Linklaters

International Tax Round-up.
June 2020

Below is an overview of key international tax developments across the Linklaters network.

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Contents

International Developments 1
EU Developments............. 2
Belgium 3
Germany 4
Netherlands 6
Portugal 8
Sweden 10
United Kingdom 14

International Developments

Digital taxation

Originally, the negotiations within the OECD/G20 Inclusive Framework on BEPS should already have been completed by January 2020. As too many aspects were in dispute, the plenary session of the Inclusive Framework determined in late January to reach an agreement on the fundamental issues until July 2020 (cf. International Tax Round-up February 2020). *Inter alia* as a result of the corona crisis, also this date could not be kept. Therefore, it was intended to even split Pillar 1: The first part was meant to settle the taxation of the (predominantly US) digital companies by the end of October. Then the second part should have concluded the negotiations on a taxation of the digital consumer industry in 2021. An agreement on the GloBe Tax (Pillar 2) should have been reached by the end of 2020. The details of the total package would then have been elaborated under the G20 Presidency of France, which starts on 1 December 2020.

From the very beginning, the United States had opposed the split of Pillar 1, as – and justifiably so – they feared mainly a taxation of their digital companies in this. The US Secretary of the Treasury, Steven Mnuchin, has addressed a letter to the governments of France, Spain, Italy and Great Britain – all of them countries which have implemented a digital tax but have currently suspended the Inclusive Framework negotiations –, stating that the discussions on Pillar 1 have reached a deadlock. He warns these countries that – should the digital taxes be re-introduced as a result of a fail of the discussions and lead to a tax burden of US companies – countermeasures by way of import duties would be introduced. It is still open if this will involve a complete withdrawal of the United States or if this is merely an expression of the clear desire to negotiate the topics under Pillar 1 uniformly and concurrently.

The United States intend to adhere to the negotiations on Pillar 2 and to introduce the minimum taxes at global level dealt with thereunder.

The OECD announced in a press release that it will continue the schedule and the work on Pillars 1 and 2 as planned, as it has been given the mandate to do so by the G20. Although this mandate may not be withdrawn unilaterally by the United States, it is doubtful how expedient negotiations of these topics without the United States will be.

< back to top >

EU Developments

DAC6 – Delay to deadlines

Council Directive (EU) 2020/876 amending Directive 2011/16/EU to address the urgent need to defer certain deadlines for the filing and exchange of information in the field of taxation because of the Covid-19 pandemic – as adopted by the Council of the European Union on 24 June 2020 – has been published in the Official Journal of the EU on 26 June 2020 (OJEU L 204/46). The Directive entered into force on the day after its promulgation and provides for a general deferral of the deadlines for filing and exchanging information on reportable cross-border tax arrangements under DAC6 (Directive 2018/822/EU) by six months. In detail, the following amendments are included:

- extension of the deadline for the first-time exchange of information on reportable cross-border tax arrangements by six months, from 31 October 2020 to 30 April 2021;
- delay of the commencement of the 30-day period for the reporting of cross-border tax arrangements in cases where the cross-border tax arrangement was made available for implementation or was ready for implementation between 1 July 2020 and 31 December 2020 or where the first step in the implementation is made within this period, to 1 January 2021 (hence a delay by a maximum of six months);
- extension of the deadline for the reporting of cross-border tax arrangements falling within the so-called retrospective reporting period (first step in the implementation between 25 June 2018 and 30 June 2020) by six months, from 31 August 2020 to 28 February 2021.

Depending on the further development of the Covid-19 crisis and its implications for the EU member states, it is provided for the possibility to delay the commencement of the reporting obligations once more by another three months.

The member states are not obliged to implement the modified reporting deadlines into national law, the implementation is optional. However, if the option is exercised, the modifications will have to be implemented as a whole.

< back to top >

Belgium

Draft bill approved by Parliament including corporate income tax measure aimed at addressing liquidity and solvency consequences caused by the Covid-19 pandemic

On 11 June 2020, the Belgian Federal Parliament has approved a draft bill which includes a carry back system of expected tax losses incurred in the Covid-19 period. This corporate income tax measure is aimed at addressing liquidity and solvency consequences caused by the Covid-19 pandemic.

