International Tax News

Edition 114

Start

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Welcome

Keeping up with the constant flow of international tax developments worldwide can be a real challenge for multinational companies. International Tax News is a monthly publication that offers updates and analysis on developments taking place around the world, authored by specialists in PwC's global international tax network.

We hope that you will find this publication helpful, and look forward to your comments.

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In this issue

Legislation

Portugal

2023 Budget law proposal submitted to Parliament

The 2023 Budget law proposal was submitted to the Parliament on 10 October.

Crypto assets - Proposed tax framework

While the current income from crypto assets is subject to corporation tax (CIT) when derived by Portuguese tax-resident companies, including permanent establishments in Portugal of foreign entities, the proposed tax framework is introducing a definition of ‘crypto assets’. It includes all digital representations of values or rights that can be transferred or stored electronically using distributed ledger or similar technology. The framework also includes provisions regulating the taxation of income and gains from crypto assets for personal income tax.

Corporation tax – Tax losses

Tax loss carryforwards would be allowed for an indefinite period. This rule would apply to the deduction of tax losses against taxable profit of tax years starting on or after 1 January 2023. It also would apply to tax losses assessed in tax years prior to 1 January 2023, for which period a deduction is still running. The deduction of tax losses would also be reduced to 65% (currently, 70%) of taxable profit.

New tax incentive scheme - Incentive for Capitalization of Companies

The Budget proposes a new tax incentive aiming at capitalizing companies with equity. Eligible companies could deduct an amount corresponding to 4.5% of the net increase in eligible equity. The deduction would occur in the tax year in which the increase in equity takes place, as well as in the nine following tax periods. Such deduction would not exceed, in each tax year, the higher of EUR 2 million or 30% of the tax EBITDA. The part that exceeds the percentage of the tax EBITDA could be carried forward for a five-year period. The following are eligible equity increases: cash contributions made in connection with the incorporation of companies or the increase in the share capital of the beneficiary company; contributions in kind made within the scope of the share capital increase that correspond to the conversion of credits into capital; premiums for issuing securities, and tax profits that are applied to retained earnings or, directly, to reserves or to an increase in share capital.

While the 2023 Budget proposal is under discussion at the Parliament and there is yet no certainty around the final wording of the provisions on crypto assets, entities operating in the crypto assets business in Portugal should consider the additional tax compliance burden from 2023 onwards.

The tax loss measure reinforces the principle of solidarity between tax years, as an exception to the principle of accrual-based accounting, potential impacts on deferred taxes should be analysed. To some extent, the reduction of the percentage of deduction of tax losses against the taxable profit limits the full potential of the proposed measure. On the other hand, careful planning for next year is recommended, given the subsistence of multiple regimes and deadlines for the carryforward and the deduction of tax losses, resulting from consecutive amendments to the tax law and temporary measures during the pandemic.

The tax benefits associated with the new tax incentive scheme should be considered when it comes to investment decisions as it could lead to relevant future tax savings.

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Legislation

New Zealand

Draft legislation affecting dual tax resident companies

Draft legislation was recently circulated which will impact NZ taxpayers that are dual tax resident companies. The legislation includes amendments to historic tax avoidance provisions that are no longer required given the introduction of NZ's anti-hybrid rules, as well as proposed new integrity measures. Some of the key proposals include the ability for dual tax resident companies to transfer tax losses to other NZ group taxpayers, the ability to be part of a NZ tax consolidated group, and flexibility with maintaining imputation credits in certain circumstances.

Generally the changes are positive for taxpayers, however the draft legislation also includes the following proposed integrity measures:

- restricting unintended benefits currently available on distributions made from a NZ group company to a NZ company that is dual tax resident but tie-broken to a second country under the relevant tax treaty, which could result in material non-resident withholding tax obligations for the company; and
- extending the corporate migration rules to deem a NZ company whose residence tie-breaks to a second country under a tax treaty to have liquidated, meaning a deemed disposal of assets and distribution of proceeds to its shareholders for tax purposes which could result in material income tax and/or non-resident withholding tax obligations for the company.

The proposed legislation is expected to be enacted in March 2023 but with retroactive effect to 30 August 2022. It is important for New Zealand group entities that are dual tax resident companies to consider the impact of these rules.

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Legislation

Germany

Federal Parliament resolves legislative changes to the taxation of payments for German-registered rights

The German Federal Parliament passed the Annual Tax Act 2022 on 2 December. Among other provisions, the Act introduces (transitional) legislative changes to the taxation of payments for IP rights that are registered in a German register between foreign taxpayers. In a change from the government's draft bill, all non-treaty cases between related parties, for the time being, will remain subject to German nonresident taxation beyond 2022. The German Federal Council will deal with the law in its session on 16 December.

For more information see our PwC Insight.

Taxpayers who may have potential German taxation under Sec. 49 of the German Income Tax Act in prior or future years should analyze the impact of these German law changes. Specifically, taxpayers with royalty payments related to German-registered IP, or who recognized capital gains on sales of such property to unrelated parties, no longer have potential tax liability under Sec. 49 of the German Income Tax Act (even for prior years).

For taxpayers with these royalty payments (or capital gains) with a related party, it will be necessary to determine if the payor (or seller in the case of a capital gain) is entitled to claim a treaty exemption with Germany. Such a determination is not automatic in that treaty-shopping rules (both treaty-based and those under German domestic law) must be considered inapplicable. Finally, those taxpayers claiming a treaty exemption on prior-year related-party royalty payments (or capital gains on sales of IP to related parties) under the simplified filing procedure must complete such work before June 30, 2023. Failure to do so by then will require disclosure of much more detailed information in order to seek treaty exemptions.

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Legislation

Italy

Italy introduces permanent establishment investment management exemption

The 2023 Budget Bill, expected to be enacted before year-end, introduces in the Italian Income Tax Act (IITA) an investment management exemption (IME). The IME is a safe harbor aimed at providing certainty that foreign investment funds (and controlled entities) will not trigger a permanent establishment (PE) due to activities in Italy of a fund's (senior) asset managers.

