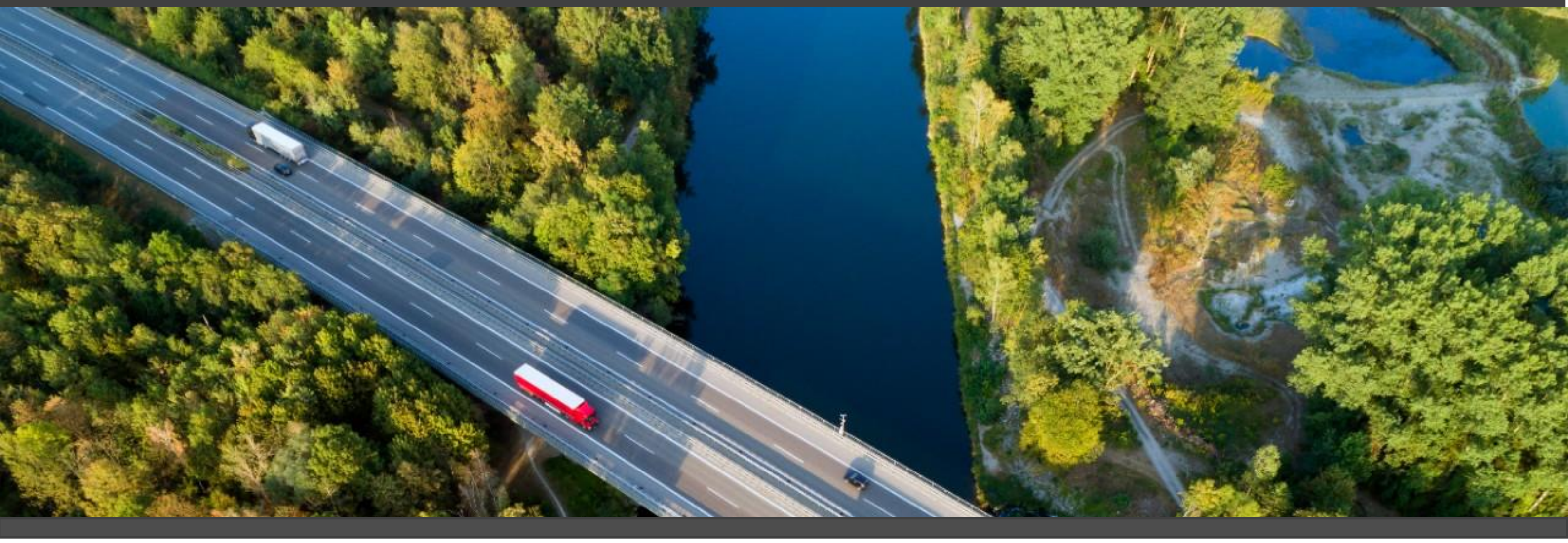
EMEA Tax & Legal Insurance Newsflash

2nd Edition – July 2022 (Q3)



Real Estate Reporting in Poland

Hybrid Disclosures in UK

DEBRA

Pillar One - Tax Certainty Framework

Insurance VAT Exemption in France

Lux Withholding Tax Reclaims

VAT Exemption Brokerage in Austria

pwc

Austrian Insurance Contract Act Amendment 2022

Welcome

Welcome to our new edition of the quarterly published EMEA Tax & Legal Insurance Newsflash (Q3/2022). We are pleased to share with you the latest tax and legal topics and updates from the EMEA region.

In this edition you will find the following articles:

- **Pillar 1: OECD consultation – Tax Certainty Framework (Amount A)**
- **EU: Proposal for an EU Directive introducing a debt-equity bias reduction allowance (DEBRA)**
- **Austria: Insurance Contract Act Amendment 2022**
- **Austria: Administrative Court on VAT-exempt insurance brokerage**
- **France: Update of guidelines regarding the scope of VAT exemption in the insurance business**
- **Germany: Report evaluating current legal situation of so-called register cases**
- **Luxembourg: WHT reclaims opportunities**
- **Poland: Real estate reporting obligation**
- **UK: Hybrid Disclosures - new requirements**

I hope you enjoy the articles that we have put together, and as always please get in touch with me or your PwC team if there is anything that you would like to discuss further. Also feedback and wishes for our next edition are highly welcome and much appreciated!

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Contents

OECD

Consultation on Pillar One - Tax Certainty Framework (Amount A)

Following the discussion and consultation regarding the Regulated Financial Services Exclusion under Pillar One, the OECD recently has published a consultation regarding a possible “Tax Certainty Framework for Amount A”.

Certainty over whether a group is in-scope of rules on Amount A

The idea of the proposed certainty procedure is that especially out-of-scope groups could reach certainty that the rules for Amount A are not applicable. If a group assumes that it is not in scope of Amount A (e.g., insurance/re-insurance and asset manager), a "Scope Review Panel" consisting of the tax authorities of the jurisdictions concerned examines the request for a determination. The final determination that a group is out-of-scope is then binding for all jurisdictions (the consultation contains three mechanisms for certainty: A scope certainty review, an advance certainty review and a comprehensive certainty review). Following a positive determination by the “Scope Review Panel”, a simplified determination procedure is to be possible in subsequent years.

