Inside Indirect Tax

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About this Newsletter

Welcome to *Inside Indirect Tax*—a publication from KPMG's U.S. Indirect Tax practice focusing on global indirect tax changes and trends from a U.S. perspective. *Inside Indirect Tax* is produced on a monthly basis as developments malaysia. We look forward to hearing your feedback to help us in providing you with the most relevant information to your business.

Announcement

KPMG Tax News Flash Newsletter on COVID-19 Measures

KPMG has set-up a dedicated TaxNewsFlash newsletter reporting tax measures adopted by countries around the globe in response to the coronavirus (COVID-19) pandemic, including indirect tax measures. We recommend readers to subscribe to this newsletter as jurisdictions adopt or amend their measures at a frantic pace. The most common indirect tax measures adopted by jurisdictions so far include: delay in VAT return filing and paying deadlines, relief from late payment interest and penalties, accelerating VAT refunds, and other targeted measures such as exempting certain medical equipment.

Global Rate Changes

— **Costa Rica:** Costa Rica will apply a reduced VAT rate of 4 percent to engineering, architecture, topography, and civil works construction services for eligible projects (i.e., those civil works projects that have obtained approval from the *Colegio Federado de Ingenieros y Arquitectos* before September 30, 2019). Eligible projects will be registered in the Exonet system, and then will be granted an authorization number and generic note. To claim the 4 percent rate, taxpayers must indicate the corresponding project number and the authorization number on invoices that reflect the reduced VAT rate. The reduced rate is effective from July 1, 2020 through June 30, 2021. To read a report prepared by the KPMG International member firm in Costa Rica, please click here.

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— **Germany:** Effective July 1, 2020, Germany proposes to temporarily reduce the standard VAT rate from 19 percent to 16 percent and the reduced VAT rate from 7 percent to 5 percent. The new rates, if approved by the parliament, will apply until December 31, 2020.

— **Mexico:** A legislative proposal, presented to the Mexican Congress in June 2020, would temporarily reduce the VAT rate from 16 percent to 10 percent. The proposed VAT rate reduction would be effective from the date of publication of the enacted legislation in the official gazette until December 31, 2020. The reduced VAT rate would not apply for the "northern border region where the VAT rate is already set at 8 percent and would add a new "southern border region" where the 8 percent rate of VAT would apply. The proposal would define the geographic location of both border regions to include the 20-kilometer border strip parallel to the international borders to the north and south of Mexico. To read a report prepared by the KPMG International member firm in Mexico, please click here.

— **Lesotho:**[1] Effective April 1, 2020, Lesotho increased the VAT rate applicable to the sale of electricity from 8 percent to 9 percent and the VAT rate applicable to sale of telecommunication services from 12 percent to 15 percent.

The Americas

United States: Proposals to Impose Sales Tax on Digital Advertising in New York

Identical bills were recently introduced in the New York Assembly and Senate that would impose sales and use tax on digital advertising services, unless such services were purchased for resale. Assembly Bill 10321 and Senate Bill 8166. The bills define "digital advertising services" as "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services which markets or promotes a particular good, service, or political candidate or message." The bills do not provide any methodology for sourcing digital advertising services to the state.

A separate bill had previously been introduced in the New York Senate that would have imposed a gross receipts tax on revenues derived from digital advertising services. That bill, which is pending in committee, defines "digital advertising services" as "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services, that use personal information about the people the ads are being served to." For more information, click here.

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Brazil: Proposal to Introduce Digital Services Tax

On May 4, 2020, the Chamber of Deputies of Brazil accepted for consideration draft law No. 2,358/2020, which would introduce a digital services tax, the Contribution for Intervention in the Economy, covering digital services rendered by large technology companies (CIDE-Digital). The CIDE-Digital would be levied on gross receipts related to (1) advertising to users located in Brazil; (2) making available a digital platform that allows users to interact with the objective of the sale of goods or services directly between such users, if one user is located in Brazil; and (3) transferring data collected from or generated by users located in Brazil during the use of a digital platform. If the gross receipts resulting from the advertising on a digital platform also includes advertising displayed to users located in other countries, the tax base would be apportioned based on displays to users located in Brazil. The same applies to the transfer of data (i.e., the gross revenue should be related only to the transfer of data of users located in Brazil). According to the draft law, the CIDE-Digital would be levied progressively: (1) 1 percent on amounts up to BRL 150 million ($28.8 million); (2) 3 percent on amounts exceeding BRL 150 million and under BRL 300 million ($57.7 million); and 5 percent on the amount exceeding BRL 300 million. CIDE-Digital taxpayers would be any legal entity, domiciled in Brazil or abroad, with gross receipts related to the mentioned taxable events, and that belong to an economic group that earned, in the previous calendar year: (1) global gross receipts exceeding BRL 3 billion ($576.9 million); and (2) gross receipts exceeding BRL 100 million ($19.2 million) in Brazil. Taxpayers would be required to pay the CIDE-Digital by the last working day of March of the year following the year in which the taxable sales are made.

Source: Orbitax, Draft Bill for Introduction of Digital Services Tax Submitted in Brazilian Parliament (May 8, 2020). Brazil—Chamber of Deputies Examines Proposal to Create Digital Contribution (May 11, 2020), News IBFD.

Chile: Guidance on Nonresident VAT Digital Services Rules

On June 11, 2020, the tax authority of Chile published Circular No. 42 that intends to clarify the application of a new law governing VAT on digital services provided by nonresidents, which became effective June 1, 2020. (For KPMG's previous coverage of this development, please click here.) According to the Law, digital services subject to VAT include (1) intermediary services, (2) sales of digital content such as videos, music, games (downloading, streaming or others), (3) sales of software, platform and IT infrastructure, and (4) advertisement (regardless of the presentation or transmission method). The Circular includes a detailed explanation of the new digital services to be taxed, with clarifications on the facts triggering the application of VAT. For instance, the Circular clarifies that intermediation services provided by a nonresident to another nonresident vendor and commissions charged to a nonresident developer for the sale of an app through that platform are not subject to VAT. Whether the sale of the app to a Chilean customer is subject to VAT must be determined under the general rules. However, commissions charged to a domestic service provider (of the underlying service), who uses the intermediation service, may be subject to VAT if nexus or jurisdiction to tax exists. The same applies in case of a Chilean user who buys goods to be imported into Chile.

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The Circular further clarifies the nexus criteria to be used as well as rules for sourcing income to Chile. An individual customer will be deemed to be in Chile if at least two of the following conditions are met: (1) the IP address of the corresponding device or any other localization mechanism shows that the customer is situated in Chile; (2) the credit card, bank account, or any other payment method used was issued or registered in Chile; (3) the domicile indicated by the user for invoicing purposes or the issuance of a proof of payment is situated in Chile; or (4) the subscriber identity module (SIM) of the mobile phone used to receive the service shows "Chile" as country code. The VAT Law indicates that these factors must be analyzed when the service is ordered and when payment is made. If at either point, two of the conditions are met, the service will be presumed used in Chile. However, if a service is in fact used outside of Chile, the taxpayer may prove that the services are not subject to VAT in Chile.

The Circular also provides rules dealing with the interaction between VAT and withholding taxes (WHT) on digital services. It provides states that payments for digital services provided by nonresidents will be subject to only one of those taxes. As such, unless the service beneficiary informs the vendor that he is a VAT taxpayer, the payment to the nonresident provider will be exempt from WHT for the services that fall under the scope of the new VAT rules on digital services. The nonresident provider will be responsible for the declaration and payment of the VAT. If a service is subject to WHT (and not to VAT), the person responsible for the payment will be the resident beneficiary of such service.

In general, the VAT Law indicates that the VAT must be paid by the provider of the service. However, if the digital services are provided through a platform or marketplace, the Circular states that the platform or marketplace will be responsible for the remittance of the tax. Moreover, when the customer is a VAT taxpayer, the customer will be responsible to self-assess VAT under the reverse charge mechanism, thus relieving the nonresident provider from any VAT obligation. As such, the Chilean VAT taxpayer will need to inform the nonresident provider that the customer will be responsible for the tax.

As a consequence, nonresident providers selling digital services directly to consumers as well as online marketplaces facilitating such sales are required to register for VAT in Chile under the simplified registration regime. These taxpayers are required to declare and pay the VAT on a monthly or quarterly basis, at the taxpayer's choice. Taxpayers must declare online in a simplified form and remit the tax collected in foreign currency. Remittances are due by the 20th of the month following the ending of the referred period. Sales for June 2020 will be included in the July 2020–September 2020 period, to be paid by October 20, 2020.

Source: Chile—Tax authorities launch public consultation on clarifications of VAT rules on digital services (May 22, 2020), News IBFD.

