International Tax News

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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.

Cross Border Tax Talks

Tune into **Cross-border Tax Talks,** hosted by Doug McHoney, International Tax Services Global Leader. Various PwC specialists are featured and share insights on key issues impacting the ever-changing international tax landscape.

Pascal Saint-Amans: The Pillar Two Origin Story 1 March 2023
Searching for Pillar Two clarity: The OECD's Administrative Guidance 8 March 2023
Pillar Two Readiness: Complex data and complex challenges 15 March 2023
Disequilibrium: The new geopolitical and macroeconomic landscape 29 March 2023

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Legislation

Germany

Germany publishes Pillar Two discussion draft

The Federal Ministry of Finance (MoF) published a draft law on 20 March, to implement the Pillar Two Directive ensuring a global minimum taxation for multinational groups and large domestic groups in the European Union (the so-called Minimum Tax Directive Implementation Act - MinBestRL-UmsG). The publication of the German draft law follows the formal adoption by the EU Council to adopt Pillar Two on 15 December 2022. (See our prior Tax Policy Alert).

Read the full Tax insight here.

The discussion draft is largely based on the EU Directive, the OECD Model GloBE Rules (See our Tax Policy Alert) and other OECD publications, such as the Safe Harbour Rules. (See our previous Tax Policy Alert).

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Legislation

Hong Kong

Hong Kong's 2023-24 Budget and GloBE Rules implementation plan

Financial Secretary Paul Chan delivered the 2023-24 Hong Kong Budget on 22 February 2023 with the theme 'Leaping forward steadily, together we bolster prosperity under our new vision.' The Financial Secretary announced Hong Kong's plan to apply the GloBE Rules on in-scope MNE groups and implement a Domestic Minimum Top-up Tax effective in 2025. A public consultation will allow affected MNE groups to make early preparations. Furthermore, the Financial Secretary proposed, among other items, the following profits tax measures and initiatives:

1. A 'patent box' regime to provide tax concessions for profits sourced in Hong Kong from qualifying patents generated through R&D activities.
2. Clear guidelines on whether onshore gains on disposal of equity interests are subject to tax.
3. Enhancing the aircraft leasing preferential regime, which includes allowing a tax deduction for the acquisition cost of aircraft and expanding the scope of leases and aircraft leasing activities qualifying for the regime.
4. A tax deduction for spectrum utilisation fees to be paid by future successful bidders of radio spectrum.
5. Reviewing the existing tax concession measures applicable to funds and carried interest.
6. An enhanced tax deduction of 200% in respect of Mandatory Provident Fund voluntary contributions made by employers for their employees aged 65 or above.
7. A one-off reduction of 100% of profits tax for the 2022/23 assessment year, subject to a ceiling of HK$6,000 per case..

For more information see our PwC Alert.

While several major economies such as the European Union, Japan and South Korea have announced their plans to make the GloBE Rules effective in 2024, Hong Kong intends to implement the rules one year later. Notwithstanding the 2025 start date, the interlocking nature of the GloBE Rules would mean that some MNEs with Hong Kong operations may still be impacted in 2024 due to other jurisdictions' implementation. Other in-scope MNEs not impacted in 2024 are strongly advised to take full advantage of the two-year lead time and continue gearing up their people and systems for the complicated GloBE rules.

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Legislation

Italy

Italy introduces new 'land rich' rules

Italy's 2023 Budget Bill introduced (i) a new indirect transfer rule over 'land rich' entities, and (ii) a limitation to the non-resident capital gain tax exemption currently applicable for the disposal of a non-qualified interest in Italian entities (including 'land rich' ones). Both of these measures are effective as of 1 January 2023.

Italy's 2023 Budget Bill introduced the following new measures (effective 1 January 2023) applicable to non-Italian resident investors (other than EU / EEA 'regulated' investment funds) that cannot benefit from treaty protection:

- Capital gains derived from the disposal of unlisted shares in non-Italian resident corporations or entities, where more than 50% of their value is derived, at any time during the 365 days preceding the disposal, directly or indirectly, from real estate properties situated in Italy (other than the ones directly used in the core business activity or produced and/or exchanged as part of the core business activity), are deemed to be Italian sourced and should be subject to tax in Italy.
- The domestic non-resident capital gain tax exemption currently applicable to 'white-listed' investors who dispose of a non-qualified interest (i.e., less than 20% of voting rights or 25% in the capital in the case of unlisted shares; or less than 2% of voting rights or 5% in the capital in the case of listed shares) in Italian corporations or entities will no longer apply for those unlisted corporations or entities, where more than 50% of their value is derived, at any time during the 365 days preceding the disposal, directly or indirectly, from real estate properties situated in Italy (other than the ones directly used in the core business activity or produced and/or exchanged as part of the core business activity). Therefore, any associated capital gains should be taxable in Italy.

It is unclear if units held in Italian Real Estate Investment Funds (REIFs) also will be in scope of the new rules given the broad language that seems to include capital gains from the disposal of interest in any type of Italian-based entities. Taxpayers should await guidance in this area and consider the impact prior to a disposal event over REIFs' units.

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Legislation

Singapore

Singapore submits plans to implement Pillar Two

In the 2023 Budget presented in parliament on 14 February 2023, Deputy Prime Minister and Finance Minister Mr Lawrence Wong noted that Singapore plans to implement the Global Anti-Base Erosion (GloBE) rules as well as a Domestic Top-up Tax for in-scope multinational enterprises (MNEs) effective with their financial year beginning on or after 1 January 2025. The recently announced transitional safe harbour provisions may provide a brief reprieve for qualifying MNEs, although they should use the additional time to implement a robust system and process to fulfil the compliance requirements.

