the WHT process to be applied by WHT agents,
- materially amending the beneficial owner definition,
- imposing an obligation on Polish WHT agents to follow a "due diligence" process to verify whether they may abstain from levying WHT or apply an exemption or a lower rate.

New WHT mechanism

Polish WHT rates range from 10% to 20%, depending on the nature of the payment.

Under the old law, a WHT agent was allowed to not levy WHT or to apply a reduced WHT rate or an exemption, if authorised by special regulations, including DTTs.

After the changes, to the extent that the payments made by a WHT agent to a non-resident exceed PLN 2 million in aggregate during a tax year, the WHT agent must levy WHT at the standard rate (usually 19% or 20%) in all cases. The foreign taxpayer may then seek a refund of any of the WHT that represents excessive (double) taxation.

With such a low threshold (PLN 2 million in total gross amount of payments made to a single foreign recipient during one tax year of the Polish WHT agent), the relief at source method has in practice been replaced with the pay and refund mechanism.

However, the law offers two options for relief at source:
- Representation by the Polish WHT agent's management that it has:
  - the documents required under tax law to forbear levying WHT or to apply a reduced rate or an exemption; and
  - conducted a due diligence verification of the right to apply an exemption or a reduced rate, or not to levy WHT, under special regulations, it is not aware of anything that could reasonably give rise to a suspicion that any circumstances exist which would preclude the application of such rate or exemption or the option not to levy WHT.

However, together with amending the income tax legislation, the new law also amended the Polish Fiscal Penal Code to impose personal criminal liability on members of the WHT agent's management if their representation turns out not to be true to facts.

- Exemption opinion issued by tax authorities. However, this is available only for exemptions under PS Directive or I&R Directive and is difficult to obtain by foreign taxpayers for formal reasons when they do not have a Polish tax ID (NIP).

While the changes are fundamental, they have generated plenty of controversy as to their practical application. The Finance Ministry has therefore deferred the new law for as many as five times for CIT and four times for PIT. The last such deferral applies until 30 June 2021.

According to news from the Finance Ministry, they are planning to defer the new law again (apparently for the last time), this time until the end of 2021. The Ministry is working on, quote, *"revamping the statutory regulations on the WHT mechanism, including the scope of application of the said WHT refund procedure."* This work is supposed to be finished in 2021.

New definition of beneficial owner

The 2019 amendment also changed the definition of the beneficial owner.

As of 1 January 2019, a beneficial owner is the entity which:

- receives the payment for its own benefit, and in particular decides independently on its use and bears the economic risk of its total or partial loss,
- is not an intermediary, representative, trustee or any other entity legally or contractually required to transfer the payment in whole or in part to another entity, and
- carries on genuine business activity in the country in which it is established, if the payments are received in connection with the business.

The genuine (substantive) business activity test is to be carried out by reference to the criteria in the controlled foreign company regulations. This means that the test must consider the following requirements:

- whether the registration of the entity entails the existence of an enterprise through which it genuinely pursues business activities, and in particular it has premises, qualified personnel and equipment used in its business;
- whether the entity forms a structure that operates without economic reasons;
- whether there is a proportionate relationship between the scope of the entity's business and its actual premises, personnel or equipment;
- whether the agreements made by the entity reflect economic reality, have a valid commercial rationale and are not manifestly contrary to general commercial interests of the company;
- whether the entity autonomously performs its basic economic functions using its own resources, including managing persons on the site.

The new definition intends to put a stop to treaty shopping and similar practices.

However, the way it is used in Polish income tax law as well as its over-sophistication has led to a situation where:

- there is plenty of controversy mainly about whether the test is really applicable to all payments to non-residents (including corporate profit distributions) and about its application to such entities as holding companies, shared services centres, and collective management or investment schemes;
- Polish WHT agents have a number of additional duties associated with finding the status of the recipient as the economic owner of the payment (one who decides independently on its use and incurs the economic risk of its loss or diminution in value), including through the substantive business test.

Despite severe criticism of business and advisory circles, the amended definition of the beneficial owner has remained in force since 1 January 2019 and its application has not been postponed.

Responding to critical comments, the Finance Ministry attempted to offer an official construal of the definition by publishing a draft of dedicated tax guidance on 19 June 2019.

However, the proposed guidance came under fire from businesses and the consulting industry and has never been finalised. Neither has the Finance Ministry come through on its promise to issue a public tax ruling that would provide a reasonable framework for applying the definition in various real business situations.

"Customer due diligence" by Polish WHT agents

For all practical purposes, this law shifts control functions and responsibilities, including the new beneficial owner test, from tax authorities onto the entities making payments to non-residents, i.e. to WHT agents exposed to considerable risk.