Costa Rica: VAT on Digital Services Implemented

On June 11, 2020, the tax authority of Costa Rica published Resolution DGT-R-13-2020, which implements the VAT provisions relating to digital services provided by non-resident vendors. According to the Resolution, effective

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August 1, 2020, Costa Rican credit card issuers will need to charge a 13 percent VAT in addition to the transaction amount for sales made by the nonresident digital services vendors listed in the Resolution, regardless of the status of the customer. Digital service providers included on the list may opt to register for and collect VAT on sales of digital services made to customers in Costa Rica. Nonresident digital service providers that are not on the list have no VAT obligations in Costa Rica, but should regularly review the tax authority's list of digital services providers falling within the scope of the VAT as the tax authority will update the list every 6 months. To read a report prepared by the KPMG International member firm in Costa Rica, please click here.

Mexico: Guidance on Nonresident VAT Digital Services Rules

On May 12, 2020, Mexico published the First Modification to the miscellaneous rules implementing the new VAT rules on digital services provided by nonresidents, which are effective June 1, 2020. (For KPMG's previous discussion on the new rules for nonresident digital services providers, click here.) Under the tax reform approved last year, nonresident vendors are required to register for and charge VAT when making sales of digital services to customers in Mexico. Digital services are sourced to Mexico if any of the following conditions are met: (1) the customer is domiciled in Mexico; (2) the payment intermediary through which the digital service is purchased is located in Mexico; (3) the IP address of the device used to purchase the digital services is located in Mexico; or (4) the SIM card country code of the phone used to purchase the digital services is located in Mexico.

Digital intermediaries and marketplaces facilitating sales of digital services, and connecting sellers of goods or services with buyers in Mexico, are also subject to the same rules as those nonresidents making direct sales of digital services to customers in Mexico. In addition, these intermediaries are required to: (1) publish the VAT amount applicable to the goods, services or the temporary use or enjoyment of goods via their website or platform; (2) provide the tax authority with information about their customers (whether individuals or legal entities) when they act as an intermediary, even if they do not process the corresponding payment or related VAT; (3) collect the sales price plus the amount of VAT for the underlying transactions; and (4) withhold VAT and income tax from individuals selling through the platform. The withholding amount is 50 percent of the VAT effectively collected or 100 percent if the individuals do not provide their Mexican tax number (RFC). Likewise, pursuant to income tax law measures, intermediaries of digital services that collect the sales price and VAT on behalf of the seller, are required to withhold income tax only when the seller is an individual taxpayer. The withholding tax rate depends on the type of service provided and the amount of gross income received by the individual during the taxable period: ground transportation services of passengers and delivery of goods (2 percent–8 percent); accommodation services (2 percent–10 percent); and sales of goods and services (0.4 percent–5.4 percent).

The primary changes in the miscellaneous rules concern the required forms to be used by digital services providers. Nonresidents providing digital services in Mexico, are required to pay the VAT collected through the "VAT return for the provision of digital services" no later than the 17th day of the following month

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to which the payment corresponds. During 2020, the quarterly obligation to provide information on the number of services or operations carried out in each calendar month with recipients located in Mexico and who receive their services will be considered as having been satisfied with the filing of the "VAT return for the provision of digital services." Digital services intermediaries can opt to calculate the income tax withholdings of each taxpayer on a daily basis, applying to the total amount of daily income received by the taxpayer.

Intermediaries of digital services must report the VAT withholding through the "VAT withholdings return for technological platforms" and for the income tax withholding for individuals through the "Income tax withholding return for technological platforms" no later than the 17th day of the following month in which the withholding is made. Intermediaries of digital services must provide the tax authorities with information about their customers who sell goods and services even if they have not collected the sales price and VAT, through the "Information return of digital intermediation services between third parties" no later than the 10th day of the following month to which the information corresponds. Intermediaries of digital services may choose to publish the price at which the goods or services are offered by the sellers without expressing the VAT separately, as long as the price includes VAT and they disclose that the prices have "VAT included." Finally, additional rules are provided for individuals selling through technological platforms. To read a report prepared by the KPMG International member firm in Mexico, please click here.

On May 29, 2020, Mexico published the Second Amending Resolution to the miscellaneous rules implementing the new VAT rules on digital services provided by nonresidents, which clarify the treatment applicable to cancelations, refunds, and discounts. In case of refunds of goods or cancelation of services when platforms operate as intermediaries, the platform will refund the collected amount (VAT included) to the client. If the VAT pertaining to the refund was already paid to the tax authority, the platform may deduct this refund (VAT excluded) from the total of transactions subject to VAT on the VAT returns of the following months, until the amount is fully deducted. This deduction will be possible only if the platform has a Mexican tax ID and issues an expense receipt (CFDI egreso). In case of cancelations of services, refunds, or discounts on services for which digital platforms perform a VAT withholding, individuals may reduce the amounts at issue (VAT excluded) on an amended VAT return of the corresponding month, in order to cancel complete or partially such operation. For refunds or discounts of services where the individual considers the VAT withholding performed by the digital platforms as a final payment, the corresponding expense receipt (CFDI de egreso) must be issued. If a cancelation was made, the corresponding receipt must be cancelled. The Individual must submit a refund request before the tax authority with the following documentation: (1) the processing file 6/PTL; (2) the issue or cancelled receipt document; and (3) the receipt of withholdings and payments issued by the digital platform or the VAT return.

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European Union: VAT Committee Guidelines on Sourcing of Services Related to Admissions to Entertainment and Educational Events

On April 8, 2020, the European Commission published an updated version of the VAT Committee Guidelines, which address the sourcing rules for the sale of admissions and related ancillary services to a taxpayer for cultural, artistic, sporting, scientific, educational, entertainment, or similar events. The VAT Committee was set up to promote the uniform application of the provisions of the EU VAT Directive and give some nonbinding guidance on the application of the Directive. According to the EU VAT Directive, the services in question are sourced where the events physically take place. According to the VAT Committee, the provision at issue should be interpreted as concerning the type of services provided (services related to event admission) and not the type of taxpayer providing them.

The VAT Committee further advised that when the event takes place in multiple EU Member States, the provision of services should be apportioned among the Member States based on the number of days the event takes place in each Member State. The VAT Committee noted, however, that when the "essential part" of the event is only in one Member State, any other ancillary event in another Member State should be treated as occurring in the Member State where the essential part takes place.

The VAT Committee further held that when determining the applicability of the sourcing rules, the duration of a course, seminar, or conference should not be the only deciding factor in whether it qualifies as an event. Member states must also look at elements such as content, place, and time. However, the longer the duration of a course, seminar, or conference, the less likely it is to qualify as an event. As guidance, the VAT Committee observed that an event usually will not last longer than a week.

Finally, the VAT Committee held that Member States should disregard advance registration and payment for a course, seminar, or conference when applying the sourcing rules because the fact that the coordinator knows the participants and can adapt to their "needs or wishes" is immaterial. Further, when a company acquires a service that qualifies as an event, the fact that company employees are present at the event is also irrelevant when applying the sourcing rules.

Source: Tax Analysts, Committee Advises on Scope of EU VAT Rules on Event Services (Apr. 9, 2020).

European Union: Cost Sharing Exemption Does Not Apply To Members in Third Countries

On April 23, 2020, the Court of Justice of the European Union (ECJ) published the Opinion of its Advocate General (AG) in *Kaplan International Colleges UK Ltd,* Case C-77/19, regarding whether the cost sharing exemption may be applied to members established in third countries. The cost sharing exemption

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applies when two or more organizations (whether businesses or otherwise) with exempt or non-business activities join together on a co-operative basis to form a cost sharing group (CSG). A CSG is a separate, independent entity, set up to enable its members to sell certain qualifying services at cost to themselves exempt from VAT. In the case at hand, the taxpayer, a holding company, owns 100 percent of the shares of a number of UK subsidiaries (international colleges) which provide education services exempt from VAT. Some of them form a VAT group in the UK. The international colleges which recruit their students through a network of agents in many different countries, established a company limited by shares established in Hong Kong (where there is no VAT system). The Hong Kong company and the international colleges formed a cost sharing group. HMRC established a VAT liability in the UK on the ground that services received by the holding company from the Hong Kong company do not fall within the scope of the VAT exemption for CSG and are therefore subject to the self-assessment requirement in the UK. As the holding companies sales are predominantly VAT exempt, the VAT incurred on expenditures is not recoverable.

The AG first addressed the territorial scope of the cost sharing exemption in the EU VAT Directive. The AG is of the opinion that the provision of services by a CSG in a third state is not covered by the exemption. Although the wording of the article does not include any geographical restriction, its predecessor legal provision placed the VAT exemption of CSG under the heading "exemptions within the territory of the country." At the same time, in the EU VAT Directive, the exemption is placed under Chapters 1 to 3 in Title IV which do not entail any cross border transactions. This interpretation avoids an inconsistency with article 11 of the EU VAT Directive (2006/112) on VAT groups, which only refers to undertakings established in the same Member State. The CSG exemption lays down less stringent requirements with respect to the nature of the group than article 11. It would therefore be inconsistent on this basis to allow a cross-border VAT exemption which cannot be achieved by the VAT group provision imposing stricter conditions. Moreover, the absence of distortion of competition required by the CSG exemption would be impossible to evaluate for a single tax authority in situations involving third countries. The AG is further of the view that, in determining the existence of distortion of competition, it must be examined whether the group can be certain of keeping its members as customers even if there is no exemption. If the services provided by the group are tailored to the needs of the members such that the group can also be certain that the members will purchase those services, there is, in principle, cooperative action and no distortion of competition. Finally, the AG opined that even though some members of the CSG are also part of a VAT group in the United Kingdom does not therefore preclude the application of the CSG exemption. The ECJ must now decide whether to follow the AG's Opinion.

