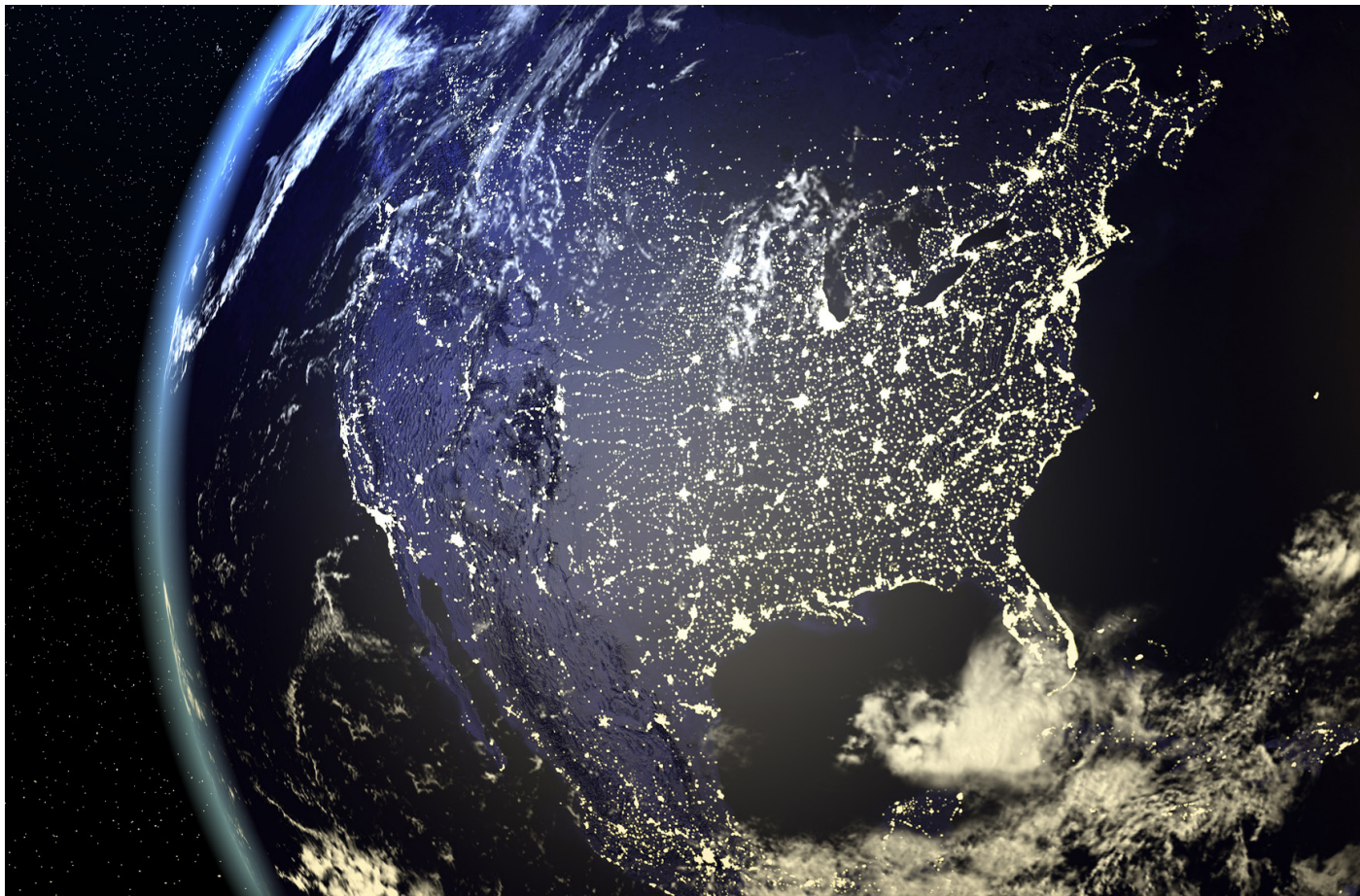


# MAZARS U.S. TAX DESK NEWSLETTER

June 2019



## IN THIS ISSUE!

Welcome to the second edition of the Mazars U.S. Tax Desk Newsletter for 2019!

Aside from the continued push by the G20 for review and action on the digital economy, local country reform on matters such as VAT and transfer pricing continues. In this issue, we explore and share our perspectives on:

- Dividends from US corporations under German trade tax law;
- Reduction in China's VAT rate;
- Brexit update; and
- New regulations on how to book depreciations in a merger in Sweden.

The above is only a selection of the wide array of contributions in this issue. Please see page 2 for a full listing.

We are delighted that our publication is continuing to grow in content and circulation numbers. If you would like to share your country insights, please feel free to contact us.

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 **EUROPE**

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## DIVIDENDS FROM NON-EU (US) CORPORATIONS - LIGHT AT THE END OF THE TUNNEL

Under German trade tax law, dividends are generally subject to German trade tax as far as:

- they qualify as business income (e.g. corporation with registered office or place of management in Germany) and
- this income can be attributed to a German permanent establishment (e.g. place of management in Germany).

German trade tax ranges from 7% to approximately 17% depending on where the company or permanent establishment is located. In contrast to corporations, individuals can credit the trade tax against their personal income tax up to a trade tax rate of 13.30% (380% \* 3.5%) but limited to the actual trade tax. Thus, especially for corporations, trade tax has a significant economic impact.