Subject to certain limits and conditions, companies that expect to incur losses during the Covid-19 pandemic would be entitled to claim a temporary exemption of all (or part) of their taxable profits of the financial year preceding this period, up to the amount of such estimated losses.

The profits that can be exempt must relate to a financial year that ended in the period between 13 March 2019 and 31 December 2020 (the “pre-Covid FY”). Technically speaking, the exemption would take the form of a temporary tax-exempt reserve to be deducted from the taxable reserves in the pre-Covid FY. The tax-exempt reserve can only be created in relation to one financial year.

The maximum amount of the reserve would be the higher of (i) the taxable result of the pre-Covid FY, as adjusted, and (ii) EUR 20m.

Certain companies would be excluded: (i) companies not subject to the common Belgian corporate income tax regime in the pre-Covid FY, (ii) companies which qualify on 18 March 2020 as an undertaking in difficulty, and (iii) companies which, in the period from 12 March 2020 up to and including the date of filing the tax return relating to assessment year 2021,

> have done share buybacks, made dividend distributions and/or carried out capital reductions;

> have a direct shareholding in a company located in a tax haven country; or

> have made payments of at least EUR 100,000 to tax haven companies unless these payments are made within the framework of real and sincere transactions that meet genuine financial or economic needs.

The tax-exempt reserve would become taxable at the ordinary corporate tax rate in the subsequent financial year following the pre-Covid FY (the “Covid FY”) during which the (expected) losses would be incurred. A mechanism is provided to correct arbitrage between the difference in tax rates for the pre-Covid FY and the financial year in which the losses were incurred, if any. From an accounting perspective, the temporary tax savings should be recorded in the P&L accounts relating to the Covid FY.

A special tax charge would apply as a sanction in cases where the amount of the tax-exempt reserve (i.e. the expected losses) would be overstated by more than 10% compared to the losses incurred in the Covid FY. An interest penalty ranging from 2% to 40% depending on the magnitude of the overstatement may in that case be applied to a tax base equal to 25% of the difference

between the taxable result in the Covid FY, as adjusted, and 10% of the tax losses that would have been incurred in the Covid FY when disregarding the recovery of the tax-exempt reserve.

The tax loss carry back will be subject to specific formalities.

Comments

> The loss carry back mechanism can help to address short and longer term solvency and liquidity needs, particularly for smaller and medium-sized companies given the EUR 20m limit.

> Companies wanting to benefit from this measure will be restricted in terms of any dividend distributions, capital reductions or share buybacks that can be carried out in the period from 12 March 2020 up to and including the date of filing the tax return relating to assessment year 2021. The timing and opportunity of any such distributions should thus be examined carefully.

> Subject to a toleration of 10%, an overestimation of the expected losses under the loss carry back regime should be avoided as this can result in a significant penalty in the subsequent financial year.

< back to top >

Germany

Covid-19 Update – 2nd Corona Tax Relief Act

On 29 June 2020, the 2nd Corona Tax Relief Act implementing the tax relief measures to cope with the corona crisis was adopted. The act particularly includes the following tax measures:

> Reduction of the value added tax rates from 19% to 16% respectively from 7% to 5% for the period from 1 July 2020 to 31 December 2020.

> Increase of the tax loss carry-back for the years 2020 and 2021; furthermore, a tax loss carry-back for the year 2020 may, on a compounded basis, be carried back to the assessment period 2019 in an amount of up to 30% of the total income; proof of a higher loss carry-back shall be possible. Income from paid employment shall be exempted from this provision.

> Introduction of a degressive tax depreciation rate of 25%, which is limited to a maximum of 2.5 times the linear depreciation, for movable assets acquired or manufactured in 2020 and 2021.

> Increase of the reduction factor for business income from 3.8 to 4 times the trade tax assessment amount.

> Increase of the tax-exempted amount for trade tax add-backs to EUR 200,000.

> Increase of the maximum tax base for the research allowance to EUR 4m per company for the period from 2020 to 2025.

Contract act for the ratification of the Multilateral Instrument (MLI) – Government draft

On 27 May 2020, the Federal Cabinet has resolved the government draft of an act on the Multilateral Convention of 24 November 2016 to implement tax treaty-related measures to prevent base erosion and profit shifting ("MLI").