Source: European Union; United Kingdom—ECJ Advocate General's Opinion (VAT): Kaplan International Colleges UK Ltd v. The Commissioners for Her Majesty's Revenue and Customs (Case C-77/19)—Application of VAT Exemption to CSG; Territorial Application; Distortion of Competition—Details (May 4, 2020), News IBFD.

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European Union: ECJ Clarifies Scope of Obligation to Verify Whether Customer has a Fixed Establishment

On May 7, 2020, the ECJ published its judgment in *Dong Yang Electronics Sp. z o.o.*, Case C-547/18, regarding whether a subsidiary may constitute a fixed establishment of a parent company established outside the EU. Recall, in the case at hand, Dong Yang Electronics (Poland) ("Dong Yang") assembles printed circuit boards for LG Display established in Korea ("LG Korea"). This assembly qualifies as a service for VAT purposes, with the right to levy VAT being allocated to the country in which the customer is established or has a fixed establishment. Dong Yang obtains the components from a subsidiary of LG Korea (LG Poland Production), although LG Korea remains the owner. After assembly, Dong Yang Electronics sends the printed circuit boards back to LG Poland Production. Dong Yang issues invoices, without VAT, to LG Korea, because it has a contract with LG Korea and thus regards LG Korea as the purchaser of its services. Furthermore, LG Korea assured Dong Yang that it did not have a fixed establishment for VAT purposes in Poland. The Polish tax authorities argued that Dong Yang should have charged Polish VAT to LG Korea because LG Poland Production qualifies for VAT purposes as a fixed establishment of LG Korea and this fixed establishment is the actual beneficiary of the services of Dong Yang. The contractual structure of the business model means that LG Korea has access to the personnel and technical resources of LG Poland Production. According to the Polish tax authorities, on the basis of the type of services performed and their use, Dong Yang, as vendor, should have determined for which fixed establishment of the customer the service was performed. It would thus have determined that LG Korea had a fixed establishment in Poland. The AG previously opined that a subsidiary of a company established outside the EU should not be regarded as a fixed establishment for VAT purposes. The ECJ however did not completely follow its AG's Opinion.

The ECJ first addressed whether it can be inferred from the fact that a company established outside the European Union has a subsidiary in the territory of Poland that a fixed establishment for VAT purposes exists in Poland. According to the ECJ, the Free Trade Agreement between the EU and Korea establishes that Korean investors may undertake and pursue economic activity in Poland only by setting up specific legal entities. Hence, this provision precludes the possibility for Korean companies to directly carry out an economic activity in Poland. However, the ECJ recalled that taking into account the economic and commercial reality is a fundamental criterion for the application of the EU VAT system. Therefore, the classification of an establishment as a fixed establishment cannot depend solely on the legal status of the entity concerned. Although it is possible for a subsidiary to set up a fixed establishment of its parent company, such a classification depends on the material conditions laid down in the EU VAT Implementing Regulation, which must be examined in the light of economic and commercial reality. The regulation states that a fixed establishment is any establishment, other than the place of establishment of a business, characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services provided to it for its own needs.

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The ECJ then addressed whether a third party is required to examine contractual relationships between a company established outside the EU and its subsidiary to determine whether the former company has a fixed establishment in Poland. While the vendor should check whether its customer has a fixed establishment involved in the transaction, this obligation only concerns the contract for the provision of services between the provider and the taxpayer to whom the service is provided and not the contractual relations between that taxpayer to whom the service is provided and an entity that may be identified as its fixed establishment.

Source: PL: ECJ, May 7, 2020, Case C-547/18, Dong Yang Electronics Sp. z o.o. v. Dyrektor Izby Administracji Skarbowej we Wroc awiu, Case Law IBFD.

European Union: Overview of Recent VAT Expert Group Working Papers

On May 11, 2020, the VAT Expert Group (VEG) of the European Commission held its 26th meeting following which it published several working papers. The VEG assists and advises the European Commission on VAT matters. The group is composed of individuals appointed in a personal capacity with the requisite expertise in the area of VAT and organizations representing in particular businesses and tax practitioners which can assist in the development and implementation of VAT policies.

In VEG No. 089, the VEG addresses the VAT treatment of financial services. Financial and insurance services are VAT exempt under the EU VAT Directive. Since VAT incurred on expenditures relating to these services is non-deductible, financial institutions apply different methods to reduce the amount of VAT that becomes an actual cost. Cost sharing groups were widely used for this purpose, until the ECJ decided in a number of cases that the CSG exemption cannot be applied to taxpayers performing financial services. Case C-326/15, *DNB Banka* (September 21, 2017). In addition, the VEG observed that the current system of VAT exemptions has proven to be too complex, as reflected in the volume of litigation in the area. The VEG further pointed out that there are special sector-specific taxes also applicable for businesses in the financial sector. To tackle these challenges, the Commission first ordered a study to evaluate the current rules, to identify options for the reform, and to analyze the impact of the different options. The final report is due by September 2020.

In VEG No. 090, the VEG discusses the VAT treatment of the platform economy. The working paper reviews the existing ECJ case law on the sharing economy, describes the different options available for the VAT treatment of such business models, and provides an outlook on the work being done in the international community. Key issues regarding the sharing economy are the taxpayer status of the vendor and the qualification of the service provided by the electronic interface operator to the vendor. In VEG No 091, the VEG discusses upgrading the EU VAT system: the working document provides a comprehensive overview of the steps taken to reduce the complexity of the current EU VAT system and to make it more fraud-proof. Key focus areas for the Commission in this regard are keeping up with new business models, taking advantage of technological development and reducing the administrative burden for businesses.

Source: European Union—European Commission—VAT Expert Group Meeting on May 11, 2020 (Apr. 30, 2020), News IBFD.

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European Union: VAT Treatment of Discounts Clarified

On May 28, 2020, the ECJ published its judgment *in World Comm Trading Gfz SRL*, Case C-684/18, regarding the VAT treatment applicable to discounts. In the case at hand, a taxpayer established in Romania concluded a distribution agreement with a Finnish company for the purchase of a series of mobile telephony products. The products were delivered to the taxpayer in Romania from Finland, Germany, Hungary, and Romania. The Finnish company was VAT registered in the countries from which the products were dispatched. The taxpayer received a discount based on the ordered quantity, regardless of where they were delivered from (i.e., from Romania or other EU Member States). The Finnish company issued a single invoice each quarter with a negative amount from its Finnish VAT number. The taxpayer recorded the entire amount as an intra-EU acquisition, even if part of the discount related to the goods delivered from Romania. The Romanian tax authority did not agree with this approach, stating that the taxpayer had incorrectly adjusted its initial right to deduct for the entire discount received and should have distinguished between domestic and intra-EU sales. The taxpayer objected to this decision, claiming that it was unlawfully denied the right to deduct VAT. Applying the law as the tax authority did would have irreparable consequences for its tax situation, from the point of view of the principle of neutrality. The Finnish company had already ended its activities in Romania at the time of the tax inspection. As a result, it would no longer have had the possibility to invoice the discounts for domestic deliveries separately or adjust its already paid VAT.

The ECJ first analyzed the modification of the VAT base when a discount is granted as was asked by the referring court. Considering, however, that the dispute related to the correction of deductible VAT, the ECJ has redirected the issue to the adjustment of the initially deducted VAT. The ECJ recalled that an adjustment is necessary due to a change in any of the elements initially taken into account to calculate the deductible VAT. This adjustment needs to result in the amount of VAT that would have been deductible if the change would have been taken into account from the start. The ECJ thus considered the adjustment of the initial VAT deduction appropriate. The ECJ further concluded that the fact that the taxpayer does not have a separate invoice issued by the domestic vendor regarding the discounts granted for domestic sales (only an invoice issued by a vendor established abroad relating to both intra-EU and domestic sales), does not exempt it from adjusting the VAT deduction initially taken, since this obligation is an integral part of the VAT deduction mechanism. Finally, the ECJ denied any kind of effect to the fact that the vendor had ceased to operate in Romania. The circumstance that the VAT charged by the vendor has not been adjusted is irrelevant for the purposes of adjusting the VAT deducted by the customer.

Source: RO: ECJ, May 28, 2020, Case C-684/18, World Comm Trading Gfz SRL v. Agentia Nationala de Administrare Fiscal (ANAF), Directia Generala Regional a Finantelor Publice Ploiesti, Case Law IBFD.

