International Tax News

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Start

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Welcome

Keeping up with the constant flow of international tax developments worldwide can be a real challenge for multinational companies.
International Tax News is a monthly publication that offers updates and analysis on developments taking place around the world, authored by specialists in PwC's global international tax network.

We hope that you will find this publication helpful, and look forward to your comments.

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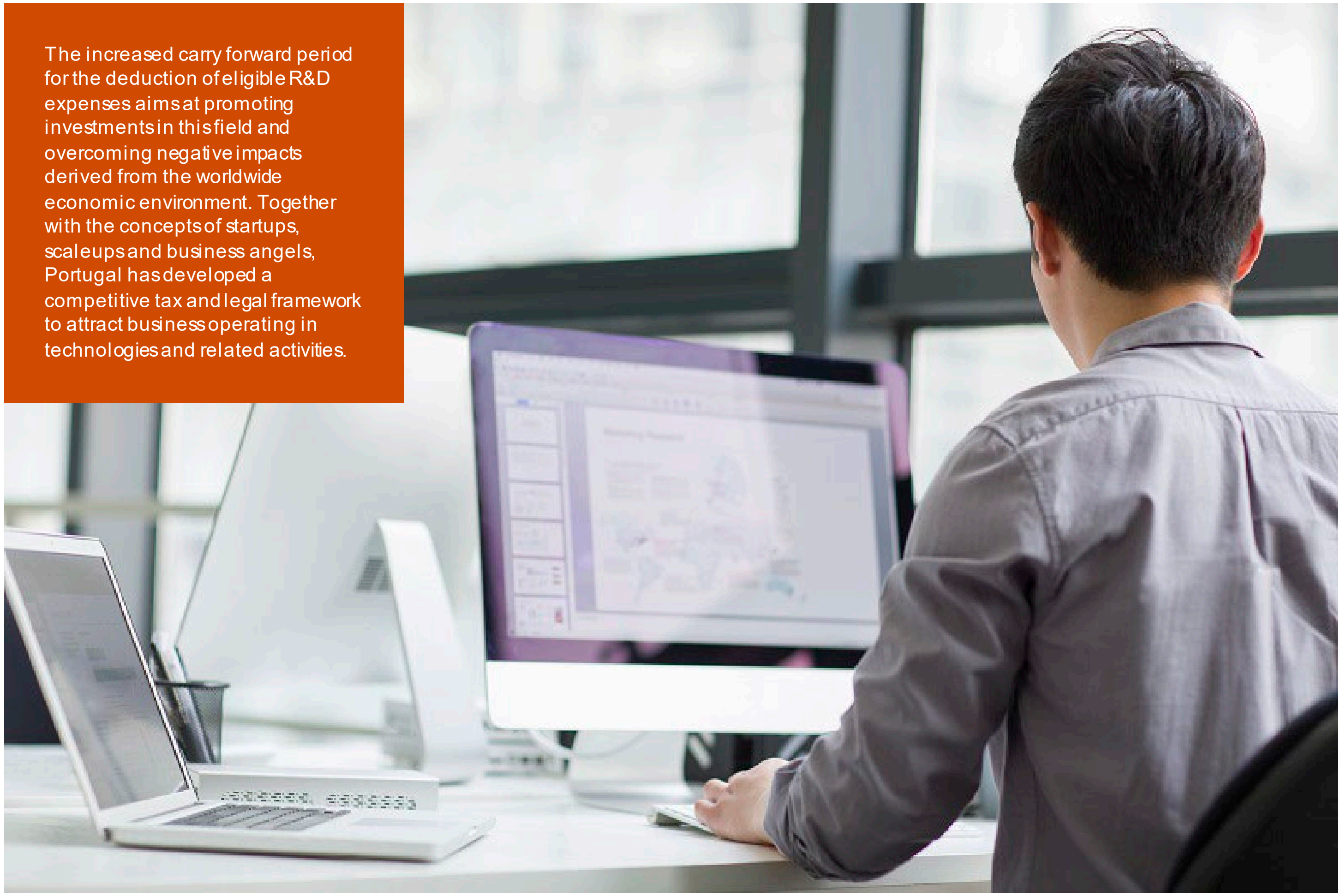
Portuguese tax-resident companies carrying out commercial, industrial, or agricultural activities, and non-resident companies with a permanent establishment in the Portuguese territory, are allowed to deduct from the corporate tax due, an amount not to exceed the amount of eligible R&D expenses incurred, in a double percentage as follows:

- Base rate: 32.5% of the R&D expenses incurred; this rate increases by 15% for small and medium-sized entities that do not benefit from the incremental 50% rate (applicable to entities that had completed two years of activity).
- Incremental rate: 50% of the difference between the R&D expenses incurred in the tax year and the average amount of the R&D expenses incurred in the previous two years, up to the limit of EUR 1.5 million.

Following a tax law amendment, beginning 1 January 2024, eligible R&D expenses that, due to insufficient tax due cannot be deducted in the tax year incurred, can be carried forward twelve years (currently, eight years).

