International Tax News

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Start

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Legislation

Barbados

Barbados response to Pillar Two global minimum tax

The Prime Minister of Barbados, on 7 November, announced significant forthcoming international tax amendments to Income Tax Act, Cap. 73. The amendments, which are scheduled to come into effect on 1 January 2024, will again change the corporation tax landscape in Barbados.

Effective 1 January 2024, the corporation tax rate will increase to 9%. This increased tax rate will impact all corporate entities other than those that fall within the stipulated exclusions under the GloBE Rules.

For in-scope multinational enterprises (MNEs) whose Ultimate Parent Entity (UPE) is in a jurisdiction that has not adopted or implemented either the Income Inclusion Rule (IIR) or the Under-taxed Profits Rule (UTPR), or whose Constituent Entities are not subject to the IIR or UTPR, the current corporation sliding scale rates of 5.5% to 1%, established in 2019, will continue to apply. The Qualified Minimum Domestic Top-up Tax (QDMTT) will not apply.

Effective 1 January 2024, a QDMTT shall be introduced consistent with the GloBE Rules for in-scope companies. For subsidiaries and permanent establishments of in-scope MNEs' Constituent Entities whose UPE is in a jurisdiction that has introduced a IIR or a UTPR, a Top-up Tax will be imposed on the Constituent Entities to ensure that they will be subject to a 15% ETR in accordance with the GloBE Rules. The new corporation tax rate will apply only for the portion of profits in income year 2024 that is earned from 1 January 2024.

The Corporation Tax Reform 2024 Policy Paper references the implementation of a number of safe harbours in relation to the new Top-up Tax: QDMTT Safe Harbour, UTPR Safe Harbour, and Country-by-Country Reporting (CbCR) Safe Harbour.

For more information see our PwC Insight.

The implementation of the safe harbours in Barbados would offer a reduced administrative and compliance burden for taxpayers, albeit primarily at group or ultimate parent level. The applicability of the CbCR safe harbour will have the potential to significantly reduce compliance requirements for eligible taxpayers. Thus, CbCR reporting should be undertaken such that it would comply with the GloBE Rules. Safe harbours also provide greater certainty that there would be no additional Top-up Tax payable to other jurisdictions.

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Legislation

Belgium

Significant changes expected to the Belgian investment deduction regime

The Belgian Federal Government agreed on the federal budget in October 2023. One important tax measure in this agreement relates to changes in the Belgian investment deduction regime, an effort to support the Belgian investment climate.

The final law – after it is voted on and enters into force – will increase the ordinary investment deduction rate from 8% to 10%. The 10% rate will further increase to 20% for qualifying digital investments made by SMEs/qualifying individuals.

The new regime will replace the previously mentioned specific categories of qualifying investments in an increased 'thematic' investment deduction of 40% (30% for non-SMEs). The thematic investment deduction will apply to the following categories:

- Investments relating to the efficient use of energy and renewable energy;
- Investments in zero-emission transport;
- Environmentally friendly investments; and
- Supporting digital investments (linked to the above-mentioned categories).

For more information see our PwC Insight.

If the corresponding tax law will be finally voted, the new regime is expected to apply to investments made as of 1 January 2025 (apart from the correction related to the (partial) professional withholding tax exemption regime, which will apply to investments made as of 1 January 2024).

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Legislation

Cyprus

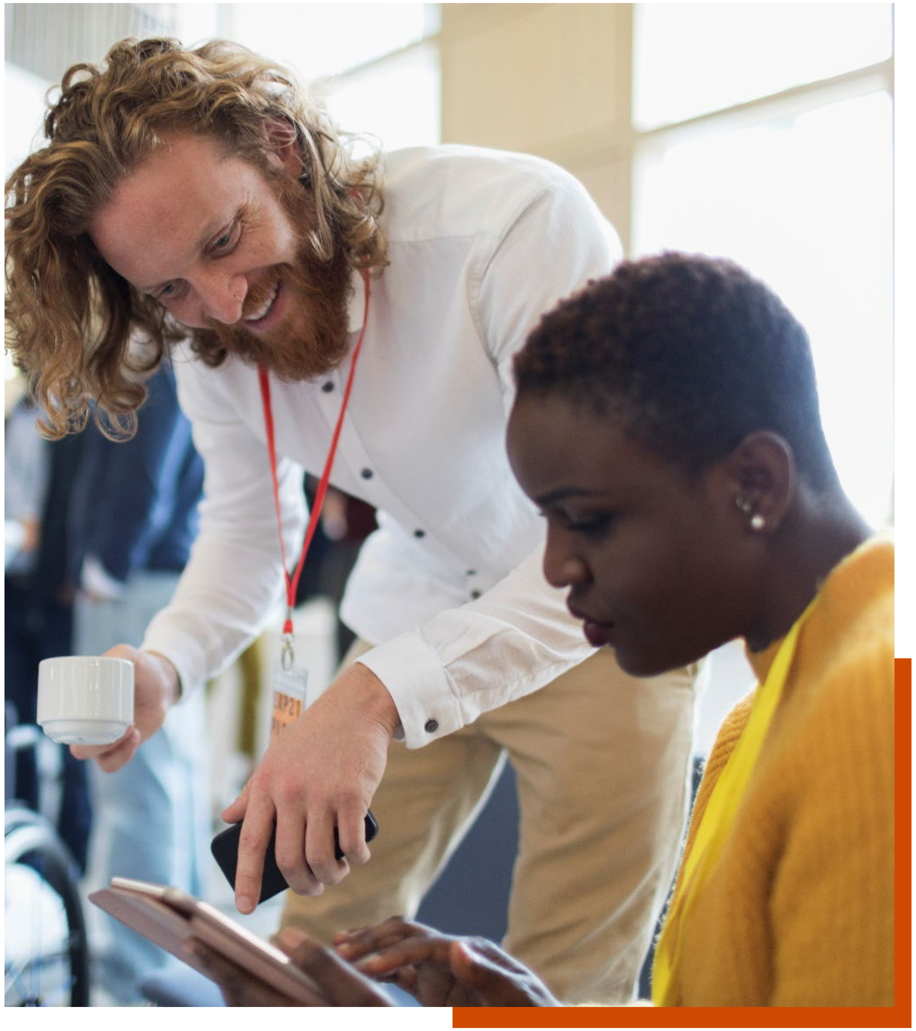
Cyprus consents to QDMTT and Transitional UTPR Safe Harbours