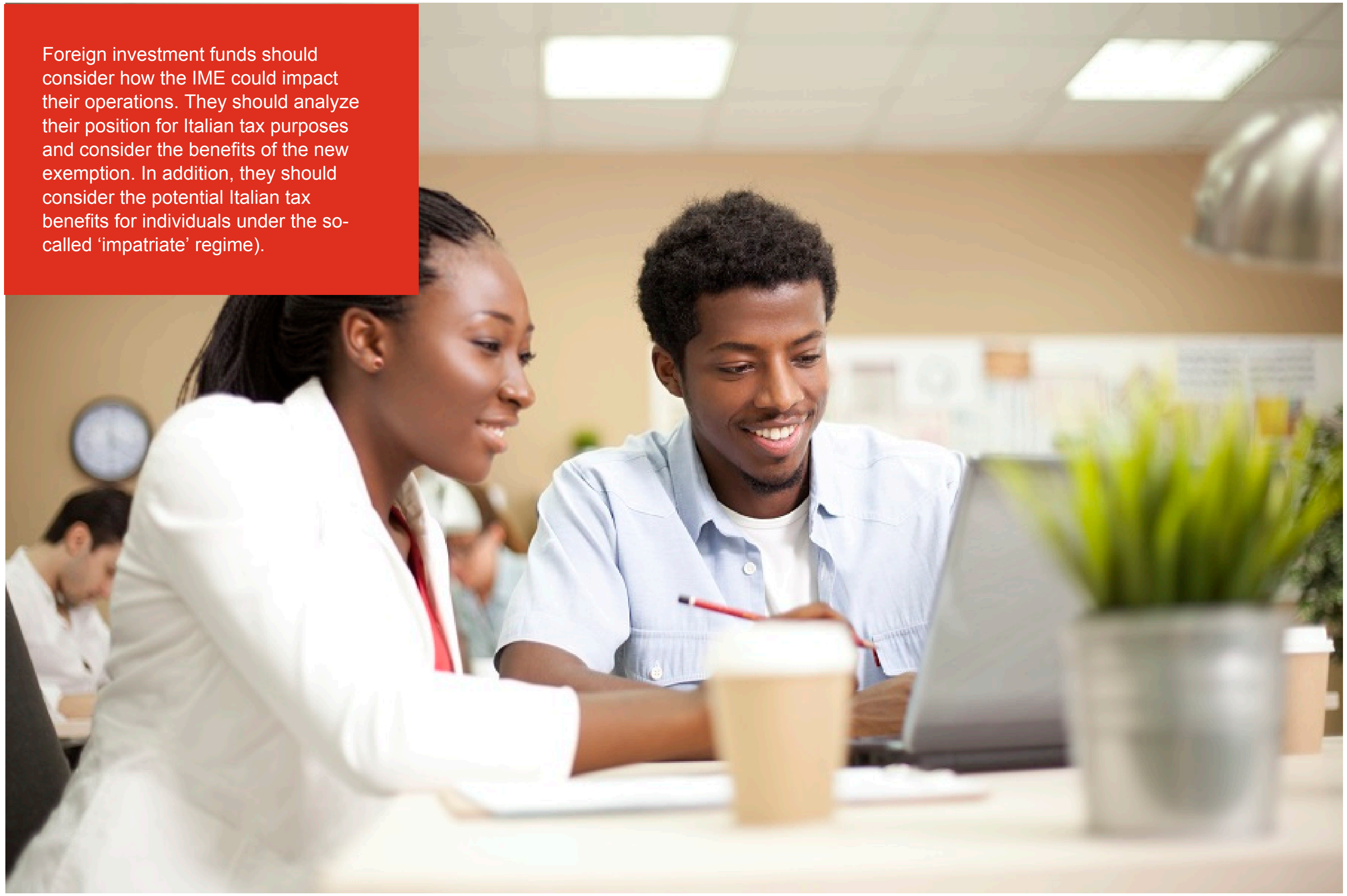
Features of the IME in the Budget Bill include:

- A 'safe harbor' from PE issues aimed at encouraging the transfer of fund managers to Italy.
- Reduced risk connected to the presence of fund managers in Italy (whether they are traders, deal teams, local partners, etc.), thereby seeking to reduce the attraction and taxation of fund income (and therefore of nonresident investors) in Italy.
- Allowing the operations of sponsor management companies (and PEs) in Italy (with regular taxation of the business income of management companies), and allowing the fund (and therefore the investors) to maintain the tax regime of the country of residence/location.

The Italian Ministry of Economy and Finance will implement the regulation through a decree.

For more information, please see our Tax Insight.

Foreign investment funds should consider how the IME could impact their operations. They should analyze their position for Italian tax purposes and consider the benefits of the new exemption. In addition, they should consider the potential Italian tax benefits for individuals under the so-called 'impatriate' regime).



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Legislation

Nigeria

Nigeria Startup Act- Positioning the country for the fourth revolution

The Nigeria Startup Bill was signed into law on October 19, 2022, and took effect immediately. The Act seeks to provide the enabling environment for budding companies to thrive, through the provision of tax incentives such as an investment tax credit, a startup investment seed fund of N10billion to be managed by the Nigerian Sovereign Investment Authority (The Fund Manager), a startup portal to ease the process of registering as a startup and other business incentives.

For a startup to be eligible to access the incentives, the Act outlines certain conditions to be met in order to be labelled as a startup:

- It is registered as a limited liability company under the Companies and Allied Matters Act, and has been in existence for a period not more than 10 years from the date of incorporation ;
- Its objects are innovation, development, production, improvement, and commercialisation of a digital technology innovative product or process ;
- It is a holder or repository of a product or process of digital technology, or the owner or author of a registered software ;
- It has at least one-third local shareholding held by one or more Nigerians as founder or co-founder of the startup.

For businesses registered as sole proprietorships and partnerships, a pre-label certificate would be issued with a duration of six months during which they would change their corporate status to a limited liability company.

A core objective of the Act is to position Nigeria's startup ecosystem as the leading digital technology centre in Africa with world class innovators, cutting edge skills and exportable capacity. The Federal Government also provided the framework where such initiatives that border on digital technology can be accelerated, leveraging tertiary education institutions, research organisations and echnical partners (locally and internationally). This is expected to help address the talent development gap existing today in the industry.

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Legislation

Spain

Proposed draft legislation to tax banking and energy sectors

The Spanish Government proposed draft legislation on 28 July 2022 that proposes imposition of a 4.8% tax on the net income from interest and commissions of the main banks, as well as a 1.2% tax on the income of large energy companies. If approved, these new taxes would apply to years 2023-2024.