As an exception to this general rule, dividends can be partially trade tax exempt (corporations 95%, individuals 40%, and partnerships 95% or 40% depending on the nature of the respective partner) as far as they meet the requirements of the so-called trade tax participation exemption (in the following: "TT Participation Exemption").

According to the current German trade tax law, trade taxpayers receiving dividends from domestic corporations must meet fewer requirements (in the following: "Domestic Requirements") than trade tax payers receiving dividends from non-EU corporations (in the following: "Non-EU Requirements") to benefit from the TT Participation Exemption.

Domestic Requirements	Non-EU Requirements
Minimum share of 15% at the beginning of the assessment period (calendar year) and	Minimum share of 15% continuously held as of the beginning of the assessment period, and
the profit participation has been recognized for the determination of the trade income.	the profit participation has been recognized for the determination of the trade income, and
	proof of gross income exclusively or almost exclusively arising from active business or from certain participations within the meaning of the German Controlled Foreign Corporate rules (so-called activity clause).

The Non-EU Requirements were subject to a recent decision of the European Court of Justice (in the following: "ECJ") which will lead to an amendment of the German Trade Tax Act and will have an impact on investments in US corporations.

### ECJ DECISION

On 20 September 2018, the ECJ decided that the Non-EU Requirements are in breach with the European Freedom of free movement of capital (EV, ECJ C-685/10) since the Non-EU requirements of the TT Participation Exemption are stricter than the Domestic requirements and there is no adequate reason for this. Consequently, German tax authorities were obliged to apply the current stipulation of the TT Participation Exemption under consideration of the European Freedom of movement of capital.



## JOINT DECREE OF THE FEDERAL STATES AS REACTION ON ECJ DECISION

After the decision by the ECJ, the Federal States released a Joint Decree, dated 25 January 2019, which stated that trade taxpayers receiving dividends from non-EU corporations benefit from the TT Participation Exemption when the Domestic Requirements are met.

## ENVISAGED CHANGE OF TRADE TAX LAW

Following the ECJ decision and the Joint Decree, it is envisaged to change the trade tax law with effect as of 1 January 2020. According to the latest draft bill, the TT Participation Exemption for dividends from non-EU corporations will be granted if the Domestic Requirements are met.

## OUTLOOK: TT PARTICIPATION EXEMPTION ON DIVIDENDS FROM US CORPORATIONS

Dividends from US corporations are and will be subject to the TT Participation Exemption under the same requirements as dividends from domestic corporations. This means that the trade taxpayer will not have to

meet the requirements of the activity clause. This is a significant simplification as the application of the activity clause could easily result in a cumbersome procedure for the trade taxpayer (such as documentation of the US corporations' gross income and correspondence with the German tax office).

Furthermore, the trade taxpayer will only need to hold at least 15% of the shares in the US corporation at the beginning of the assessment period instead of continuously holding at least 15% of the shares as of the beginning of the assessment period.

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## THE NETHERLANDS

## DRAFT DECREE - REVISED DUTCH RULING PRACTICE

On April 23, 2019 the Dutch State Secretary of Finance published a draft decree on the revised Dutch ruling practice for rulings with an international character. This draft decree follows the outline of the revised ruling practice as mentioned in the letter dated November 22, 2018. We refer to our previous edition of the Newsletter: [US Desk December 2018 edition](#).

The draft decree provides, among others, further guidance on the conditions to conclude an international tax ruling which includes concise and practice-related examples. The aim is to implement the new ruling practice policies as of July 1, 2019.

### OVERVIEW

Below we will describe the following three conditions which disallow concluding an international tax ruling:

1. The Dutch taxpayer (and the group as a whole) does not have sufficient 'economic nexus' with the Netherlands.
2. The sole or decisive motive for entering into the transaction is to avoid Dutch or foreign taxes
3. The ruling relates to the tax consequences of direct transactions with certain low taxed or black-listed jurisdictions

Further we will briefly detail the increase in transparency, the process of obtaining such a ruling and the implementation of the revised Dutch ruling practice.

### INTERNATIONAL TAX RULINGS

Under the new policy, taxpayers applying for an international tax ruling may not obtain a Dutch tax ruling if any one of the following conditions apply:

- I. The Dutch taxpayer (and the group as a whole) does not have sufficient 'economic nexus' with the Netherlands. This new term is to replace the current (minimum) Dutch substance requirements which are required to be met in order to obtain a tax ruling. Sufficient economic nexus means that the level of relevant operational economic activities and staff in the Netherlands should be in line with the position and the function of the relevant Dutch entity within the group.

*An example mentioned in the draft decree relates to a Dutch company which runs an operational distribution center. Next to the distribution activities the Dutch company also pays and receives interest and/or royalty payments to and from its affiliates without there being a functional body seeing to these activities. This entity may receive a Dutch tax*

ruling regarding its distribution activities but not on the interest and/or royalty payments to and from its affiliates as there is no 'economic nexus' for this portion of the activities.

