BEPS and international tax newsletter

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Introduction

This newsletter provides regular updates and insights on the OECD's BEPS initiative and ongoing international tax reforms.

Our thirteenth edition deals with the new measures February 2022 by the OECD and in 27 countries: Australia, Belgium, Benin, Botswana, Canada, Chile, Curaçao, Cyprus, Denmark, France, Germany, India, Italy, Kenya, Lesotho, Malaysia, Netherlands, Niger, Peru, Spain, Seychelles, Switzerland, Taiwan, Turkey, United Arab Emirates, Ukraine and United States.

If you have any questions, please don't hesitate to get in touch with a member of our team.

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OECD

On 4 February 2022, the Secretariat of the Organisation for Economic Co-operation and Development (OECD) released a public consultation document with draft rules for tax base determinations under Amount A for Pillar One of the OECD/G20 project on Addressing the Tax Challenges Arising from the Digitalisation of the Economy (the so-called BEPS 2.0 project). Pillar One involves the development of new nexus and profit allocation rules that assign a greater share of the taxing rights over global business profits to the market jurisdictions. The consultation document indicates that it is a working document released to obtain input from stakeholders. The release of the document does not reflect consensus of the Inclusive Framework member jurisdictions on the substance of the document. Comments may be provided on any aspect of the rules, but the consultation document identifies areas where specific input is sought (e.g., the conversion of non-equivalent financial accounting standards, the cap on restatement adjustments, the inclusion of time limitations on loss carry forwards, and the treatment of changes in the group structure). On 22 February 2022, the Inclusive framework published the first public comments received.

For Amount B of Pillar One, a public consultation document will be issued in mid-2022, with a public consultation event to follow the comment period.

For the subject to tax rule of Pillar Two, the draft model provision and its commentary will be released in March 2022 with defined questions set for input.

On 18 February 2022, the OECD Secretary-General has released a report on taxation for G20 Finance Ministers and Central Bank Governors. The report mentions the key developments in international tax reform, including the two-pillar solution for reforming the international tax system, the work on carbon pricing, the tax transparency and the BEPS minimum standards.

The OECD announced that Lesotho, Thailand, and Vietnam signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). At the time of signature, all three jurisdictions submitted a list of its tax treaties in force that they would like to designate as covered tax agreements (CTAs). Together with the list of CTAs, they also submitted a preliminary list of their reservations and notifications in relation to the CTAs (MLI positions) with respect to the various provisions of the MLI. The definitive MLI positions for these jurisdictions will be provided upon the deposit of their respective instrument of ratification, acceptance or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Lesotho was the only jurisdiction who opted in for mandatory binding arbitration.

The OECD released an update on the results of the peer reviews of jurisdictions' domestic laws under BEPS Action 5 (harmful tax practices). The updated results cover new decisions on nine preferential tax regimes. According to the OECD press release, the total number of tax regimes that have been reviewed, or are under review, is 317. The peer review shows the following results:

• The regimes of Hong Kong (Profits tax concession for carried interest); Lithuania (Large scale investment projects); Qatar (Exemptions and concessionary rate under Qatar financial centres; Free zones at science & technology parks; and Free zone areas) are considered not harmful.

• The regimes of Mauritius (Foundations and Trusts regimes) have been abolished.

• The regime of Costa Rica (free trade zone) is in the process of being amended.
• The regime from Albania (Industries incentive (software production/development)) is under review.

The OECD released the eighth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino, and Serbia on dispute resolution under BEPS Action 14. Overall, the outcomes of this batch reports positive changes across the assessed jurisdictions. According to the peer review reports, Curaçao, Guernsey, Jersey, Monaco, San Marino, and Serbia have addressed either all or most of the deficiencies identified in the Stage 1 peer review. Brunei Darussalam and the Isle of Man addressed some of the identified deficiencies. All the assessed jurisdictions have committed to resolve the remaining deficiencies identified during the peer review process.