The Cyprus Ministry of Finance, on 30 October, issued an announcement assuring that Cyprus consents to the Pillar Two Qualified Domestic Minimum Top-up Tax (QDMTT) and Transitional Undertaxed Profits Rule (UTPR) Safe Harbours as established by the OECD Inclusive Framework.

Article 32 of the EU Directive on Pillar Two (Council Directive (EU) 2022/2523) stipulates that the Top-up Tax due by a group in a jurisdiction shall be deemed to be zero if the effective level of taxation of the Constituent Entities located in that jurisdiction fulfils the conditions of a "qualifying international agreement on safe harbours." For an agreement to be considered as "qualifying international agreement on safe harbours" all EU Member States need to have consented to it.

The Inclusive Framework agreed on the said Safe Harbours on 13 July 2023. Cyprus, as an EU Member State that is not a member of the Inclusive Framework, did not have the opportunity to consent to the said Safe Harbours at the level of the Inclusive Framework.

Given the fast-approaching implementation of Pillar Two, in-scope groups should analyze the potential implications now. The announcement of the Cyprus Ministry of Finance provides comfort that the Safe Harbours in respect of QDMTT and Transitional UTPR as agreed at the level of the Inclusive Framework will apply in Cyprus.



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Legislation

Denmark

Denmark submits Pillar Two legislation to Parliament

Denmark's legislative proposal to transpose Pillar Two into the Danish tax legislation was submitted to the Danish Parliament 5 October 2023 (titled Minimum Tax Act). The first reading/discussions of the bill happened 11 October 2023 and will be followed by a discussion in the Tax Council which will take place before the second reading/discussions occur (expected 5 December 2022).

The deadline for additional questions to the proposal was 10 November 2023 and the deadline for the replies and suggested amendments was scheduled for 22 November 2023. The political discussions in the Tax Council have to be finalized by 29 November 2023 and the final bill is currently expected to be finalized and agreed during the third reading/discussions scheduled for 7 December 2023.

Denmark must implement the Pillar Two rules in line with Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

The bill generally aligns with the EU Directive and introduces a 15% minimum tax. The bill includes implementation of the Income Inclusion Rule (IIR) for income tax years starting in 2024 with a later implementation of the 'Undertaxed Profits Rule' (UTPR) in 2025 (with the amendments from the OECD Guidance). The proposal also includes a Danish Qualified Domestic Minimum Top-up Tax (QDMTT) applicable from 1 January 2024. The Danish Ministry of Taxation has said that they expect it to be a 'Safe Harbour' QDMTT.

The Pillar Two legislation effectively introduces a new corporate tax system in addition to the existing company tax framework. The Danish legislative proposal lays down the new rules in a separate legislative act.

The new tax act will apply alongside and in addition to the existing Danish national tax rules, tax treaties, various EU Directives, and government decisions. The legislative act will apply to entities of (multinational or large domestic) groups that are based in the Denmark with a consolidated group turnover of at least €750 million (certain sectors are exempted).

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Legislation

Germany

German parliament passes German Growth Opportunities Act

The German Bundestag (parliament) on 17 November passed the 'Growth Opportunities Act,' submitted by the government. The Bundestag's legislative resolution foresees a new law introducing an investment grant for certain investments aiming to achieve energy savings, and various adjustments to national and international tax law provisions. The Bundestag's proposal differs in parts from the 30 August 2023 draft bill. This tax insight focuses on the significant changes with respect to the rules limiting the interest deduction.

Read out PwC Insight.

The new adjustment of the rules for determining the arm's length price for financing relationships which are again included in the Bundestag's legislative resolution had been highly debated when they were originally proposed within the legislative procedure of the ATAD Implementation Act. The technical doubts and open questions with regard to these rules remain and might result in extensive discussions in the political process. Furthermore, the new draft law foresees further documentation requirements to ensure the deductibility of intra-group interest payments.

Next, the Bundesrat must pass the draft law. However, this is not guaranteed as there are still political disagreements on various aspects of the draft law.