- II. the sole or decisive motive for entering into the transaction is to avoid Dutch or foreign taxes;

*Another example relates to a Dutch company who enters into an interest free loan borrowing from an affiliate in order to derive a tax benefit from a transfer pricing mismatch (i.e. a deductible tax expense in the Netherlands with no pick-up at the level of the affiliate). In this case, the sole or decisive motive for entering into the interest-free loan is to avoid foreign taxes.*

- III. The ruling relates to the tax consequences of direct transactions with certain low taxed or black-listed jurisdictions. If transactions involve a tax resident in a state that is included on the Dutch list of so-called "low-tax jurisdictions", and the EU list of non-cooperative jurisdictions, a tax ruling may not be obtained. A jurisdiction is considered "low taxed" if it levies no profit tax or a profit tax with a statutory rate of less than 9%. Prior to each calendar year, an exhaustive list will be published with all designated non-cooperative and low-tax jurisdictions for the next calendar year.

*One of the examples in this respect sees to a multinational enterprise with its headquarters (HQ) based in a country listed on the Dutch list of "low-taxed jurisdictions". The headquarters has an FTE of 100 and holds a participation in an operational Dutch company with a count of 25 FTE. The Dutch company wishes to enter into a tax ruling procedure for questions relating to dividend withholding tax on dividends distributed to the HQ. However, as the HQ is located in a black-listed jurisdiction no ruling may be obtained.*

## TRANSPARENCY

To increase transparency, the Dutch tax authorities will publish anonymized summaries of each international tax ruling to the public. Information provided by taxpayers to the Dutch tax authorities is to be treated as confidential, whereby the summaries of the ruling cannot be traced back to the taxpayer. In addition to the November letter, cases which are denied will also be published. The latter is to clarify why in these cases no ruling was concluded.

## ISSUE PROCESS

To further improve the quality of the Dutch ruling practice, the State Secretary proposes to coordinate the issue process of international tax rulings more centrally by means of a designated team within Dutch tax authorities. This team will be included in the sign-off of international tax rulings.

All rulings will be concluded in a standardized form for a period of 5 years (which can be extended to 10 years in exceptional situations).

## IMPLEMENTATION

As indicated above, the aim is to implement the revised Dutch ruling practice for international tax rulings as of 1 July 2019. The letter seems to indicate that the new ruling policy has no retroactive effect, meaning that international tax rulings which are already in place, should not be affected by the revised Dutch ruling policy.

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## **CHANGES TO THE IRISH TRANSFER PRICING REGIME?**

On 18 February 2019, Ireland's Department of Finance launched a public consultation on Ireland's transfer pricing regime. The proposed changes to the transfer pricing (TP) regime, to be contained in Finance Bill 2019, are due to be enforced in 2020. These are likely to impact both Ireland's domestic and international tax landscapes significantly. Therefore, undertaking a public review is critical to ensure that the correct regime is introduced to allow Ireland to remain competitive, as well as counteracting any tax abusive transfer pricing measures.

Since April 2019, there have been multiple responses to the Department of Finance's public consultation process.

Set out below are some of the responses to the six primary questions raised.

### **1. INCORPORATION OF THE OECD 2017 GUIDELINES INTO IRISH LEGISLATION**

Current TP legislation is drafted by reference to the 2010 OECD guidelines. General recommendations suggest a transition time for the adoption of the OECD 2017 Guidelines with no retrospective application of rules, while providing sufficient time to assess the impact on business operations. A request has also been made for clear guidance. Other commentary has suggested the requirement for a sufficiently resourced Competent Authority to deal with international tax disputes. Overall the recommendations have been welcomed.

### **2. REMOVAL OF GRANDFATHERING FOR PRE-1 JULY 2010 ARRANGEMENTS**

When originally enacted, Irish TP provisions contained grandfathering provisions in respect of transactions which

were in place and documented prior to 1 July 2010. If grandfathering provisions are removed with effect from 1 January 2020, clear guidance must be provided by Revenue regarding the repricing of existing grandfathered transactions. A practical approach should be adopted for documentation requirements for such transactions where data availability is limited.

### **3. EXTENSION OF TRANSFER PRICING RULES TO SME'S**

Continued exemption for SME's is supported. It is noted that many other EU countries do not extend TP rules to SME's as the risks identified in the BEPS project would not be outweighed by the additional taxpayer compliance requirements. If the general exemption is removed, the threshold for the application of TP rules should be set at a de-minimis limit so that the compliance and documentation burden does not overwhelm SME's.

### **4. EXTENSION OF TRANSFER PRICING RULES TO NON-TRADING TRANSACTIONS**

The proposed extension of TP rules to non-trading transactions, which has the potential to add significant layers of compliance, has warranted close attention. One suggestion is to align the existing legislation that applies market value to capital transactions with transfer pricing legislation, such that the use of accounting valuations for capital gains tax purposes could satisfy the documentation requirements for transfer pricing purposes. Further consideration should be given to the exemption of:

- domestic non-trading transactions, in order to minimise the impact of varying corporate tax rates applying to parties to domestic transactions; and
- loans or other forms of debt provided by an Irish company to subsidiaries, which would reflect the economic reality of such funds as quasi-equity.



## 5. TRANSFER PRICING DOCUMENTATION

Ireland should adopt the OECD's set of common criteria in Annex I and II of the 2017 Guidelines for Master and Local Files, as the standard for transfer pricing documentation.

The Master File requirement should not apply to multinational groups of a medium or smaller scale, as the Local File should contain enough information to evaluate the reasonableness of their transfer pricing policies. Local File requirements in Ireland could consider a 'Country File' as a simplification measure and have de minimis thresholds for materiality purposes. The filing of Master and Local Files should be upon written request by Revenue, rather than imposed as a mandatory filing requirement.