Practical implementation

Currently there are still a couple of open questions concerning the suggested procedures in terms of compliance burden, thus the documentation requirements for the documentation package have not been defined yet. And also, there is no mandatory deadline for the review and the criteria for determining which jurisdiction has an interest to participate in the review process are vague.

Relevance for Insurance companies

However, especially for international insurers the instrument of a “Tax Certainty Framework” could be quite valuable because compliance activities by tax administrations would be coordinated and would lead to a reduction of the risk of unrelieved double taxation and disputes. Therefore, the “Tax Certainty Framework” also includes a possibility for tax administrations to agree to work multilaterally and agree a common approach through a coordinated review in the absence of a request.

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European Union

DEBRA

In May 2022, the European Commission published a proposal for an EU Directive introducing a debt-equity bias reduction allowance (DEBRA). The proposal includes a tax-deductible allowance for equity investments over a 10-year period, but also further limits the ability to deduct interest on debt.

Scope of the proposal

This proposal is set to apply to taxpayers that are subject to corporate tax in one or more Member States, including a permanent establishment in one or more EU Member State(s) of an entity that is tax-resident in a third country. The proposal does not, however, apply to financial undertakings.

Financial undertakings

Financial undertakings, which include insurance and reinsurance undertakings, are carved out from this proposal, as are insurance holding companies. The definition of a financial undertaking does not completely align with that used for the purposes of the Anti-Tax Avoidance Directive (ATAD) I Directive, so there may be entities which are in scope of ATAD I but not DEBRA. There are no group-wide carve outs however, so it is possible that some entities within an insurance group could be within scope.

Equity allowance

The equity allowance allows companies to deduct a notional allowance for equity from its taxable base for ten consecutive periods, where a taxpayer increases their equity from one tax period to the next.

The allowance would be calculated by multiplying the increase in year-on-year equity (allowance base) with a notional interest rate, which is based on a medium- to long-term risk-free rate.

Allowance on equity = Allowance Base X Notional Interest Rate (NIR)

The notional interest rate is the currency specific risk-free rate for 10-year debt plus a risk premium rate of 1%, with a higher risk premium interest rate (1.5%) proposed for small- and medium-sized entities (SMEs).

Notional Interest Rate (NIR) = Risk Free Rate + Risk Premium.

The allowance is limited to 30% of EBITDA, similar to interest limitation rules. In the case of unused allowances (owing to a lack of taxable profits), the excess may be carried forward indefinitely to future periods.

Where equity is subsequently reduced, this will result in taxation of the negative allowance on equity over 10 years unless the taxpayer can demonstrate that the negative equity is a consequence of accounting losses or due to a legal obligation to reduce capital.

One important point worth being aware of is that financial statements would not account for this notional deduction, so for the purposes of Pillar 2 rules, utilising the allowance could reduce the effective tax rate, thereby potentially leading to an increase in Pillar 2 top-up tax.

Limitation to interest deduction

The Directive also includes a further limitation on the tax deductibility of debt-related interest payments to 85% of "exceeding borrowing costs" (i.e. interest income - interest expense). This restriction applies before applying the ATAD I interest limitation rules.

If the result of applying the ATAD I interest limitation rules is a deductible amount lower than this 85%, the taxpayer will be entitled to carry forward (or back) the difference between 85% and the amount of deductible interest under ATAD I interest limitation rules, i.e. the restriction under DEBRA is a permanent one, but additional restrictions under ATAD I are not.

Next steps

Like all proposed directives that relate to direct tax, unanimity is required from all 27 EU Member States for the proposal to progress. If adopted, it is currently proposed that EU Member States will be required to implement the provisions of the Directive by 31 December 2023 such that they take effect and apply from 1 January 2024 (unless a Member State has an existing equity allowance regime, in which case deferral may be possible).

We understand that the proposal has not been well received in all Member States, so it is quite possible there could be changes before the proposal is put to a vote amongst the EU Member States. So watch this space!

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Austria

Insurance Contract Act Amendment 2022 published in the Federal Law Gazette

As early as December 2019, the Rust-Hackner European Court of Justice (ECJ) ruling was an important decision regarding the problem of late withdrawals from life insurance contracts, which made it necessary to adapt the Insurance Contract Act.

After two and a half years and a letter of formal notice from the European Commission to Austria to implement the ECJ case law and a large number of decisions made by the Supreme Court, the Insurance Contract Act Amendment 2022 was published in the Federal Law Gazette on June 10, 2022, and will come into effect on August 1, 2022.

The amendment makes it clear that consumers are entitled to a so-called "perpetual right of withdrawal" in the event of grossly incorrect or missing cancellation instructions. It is also clarified that – unlike in the past – it is not the surrender value that is to be reimbursed, but rather a reversal in accordance with the law of enrichment, regardless of the period that has elapsed. Affected policyholders are therefore entitled to a refund of the premiums they have paid.