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Legislation

Hong Kong

Bill on tax certainty enhancement scheme for onshore equity disposal gains gazetted

The highly anticipated tax certainty enhancement scheme has taken a further step towards implementation, with the Inland Revenue (Amendment) (Disposal Gain by Holder of Qualifying Equity Interests) Bill 2023 gazetted on 20 October 2023. The Bill proposes to amend the Inland Revenue Ordinance (IRO) by adding a new section 40AX and Schedule 17K to the IRO to provide for the tax treatment in relation to gains covered by the Enhancement Scheme.

Under the enhancement scheme, onshore equity disposal gains that satisfy all the prescribed conditions will be regarded as capital in nature and not chargeable to profits tax. These conditions include, inter alia, that the investor entity has held at least 15% of the equity interests in the investee entity for a continuous period of at least 24 months immediately prior to the date of disposal of such interests.

The government has adopted the following major recommendations: (i) equity interests held by an investor entity and its closely related entity/entities can be aggregated for meeting the 15% holding threshold; and (ii) in the case of disposal in tranches, gains from a subsequent disposal of left-overs from a previously qualifying disposal will not be required to satisfy the 15% holding threshold provided that the subsequent disposal occurs within 24 months after that previous disposal.

Subject to passage of the Bill by the Legislative Council, the Enhancement Scheme will apply if (i) the eligible equity disposal occurs on or after 1 January 2024, and (ii) the gains accrue in or after the year of assessment 2023/24.

For more information see our PwC Insight.

> The enhancement scheme will not only provide greater upfront certainty of non-taxation to taxpayers looking to restructure or exit from their equity investments, but also reduce the compliance cost of businesses. The Bill has incorporated many stakeholder suggestions, considerably enhancing the attractiveness of the enhancement scheme. The implementation of the enhancement scheme will further bolster the competitiveness of Hong Kong as a regional investment hub for multinational enterprises.

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Legislation

Hong Kong

Gazettal of the bill on further refinements to FSIE regime in Hong Kong

Following extensive stakeholder consultations, the Inland Revenue (Amendment) (Taxation on Foreign-sourced Disposal Gains) Bill 2023 was gazetted on 13 October 2023, The Bill seeks to refine the existing foreign-sourced income exemption (FSIE) regime under the Inland Revenue Ordinance by expanding the scope of assets in relation to foreign-sourced disposal gains to cover assets other than equity interests.

The European Union has rejected the HK Government's proposals to (i) confine the scope of assets subject to the refined FSIE regime; and (ii) allow the rebasing of an asset cost to its fair market value prior to the effective date of the refined FSIE regime (or an alternative taper relief). However, it has agreed to (i) the exclusion of disposal gains derived by traders of assets other than intellectual property and (ii) the introduction of an intra-group transfer relief.

Furthermore, the HK Government has adopted several stakeholder recommendations to mitigate the impacts of the refinements on covered taxpayers. For instance, less stringent conditions are imposed on the proposed exclusion for traders, and the association condition under the newly proposed intra-group transfer relief is drafted very broadly, such that taxpayers with entities in different business forms within their MNE group would be able to enjoy the relief.

The Bill was introduced into the Legislative Council on 18 October 2023, and the refinements are proposed to apply to disposal gains accrued and received by covered taxpayers on or after 1 January 2024.

For more information see our PwC Insight.

While the refined FSIE regime will be further expanded to cover disposal gains in relation to all types of assets, the Bill also proposes mitigating measures, such as enhancing the existing exclusion to cover non-IP disposal gains derived by traders and certain specified entities, as well as introducing an intra-group transfer relief. If the Bill is enacted as proposed, with proper planning, foreign-sourced disposal gains derived by covered taxpayers should remain non-taxable under the refined FSIE regime. Taxpayers with adequate economic substance in Hong Kong are unlikely to see significant impact.

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Legislation

Italy

Draft Italian Budget Law introduces participation exemption for EU/EEA entities

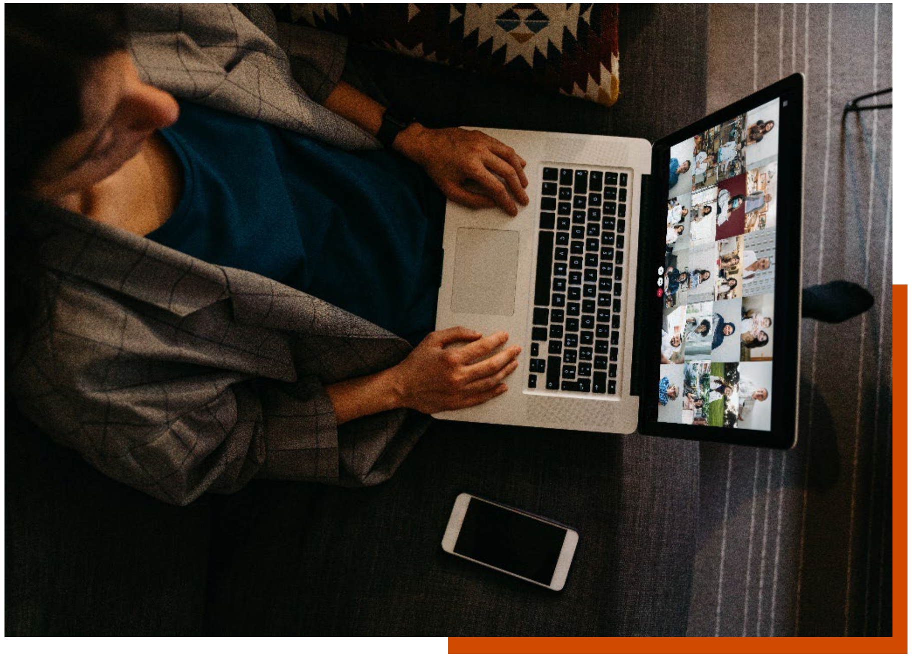
Italy generally provides for a 26% non-resident capital gain tax. The Draft of the Italian Budget Law (currently under Italian Parliament's approval) extends the 95% participation exemption regime (already applicable to Italian entities) to EU / EEA resident entities that transfer Italian company shares. The extension will remove the discrimination against EU / EEA resident entities by allowing them to invoke the 95% exemption on the gains stemming from the transfer of Italian shares. In particular, the 95% gain exemption will apply to entities that (i) do not have a permanent establishment in Italy; (ii) are resident in an EU/EEA country allowing an adequate exchange of information; and (iii) are subject to corporate tax in their country of residence.