Australia

The Australian Government has introduced a Bill into Parliament proposing to introduce an optional 17% patent box regime (patent box) targeting medical and biotechnology patents, as announced in the 2021-22 Federal Budget (Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022) to apply for income years commencing on or after 1 July 2022. This Bill follows a July 2021 Discussion Paper, with no further public consultation on any exposure draft Bill and only limited confidential consultation on an early draft of the law. It appears that many improvements called for in submissions have not been incorporated in the Bill. In particular, the proposals remain limited to eligible income from a medical or biotechnology patent only and calls to expand the patent box to Fintech, life sciences outside the medical space and low emissions technologies were not incorporated. The patent box applies to patents granted or issued after 11 May 2021. This is a positive development, as Treasury's Discussion Paper previously proposed that the patent box would only apply to patents applied for after 11 May 2021.

Belgium

The transfer pricing audit department within the Belgian tax administration is launching a new batch of transfer pricing audits with an expansion of the audit team underway and a tendency to be less settlement minded.

Benin

Benin's tax authority has published the Finance Law for 2022 (Law No. 2021-16 of 23 December 2021).

Botswana

The government of Botswana published a communication in the Gazette Extraordinary, Vol. LIX, No. 122 of 29 December 2021, announcing that the amnesty period for the waiver of interest and penalties, which was due to come to an end on 31 December 2021, was extended until 30 June 2022. The waiver applies where a taxpayer makes full payment of the principal amount of income tax and value added tax due.

Canada

On 4 February 2022, Canada's Department of Finance released draft legislation to amend the Income Tax Act (ITA) and the Excise Tax Act to reflect certain measures announced in the Canada 2021 federal budget, although some significant measures, such as changes to the Canadian transfer pricing regime and modernization of the general anti-avoidance rule, were not addressed. Interested parties are invited to provide comments on the proposed amendments by various dates.

Chile

Recently, the elected President of Chile (who will take office in March 2022) announced a tax reform. Among other items, the proposed changes would allow tax authorities to apply general anti-avoidance rules. Currently, general anti-avoidance rules are under the competence of tax courts, i.e., only tax courts can decide the existence of abuse or simulation (upon request of the tax authority with the taxpayer being a party in the procedure). However, any changes in the legislative regulation of these rules will require approval by the Chilean Congress.

Curaçao

The Curaçao Ministry of Finance released new guidance on the innovation box regime.

Cyprus

The Cypriot Tax Department issued an announcement which lists the 10-year government bond yield rates as of 31 December 2021 for a number of countries with respect to the Notional Interest Deduction (NID) on equity. These yield rates are to be used to determine the reference interest rate for claiming NID for the 2022 tax year.

Denmark

The Danish Tax Administration (DTA) published guidance on the requirements to submit the Master File. The deadline for submission of the Master File is 60 days after the due date for the filing of the annual corporate income tax return. For income years starting on 1 January 2021, the deadline is 29 August 2022. However, foreign groups owning Danish subsidiaries raised some questions about the feasibility to finalize the Master File in time to meet the deadline. According to the guidance, the DTA would allow the submission of a temporary Master File if certain cumulative requirements are met, such as:

(i) the temporary Master File submitted is less than a year old at the time of the submission deadline;

(ii) it must be stated when the final Master File for the income year in question will be submitted; and

(iii) significant changes affecting the Danish taxpayer for the income year in question, not already disclosed in the local file, must be briefly described.

If the taxpayer is not able to submit a temporary Master File meeting the requirements above, an extension of the submission deadline must be requested to the DTA.

France

Tax treaty between France and Colombia is finally entered into force.

The French Government recently published the French synthesised text of the France – Mauritius Income and Capital Tax Treaty (1980), as amended by the 2011 protocol, displaying the modifications made to the treaty by the MLI. France and Mauritius deposited their instrument of ratification of the MLI on, respectively, 26 September 2018 and 18 October 2019. The MLI entered into force for France on 1 January 2019 and for Mauritius on 1 February 2020. France expanded the application of the Multilateral BEPS Convention on its existing treaties on 22 September 2020.