France: Expanded VAT Exemption for Funds Management Operations

On May 6, 2020, the French tax authority published guidelines clarifying the VAT exemption for the management of special investment funds. Effective

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January 1, 2020, France amended its law relating to the exemption regarding the management of undertakings for the collective investment in transferable securities (UCITS), alternative investment funds (AIF), and collective investments with similar characteristics. Under prior law, reference was only made to UCITS and alternative funds that were expressly listed in the Monetary and Financial Code, which largely restricted the application of the VAT exemption. When a new type of fund was created from a regulatory standpoint, this gave rise to uncertainty due to the restrictive nature of the references to the Monetary and Financial Code and the strict interpretation of any exemption. Because of reference to European legislation and particularly to the funds covered by the UCITS Directives and now by the Alternative Investment Fund Managers (AIFM) Directive, certain alternative investment funds that were not explicitly covered by the French statutes are allowed to come within the scope of the VAT exemption.

The connection regarding alternative investment funds covered by the European directive is now well established. However, the reference to the funds covered by the AIFM Directive may be confusing as it does not regulate the funds themselves, but the companies that manage them. Only EU Member States are authorized to recognize alternative investment funds. However, this will allow the scope of the exemption to be extended to European AIFs, provided that they comply with the conditions set out in European case law, as described below.

Finally, the new provision refers to other collective investments with characteristics that are similar to UCITS and that are in competition with UCITS. To benefit from the VAT exemption, funds must meet the following conditions: (1) being a collective investment; (2) operating on the principle of spreading the risk; (3) being subject to specific state supervision; (4) having a return on investment that is subordinate to performance of the investments, thus implying that asset holders must assume the risks inherent in the management of the assets. The tax authority notes that the condition relating to state supervision is assessed at the level of the collective investment, and not at the level of the management company, and is deemed to be met as soon as the collective investment is registered, declared or notified to the competent authorities. State supervision differs among Member States, but the administrative doctrine lays down now a fairly broad presumption. To read a report prepared by the KPMG International member firm in France, please click here.

Italy: Overview of Recent Indirect Tax Developments

On April 30, 2020, the ECJ published its judgment in *Société Générale S.A.*, Case C-565/18, in which it held that Italy's tax on financial transactions does not discriminate between resident and nonresident financial market participants and intermediaries under article 63 of the Treaty on the Functioning of the European Union. The article prohibits any differences in tax treatment that may restrict the free movement of capital. According to the ECJ, because the tax is based on the value of the contract and type of instrument traded, regardless of where the transaction took place and the residence of the financial market participants and intermediaries, resident and nonresident companies are subject to an identical tax regime. Therefore, cross-border financial transactions and transactions within Italy are treated the same.

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On May 4, 2020, the Italian tax authority (ITA) published Protocol No. 185115/2020, amending Protocol No. 89757/2018 of April 30, 2018, which provided implementing rules for the issuance and receipt of electronic invoices. Electronic invoices must be issued and received through the tax authorities' SdI system (*sistema di interscambio*). Qualifying taxpayers and their representatives may consult and download issued and received electronic invoices through a specific online service available on the ITA website, provided that they explicitly adhere to such service by September 30, 2020 (previously May 4, 2020).

On May 14, 2020, the EU published Council Implementing Decision (EU) 2020/647 authorizing Italy to continue to exempt from VAT those taxpayers whose annual gross receipts do not exceed EUR 65,000 ($73,500). The derogation applies retroactively from January 1, 2020 until December 31, 2024.

On May 25, 2020, the ITA released proposed rules to be used by yacht owners to access VAT reliefs on travel outside the EU. In July 2019, the European Commission launched proceedings against illegal tax breaks in the yacht industries of Italy. Current EU excise duty rules allow member states not to tax fuel used by a navigation company for commercial purposes. An exemption can apply only if the person leasing the boat sells such services to others. The European Commission considers that, in breach of EU rules, Italy allows chartered pleasure crafts, such as yachts, to qualify as "commercial" even if they are for personal use. This situation may allow them to benefit from excise duty exemption on fuel used to power their engines. The European Commission decided to refer Italy to the ECJ for its failure to remedy the issue. Moreover, current EU VAT rules allow tax exemptions for services when the effective use and enjoyment of the product is outside the EU. However, the rules do not allow for a general flat-rate reduction without proof of where the service is actually used. Italy has established VAT rules according to which the larger the boat is, the more the lease is presumed to take place in EU waters. As a consequence, the applicable VAT base can be substantially reduced. The Italian government has proposed a regime under which boat owners will be able to demonstrate the extent to which their voyage is undertaken outside EU waters, in direct response to the infringement proceedings. The Budget Law proposes that the sourcing of rental and similar services of pleasure boats will considered outside the EU if, through adequate means of proof, the effective use and effective use of the service outside the European Union is demonstrated. The provision identifies the means and test methods suitable for demonstrating the use of the pleasure boat outside the EU. The concepts of pleasure craft, provider, pleasure boat user, and test vehicle are defined and the obligation to keep documentation certifying the actual use of the boat is regulated.

Source: Italy—Electronic Invoicing—Tax Authorities Amend Implementing Rules (May 6, 2020), News IBFD; European Union; Italy—European Commission Authorizes Italy To Extend Application of Higher VAT Registration Threshold for Small Businesses (May 14, 2020), News IBFD; CCH, Global VAT News & Features, Italy To Bring Yacht Industry VAT Regime Into Line With EU Law (Jun. 1, 2020); Tax Analysts, Italian Financial Transaction Tax Does Not Violate EU Law (May 1, 2020).

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Kenya: Overview of Recent Indirect Tax Developments

On March 31, 2020, the Tax Appeals Tribunal of Kenya published its decision in *Coca-Cola Central East and West Africa Limited*, (TAT NO. 5) [2018], regarding the VAT treatment applicable to marketing and promotional services. In the case at hand, a taxpayer established in Kenya provided marketing and promotional services which it zero-rated for VAT purposes to its parent company in the US. It considered the services to be exported services. The Kenya Revenue Authority (KRA) took the position that the services were consumed locally. The Tribunal relied on the OECD guidelines, finding that the test for the export of services is based on where the services are used and consumed, and not where the services are performed. The Tribunal further evaluated the flow of services, which included that services flowed from the Kenyan entity to the US parent, which then provided services to a concentrate manufacturer in Swaziland (now Eswatini), with the products then imported into Kenya for sale. Based on this flow, the Tribunal determined that the benefit of the services was accrued by the US entity and the services were used and consumed by the US entity. As a consequence, the Tribunal held that the services in question should be zero-rated as an export of services.

On April 24, 2020, the KRA issued a public notice to remind digital marketplaces that they are required to charge VAT on items traded via their platforms. Following changes adopted in the Finance Act 2019, sales of digital services made through a digital marketplace are within the scope of VAT. (For KPMG's previous discussion on the amendments introduced in the Finance Act, click here.) Digital marketplaces are required to charge and account for the VAT on all sales made on the platform, including commissions charged to vendors who use digital platforms to facilitate sales. The KRA advised all non-compliant digital marketplaces to comply with the provisions of the VAT Act to avoid being charged penalties and interest on outstanding taxes.

On May 5, 2020, the Kenyan National Assembly accepted for consideration the Finance Bill for 2020. If approved, it would introduce a 1.5 percent digital service tax on the gross transaction value for services derived from the digital marketplace. The Finance Bill would further clarify circumstances for VAT deductions and remove the VAT exemption for the sale or import of specified aircraft.

The Kenyan National Treasury recently released the draft Value Added Tax (Digital Marketplace Supply) Regulations, 2020. According to the draft regulation, digital services subject to VAT would include (1) downloadable digital content; (2) subscription-based media; (3) software programs; (4) electronic data management; (5) sale of music, films and games; (6) provision of search-engine and automated helpdesk services; (7) tickets bought for live events, theaters, restaurants etc. purchased through the internet; (8) provision of distance teaching via pre-recorded medium or e-learning; (9) sale of digital content for listening, viewing or playing on any audio, visual or digital media; (10) provision of services on online marketplaces that link the vendor to the

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recipient; and (11) any other digital marketplace sale as may be determined by the Commissioner. Nonresident digital marketplaces facilitating the sale of such digital services will be required to register under the simplified VAT registration framework within thirty days from the publication of the final regulations. Nonresidents that are unable to register may appoint a tax representative to account for VAT on their sales. The new rules generally apply for business-to-consumer (B2C) sales, while business-to-business (B2B) sales are treated as imported services, which are generally subject to the self-assessment requirement.

Source: CCH, Global VAT News & Features, Kenya Reminds Online Marketplaces Of VAT Obligations (May 5, 2020); Orbitax, Kenya Announces Draft Regulations for VAT on Supplies Through Digital Market Places (June 3, 2020); Orbitax, Kenya Tax Appeals Tribunal Holds Marketing and Promotional Services to Foreign Affiliates Considered Exported Services (May 19, 2020); Kenya Lower House Considers 2020 Finance Bill, Bloomberg Law News May 11, 2020.