The increased carry forward period for the deduction of eligible R&D expenses aims at promoting investments in this field and overcoming negative impacts derived from the worldwide economic environment. Together with the concepts of startups, scaleups and business angels, Portugal has developed a competitive tax and legal framework to attract business operating in technologies and related activities.



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Legislation

Costa Rica

Costa Rica Executive Branch introduces corporate tax bill

Costa Rica's Executive Branch in mid-May presented a corporate income tax bill to the Costa Rica Congress for consideration. The Bill is part of a package of five proposed bills that also includes proposals to strengthen the tax audit function, amendments to VAT law, rules regarding vehicles tax, and proposed rules related to the management of public debt and other functions of the National Treasury.

The Bill proposes to repeal the corporate income tax law as currently in force. In its place, new provisions would expand the definition of Costa Rican-source income to include certain passive items, such as capital income and capital gains earned by Costa Rican tax residents, regardless of the source location. If the bill is enacted and published by the end of 2023, it would enter into force 1 January 2024.

For more information see our Tax Insight.

This proposed change would constitute a significant deviation from the traditional territorial tax system that currently applies in Costa Rica. The change is intended to increase tax collection and align the Costa Rican tax system with the requirements imposed by the European Council in order to remove the country from the EU List of Non-cooperative Jurisdictions for Tax Purposes. Multinational companies with operations or presence in Costa Rica should monitor the legislative process to assess whether changes to the current tax system could impact their structures.

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Legislation

United States of America (the)

House Ways and Means Committee approves business and individual tax relief bills, Taiwan trade agreement

The House Ways and Means Committee late on June 13 voted along party lines to approve an economic growth package consisting of three separate tax bills: (1) the Tax Cuts for Working Families Act (H.R. 3936); (2) the Small Business Jobs Act (H.R. 3937); and (3) the Build It in America Act (H.R. 3938). The committee also voted unanimously to advance a bill (H.R. 4004) that approves the first trade agreement signed under the U.S.-Taiwan Initiative on 21st-Century Trade.

The Build It in America Act was approved by a vote of 24 to 18. The legislation includes provisions to restore retroactively through the end of 2025 the tax rules for research and experimentation (R&E) expensing under Section 174, business interest deduction limitation under Section 163(j), and 100% bonus depreciation under Section 168(k), each of which was the subject of scheduled modifications under the 2017 Tax Cuts and Jobs Act (TCJA). The Build It in America Act also includes provisions addressing recent foreign tax credit regulations, certain foreign acquisitions of US agricultural interests, and Superfund tax repeal. The bill also repeals or modifies certain IRA clean energy tax credits.

For more information see our Tax Insight.

The committee's economic growth package may be approved by the Republican-controlled House but will not advance in its current form in the Democratic-controlled Senate. Efforts to address TCJA provisions affecting Section 174 expensing, interest deductions, and bonus depreciation are expected to require negotiations later this year with Senate Democrats and the White House seeking some level of increase in the child tax credit. Federal budget deficit considerations also may affect the overall scope of any tax package later this year given the difficulty of identifying revenue offsets that can secure bipartisan approval

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Legislation

Hungary

Hungary's proposed changes could increase tax burden and compliance obligations for non-resident entities

The Hungary Government submitted a bill (No. T/4243) to Parliament on 6 June, covering proposed tax law changes for 2024. Amongst other proposals, the bill would implement the windfall measures introduced via government decrees in 2022 into an Act. The most important proposed amendments relevant for corporations include:

Changes to the Hungarian corporate income tax rules: By replacing the current effective deadline for tax years that include 31 December 2030, net operating losses generated prior to the tax year starting in 2015 could be carried forward and utilized without any time limitation for corporate income tax purposes.

Changes to the Hungarian local business tax (LBT) rules: The LBT rules would be extended to non-resident airlines effective 1 January 2024 by extending the permanent establishment (PE) definition to air passenger transport entrepreneurs (i.e., entrepreneurs whose net sales revenue in the tax year are derived at least 75% from air passenger transport services and related services). There is no tax treaty protection against the PE qualification for LBT purposes (with the exception of the very few jurisdictions whose tax conventions with Hungary explicitly list the LBT as a covered tax), and therefore, the determination must be based solely on the local rules.

Changes to the payment services tax: Beginning in June 2022, the payment services tax (PST) was extended to include cross-border payment service providers. However, the new rules did not define who qualified as a cross-border payment service provider, thus creating many uncertainties. The proposed tax law change clarifies that foreign persons who provide payment services, credit and loan granting, currency exchange activity, and currency exchange intermediation services to Hungarian tax residents (including both individuals and entities) are subject to the PST.

Changes to the investment transaction tax: The investment transaction tax (ITT) was introduced in June 2022, subjecting cross-border investment service providers, amongst others, to a levy on certain transactions that included Hungarian securities. The proposed tax law change clarifies that foreign persons who provide investment services directly to Hungarian tax-resident companies are in scope. Additionally, a new exemption proposes that no ITT payment liabilities shall arise for purchase transactions where the securities accounts are owned by non-Hungarian resident persons. The changes do not address all the uncertainties, such as the interpretation of purchase transactions or same-day trading.