Tax incentives have historically been an integral part of Singapore's fiscal toolkit in attracting foreign direct investment. There has been much interest in how Singapore's tax system (and specifically its incentive regime) will be affected ever since the OECD Inclusive Framework published its two-pillar solution to address the tax challenges arising from the digitalisation of the economy. Such a global minimum tax would negate the benefits of concessionary tax rates that certain large MNEs enjoy in Singapore through incentives awarded in return for making substantial local investments.

Typically, tax changes contained in the Budget Statement will be included in a set of draft legislation published for public comments a few months after the Budget speech is delivered in parliament. Under this timeline, the public will have an opportunity to provide comments (although this consultation exercise usually focuses on the clarity of drafting and not a reconsideration of policy directions taken). It remains to be seen whether the government will follow this timeline, since the new regime is planned to take effect only in 2025.

For further information see our Tax Insight.

In-scope MNEs should start preparing for the new regime now, notwithstanding the 2025 start date and the recently announced transitional safe harbour provisions. The GloBE rules are extremely complex, and not identical to current tax laws, nor do they follow accounting standards in all respects. Compliance with these rules requires a vast amount of data, not all of which is readily available in current financial systems. MNEs should begin implementing these systems and processes to collect the relevant data and perform the necessary calculations for GloBE reporting.

Furthermore, with potentially different effective dates among jurisdictions, MNE groups should closely monitor international developments, assess their exposure (if any), and take full advantage of the two-year lead time to prepare for this new tax regime.

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Legislation

South Africa

South Africa Budget announcement provides more details on Pillar Two implementation

The annual South African Budget Speech was delivered in Parliament on 22 February 2023. National Treasury will publish a draft position paper on the implementation of Pillar Two for public comment during the course of 2023, and that draft legislation will be prepared for inclusion in the 2024 Taxation Laws Amendment Bill. South Africa is an Inclusive Framework member, and as such has previously indicated its in-principle support for Pillar Two. The above announcement however provides more detail on the expected implementation date.

The 2024 Taxation Laws Amendment Act is expected to be enacted during the latter half of 2024. Legislation usually is effective from such date or a specified future date, so a 2025 implementation appears likely. However, Pillar Two legislation possibly could be introduced during 2024. An announcement to this effect would be in the 2024 Budget Speech (to be delivered in February 2024).

Various other amendments were proposed to tighten up the legislation governing cross-border transactions and structures, including amendments to counter perceived abuse of the capital gains tax participation exemption on the disposal of foreign entities, as well as a limitation of the substance-based CFC exemption where a CFC outsources key functions.

For more information see our PwC 2023 Budget Highlights.

Details of the specific rules to be introduced are expected along with the draft position paper during 2023. In the meantime, to the extent that the implementation date is in 2025, outbound groups should monitor the introduction of any 2024 legislation at the Constituent Entity level. South Africa already has onerous CFC legislation, and the interplay between this and any introduced Income Inclusion Rule also needs to be monitored.

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Legislation

Spain

Spain moves forward on transposing the EU Pillar Two Directive

The Ministry of Finance and Public Function submitted for public consultation the transposition to Spanish legislation of the European Directive that imposes a minimum Corporate Income Tax rate of 15% on large groups with turnover of EUR 750 million, (i.e., the EU Pillar Two Directive).

Europe requires the transposition of this Directive (2022/2523 of the Council, of 15 December 2022) before 31 December 2023. Thus, a 15% minimum rate will apply effective for fiscal year 2024 and the UTPR will apply effective for fiscal year 2025.

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Legislation

United Kingdom of Great Britain and Northern Ireland (the)

UK Spring Budget 2023

The UK's Chancellor of the Exchequer, Jeremy Hunt, delivered his Spring Budget 2023 on 15 March 2023. Most significantly from an international perspective, a Pillar Two Policy Paper was amongst documents published on Budget Day. Key announcements from a business tax perspective include:

- **Corporation tax** - The Chancellor confirmed that the main corporation tax rate will increase from 19% to 25%, effective 1 April 2023.
- **Capital Allowances** - The super-deduction regime will end 31 March 2023, and will be replaced effective 1 April 2023, with 'full expensing' - 100% capital allowances for qualifying plant and machinery. This will last for three years, to 31 March 2026, although the Government indicated their ambition to make this permanent. The Government will also introduce 50% first year allowances for 'special rate' plant and machinery, including long-life assets. These rules apply only for corporation tax purposes, and will not be available for businesses that are subject to income tax, unless they are below the Annual Investment Allowance threshold of £1m per annum.
- **Research & Development** - From 1 April 2023, a higher rate of relief for loss-making R&D intensive SMEs will be introduced. SME companies whose qualifying R&D expenditure constitutes at least 40% of their total expenditure will be able to obtain an effective credit of 27p for every £1 of qualifying R&D expenditure. The previously announced restriction on the inclusion of some overseas expenditure in R&D tax relief claims is deferred for a year until 1 April 2024. Two new categories of qualifying R&D expenditure will be created, for data licences and cloud computing services.
- **Investment Zones** - The Government has announced 12 Investment Zones across the United Kingdom, with the stated aim of helping drive economic growth and 'levelling up' the country. The confirmed locations include the West Midlands, Greater Manchester, the North-east, South Yorkshire, West Yorkshire, East Midlands, Teesside, and Liverpool.

For further information and analysis of the UK's Spring Budget 2023, see our dedicated webpage here .