Revenue guidance is essential once the new documentation requirements are introduced.

The timing for the preparation of transfer pricing documentation should remain in line with current practice, that is, available no later than when the Irish corporation tax return is due for the accounting period in which the transaction was reflected.

Penalty protection measures put forward in the OECD 2015 BEPS Action 13 Report could be considered to encourage transfer pricing documentation compliance.

## 6. APPLICATION OF TRANSFER PRICING RULES TO BRANCHES, ADOPTION OF THE AUTHORISED OECD APPROACH

In principle, it is considered appropriate to adopt the Authorised OECD Approach (AOA) for the attribution of branch profits into Irish law. However, it is highlighted that there is a requirement for more time to consult with shareholders in the financial services industry and other relevant sectors, to ensure that there are no unintended consequences resulting from the proposed adoption of the AOA approach.

Detailed Revenue guidance regarding the application of the AOA in an Irish context would be required to provide certainty for businesses, given the differing views that have been taken by tax authorities around the world regarding aspects of the AOA.

In general, replies to the Department of Finance's consultation process have been positive and constructive,

though a common theme throughout has been the request for clear comprehensive guidance to be supplied by Revenue. This highlights the pace at which domestic and international tax policy is developing and tax-payers' ability to keep up with developments.

Ireland intends to legislate for the new TP rules in Finance Act 2019, with a proposed implementation date of 1 January 2020.

In addition to the implementation of the new TP rules, the BEPS project has highlighted many risks and Ireland's response has placed additional compliance requirements on taxpayers. Further challenges such as Brexit will also place additional pressure on enterprises. The EU's ATAD interest implementation and the Multi-Lateral Instrument further add layers of complexity to our growing corporate tax code.

## OECD DIGITAL ECONOMY ROADMAP

In early June 2019 the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) announced that its 129 members have adopted a "Programme of Work" setting out a process for agreeing a new global consensus for taxing multinational enterprises (MNEs). The document, which calls for intensifying international discussions around two main pillars, was approved at a meeting of the Inclusive Framework.

This Programme of Work, which is a follow on from the consultation process undertaken earlier this year, sets out a roadmap which includes two pillars of work. The first pillar will focus on solutions for determining where a company should pay tax and on what basis as well as what portion of profits should be taxed where clients or users are located. The second pillar of work is intended to address remaining issues identified by the OECD/G20 BEPS initiative and explores the design of a minimum tax for MNEs.

The OECD said that there is a large amount of work to do to reach a consensus-based long-term solution, adding that they hope to reach a unified solution before the end of 2019 to ensure adequate time for completion of work during 2020.

The Programme of Work was endorsed when presented by the OECD to the G20 Finance Ministers earlier this month in Japan, who agreed there is an urgent need for the introduction of a digital tax.

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## **BREXIT UPDATE**

Given the events of the last few weeks in the UK, the below information is intended to remove bias and media spin to concisely outline the current political situation in the UK in a factual manner.

### **UK PRIME MINISTER RESIGNATION**

Theresa May announced on Friday 24 May that she will be resigning as Prime Minister of the UK but will remain in office until her successor is appointed. She stood down as party leader on 7 June 2019 in order to commence the process of the Conservative Party electing their new leader.

There is no requirement for there to be a public vote; the new leader of the Conservative Party will become the new UK Prime Minister once selected (through a series of votes within the Conservative Party). As at 21 June 2019, a number of voting rounds have concluded and the final 2 candidates (being Boris Johnson and Jeremy Hunt) will now campaign over the next 4 weeks ahead of the final vote that will take place in late July; currently, it is anticipated that the new leader of the Conservative Party will be announced on 22 July 2019.

The UK is still part of the EU and will remain so until a deal (that has been agreed with the EU) is approved by the House of Commons. Should a deal not be agreed and approved by 31 October 2019, the default position is that the UK will leave the EU (although this was the position at 29 March 2019 at which point an extension was granted).

It has been publicly announced by the Speaker of the House of Commons that he will not allow the UK to crash-out of the EU without a deal, at least not before Parliament votes and approves for there to be no deal.

Although the election for the new Conservative Party leader has commenced, it is not possible to provide comment on what the successful candidate will try to achieve regarding Brexit. All possibilities are therefore open, including a possible second referendum.

### **EU ELECTION RESULTS**

As the UK is still part of the EU, it took part in the EU elections for the European Parliament that concluded on Sunday 26 May 2019. The elected individuals become Members of the European Parliament (i.e. MEPs).

The MEPs have no impact on the running of each individual Country but are the representatives of their Country in respect of European Union matters. Therefore, the political ideology that is most heavily represented within the collective of MEPs (i.e. from every Country) tends to dictate the directives that the EU gives to each Member State to be enacted in local legislation.

The Pro-Brexit parties performed strongly in the UK MEP elections and Nigel Farage's Brexit Party made the headlines achieving 31.6% of the votes. However, when considered in aggregate, the 'Anti-Brexit' parties also performed well (the Pro and Anti Brexit Parties share roughly equal representation). The two main UK political parties achieved minimal success.

With only 36.9% of the UK electorate turning out to vote, it is questionable whether these results can be extrapolated to accurately represent the Brexit views of the UK population. The impact of this point would only be directly relevant in the event of a second referendum.

### **CONCLUSION**

The events of the previous 3 weeks should not have an immediate impact on the Brexit process in the UK.

