Briefing

International review for May

Speed read

This month, the US followed the EU's lead in taking its first steps towards the introduction of public country by country reporting. There are signs that members of the European Parliament are becoming impatient in waiting for a global agreement on taxing the digital economy, with a resolution on a temporary EU digital services tax. The European Commission has also put forward a bold new vision for EU tax policy. Companies should re-evaluate the permanent establishment and residence risks in relation to cross-border workers still working from home as government restrictions begin to lift. Recent judgments in the EU and India may have implications for multinationals. In Taiwan, there is an update on rules allowing a one-time transfer pricing adjustment before the year-end for companies engaged in certain controlled transactions.

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Public country by country reporting

This month the US took steps towards public country by country reporting (CbCR). The Financial Committee of the House of Representatives approved a bill that would require public companies to disclose certain financial information on a country-by-country basis. This would include total income tax paid on a cash basis to all tax jurisdictions. The next step is for the bill to be considered by the whole House of Representatives before moving on to the Senate.

The EU is also working on its own public CbCR proposal. Back in March, the European Council and the European Parliament approved mandates for their negotiating positions, and we can expect an update on these negotiations before the end of Portugal's EU presidency on 30 June 2021.

The proposals in the US and the EU are at a relatively early stage but if they become law, it seems inevitable that other jurisdictions will follow. While multinationals will already be comfortable with providing CbC reports to tax authorities, public disclosure will bring a whole new level of tax transparency with greater public and press scrutiny.

Poland joins ICAP

At the end of April, Poland confirmed that it will join the OECD's International Compliance Assurance Programme (ICAP). Broadly, the ICAP is intended to facilitate open and cooperative multilateral engagement between multinational enterprise (MNE) groups and tax administrations on transfer pricing and permanent establishment profit attribution issues. The aim of ICAP is for fewer disputes to require resolution through mutual agreement proceedings.

Since commencing in 2018 and 2019, two pilot programmes have been in progress. Both pilots received positive feedback, with MNEs recognising the value of real-time multilateral discussions. Feedback has also enabled tax authorities to refine the documentation package and processes.

From September 2021, following the success of the pilots, ICAP will run in full. Parent companies of MNEs interested in joining the programme have been asked to discuss participation with their local tax administration.

Including Poland, ICAP now has 20 participating countries. Others include the UK, a number of other European countries, the US, Canada, Japan, Australia, and Singapore.

The EU's tax agenda

On 18 May, the European Commission (EC) issued an important communication *Business taxation for the 21st century* setting out its tax policy agenda and the EU implementation of the OECD's BEPS 2.0 proposals. The proposals would represent significant changes to the basis of corporate taxation in the EU and may have knock-on consequences for the competitiveness of the UK post-Brexit.

Among the EC's action points is the tabling of a proposal by 2023 on a common tax rulebook, 'business in Europe: framework for income taxation' (BEFIT). BEFIT will build upon the OECD's pillar one and two proposals which will be implemented via EU directives once agreed at OECD level. In short, BEFIT would consolidate the profits of the EU members of multinationals into a single tax base, to be subsequently allocated to member states using a formula that will replace the current transfer pricing rules. Once implemented, BEFIT could be a stepping-stone to more radical reforms, such as a single EU corporate tax return for a group.

The other actions are:

- a proposal by the end of this year on targeted action on the use of shell companies;
- a proposal by 2022 on a new requirement for large companies to publish their effective tax rates;
- a proposal by 2022 for a new 'debt equity bias reduction allowance' to address pro-debt bias in current tax rules; and
- a recommendation for member states to allow carry-back of losses to support companies with the impact of covid-19.

The EC's planned timetable is certainly ambitious, and it will be interesting to see how this takes shape once the OECD reaches an agreement on BEPS 2.0.

The EC is also due to launch a broader reflection on modernisation of tax systems concluding in a 2022 symposium on the 'EU tax mix on the road to 2050' which could trigger further reforms. The EC is keen to 'future-proof' its tax mix taking into account trends such as climate change and digitisation.

Staying in the EU, on 29 April 2021 the European Parliament (EP) adopted a resolution concerning digital taxation, highlighting its support for 'swift' global agreement on taxing the digitalised economy.

It is widely hoped that a global solution to taxation of the digital economy will be reached this summer at OECD level; however, understandably, MEPs are of the opinion that the EU must have a fallback plan. As a first step, MEPS are calling on the EC to consider introducing a temporary EU digital services tax. This could be rolled back and replaced once an OECD agreement is reached. A number of countries (including some EU member states) have already unilaterally implemented their own digital services taxes pending a global consensus.

PE risks for home workers

Around the globe many employees have now been working at home for over a year as a result of the covid-19 pandemic. In light of this, many businesses are now considering a permanent reduction in their office footprint and a mix of home and office working. Among the millions of new home-workers are cross-border workers who usually work in a

different jurisdiction to where their home is. So, what are the corporate tax implications for employers?

Earlier in the year the OECD released helpful updated guidance considering the issues faced by cross-border employees and their employers. The 2021 guidance maintains that individuals working from home because of government measures related to the covid-19 pandemic are unlikely to create a fixed place of business permanent establishment (PE).