The European Central Bank (ECB) has warned that Spain's proposed extraordinary tax on bank profits could pose a risk to the country's financial stability, as well as to the availability of credit for borrowers. In its non-binding opinion dated November 2, 2022, the ECB stated that the use of the tax on credit institutions could negatively affect real economic growth and foster uncertainty to the extent that the imposition of the new tax may generate lenders less resilient to economic shocks, eventually issuing fewer loans or granting credit on less favorable terms. The ECB has asked Spain for an exhaustive analysis of the possible negative consequences that could derive from the proposed tax, detailing the impact on the profitability of financial institutions, as well as on the conditions of competition in the market.

In parallel, the Spanish Government introduced an amendment to the draft legislation aiming to include in the scope of the proposed tax the domestic units of foreign lenders supervised directly by the ECB. The amendment to the draft legislation, proposed November 10, 2022, states that the tax on bank profits will apply not only on credit institutions and financial establishments with income from interest and commission greater than EUR 800 million, but also to entities directly supervised by the ECB as of January 1,2023, as well as the branches established in the Spanish territory of foreign credit institutions subject to the ECB's direct supervision.

Regarding the tax on energy companies, the draft legislation has a different configuration from the one proposed by the European Union, as it taxes the sales of energy companies and not their surplus profits.

It remains to be seen whether the proposed tax complies with the temporary solidarity contribution proposed by the EU Regulation.

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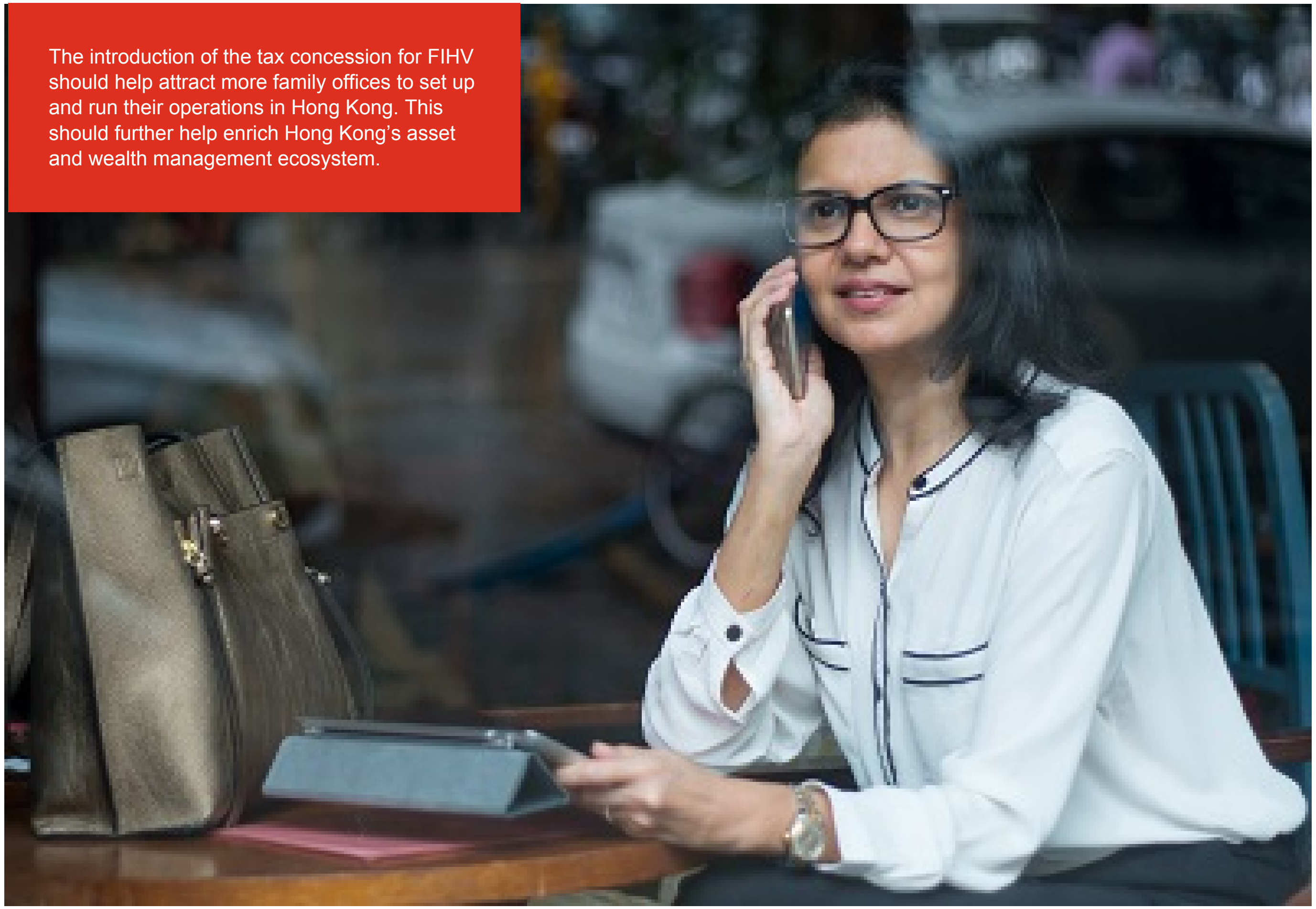
Legislation

Hong Kong

Proposed profits tax concession for family-owned investment holding vehicles

The Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Bill 2022 was gazetted on 9 December 2022. The Bill provides a profits tax concession for an eligible family-owned investment holding vehicle (FIHV) managed by an eligible single family office in Hong Kong, such that the FIHV's assessable profits earned from qualifying transactions and incidental transactions (the latter being subject to a 5% threshold) would be subject to a 0% profits tax rate. The tax concession will have retroactive effect from the year of assessment commencing on 1 April 2022. For more information see our PwC Insight.

The introduction of the tax concession for FIHV should help attract more family offices to set up and run their operations in Hong Kong. This should further help enrich Hong Kong's asset and wealth management ecosystem.



