

Briefing

International review for February

Speed read

Against the backdrop of covid-19, global tax developments continue at pace. This month saw Poland propose a new levy on traditional and online advertising, with funds being used to help the country recover from the continuing economic damage of the pandemic. Belgium and Greece both announced an extension of the DAC 6 reporting deadlines. The European Parliament has recommended formalising the process for amending the EU list of non-cooperative jurisdictions via a legally binding instrument, no later than the end of the 2021. Meanwhile, in Luxembourg, a bill was passed to disallow tax deductions for interest and royalties due to associated enterprises located in a country listed as a non-cooperative jurisdiction. The OECD and Australia have provided greater clarity on the permanent establishment risk of employees working cross-border as a result of the pandemic. India's finance minister presented the Budget for 2021/22. Finally, moving to the Americas, Canada has made a welcome move to cancel charges for taxpayers entering into advance pricing agreements and, in Mexico, changes to the authorised economic operator program include temporary tariff relief.



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Taxation of the digital economy

While the OECD continues its work on a global solution to taxation to the digital economy, February saw Poland join the ranks of countries proposing and implementing a unilateral digital services tax in the form of a new advertising levy. Proceeds from the levy will be used to mitigate the long-term health, economic and social effects of covid-19. Interestingly, Poland's levy will also apply to traditional advertising which perhaps makes it more akin to a windfall tax. It will be interesting to see whether other countries follow suit with similar taxes as governments seek to claw back their spending on covid-19 support packages.

According to the proposals, for online advertisers in Poland, a 5% levy would apply if revenues of the service provider (including group entities) wherever earned, exceeded €750m and revenues from the advertising services in Poland exceeded €5m for the year. The rate of the levy is 5% of revenues that are assessed as being attributable to recipients based in Poland.

For traditional advertising including TV, radio and outdoor media the levy applies where the value of advertising exceeds PLN 1m, or PLN 15m for advertising published in the press. Revenue for TV, radio and outdoor media will be taxed at 7.5% up to revenues of PLN 50m and 10% on revenues in excess of PLN 50m. Special rates apply to 'qualified goods' (e.g. medicinal products, dietary supplements and sweetened beverages) of 10% and 15% respectively. The rate of the levy

if the revenue is from press advertising would be 2% (4% for qualified goods) for amounts generated above the PLN 15m cap and under PLN 30m and 6% (12% for qualified goods) for amounts over PLN 30m.

Poland's proposed levy follows on from the European Commission's publication on 14 January of a roadmap for a new EU-wide 'digital levy' to help ensure that Europe is fit for the digital age. A public consultation is open on the roadmap for a period of 12 weeks and the European Commission expects to put forward a proposal for a Directive, for the introduction of a 'digital levy' during the first half of 2021.

EU list of non-cooperative jurisdictions

Staying in the EU, on 21 January 2021, the European Parliament adopted a resolution on reforming the EU list of non-cooperative jurisdictions. The list, first adopted in December 2017, is part of the EU's efforts to clamp down on tax avoidance and harmful tax practices.

While the positive impact of the list was acknowledged, the resolution notes that the list has failed to 'live up to its full potential' and, in the Parliament's view, currently includes jurisdictions that cover a reduced percentage out of the overall global tax revenue losses. The European Parliament therefore calls on the Council and Commission to make a number of changes to the criteria and process for listing. The European Parliament recommended that the process of revising and amending the list is formalised via a legally binding instrument, no later than the end of the 2021. In addition, a more coordinated approach to defensive measures has been called for.

The current list includes the following countries: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, U.S. Virgin Islands, Vanuatu, and Seychelles. The Cayman Islands and Oman were removed from this list in October 2020.

Resolutions adopted by the European Parliament are not binding on the Council and European Commission, therefore the adoption of any changes requested or suggested by Parliament in its resolution on reforming the EU list of non-cooperative jurisdictions is at the discretion of the two institutions. It therefore remains to be seen which of the reforms asked by Parliament will be taken on the Council's and the Commission's agendas.

Meanwhile, on 29 January 2021, Luxembourg's Parliament passed a bill to disallow (under certain conditions) tax deductions for interest and royalties due to associated enterprises located in a country listed on the EU list of non-cooperative jurisdictions. The measures to disallow these deductions have an effective date of 1 March 2021. The new provisions will not apply if the taxpayer is able to prove that the transaction giving rise to the interest or royalties payments was entered into for valid commercial reasons, reflecting the economic reality.

Extension of DAC 6 reporting deadlines

In response to the ongoing disruption caused by the pandemic, tax authorities in Belgium and Greece both announced on 28 January 2021, an extension of the reporting deadlines under the EU mandatory disclosure rules.

In Belgium, the deferral will apply until 28 February 2021 for arrangements that should have been reported in January and February 2021.

In Greece, the deferral period has been extended to include arrangements for which reporting was triggered

between 1 and 31 January 2021 (previously 1 July to 31 December 2020) and the 30-day deadline now starts from 1 February 2021. Deadlines for reporting arrangements in the look-back period and for the periodic reportable arrangements remain the 28 February 2021 and 30 April 2021 respectively.