In order to benefit from the exemption, the same requirements already provided by the participation exemption regime applicable to the Italian entities should be fulfilled. Furthermore, the transferred Italian shareholding must be 'qualified' i.e., represent at least 20% of voting rights or a 25% capital participation (these percentages are reduced respectively to 2% and 5% in case of listed shares).

The news follows two recent decisions (no. 21261/2023 and no. 27267/2023) of the Italian Supreme Court (ISC) which recognised that the difference in tax treatment for Italian companies (that could benefit from the regime) and non-resident companies (that could not benefit from it) violated EU law principles (of articles 49 and 63 of TFUE).

Based on the ratio of the law, the new provision might reduce the 26% Italian non-resident capital gain tax to 1.2% for EU/EEA entities disposing of Italian shares. Impacts of the provision might be relevant, for example, when considering exit strategies or group reorganisations involving transfers of Italian shares. However, the parameters of the participation exemption requirements for non-residents is unclear and requires a case-by-case analysis.

Generally, since the freedom of movement of capital (art. 63 TFUE) applies to relations both between two EU countries and between EU and non-EU countries, the news could conceivably have been extended to non-EU/EEA selling companies (e.g. the United States, even if this argument is not included in the law).



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Legislation

Italy

Italian international draft tax reform decrees

In addition to Pillar Two drafted law, the draft of international tax reform decree provides the following relevant measures:

- **Repeal of the Notional Interest Deduction (NID)** - Expected starting from the FY following the one ongoing on 31 December 2023 (i.e. FY 2024 for calendar taxpayers) .
- **Reform of Italian tax residency criteria for corporations** - The legal seat criterion does not change. In addition, (i) the place of effective management (PoEM) and (ii) the place where day-by-day management mainly occurs are introduced. The explanatory report specifies that the introduction of the PoEM is functional in aligning the Italian law with its tax treaties (already providing the PoEM as tie-breaker rule). It also clarifies that the effective management shall be conceptually distinguished from the shareholder's will (i.e., a physiological supervision/monitoring activity exercised by the shareholders cannot *per se* lead to consider the entity as resident for tax purposes in the country of residence of the shareholders).
- **Inshoring regime**: Partial tax exemption, for CIT (IRES, 24% tax rate) and Regional Tax (IRAP, 3.9% ordinary tax rate) purposes, for any income derived by activities in-shored from non-EU/EEA countries (e.g. Switzerland, the UK or the US) to Italy. Income derived by the in-shored business will be 50% exempted (ETR, 13.95%) for six fiscal years. Activities carried out in Italy in the 24 months preceding the transfer are not eligible for the exemption. A recapture regime applies if the exempted activities are relocated outside Italy within 5 years (10 for large companies). The regime:
  - could be aggregated with the Italian entry tax regime (which allows a step-up of the value of assets in case of migration to Italy, cross-border transactions implying transfer of assets / business to Italy, even between a head office and its branch or between branches), and
  - is subject to European Commission approval.
- **Streamlining of CFC rules -** Amendments are aimed to simplify the CFC rules with reference to the computation of the effective tax rate (ETR). The aim is coordinating the CFC regime with domestic rules implementing EU Directive 2022/2523.

Taxpayers and MNE might consider facing the NID repeal in Italy, and consequently (i) determining potential higher Italian tax burden and (ii) implementing potential actions due to the new element of the equation. Additionally, they might consider benefitting from the inshoring regime in case they are planning group reorganisations or setting up new business in Italy.

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Legislation

Hungary

Hungary releases draft bill implementing Pillar Two

The Hungarian Ministry of Finance published on 18 October the draft legislation for public consultation to implement EU Directive 2022/2523/OECD Model Rules on the global minimum tax (GloBE). The draft legislation closely aligns with the OECD Model Rules, Commentary, and Administrative Guidance published thus far. The draft bill includes the full set of the Pillar Two charging provisions, including:

- an Income Inclusion Rule (IIR) and a Qualified Domestic Minimum Top-up Tax (QDMTT) applying in 2024,
- an Undertaxed Profits Rule (UTPR) applying in 2025,
- a Country-by-Country Report (CbCR) based Safe Harbor legislation,
- a Substance Based Income Exclusion amount for all Top-up Taxes, and
- a minimum tax rate at 15%.