Changes to the extra profit surtaxes introduced by Government Decree 197/2022. (VI. 4.): According to the proposed changes, effective 1 August 2023, several extra profit surtax provisions (e.g., the surtax on credit institutions and financial enterprises, the contribution of commercial airlines, the PST or the ITT) would be introduced into the relevant sectoral tax laws (replacing the current Government Decree).

If approved by Parliament, the tax law changes would result in additional tax burden and new compliance obligations for many non-resident entities in Hungary. As there is no de minimis exemption, the compliance requirements could be more burdensome than the actual tax payment liability, especially in the case of the ITT and the PST. Since the proposed changes involve uncertainties, companies affected by the ITT, PST, and LBT amendments should consider what the new rules will mean for their operations.

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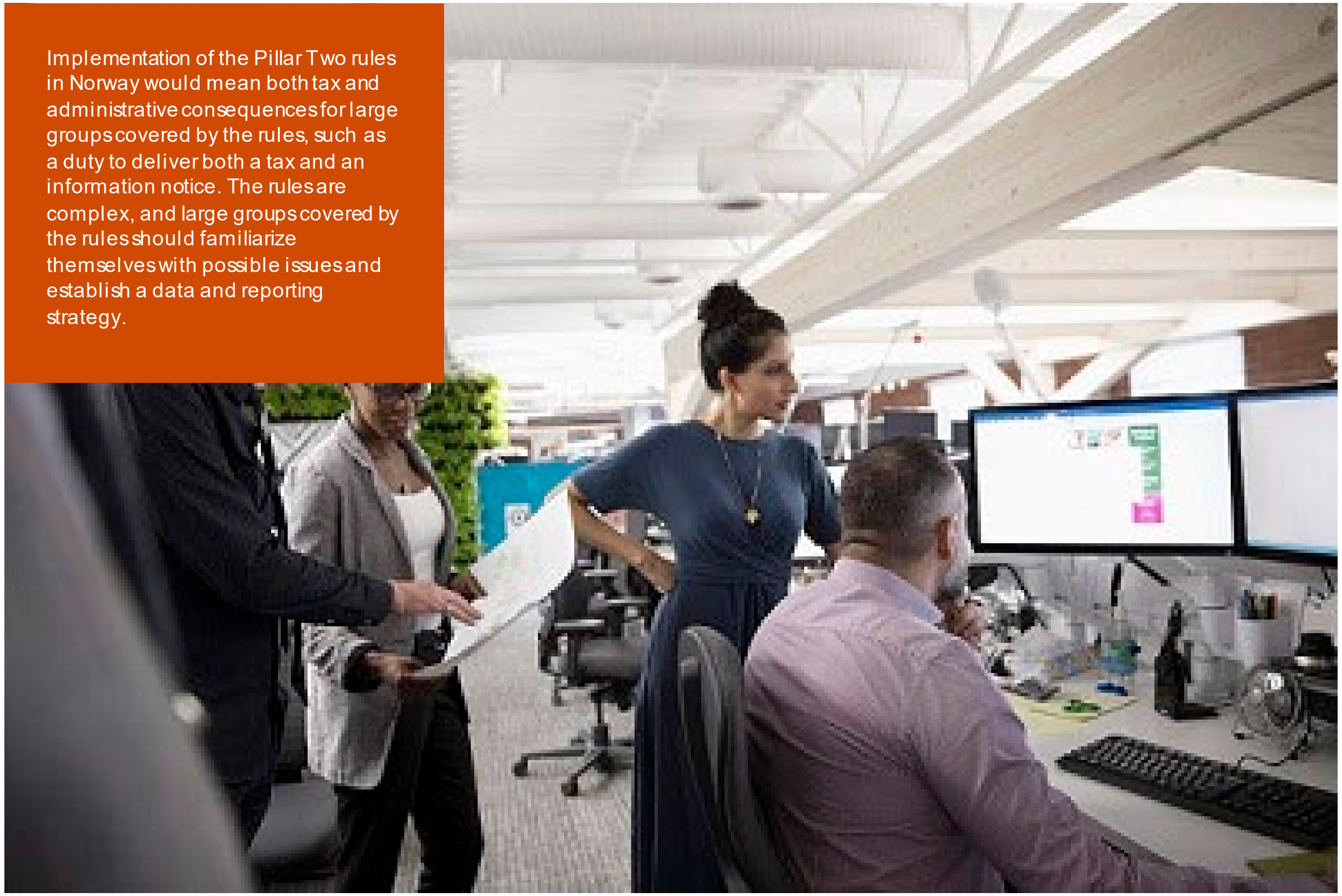
Legislation

Norway

Norway proposes Pillar Two legislation

The Norwegian Ministry of Finance released proposed Pillar Two legislation on 6 June. The proposal includes implementation of the Income Inclusion Rule (IIR) for income tax year 2024, with a later implementation of the 'Undertaxed Profit Rule' (UTPR). Norway's proposed Pillar Two rules would apply to multinational groups and Norwegian entities in multinational groups, in addition to purely Norwegian national groups. The Norwegian Ministry of Finance is currently working on simplifications to the Safe Harbours.