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Legislation

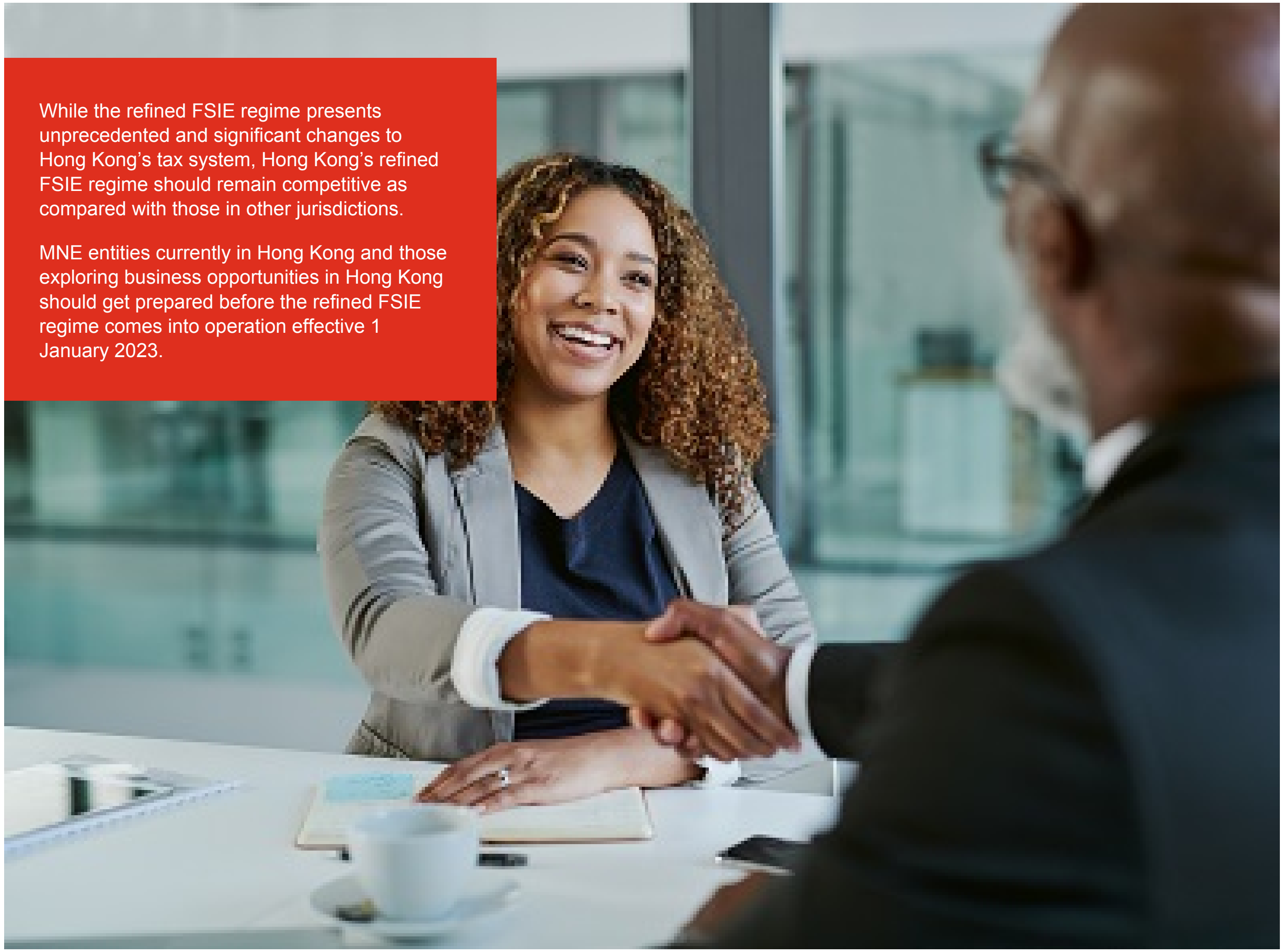
Hong Kong

Refined foreign-sourced income exemption regime

The Inland Revenue (Amendment) (Taxation on Specified Foreign-sourced Income) Ordinance 2022 was gazetted on 14 December 2022, introducing refinements to Hong Kong's foreign-sourced income exemption (FSIE) regime for four types of offshore income: interest, dividends, disposal gains from the sale of equity interests, and income from intellectual property (collectively, 'specified foreign-sourced income').

Under the refined FSIE regime, the specified foreign-sourced income accrued to and received in Hong Kong by a MNE entity carrying on a trade, profession, or business in Hong Kong on or after 1 January 2023 will be deemed to be sourced from Hong Kong and chargeable to profits tax, unless certain exemptions are met.

For more information see our PwC Insight.



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Legislation

Spain

Spain advances reform to the tax incentive system for the audio-visual industry

The Spanish Congress of Deputies (i.e., Spain's lower house), on November 24, approved the Bill to amend the tax incentives for investments in film productions, audio-visual series, live performing arts, and music shows, included in the Corporate Income Tax (CIT) Act. The proposed amendments include:

- Taxpayers who participate in financing the production of Spanish feature-length films, short-films, audio-visual fiction, animation or documentary series, or live performing arts and shows may apply the incentives generated by the producer envisaged in the CIT Act, when the amounts contributed not only finance productions costs, but also expenses for obtaining copies, advertising, or promotion payable by the producer up to the limit of 30% of production costs.
- The amount of the tax credits that the investor may apply should be determined on the same terms as the producer would have applied.
- The maximum tax credit which the investor may apply is the result of multiplying the amount contributed by the investor to finance production costs or expenses for obtaining copies, advertising, and promotion payable by the producer by 1.2.
- The investor may apply the increased tax incentive limit of 50% to gross tax payable provided that the tax credit amount pertaining to the finance provider equals 25% or more of its gross tax payable less international double tax deductions and tax relief.

If signed into law the amendments would apply to tax years begining on or after January 1, 2021.

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Legislation

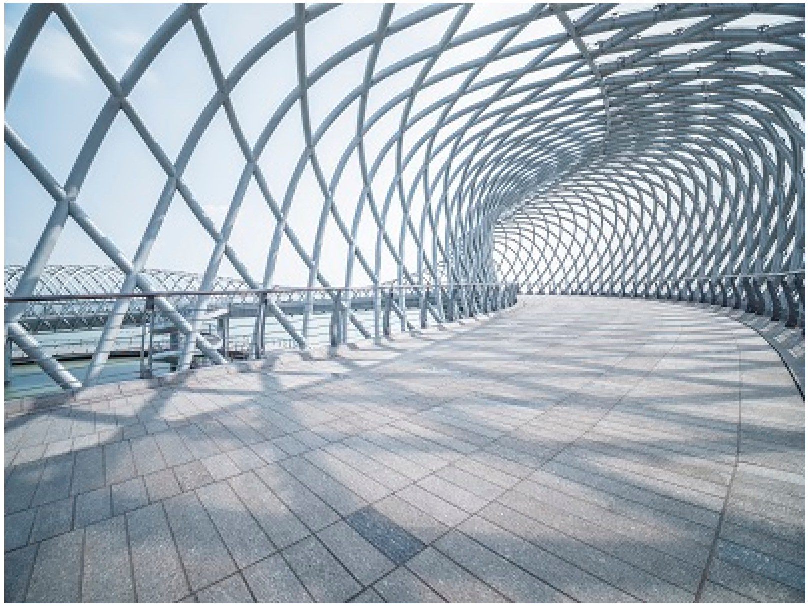
Spain

Spain releases draft of potential temporary reform to Spanish tax group regime

Spain released the first draft of legislation relating to the previously announced temporary tax reform of the Spanish tax consolidation regime. In this draft, certain modifications are established in the system for determining the tax base for consolidated tax groups. The proposals includes the following changes:

- Exclusive application for tax periods beginning in 2023.
- The modifications to the current regimen would apply to all Spanish tax groups, without establishing any exclusion based on their size.
- Under the current regime, the tax base of the group is determined from the aggregation of the individual tax bases. However, the proposed text establishes that this amount will refer to the individual positive taxable bases and to 50% of the individual negative taxable bases.
- For successive tax periods, the amount of the individual negative tax bases not included in the tax base of the tax group by application of the previously mentioned provision will be considered a negative tax base of the tax group.

Multinationals must revisit their structures and investments in Spain as the amendments included in this draft could signifcantly impact their business operations.



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Administrative

Australia

Corporate tax transparency report

The Australian Taxation Office (ATO) has released its corporate tax transparency report for the 2020–21 income year which contains the name, Australian Business Number (ABN), total income, taxable income, and tax payable for:

- Australian public and foreign-owned companies with income of AUD 100 million or more
- Australian-owned resident private companies with income of AUD 200 million or more. It also contains the name, ABN and tax payable for entities that had a petroleum resource rent tax (PRRT) payable amount for the 2020–21 income year.

It was reported that despite the COVID-19 pandemic, Australia's large corporate taxpayers generally performed well and paid a combined AUD 68.6 billion in income tax – representing a 19.8% increase on the income tax from the prior year. Higher commodity prices were the key driver of the increase in corporate tax payments. Note that for Australian-owned resident private companies, the reporting threshold decreases to AUD 100 million effective with the 2022/23 income year (which will be reported in 2024 and onwards).

The ATO has a continued focus on multinationals and has, in recent months, legislated to expand the number of companies reported upon in the annual corporate tax transparency report.

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Judicial

France

Confirmation of the new position regarding beneficial ownership in tax treaties

The Administrative Supreme Court, on February, 5, 2021, addressed the qualification of beneficial owner regarding a British company collecting royalties on behalf of British and foreign authors. The Court held that this qualification not only depends on the powers formally granted to a company, but also on how the royalties are allocated in practice.

Following this decision, the Versailles Court of Appeal ruled that the British company does not qualify as beneficial owner based on the facts of the case. It therefore confirmed the position of the French tax authorities challenging the exemption of withholding tax in France for royalties paid to non-British authors.

For royalties paid to these non-British residents, a tax treaty signed between France and their State of residence may grant an exemption from withholding tax in France provided these persons qualify as beneficial owners of the payment. Such a qualification was not demonstrated in the case at hand.

This decision highlights the need to carefully demonstrate, based on *de jure* and *de facto* elements, the qualification of beneficial owner to benefit from the withholding tax exemption in France.

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Judicial

Poland

Polish PE triggered by support services provided by a related company

The Polish tax authorities present an unfavorable position for taxpayers by refusing to recognize sales support activities as ancillary activities, thus recognizing that such activities constitute a permanent establishment (PE) in Poland. The Polish tax authorities are increasingly willing to refer to the amended version of the OECD Commentary and the OECD Model Tax Convention on Income and Capital, by applying the dynamic approach to the interpretation of tax treaties concluded before the introduction of the changes in the Model Convention.

The same conclusion was reached by both the Provincial Administrative Court and the Supreme Administrative Court in a recent case where the activity conducted by the agent under the agency agreement constituted a PE in Poland within the meaning of the Poland and Germany tax treaty signed in 2003. The Provincial Administrative Court in Warsaw pointed out that *"both in the previous and in the current version of the Convention, there are provisions concerning the dependent and independent agent"*.

Based on the analysis of the updated OECD Commentary, both the court of first and second instance concluded that the services provided by the agent could not be assumed to be preparatory or auxiliary nature, because the agent's marketing activities are aimed at achieving identical goals with the core business of the taxpayer. For more information see our Tax Insight.

The above unfavorable verdict of the court of first and second instance, as well as the analysis of tax rulings issued in recent years, indicate that the risk of a PE in Poland is growing in situations where Polish subsidiaries provide various support services to foreign enterprises.

The growing PE risk in Poland may result in an obligation to allocate part of the foriegn profits into Poland and settle outstanding CIT (along with late payment interest in case of tax arrears). In such situation, a number of compliance obligations need to be fulfilled in Poland.

Lack of PE disclosure where there is an obligation to register PE for tax purposes and settle the corporate income tax may also result in fiscal penal sanctions against the persons responsible for the non-resident financial / tax matters of foreign entities (e.g., Management Board members, the chief accountant).

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EU/OECD

European Union

EU Member States give final approval to proposed Pillar Two Directive

On 15 December, the EU Council formally adopted the EU minimum tax Directive by written procedure. The written procedure ended with this unanimous agreement, notwithstanding the fact that Hungary abstained from the final vote, and Sweden made a written observation on a specific provision of the Directive. The Directive will enter into force on the day following its publication in the Official Journal of the European Union. Member States shall transpose the Directive into their domestic law by 31 December 2023. All Member States voted in favour of the accompanying Council Statement. This outcome follows a week of speculation on the deal after Poland reserved its support until yesterday's EU Council meeting.

The overall package passed at the EU Council meeting includes the EU minimum tax Directive, funding for Ukraine, a Council decision for the protection of the Union budget against breaches of the rule of law in Hungary (rule of law conditionality mechanism) and a further Council decision which approves the Commission's assessment of Hungary's recovery and resilience plan.

For more information see our PwC Tax Policy Alert.

The deal to secure Hungary's support for the Directive through promising the release of EU recovery funds is a significant development in this long-running saga. Once the written procedure is secured, the European Union will be the first block of countries that have adopted the Pillar Two minimum taxation rules. This undoubtedly will encourage other countries to adopt and implement the rules.