The lack of clarity on the direction and the uncertainty of how things will unfold can only become clearer once we know who the new Prime Minister will be (although whether or not it does become clearer, remains to be seen).

It is therefore difficult to predict what the actual impact of recent events will be due to the plethora of new information coming out of Parliament every day. It is imperative not to let media headlines dictate strategic and commercial decisions.

We will be observing the situation closely and will continue to keep you updated as and when any material circumstances change.

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## CHANGING ROMANIAN TAX LANDSCAPE

Late 2018 and the first quarter of FY 2019 were marked by a series of amendments to the Romanian tax landscape. In terms of the amendments and updates pertaining to the second quarter of 2019, the following are relevant in this regard.

Further on, significant updates from a Romanian tax perspective are expected, inter alia, in the following period including the transposition deadline for Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union.

### TRANSPOSING OF EU DIRECTIVES

Effective as of 20 April 2019, the provisions of EU Directive 2016/1065 regarding the treatment of vouchers, as well as the provisions of the EU Directive 2009/132 regarding the VAT obligations for supplies of services and distance sales of goods, have been transposed into the Romanian tax legislation. The main areas impacted by the law are:

- the definition of vouchers is introduced;
- the vouchers can be single-purpose or multi-purpose, having different VAT treatments;
- in case of telecommunication services, radiocommunications and television services electronically provided to a non-taxable person, the place of the supply is the place where the provider is located, if some certain conditions are cumulatively fulfilled, for example, if the total value without VAT is less than €10,000.

### REDUCED VAT RATE FOR SUPPLY OF HIGH-QUALITY FOOD PRODUCTS

With effect from 1 June 2019, the reduced 5% VAT rate has been extended to the supply of high-quality food products - eco, mountain and traditional products authorized by the Ministry of Agriculture and Rural Development.

The NC codes of the goods subject to the 5% VAT rate will be further established through methodological norms.

### SOCIAL SECURITY CONTRIBUTIONS

In respect of tax decisions for 2014 – 2017 issued after the 15 March 2019, the payment deadline for the health fund contribution is 120 days commencing from 28 May 2019 (i.e. 274 September 2019). Such tax decisions are issued in relation to individuals which obtained revenue from sources other than salary and were thus subject to the submission of the consolidated income return. For payments made within 60 days, a reduction of 10% will



be granted on the amount due.

The health fund contribution due by the individuals for which the taxable base was under the minimum salary per country or, depending on the case, under 12 minimum salaries per country, for the period 1 July 2015 – 31 December 2017 has been cancelled. In this case, tax decisions will no longer be issued.

The individuals will be notified regarding the cancellation through a decision issued by the tax authorities.

### TAX DEDUCTIONS FOR SPONSORSHIP GRANTED FOR NON-PROFIT ENTITIES OR CULT ORGANISATIONS

As of 1 April 2019, profit taxpayers, as well as microenterprise payers, can deduct as tax credit the sponsorship granted towards non-profit entities or cult organisations, only if those entities are included within the Register for entities/cult organisations for which tax deductions are granted.

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## NEW REGULATIONS ON HOW TO BOOK DEPRECIATIONS IN A MERGER

*The Supreme Administrative Court changes the Council for Advance Tax Rulings' tax ruling and grants the receiving company the right to apply book depreciation in connection with a qualified merger.*

A merger involves a reorganization where all assets and liabilities of the transferring company are taken over by the receiving company, and the transferring company thereby ceases to exist. Mergers are treated favorably from a taxation perspective if certain conditions under the Swedish Income Tax Act are met. In a qualified merger, the transferring company does not establish any income nor does the company deduct any expenses due to the merger. The receiving company assumes the transferring company's current tax obligations. Therefore, a qualified merger means that there is continuity in taxation and the receiving company is regarded as having carried out the transferring company's operations from the beginning of the tax year in which the merger occurred.

This was a case of a company that intended to complete a qualified merger with one of its subsidiaries and would thereby take over the subsidiary's equipment. The company applies the rules of book depreciation. However, in a previous year, the subsidiary had written up its equipment value in the accounts, then applied the residual value depreciations. According to the subsidiary's balance sheet, at the time of the merger, the value of equipment was lower than the tax value. After the merger, the company will establish the value of the equipment at the same amount as in the subsidiary's accounts.

The company applied for a tax ruling to determine whether the company may apply book depreciation during the merger year, and in that case, how the difference between the tax value and the book value of the received equipment should be treated. The Council for Advance Tax Rulings held that the company was not entitled to apply book depreciation. The Swedish Tax Agency appealed the tax ruling and claimed that book depreciation should be established. The company in turn also requested that the decision be changed.

The Supreme Administrative Court of Sweden states in its ruling that a receiving company that was entitled to apply book depreciation prior to a qualified merger does not forfeit that right on the grounds that the transferring

company was not able to apply the method. If, the year prior to the merger, the balance sheet value of the equipment for the transferring company was lower than the tax value and the same value is used for the receiving company's accounts after the merger, the retention of the right to book depreciation is conditional upon the fact that deductions are made at an amount that corresponds to the difference. According to the Supreme Administrative Court of Sweden, the company does not forfeit the right to apply book depreciation due to the merger provided that deductions are made in accordance with Ch. 18, Section 21 of the Swedish Income Tax Act. The deduction is distributed across five years

### MAZAR'S TAX LAWYER'S COMMENTS:

If the value in the balance sheet is higher than the tax value, the company is not entitled to apply book depreciation. However, a company may still apply book depreciation provided that the difference between the equipment value on the balance sheet and the tax value is established as revenue. This means that the tax value of the equipment is thereby increased. The value in the accounts will then be in agreement with the tax value. This may be attributable to the fact that the company makes higher depreciation deductions for taxation than it does in its accounts or that the equipment has been written up in the accounts. The write-up year, the company is then directed to apply residual value depreciation, and the year after, a return to book depreciation can be done by establishing revenue.