Implementation of the Pillar Two rules in Norway would mean both tax and administrative consequences for large groups covered by the rules, such as a duty to deliver both a tax and an information notice. The rules are complex, and large groups covered by the rules should familiarize themselves with possible issues and establish a data and reporting strategy.



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Legislation

Netherlands (the)

Pillar Two bill submitted to Dutch Parliament

The Netherlands legislative proposal to transpose Pillar Two into the Dutch company tax system, titled 'Minimum Tax Act 2024 (Pillar Two),' was submitted to the Dutch Parliament on 31 May. The Netherlands is the first EU country to release its domestic Pillar Two legislation. By doing so, the Netherlands takes the next step in implementing Pillar Two, effective 31 December 2023. The proposal aims to implement EU Directive 2022/2523 of 14 December 2022 (the Directive), published by the European Commission on 14 December 2022. The proposal generally aligns with the Directive.

The complex Pillar Two legislation effectively introduces a new corporate tax system in addition to the existing company tax framework. The Dutch legislative proposal lays down the new rules in a separate legislative act and creates a separate levy. The new tax act will apply alongside and in addition to the existing and already complex Dutch (inter)national (corporate) 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 Netherlands with a consolidated group turnover of at least €750 million (certain sectors are exempted).

For more information see our Tax Insight.

Parliament and the Upper House will discuss the legislative proposal in the coming months. The legislative bill is expected to enter into force on 31 December 2023. The Pillar Two rules will apply to accounting years beginning on or after this date. The complex Pillar Two legislation impacts the entire (global) business organization of in-scope companies. Therefore, companies should start analyzing the financial and administrative impact of these new rules on their business organization.

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Legislation

Spain

Spain will tighten the rules limiting the deductibility of interest expense

A Draft Law amending Law 58/2003 of 17 December 2003 on General Taxation, transposing Council Directive (EU) 2021/514 of 22 March 2021 which amends Directive 2011/16/EU on administrative cooperation in the field of taxation, and other tax rules, introduced a proposal to amend Article 16 of the Spanish Corporate Income Tax (CIT) to bring it into line with the EU ATAD Directive.

Council Directive (EU) 2016/1164 of 12 July 2016 on anti-tax avoidance rules with a direct impact on the functioning of the internal market (i.e., ATAD) regulates measures to prevent aggressive tax planning. These measures include a general anti-abuse clause, an international tax transparency rule, an exit tax, anti-hybrid rules, and a clause limiting the deductibility of financial expenses. All of these rules have already been transposed by Spanish legislation, except for the rule limiting the deductibility of interest.

The EU ATAD Directive allowed jurisdictions to postpone application of the harmonized rule until 1 January 2024, if they had domestic legislation that was 'equally effective.' Since the European Commission considered the Spanish legislation to be equally effective, the transposition was deferred until 2024.

The main difference between the CIT's current wording and the EU Directive derives from the concept of operating profit (i.e., EBITDA), on which the 30% limit is calculated. The Directive is more restrictive than the Spanish rule as it requires the exclusion from EBITDA of income that had already been exempted, and therefore not included in the tax base (e.g., dividends).

This reform will come into effect 1 January 2024, and will be relevant for those holding companies in Spain. They will see their deductibility limit reduced to the extent that the dividends they received (which are exempt) will not be considered for calculation of the Article 16 CIT limit.

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Legislation

Switzerland

Switerland voters approve Pillar Two

With a majority of roughly 78%, Swiss voters approved the new constitutional provision on the implementation of Pillar Two in a public vote on 18 June 2023. This positive outcome enables Switzerland to continue with the work on the global minimum tax implementation plan. The legal framework foresees that the Federal Council can temporarily introduce Pillar Two by an ordinance. This would need to be replaced by a Federal law passed by the Swiss Parliament within six years.

The Swiss Federal Council released the second draft ordinance governing the implementation of Pillar Two in Switzerland on 24 May 2023 (see Press Release). The ordinance is open for consultation until 14 September 2023. This second draft ordinance essentially extends the content of the previously published first ordinance (in the same document) and particularly clarifies the tax procedure in Switzerland.

After discussions with different stakeholders (including tax authorities and companies), the Federal Council proposes to levy the Top-up Tax with a 'one-stop shop' concept in Switzerland. In other words, only one canton will levy the Top-up Tax and distribute the respective funds to the Federation / other cantons. A taxpayer would file the Pillar Two tax returns (QDMTT return, IIR return, and UTPR return) with one canton only; further developments in terms of the GloBE Information Return would be monitored and built into the ordinance once available. The relevant Swiss filing entity would be the top-tier company in Switzerland. In case no such top-tier company exists, the economically most relevant Swiss company has the respective filing obligation (relevance being measured by reference to the highest average net income throughout the last three tax periods or the highest average equity during the same period).