Permanent establishments and covid-19

Across the Pacific, the Australian Taxation Office (ATO) has updated its guidance concerning whether the presence of employees in Australia, due to covid-19-related travel restrictions, creates a permanent establishment (PE).

The updated guidance states that the ATO will not apply compliance resources to determine if there is a permanent establishment under the following conditions:

- there was no permanent establishment in Australia before the effects of covid-19;
- the temporary presence of employees in Australia continues solely as a result of covid-19 related travel restrictions;
- those employees temporarily in Australia will relocate overseas as soon as practicable following the relaxation of international travel restrictions; and
- the employee has not been recognised as creating a permanent establishment or generating Australian-source income in Australia for the purpose of the tax laws of another jurisdiction.

According to the ATO, this approach is applicable until 30 June 2021, after which, employers will be required to consider whether ongoing arrangements give rise to a permanent establishment in Australia. This guidance should come as a relief to companies that have employees that are 'stuck' in Australia as a result of the pandemic.

The OECD Secretariat has also recently updated its guidance on how tax treaties should be applied in the context of the dislocation of individuals and disruption to economic activities resulting from the pandemic. This guidance gives the view that where an employee of an enterprise of one state concludes contracts on behalf of the enterprise while the employee is, exceptionally, working from a home in the other state as a result of public health measures imposed or recommended by the government of either state, such conclusion of contracts should not be regarded as habitual, and therefore should not give rise to a dependent agent PE, unless it was already taking place before the pandemic. In addition, the guidance considers whether the home of an employee could result in a fixed place permanent establishment.

Importantly, however, the OECD guidance contains caveats that it does not necessarily represent the official views of OECD member countries; it does not purport to replace the judgement of tax administrations in cases where factual determinations are required; and that each jurisdiction may adopt an approach that differs from that in the guidance. Businesses should therefore obtain advice on specific cases in the countries involved. Existing PE risks may have been amplified by the pandemic, so it is important that groups are forensic with the facts when assessing risks in this area.

Indian Budget

The Indian economy is not alone in suffering from the disruption of covid-19, and economic growth there is at a multi-year low. Against this backdrop, on 1 February 2021 the finance minister presented the 2021/22 Union Budget before Parliament. Many of the tax changes announced in the Budget seek to ease compliance and facilitate dispute

resolution. Among the key announcements were important clarifications on the equalisation levy and changes to the advance ruling process.

The Authority for Advance Rulings (AAR), which provides tax certainty for foreign entities in relation to a transaction undertaken or proposed to be undertaken, is to be discontinued and replaced by a new Board for Advance Rulings with advance rulings being non-binding and appealable before the High Court. It is hoped that the new system will provide rulings in a more efficient and timely manner.

There was also welcome clarification that income taxed in India as royalties or fees for technical services, will not also be subject to India's equalisation levy which applies to certain digital services, as the taxes are mutually exclusive. This is effective from 1 April 2020, when the equalisation levy was first introduced.

The following further amendments to the equalisation levy, are applicable from assessment year 2021/22:

- 'consideration' for the purpose of the equalisation levy has been clarified to include value of goods or services, regardless of ownership or facilitation by e-commerce operator; and
- the scope of online sale of goods/online provision of services has been clarified to include instances of where one or more of the following activities are carried out online: acceptance of offer for sale; placing or acceptance of purchase order; payment of consideration; or supply of goods or provision of services, partly or wholly.

Goodwill of a business or profession will not be considered as a depreciable asset, and no depreciation is to be allowed even in respect of purchased goodwill.

Canada cancels APA charges

On a positive note for taxpayers, the Canada Revenue Authority (CRA) announced, on 5 February 2021, that it will no longer require taxpayers to pay a cost-recovery charge when entering into an advance pricing arrangement (APA). Previously, the CRA required taxpayers to pay a recovery charge to cover the CRA's estimated expenses to complete the APA process, including travel to taxpayer locations to conduct site visits and functional interviews. The CRA's welcome cancellation of this charge should make APAs an increasingly attractive option for many taxpayers.

Mexico: AEO changes and new reporting rules

Last but not least, turning to Mexico, changes to the authorised economic operator program include tariff relief for a period of 36 months for merchandise imported temporarily into Mexico. To provide better statistical control of import and export transactions, new measures have been brought in to eliminate certain low-volume tariff items and subheadings, modified tariff descriptions and revised identification numbers.

Finally, at the end of 2020, Mexico put into place a requirement to report certain schemes that result in certain tax benefits. The first deadline to disclose a reportable scheme, which applied for plans implemented before 2020, if resulting in the requisite tax benefits of at least MXN 100m, passed on 15 February 2021. ■

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▶ The European Commission's 'digital levy' (J Maskell & R Sultman, 25.2.21)

▶ DAC 6 update: UK narrows scope of mandatory reporting (S Bhogal & A Kaye, 12.1.21)