Vaguely defined compliance duties are accompanied by dedicated penalties, such as where the Tax Code was amended to introduce a tax surcharge that may be imposed on the Polish WHT agent, if the relief at source representation by its management proves untrue, or if the agent fails to carry out the required customer due diligence or if its due diligence process was inadequate given the nature or scale of its business. Such tax surcharge is imposed at the standard rate of 10% of the gross payment, but may reach 20% or even 30% in extreme cases.

If you wish to discuss these topics, please contact:
WTS Saja, Poznan

Magdalena Kostowska
magdalena.kostowska@wtssaja.pl
T +48 61 643 4550

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Spain

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Supreme Court on WHT exemption for sovereign wealth funds

On 24 February 2021, the Supreme Court ruled on the right to refund WHT levied on Spanish dividends obtained by foreign sovereign wealth funds (appeal no. 3829/2019).

The case concerned the request of the Norwegian Central Bank ("*Norges Bank*") as owner and manager of the Government Pension Fund Global sovereign wealth fund ("GPFG") - a collective investment institution intended to cover future pension commitments in Norway - to refund WHT (15% to 18%) levied on Spanish dividends. The High Court had considered that it constituted an infringement of the free movement of capital, if Spanish dividends obtained by Norges Bank are subject to WHT, while dividends obtained by the Spanish State or the Spanish Social Security Institution are exempt from such WHT.

The Supreme Court now upheld this prior High Court decision.

The Supreme Court confirmed that Norges Bank and GPFG could rely on the free movement of capital (Art. 63 TFEU). The Supreme Court stated that a sovereign wealth fund, by investing in the competitive market under the same conditions as private operators, carries out an economic activity. As an investment vehicle, a sovereign wealth fund is subject to Community regulations like any other investment vehicle.

Secondly, the Supreme Court confirmed that GPFG and the Spanish Social Security Reserve Fund are objectively comparable, although they employ different investment strategies and have different management structures.

Finally, the Supreme Court held that the difference in treatment could not be justified by overriding reasons of general interest linked to the allocation of the taxation powers between the national jurisdictions and the coherence of the tax system. The Supreme Court considered that the only evident reason for the discrimination, revealing the unequal and discriminatory treatment, is purely economic and for raising revenue.

In short, the Supreme Court concluded that the taxation of Spanish dividends paid to a non-resident public entity with no permanent establishment in Spain, which manages a collective investment institution intended to cover future pension commitments in that other country, is contrary to the free movement of capital, since the same dividend would be exempt from tax if paid to a management entity of the Spanish Social Security Institution.

It should be noted that - with similar reasoning and with reference to the above ruling - the Supreme Court decided on a second case on 2 March 2021 (appeal no. 3834/2019). In this decision, the Supreme Court confirmed a violation of the free movement of capital via levying WHT on dividends obtained by Norges Bank, while dividends paid to the Bank of Spain are exempt from WHT. Both public entities have identical functions and are therefore objectively comparable.

If you wish to discuss these topics, please contact:
ARCO, Barcelona

Marina Esquerrà
marinaesquerra@arcoabogados.es
T +34 934 871 020

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Sweden

Crypto assets

There is no Swedish tax legislation which specifically regulates the taxation of crypto assets, and the regulation of trade with such assets is somewhat limited. Crypto assets are taxed under the general rules in the Swedish Income Tax Act, which has implicated some questions of the classification of crypto assets for tax purposes.

The tax treatment of the specific crypto asset Bitcoin was assessed by the Swedish Supreme Administrative Court (SAC) in 2018 (SAC 2018 ref. 72). The court stated that from a tax perspective Bitcoin could not be compared with a foreign currency since Bitcoin was not issued by a national bank and was not an approved means of payment. Bitcoin was assessed as an "other asset", to be taxed under the general rules on capital gains. As a result of this case, the general rule is that Bitcoin (and other type of crypto assets) is taxed as capital assets. Capital gains shall be calculated for each sale or transfer. The sales price is reduced by the purchase price and eventual other costs relating to the sale of the asset. The capital gain / loss is taxable or deductible as income of business, if held in a business, and as income of capital, if held as an individual. Applicable tax rates are 20.6% (income of business) or 30% (income of capital, if held by individual).

Swedish WHT on dividends

New Swedish WHT Act

Under the Swedish withholding tax act (WHT act), limited tax liable (cf. non-tax resident) individuals and foreign legal entities are subject to WHT of 30% on dividends from Swedish companies.