For more information see our PwC Alert.

The Federal Council intends to align the Swiss implementation date with the European Union. Currently, the QDMTT and the IIR are expected to be implemented effective 1 January, 2024, while the UTPR may follow effective 1 January, 2025. However, the Federal Council will continue to monitor international developments as far as implementation dates in other countries are concerned and would have the option to adjust the Swiss implementation dates accordingly.

During the consultation period for the first part of the ordinance, there have been suggestions not to introduce the UTPR at all. The explanatory report to the second draft ordinance refers to these propositions and seems to suggest that this might be a possibility as well.

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Administrative

India

Key administrative notifications with respect to investments by non-residents in privately held Indian companies

According to a recent amendment in Indian tax law, effective 1 April 2023, any investment by non-resident investors in a privately held Indian company in excess of the fair market value of the shares of the Indian company will be taxable in the hands of such company. This is popularly known as 'angel tax' in India. Subsequently, the Indian Government issued two important administrative notifications providing exemptions in certain situations where consideration is received from non-resident investors.

Class of exempt privately held Indian company

One notification applies to any company which is a 'startup' and files the declaration as specified in the notification issued by the Department for Promotion of Industry and Internal Trade.

Classes of exempt non-resident investors

The other notification applies to

(i) Government and government-related investors, including entities controlled by the government or where direct or indirect ownership of the government is 75% or more;

(ii) Banks or entities involved in the insurance business where such entity is subject to applicable regulations in the country where it is established or incorporated or is a resident;

(iii) Certain classes of regulated entities which are residents of 21 specified countries (including inter alia the United States, United Kingdom, Australia, France, Germany, Italy, Japan, Korea and New Zealand).

Moreover, the government has released draft rules proposing changes in the method for valuation of shares for determining the fair market value in the case of investments by non-resident investors. This includes the introduction of five additional valuation methods in cases of consideration from non-residents, safe harbour of 10%, etc.

For more information see our PwC Insight.

The exclusions to the specified classes of investors from the provisions of angel tax are welcome. However, investors incorporated in or residents of certain important jurisdictions like Singapore, UAE, Mauritius, and certain European countries like Ireland, Netherland, etc., from which investments are typically made, are not included in the exemption. Moreover, once the draft rules are notified, non-resident investors may have more options to value their investment in specified companies. A 10% safe harbour is also welcome.

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Spain

New criteria limiting the compensation of tax credits in consolidated groups

The Spanish Tax Authority recently issued a note on the regulation for the distribution of consolidated group tax credits and the limits by that group's use of tax credits generated by companies before their inclusion in the group (i.e., pre-group tax credits). The note summarizes the doctrine of the Directorate-General for Taxation and the Economic and Administrative Court on these matters. However, with regard to the compensation of pre-consolidation tax credits, the note includes a change in the criterion, which has already been applied for several months in tax inspection procedures, and which significantly limits the possibility of compensating these credits.

When allocating tax loss carryforwards and tax credits, generally, for companies that leave the Group, tax credits should be allocated to these companies on a pro rata basis, based on their contribution to generating these credits. This leaves the Group free to decide which tax credits to use.

Based on the above, a Group's total tax credit is treated as a single credit and not a separate credit for each of the entities that form the relevant Group. Hence, if a given year's tax credit is partially used, the unused part is distributed among the entities in proportion to their contribution.

With regard to the compensation of pre-group tax credits, the starting point is the double limit established by the legislation: the limit applicable to the generating entity under the individual tax regime and the limit corresponding to the group. The note clarifies that, when determining the percentage limit for compensation of pre-group tax losses, the net turnover amount of the entity that generated the tax loss carryforward will be used. The note also states that it is possible to apply the limit of one million euros (which operates as an exception to the percentage limit established on the basis of the net turnover) to pre-group tax losses.

The Tax Authority's note states that if an entity that was already part of the group contributed to the generation of a negative tax base and that negative tax base is used by the group, this amount must be taken into account when considering the pre-group tax loss carryforwards of that entity. In other words, the set-off of tax losses generated by a company within the group limits the possibility to set off tax losses generated by that company before it joined the group.

Taxpayers should await court rulings, insofar as this new approach raises questions as to whether it fits in the Spanish tax system, which treats the tax Group as a single taxpayer.

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Administrative

Czech Republic

The Czech Republic moves forward with Pillar Two implementation

The Czech Republic Ministry of Finance published, on 15 May, a draft law to implement the Pillar Two Directive. The implementation would be provided through a separate law, the Minimum Tax Act. The discussion draft is largely based on the EU Pillar Two Directive and is designed to align with the timing of the EU Pillar Two legislation. As such, the Income Inclusion Rule (IIR) would apply for fiscal years beginning on or after 31 December 2023, while the Undertaxed Profit Rule (UTPR) would apply for fiscal years beginning on or after 31 December 2024. The draft law also takes into account the OECD Transitional Safe Harbours based on Country-by-Country reporting (CbCR) which should also apply to the Qualified Domestic Top-up Tax (QDMTT).