The changes also apply retrospectively to those declarations of withdrawal that were made after December 31, 2018. In practice, however, the innovations will probably be limited in the end since it is essentially a legislative implementation of the Supreme Court's case law of the past two and a half year.

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Austria

Administrative Court on VAT-exempt insurance brokerage

The Austrian Administrative Court (AAC) recently dealt with the question of the VAT exemption of insurance brokerage services and seems to use a rather broad concept of brokerage.

In the present case, in addition to placing advertisements in a daily newspaper (including a promise to receive a smartphone when taking out insurance) and advertising on the insurance intermediary's website (interested parties could enter their data via a "register button" to then be contacted) credit checks are also carried out by the insurance intermediary. For these services, the insurance intermediary received payment in the form of commissions, with most of the commissions being passed on to the above-mentioned daily newspaper and the insurance intermediary only withholding a 2.5% handling fee. If the insurance was canceled within five years, the commission had to be repaid (pro rata).

It was disputed whether the services provided by the insurance intermediary fall under the tax exemption for insurance agents in accordance with § 6 Para. 1 Z 13 of the Austrian Value Added Tax Act. The AAC first refers to the case law of the ECJ on brokerage services, which consists of "proving the contracting party with the opportunity to conclude such a contract, contacting the other party or, in the name and for the account of the customer, about the details of the mutual services negotiate"; on the other hand, taking on the material work associated with a contract does not constitute an intermediary activity.

The fact that the service is carried out entirely by means of electronic data processing does not in itself preclude the application of the tax exemption. Based on the services provided, according to the AAC, there is tax-free insurance mediation. The fact that the insurance intermediary has also provided other services (e.g., credit checks) does not conflict with this assessment, since an overall assessment must be carried out in the case of a bundle of services. In the present case, this overall consideration shows that the main service is insurance brokerage.

The finding of the insurance intermediary is remarkable, since the AAC considered a bundle of services consisting of sales activities for a specific insurance product, combined with the forwarding of contact data, to be sufficient for the existence of a tax-free brokerage service. In the opinion of the AAC, it seems to have been decisive that the activities of the insurance intermediary related to a very specific insurance product and not just to the products offered by the insurance company in general. The fact that the non-cash bonuses were aimed at concluding the contracts and that only a performance-related fee was agreed could also have played a role.

According to marginal number 881 of the Austrian sales tax guidelines, a tax-free brokerage service would (only) exist if the insurance broker, through his activity, achieved that the interested party signed an application for the conclusion of an insurance contract and forwarded it. This does not appear to have been the case in the present case. Through the activities of those involved, contact was established with the insurer, but (according to the facts) an application for the conclusion of a contract had not yet been submitted.

According to the current findings of the AAC, there could be a sales tax-free brokerage service in some areas that would not have been classified as tax-free according to previous thinking. This would be associated with the loss of the proportionate input tax deduction on related input services.

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France

French tax authorities have updated their guidelines regarding the scope of VAT exemption in the insurance business

The update stems from the Court of Justice of the European Union (CJEU) case law that has shaped, over years, the scope of the VAT exemption in the insurance business, mainly the "Aspiro" case that set the conditions of application of the VAT exemption to the insurance intermediaries.

The new guidelines clarify the conditions of application of the exemption for the insurance services and for the services supplied by the insurance intermediaries that relate to the insurance services.

The VAT exempt insurance services

In their guidelines, the tax authorities remind that an insurance service is exempt from VAT if it is characterized *"by the fact that an insurer undertakes, subject to the prior payment of a premium, to provide an insured, in the event of the occurrence of the risk covered, with the benefit agreed upon conclusion of the contract. By nature, the existence of an insurance transaction implies the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, namely the insured."*

The tax authorities indicate that it is the nature of the service that drives the VAT exemption, and not the regulatory status of the service supplier.

Application of the VAT exemption to services supplied by insurance intermediaries

As regards the services supplied by insurance intermediaries, the tax authorities address the characteristics of the insurance intermediaries and the scope of the services the latter supply to determine the scope of the exemption.

On the notion of insurance intermediary, the new guidelines provide, as for insurance transactions, that the VAT exemption does not depend on the quality or regulatory status of the service supplier but on the nature of the service he supplies.

The tax authorities specify that the service must be provided by a person who exercises the function of intermediary, which is characterized by a direct or indirect relationship with the insurer and with the insured and by the supply of services that are characteristic of an insurance intermediary, i.e., searching for prospects and putting them in contact with the insurer with a view to conclude insurance contracts.

In that respect, say the guidelines, prospecting must be understood in a broad manner, encompassing all the actions which consist in identifying and contacting new potential customers, or prospects, with the aim of bringing them to conclude a contract, without the actual signature of a contract at the end of their intervention being decisive. It also covers actions which consist of presenting new guarantees to an insured person or leading such person to renew an insurance contract already subscribed.

Inter alia, the following actions should be considered as prospection in particular: the renegotiation or renewal of a pre-existing insurance contract whose purpose is its extension, increase or reduction of the conditions provided for in the contract, aiming at obtaining the subscription of extended guarantees for a contract belonging to the portfolio entrusted to the intermediary; seeking to have a potential customer subscribe to a contract, including if the latter is already part of its commercial portfolio under other insurance products.