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EU/OECD

European Union

European Commission publishes crypto and other revised reporting proposals for tax (DAC8)

The European Parliament's recommendations to the EU Commission on a fair and simple taxation strategy included additional categories of income and assets, such as crypto assets, to include in the scope of automatic exchange of information. The seventh potential update published by the European Commision to the EU's Directive on Administrative Cooperation on Tax (DAC), which would make this DAC8, is to address certain deficiencies that have been identified in the scope of the automatic exchange of information, including to set minimum levels of financial penalties with respect to serious non-compliance.

- Amendments would address the lack of information at the level of EU tax administrations about e-money, digital currencies, cross-border tax rulings for high net worth individuals, and certain crypto assets.
- The crypto asset and e-money element largely follows the model rules of the OECD's Crypto-Asset Reporting Framework (CARF) which was published in October, along with amendments to the Common Reporting Standard (CRS), as set out in our Alert of 11 October 2022.
- The Commission believes this information will level the playing field and raise additional tax revenues of €2.4B by the EU Member States; implementation costs are estimated at €300M with annual recurring costs of €25M.
- With a few exceptions these changes would apply effective 1 January 2026.

For more information see our Tax Policy Alert.

EU entities are increasingly becoming subject to additional reporting obligations for tax purposes, whether they are headquartered in the European Union or elsewhere. Where a group makes use of the ability to report EU-wide information under any of the DAC regimes in one Member State rather than specific information in a number of Member States, it may wish to review any change in the penalties it faces for getting that information wrong or failing to provide it on time. Groups may also want to analyse any entities in their group that may have additional EU reporting requirements related to crypto-assets or e-money were DAC8 to be agreed unanimously by Member States in the Council of the European Union.

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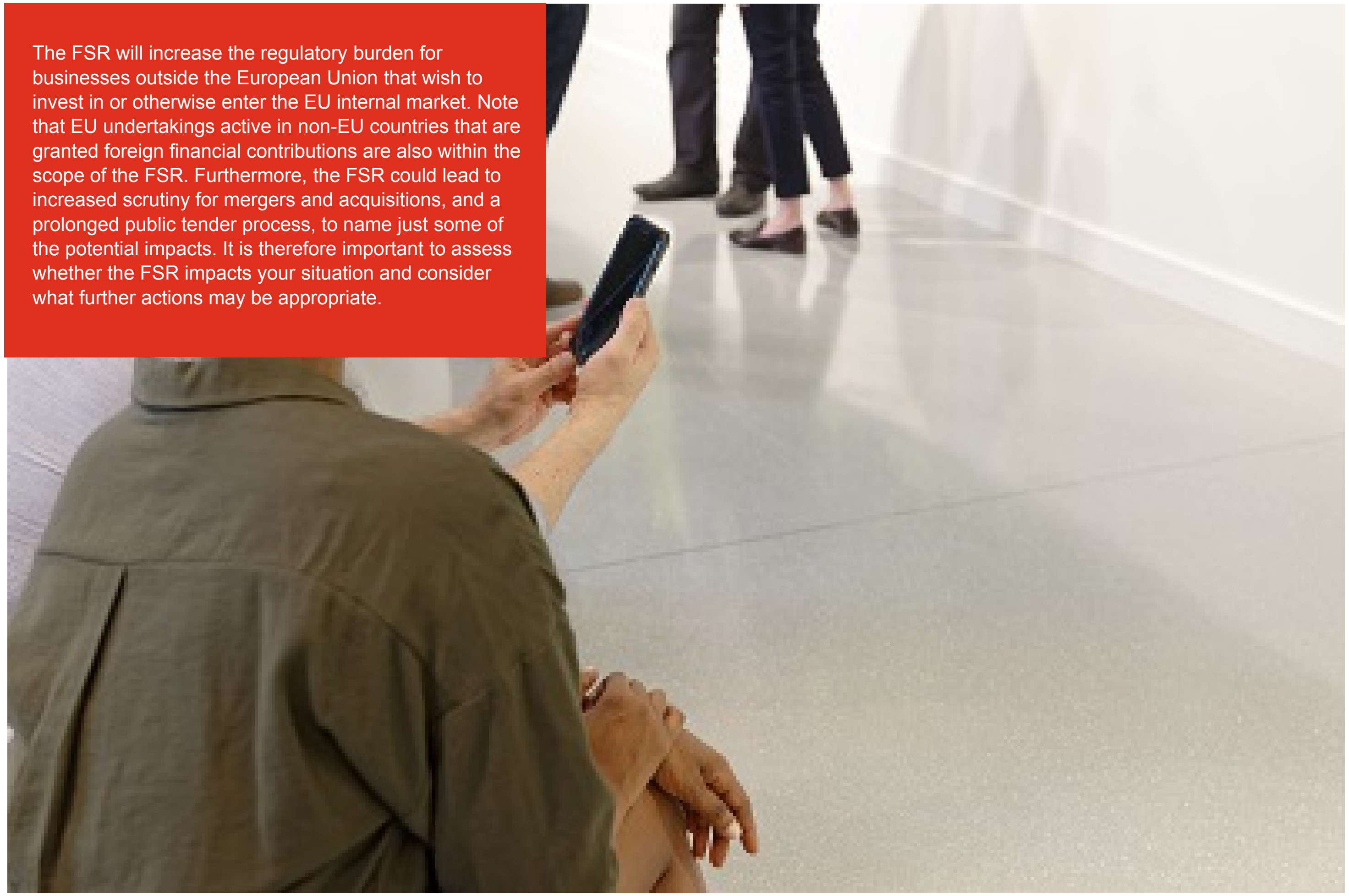
EU/OECD

European Union

European Council formally adopted the Foreign Subsidy Regulation

After the European Parliament's approval on 10 November, the Council formally adopted, on 28 November, the regulation on foreign subsidies ('FSR') that, in certain cases, are distorting the internal market.

The FSR is likely to enter into force in December 2022 and will apply as of mid 2023. The FSR is the latest instrument by which the European Commission aims to ensure a level playing field in the internal market and to execute its broader EU 2020 industrial policy. For more information see our Tax Policy Alert.



The FSR will increase the regulatory burden for businesses outside the European Union that wish to invest in or otherwise enter the EU internal market. Note that EU undertakings active in non-EU countries that are granted foreign financial contributions are also within the scope of the FSR. Furthermore, the FSR could lead to increased scrutiny for mergers and acquisitions, and a prolonged public tender process, to name just some of the potential impacts. It is therefore important to assess whether the FSR impacts your situation and consider what further actions may be appropriate.