This Budget provides much needed support for UK competitiveness. Businesses should be relieved that the Chancellor has acted to soften the blow from the double hit of rising corporation tax rates and the ending of the super deduction. Combined with increased R&D incentives, this leaves the United Kingdom in a competitive position compared to other G20 economies, albeit somewhere short of the most pro business tax environment anywhere.

The introduction of a temporary full-expensing window for plant and machinery is an important commitment to capital investment in the United Kingdom. The window will run from 1 April 2023 to 31 March 2026. This announcement effectively delivers the same level of tax relief for companies incurring capital expenditure on certain assets as was received under the super-deduction; it also appears to include the same clawback and tracking provisions.

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Administrative

Australia

Australia explains significant proposals for the interest limitation regime

Australia's Commonwealth Treasury, on 16 March, released for submission and comment draft law and explanatory materials to implement the government's proposed new interest limitation rules. These rules, which would replace the existing thin capitalization rules, would apply for income years commencing on or after 1 July 2023, with no grandfathering or transitional rules for existing capital structures.

For most taxpayers, the measures included in the draft legislation would replace the existing rules with three tests. A taxpayer must select one (in writing) when filing its tax return:

- Replace the existing asset-based safe harbor test with a new earnings-based 'fixed ratio test,' which would limit an entity's net debt deductions to 30% of a newly defined 'tax EBITDA' concept. This new concept starts with taxable income and then adds back net debt deductions and some tax depreciation and amortization. Taxpayers would be able to carry forward denied deductions for up to 15 years, subject to an integrity rule;
- Replace the (rarely used) worldwide gearing test with a new earnings-based 'group ratio test.' This test would allow an entity in a group to claim debt-related deductions up to the level of the worldwide group's net interest expense as a share of earnings (based on financial statements with certain modifications); or
- Replace the arm's length debt test (ALDT) with a new 'external third party debt test.' This test would allow interest expenses, which are paid to unrelated third parties, to be deducted when those expenses are attributable to genuine third-party debt that is used wholly to fund Australian business operations, while entirely disallowing third-party debt deductions that do not meet these conditions and any related-party debt deductions.

In addition to these changes, which largely were expected, the draft legislation includes unexpected and previously unannounced measures, including:

- Disallowing the deduction of interest expense related to investments in foreign subsidiaries (on the basis those investments produce income which is eligible for a dividend participation exemption);
- Modifying the transfer pricing provisions to allow for transfer pricing adjustments to the quantum of debt used as well as to the interest rate applied (even in circumstances where the debt deductions are less than the thin capitalization thresholds); and
- Narrowing the scope of entities defined as 'financial entities' (and therefore entities that would be eligible to use the existing thin capitalization provisions).

For more information see our PwC Tax Insight.

These changes would fundamentally alter the deductibility of interest in Australia and therefore could have a material impact on Australian tax payable – with no transitional relief for existing capital structures. Affected taxpayers should consider whether to make a submission on the draft law (submissions are due by 13 April 2023), and consider the impact of these changes on their specific circumstances.

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Administrative

France

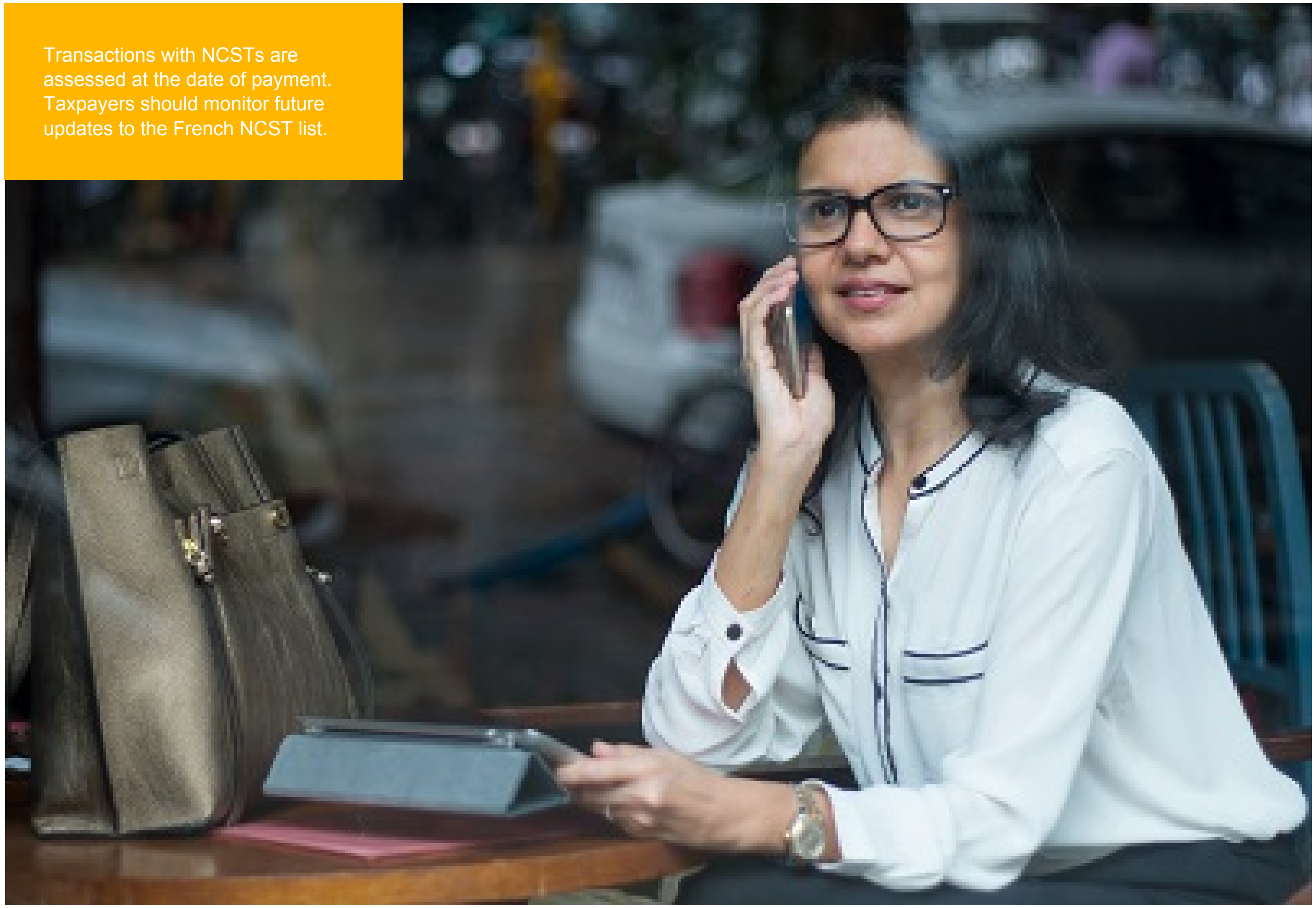
France updates list of non-cooperative states and territories