Similarly, a temporary change in the location of the CEO and other senior board members resulting from what it calls 'the extraordinary and temporary situation due to the covid 19 crisis' should not of itself trigger a change in the place of effective management or in the place determined as the place of residence by the competent authorities. However, as government restrictions begin to lift, and businesses are increasingly giving employees the option (rather than requiring them) to continue working at home, companies should re-evaluate the PE and residence risks.

Permanent establishments

Under the OECD Model Tax Convention and supporting commentary, for a home office to be considered a fixed place of business PE, there broadly needs to be business activities of the company carried on there, a degree of permanence to those activities and the home office needs to be 'at the disposal' of the company. An employee conducting sporadic business activities in a home office does not mean the place is at an employer's disposal. The 2021 OECD guidance highlights that an important factor is whether the business requires the individual to work from home.

An individual who temporarily works from home for a non-resident company can give rise to a dependent agent PE if the worker habitually concludes contracts on behalf of the company. When an employee works from home due to government measures because of the covid-19 pandemic, the OECD's guidance concludes that the conclusion of contracts should not be considered as being performed 'habitually.' However, if the worker was habitually concluding contracts on behalf of a company in the home country before the pandemic, then the work from home required by the pandemic would not change the assessment.

The updated guidance states if an employee continues to work from home after any public health measures are lifted and continues to conclude contracts (on behalf of the non-resident company) it would be more likely that activity of the individual would be considered 'habitual.'

Corporate tax residence

The OECD guidance covers residence for the purposes of double tax treaties, including 'place of effective management' (POEM) (which was the pre-BEPS treaty tie-breaker of choice and which is still the tie-breaker in numerous bilateral treaties), and the post-BEPS treaty tie-breaker based on determination by the respective competent authorities. Where instead the tie-breaker is based on a different test, or where no treaty applies, companies must determine residence under the relevant domestic law.

As noted above, the OECD guidance indicates that a temporary change in the location of the CEO and other senior board members resulting from what it calls 'the extraordinary and temporary situation due to the covid-19 crisis' should not of itself trigger a change in POEM or in the place determined as the place of residence by the competent authorities. As government restrictions lift and board members are no longer required to be at home, companies must give careful consideration to what this means for where the POEM is located.

Recent tax cases

There have been several noteworthy cases. Firstly, in *Luxembourg v Commission* (Cases T-816/17 and T-318/18), the General Court of the European Union issued a judgment in favour of the Luxembourg government holding that a 2003 tax ruling issued by Luxembourg to a taxpayer did not provide a selective advantage that was incompatible with the EU internal market. The tax ruling in question endorsed the 'arm's length' method in calculating the annual royalty payment between two Luxembourg subsidiaries of a multinational group. In 2017, the EC found that this method constituted unlawful state aid and ordered this to be recovered. In another blow to the EC's attempts to challenge transfer pricing practices as state aid, the General Court has now annulled the EC decision in its entirety. This judgment provides clarifications on the EC's burden of proof in establishing the existence of an advantage and will be of interest to parties in other state aid cases, particularly where these relate to transfer pricing methods.

In *Goldman Sachs India Investments (Singapore) pte. Ltd v DCIT* (ITA no. 5619/Mum/2016) it was held by the Mumbai branch of the Income Tax Appellate Tribunal that a Singaporean entity could carry forward capital losses arising in the Indian capital market under the provisions of India's Income Tax Act 1961. This was allowed even though capital gains are not taxable under the India-Singapore double tax treaty. The tribunal observed that the taxpayer is eligible to opt for the provisions of the Income Tax Act where these are more beneficial than the tax treaty. This case will be of interest to other multinationals operating in India, particularly where tax reliefs are not available under a relevant treaty with India.

Staying in India, in *Concentrix Services Netherlands BV v ITO* (WP {c} 9051/2020) and *Optum Global Solutions International BV v. DCIT* (WP {c} 882/2021) the Delhi High Court allowed the benefit of a reduced 5 percent rate for dividend payments from India to the Netherlands. This was allowed under the most favoured nation (MFN) clause within the protocol to the India-Netherlands treaty. The court found that the protocol forms an integral part of the tax treaty. This is a welcome decision by the Delhi High Court which dealt with the applicability of the MFN clause in detail. India has an MFN clause in several of its treaties including those with France, Spain and Switzerland. Taxpayers in these jurisdictions may benefit from re-evaluating their Indian dividend transactions in light of this judgment.

New transfer pricing guidance in Taiwan

Finally, in Taiwan, the Ministry of Finance released guidance on the implementation of new rules allowing a 'one-time transfer pricing adjustment'. Broadly, these rules allow a one-time adjustment before the year-end for companies engaged in controlled transactions. The adjustment allows reasonable allocation of profits between related companies in line with the arm's length transfer pricing principle. The 2020 annual tax return form now reflects space for the necessary disclosures for those companies that choose to apply the one-time adjustment.

The option to make a one-time adjustment may be helpful where companies are unable to reflect transfer pricing adjustments on a timelier basis due to fluctuations in market conditions or environmental factors. A disadvantage, however, is that taxpayers cannot apply to Taiwan's customs or competent authorities to make subsequent corrections to taxes that have been adjusted and paid under these rules. ■

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- Covid-19: corporate residence in a world without travel (G Price, A Greenbank & R Kinghall Were (15.4.20)