Up for debate in the Czech Republic's Pillar Two implementation is the treatment of qualified refundable tax credits. Under the EU Pillar Two Directive such credits must be paid to the recipient as cash or cash equivalents within four years of the recipient satisfying the conditions for receiving it. Currently, the Czech R&D tax allowances or tax incentives would not meet this definition. Therefore, even if the Czech company utilised a tax credit under local law (and its effective tax rate fell below 15%), such entity might be subject to Top-up Tax under Pillar Two unless those businesses are assets and payroll heavy. In such a case, the GloBE tax base might be sheltered by the substance-based income exclusion. Thus, while some might anticipate an amendment to the current tax credit, it is not on the agenda in the foreseeable future given it would require revisiting the whole concept of the Czech Republic's tax credit system.

The CbCR Safe Harbour could be helpful for MNEs with either (i) small investments generating revenues less than €10m and profit of less than €1m; or (ii) significant capital investments in tangible assets in the Czech Republic (e.g., manufacturing companies that are eligible for incentives). In these fact patterns, the substance-based income exclusion is likely to be relatively high compared to the excess profits, so the Safe Harbour calculation should in many cases be less complex than undertaking the full application of the GloBE rules. However, qualifying for a Safe Harbour (be it a temporary or permanent Safe Harbour under Pillar Two or CbCR) does not exempt an MNE Group and its subsidiaries from complying with the group-wide GloBE requirements such as the requirements to prepare and file a GloBE Information Return or a Top-Up Tax Return.

The Czech Republic Ministry of Finance has expressed that, in general, the implementation framework of the Pillar Two Rules adopted by the Inclusive Framework will be considered relevant interpretative guidelines, provided its content does not conflict with the EU Pillar Two Directive. If the GloBE Rules conflict with the Czech Minimum Tax Act, taxpayers are obligated to follow the transposed legislation. Indeed, GloBE measures cannot be transposed in contravention of the EU Pillar Two Directive. However, as pointed out in the previous newsletter, the question arises as to whether the OECD guidance may be considered an 'international agreement' in the absence of a delegating act from the EU competent authorities 'implementing' the guidance into EU law (as is the case with the EU Pillar Two Directive) and how this conflict will be assessed by the European Court of Justice (CJEU) in the future.

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United Kingdom of Great Britain and Northern Ireland (the)

United Kingdom releases Pillar Two guidance

The Pillar Two guidance makes important clarifications regardng transitional safe harbour rules, confirming that:

(1) simply because information in the CbCR for one jurisdiction has not been drawn from qualifying financial statements does not mean it taint other jurisdictions. So the transitional safe harbour still may be available in other jurisdictions (provided the information for those jurisdictions has been extracted from qualified financial statements).

(2) a mix and match approach can be used. Thus, information for one jurisdiction may be extracted from the accounts used to prepare the consolidated financial statements whilst the information for another jurisdiction is extracted from the entity financial statements. The transitional safe harbour may be available in both jurisdictions.

(3) it is not possible to mix and match within a jurisdiction. The transitional safe harbour will not be available in a jurisdiction if the information for that jurisdiction within the CbCR has been extracted from both the entity financial statements and the accounts used to prepare the consolidated financial statements

The guidance does not address many of the open questions concerning the application of the minimum tax and domestic top up tax rules in the United Kingdom. HMRC indicated at the start of this process that they intended to publish a schema (mapping the UK rules to the OECD model rules) shortly after the UK legislation is published, with substantive guidance on the computational provisions to follow later in the year.

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Judicial

Israel

District Court Rules in the Medtronic Case on Business Restructuring

An Israeli District Court ruled, on 1 June 2023, on an appeal for a 'business restructuring' of the Israeli company, Ventor Technologies. In 2009, Medtronic aquired the shares of Ventor Technologies Following the acquisition, Medtronic invested heavily in Ventor Technologies in Israel and entered into intercompany agreements whereby it provided a license to Medtronic in the US for the right to use Ventor Technologies intellectual property (IP) that it had developed up to the acquisition date, as well as an agreement for the provision of research and development services (under the cost-plus method) to Medtronic Inc (and an affiliate). The activities of Medtronic Israel were terminated in 2012.

The Israeli Tax Authorities (ITA) argued that there was a post-acquisition 'business restructuring' and that these arrangements effectively constituted a deemed sale of IP by Ventor Technologies. Medtronic Israel appealed the ITA assessment and the District Court ruled in favor of the ITA.

For more information see our tax insight.

The Medtronic case is the latest of several District Court decisions related to business restructuring following the acquisition of Israeli companies. In previous cases, the Court ruled in favor of the taxpayer in Broadcom (December 2019) and Medingo (May 2022), and in favor of the ITA in Gteko (2017).