France updated its Non-Cooperative States and Territories (NCST) list with a decree of 3 February 2023. Both the Bahamas and Turks and Caicos Islands were added to the list, with the additions applying as of 1 May 2023.

Transactions with entities established in countries included on the French NCST list lead to application of anti-avoidance measures and potential withholding taxes at the increased rate of 75%.

The EU Council also adopted an updated NCST list on 14 February 2023, with the British Virgin Islands, Costa Rica, Marshall Islands and Russia being added. Costa Rica, Marshall Islands and Russia are not yet mentioned in the French list. The inclusion of these three jurisdictions in the French list is not automatic. Therefore, until the next update, French provisions implemented against NCSTs are not applicable (except DAC6 provisions). It is unclear whether the update of the French list will happen on an exception basis before next year, as it is usually updated annually.

Transactions with NCSTs are assessed at the date of payment. Taxpayers should monitor future updates to the French NCST list.



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Administrative

Spain

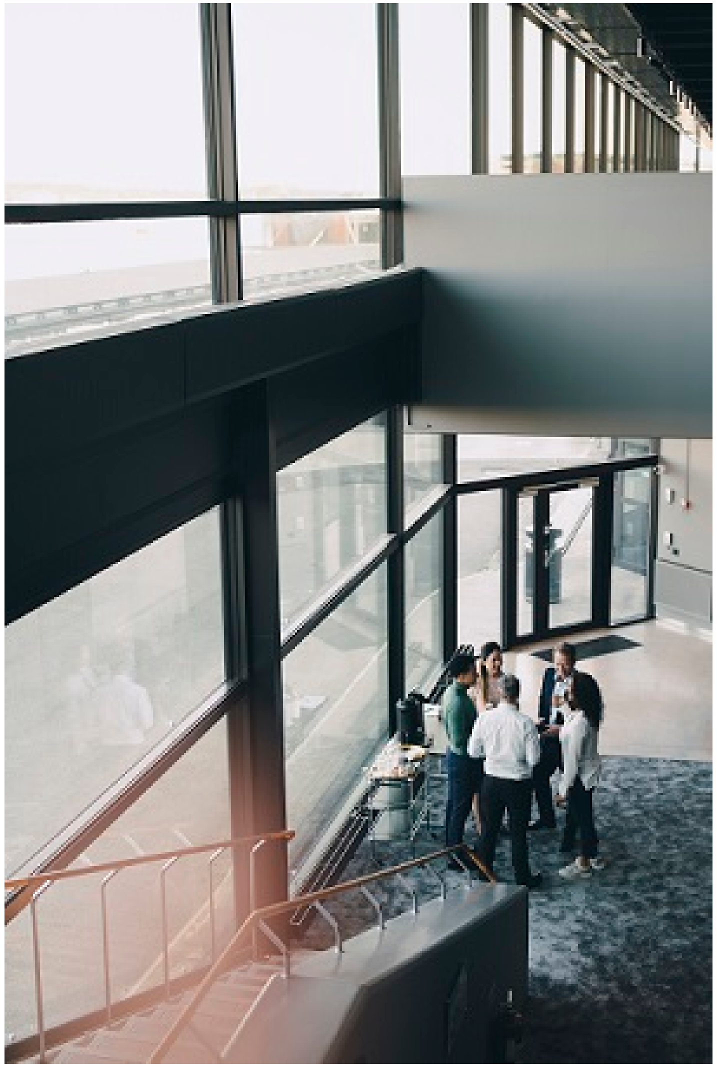
Monetizing the R&D deduction with the Spain domestic minimum tax

The Spanish General State Budget Law for 2022 established a minimum corporate income tax rate for tax periods beginning 1 January 2022, through article 30 bis of the Corporate Income Tax Law (CIT). The minimum tax affects companies with a net turnover exceeding EUR 20 million or conforming a tax consolidation group. This minimum tax raised concerns over the interpretation of the application of R&D tax credits and its compatibility with the mechanism of monetizing the R&D deduction (cash-back) in cases where there was an insufficient tax quota.

The Spanish General Directorate of Taxes confirmed in a binding ruling issued 16 February 2023 (V0308-23), that monetization should be compatible with the establishment of this minimum taxation.