Like the draft bill published in April (see International Tax Round-up April 2020), the government draft contains the ratifying act including a declaration of legislative intent, the list of selection decisions and reservations, the respective text of the convention in an official German translation as well as a two-fold memorandum with explanations on the MLI and the German selection decisions.

The list of selection decisions and reservations shows that out of nearly 100 existing German double tax treaties ("DTT"), (only) 14 have been selected for the MLI procedure meaning that the application scenarios will be modest in numbers (in detail, these are the DTT with Austria, Croatia, the Czech Republic, France, Greece, Hungary, Italy, Japan, Luxembourg, Malta, Romania, Slovakia, Spain and Turkey). According to the government draft, a bilateral approach has often proved to be speedier. Nevertheless, the contracting states will at any time be able to include further tax treaties in the MLI procedure by addressing a respective notification to the OECD.

The modification and adjustment of the tax treaties under the MLI shall be realised by way of a two-step procedure. In a first step, the convention will be ratified in the course of the MLI's implementation into national law, whereby the aforementioned designation of the covered tax treaties as well as the selection decisions and reservations will be declared to be binding for the Federal Republic of Germany. In a later step, and for the benefit of legal certainty and legal clarity, the specification of the modifications to the tax treaties under the MLI and their application shall be realised by way of separate application acts.

In this context, the Federal Republic of Germany has made use of a special reservation of the convention with the result that the implications of the MLI will only occur on or after the thirtieth day following the notification of the necessary national measures with respect to the convention's effective date. Hence, the MLI will – despite ratification by Germany – take effect on the respective tax treaty only after a ratification act on the specific application act has been adopted.

Apart from that, the mere fact that two states are participating in the MLI and have transposed the convention into national law will not lead to an automatic adjustment of the existing tax treaties between these two states. Rather, for the MLI to take legal effect, it is necessary that each of these of two states has notified the convention vis-à-vis the OECD.

Now the draft bill needs to be passed by the Federal Parliament and the Federal Council.

< back to top >

Netherlands

Six-month deferral of DAC6 filing time limits announced

On 24 June 2020, the EU Council announced an optional six-months deferral of the filing time limits for intermediaries and taxpayers under the EU Mandatory Disclosure Rules (DAC6). The optional deferral is the outcome of discussions between Member States over the past weeks and is in response to the severe disruption caused by the Covid-19 pandemic according to the EU Council's announcement.

On 26 June 2020, the Netherlands have announced that they will make use of this optional six-month deferral option. For the Netherlands, this has the following consequences:

> All historical arrangements (i.e. reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020) are to be filed by 28 February 2021 (originally 31 August 2020).

> The thirty-day reporting deadline for reportable cross-border arrangements commences on 1 January 2021 (originally 1 July 2020), which deadline also applies to arrangements for which DAC6 reporting is triggered between 1 July 2020 and 31 December 2020.

> The new deadline for the first periodic report for marketable arrangements is 30 April 2021.

The announced deferral of the DAC6 filing deadlines by the Netherlands is a welcome gesture to taxpayers and intermediaries who have now been given more time to comply with the reporting obligations imposed by DAC6 before filing commences.

Tax residence of companies and Covid-19

For Dutch corporate income tax purposes, the tax residence of a company is determined by reference to all relevant facts and circumstances whereby the "place of effective management" of the company is the decisive factor. A company's management rests with the management board and the place of effective management is located where this management carries out its management tasks.

As also recognised by the OECD in a publication of early April, the Covid-19 crisis may raise concerns about a potential change in the place of effective management of a company as a result of a relocation, or inability to travel, of chief executive officers or other senior executives. The concern is that such a change may result in a change of the company's tax residence under relevant

domestic tax laws and affect the country where a company is regarded as a resident for tax treaty purposes.

As expressed by the OECD in its publication, it is unlikely that the Covid-19 situation will create any changes to an entity's residence status under a tax treaty since such a temporary change in location of the chief executive officers and other senior executives is an extraordinary and temporary situation resulting from the Covid-19 crisis and such (temporary) change of location should not trigger a change in residency, especially once the tie-breaker rule contained in tax treaties is applied.