For the reverse scenario, i.e. when the value according to the balance sheet is lower than the tax value, as in the case referred to here, a special deduction must be made in order to be permitted to make a transition to book depreciation, or, in the case of a merger, a company's right to apply book depreciation may be maintained.

There are a range of issues that arise in connection with a merger. Please contact our tax team if you need assistance regarding these issues or any other concerns.

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## VAT RATES ARE FALLING FROM 1 APRIL 2019

On 5 March 2019, China Premier, Mr. Li Keqiang announced that the current VAT rates for manufacturing industries and transport and construction industries will be reduced as a measure to enhance the economy.

### THE NEW VAT RATES

The actual implementation date is 1 April 2019. When the new VAT rates are implemented, they are changed to 13%, 9%, 6% and 0% accordingly. The reductions are as follow:

Deduction category	Current VAT rate	New VAT rate
Sales or importation of tangible goods, provision of labor services and leasing of tangible personal property	16%	13%
Provision of transport, postal, basic telecommunications, construction, and real property leasing services, sales and transfer of real property, and land use right, and sales or importation of 23 kinds of goods listed in the Provisional VAT Implementation Rules	10%	9%
Provision of financial services, modern services(including R&D, IT, cultural creativity, logistics supporting, consulting, radio, film and television services, business supporting and others), Daily life services (including cultural and sports, education and medical , tourism and entertainment, catering and accommodation)	6%	6%
Exportation of tangible goods, services, and transfer of intangible assets outside China	0%	0%

### MAZARS' COMMENTS

Owing to the changes in VAT rates, taxpayers should pay attention to the following risks:

### APPLICABILITY OF NEW AND OLD VAT RATES

Taxpayer should pay attention to when the VAT liabilities arise in this transitional period. If the tax liabilities arise before the implementation date of the new VAT rates, old VAT provisions shall prevail. On the other hand, if the VAT tax liabilities arise after the implementation date, new VAT shall be applicable. This transition could trigger unwarranted implications.

It is announced that the implementation date is 1 April 2019. If a taxpayer entered into an agreement with a customer in February 2019, under which the taxpayer will be entitled to recognize the sales after it has delivered the goods to the customer. The taxpayer delivers the goods to the customer in March and issues a VAT special invoice with the new VAT rate of 13% in April. According to the Provisional VAT Implementation Rules, VAT liabilities shall arise at the earlier of either, (i) the goods are delivered or (ii) the issuance of VAT invoices. As such, the VAT liabilities shall arise in March when the goods are delivered. Therefore, the applicable VAT rate should be 16% instead of 13%. This taxpayer would be subject to the risk of under-reporting VAT in that month, i.e., March.

We therefore advise taxpayers that they should pay attention to the applicability of new and old VAT rates during this transitional period in order to avoid possible late payment surcharges.

### REVIEW THE CONTRACTS ALREADY CONCLUDED

The forthcoming tax rates may lead to loss in tax in actual implementation.

For example, if a taxpayer enters into a contract to buy goods at a tax inclusive price of RMB1.16 million in March 2019. In May, it receives a VAT special invoice with the new VAT rate. It would result in lower input VAT of RMB 0.133 million (instead of 0.16 million under the old VAT rate) and higher purchase price. Therefore, we advise taxpayers to review the existing contracts to see whether it would result in higher tax liabilities due to the changes in VAT rates and approach the contract parties for amendments, if necessary.

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## INLAND REVENUE (PROFITS TAX EXEMPTION FOR FUNDS) AMENDMENT BILL 2018

The Government published in the Gazette on 7 December 2018, the Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018 to provide profits tax exemption for eligible funds operating in Hong Kong.

The main objective of the Bill is to address the concerns of the Council of the European Union over the ring-fencing features of Hong Kong's tax regimes for privately offered offshore funds and enhance the competitiveness of our tax regimes by creating a level playing field for all funds operating in Hong Kong.

Under the current tax regime, publicly offered funds, both onshore and offshore, are exempted from profits tax. However, for privately offered funds, only offshore funds and onshore privately offered open-ended fund companies ("OFC") are exempted from profits tax whilst other onshore privately offered funds cannot enjoy profits tax exemption like their offshore counterparts.

The Bill seeks to unify the profits tax exemptions for privately offered funds so that all funds operating in Hong Kong, regardless of their structure, their location of central management and control, their size or the purpose that they serve, may enjoy profits tax exemption for their transactions in specified assets subject to fulfilling certain conditions. The new provisions under the proposed unified tax exemption regime will also apply to privately offered OFC and thus the existing tax exemption provisions for OFC will be repealed.