As regards the scope of the VAT exemption for the services supplied by these insurance intermediaries, the tax authorities provide a broad definition: all services relating to insurance and reinsurance operations carried out by insurance brokers and intermediaries when they contribute to the performance of insurance transactions.

It is broad enough in principle to include all services relating to an insurance or reinsurance operation. Such services include the operations necessary for the issue of contracts, the affiliation of new beneficiaries for an existing contract, the issue, call and collection of premiums, the management and termination of policies, the management of claims, their settlement, damage assessment.

The explicit exclusion from the exemption

Back-office services are taxable when they do not relate to an insurance or reinsurance transaction or when, although they relate to such a transaction, they are not carried out by an insurance broker or intermediary. Thus, services relating to insurance or reinsurance transactions cannot benefit from the exemption if they are not rendered by insurance brokers or intermediaries.

What action to undertake further to this change?

Under the previous doctrine, the scope of the exemption was wide to the extent the intermediary was recognized as such from a regulatory point of view. The update issued by the tax authorities triggers changes in the VAT treatment of the services that regulated insurance intermediaries would supply outside their strict intermediary VAT exempt services.

While tax authorities have acknowledged that stakeholders can still refer to the previous version of the guidance to adjust their systems until December 31, 2022, the change in doctrine should result in the nature and terms of services being reviewed, purchased and delivered to change their VAT treatment if necessary.

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Germany

Report evaluating current legal situation of so-called register cases

The Federal Ministry of Finance's published a report evaluating the current legal situation with regard to the taxation of persons subject to limited tax liability who derive German income from the assignment of rights entered in a German public record or register (so-called register cases).

End of 2020, the German Federal Ministry of Finance issued a circular regarding the obligation for non-resident taxpayers to submit tax declarations / tax returns for license income from rights registered in a domestic register. As a result, in the recent past there were some discussions about the correct application of these rules and Germany's rule was criticized internationally and is perceived as a unilateral extraterritorial measure.

The evaluation of the current legal situation and the resulting taxation process now shows that the way in which limited tax liability is tied to entering a right in a German record or register (taxation of register cases) needs to be reassessed. The evaluation needs to consider (a) the insights of the tax authorities gained while processing the present cases and (b) the international tax environment and recent changes in the international tax environment. Consideration must be given to the planned partial reallocation of taxing rights under Pillar One of the BEPS processes and the decision to introduce a global minimum effective tax (Pillar Two).

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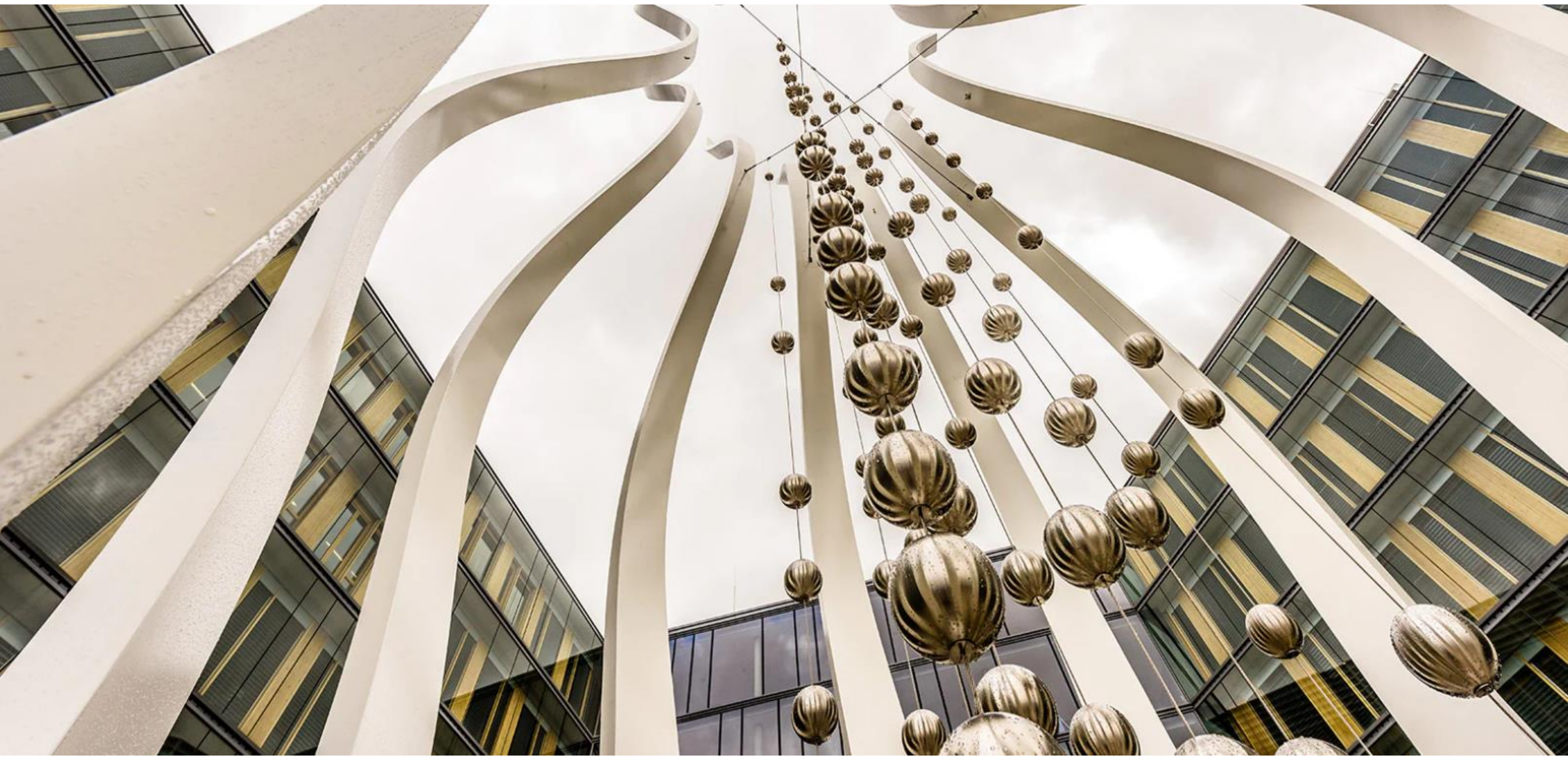