On 15 June 2020, the Dutch Undersecretary of Finance sent a letter to the Dutch parliament with respect to tax measures taken by the Netherlands in relation to the Covid-19 crisis. Although no firm position is taken on the point of tax residence of companies, the Undersecretary does specifically refer to the above-mentioned OECD publication and expresses that the Netherlands endorses the above OECD-analysis.

The above is helpful guidance and takes away immediate concerns in situations where management board members of Dutch resident companies are currently not able to travel to the Netherlands or where management board members of foreign companies are present in the Netherlands without currently being able to travel abroad.

Proposal for additional Dutch dividend withholding tax as of 2024

The Netherlands levies withholding tax on dividends distributed by Dutch tax resident companies. The dividend withholding tax rate is 15%, subject to refunds, reductions or exemptions, either on the basis of Dutch domestic tax law (including the implementation of relevant EU law such as the EU Parent-Subsidiary Directive) or on the basis of tax treaties. The Dutch dividend withholding tax act has been amended in recent years, introducing various anti-avoidance rules including the EU Parent-Subsidiary general anti-avoidance rule and the ATAD general anti-avoidance rule.

Rather surprisingly, it was announced on 29 May 2020 that the Dutch government is planning to introduce an additional withholding tax on dividends next to the existing Dutch dividend withholding tax. This new Dutch dividend withholding tax, which should come into force as of 2024, will apply to dividend flows to low-tax jurisdictions, being countries with a corporate tax rate lower than 9%, and to countries on the EU blacklist, even if the Netherlands has concluded a tax treaty with these countries.

More details on the proposal will have to be awaited, but this is clearly another big step of the Netherlands in the fight against tax avoidance.

< back to top >

Portugal

Supplementary State Budget Law for 2020 – Draft bill

Draft Bill no. 33/XIV, proposing a Supplementary State Budget Law for 2020, was presented on 9 June 2020 before the Portuguese Parliament. The law aims to address Covid-19 pandemic consequences by, *inter alia*, granting specific tax incentives, as summarised below.

Special investment tax credit II

i. 20% of eligible investment expenses incurred from 1 July 2020 through 30 June 2021, up to a cap of EUR 5m, may be credited against corporate income tax (CIT).

ii. The credit may not exceed 70% of the company´s CIT liability for a given year but may be carried forward for five years.

iii. Subject to certain exclusions, eligible expenses include the acquisition of new tangible and biological assets, R&D, IP and others.

iv. The regime is subject to certain conditions, e.g. certain cases of termination of employment agreements are forbidden during a 3-year period.

Carry forward of tax losses

i. Tax losses incurred in 2020 and 2021 may be carried forward for 10 years (usually 5 years), or for 12 years in the case of micro, small and medium-sized companies, and may be used up against 80% of taxable profit (usually 70%).

ii. Tax losses incurred previously, which are not used in 2020 or 2021, may be used for two additional years.

CIT – payments on account

i. CIT payment on account’s first and second instalments may be limited to 50% for companies with a turnover decrease of 20% in the first 6 months of 2020.

ii. CIT payment on account’s first and second instalments may be waived for companies with a turnover decrease of 40% in the first 6 months of 2020.

Special computation rules apply to (i) groups subject to the special tax grouping regime and (ii) companies which commenced their activity on or after 1 January 2019.

Tax and social security debts

Instalments under certain agreed tax and social security debt plans which were not paid from 9 March 2020 through 30 June 2020 may be rolled over and paid during the remaining of the payment plan (which may be extended up until 31 December 2020, if applicable).

Additional solidarity bank levy

i. The levy applies to:

a) domestic credit institutions;

b) subsidiaries of foreign credit institutions;

c) branches of foreign credit institutions.

ii. Subject to specific rules, the levy generally applies to:

a) average liabilities, net of those qualifying as tier 1 or tier 2 capital and of certain qualifying deposits – 0.02% tax rate;

b) average off-balance sheet derivatives, excluding hedging arrangements – at a 0.00005% tax rate;

iii. The regime purports to envisage financing the social security system (proceeds being assigned to the Social Security Financial Stability Fund) and compensating for the VAT exemption which generally applies to financial transactions, thus levelling the playing field *vis-à-vis* other sectors (with no reference being made, however, to the fact that stamp tax already applies to financial transactions instead of VAT).