Germany

Due to the ATAD Implementation Act, the so-called exit taxation according to section 6 of the Foreign Tax Act (Aussensteuergesetz or AStG) has been subject to some significant changes. The group of taxpayers who may be subject to exit tax has been modified. In the past, an unlimited tax liability in Germany of at least ten years was required. From now on, taxpayers who have been subject to unlimited tax liability in Germany for at least seven years within a period of twelve years are subject to the exit taxation. As before, taxpayers are subject to exit taxation if they hold shares of at least 1% in domestic or foreign corporations. But caution is needed: In case a partnership has opted for the taxation of corporations through the German Act for Modernisation of the Income Tax Act (Körper-schaftsteuerrecht-Modernisierungsgesetz, KöMOG) the partnership would also be subject to exit taxation. Even after the reform of section 6 AStG, the most frequent cause of the exit taxation is the exit/move of the individual to abroad. In addition, however, the transfer of a significant participation without a payment to persons not subject to unlimited tax liability leads exit taxation. Also, the exclusion or restriction of German tax law causes exit taxation. The assessed tax can be deferred at the taxpayer's application so that the tax can be paid in seven equal annual instalments. Basically, the tax office will require a security deposit for this. Whereas in the old regulation a distinction was made between departures to an EU/EEA country and those to a third country, the deferral regulation (Stundungsregelung) now applies in any case. As a result, the regulation of indefinite deferral without security deposit for the exit to an EU/EEA country will not be applicable anymore. Due to the ATAD Implementation Act the so-called return regulation was also adjusted. According to the return regulation, the tax claim generally lapses if the taxpayer re-establishes a residence in Germany within seven years and becomes subject to unlimited tax liability again. In the past, this time limit was only five years. The time limit can be extended to a maximum of twelve years if the "intention to return" persists. What at first glance appears to be a relief, however, turns out to be a disadvantage for those who have moved to an EU/EEA country: Under the previous regulation, these taxpayers could return without any time limit. The new regulations will apply as of the 2022 assessment period.

India

The Indian Government issued a Circular clarifying the applicability of the Most Favored Nation (MFN) clause found in some of India’s Double Taxation Avoidance Agreements (DTAAs). The Circular restricts the applicability of the MFN clause in a DTAA between India and another country (the second State) to cases where all the following conditions are satisfied:

- India’s DTAA with the country which has a lower rate or restricted scope (the third State) is entered into after the signature/entry into force (depending on language of MFN Clause) of India’s DTAA with the second State.
- The third State has to be an OECD member at the time of signing its DTAA with India.
- India limits its taxing rights in relation to the rate or scope of taxation in its DTAA with the third State.
- India issues a separate notification under the Income Tax Law for importing the favorable benefits of the DTAA with the third State into the DTAA with the second State.

The above Circular will not be applicable in the case of taxpayers who have received a favorable decision by any court on the applicability of the MFN clause.

India releases Union Budget 2022.

Italy

The Italian Tax Authorities released Circular Letter No. 2/2022 providing clarifications on hybrid mismatch rules. This Circular follows the comments received during the public consultation period launched in October 2021. Among other items, the Circular provides clarifications and examples on the application of the rules, and relevant definition and requirements. Further, the Tax Authorities clarified that the domestic rules addressing hybrid mismatches do not qualify as specific anti-avoidance rules and, therefore, cannot be subject to the disapplication of anti-abuse rules.

Kenya

In a judgment delivered on 10 December 2021, the Kenya High Court ruled that the distribution and sale of copyrighted material is not subject to withholding tax.

The High Court found that a distinction should be made between the sale of copyrighted material and the use or exploitation of a copyright.

Arrangements between a software copyright holder and a distribution intermediary grants to the distribution intermediary the right to transactions, and the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Accordingly, in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be considered as business profits and not royalties subject to withholding tax, irrespective of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

Lesotho

On 9 February 2022, Lesotho signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS bringing the total number of signatories to 97. The government of Lesotho released its provisional list of expected Reservations and Notifications, which will be confirmed upon deposit of the instrument of ratification.

Malaysia

The Income Tax (The Incentive for Manufacturers of Pharmaceutical Products Scheme) Rules 2022 [P.U.(A) 34/2022] were gazetted on 17 February 2022 and are deemed to have effect from the year of assessment 2021.