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EU/OECD

OECD

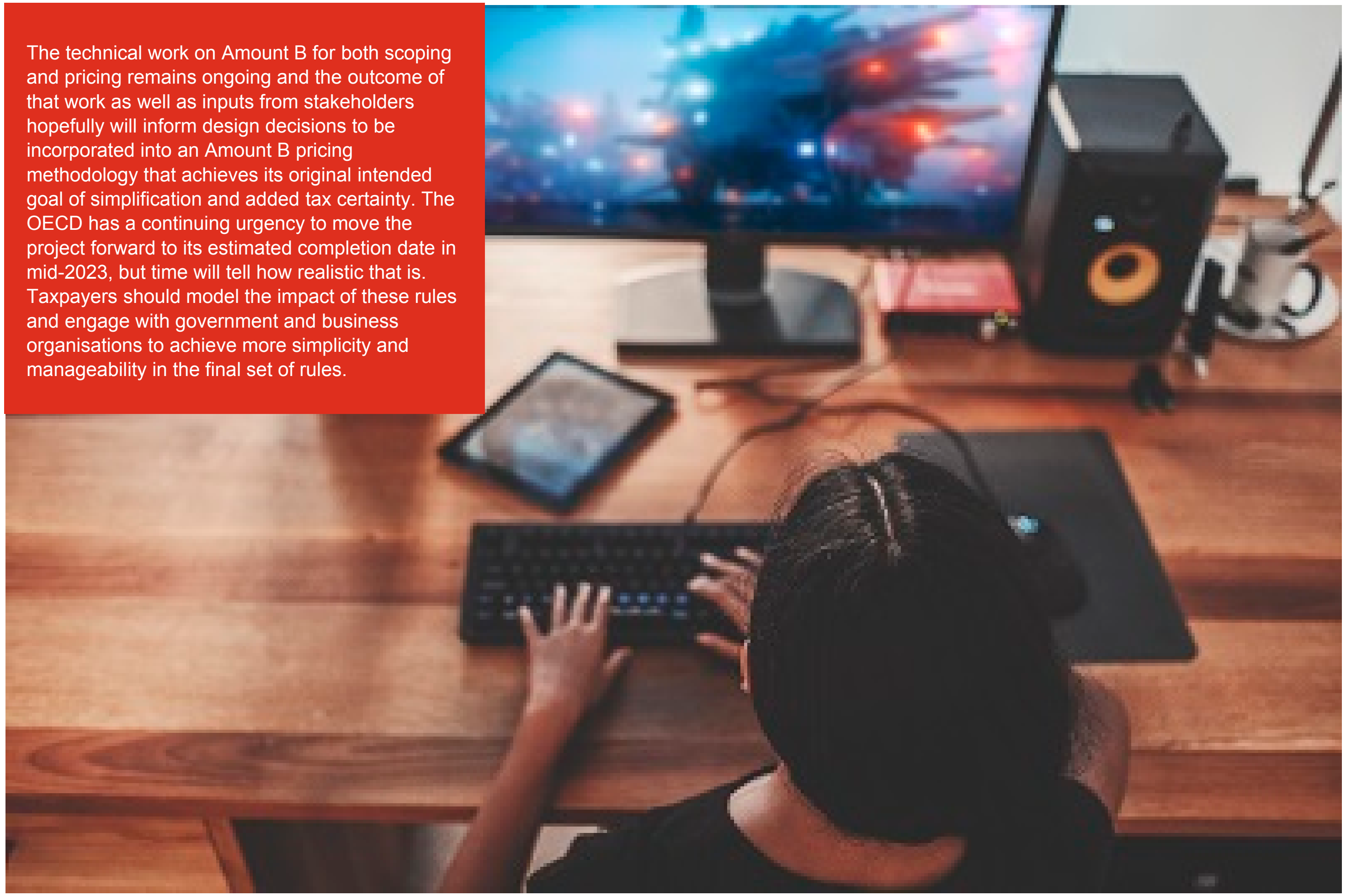
OECD Releases Pillar One Amount B Consultation Draft

On 8 December 2022, the OECD released a public consultation document on Amount B of Pillar One (the 'Consultation Document'). The Consultation Document sets out the main design elements of Amount B, which aims to standardise the remuneration of related party distributors that perform baseline marketing and distribution activities. The Consultation Document outlines the progress made in defining in-country baseline marketing and distribution arrangements, how they may be identified in practice, and subsequently how in-scope arrangements may be priced in accordance with the arm's length principle (ALP). It also identifies areas where further work is being undertaken and seeks input from stakeholders on a number of specific questions.

The work on Amount B is still planned to be completed by mid-2023, coinciding with the planned completion of the work on Amount A of Pillar One. It is (as always) particularly important to note that the proposals outlined in the Consultation Document represent the work of the OECD Secretariat, since the Inclusive Framework (IF) has not yet reached consensus on them. Their basic design may, therefore, be subject to change, unrelated to the consultation process.

Comments on the Consultation Document are due by 25 January 2023. For more information see our Tax Policy Alert.

The technical work on Amount B for both scoping and pricing remains ongoing and the outcome of that work as well as inputs from stakeholders hopefully will inform design decisions to be incorporated into an Amount B pricing methodology that achieves its original intended goal of simplification and added tax certainty. The OECD has a continuing urgency to move the project forward to its estimated completion date in mid-2023, but time will tell how realistic that is. Taxpayers should model the impact of these rules and engage with government and business organisations to achieve more simplicity and manageability in the final set of rules.



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EU/OECD

Spain

Spain updates treaties through MLI

Treaty with Indonesia

The Spanish Ministry of Finance and Public Administration, on November 10, published the Indonesia-Spain tax treaty synthesized text under the OECD MLI. This new text presents the tax treaty with modifications made by the MLI and the relevant positions submitted on April 28, 2020 by Indonesia and on September 28, 2021, by Spain.

On August 1, 2020 and January 1, 2022, Indonesia and Spain respectively deposited a notification with the OECD through which they confirmed the completion of its internal procedures for some additional covered tax agreements, including the Spain-Indonesia tax treaty. Based on the above, the provisions of the MLI for the Indonesia-Spain tax treaty will come into effect in the following manner:

- For taxes withheld at source on amounts paid or credited to non-residents, when the event giving rise to those taxes occurs on or after January 1, 2023.
- For all other taxes levied, for tax periods beginning on or after June 10, 2023 in the case of Spain and for tax periods beginning on or after January 1, 2024, in the case of Indonesia.