Acquisition of micro, small and medium-sized companies

i. Losses of such entities which are acquired by other micro, small and medium-sized companies or mid cap companies may be transferred to the purchaser and used up against 50% of its taxable profit.

ii. Regime is subject to certain conditions, including the following:

a) Acquired entity became a *"company in difficulties"* in 2020;

b) Purchaser comes to hold a majority of the voting rights in the acquired entity;

c) Profit distributions by the acquired company are forbidden during a 3-year period;

d) Certain cases of termination of employment agreements are forbidden during a 3-year period.

Mergers between micro, small and medium-sized companies

i. Tax losses of a merged company transferred through a merger may be deducted against the beneficiary company´s full taxable profits (usually subject to a ratio between merged company´s and overall amalgamated companies' net assets).

ii. No CIT state surtax to apply for 3 years.

iii. Regime is subject to certain conditions, e.g. no profit distribution for 3 years.

Interest deductibility limitations amendment – Potential impact to NPLs deals made through securitisation companies

Following an infringement letter from the European Commission to Portugal (and Luxembourg) concerning an alleged ATAD 1's defective transposition, draft tax legislation was presented aiming at amending the so-called EBITDA rule, under which net interest deductibility for CIT purposes is generally limited to the highest of 30% EBITDA or EUR 1m, and have it likewise applying to securitisation companies, which have thus far been exempt from it.

The proposed amendment may be of particular importance to the Non-Performing Loans (NPLs) industry, as the tax deduction of payments to noteholders may be limited to the extent arising from reimbursements of principal in excess of acquisition cost, with respective investors and sponsors being advised to assess the potential impact this amendment may have in live trades or deals in the pipeline.

Parliamentary discussions carry on with talks of an industry reaction and further developments are expected shortly.

< back to top >

Sweden

Legislative changes

Proposal for a new VAT Act

The Swedish Ministry of Finance has presented its report on a new VAT Act.

The purpose has been to carry out a technical review of the Swedish VAT legislation's structure, and has resulted in a proposal to replace the current VAT Act (1994:200) with a new VAT Act.

The new VAT Act is proposed to have a clearer structure and to be more transparent and user-friendly, by dividing it into 24 chapters. The chapters are proposed to be disposed mostly in the same order as the sections and chapters of the VAT Directive.

The new VAT Act is proposed to enter into force on 1 January 2022.

The Supreme Administrative Court

Unit trusts and repayment of withholding tax

The Supreme Administrative Court (the "Court") has ruled that an investment fund, organised in the form of a so-called unit trust and covered by Directive 2009/65/EC (UCITS Directive), is the entity entitled to dividends for the purpose of assessing the Withholding Tax Act's rules on repayment of Swedish tax on dividends.

Swedish withholding tax is levied on dividends from shares in Swedish limited companies if the person receiving the dividend is a natural or legal person resident outside of Sweden. Being entitled to dividends means being the

person who, at the time of the dividend, acquires the dividend for itself (beneficial owner).

The fund in question is an Irish fund in the form of a unit trust. The fund is established through a trust deed between a trustee and a manager. The fund is not a legal person and the assets in the fund are formally owned by the trustee. The fund is managed by the manager.

The trustee of the fund in question had, in the years 2006 to 2011, received dividends on behalf of the fund from Swedish limited companies. Approximately SEK 10m of retained withholding taxes had been claimed for repayment by the manager. The basis for the claim for repayment was that the fund was not a legal person and therefore not tax liable, and that the taxation was contrary to the rules on free movement of capital in accordance with the TFEU. The Swedish Tax Agency rejected the fund's claim for repayment on the grounds that the fund was not a legal person and could thus not be considered the person entitled to the dividends in accordance with the Withholding Tax Act.

The Court initially stated that a holder's rights in a UCITS Directive-covered unit trusts are limited to having his or her part of the fund redeemed and, when applicable, receiving dividends. None of the holders can, on their own, control the assets of the fund or their returns. Such holders can therefore not be considered entitled to dividends in accordance with the Withholding Tax Act.