Luxembourg

Why focusing on withholding tax reclaims opportunities will lead to better returns for you or your clients?

In brief

In today's global economic context, the actors of the Insurance sector are experiencing pressure on their investment performance and margins. To remain competitive, these players are launching initiatives focusing on investment strategies or costs reduction. One pragmatic solution with direct impacts on investment performance, client's satisfaction and cost management is an optimal management of the withholding tax applied on the income derived from investments.

Reclaiming withholding taxes will positively impact the investment return of the investors by recovering cash paid in excess to tax authorities. However, this triggers many challenges due to the very complex and diversified withholding tax relief and reclaim procedures around the world. As an obvious illustration, in 2016 the European Commission estimated the foregone tax relief and opportunity costs under the scope of double tax treaties to a value of more than EUR 8.4 bn annually. This amount is significantly higher when considering recent European caselaw and National law based reclaims which reflects the trends of the national authorities to create investment niche.

We see an acceleration in the Insurance sector to set up and ultimately monitor their withholding tax framework to remain relevant when advising their clients with cross-border investments and meet their clients returns expectations. On top of this, we also noticed from our several discussions with key market players that end policy holders may put some pressure on Insurance companies and require the guarantee that the best withholding tax rate will be applied.

In detail

Why do you need to focus on it now?

Tax reclaims have always been a complex topic as the tax authorities required more and more transparency on the designation of the beneficial owner, the numerous stakeholders involved in the chain of payment, the non-harmonization of procedures across countries, etc.

However, it is paramount to keep a close eye on the tax reclaims' activity given the recent market and regulatory updates: the developments within the EU caselaw based reclaims area, notably in France, or TRACE, the new regulation that will increase responsibility to financial institutions.

Although tax reclaims for Insurance nowadays can be challenging because of multiple layers of complexity, all these recent market and regulatory developments are showing that it is a must have to set up a robust framework (policies, procedures and tax matrix) to manage withholding tax, supported by tax expertise on cross-border investments and a robust operating model eventually based on partial/ full outsourcing.

What developments and challenges have we seen?

1. A burdensome and complex topic

In most of the investment countries, the withholding tax is first levied in full and then refunded until the taxpayer has claimed the tax back. To eliminate the double or higher taxation, the non-resident investor is required to submit a refund reclaim to get the excess tax withheld by the investment country back. In practice, taxpayers rarely file a tax reclaim.

The reclaim or set-up of relief at source is usually part of standard services offered by Custodian Banks and some Private Banks, however the list of countries in scope is generally limited to the standardized procedures allowing economy of scale and possibility of automation. Additionally, investments are sometimes dispersed over several Custodian Banks and Insurance companies could in such cases only be provided with a listing of positions and not of the income received, which is complicating a bit more the process of identifying the reclaim opportunities and preparing a tax reclaim or relief at source application for an insurance company.

What we see in practice is that the beneficial owners legitimately entitled to reclaim the overpaid withholding taxes are not always aware of their own eligibility nor of the numerous possibilities and opportunities available. And when the potential claimants have a view on their reclaim possibilities, the procedures are so heavy in terms of documentation to be provided, proof of ownership of the income, costs to be borne that they often give up their right to a correct taxation.

2. A constantly changing tax framework, e.g., the French Council of State decision regarding dividend payment

On 18 February 2021, France received a letter of formal notice from the European Commission in the context of an infringement procedure concerning withholding tax, more specifically in terms of unit-linked contracts issued by life insurance companies established in another EEA Member State.

The Commission sent a letter of formal notice to France urging it to change its withholding tax rules on dividends paid to “Unit Linked insurance” companies established in other European Economic Area (EEA) Member States. The Commission deems that these rules infringe on the free movement of capital (Article 63(1) of the TFEU and Article 40 of the EEA Agreement).