### NEW UNIFIED TAX EXEMPTION REGIME

The Bill defines how an arrangement will be regarded as a fund for the profits tax exemption. This is largely similar to the definition of "collective investment scheme" contained in Part 1 of Schedule 1 to the Securities and Futures Ordinance. Where an arrangement falls into the definition of fund, with effect from 1 April 2019, transactions in qualifying assets ("qualifying transactions") and transactions incidental to the carrying out of qualifying transactions ("incidental transactions") of the fund will be exempt from Hong Kong profits tax provided that:-

- A. either one of the following conditions are satisfied:-
  - I. the qualifying transactions of the fund are carried out in Hong Kong by or through a specified person, or arranged in Hong Kong by a specified person; or
  - II. the fund is a qualified investment fund; and
- B. The fund's trading receipts from incidental transactions do not exceed 5% of the fund's total trading receipts from qualifying transactions and incidental transactions.

A qualified investment fund means a fund in relation to which-

- A. At all times after the final closing of sale of interests –
  - II. The number of investors exceeds 4; and
  - III. The capital commitments made by investors exceed 90% of the aggregate capital commitments; and
- B. An agreement governing the operation of the fund provides that not more than 30% of the net proceeds arising out of the transactions of the fund are to be received by the originator and the originator's associates, after deducting the portion attributable to their capital contributions (which is proportionate to that attributable to the investors' capital contributions).

Qualifying assets are defined as (a) securities; (b) shares, stocks, debentures, loan stocks, funds, bonds, or notes of, or issued by, a private company; (c) futures contracts; (d) foreign exchange contracts; (e) deposits other than those made by way of a money-lending business; (f) bank deposits; (g) certificates of deposit; (h) exchange-traded commodities; (i) foreign currencies; (j) over-the-counter derivative products; and (k) an investee company's shares co-invested by a partner fund and Innovation and Technology Venture Fund Corporation under the Innovation and Technology Venture Scheme.



The Bill also provides tax exemption to the fund's special purpose entities ("SPE") in respect of its profits derived from the disposal of an interposed SPE or investee private companies, to the extent that it corresponds to the percentage of shares or interests held by the fund. The SPE must be established solely for the purpose of holding (whether directly or indirectly) and administering one or more investee private companies. In addition, the fund / SPE must meet in good faith the following tests for the profits tax exemption in respect its profits derived from the disposal of SPE / investee private companies:-

1. Immovable property test – the investee private company holds not more than 10% in immovable property in Hong Kong; and
2. Holding period test – the fund / SPE holds the investee private companies for more than two years.

Failing the holding period test, a third test would be applied: -

3. Short-term assets test - the fund does not have a controlling interest in the investee private company; or if the fund does have a controlling interest, the investee private company does not hold more than 50% in short-term assets (which means non-qualifying assets held by the investee private company for less than three consecutive years before the date of disposal).

Please refer to the flow chart set out below which illustrates how the tests would be applied.

It is worth noting that under the current offshore fund tax exemption regime, investments in private companies can enjoy tax exemption only if the investee private companies meet the definition of "excepted private company" which only includes overseas incorporated private companies. On the other hand, under the proposed unified tax exemption regime, investment in private companies can enjoy tax exemption regardless of where they were incorporated subject to fulfilling the above-mentioned conditions.

## OTHER FEATURES OF THE PROPOSED TAX REGIME

In addition to addressing the ring-fencing features contained in our tax regime for offshore funds, the Government has also taken the opportunity to adjust the tax treatment for funds, such that Hong Kong remains competitive in the face of increasing regional and international competition. We share below some of the other features proposed by the Bill.

### NO TAINTING FEATURE

Under the current offshore fund tax exemption regime, a single non-qualifying transaction would "taint" the profits derived from qualifying transactions and cause them to be subject to Hong Kong profits tax. The Bill proposes to remove the tainting feature of the existing regime, such that only Hong Kong sourced revenue profits derived from investments in non-qualifying transactions, would be taxed without jeopardizing the exemption for the qualifying transactions.

### EXISTING OFFSHORE FUND TAX EXEMPTION REGIME WILL BE KEPT IN ITS ENTIRETY

The current offshore fund regime provides tax exemption to non-resident persons who meet all the specified conditions. It does not contain the definition of a fund and as such, there is no requirement for the non-resident persons to be established as "funds".

In this regard, the Government anticipates that the proposed definition of "fund" in the Bill may potentially exclude certain non-resident persons (i.e. non-fund entities) from the unified tax exemption regime. As such, the Bill proposes to retain the relevant provisions of the existing offshore fund regime in their entirety such that these non-fund entities can choose whether to rely on the existing offshore fund regime or to take advantage of the proposed unified tax exemption regime.





That said, the current exemption regime is less favourable than the proposed unified tax exemption regime as the restrictive provisions in relation to investments in overseas private companies and the tainting provisions as mentioned above would still apply.