The draft legislation defines taxes that are considered covered taxes, i.e., taxes that can be taken into account for the purposes of GloBE effective tax rate (ETR) calculations. The non-exhaustive list includes: corporate income tax, local business tax, innovation contribution, and energy suppliers' income tax.

Hungary aims to introduce a Safe Harbor QDMTT based on the financial statements that companies use for local statutory reporting purposes (this could be either Hungarian GAAP or IFRS based on local legislation). The proposed design of the QDMTT regulation follows the administrative guidance issued by the OECD, including the provisions on the allocation of covered taxes between Constituent Entities. Notably, controlled foreign company taxes levied on the foreign parent entities of Hungarian Constituent Entities would not be allocable to Hungary for the purposes of the ETR calculation for QDMTT purposes.

For more information see our PwC Insight.

The complex Pillar Two legislation impacts the entire (global) business organization of in-scope companies. Companies should start analyzing the financial and administrative impact of these new rules on their business organization.

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Legislation

Liechtenstein

Liechtenstein Parliament approved GloBE Tax Law

The Liechtenstein Parliament in its secondary hearing on 10 November, approved the GloBE Tax Law, which introduces the OECD Pillar Two Global Minimum Tax rules into local Liechtenstein law while remaining flexible on the effective date. The GloBE Tax Law would introduce a Qualified Domestic Minimum Tax (QDMTT), an Income Inclusion Rule (IIR) and the Under-taxed Profit Rules (UTPR).

The GloBE law could generally become effective for tax years starting on or after 1 January 2024. However, the GloBE law was adjusted by Parliament so that the government, via ordinance, can still decide to make the GloBE law effective as of 1 January 2025. The effectiveness of the UTPR will be separately defined via a second ordinance. The earliest the UTPR can enter into force is 1 January 2025. The government, when deciding on the GloBE law effective date, will consider the OECD model rules' implementation status at a global level.

Generally, the Liechtenstein GloBE Tax Law follows the OECD Model Rules. Multinational enterprises (MNEs) with gross revenue of EUR 750M (as in accordance with the EU Council Directive), as well as pure domestic Liechtenstein groups exceeding the revenue threshold will fall within scope of the GloBE Tax Law. The MNE definition includes corporate vehicles, but also trusts, foundations, and establishments. Hence Liechtenstein corporate or legal vehicles of any form should assess whether they fall within scope of the new GloBE Tax Law.
For more information see our PwC Blog.

The GloBE tax law needs to be approved and sanctioned by the Reigning Prince of Liechtenstein in order to be enacted and enter into force. It is expected that such approval should follow in due course. The Liechtenstein Parliament adjustment has set the legal basis for the GloBE introduction, but still kept flexibility and discretion for the Government to defer the implementation for one year, depending on what other important countries around the globe will do. Taxpayers should closeley monitor the decision by the Government on whether the QDMTT and IIR rules shall become effective for January 1, 2024 or in 2025. Additionally, investment structures often have a Liechtenstein trust, establishment or foundation should be reviewed for qualification as an ultimate parent entity.

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Legislation

Saudi Arabia

Proposed new tax law and proposed New Zakat and tax procedures law

The Zakat, Tax and Customs Authority (ZATCA) on 25 October 2023, launched a strong and unprecedented step toward reforming and developing the tax system and landscape. ZATCA proposed a comprehensive tax law and a Zakat and tax procedures law for public consultation until 25 December 2023. The objective is to develop and update the current tax law to align with international best practices.

The proposed new income tax law aims to be consistent with the Kingdom's vision and goals of encouraging foreign investment, as well as domestic economic growth. This is in addition to supporting tax compliance, transparency and international tax cooperation.

In line with ZATCA's approach of being current and competent with the comparative tax regulations, ZATCA has proposed new tax law according to international standards. The proposed new tax law includes:

- Changing the tax treatment of partnerships.
- Transparent tax treatment of investment funds in line with their Zakat treatment.
- Stating alternative methods of tax computations for the Micro-Enterprise (i.e., infinitesimal) taxpayers.
- Stating special provisions regarding:
  - Transferring residency to and from the Kingdom as per articles 30 and 31.
  - Re-investment reserve.
  - Tax treatment of merger and demerger transactions.
  - Cases of non-coincident tax treatment of financial instruments between different jurisdictions.
  - Tax treatment of taxes paid outside the Kingdom.

For more information see our PwC Insight.

Taxpayers should analyse the proposed new tax law for potential tax and compliance implications. Tax and Zakat payers should engage with ZATCA, providing feedback on the proposed amendments through the Istitla portal.

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Legislation

Uruguay

Accountability law for fiscal year 2022

Uruguay passed the Law of Accountability for Fiscal Year 2022 on 6 November 2022, introducing certain tax provisions that will take effect on 1 January 2024. The following relevant provisions were among those introduced.

1. Mergers and spin-offs
Legal status is granted to the rule that excludes from computing for tax purposes the goodwill in intragroup restructurings which are not tax-driven and provided the following conditions are met:

- The ultimate beneficiaries from the entities to be merged or spun-off, are exactly the same, maintaining at least 95% of their equity proportions and not modifying them for the following two years.
- The operations must be carried out at the book value.
- Compliance with the reporting of the merger or spin-off to the appropriate public registries.
- The core business before the merger or spin-off take place must be kept for the following two years.

In the case of non-compliance with these conditions, taxes must be paid without penalties and interests. The statute of limitations applicable in this case will be 10 years. The successor companies will be jointly responsible for the tax obligations of their predecessors in the event of non-compliance.