Nigeria: Tax Obligations for Nonresident Digital Services Providers Clarified

On May 29, 2020, the government of Nigeria issued an Order that defines the significant economic presence standard (SEP), which was introduced earlier this year with the Finance Act for 2020. (For KPMG's previous discussion on Nigeria's Finance Act for 2020, click here). According to the Order, which is retroactive to February 3, 2020, a nonresident will be considered to have SEP in Nigeria if the nonresident makes sales of digital services (as defined in the Order) which exceed an annual threshold of NGN 25 million ($64,500). In addition, any nonresident company that meets any of the following conditions is also deemed to have SEP: (1) the nonresident uses a Nigerian domain name (.ng) or registers a website address in Nigeria or (2) the nonresident has a purposeful and sustained interaction with persons in Nigeria by customizing its digital page or platform to target persons in Nigeria providing digital services.

If a nonresident is deemed to have SEP in Nigeria, it is required to register for tax purposes with the Nigerian tax authority and file all required returns, including income tax and VAT. Once registered for tax purposes, businesses will have to analyze whether all services provided to customers in Nigeria, including digital and professional services, are subject to tax in Nigeria. For VAT purposes, a nonresident with SEP will be required to charge VAT on B2B and B2C transactions. However, a VAT-registered customer should in principle withhold any VAT charged and remit it to the tax authority, thus relieving the nonresident from the collection and remittance obligation. If a nonresident with SEP makes only B2B sales it would accordingly file nil VAT returns. However, if the customer pays the VAT to the nonresident, the nonresident will be required to remit the VAT collected to tax authority. For B2C transactions, the nonresident is required to charge, collect, and remit any VAT applicable on the sales to Nigerian customers. To read a report prepared by the KPMG International member firm in Nigeria, please click here.

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Russia: Overview of Recent Indirect Tax Developments

On February 20, 2020, the Federal Tax Service of Russia (FTS) published Guidance Letter no. СД-4-3/2174 in which it clarified that royalties paid under a licensing agreement by a Russian company to a nonresident company for the acquisition of rights to use know-how for production purposes are exempt from VAT. The VAT exemption does not apply to a sham or fraudulent transaction.

On February 27, 2020, the Russian Ministry of Finance published Guidance Letter 03-07-11/14211 in which it clarified that effective January 1, 2020, a successor of a reorganized legal entity must repay the VAT that the reorganized entity deducted before its reorganization.

On March 5, 2020, the Arbitration Court of Moscow issued its decision in case no. A40-143296/19-107-2312. In the case at hand, a Russian bank granted special loans to its clients in the form of sale of gold bars. The specific characteristic of these loans was that the clients, in repaying the loans, were buying the gold bars received as a loan. The sale of gold bars made to the clients under these special loan agreements was considered VAT exempt by the bank. The tax authority denied the VAT exemption. The Arbitration Court supported the position of the tax authority because only specific banking transactions involving precious metals are VAT exempt, such as investments in gold made by the clients. However, the sale of the gold bars under the special loan agreements is not covered by the VAT exemption. The bank thus obtained an unreasonable tax benefit in the amount of unpaid VAT from the sales of gold bars where the payment for such sale of the gold bars was delayed under the loan agreement.

On March 10, 2020, the MOF published Guidance Letter 03-07-08/17382 in which it clarified that the provision of services involving the development of computer programs are sourced to the location of the buyer. If those services are provided to a nonresident they are not sourced to Russia and are thus not subject to VAT.

On March 16, 2020, the MOF published Guidance Letter 03-07-08/19633 in which it clarified that a Russian resident legal entity cannot deduct VAT paid in connection with the acquisition of goods that will be used by its branch that is registered as a taxpayer in a foreign state to perform works or provide services there.

On April 20, 2020, the MOF published Guidance Letter 03-07-11/31326 in which it clarified that the date of shipment or transfer of goods is the date on which the primary documents regarding the goods have been drawn up for their buyer or for the carrier for the delivery of the goods to the buyer. Therefore, if the relevant goods are located in a foreign country on the date on which the primary documents were drawn up for the buyer, Russia will not be considered the place of sale and the sale will not be subject to VAT in Russia.

On April 20, 2020, the MOF published Guidance Letter 03-07-08/31638 in which it clarified that if a foreign legal entity is registered with Russian tax

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authorities, it must independently determine and remit the VAT due in Russia on goods, works, or services it sells if Russia is considered to be the place of provision of those goods, works, or services. Therefore, a Russian legal entity that makes advance (partial) payment to a foreign legal entity registered with the Russian tax authorities for services considered to be provided in Russia will not act as a tax agent. The foreign legal entity is responsible for calculating and remitting the VAT due in Russia on that transaction.

On April 7, 2020, the MOF published Guidance Letter 03-07-08/27428 in which it clarified that when a foreign legal entity provides electronic services through a Russian intermediary, the Russian intermediary is required to collect the VAT due from the buyers of the nonresidents' services and to issue the relevant VAT invoices to enable the buyers to deduct the VAT charged by the intermediary.

Source: Russia—VAT on royalties upon acquisition of know-how from non-resident—FTS clarifications (April 15, 2020), News IBFD. Tax Analysts, Russian Finance Ministry Issues 3 VAT Guidance Letters (Apr. 17, 2020); Russia—Arbitration Court Denies VAT Exemption for Supply of Gold Bars (Apr. 21, 2020), News IBFD; Iurie Lungu, Russian Finance Ministry Issues 3 VAT Guidance Letters, Tax Analysts (Apr. 17, 2020); Iurie Lungu, Russian Finance Ministry Issues 3 VAT Guidance Letters (May 14, 2020).

South Africa: Overview of Recent Indirect Tax Developments

On April 2, 2020, the South African Revenue Service (SARS) issued a draft Interpretation Note on the VAT treatment of points-based loyalty programs. The draft Note deals with the following: characteristics of a loyalty program; transactional flow of loyalty program; different structures of a loyalty program including exclusive programs and multiple party programs; nature of a loyalty point; participation in a loyalty program; original sale of goods or services; participation in a loyalty program; award of loyalty points; sale of a loyalty point; payment of points fee; transfer of loyalty points between members; awarding of loyalty points under an employment incentive scheme; redemption of loyalty points; payment of redemption cost; and conversion of loyalty points.

On April 3, 2020, the Supreme Court of Appeal of South Africa (SCA) published its judgment in *Diageo South Africa (Pty) Ltd*, [2020] ZASCA 34, on the VAT adjustments made by a taxpayer for services rendered to nonresident entities. In the case at hand, a South African alcohol manufacturer charged zero percent VAT to various nonresident owners of brands in South Africa for the provision of advertising and promotional goods and services. In a prior judgment, the tax court held that the promotional goods consumed in South Africa were distinct from the services rendered and that the taxpayer was thus liable for standard rate VAT on the goods. The SCA affirmed the tax court's decision and held that the taxpayer made dissociable sales of both services and goods. Since the sale of promotional goods was deemed to be a separate sale, it is therefore subject to VAT.

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On April 9, 2020, the SARS published the VAT Rulings Process Reference Guide (Issue 2), which sets out the steps to be followed when applying for a VAT class ruling or a VAT ruling and explains certain terms. The Guide deals with the following: VAT ruling or a decision; VAT rulings application process; receipt of VAT ruling applications; rejected applications; allocation of a successful application; effect of a VAT ruling; and alternative tax rulings.

On April 14, 2020, the SARS published the VAT Reference Guide for Foreign Donor Funded Projects. The Guide sets out the development of the South African VAT system with regard to foreign donor-funded projects and introduces the concept of a foreign donor-funded project together with the different persons involved. The Guide further provides guidance on the VAT registration requirements and procedures for the implementing agencies of foreign donor funded projects eligible for registration by the SARS as vendors on or after April 1, 2020. Moreover, the Guide sets out the VAT consequences of any transactions entered into by an implementing agency for the purpose of a foreign donor- funded project and deals with the various documentary and record-keeping requirements. Finally, the Guide contains comprehensive examples illustrating the various VAT principles discussed in the Guide.

Source: Bloomberg Law News Apr 8, 2020, South Africa Supreme Court Rules on VAT Exemptions for Supply of Advertising Goods; South Africa—Guide on VAT rulings process published (Apr. 14, 2020), News IBFD; South Africa—Draft Interpretation Note on VAT consequences of points-based loyalty programmes published (Apr. 14, 2020), News IBFD; South Africa—Guide on VAT treatment of foreign donor funded projects published (Apr. 16, 2020), News IBFD

United Kingdom: Evidence of Actual Behavior of Average Customers is Relevant When Reviewing Fiscal Neutrality Test

On April 15, 2020 the UK's Upper Tribunal (Tax and Chancery Chamber) published its decision in *The Rank Group PLC*, [2020] UKUT 117 (TCC), regarding the VAT liability of gambling sales. The UK implemented the EU VAT Directive's exemption for "betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State." In the case before the tribunal, the taxpayer made gambling sales made through so-called section 16/21 machines and fixed odds betting terminals (FOBTs), which were exempt from VAT, and through section 31/34 machines, which were subject to the standard VAT rate because they are classified as gaming machines. The taxpayer requested repayment of VAT from the UK tax authority (HMRC) on the sales of gambling made through section 31/34 machines from October 1, 2002, to December 5, 2005, claiming that the sales were similar to those made through the tax-exempt FOBTs and that HMRC's treatment for VAT purposes violated the EU's principle of fiscal neutrality. Before December 2005, sales of gambling through FOBTs were exempt from VAT. In December 2005, the U.K. legislation was amended to standard rate FOBTs. HMRC refused to make the repayment and issued VAT assessments for sales made through the section 16/21 machines too, saying that they were also "gaming machines" and excluded from the VAT exemption.