### REMOVAL OF THE NON-CLOSELY HELD CONDITION FOR OFC

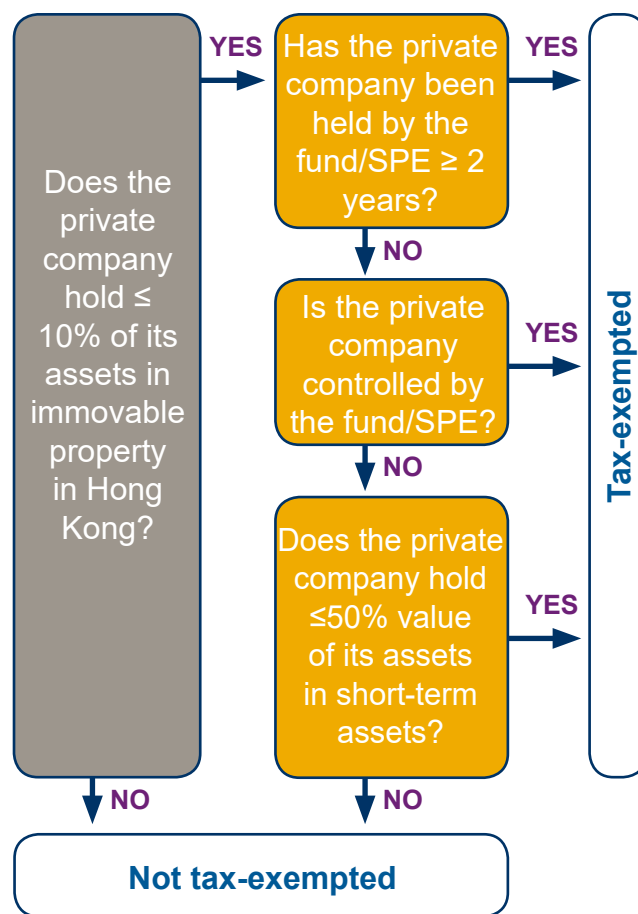
The Bill would repeal the tax exemption provisions for OFC and the proposed unified tax exemption regime would also cover OFC. The repeal of the OFC provisions means that OFC will not be required to meet the non-closely held condition i.e. minimum requirements on the number of investors and the maximum/minimum participating interest of each investor, in order to enjoy profits tax exemption.

### ANTI-ROUND TRIPPING PROVISIONS

The anti-round tripping provisions under the existing regime would remain to deem a Hong Kong resident person who, either alone or jointly with his associates, has a beneficial interest of 30% or more in a tax-exempt fund (or any percentage if the fund is the resident person's associate) to have derived assessable profits in respect of the trading profits earned by the fund from the qualifying transactions. This aims to prevent abuse or round-tripping by a resident person disguising as a fund to take advantage of the exemption.

### MAZARS' COMMENTARY

We welcome the introduction of the Bill for a unified tax regime for the fund industry. The Bill will give parity tax treatment to onshore and offshore funds. Currently, the majority of funds in Hong Kong are offshore ones. One of the main reasons is that onshore funds (except for onshore privately offered OFC) cannot enjoy profits tax exemption under the current tax regimes. We expect the proposed unified tax regime in the Bill would attract more funds to be domiciled in Hong Kong. This would also drive demand for the related professional services locally, such as fund administration, investment advice, legal, accounting and other ancillary services. In addition, this would further strengthen Hong Kong's role as an international centre for fund a wealth management and foster the further development of our financial services industry.



Source:

Appendix B to Legislative Council Brief – Inland Revenue (Profits Tax Exemption for Funds) (Amendment) Bill 2018 issued on 5 December 2018

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# SOUTH AMERICA



MAZARS



## TRANSFER PRICING RULES IN ARGENTINA

### MODIFICATIONS IN THE ARGENTINEAN TP OBLIGATIONS

The Argentine tax authorities amended the transfer pricing compliance obligations through General Resolution N° 4496.

Throughout this regulation the AFIP-DGI establishes:

- One due date for the different Argentine transfer pricing affidavits. Under GR 4496, taxpayers must file all transfer pricing forms, when applicable, and the related documentation in the first week of the eighth month following the close of the tax year. The transfer pricing forms include Forms 741, 743, 867 and 4501.
- Eliminates Form 969, which was due 28 May 2019 for the tax year ending 31 December 2018.

- Updates the global amounts and de minimum transactions that trigger the obligation to file the tax return Form 743 and Form 4501 with the Transfer Pricing Report and the Certified Public Accountant Certification. Those forms must be file if the transactions (invoiced during the tax year) with foreign related parties or with third parties located in tax havens (i.e., non-cooperating countries or low or no taxation jurisdictions) individually exceed ARS300,000 or as a whole exceed ARS3 million (approx. US\$6,666 and US\$66,666).

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**HERE TO HELP**

 MAZARS

## HERE TO HELP YOU!

International firms with a competitive advantage have real time access to insightful foreign tax knowledge. The right advisor helps to identify opportunities and to manage risk profiles. Given the far-reaching effects of the OECD BEPS project, awareness of legislative and regulatory changes has never been more important.

The Mazars US Tax Desk was created to help US companies successfully manage these challenges. We can help you to ask the right questions, set priorities and define the action plans needed to succeed in the fast-moving landscape of international tax.

The Mazars US Tax Desk is a platform for companies with existing international operations and those looking to enter other jurisdictions.

In working with the Desk, companies will be able to access a wealth of multifaceted, cross border experience in areas such as:

- International tax structuring
- Transfer pricing
- Inbound and outbound investment
- Intellectual property planning
- Financing structuring
- Treaties – interpretation and maximisation of benefits
- Research and development tax credits
- Cross border financing, leasing and licensing
- Corporate acquisitions and divestments

We are here to help you! As part of our programme to keep you up to date on what is happening in the world, we will publish regular newsletters. These will discuss important tax legislative changes, provide on the ground insight, but most importantly, identify how this news is of relevance to you.

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