In another decision dated 11 May 2021 (No. 438135, UBS Asset Management Life Ltd) the French Supreme Court also ruled that it was contrary to the principle of free movement of capital to prevent a British life insurance company receiving French source dividends from deducting certain expenses from the withholding tax basis, for the purposes of Article 119 bis, 2 of the FTC.

Unit Linked insurance companies established in EEA Member States are required to pay a final withholding tax on French dividends received. However, Unit Linked insurance companies established in France either pay no withholding tax on these dividends, or can credit the withholding tax paid against French corporation tax, which amounts to zero. This is because the dividends received constitute deductible provisions or technical reserves.

On 15 December 2021, the French Parliament approved the Finance Bill for 2022. In order to comply with European Union (EU) law and the French Administrative Supreme Court (Conseil d'Etat) case law,1 Article 7 of the Bill provides for several measures whose objective is to ensure that various provisions of national law recently ruled contrary to the freedoms guaranteed by the Treaty on the Functioning of the EU (TFEU) by the French Supreme Court (i.e. Conseil d'Etat) are brought into line with EU law.

The proposed adjustments are therefore intended to allow computing the withholding tax on a net basis (i.e., after deduction of expenses) and no longer on a gross basis.

Since the beginning of the year, numerous new decisions at State or European have been issued[1]; these decisions show the obligation to be up to date on tax reclaims practice. In addition to the complex process, not having reclaims experts in the area of the said reclaims can bring complexity to the claimants to understand and determine the requirement of each country in term of tax residence definition, comparability characteristic among the investment vehicles, etc. as each country has its own tax reclaim procedure.

3. Increasing responsibilities moved to the claimants

It has always been complicated for portfolio investors to effectively reclaim the reduced rates of withholding tax due to, among others, administrative barriers. The OECD Treaty Relief and Compliance Enhancement (TRACE) initiative launches the framework of a standardized system allowing the reclaiming of withholding tax relief at source on portfolio investments. This will help minimize administrative costs for all stakeholders and allow them to ensure proper compliance with tax obligations.

When TRACE suggests a commitment for future harmonization, this will however increase the legal liabilities and responsibilities of the financial institutions. Since the new system was implemented in Finland on 1 January 2021, we already saw key financial players who choose to change their market offering by not implementing relief at source of Finnish dividends anymore as they are not willing to cope with an increased risk exposure, legal liabilities and responsibilities.

Although the implementation of TRACE will be limited in the coming years, following the emergence of the so-called "cum-cum" and "cum-ex" systems, which have given rise to significant tax evasion and avoidance, tax authorities have become increasingly cautious and eager to ensure compliance with tax obligations and to avoid exploiting weaknesses in national or treaty tax provisions, particularly when it comes to identifying the beneficiary of income. As claimants, beneficial owners are increasingly being asked to define and evidence their own eligibility to access certain types of reclaims or relief at source. Considering the complexity of certain types of claims, people impacted by unduly withholding taxes face limitations in their ability to analyze and frequently must turn to tax experts in this area.

How should you react to this?

While it is the obligation of the tax applicant to understand the duties and tax requirements when requesting the implementation of relief at source or a withholding tax reclaim, it also imposes substantial compliance obligations by, among others, deploying a robust data quality procedure or monitoring the status of the reclaims. This can generate some risks such as: operational risk due to complexity and the charge of the tax requirements, manual and burdensome processes, financial risk considering the resources or development to be deployed, reputational and legal risk of failure to meet the tax authorities' requirements. Besides, it is more than complicated to be up to date on the various new legislations / legal developments without creating a specific watch with dedicated trained tax experts.

When (re)designing the tax reclaims strategy, the beneficial owner and its advisor should consider stream-lined deployments eventually with the partial/ full outsourcing of some activities:

[1] Italian Tax Court of First Instance rules that withholding tax levied on dividends distributed to a Luxembourg investment fund is incompatible with EU law (Decision 49 on 7 February 2022 from the Pescara Tax Court of First Instance);
Court of Justice of the European Union issued its judgment that the Finnish tax treatment of a non-Finnish corporate fund was found to be discriminatory and contrary to the free movement of capital and the discriminatory tax treatment could not be justified by any overriding reasons in the public interest. (Judgement C-342/20 'A SCPI v Veronsaajien oikeudenvalvontayksikkö.' on 7 April 2022)

- A robust governance supported by robust risk management given all the channels affected by the operational tax system, the governance in place must integrate transversal functions to create synergies between the area of operations, AML, risk management, reporting, data management and finance and act as a support structure for management and compliance. In addition, it is paramount to have a control framework and risk management processes to identify red flags and define mitigating actions along the entire process.

- Reliable and accurate data quality management: you must be sure that the information in your systems and provided by your Financial Institutions is correct, reliable and timely updated to run efficiently withholding tax reclaim or relief operations and to capture the full potential of reclaimable amount with a clear strategic spotlight on how data is handled through people's responsibilities, processes and IT systems

- Clear operational processes: this provides transparent guidelines on how relief at source/refund application should be prepared across investment countries and type of claims. This will define the roles and responsibilities of the dedicated people in charge among the organization or in the case the services are partially delegated to an external service provider.