2. Transfer of equity shares
Transfer of equity shares of Uruguayan tax-resident legal entities will be considered carried out at their fiscal value and thus, no tax due would be derived from these operations, provided that the following conditions are met:

- The transferors and transferees are tax residents in Uruguay.
- The ultimate beneficiaries from the transferors and transferees, are exactly the same, maintaining at least 95% of their equity proportions and not modifying them for the following four years.
- The transferees maintain the shares for the following four years.
- The price of the operation equals the book value of the equity shares transferred.
- The merger or spin-off must be reported to the appropriate public registries.

Corporations should review the possibility to take advantage of this neutral tax regime on reorganizations and transfer of equity shares with no purpose of obtaining an economic result.

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Administrative

Canada

Canada Revenue Agency officially designates first notifiable transactions

The Canada Revenue Agency (CRA), on 1 November 2023, designated its first set of transactions for purposes of the recently enacted 'notifiable transactions' regime, which forms part of Canada's enhanced mandatory disclosure rules (MDR). The transactions and their related descriptions are identical to the sample designated transactions that were released on 4 February 2022, except that they:

- are now stated to be effective 1 November 2023, and
- no longer include the manipulation of Canadian-controlled private corporation status.

In addition, on 2 November 2023, the CRA issued updated guidance on various aspects of the MDR regime, including important statements on the transitional application of the rules for notifiable transactions. Together, these documents imply that the first filings for notifiable transactions will be due no earlier than 30 January 2024. The enhanced MDR regime, enacted 22 June 2023, is comprised of three distinct elements:

- reportable transactions, triggered by a tax avoidance purpose and the presence of one of three generic hallmarks;
- uncertain tax treatments, triggered by financial statement recognition of tax uncertainties; and
- notifiable transactions, triggered by resemblance to specifically designated transactions.

For more information see our PwC Insight.

With the CRA's publication of its first set of designated transactions, the final element of Canada's three-part MDR regime is now in place. Taxpayers, advisers, and promoters may need to file information returns in respect of notifiable transactions as early as 30 January 2024. The CRA regularly issues new guidance on all three elements of the MDR regime, so additional relevant guidance could be issued before the January 2024 deadline.

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Administrative

United Arab Emirates

The UAE publishes additional guidance on the corporate tax regime

The UAE Ministry of Finance issued an Explanatory Guide to the CT Law on 12 May 2023. The UAE Federal Tax Authority then published a Corporate Tax General Guide on 11 September and complemented it with a Guide on Exempt Income: Dividends and Participation Exemption issued on 16 October and a Transfer Pricing Guide issued on 23 October.

While the Explanatory Guide explains the meaning and intended effect of each article of the Corporate Tax Law, the CT Guide and Exempt Income Guide combine the key provisions on a topic covered in the Corporate Tax Law and relevant Cabinet and Ministerial Decisions in one place. All guides provide clarifications on particular concepts and include practical and numerical examples.

For more information see our PwC Insight.

All of these should make it easier to understand and interpret the provisions of the UAE corporate tax regime. Note that the Explanatory Guide, the CT Guide, Exempt Income Guide, TP Guide and FAQ are not law and do not have any legal power.

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Administrative

United States

Treasury releases foreign currency proposed regulations

Treasury and the IRS on 9 November released proposed regulations under Section 987 on the taxation of foreign currency translation gains or losses arising from qualified business units (QBUs) that operate in a currency other than the currency of their owner. The 2023 proposed regulations largely retain the methodology of the 2016 final but not yet effective Section 987 regulations. The 2023 proposed regulations offer an election to utilize a methodology similar to the Section 987 regulations proposed in 1991—by treating all items of a QBU as marked items, subject to a loss suspension rule—and an election to recognize all Section 987 gain or loss with respect to a QBU on an annual basis.

The new regulations generally are proposed to be effective for tax years beginning on or after 31 December 2024. Certain provisions primarily related to the deferral of Section 987 gains and losses are proposed to be effective for branch terminations (or certain check-the-box elections) occurring on or after 9 November 2023. Transition rules are provided to offer guidance on the future recognition of pre-transition unrealized Section 987 gains and losses. Comments are due by 12 February 2024 on both the 2023 proposed regulations and the previously issued 2016 proposed regulations.

For more information see our PwC Insight.

Companies should analyze the impact of the new proposed regulations on any current planning that involves terminating a QBU, as realized Section 987 losses may be deferred or disallowed if the regulations are finalized as proposed. Further, they should model the overall impact of the 2023 proposed regulations on their QBUs with and without the newly proposed elections, as the elections would affect both the quantitative results of the regulations and the data required to be tracked. Companies should also consider providing comments during the comment period. Finally, companies should evaluate the potential financial reporting impact of the 2023 proposed regulations and their impact if finalized as proposed.

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Judicial

India

Supreme Court decision on MFN clause in India's tax treaties

India had entered into tax treaties with various OECD member countries (France, Netherlands and Switzerland (FNS Countries), to provide for the rate and scope of taxability of income. Subsequently, India entered into a Protocol/ Most Favoured Nation (MFN) clause with the respective FNS countries to provide that, if India provides a rate more favourable or a scope more restricted to any other OECD member, then such favourable rate or restricted scope must also be provided to the respective FNS country from the date on which such subsequent relevant tax treaty enters into force.