The implementation of a new Swedish WHT Act has been discussed in previous years, and in late April 2020, the Swedish Ministry of Finance referred a proposal (Ds. 2020:10) for consultation regarding a new law on WHT on dividends. It is proposed that the current WHT Act is to be replaced by a new law, under which liability to WHT applies to non-Swedish tax residents who are entitled to dividend at the time of the dividend payment (i.e. tax liability is no longer limited to investors qualifying as legal persons). According to the proposal, there will be no changes regarding applicable tax rates.

Exemption from WHT applies to dividends distributed to a foreign contractual fund. In addition, exemption from WHT tax applies to funds within (i) the E.E.A. or (ii) a country with which Sweden has a comprehensive income tax treaty, or a tax information exchange agreement.

Recent court cases

Funds that are taxed at the co-owning level must be comparable to a Swedish special fund (non-UCITS) to be exempted from WHT. The Swedish Tax Agency applies certain criteria to decide whether a foreign fund is comparable. In 2020, the SAC ruled in a case concerning the refund of WHT paid by a trust fund. The case concerned an Irish trust fund, organized as a unit trust – constituted by a trust deed between the trustee and the manager of the fund. The court concluded that the only difference between a Swedish special fund and the unit trust fund was that the trustee was the formal owner of the fund's assets, which should not result in different treatment compared to a contractual fund. The Irish trust was granted full repayment of Swedish WHT.

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In another SAC ruling (SAC case no. 3725-3727-18), it was confirmed that a foreign investment fund can be regarded as comparable to a Swedish investment fund regardless of legal form, if all other requirements are fulfilled. The case concerned a US investment fund. The fund invested in different securities on its shareholders' behalf. During 2006-2008, the fund received dividends from Swedish companies which were subject to WHT. For the years in question, Swedish investment funds were tax exempt, being entitled to a tax deduction for dividends paid, whilst overseas investment funds were subject to Swedish WHT on gross dividends received. The US fund argued that the different treatment was contrary to the free movement of capital in article 63 of the Treaty of the Function of the European Union (*"TFEU"*). SAC agreed with the fund and stated that the present case should be assessed by reference to EU law and CJEU case law. As described above, this ruling could also have positive impact on reclaim possibilities for other types of foreign investment funds that are non-UCITS and legal entities.

Controlled Foreign Companies (CFC)

Sweden's CFC provisions aim at taxing a Swedish resident shareholder for shareholdings in low-taxed foreign entities. A Swedish resident shareholder with a holding in a CFC entity is taxed annually for its ownership portion of the CFC's income, according to provisions applicable to a Swedish corporation. In order to be subject to CFC tax in Sweden, the Swedish resident shareholder has to, directly or indirectly, control at least 25% of the capital or the votes in the foreign company. Also, the applicable tax rate on the net income (calculated according to Swedish rules) in the applicable CFC country must be below 55% of the Swedish CIT of 20.6%, i.e. 11.33%. Shareholders that can prove that the foreign company has a genuine establishment and that the company derives business on commercial grounds, will not be CFC taxed.

In a ruling from the SAC (case no. 6446-19) the court stated that an AIF may be assessed to have a genuine establishment and thus, the shareholders may be exempted from taxation under the CFC regime. The case concerned two natural persons who were shareholders in a Luxembourg fund company of the type SA, SICAV-SIF. Together with a fund manager (a Luxembourg SA) and a custodian (a Luxembourg SA) the SA, SICAV-SIF had set up an AIF. In Luxembourg, the SA, SICAV-SIF was exempted from tax on its profits. Instead, it was subject to an annual tax of 0.01 % of the value of the Fund Company's net assets (taxe d'abonnement). The SA, SICAV-SIF was deemed as low taxed, so the CFC rules were in principle applicable. But the SAC held that the business carried out by the SA, SICAV-SIF were of such type that it constituted a genuine establishment.

The assessment of whether a company constitutes a genuine establishment must be assessed based on the type of activities in the individual case. In the mentioned ruling, the AIF was considered having sufficient resources and competence for its task. With regard to the operations conducted in the AIF, it was considered irrelevant that the AIF did not have its own staff and that it was the external manager who made the decisions in the day-to-day operations. Against this background, the SAC found that the AIF constituted a genuine establishment from which a commercially motivated business was conducted and no CFC taxation was imposed.