In two prior decisions, a lower court, the First-Tier Tribunal, analyzed both documentary and witness evidence, as well as data from a "bin distribution

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table." The tribunal conducted a detailed analysis of each relevant characteristic using the evidence presented to it in reaching its decision. The tribunal held in both cases that the differences in VAT treatment between the various games breached the EU principle of fiscal neutrality. HMRC appealed the decisions of the First-Tier Tribunal, saying the court had erred in applying the EU test of fiscal neutrality to the evidence presented because the tribunal did not identify the characteristics of an average consumer.

The Upper Tribunal found that there is no authority for HMRC's argument that the First-Tier Tribunal must consider evidence of the reasons for consumer decisions and possible preferences of individual customers when assessing the needs of an average consumer. It also rejected HMRC's contention that evidence of actual behavior of average customers is inherently unreliable and said that this evidence is "undoubtedly relevant" to assessing whether differences in the relevant characteristics of the compared sales have a significant influence on the decisions made by average consumers of those sales.

Source: Tax Analysts, U.K. Tribunal Dismisses HMRC's Appeals in Gaming VAT Dispute (April 17, 2020).

Asia Pacific (ASPAC)

Indonesia: Nonresident Digital Service Providers Required to Register for VAT

The Ministry of Finance of Indonesia recently issued Regulation No. 48/PMK.03/2020 ("PMK-48"), which implements a 10 percent VAT on the sale of digital services by nonresident companies effective July 1, 2020. This was previously put forth in PERPPU No. 1 Year 2020, which was ratified by the House of Representatives on May 12, 2020. (For KPMG's previous discussion on Indonesia introducing VAT on digital services, click here.) The list of intangible assets and services subject to the 10 percent rate of VAT includes: (1) the use or right to use copyrights in the fields of literature, art or scientific work, patents, designs or models, plans, formulae or secret processes, trademarks, or any form of intellectual/industrial property rights or other similar rights; (2) the use or right to use industrial, commercial or scientific equipment; (3) the use of scientific, technical, industrial or commercial knowledge or information (including the reception or the right to receive images and/or sound recordings distributed to the public through satellite, cable, fiber optics or similar technology and the use or right to use images and/or sound recordings for television or radio that are broadcasted/transmitted via satellite, cable, fiber optics or similar technology) and the use or right to use part or all of the radio communication spectrum; (4) the use or right to use motion picture films, films or video tapes for television broadcasts or sound tapes for radio broadcasts; and (5) the acquisition of all or part of the

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rights related to the use or granting of intellectual/industrial property rights or other rights. The use of intangible taxable assets and/or taxable services also includes the use of digital assets and/or services.

The obligation to collect VAT from payments made by Indonesian customers rests with the nonresident providers. The Indonesian Tax Office (ITO) will appoint such nonresident providers as VAT collectors. To be appointed as VAT collectors, nonresident providers must meet certain criteria established by the ITO, which will be based on: (1) a minimum value of transactions with buyers/customers in Indonesia within a 12-month period; and/or (2) a minimum amount of traffic or visitors within a 12-month period. A customer is considered to be located in Indonesia if: (1) its residence/domicile is in Indonesia, as indicated by its correspondence/billing address and/or by identification of Indonesia when registering with an e-commerce provider; (2) payments are made using an Indonesian payment facility; and/or (3) transactions are made from an Indonesian Internet Protocol address and/or an Indonesian telephone number. If a nonresident provider meets the above criteria but has not been appointed as a VAT collector, it may notify the ITO to be appointed. After being appointed as a VAT collector, the nonresident provider will be provided a tax identification number (TIN) and its VAT obligations will start at the beginning of the following month.

The proof of VAT collection by a nonresident provider can be a commercial invoice, billing, order receipt and/or any other documents stating the VAT amount and payment, which will be considered equivalent to a tax invoice by the ITO. The VAT collected must be transferred to the Indonesian State Treasury monthly by the end of the following month. The VAT collector must also submit quarterly reports, which are due at the end of the month after each quarterly period. This report must include the monthly total number of customers and total amounts of payments, VAT collections and VAT transferred. In addition, the ITO may also request annual detailed reports, which would include the names and TINs of the customers. The ITO will prepare a separate application or system to facilitate the necessary reporting. The ITO must issue further regulations on the above requirements to assist nonresident providers to determine if they are required to register for VAT purposes in Indonesia. To read a report prepared by the KPMG International member firm in Indonesia, please click here.

Philippines: Proposal to Implement VAT on Digital Services Provided by Nonresidents

On May 19, 2020, the House of Representatives of the Philippines introduced House Bill No. 6765, which, if adopted, would apply withholding tax (WHT) or VAT to the sale of digital goods and services. According to the bill, if income which is subject to WHT at the prescribed rate is derived through a membership in a network orchestrator system such as a ride-sharing app and other similar services, the network orchestrators will be made withholding agents to ease their partners' burden of paying taxes on their own and to encourage tax compliance. A network orchestrator is defined as a person aided by information technology which creates a network of accredited service providers and service consumers, and acts as the intermediary that facilitates the matching of a consumer's service needs with the provider's available services.

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Goods and services that are digital or rendered electronically in the course of trade or business would be subject to VAT. Sales and exchanges of services that would be subject to VAT include the sale of digital advertising services, subscription-based services such as video or music streaming services, and the sale of services that can be delivered through an information infrastructure such as the internet. When proceeds from the sale of goods and services which are subject to VAT are derived through a membership in a network orchestrator system such as a home-sharing app or an electronic commerce platform, the network orchestrator or the electronic commerce platform would be made a withholding agent and required to deduct and withhold the VAT from the seller. The VAT withheld would have to be remitted within 10 days following the end of the month the withholding was made. Nonresidents that provide digital services in the Philippines would be required to establish a resident representative office or appoint a resident agent in the Philippines.

Source: Philippines—Philippines Proposes Law on Digital Economy Taxation (May 27, 2020), News IBFD.

Trade & Customs (T&C)

European Union: Information on Prohibitions and Restrictions of Imports and Exports Following Brexit

On May 15, 2020, the European Commission published a notice on the EU rules governing prohibitions and restrictions of imports and exports, in particular import and/or export licenses following the withdrawal of the UK from the EU. The import and export of certain goods is banned or limited within the EU, unless relevant authorizations or approvals are received. The notice provides an overview of the products subject to such prohibitions and restrictions as a result of the UK withdrawing from the EU. The document specifically discusses how these rules will apply in Northern Ireland, with a four year transition.

Saudi Arabia: Customs Duty Rates Increased Effective June 10, 2020

On May 27, 2020, the General Authority of Saudi Customs announced that Saudi Arabia will increase the customs duty rates for certain commodities and goods effective June 10, 2020. The products potentially affected by the increase include poultry, meat, dairy products, certain consumer products, some types of drinks and vegetables, spare parts, chemicals, building materials, and vehicles. For example, foods and beverages such as poultry and meat products, live sheep and goats, fish, cold-water shrimps and prawns, dairy products, juices, yogurt, dairy spreads, vegetables and olive oil, which are subject to duty rates of 0 percent, 5 percent, 12 percent, and 20 percent, are now subject to rates ranging from between 6 percent and 25 percent, depending on the product. The customs duty rates of chemicals such as carbon, silicon, zinc oxide, sulphonamide, propylene copolymers may increase from 5 percent to 6.5 percent. The customs duty rates for building materials such as tiles, marble, travertine and alabaster, pipes and tubes, electric wire and cable may increase from 5 percent and 12 percent to rates ranging between 12 percent and 15 percent. Finally, the customs duty rates for vehicles such as private vehicles and emergency vehicles may increase from 5 percent to rates ranging 5 percent and 7 percent. To read a report prepared by the KPMG International member firm in Saudi Arabia, please click here.

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United Kingdom: Updates on Post-Brexit Trade Rules

On May 5, 2020, the Office of the United States Trade Representative (USTR) issued a joint statement on the formal launch of trade agreement negotiations between the U.S. and the UK. Both parties agree that a Free Trade Agreement (FTA) would contribute to the long-term health of both economies. An FTA is a priority for both countries and both countries share a commitment to secure an ambitious agreement that significantly boosts trade and investment. The countries will undertake negotiations at an accelerated pace and have committed the resources necessary to progress at a fast pace. A comprehensive US-UK trade agreement will further deepen strong trade and investment ties between the two countries. The U.S. and the UK are the first and fifth largest economies in the world, respectively. Total two-way trade between the two countries is already worth about $269 billion a year. Each country is the other's largest source of foreign direct investment, with about $1 trillion invested in each other's economies.