The ITA continues to scrutinize such issues (in line with the ITA Circular published in November 2018), seeking to apply a substance-over-form approach in asserting that certain intercompany licensing arrangements constitute a sale of IP.

The ruling in the Medtronic case underscores the importance of careful post-acquisition business model restructuring, as well as accurately designing intercompany arrangements. The determination of whether there has been a 'business restructuring' will ultimately be based on the specific facts and circumstances.

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Judicial

Netherlands (the)

Dutch company appeals Pillar Two Directive

According to information made available this month, a Dutch company filed an application before the General Court of the European Union against the Pillar Two Directive. Among other items the company contests the validity of the international shipping income exemption as provided in Article 17 of the Pillar Two Directive (T-143/23). The company complains that the Pillar Two Directive can lead to unequal taxation between shipping companies. One of the pleas is that it excludes income from a shipping activity covered by EU Member States' tonnage tax regime authorized under State aid rules from its scope.

Legally speaking, it is possible for an individual or a company to challenge an EU Directive. The applicant's pleas could open an EU pandora's box as the appeal is not limited to Article 17. For instance, the company complaints that application of the Pillar Two rules to purely domestic situations infringes the principle of proportionality.

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Judicial

France

French Court rules on characterization of rent

In 2008, two German companies sold the usufruct of buildings they occupied in Germany to a French financial institution which then leased back the usufruct to the German companies. The financial institution considered that the corresponding rent qualified as income derived from real estate and should only be subject to taxation in Germany. Conversely, the German tax authorities considered that this income had the nature of financial interest and should only be subject to taxation in France. The difference in characterization enabled the income to escape taxation. For the parties, the tax mismatch was one of the objectives of the structuring.

The French tax authorities challenged this structuring as an artificial arrangement and reassessed the financial institution on the ground of the abuse of law.

However, the Administrative Supreme Court (CE, 3 May 2023, 434441 BNP Paribas & Parilease) ruled that the abuse of law could not be recognized, as the arrangement was not only tax-motivated but also enabled the German companies to benefit from a financing.

Nevertheless, the Court recharacterized the rents into financial income as the parties had taken restrictions to the usufruct so that the operations were actually not related to real estate but consisted instead in a mere financial structuring. These rents should therefore be subject to taxation in France.

Companies should assess whether their operations give rise to similar mismatch effects which could fall within the scope of the new ATAD 2 rules that target situations where there is deduction without inclusion or there is a double deduction. In such cases, the hybrid deduction would be denied for tax purposes.

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Judicial

Spain

Recent Spanish National High Court rulings

Deductiability of expenses directly related to royalties received by a non-resident entity

The Spanish National High Court, in its ruling 5345/2022 of 12 October 2002, concluded that expenses directly related to royalties received by a non-resident entity may be deducted when determining the taxable base of the withholding tax to be levied under the non-resident income tax. The judgment's reasoning is based on the principles of another judgment issued by the same body on 5 October 2022, in Appeal 610/2018, which deals with a similar issue. The classification of the income received as royalties or business income and the deductibility of the expenses related to the income paid for the purpose of calculating the tax base of the withholding tax are discussed both in the present judgment and in the judgment of 5 October 2022.

The Court ultinately concluded that expenses directly related to income received by a non-resident entity taxable in Spain should be deducted from the taxable base of the withholding tax, provided that there is no double reimbursement.

Spain's Capital Gains Tax regime in force until 2020 violated European Union Law.

The Spanish National Court concluded, on 24 May 2023, that a company resident in the European Free Trade Association area (EFTA) can't be treated differently from a company resident in Spain or an EU Member State with regard to the exemption of capital gains provided in the Spanish Non-Resident Income Tax Act.

The conflict addressed by the ruling has its origins in 2016, when an Icelandic group sold its Spanish subsidiary, declaring a corporate tax of €2.5 million on the capital gain from the sale, and soon after decided to appeal this self-assessment in order to benefit from the exemption of capital gains recognized for companies resident in the European Union at the time. The relevant Tax Administrative Review Body rejected the appeal on the grounds that the infringement was justified as Iceland was an EFTA country not covered by the EU Directive on mutual assistance by the competent authorities of the Member States in the field of taxation. During this tax procedure, the European Commission initiated an infringement procedure, resulting in the amendment of Article 14(1)(c) of the Spanish Non-Resident Income Tax Law. This excludes from taxation capital gains realized by EFTA companies in the same circumstances as those applicable to companies resident in EU Member States.

Multinationals should revisit their structures and investments in Spain to see if these rulings impact their tax positions.