This interpretative criterion helps clarify a convulsive scenario related to the application of R&D deductions, due to recent jurisprudential changes that supported a restrictive criteria in relation to the expenses that qualify as technological innovation for purposes of the deduction basis, as mentioned in our International Tax News February 2023.

This binding ruling should help maintain competitiveness by promoting R&D activities and innovation in the country by giving legal certainty.



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Administrative

China

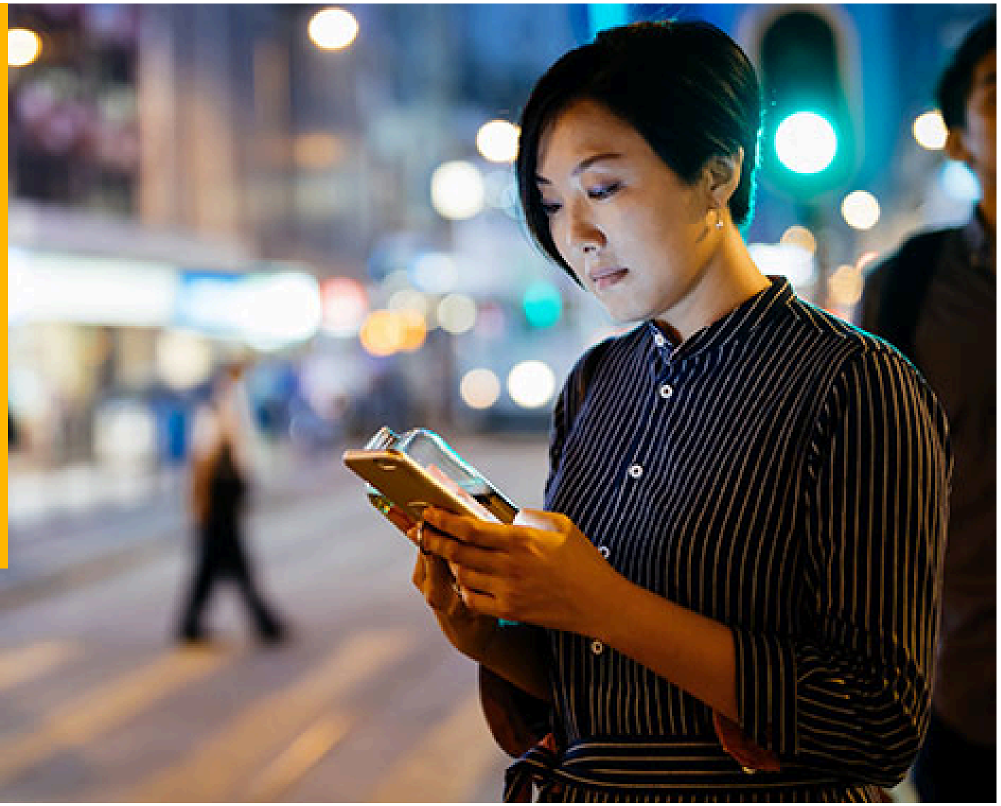
Preferential tax regimes in the Guangdong-Hong Kong-Macao Greater Bay Area in China

China issued the *Overall Plan for Nansha of Guangzhou to Deepen the World-Oriented Comprehensive Co-operation of Guangdong, Hong Kong and Macao* (Guo Fa [2022] No. 13, the Nansha Plan) on 6 June 2022. The plan proposes to build Nansha of Guangzhou (Nansha) as a world-oriented strategic platform based in the Guangdong-Hong Kong-Macao Greater Bay Area (GBA), linking Hong Kong and Macao. In October 2022, the relevant government authorities issued Cai Shui [2022] No. 40, which provides details on implementation of the preferential CIT policies, effective from 1 January 2022 to 31 December 2026:

- Reduced CIT rate: For enterprises registered in the pilot zones of Nansha and engaging in the encouraged industries, the applicable CIT rate is reduced to 15%.
- Extended tax loss carryforward period: The unutilized tax losses for up to eight years before a Nansha enterprise becomes a high and new technology enterprise or small and medium-sized technological enterprise may be carried forward a maximum of 13 years.

For more information see our PwC News Flash.

Among the Greater Bay Area, cities and regions have offered the preferential CIT policy of 15% CIT rate for enterprises in specific regions and industries. Enterprises interested in investing in these areas or relocating to the these cities should pay attention to the substantive operation requirement, and adjust the business model, group structure, and employment arrangement, according to their own situations. Nansha Taxation Bureau will provide more guidance on the assessment of 'substantive operation' to reduce the uncertainty for taxpayers enjoying tax benefits in due course.



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Administrative

Spain

The Spanish Tax Authority will intensify control over the Non-Resident Income Tax

The General Directorate of Tax has published the General Guidelines of the 2023 Annual Tax and Customs Control Plan, through a Resolution dated 6 February 2023. The Annual Tax and Customs Control Plan defines the main strategic lines of the Spanish Tax Authorities in the selection of taxpayers, industries, transactions and activities considered priorities for the prevention and control of tax and custom fraud. These are framed in Strategic Plan 2020-2023.

The Tax Authorities will promote control over citizens residing in Spain who declare their income through the Non-Resident Income Tax (NRIT) to artificially lower their tax bill, since the NRIT rate is lower than the Personal Income Tax (PIT) rate. This allows non-residents to be taxed in Spain only on income generated in Spain, rather than on their worldwide income. The General Guidelines of the 2023 Annual Tax and Customs Control Plan also emphasize the need to control simulations of residence in the different Spanish regions, as well as to utilise information available on real estate owners of opaque companies with high-standing residential properties. In the same way, specific plans will be executed in relation to the indirect ownership of real estate by non-residents, for purposes of their correct property taxation.