On May 19, 2020, the UK government announced the UK's new MFN tariff regime. The UK Global Tariff (UKGT) will replace the EU's Common External Tariff on January 1, 2021. According to the government, the new tariff is tailored to the needs of the UK economy. It is a simpler, easier to use and lower tariff regime than the EU's Common External Tariff (EU CET). The new tariff schedule streamlines and simplifies nearly 6,000 tariff lines, and lowers costs for businesses by reducing administrative burdens. The changes include scrapping tariff variations, rounding tariffs down to standardized percentages, and getting rid of all tariffs below 2 percent. The UKGT also expands tariff-free trade by eliminating tariffs on a wide range of products. The government is maintaining tariffs on a number of products backing UK industries such as agriculture, automotive, and fishing.

Source: Orbitax, U.S. and UK Launch Free Trade Agreement Negotiations (May 8, 2020); Orbitax, UK Government Announces New Global Tariff Regime to Replace EU's Common External Tariff (May 21, 2020).

In Brief

- **Bolivia:**[2] Bolivia recently announced that it will shelve plans to implement a new electronic invoicing system (*Sistema De Facturacion Electronica* (SFE)). The electronic invoicing system was due to be in place from June 1, 2020, but has been put on hold to ease the administrative burden on companies in light of COVID-19. The Government has not announced a new deadline for its implementation.

- **Brazil:**[3] On April 24, 2020, the federal supreme court of Brazil published Binding Precedent 57 (*Súmula Vinculante* 57) confirming that the constitutional tax exemption for books, newspapers, periodicals, and the paper used for printing applies to the importation and sale in the Brazilian market of e-books. E-books and e-readers had heretofore been subject to the state VAT (*Imposto sobre Circulação de Mercadorias e Serviços de Tranporte Intermunicipal, Interestadual e de Comunicação*—ICMS).

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- **Brazil:**[4] On May 8, 2020, the federal supreme court published Binding Precedent 58 (*Súmula Vinculante* 58) confirming that the purchase of exempt, non-taxable, or zero-rated items does not give rise to "presumed credit" (i.e., a fictitious tax deduction) for the purpose of the federal tax on manufactured products (*Imposto sobre Produtos Industrializados*, IPI). In general, taxpayers may credit (against the IPI due) the amount of IPI levied on the goods purchased or imported for the manufacturing process. However, questions arose at judicial courts as to whether the purchase of exempt, non-taxable, or zero-rated items would give rise to a presumed credit. The federal supreme court ruled that these purchases do not give rise to credits and that this conclusion does not does not violate the constitutional principle of non-cumulative taxation.
- **China:**[5] On April 8, 2020, the Chinese State Taxation Administration published the protocol to the Chile-China income tax treaty, which became effective October 17, 2019. It clarifies that for enterprises of a contracting state that operate ships or aircraft in international traffic in the other state, an exemption from VAT applies in the other state.
- **China:**[6] On April 20, 2020, China's Ministry of Finance issued Announcement No. 22, which extends the preferential tax policies for financing micro and small businesses, sole proprietors, and farmers. This includes that several preferential VAT policies introduced in 2017 and scheduled to expire December 31, 2019 are extended to December 31, 2023. The policies include VAT exemptions on the financing of qualifying small taxpayers and allowed input tax deductions for fixed asset leasing. VAT that has been levied in 2020 before the date of the announcement may be deducted or refunded.
- **China:**[7] On April 23, 2020, the Chinese State Administration of Taxation published Announcement No. 9, discussing changes in VAT requirements. The announcement includes information on the requirement for used car dealers to collect VAT at a reduced rate of 0.5 percent effective May 1, 2020 through December 31, 2023, and the application of VAT rates of 6 percent and 13 percent applicable to waste processing fees if the end product belongs to the processor or the customer, respectively. Moreover, the Announcement clarifies the use of the acquisition price rather than the sales price in calculating VAT on restricted shares sold at a loss. The Announcement further clarifies the taxpayer elections concerning the timing of claiming VAT exemptions and reductions and the permitted transfers to small scale businesses ahead of the transfer registration date for tax reporting purposes, if made prior to December 31, 2020. Finally, the Announcement includes updated requirements for completing VAT returns, effective April 23, 2020, and the updated VAT invoice and record keeping requirements for auction houses dealing in art and artifacts.
- **Czech Republic:**[8] On May 6, 2020, the lower house of the Czech parliament approved a proposal to postpone the introduction of a compulsory electronic sales recording regime until January 1, 2021. The "EET" system, under which small businesses and traders will be required to electronically record their sales, was originally due to commence on May 1, 2020. Under a special law approved in March, the regime's

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introduction was delayed until three months after the cessation of the state of emergency, or August 19, 2020. The Chamber of Deputies has now voted to delay the regime further, until 2021, due to the disruption to business operations caused by COVID-19. The law further delaying the EET's introduction must also be approved by the Senate.

— **Czech Republic:** On May 13, 2020, the Czech Chamber of Deputies accepted for consideration Bill No. 867, to incorporate the EU VAT e-commerce package into Czech law. (For KPMG's previous discussion on the EU VAT e-commerce package, click here.) The e-commerce package amends the sourcing rules for business-to-consumer sales of intra-EU remote sales of goods; introduces new VAT rules for business-to-consumer low value imports of goods; shifts the liability to collect and remit VAT on online marketplaces facilitating sales of certain business-to-consumer sales of goods; and expands the scope of the Mini One-Stop Shop mechanism to cover all business-to consumer sales of services and goods. To read a report prepared by the KPMG International member firm in the Czech Republic, please click here.

— **Czech Republic:**[9] The Czech Ministry of Finance is reportedly considering a delay in the introduction of the country's digital services tax (DST), as well as a reduction in the proposed rate from 7 percent to 5 percent. Legislation for the DST, which was introduced in January 2020, is currently pending before the Czech parliament. (To read KPMG's previous coverage on the Czech Republic's proposed DST, click here.)

— **European Union:**[10] On April 23, 2020, the ECJ published its judgment in *Herst, s.r.o.*, Case C-401/18, in which it held that the allocation of the intra-EU transaction in a chain of transactions is also relevant for goods subject to an excise-duty-suspension regime. The time when the transfer of the right to dispose took place is a key factor to take into account. It is however contrary to EU law for the national courts to apply the *in dubio mitius* principle when interpreting VAT rules.

— **European Union:**[11] On April 23, 2020, the ECJ published its judgment in *Sole-Mizo Zrt.*, Case C-13/18, in which it held that the EU law requires the Member States to compensate taxpayers for damage they have caused as a result of their failure to properly apply EU law. This compensation must cover the VAT amounts that had been unlawfully withheld ("overpaid VAT") beyond a reasonable period plus interest. Procedural rules will depend on the national law, but these conditions must comply with the principles of effectiveness and equivalence.

— **European Union:**[12] On April 23, 2020, the ECJ published its judgment in *Ryanair Ltd.*, Case C-28/19, in which it held that air carriers must display online check-in fees, VAT charges, and other administrative fees and applicable taxes for credit card purchases on their initial online airfare offers. Those price elements must be shown in the initial offer to customers because the airfare fees and VAT charges are unavoidable and foreseeable within the meaning of the second sentence of article 23(1) of Regulation (EC) No. 1008/2008, unless the fees are considered "optional price supplements."

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- **European Union:**[13] On April 2020, the ECJ published the Opinion of its AG in *XT*, Case C-312/19, in which the AG opined that a member of a joint commercial activity is individually liable for VAT payments for transactions made in the individual's name, even if the agreements benefit the partnership.
- **European Union:**[14] On April 30, 2020, the ECJ published its judgment in *CTT—Correios de Portugal*, Case C-661/18, in which it held that a retroactive adjustment of the VAT deduction method should be allowed in a situation when (1) the taxpayer performing both VAT taxable and exempt activities was unaware of the correct VAT treatment of the sales, (2) the limitation period had not expired, and (3) the new VAT deduction method allowed a more accurate calculation of the amount of deductible VAT.
- **European Union:**[15] On May 11, 2020, the director for direct taxation, tax coordination, economic analysis, and evaluation for the European Commission's Directorate-General for Taxation and Customs Union announced that the European Commission will propose new rules that would require digital platforms to report user transaction details to EU tax administrations and allow the exchange of those data between Member States by July. The commission is planning to draft a proposal amending the directive on administrative cooperation (Directive 2011/16/EU) to require digital platform providers to collect and report user transaction data to EU tax authorities and allow those authorities to exchange those data with their counterparts in other member states. A consultation on a proposal for a directive began February 7 and closed March 6. The measure was also included in the Commission's action plan to fight tax fraud and evasion. A consultation on that plan started March 4 and ended April 1. The proposed rules would apply to both EU and non-EU digital platform operators to ensure equal treatment of all companies.
- **European Union:**[16] On May 14, 2020, the European Commission announced that it closed the infringement procedure against the United Kingdom, Denmark, Spain and Romania regarding their failure to the EU VAT Quick Fixes.
- **European Union:**[17] On May 15, 2020, the European Commission launched the Classification Information System (CLASS), a search platform assisting with the customs classification of products. Classification of goods is used for a number purposes, e.g. determining applicable customs tariff rates, anti-dumping thresholds, etc. The CLASS contains the following information: (1) conclusions of the Customs Code Committees; (2) classification Regulations; (3) ECJ rulings; (4) Combined Nomenclature (CN) and CN Explanatory Notes; and (5) TARIC information.
- **Finland:**[18] On June 12, 2020, the European Union published a Council Implementing Decision allowing Finland to extend the increase of its VAT registration threshold from EUR 10,000 ($11,290) to EUR 15,000 ($16,930). The extension to the derogation for Finland applies until December 31, 2024.
- **France:** The French tax authority recently extended the deadline for the 2019 nonresident refund claims for taxpayers established outside the EU from June 30, 2020 to September 30, 2020. To read a report prepared by the KPMG International member firm in France, please click here.