- Smart and efficient tax operating model to cope with increasing volumes and complexity: it is paramount to target efficiency gains and agility to adapt to ever changing reclaim procedures and requirements. For example, setting up delegation of tax reclaims operations to specialized service providers can help you tackle operational challenges in the different phases of your tax reliefs/reclaims.

  - Dedicated tax functions with a good balance of tax expert and operational profiles: tax experts help to understand and comply with the requirements, avoiding multiple risks and assessing the impacts. Specialised operational tax teams can relieve resources and offer stability in the tax reclaim process and allow them to concentrate on the core business activities.

- Require transparency and feedback to your services providers: as part of their development strategy, the financial institutions and other providers must show awareness on the tax consequences within your structures and develop dedicated reporting and indicators to monitor your portfolio taxation.

- Anticipation of the client's expectations: the demands of clients are increasing in pace and complexity. Demonstrating that you understand your clients' needs is a cornerstone of the business strategy. By demonstrating your capacity to increase their portfolio's performance with clear indicators and dedicated expertise in this field, you will create full transparency to your internal stakeholders and clients to anticipate their needs and provide feedback.

Takeaway

Being up to date on the tax news and opportunities, understanding every specificity of each tax reclaim process and complying with tax authorities' requirements and the financial institutions' expectations at the same time can sound like a tricky mission to recover the unduly withholding taxes and generate substantial risks.

Of course, there are several ways to tackle these heavy procedures and ease these operations, and this could be the right time to assess your tax reclaims' strategy and rethink the model in place.

Our Global Tax Reclaim Services and dedicated teams can help you tackle challenges faced within the tax reclaim process and capture your refund opportunities. We can provide you insights and support that improve investor services, decisions on strategy and operational efficiency in day-to-day business. This includes the following range of solutions:

- We help you in different phases of your tax reliefs/reclaims set up by enhancing your awareness & conducting health checks on your existing activities and investment portfolio,
- We support you by developing and transforming your operational tax activities and by running your entire operations or with a focus on specific markets/streams.
- We assist you to manage your tax compliance risk and oversight and help you at every step of the tax reclaim process by combining our expertise and operational efficiency set-up supported by state-of-the art tools

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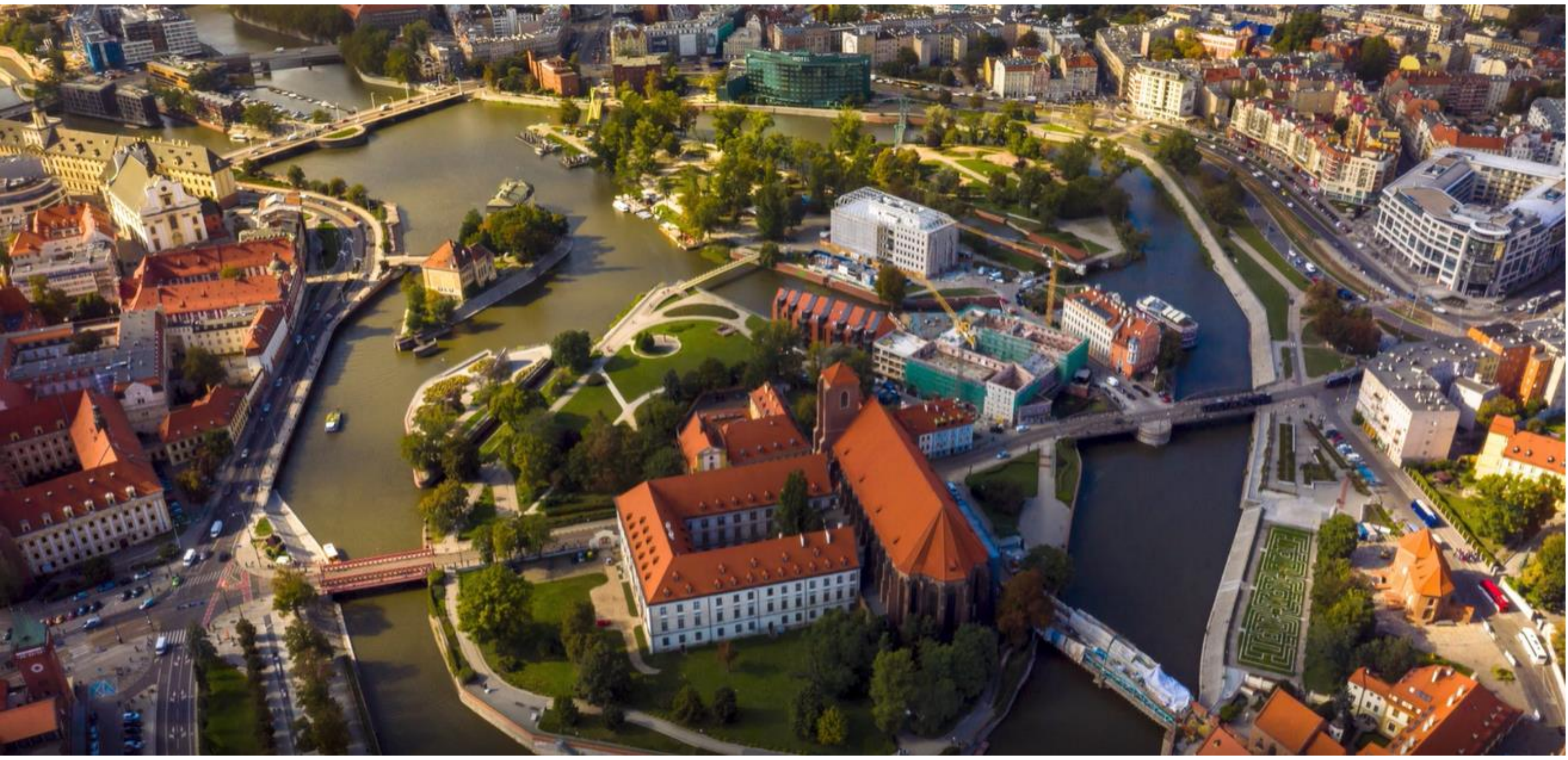