Another 2023 priority for the Tax Authorities will be the reinforcement of actions related to those economic activities that use 'virtual payments,' specifically with the use of electronic payment methods located abroad through entities that do not meet the requirements of the Spanish obligations to provide financial information.

Taxpayers should anticipate possible tax verifications / tax audits and analyze if they are in any of the highest risk groups or situations. The Spanish Tax Authorities will also once again intensify the verification of NOLs, tax credits, or tax quotas pending to compensation or application. They will ensure that the application of the deductions / tax credits provided for in the Corporate Income Tax Act are linked to the development of real activities. They also will ensure that the amount applied as tax credits corresponds to expenses actually incurred, avoiding any abuse in the transfer of tax benefits.

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Administrative

United States of America (the)

Treasury releases ‘FY24 Green Book’ describing Biden’s tax proposals for businesses

The White House released President Biden’s Fiscal Year 2024 Budget (‘FY24 Budget’) on 9 March 9. On the same day, the US Treasury released the General Explanations of the Administration’s Fiscal Year 2024 Revenue Proposals, commonly referred to as the ‘Green Book.’ The Green Book explains the revenue proposals in the FY24 Budget, and serves as a guidepost to Congress for tax legislation by describing current law (adjusted baseline), proposed changes, the rationale from a policy perspective, and Treasury’s revenue projections.

The FY24 Budget proposes to raise the corporate tax rate from 21% to 28%, raise the GILTI rate from 10.5% to 21%, and quadruple the tax on corporate stock buybacks from 1% to 4%. Also included in President Biden’s budget is unspecified ‘additional support’ for R&E expenditures. The proposal to replace the BEAT with a UTPR and a domestic minimum top-up tax perhaps is the most significant US international tax proposal in the FY24 Budget. The UTPR proposal attempts to align the US rules for foreign-parented MNCs with the OECD’s Pillar Two Model Rules, including setting the tax rate at 15% and using modified financial accounting concepts (including modified deferred taxes) to determine the amount of tax paid in a jurisdiction.

In 10 March testimony to the House Ways and Means Committee, Treasury Secretary Janet Yellen stated that the President’s proposals are intended to “end a race to the bottom in corporate taxation – and raise crucial revenue for essential investments like those proposed in the President’s Budget.”

For more information see our PwC Insight.

Republican control of the House of Representatives will prevent action on President Biden’s tax increase proposals in the near term. House and Senate Republicans have opposed the Administration’s support for the OECD’s Pillar One and Pillar Two tax proposals, and have expressed concern that the Administration’s tax proposals will put the United States at a competitive disadvantage relative to China and other countries. Companies should evaluate and model the potential effect of the corporate tax proposals set forth by President Biden. Companies also should engage with policy makers about how specific proposals may affect their employees, job creation, and investments in the United States.

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Judicial

India

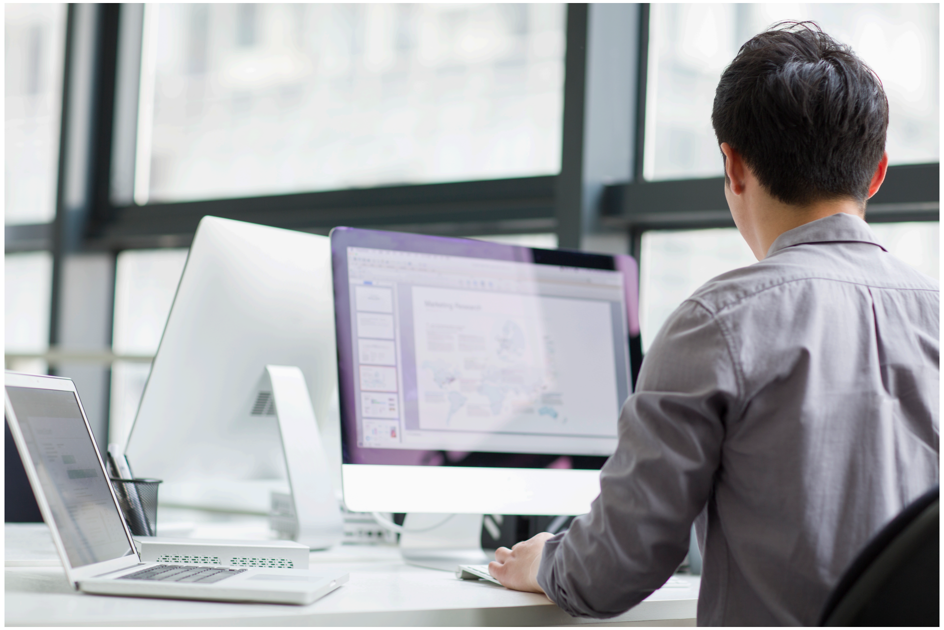
Indian Administrative Tribunal directs IRA to not go beyond the scope of the TRC to claim tax treaty benefit

Under the India-Singapore tax treaty, prior to 1 April 2017, capital gains earned by a Singaporean company on the sale of shares of an Indian entity were claimed as exempt under the tax treaty based on the tax residency certificate (TRC) issued by the Singapore Tax Authority.

The Indian Revenue Authority (IRA) generally does not accept this position and engages in detailed fact finding in each case to prove that the beneficial owner of shares is not the Singaporean company, and that the control and management of such company is outside Singapore, and therefore, the Singaporean company is a mere conduit or a shell company.

In a significant ruling, the Indian Administrative Tribunal, inter alia, directed the IRA to treat TRC as statutory evidence to claim tax treaty benefits. The Tribunal held that the IRA's attempt to pursue it is wholly contrary to the Indian Government's consistent policy and repeated assurances to foreign investors, thus reaffirming the settled principle of the Supreme Court and the administrative circular in this regard.