Further, the Court stated that a unit trust shows many similarities to contractual funds established in accordance with the UCITS Directive, which are entitled to dividends in accordance with the Withholding Tax Act. A contractual fund is not a legal person, the assets are managed by a fund company and held by a custodian, and the formal ownership of the assets has been separated from both the management and custody. The main difference between a unit trust and a contractual fund is that the trustee of the unit trust is the formal owner of the fund's assets. This difference shall not, according to the Court, mean that they should be treated differently for the purpose of the Withholding Tax Act. The unit trust was thus considered entitled to the dividends in accordance with the Withholding Tax Act.

Provided services considered one single supply

The Court has ruled that the financial purpose of a company's provision of services via a digital platform has been to mediate loans between lenders and borrowers, i.e. such an intermediary service that is exempt from VAT.

According to Chapter 3, Section 9, of the VAT Act (1994:200), the turnover from banking and financial services and any turnover constituting securities trading or similar activities is exempt from VAT. The exemption shall be interpreted in accordance with Article 135(1)(b) of the VAT Directive, according to which the granting and mediation of credit and the management of credit by the person granting the credit shall be exempt from tax liability.

The company in question conducted its business through a digital platform on which potential lenders and borrowers were connected. The lender was registered in the company's credit-system and entered into an investment

agreement with the company. The lender thereafter paid the amount it intended to lend to a client account, from where funds were distributed on one or more loans. The borrower applied for loans via the company's website by submitting certain information such as desired principle amount and repayment period. The credit-system then matched the submitted information with a suitable lender. After the match, the company drafted a promissory note between the lender and the borrower. In the promissory note, the company was stated as the intermediary and agent for the lender.

In principle, the entire process of intermediating a loan was managed by the company, from reviewing the loan applications and drafting the agreements, to the distributions of the loans. The company also handled the administration of the borrower's payments of amortisation and interest and carried out recovery measures when applicable.

The Court initially stated that the financial purpose of the company's provision of services was to mediate loans between lenders and borrowers, and that the other services, such as the drafting of agreements and recovery measures, appeared subordinated to the main provision. It was therefore a matter of a provision of a single supply in which the mediation of loans was the main part. As the main part of the provision of services was exempt from VAT taxation in accordance with the VAT Act, interpreted in accordance with the VAT Directive, all the provided activities of the company's single supply were exempt from VAT taxation.

The Council for Advance Tax Rulings

Acquisition of shares considered as tax-exempt gift

The Council of Advance Tax Rulings (the "Council") has stated that an owner's transfer of shares in a limited company to a friend and employee of the company, was to be considered a tax-exempt acquisition.

As a general rule, all types of income received on the basis of employment must be taxed as income. In the case at hand, an owner of a company was planning on gifting part of the company to a near friend of his. Even though the friend worked in the company, the gift was based on their friendship and not on any work performed as an employee.

The Council stated that the assessment on whether the transferred part of the company was to be considered a taxable benefit on the basis of employment or a tax-exempt gift, had to be done on the basis of all the individual circumstances at hand. The Council found no reason to doubt that there was a close friendship between the two, and that the claimed purpose of the transfer of shares being a gift based on their friendship should be acceptable, provided the other circumstances did not demonstrate the opposite. The friend also had a salary that was deemed normal for the market as well as additional pay in the form of bonuses. The shares also held a high enough value for it to be improbable that it instead would have been based on the friend's performance as an employee of the company, and the transfer was not subject to any

conditions. The transfer and acquisition of shares was therefore to be considered a tax-exempt gift.

Administrative fee to a peer-to-peer company is not deductible

The Council has stated that a fee paid by a creditor to a company that mediates so-called peer-to-peer loans is not a deductible expense.

In the case at hand, a person was planning to lend funds to a company mediating peer-to-peer loans. Creditors wishing to lend the company funds enter into an agreement with the company, giving it the right to represent the creditors on all matters relating to a credit agreement. The company charges the creditors a monthly fee which is deducted from the creditors' interest income before the remaining amount is credited.

In general, expenses made for acquiring and maintaining income are deductible. However, certain administration fees are not deductible. According to the Council, the company is responsible for the administrative process regarding the lending, and therefore should be considered to provide a service with several and more components than what is related to the interest payment. The fee is comparable to expenses related to the administration and management of capital, which in case law has been considered non-deductible and not necessary for acquiring a certain income. The fee is therefore to be considered a non-deductible administration fee.