Poland

Polish real estate reporting obligation

On 1 January 2021 amendments to the Polish CIT Act – significant from the perspective of the real estate market – came into force.

Newly introduced regulations defined the concept of a real estate company, while imposing a number of new reporting obligations on such entities.

The first year for which a Polish real estate company status is checked is 2021 (the tax year beginning on 1 January 2021 or later).

<u>Definition of real estate company</u>

According to the Polish CIT Act, a real estate company is an entity obliged to prepare a balance sheet for accounting purposes, in which:

- in case of entities commencing their activity – as at the first day of a tax year, **at least 50%** of the market value of assets, directly or indirectly, consisted of the market value of real estate located in Poland or rights thereto, with the market value exceeding **PLN 10M** (or an equivalent amount determined according to the relevant exchange rate), or
- in case of other entities:
  - as at the last day of the year preceding the tax year, **at least 50%** of the book value of assets, directly or indirectly, consisted of book value of real estate located in Poland or rights thereto, with the book value exceeding **PLN 10M** (or an equivalent amount determined according to the relevant exchange rate), and
  - **at least 60%** of the total taxable revenues for a year preceding the tax (financial) year arose from lease, sublease, tenancy, subtenancy, leasing (or other contracts of a similar nature) or from transfer of ownership to real estate or rights thereto, or from shares in other real estate companies.

Reporting obligations

Reporting obligations to the Head of Tax Administration are imposed on **real estate companies** and **the taxpayers** who hold in such companies (directly or indirectly):

- shares giving at least 5% of the voting rights or
- total rights and obligations giving at least 5% of the profit rights or
- at least 5% of the total number of participation units or rights of similar nature.

The scope of reporting includes information on:

- entities holding, directly or indirectly, in this real estate company shares, partnership rights, participation units or rights of similar nature with the information on the amount of such rights (in the case of reporting by real estate companies);
- the number of shares, partnership rights, participation units or rights of similar nature held, directly or indirectly, in a real estate company (when information is provided by the shareholders of such company)
  - as of the last day of the tax year of the real estate company.

As a general rule, the deadline for reporting is the end of the third month after the end of the tax or financial year of the real estate company. However, for the current year the deadline was postponed by the Decree of the Minister of Finance until **30 September 2022**.

It should be also noted that the new regulations have introduced other obligations affecting real estate companies, such as the obligation to appoint a tax representative, provided that real estate company has no seat or place of management in Poland or an EEA Member State.

Our commentary

The discussed regulations undoubtedly have an impact on the real estate market and may raise many doubts as to their application.

It should be emphasized that the content of reporting rules is unclear. In particular, the interpretation of the term “taxpayer” referred to in this regulation – in the most restrictive scenario, it may refer to each entity potentially subject to taxation in Poland.

Moreover, currently there has been no practice of such reporting and the Polish tax authorities published no guidance on this matter.

Nonetheless, the reporting obligation should be fulfilled with due diligence, in order to ensure compliance with Polish law.

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Hybrid Disclosures - new requirements

HMRC has recently updated the CT600B Company Tax Return to require disclosures in relation to the UK Hybrid rules.

In particular, groups will need to determine (and disclose) any UK entities which are hybrid entities or transact with hybrid entities, even if there are no mismatches or counteractions.

In total there are ten questions on the new form which cover:

- whether the company is a hybrid entity
- whether there are any transactions with hybrid entities in the same control group;
- whether there are any hybrid mismatches under Chapters 3, 6 and 8;
- any counteraction under the hybrid rules; and
- claims/surrenders of dual inclusion income

HMRC have confirmed that the updated CT600B is to be included with **all** returns submitted to HMRC for the first time from 6 April 2022. The additional disclosure is not required where a return submitted prior to 6 April 2022 is being amended.

Groups operating in the UK should therefore consider whether there are hybrids, or hybrid transactions with a UK nexus, which need to be disclosed with the relevant information.

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