India entered into tax treaties with Slovenia, Lithuania and Colombia (SLC countries) to provide for a lower tax rate on dividend income at a 5% rate. At the time of providing this favourable tax rate, those countries were not OECD members, but subsequently became members.

Taxpayers from the FNS countries urged tax authorities to invoke the MFN clause in their tax treaties and provide the lower rate benefit while issuing a withholding certificate for dividend income, as provided to the respective SLC countries, which became OECD members. Those requests were rejected by the tax authorities.

In the recent case, the Supreme Court of India held that the MFN clause in Indian tax treaties does not come into effect automatically. It can become operational only by issue of a separate notification under section 90 of the Income-tax Act, 1961 (the Act), bringing the consequential amendments to the treaty into effect. Moreover, a claim under the MFN clause of a treaty with a country that is a member of the OECD, which relies on a third OECD member's tax treaty with India, is valid only if the third country was a member of OECD at the time of entering into its tax treaty with India.

For more information see our PwC Tax Insight.

This significant decision has far-reaching consequences. Many taxpayers have taken the benefit of the lower 5% rate of dividend taxation as provided in the tax treaty between India and the respective SLC countries pursuant to the MFN clause. However, the Supreme Court has clarified that the beneficial tax rate provided to these countries cannot be provided to the aforesaid taxpayers in the absence of any notification issued under section 90 of the Act. This will also have implications on other tax treaties that have MFN clauses where notifications have not been issued. It will also be interesting to see if there is any reaction from any of India's bilateral treaty partners that have MFN clauses, which are likely to be affected by this decision.

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Judicial

India

Final angel tax valuation rules notified

Effective 1 April 2023, any investment by non-resident investors in a privately held Indian company in excess of the fair market value (FMV) of the shares of an Indian company will be taxable in the hands of such company (popularly known as angel tax in India). In May 2023, the Indian Government had notified draft rules proposing changes in the method for determining the FMV of such shares.

Recently, the Indian Government released the final rules for determining the FMV of shares. Broadly, the final rules are in line with the draft rules, and there is one aspect of valuation of compulsory convertible preference shares (CCPS), which has been additionally provided in the final rules *vis-à-vis* draft rules.

The key amendments in the final rules include:

I. In addition to the two methods for valuation of shares, namely, the discounted cash flow and the net asset value method available to residents, five more valuation methods have been made available for non-resident investors. These include the comparable company multiple method, the probability weighted expected return method, the option pricing method, the milestone analysis method and the replacement cost method.

II. Where any consideration is received for issue of shares from any non-resident entity notified by the government, the price of the equity shares corresponding to such consideration may be taken as the FMV of the equity shares for resident and non-resident investors, subject to the following.

   a. To the extent the consideration from such FMV does not exceed the aggregate consideration that is received from the notified entity; and
   b. The consideration has been received by the company from the notified entity within a period of 90 days before or after the date of issue of shares which are the subject matter of valuation.

III. Similarly, price matching for resident and non-resident investors would be available with reference to investment by venture capital funds or specified funds.

IV. Valuation methods for calculating the FMV of CCPS have also been provided for both resident and non-resident investors. Additional methods for CCPS valuation have been provided to non-resident investors similar to the method for valuation of unquoted equity shares.

V. A safe harbour of 10% variation in value has been provided.

For more information listen to our PwC podcast.

The final rules released by the government specify the norms for valuation for only equity shares and CCPS. Other types of shares, including optionally convertible or redeemable preference shares, will continue to be governed by existing rules.

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Netherlands

F/X result on participation dividend receivable taxable

A dividend receivable arises at the moment the company's competent body adopts the dividend resolution. At that moment, the parent company must value the dividend receivable and recognise it as an asset on its tax balance sheet. The dividend to be received by the parent company is exempt if the participation exemption applies. Any results in respect of the dividend receivable (including foreign exchange results) are not covered by the participation exemption and are subject to corporate income tax. The Supreme Court confirmed this in a judgment dated 3 November 2023.

Supreme Court Ruling

In the case before the Supreme Court, the issue was whether the participation exemption also covered the foreign exchange result on the dividend receivable.

The first question the Supreme Court had to answer was the question of the moment that a dividend receivable arises for tax purposes. In particular, this discussion focused on the question of whether a dividend receivable arises at the moment the dividend is declared, i.e., the moment at which the dividend receivable arises in civil-legal terms, or at the moment it is made available for payment. The Supreme Court has now ruled that the first view is correct. A dividend receivable arises at the moment the company's competent body adopts the dividend resolution. At that moment, the parent company must value and recognize the receivable as an asset on its tax balance sheet.

The second question the Supreme Court had to answer was the question of the scope of the participation exemption. The judgment clarifies that a benefit located in the arising of the dividend receivable belongs to the exempt participation profit. The dividend itself is therefore covered by the exemption. Next, the Supreme Court ruled that with the arising of that receivable, the exempt participation profit is left. From then on, the dividend receivable is an independent asset which, by its nature, can lead to profits and losses. As a result, changes in the value of the dividend receivable, including changes in value due to exchange rate fluctuations of foreign currencies, are in the taxable domain (profits taxed, losses deductible). Therefore, the value that the dividend receivable is recognized on the tax balance sheet is very important.