Treaties with Hong Kong, Senegal, and Thailand

In accordance with MLI article 35(7)(b), Spain submitted a notification to the OECD on November 30 confirming the completion of its internal procedures for the entry into effect of the provisions of the OECD MLI regarding its Double Tax Treaties with Hong Kong, Senegal and Thailand.

Since June 1, 2022, 50 of the 88 covered tax agreements are listed in Spain's reservation and notifications for which Spain deposited the notification confirming completion of its internal procedures and for the entry into effect of Part VI (Arbitration) of the MLI for 19 of its covered tax agreements.

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Treaties

Mexico

ATAD 3- Mexican tax considerations

In recent years and as result of the changing global economic and tax environment, tax authorities around the globe are being provided with different alternatives to help combat, among other considerations, tax treaty abuse and abusive improper tax practices. These alternatives include the Multilateral Instrument (MLI) and the Anti-Tax Avoidance Directive (ATAD).

In line with the above objective and considering that EU tax authorities consider that entities with minimal substance and economic activity are used for improper tax purposes, the European Commission issued during 2021 the ATAD 3 directive, which provides a series of conditions to identify those companies with low economic substance. In general terms, unless such entities with low substance companies justify their position, the local EU tax authorities are exploring the possibility of not issuing tax residence certificates to said shell entities, among other considerations or consequences.

From a Mexican tax perspective, one of the key requirements that should be met in order to apply tax treaty benefits is that the European entity (in this case) provides a tax residency certificate issued by the corresponding EU tax authority in the same fiscal year in which the treaty benefits would be applied. Consequently, if under the ATAD 3 provisions, the EU recipient cannot secure such tax residency certificate due to its lack of substance, the benefits provided by the treaties entered with Mexico will no longer apply.

As result of the last report released by the European Parliament Committee on Economic and Monetary Affairs (ECON), there are relevant relaxations for the criteria to be followed in order to determine the substance of a EU entity as well as a deferral of the implementation of ATAD 3 to January 2025, but with a two-year 'look-back' period.

Mexican entities having transactions with EU entities should be aware of potential changes and adoption of ATAD 3 in order to assess their structures from a tax perspective (among others, from a withholding tax perspective), particularly since the 'look-back' requirement would in practice mean that it could be already too late to start analyzing these consequences once in force and applicable. In other words, altough it would apply effective 2025, the requirements should have been satisfied begining in 2023.

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Treaties

Australia

Consultation to expand the Australian tax treaty network

The Treasury is seeking comments on the government's proposed expansion of the Australian tax treaty network. This includes a plan for negotiations with Bulgaria, Colombia, Croatia, Cyprus, Estonia, Latvia, and Lithuania. Submissions were sought by 23 December 2022 on the key outcomes Australia should seek in negotiating these tax treaties and any other issues related to Australia's tax treaty network. These countries are in addition to the current treaty negotiation program, which includes Portugal, Slovenia, Greece, and Luxembourg.

The expansion of Australia's tax treaty network should facilitate cross-border trade and investment between Australia and its treaty partner jurisdictions (particularly EU Member States). Taxpayers with cross-border operations, in particular, will benefit from these measures.

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Treaties

Mexico

PPT and Mexican GAAR considerations in light of the MLI Mexico approval

Article 7 of the Base Erotion and Profit Shifting (BEPS) Multilateral Instrument (MLI) generally states that, notwithstanding any provisions of a Covered Tax Agreement (CTA), a benefit under the CTA shall not be granted in respect of an item of income or capital if it is reasonable to conclude, considering all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes (Principal Purpose Test, or PPT) of any arrangement or transaction that resulted directly or indirectly in that benefit.

The Mexican General Anti-avoidance Rule (GAAR) allows tax authorities to recharacterize transactions that do not serve a business purpose when taxpayers obtain a tax benefit (understood as a reduction, elimination, or deferral of a contribution) greater than the reasonably expected economic benefit. A reasonably expected economic benefit exists when a taxpayer's transactions intend to generate income, reduce costs, increase the value of assets, improve market positioning, etc. Moreover, if with a lesser number of steps the same economic benefit could be achieved, but the taxation would have been higher, then the Mexican tax authorties could argue there is a lack of business reasons.

The consequence of not passing the PPT would be the non-application of treaty benefits. Not passing the Mexican GAAR would result in transactions' recharacterization, i.e., the tax effects already given may be modified, when (i) the economic benefit is inferior to the tax benefit; and (ii) the economic benefit could have been achieved with fewer legal acts and their tax effects would have been more burdensome.

Considering that currently there are few precedents and clear or extended definitions on both concepts, the MLI PPT and the Mexican GAAR, multinationals doing business in Mexico should start evaluating the business elements that already (and would) support their transactions, from a tax perspective, to avoid the non applicability of treaty benefits pursuant to the MLI's PPT and transactions' recharacterization based on the Mexican GAAR.

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Treaties

Spain

Spanish tax treaty negotiations

Treaty with Paraguay

The Paraguayan Government issued a statement on 7 November, informing that, following a recent round of negotiations in Spain, representatives of both jurisdictions have signed a tax treaty. These negotiations, open since 2013, were subsequently paralyzed and but resumed in April 2022. This first agreement between Paraguay and Spain is expected to promote business and investment in both countries.

Treaty with Kuwait

Representatives of Kuwait and Spain met in Madrid on November 15, to discuss a draft protocol to amend the tax treaty signed between both countries, according to the information published by the Kuwaiti Ministry of Finance. The possible protocol would be the first amendment to the tax treaty, which was signed on May 16, 2008 and which has been in force since July 19, 2013.

Multinational enterprises with either operations in Spain or with Spanish holding companies should review how the proposed treaties may affect their investments in Spain.

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Glossary

Acronym	Definition
AFIP	Argentine Tax Authorities
ATAD	anti-tax avoidance directive
ATO	Australian Tax Office
BEPS	Base Erosion and Profit Shifting
CFC	controlled foreign corporation
CIT	corporate income tax
CTA	Cyprus Tax Authority
DAC6	EU Council Directive 2018/822/EU on cross-border tax arrangements
DST	digital services tax
DTT	double tax treaty
ETR	effective tax rate
EU	European Union
MNE	Multinational enterprise
NID	notionial interest deduction
PE	permanent establishment
OECD	Organisation for Economic Co-operation and Development
R&D	Research & Development
SBT	same business test
SiBT	similar business test
VAT	value added tax
WHT	withholding tax

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Worldwide Tax Summaries

If you're operating globally, are you aware of changes to the myriad tax rates in all the jurisdictions where you operate?

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