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Judicial

Netherlands (the)

Zeeland-West-Brabant Court: Brazilian Interest on Net Equity (IoNE) qualifies as dividend, not as interest

In a 1 May Court decision, the Zeeland-West-Brabant Court ruled that the Brazilian 'interest on net equity' (IoNE) should be classified as dividends rather than interest for purposes of the Dutch-Brazilian tax treaty. This distinction is significant because it affects the eligibility for a tax sparing credit (TSC). If classified as dividends, the TSC is set at 25%, whereas if classified as interest, the TSC is 20%. The Dutch-Brazilian tax treaty, established in 1990, does not clearly specify whether IoNE, introduced in 1995, should be considered as dividends or interest for tax treaty purposes. Under Brazilian civil law, IoNE is considered equivalent to dividends. However, for tax purposes, IoNE is treated as interest. Given the definitions of dividends and interest in the treaty, IoNE could potentially fall under both categories.

Brazil currently imposes a 15% withholding tax on IoNE payments to the Netherlands. According to the relevant article in the treaty, a 'tax sparing credit' of 25% applies if IoNE is classified as dividends under Article 10 of the treaty, whereas a 'tax sparing credit' of 20% applies if IoNE is classified as interest under Article 11 of the treaty.

The aforementioned court decision could support taxpayers' argument to utilize the 25% TSC instead of the 20% TSC. While this doesn't pertain to a Supreme Court case, it could assist taxpayers in bolstering their stance to assert the TSC calculated at the higher tax rate.

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EU/OECD

European Union

European Finance Ministers adopt new reporting and exchange of information rules centered around crypto-assets

European Finance Ministers met on 16 May as part of the monthly European Council ECOFIN meetings, and agreed to proposed changes to the Directive on Administrative Cooperation (DAC) in the area of taxation. The changes to the Directive (DAC8) shall, in principle and with minor exceptions, be implemented in EU Member States' legislation by 31 December 2025, and apply from 1 January 2026. While a reporting regime for crypto assets is a core component, the Directive also includes measures strengthening and broadening DACs 1-7, although proposals to provide for minimum penalties have not been agreed. Once the European Parliament presents its opinion on the proposal following final legal checks, the Directive can be formally adopted.

For more information see our Tax Policy Alert.

The swift adoption of DAC8 makes the European Union the first mover in this area. This change follows from the agreement resulting in DAC7 (reporting obligation for certain digital platforms), which has now been broadly transposed across the EU Member States. The US Internal Revenue Service is preparing regulations under IRC Section 6045 to implement recent legislation that will require information reporting for Digital Assets, although the timeline on these regulations may be extended. The US regulations are expected to be similar to Crypto-Asset Reporting Framework (CARF). Importantly, when transposing the DAC8 changes, Member States should adhere to a consistent approach with the OECD CARF proposals.

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Treaties

Cyprus

Netherlands - Cyprus tax treaty enters into force

The Netherlands has ratified the tax treaty with Cyprus. It enters into force on 30 June 2023. the treaty, which will be effective 1 January 2024, provides for 0% withholding taxes on dividends (under conditions), interest, and royalties.

With respect to capital gains derived from the disposal of shares by residents of either country, the treaty generally grants exclusive taxing rights to the country of residence of the alienator except where the shares derive more than 50% of their value, directly or indirectly, from: a) immovable property situated in the other contracting state (with certain exceptions, such as disposal of shares listed on a recognised stock exchange, corporate reorganisations, etc); b) certain offshore rights/property relating to exploration or exploitation of the seabed or subsoil or their natural resources located in the other contracting state.

The treaty also includes a principal purpose test (in the same manner as the principal purpose test in the MLI).

The treaty, which is a first-time tax treaty for the two countries, should enhance the trade and economic relations between the two states. The treaty should positively impact both corporate entities that wish to establish presence in either country (and have access to new markets and industries), and the exchange of highly skilled employees between them as a result of the elimination of double taxation from the exercising of activities in either State. See here for more information.

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Treaties

Spain

Spain advances tax treaties with Bulgaria and South Africa under the MLI

According to the OECD, Spain deposited on 1 June 2023 its notification confirming completion of its internal procedures for the entry into effect of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the 'MLI') for its covered tax agreements with Bulgaria and South Africa.

Since Spain made a reservation pursuant to Article 35(7)(b) of the MLI, it must notify the confirmation of the completion of its internal procedures simultaneously to the Depositary and the other Contracting Jurisdiction(s) for the MLI to become effective with respect to each specific covered tax agreement.

> Taxpayers should continue to monitor the entry into force of the amendments introduced by the MLI, specifically for which not all the necessary formalities have been completed.

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Glossary

Acronym	Definition
AFIP	Argentine Tax Authorities
ATAD	anti-tax avoidance directive
BEPS	Base Erosion and Profit Shifting
CFC	controlled foreign corporation
CIT	corporate income tax
CTA	Cyprus Tax Authority
DAC6	EU Council Directive 2018/822/EU on cross-border tax arrangements
DST	digital services tax
DTT	double tax treaty
ETR	effective tax rate
EU	European Union
LBT	local business tax
MLI	Multilateral instrument
NID	notionial interest deduction
PE	permanent establishment
OECD	Organisation for Economic Co-operation and Development
R&D	Research & Development
SBT	same business test
SiBT	similar business test
VAT	value added tax
WHT	withholding tax

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