If you wish to discuss these topics, please contact:
Svalner Skatt & Transaktion, Stockholm

Fredrik Sandefeldt
fredrik.sandefeldt@svalner.se
T +46 70 431 26 42

Erik Nilsson
erik.nilsson@svalner.se
T +46 73 525 15 51

United Kingdom

Hansuke

Spring 2021: Reshaping UK's tax landscape

In his Budget of 3 March, the Chancellor of the Exchequer, set out HM Government's post-Brexit medium-term tax and spending plan, as the UK economy showed early signs of recovery from the pandemic disruption. This was followed by the inaugural "Tax Day" on 23 March, where Chancellor Sunak announced more than 30 tax policies and consultations with the stated aim to modernise UK tax administration and policy development. Two important consultations dealing with Transfer Pricing (TP) documentation and Uncertain Tax Treatments were announced as part of the "Tax Day" measures.

The UK government must balance the need for short-term investment incentives for businesses with longer-term tax increases to fund the gaping budget deficit. The headline corporation tax rate is to increase to 25% from April 2023 (currently 19%).

UK REITs

As part of an initiative to promote UK funds, HM Government has been consulting on changes to the UK REIT regime. The changes are designed to make the UK REIT regime more attractive and simpler. UK REITs are exempt from UK tax on income and capital gains arising on qualifying UK property rental business. The increase in the main corporate tax rate to 25%, has further increased the attractiveness of UK REITs. UK REITs are required to distribute a minimum of 90% of their qualifying profits to unitholders as dividends (referred to as property income distributions, or "PIDs"). PIDs are normally paid after deduction of WHT at the basic rate of income tax (20%), which the UK REIT pays across to HMRC on behalf of the unitholder. Certain classes of unitholders, such as UK charities and pension funds, are eligible to receive gross PIDs.

UK funds review consultation

In January 2021, the HM Treasury requested stakeholders to provide tax, regulatory and other input as part of its broader review of the UK funds regime. The aim of the wholescale review is to make the UK a more attractive location to set up, manage and administer funds, and which in turn will support a wider range of more efficient investments better suited to investors' needs.

In response, the Investment Association (IA), UK's main funds trade body, has called for the abolishment of taxes on funds, in order for the UK to be able to compete as a global hub for fund management. The IA has highlighted that complicated tax rules in the UK deter international investors from investing in UK funds compared with the favourable tax regimes elsewhere that fully exempt funds from taxes.

TP documentation consultation

The consultation launched on Tax Day seeks to fully align UK's approach with that of OECD BEPS Action 13 requirements and to introduce an additional obligation to lodge an annual schedule reporting TP data on intra-group cross-border transactions. An international dealings schedule being proposed will be in addition to the master and local file requirements.

Presently, the TP documentation obligations in the UK are non-specific, requiring such records to be kept as are sufficient for a complete and accurate tax return to be lodged. The new proposals for larger businesses will require additional TP information to be maintained in standardised formats which are to be promptly furnished to HMRC upon request.

Reporting of Uncertain Tax Treatments consultation

On Tax Day, HM Government published the second round of its consultation on the reporting of uncertain tax positions, together with a response document to the original consultation from March 2020. The latest consultation round includes important changes to the scope and design of the original measures, including an increase in the de-minimis threshold. These welcome changes provide for greater clarity and limit the scope of the reporting. The measures are scheduled to be included in the 2021/22 Finance Bill and shall apply to returns to be lodged after April 2022.

If you wish to discuss these topics, please contact:
Hansuke, London

Ali Kazimi
*alikazimi@
hansuke.co.uk*
T +44 7818 522 779

John Buckeridge
*johnbuckeridge@
hansuke.co.uk*
T +44 203 903 1920

wts global

Contact

Belgium
Yannick Cools
yannick.cools@tiberghien.com
T +32 3 443 20 00
Bart De Cock
bart.decock@tiberghien.com
T +32 3 443 20 00
Dirk Coveliers
dirk.coveliers@tiberghien.com
T +32 3 443 20 00
Tiberghien Brussels
Havenlaan|Avenue du Port 86C B.419
1000 Brussels
www.tiberghien.com

Czech Republic
Jana Alfery
jana.alfery@alferypartner.com
T +420 221 111 777
Alena Křížová
alena.krizova@alferypartner.com
T +420 221 111 777
WTS Alfery s.r.o.
Václavské náměstí 40
110 00 Praha 1
www.alferypartner.com

Denmark
Ingólfur Örn Ingólfsson
ioi@lundgrens.dk
T +45 54 55 23 24
Jakob Schilder-Knudsen
jak@lundgrens.dk
T +45 22 47 43 75
Lundgrens Law Firm P/S
Tuborg Boulevard 12
2900 Hellerup
www.lundgrens.dk