The Swedish Tax Agency

The Swedish participation exemption regime and non-resident legal persons

The Swedish Tax Agency has published a statement in which it clarifies when a non-resident legal person is considered equivalent to a Swedish limited company when applying the Swedish participation exemption regime.

For the Swedish participation exemption regime to be applicable on dividends from non-resident companies, the non-resident company has to be comparable to a Swedish limited company or a Swedish cooperative on a civil judicial basis, as well as subject and liable to income taxation in its resident country.

According to the Swedish Tax Agency, the following is especially important to consider when determining a non-resident company's comparability to a Swedish limited company or a Swedish cooperative:

- The non-resident company should be a legal person and have legal capacity, meaning it should be able to:
  - acquire rights;
  - undertake obligations; and
  - bring proceedings before courts etc.

  The assessment is done based on the rules of the company's resident country and, if the company can be structured in different ways, according to its chosen structure.

- > All partners of the non-resident company must have limited liability for the company's obligations. However, certain legal forms, such as SCA (Luxembourg) and KGaA (Germany), may fall under the applicability of the Swedish participation exemption regime due to the implementation of the Parent-Subsidiary Directive.
- > The non-resident company must be subject and liable to income taxation in its resident country. The non-resident legal person must not be taxed as a partnership.
- > A non-resident legal person cannot be considered subject and liable to income taxation if no corporate tax is levied at all in its resident country. The same holds true if there is corporate tax, but the non-resident legal person is exempt from such tax.
- > The fact that a company's resident country applies the so-called principle of territoriality, meaning that certain types of income are exempt from corporate tax on the basis of them being derived from another state, does not rule out the company from being considered subject and liable to income taxation.
- > Taxes paid by the non-resident company should bear the characteristics of income tax. This requirement excludes fixed annual amounts of smaller size that are not related to actual income and tax capacity, as well as amounts paid voluntarily.

< back to top >

United Kingdom

Progress of Finance Bill 2020

The Finance Bill 2019-21 has continued to progress through Parliament.

The Public Bill Committee debates have now finished and the Report Stage Finance Bill, incorporating the amendments passed by the Public Bill Committee, published. Dates for the remaining stages are yet to be announced.

UK Supreme Court finds diver's income remains employment income under treaty despite domestic deeming provision

The UK Supreme Court (Lord Hodge, Lady Black, Lord Briggs, Lady Arden and Lord Hamblen) has determined in *Fowler v Revenue and Customs [2020] UKSC 22* that the income of an employed diver is employment income for the purposes of the UK/South Africa double tax treaty, despite a UK domestic law provision which deems the income of divers in certain circumstances to be trading income.

The issue in this case was whether the income received by the diver was employment income (governed by Article 14 of the treaty and taxable under that article in both the UK and South Africa) or business profits (governed by Article 7 of the treaty and taxable under that article only in South Africa). This

in turn depended on whether the diver received income from his employment for the purposes of the treaty. There were two complicating factors here:

- employed divers carrying out the particular type of diving work done by the taxpayer are, under domestic UK tax law, treated as if they are self-employed for UK income tax purposes (Section 15 ITTOIA 2005); and
- Article 3(2) of the treaty provides that terms used in the treaty, if not defined in it, are to be given the meaning which they have in the law of the state trying to recover the tax (here, the UK).

The taxpayer argued that the deeming of Section 15 was broad enough to mean that he received business profits (and not employment income) for the purposes of the treaty, which were not taxable in the UK.

The court disagreed considering that "*nothing in the Treaty requires articles 7 and 14 to be applied to the fictional deemed world which may be created by the UK income tax legislation".* The fiction created by Section 15 is *"not for the purpose of deciding whether qualifying employed divers are to be taxed in the UK upon their employment income, but for the purpose of adjusting how that income is to be taxed, specifically by allowing a more generous regime for the deduction of expenses. Therefore to apply the deeming provision…so as to alter the meaning of the terms in the Treaty…would be contrary to its purpose".* The treaty therefore had to be applied by reference to the "real world" position, and, on the assumption that the diver was employed, Article 14 applied.

This case has been an interesting study of how domestic deeming provisions may affect the interpretation of double tax treaties. Differing outcomes in the courts and tribunals at differing levels in the UK has illustrated the complexities of this issue.

< back to top >

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