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- **Hungary:**[19] On April 14, 2020, Hungary published Decree 109/2020, which temporarily reintroduces a retail gross receipts tax that applies to retail sales, including online retail sales by nonresidents effective May 1, 2020. The tax is levied at progressive rates based on the amount of annual net retail turnover in the previous year: (1) up to HUF 500 million ($1.64 million)–0 percent; (2) over HUF 500 million up to HUF 30 billion ($98.5 million)—0.1 percent; (3) over HUF 30 billion up to HUF 100 billion ($328.3 million)—0.4 percent; and (4) over HUF 100 billion—2.5 percent. Under the Decree, taxpayers are required to establish and declare their tax liability during the state of the COVID-19 emergency, with monthly advance payments to be made by the end of each month during the emergency beginning with an initial payment on May 31, 2020. It is also provided that if a taxpayer's retail gross receipts have dropped by more than 40 percent in a month as compared to the same month in the previous year, a proportionate discount on the monthly payment is provided. On June 9, 2020, Hungary published the Retail Tax Act, which repeals the temporary Decree and makes the retail gross receipts tax permanent. To read a report prepared by the KPMG International member firm in Hungary, please click here.
- **India:** India's Central Board of Indirect Taxes and Customs issued guidance providing relief and clarifying actions by taxpayers encountering challenges with regard to goods and services tax (GST) compliance requirements. The deadline for filing the GST annual return for FY 2018-2019 has been extended to September 30, 2020. To read a report prepared by the KPMG International member firm in India, please click here.
- **Malaysia:**[20] On April 17, 2020, the Malaysian Customs Department published Service Policy No. 10/2020, in which it announced a service tax exemption on locally provided digital services related to financial and banking services. The announcement includes a list of exempt service providers; a list of non-exempt service providers, including nonresident providers; and the service tax adjustment plan, including that no refunds are available for taxes paid.
- **Mauritius:**[21] On June 4, 2020, the Minister of Finance of Mauritius presented the Budget for 2020-21 to the National Assembly. If approved, the Budget would apply VAT on digital and electronic services provided through the Internet by nonresidents to residents of Mauritius for utilization in Mauritius. The Budget would further clarify the tax point for an operator in the construction industry to be when the VAT is paid on construction contracts awarded by the government, instead of the usual date of invoicing. Moreover, the following transactions would fall under the category of zero-rated sales: unprocessed agricultural and horticultural produce; live animals of a kind generally used as or yielding or producing food for human consumption; medical, hospital and dental services; and transport of passengers by public service vehicles excluding contract buses for the transport of tourists and contract cars. Finally, the following transactions would be exempt from VAT: construction materials and specialized equipment used by medical research and development centers; information technology and related materials and equipment for

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online education; equipment used for inland aquaculture; and the first MUR 1,000 ($25) (previously MUR 3,000) of the cost of a taxable article imported by post or courier services.

- **Norway:**[22] On May 12, 2020, the Norwegian Government announced a revised Budget for 2020. It would extend the VAT exemption for newspapers to include in-depth journalism effective July 1, 2020 and reduce the reduced VAT rate from 12 percent to 6 percent between April 1, 2020 and October 31, 2020.
- **Paraguay:** Effective January 1, 2020, Paraguay introduced a surcharge or withholding mechanism through financial intermediaries to capture VAT and Income Tax due on sales of digital services from foreign vendors to final consumers in Paraguay. The measure was to be effective July 1, 2020. Due to the current COVID-19 situation, the government has postponed the withholding requirement until January 1, 2021.
- **Poland:**[23] On May 14, 2020, Poland published a Law, which includes amendments to the Law on Cinematography to extend the scope of the 1.5 percent contribution fee to the Polish Film Institute (PISF). The contribution is currently payable by television broadcasters, cinema owners, and distributors. The Law extends the scope of the contribution so that it is also payable by providers of audiovisual media services on demand, regardless of where they are established. An entity providing an audiovisual media service on demand must make a payment to the PISF in the amount of 1.5 percent of the revenue obtained from the fees for access to the service effective July 1, 2020. An exemption from the payment obligation applies to micro enterprises and when the number of users of the media service does not exceed 1 percent of subscribers for services providing broadband Internet access. Payments of the 1.5 percent contribution fee must be made on a quarterly basis within 30 days following the end of each quarter. The payments are considered tax-deductible costs.
- **Poland:** On May 28, 2020, Poland's Ministry of Finance announced that the deadline to use a new standard audit file (SAF-T) for reporting VAT will be postponed from July 1, 2020 until October 1, 2020. (For KPMG's previous discussion on the new reporting requirement, click here.) The new SAF-T is an electronic document consisting of two parts: (1) VAT register covering information about purchases and sales and (2) VAT return containing information previously included in the VAT-7 and VAT-7K forms. In addition to information previously collected under VAT registers and the existing VAT forms, there is a new requirement to disclose specific, additional data that may pose a significant organizational challenge. For instance, the new form includes a requirement to assign appropriate group codes to products and services; indicate the type of sales or purchase transactions (including related-party transactions); specify the type of document accompanying each transaction; and reflect tax identification numbers for simplified invoices. To read a report prepared by the KPMG International member firm in Poland, please click here.

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- **Spain:**[24] According to recent reports, the Spanish government intends to have the proposed digital services tax (DST) and financial transactions tax (FTT) implemented by Q4 2020. According to the draft DST bill, the DST would be levied at a rate of 3 percent on digital services including online advertising, online intermediation services, and the sale of user data generated through a digital interface. The DST would be limited to companies with annual worldwide revenue of EUR 750 million ($847 million) and EUR 3 million ($3.4 million) revenue from digital service activities in Spain. (For KPMG's previous discussion on the proposed DST, click here.) According to the draft FTT bill, the FTT would be levied at a rate of 0.2 percent on the consideration for the acquisition of qualifying shares issued by Spanish companies if: (1) the shares are listed on a regulated Spanish or EU stock market, or on an equivalent stock exchange market of a third country; and (2) the market capitalization value of the company exceeds EUR 1 billion ($1.13 billion) on December 1 of the year preceding the acquisition. The FTT would also apply on the acquisition of securities that correspond to depositary receipts representing qualifying shares as above, regardless of the place of establishment of the issuer of said securities, and on the acquisition of securities from the execution or settlement of convertible or exchangeable notes or bonds, financial derivatives, and financial instruments or agreements.
- **Sweden:**[25] On April 17, 2020, the Swedish Ministry of Finance announced a proposal to require customers to self-assess VAT under the reverse charge mechanism on domestic sales of mobile phones, integrated circuit devices, telecommunications services, gaming consoles, tablets, and laptops effective January 1, 2021.
- **Trinidad and Tobago:**[26] Effective March 26, 2020, Trinidad and Tobago introduced a new VAT refund mechanism allowing the tax authority to issue "VAT bonds" to businesses that are in a VAT refund position. Applicants are required to provide the following information: VAT Account Number, Board of Inland Revenue (BIR) File Number and Letter ID Number. Additionally, VAT registrants must also be able to indicate on their applications, the VAT periods for which bond payments are requested, as well as, the name, account type and account number of the applicant's financial institution, as required by the Central Bank of Trinidad and Tobago to facilitate the deposit of interest payments. At the time of the request, applicants must ensure that all VAT Returns are filed; liabilities have been cleared for all tax types and their applications relate to VAT filing periods that are prior to the year 2020. Moreover, any liabilities that remain outstanding, at this time, would be deducted from the amount due, before bonds are issued. A single bond will be issued for each VAT period that a refund is applicable. These bonds will be rounded down to the nearest thousand dollars, and any remaining balance will be issued via cheques. To read a report prepared by the KPMG International member firm in Trinidad and Tobago, please click here.

About *Inside Indirect Tax*

Inside Indirect Tax is a monthly publication from KPMG's U.S. Indirect Tax practice. Geared toward tax professionals at U.S. companies with global locations, each issue will contain updates on indirect tax changes and trends that are relevant to your business.

Footnotes

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2. CCH, Global VAT News & Features COVID-19: Bolivia Ditches Plans For Electronic Invoicing System (May 20, 2020).
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