Finland
Mikko Alakare
mikko.alakare@castren.fi
T +358 50 592 3112
Castrén & Snellmann Attorneys Ltd.
Eteläesplanadi 14, PO Box 233
00131 Helsinki
www.castren.fi

France
Yves Robert
yves.robert@fidal.com
T + 33 1 55 68 15 76
Inès Boiron-Chabadel
ines.boiron-chabadel@fidal.com
T + 33 1 55 68 14 17
Prescilla Eliazord
prescilla.eliazord@fidal.com
T + 33 1 55 68 15 76
François Warcollier
francois.warcollier@fidal.com
T + 33 01 55 68 15 06
Fidal
32-34 Avenue Kléber
75016 Paris
www.fidal.com

Germany
Robert Welzel
robert.welzel@wts.de
T +49 69 1338 456 80
Steffen Gnutzmann
steffen.gnutzmann@wts.de
T +49 40 3208 666 13
WTS Steuerberatungsgesellschaft mbH
Taunusanlage 19
60325 Frankfurt am Main
www.wts.de

India
Punit Shah
punit.shah@dhruvaadvisors.com
T +91 22 6108 1000
Vishal Lohia
vishal.lohia@dhruvaadvisors.com
T +91 22 6108 1054
Dhruva Advisors LLP
1101 & 1102, One Indiabulls Centre
Tower 2B, 841, Senapati Bapat Marg
Elphinstone Road (West)
400 013 Mumbai
www.dhruvaadvisors.com

wts global

Contact

Ireland
Rachel Gaffrey
rachel.gaffrey@sabios.ie
T +353 1 5980 800
Sabios, Dublin
4 Waterloo Rd, Ballsbridge
Dublin 4, D04 A0X3
www.sabios.ie

Italy
Olivero Cimaz
oliviero.cimaz@sbnp.it
T +39 02 7636931
Studio Legale e Tributario
Biscozzi Nobili Piazza
Corso Europa 2
20122 Milano
www.sbnp.it
Marina Lombardo
marina.lombardo@ra-wts.it
T +39 3479 3108 63
WTS R&A Studio Tributario
Corso Re Umberto, 10
10121 Torino
www.ra-wts.it

Luxembourg
Maxime Grosjean
maxime.grosjean@tiberghien.com
T +352 27 47 51 11
Madeline Morel
madeline.morel@tiberghien.com
T +352 27 47 51 11
Tiberghien Luxembourg
23, Boulevard Joseph II
1840 Luxembourg
www.tiberghien.com

Netherlands
Denis Pouw
denis.pouw@wtsnl.com
T +31 10 217 9173
WTS World Tax Service B.V.
Conradstraat 18
3013 AP Rotterdam
www.wtsnl.com

Poland
Magdalena Kostowska
magdalena.kostowska@wtssaja.pl
T +48 61 643 4550
WTS Saja
ul. Roosevelta 22
60-829 Poznań
www.wtssaja.pl

Spain
Marina Esquerrà
marinaesquerra@arcoabogados.es
T +34 934 871 020
ARCO Abogados y Asesores Tributarios
Beethoven 15, 5ª
08021 Barcelona
www.arcoabogados.es

Sweden
Fredrik Sandefeldt
fredrik.sandefeldt@svalner.se
T +46 70 431 26 42
Erik Nilsson
erik.nilsson@svalner.se
T +46 73 525 15 51
Svalner Skatt & Transaktion
Smålandsgatan 16
111 46 Stockholm
svalner.se

United Kingdom
Ali Kazimi
alikazimi@hansuke.co.uk
T +44 7818 522 779
John Buckeridge
johnbuckeridge@hansuke.co.uk
T +44 203 903 1920
Hansuke Consulting Ltd
United House, North Road
London, N7 9DP
www.hansuke.co.uk

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Imprint

WTS Global
P.O. Box 19201 | 3001 BE Rotterdam
Netherlands
T +31 (10) 217 91 71 | F +31 (10) 217 91 70
wts.com | info@wts.de

Publisher

WTS Steuerberatungsgesellschaft mbH
Frankfurt Office
Taunusanlage 19 | 60325 Frankfurt/Main | Germany

→ Robert.Welzel@wts.de T +49 69 1338 45680
→ Steffen.Gnutzmann@wts.de T +49 40 3208 66613
→ Christiane.Schoenbach@wts.de T +49 69 1338 45670
→ Katrin.Classen@wts.de T +49 69 1338 45672
→ Christian.Bischler@wts.de T +49 69 1338 45620
→ Guido.Dahm@wts.de T +49 69 1338 45610
→ Stefan.Zwiesele@wts.de T +49 69 1338 45630

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