Netherlands

The Dutch Government announced its tax treaty negotiation for 2022. According to the press release, the Netherlands wants to continue discussions with the following countries: Belgium, Brazil, Kyrgyzstan, Moldavia, Morocco, Mozambique, Portugal, Russia, Sri Lanka, Uganda, and the United Arab Emirates. Additionally, the Netherlands wants to start renegotiations with Bahrain, Barbados, Rwanda, and Suriname.

Niger

The Niger - United Arab Emirates Income Tax Treaty (2018) entered into force and generally applies from 1 January 2022.

Peru

Peruvian Tax Authority establishes guidelines for permanent establishments.

Spain

On 31 January 2022, the Spanish Tax Authorities (STA) published the general guidelines for the 2022 Tax Audit Plan (the Audit Plan). The Audit Plan is a document prepared annually by STA which sets forth the most relevant courses of action for the prevention and control of tax fraud. These guidelines are publicly disclosed each year and may be of interest for international groups with a presence in Spain. While many points are recurrent, some focus areas will receive singular attention or are designated as priorities, particularly in the context of international taxation.

Spain proposes improvements to tax treatment of carried interest and inpatriates regime.

Seychelles

Seychelles became the 68th country to deposit its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The convention will enter into force in respect of Seychelles on 1 April 2022. Seychelles submitted its MLI position on 7 June 2017, listing its provisional reservations and notifications and including 28 tax treaties that it wished to be covered by the MLI.

Switzerland

The Swiss Federal Council decided on the implementation of the global minimum tax rate agreed in the two pillars solution to address the tax challenges arising from the digitalization of the economy (the BEPS 2.0 project). Accordingly, Switzerland will implement the 15% minimum tax for MNE groups that are in-scope of Pillar Two. The Federal Council will work close with the cantons, communes and other interested parties, to ensure a timely implementation of the new global minimum tax rules. Switzerland aims to have these rules in effect by 1 January 2024. The cantons will make sovereign decisions on location measures to ensure that Switzerland remains an attractive business location. The latter will be in addition to the forthcoming withholding tax reform.

The Swiss Federal Tax Administration published the safe haven interest rates for 2022 to be used on intra-group loans.

Taiwan

The Executive Yuan formally issued ruling no. 1100041879 to announce that the effective date of the Controlled Foreign Company regime is 1 January 2023.

Turkey

Turkey reduces its corporation tax rate by one point for certain corporations on specified income.

UAE

The minister of Finance of the United Arab Emirates (UAE) confirmed that the UAE will introduce a corporate income tax for financial years starting on or after 1 June 2023. The CIT rates are as follow:

- 0% for taxable income up to AED375,000 (approximately US$102,000);
- 9% for taxable income above AED375,000; and
- A different tax rate for large multinationals that meet specific criteria set in Pillar Two of the BEPS 2.0 project.

Ukraine

The Law of Ukraine No. 1525-IX of 3 June 2021 "On Amendments to the Tax Code of Ukraine on the abolishment of the taxation of income received by non-residents in the form of payment for production and / or distribution of advertising and improving value-added taxation on the provision of electronic services to individuals by non-residents” (Law No. 1525), took effect. Law No. 1525 has introduced new value added tax (VAT) treatment for supplies of electronic services by nonresidents to Ukrainian private individuals. As of 2022, such nonresidents may need to register for VAT in Ukraine, charge 20% VAT on their services, submit simplified VAT tax returns and pay tax in Ukraine. Starting from January 2022, Ukrainian tax authorities started accepting VAT registration applications filed by nonresidents through the special web-portal.

USA

Addressing the BEPS 2.0 negotiations, Republican Senate Finance Committee members wrote to Treasury Secretary Janet Yellen on 17 February, highlighting their concerns and underscoring the need for bipartisan discussions with Congress over the plan. The Republican committee members wrote that the BEPS Pillar Two global minimum tax model rules released in December 2021 apply “far more broadly and adversely” to US companies than foreign competitors. According to the letter, other countries appear to have “negotiated more successfully to protect their domestic tax laws and companies” to receive exemptions from a global minimum tax. The Senators wrote: “It is one thing for the Administration to advocate for higher taxes as part of its domestic tax agenda, but quite another to explicitly negotiate an international agreement that would subject U.S. companies to double taxation unless Congress acts accordingly.”

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About Mazars

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