In India, the IRA has re-initiated the tax audits on the issue of tax treaty eligibility claimed on capital gains earned, particularly by Singaporean and Mauritius companies on the sale of shares prior to 1 April 2017 based on the TRC. This ruling re-affirms the principle held by the Supreme Court of India and the administrative circular that the TRC is sufficient evidence of beneficial ownership, and consequently, liable for tax treaty benefit.



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Judicial

Italy

Italian Authorities approach on intercompany debt: recent case law on beneficial ownership and deductibility of interest

The Italian Supreme Court published decision no. 6079/2023 in February on Italian entities displaying a so-called 'back-to-back' loan structure. The decision concerned intercompany loans in place (i) between a Luxembourg parent company LuxCo and its Italian subsidiary ItaCo1 (loan 1), and (ii) between ItaCo1 and its controlled entity ItaCo2 (loan 2). The Court ruled that the beneficial owner of loan 2 interest payments was identifiable in LuxCo, thus forcing the application of a withholding tax by ItaCO2 even if loan 2 was not cross-border.

The reasons behind the decision were that (i) conditions of the two loans were symmetric, thus the loans were considered substantially equivalent, and (ii) interest income received by ItaCo1 in loan 2 was not 'at its free disposal,' on the grounds that (also from a timing perspective) ItaCo1 had no management autonomy over its interest income, and a corresponding interest expense was incurred in loan 1 towards LuxCo. As a result, ItaCo 1 was acting as a mere conduit of interest payments. The Court also ruled that benefits from the Interest and Royalties Directive were not claimable on the WHT, as ItaCo2 was not a direct controlled entity of LuxCo, thus requiring application of the domestic rate or a conventional rate if a tax treaty is in force.

In a connected matter, in the response to ruling no. 395/2022, the Italian Tax Authorities (ITA) considered intercompany loans proceeding from debt push-downs after closing the operations of an acquisition to be abusive pursuant to the Italtian general anti-abuse rule (GAAR). From the ITA's perspective, an interest expense deduction is disallowed for intercompany loans that are not linked by solid business reasons, and are aimed at spreading loans across a group to artificially create a 'conversion' of (non-deductible) dividends into deductible interest expense.

Back-to-back intercompany loan structures, even if between Italian entities, could embed high risk and require a case-by-case analysis. As an added factor of risk in intercompany loan structures, the ITA response suggests that any operation of debt push-down after acquisitions is likely to expose Italian subsidiaries to recast interest payments as dividends, thus disallowing deductibility.

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Judicial

Spain

Spanish Supreme Court partially suspends DAC6

The Spanish Supreme Court positively resolved an application for precautionary measures requested by the Spanish Association of Tax Advisors (AEDAF). This measure affects regulations regarding the tax obligation to provide information on cross-border mechanisms, known as DAC 6.

Since several countries, including France and Belgium, had questioned the proportionality of the informative measures that this kind of regulation requires, all legal proceedings before the Spanish Supreme Court were suspended until the various preliminary rulings affecting the topic had been resolved in Luxembourg. Meanwhile, the Spanish Court opened a procedure for parties to opine on whether a recent preliminary ruling question raised by the Belgian Court of Cassation could impact the Spanish procedure.

AEDAF used this open procedure to report on the relevance of the Court of Justice of the European Union (CJEU) ruling of 8 December 2022. This ruling stated that when the obligation to notify any other intermediary affects a lawyer subject to the duty of professional secrecy, the right to respect the confidentiality of communications between lawyer and client provided for in the European Union Charter of Fundamental Rights, as well as in the European Convention on Human Rights, is violated. The AEDAF therefore requested the Spanish Supreme Court to suspend the precepts of regulatory development related to that part of the Directive affected by the CJEU statement.

On 2 March, AEDAF received the Order, dated 27 February 2023, by which the Court agreed to adopt the injunction requested in relation to this matter. This implies suspension of the application of the relevant article which says: "the exempted intermediary must notify said circumstance within a period of five days from the day following the birth of the information obligation to the other intermediaries involved in the mechanism and the interested taxpayer through the communication referred to in the twenty-fourth additional provision of the Spanish General Tax Law."

This resolution will be notified to the National Court, so that it also may proceed with suspending the Ministerial Order that develops the forms through which this information obligation is fulfilled. These forms – 234, 235 and 236 – were also appealed by the AEDAF.

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EU/OECD

European Union

EU Council removes Uruguay, Barbados, and Jamaica from 'grey list;' adds Costa Rica and BVI to 'black list'

As reported in our February Tax Policy Alert, the EU's ECOFIN Council published the updated list of 'non-cooperative' jurisdictions for tax purposes. This so-called 'black list' now includes Costa Rica and British Virgin Islands (BVI). Other black list jurisdictions in the Latin America and the Caribbean regions include Panama, the Bahamas, Turks and Caicos Islands, US Virgin Islands, and Trinidad and Tobago.

Simultaneously, the EU Council determined that Barbados, Jamaica, and Uruguay had successfully fulfilled their commitments and removed those countries from the so called 'grey list' (i.e., the list of 'cooperative' jurisdictions with commitments).

Read the full Tax Insight here.

The EU 'black list' aims to promote changes in legislation and practices through cooperation. EU Member States are encouraged to take efficient defensive tax and non tax measures with respect to jurisdictions considered non-cooperative (e.g., increased withholding taxes, and denial of tax relief with respect to dividends received from such jurisdictions). The grey list comprises jurisdictions that are not yet deemed compliant with tax standards, but that have committed to implement reforms in their legislations.