Finally, the Supreme Court indicated how the valuation of the dividend receivable on the fiscal balance sheet should take place. In order to correctly determine the taxable total profit, the dividend receivable must be recognised on the balance sheet at the moment it arises. This is the moment a legally enforceable liability arises. Thus, there is no 'economic' approach. The valuation is made at fair value at that time.

For more information see our PwC Insight.

An important lesson from the Supreme Court ruling is that transactions involving exempt participation income must be structured with legal precision. This case concerned the distribution of a dividend to which, in itself, the participation exemption applied. However, a period elapsed between the dividend resolution and the actual payment, albeit a relatively short period of just over a month. The dividend was denominated in foreign currency. During this short period, an exchange rate difference occurred on the dividend receivable. This led to a positive taxable foreign exchange result to which the participation exemption does not apply. Unfortunately from the perspective of the group and the Dutch company, there was only a 'paper' profit given the totality of the transactions.

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Judicial

United States

US District Court applies economic substance doctrine in Liberty Global

The US District Court for the District of Colorado issued its opinion in Liberty Global Inc. v. United States on 31 October, granting summary judgment in favor of the government that the transaction at issue ('Project Soy') lacked economic substance.

Section 7701(o) provides that, when the economic substance doctrine is relevant to a transaction, the transaction has economic substance only if (1) the transaction changes in a meaningful way the taxpayer's economic position and (2) the taxpayer has a substantial business purpose for entering into the transaction. A key issue in Liberty Global was whether the economic substance doctrine was 'relevant' to the underlying transaction.

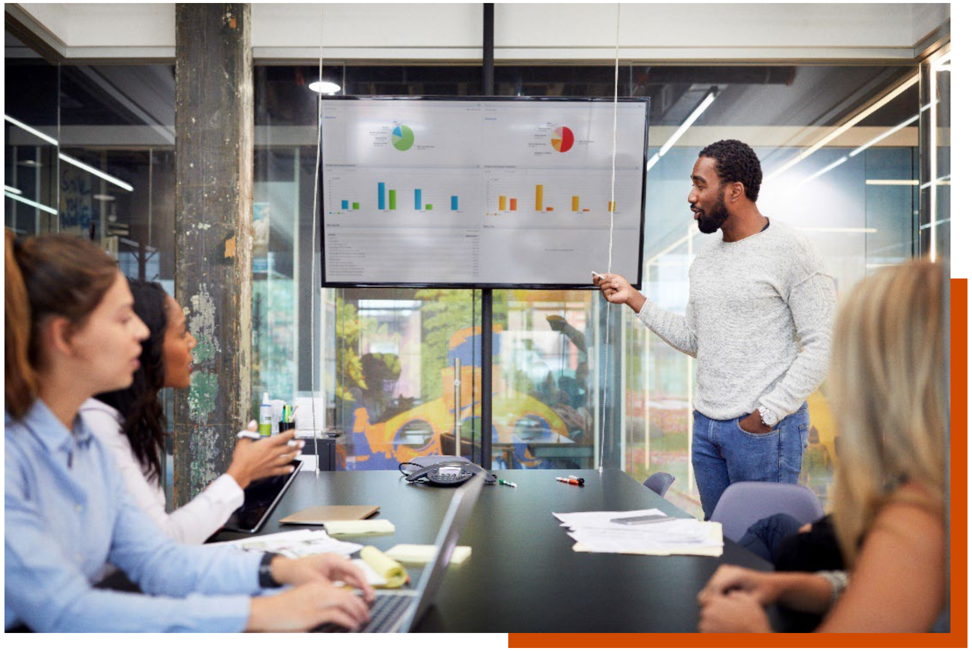
District Court Key Determinations

No 'relevance' threshold inquiry - The District Court rejected the taxpayer's argument that the legislative history of Section 7701(o) evidenced a Congressional intent to limit the types of transactions to which the provision was relevant. The District Court instead concluded – based upon its interpretation of certain statements in the Section 7701(o) legislative history and prior case law – that there is no initial 'relevance' inquiry prior to applying the economic substance test.

No basic business transaction exception - The legislative history states that Section 7701(o) does not apply to certain "basic business transactions that, under longstanding judicial and administrative practice are respected, merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages." The District Court concluded that the Project Soy steps were not basic business transactions because (i) the steps produced a tax result that was violative of the Congressional intent underlying the GILTI regime and Section 245A, (ii) the transaction was planned with the help of a sophisticated tax advisor, and (iii) the transaction comprised a complex series of steps.

For more information see our PwC Insight.

The taxpayer has stated that it will appeal the District Court's decision to the US Court of Appeals for the Tenth Circuit. While the District Court's decision has limited precedential value, taxpayers should continue to monitor the Liberty Global appeal and related litigation to assess further developments in the manner courts interpret the application of the economic substance doctrine.



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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	digital services tax
DST	double tax treaty
DTT	effective tax rate
ETR	European Union
EU	Foreign-sourced income exemption
FSIE	Global Anti-Base Erosion
GloBE	Multinational enterprise
MNE	notionial interest deduction
NID	permanent establishment
PE	Organisation for Economic Co-operation and Development
OECD	Qualified Domestic Minimum Top-up Tax
QMDTT	Research & Development
R&D	same business test
SBT	similar businesstest
SiBT	value added tax
VAT	withholding tax
WHT	

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