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EU/OECD

Poland

Polish implications of Russia's inclusion on the EU's list of tax havens

The Russian Federation was included on the EU list of non-cooperative jurisdictions for tax purposes (the so-called 'black list') adopted by the Council of the European Union on 14 February 2023. Russia's inclusion triggers mandatory disclosure obligations and has negative effects on income tax on the basis of CFC, diverted profits, and the holding company taxation regime.
DAC6 Mandatory Disclosure Rules - Transactions with entities from Russia starting from the moment Russia was included on the EU list will be subject to reporting under the DAC6 Directive.

Controlled Foreign Companies - Currently, a foreign entity having its seat or management board or registered or located in the Russian Federation automatically becomes a controlled foreign company for a Polish taxpayer who, independently or with related entities, or with the so-called 'other taxpayers,' holds shares in this foreign entity (without the minimum holding threshold). No additional conditions need to be tested. In such case, the Polish taxpayer may be required to pay tax on the entire income of the foreign controlled company, regardless of the period in which the entity was controlled by the taxpayer and participation rights to the entity's profit. The direct consequences of the above change are: (i) an obligation to pay 19% tax on the income of a foreign company controlled by a Polish taxpayer (with the possibility of making appropriate deductions), (ii) to keep a register of foreign entities, records of events occurring in a foreign entity, and (iii) to submit a tax return on the amount of income of a foreign entity.

Diverted profits- where a Polish taxpayer makes a payment to a related entity that has its seat, management board, etc. in the Russian Federation, which is not its foreign controlled company (*i.e.* in practice to an entity located above or 'next to' the Polish taxpayer in the structure) and these payments will be included in the catalog of diverted profits, but at the same time they will not be taxed with income tax in Poland (including withholding tax), the Polish taxpayer will pay the tax on diverted profits at a 19% tax rate. In this case, however, the minimum level of relation is examined on the terms set out in the transfer pricing regulations (minimum share - direct or indirect - 25%).

Polish holding company - If a foreign subsidiary has its seat or management board or is registered or located in the Russian Federation, the Polish holding company will not be able to apply the exemption provided under this preferential regime in the future to income from dividends or the sale of shares in such a company. On the other hand, if any entity with its seat or management board or place of registration or location in the Russian Federation is identified in the above structure of a Polish company, it will not be able to become a beneficiary of the tax holding regime at all. These restrictions will apply as long as Russia is blacklisted as a tax haven, and it seems that even for another two years after eventual removal from the list.

The above consequences indicate that the inclusion of the Russian Federation in the list of so-called tax havens has a significant impact on taxpayer situations. The mere fact of registering a given related entity in the Russian Federation increases the risk of additional tax and reporting obligations on the part of the Polish taxpayer, and also makes it impossible in certain situations to benefit from preferential regimes.

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Treaties

Italy

Italian Tax Authorities issue treaty guidance for software payments

The Italian Tax Authorities (ITA) published principle of law no. 5/2023 (ITA Principle) in February 2023, arguing that payments made for the license to use, reproduce, and distribute a software could be subject to withholding tax only if in line with the provision of the relevant tax treaty, and if the use without consent of the copyright holder constitutes an infringement of copyright on the asset - as grounded by the Italian Copyright Law (ICP). According to the ICP, software is considered to be a 'work of art.' Under Italian tax law, payments received for the use or right to use works of art may be subject to a 30% withholding tax (reduced to 22.5% upon certain conditions).

On the other hand, in most Italian treaties, the definition of 'royalty' follows Article 12 of the OECD Model Tax Convention (MTC), according to which the characterization of a payment as royalty depends on the nature of the rights acquired. In particular, the Principle is built on para 13.1 of MTC and on an ITA resolution from 2008, which argues that payments made for the license to use, reproduce, and distribute a software, in cases where the absence of a license would result in a breach of copyright, represent a royalty and are thus regulated, for the purpose of allocating taxing rights, by the provisions of the relevant treaty. In addition, while MTC para 14.4 posits that payments for the right to merely distribute software generally should not be considered royalties, Italy voiced an observation by which it reserves the right to examine the payments *in each case*, taking into account all circumstances and rights granted in relation to the distribution.

Concluding, the wording chosen by ITA in the published Principle, as well as the observation exercised on para 14.4 embed complexities that most likely are to be addressed on a case-by-case basis in order to understand if a payment can qualify as a royalty and if a withholding tax is applicable.

The characterization of payments for the use or right to use a software as royalties seems dependent on a variety of factors. The analysis of this (case-by-case) characterization needs to consider a complex legal framework that includes tax and copyright law. A review of the nature of payments, including all the underlying facts and circumstances, is advised in order to address their qualification as royalties and levy of withholding taxes. For those who seek full tax certainty in advance, a tax ruling request still seems to be the only available solution.

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Treaties

Mexico

MLI enters into effect on 1 January 2024 for Mexico

Mexico deposited the instrument of ratification for the Multilateral Instrument (MLI) with the OECD on 15 March 2023. The Mexican Senate had approved the MLI on 12 October 2022, and completed its legislative ratification process on 22 November 2022, with its publication in the Official Gazette. See our previous PwC Insight. The MLI will enter in to force on 1 July 2023, and will be effective for all Mexican tax purposes on 1 January 2024.

Read the full Tax Insight here.

Taxpayers should consider the potential impact of the MLI if they are currently rely on, or anticipate relying on, benefits under Mexico's income tax treaty network.

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Glossary

Acronym	Definition
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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