Briefing

International briefing for June

Speed read

The main BEPS development this month has been the release of a discussion draft on a multilateral instrument. At the EU, there have been a number of developments around the proposed Anti-Tax Avoidance Directive. In the Netherlands, proposed changes to the innovation box have been released and proposals to change the dividend withholding tax rules for cooperatives are expected to be presented on Budget day. Details on the implementation of Italy's new tax ruling procedure for substantial investments have been released. In Finland, there have been recent developments that could impact debt push down arrangements and proposed changes to time limits which could impact, in particular, overseas funds making claims for refunds of withholding tax.

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It has been a busy month for HMRC with a flurry of activity before the start of 'purdah' in the lead up to the EU referendum. As well as consultations on corporate tax losses and the substantial shareholding exemption, there was also a proposal for the possible introduction of a secondary adjustment rule into the UK's domestic transfer pricing legislation and a consultation on renewing and extending the scope of the double taxation treaty passport scheme. Draft statutory instruments (SIs) have also been published which relate to the UK's tax treaties with Jersey, Guernsey and the Isle of Man. These SIs introduce the transactions in land anti-avoidance provisions that were announced at Budget 2016 to ensure that non-UK based property developers in those jurisdictions pay the same level of tax as UK-based property developers.

There has also been activity at the OECD on the base erosion and profit shifting (BEPS) project. The outcome of BEPS Action 15 was the establishment of an ad hoc group tasked with developing a multilateral instrument to modify existing bilateral tax treaties in order to implement the tax treaty measures developed in the course of the BEPS project. A discussion draft was released by the OECD on 31 May which summarises the provisions that are expected to be included in the multilateral instrument and describes and requests comments on technical issues such as:

- The relationship between the provisions of the multilateral instrument and the existing tax treaty network.
- Ensuring consistent application and interpretation: the multilateral instrument may need to be accompanied by tools, such as an explanatory statement or commentary, to ensure consistent application of its provisions to diverse bilateral tax treaties.
- Modifying bilateral treaties in multiple authentic languages bearing in mind the multilateral instrument is being negotiated and is expected to be concluded only in English and French.
- Comments have been requested by 30 June and the ad hoc group aims to conclude its work and open the multilateral instrument for signature by 31 December 2016.

Also at the OECD, it was announced on 15 June that the OECD Council has approved the incorporation of BEPS amendments into the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. These are amendments that were set out in the 2015 BEPS reports on Actions 8–10 (aligning transfer pricing outcomes with value creation) and Action 13 (transfer pricing documentation and country by country reporting). Further work is being undertaken to make amendments to other parts of the *Transfer Pricing Guidelines*, in particular to chapter IX 'Transfer pricing aspects of business restructurings', and these are expected to be approved later in 2016.

EU update

Anti-Tax Avoidance Directive

The Anti-Tax Avoidance Directive (ATAD) is one of the two legislative pillars of the European Commission's anti-tax avoidance package, which was launched in January 2016. The Economic and Financial Affairs Council (ECOFIN) met to discuss and agree on its position on the draft ATAD on 25 May and then again on 17 June. Final agreement could not be reached at those meetings but, in the light of the discussions held, the presidency put forward a final compromise text and announced a 'silence' procedure until midnight on 20 June. As no objections were raised by that deadline, political agreement was deemed to be reached and the text will be submitted to a later ECOFIN meeting for formal adoption (expected to be 12 July).

> Political agreement was deemed to be reached [on the final compromise text of the EC's Anti-Tax Avoidance Directive] ... The main changes relate to the CFC rules

The main changes from the previous published version of the ATAD (dated 26 May) relate to the CFC rules, where wording which referred to an effective corporate tax rate of at least 50% of that of the parent's member state has been replaced with a test based on the difference between actual corporate tax paid and the tax that would have been paid, and the substance requirement has been amended to reflect current case law of the CJEU.

In relation to the interest limitation proposals, which take the form of an interest stripping rule, a five year transition period (until 2024) has been introduced for member states wishing to keep their domestic targeted rules, such as thin capitalisation legislation, as a substitute for the new rules (provided they are 'equally effective'). Finally, the controversial switch-over clause has been deleted.

In addition, the Commission has been asked to put forward a (legislative) proposal on hybrid mismatches involving third countries by October 2016. This was

an integral part of the political agreement, intended to satisfy those member states which were of the opinion that third-country mismatches should have been included in the ATAD.

In relation to the other legislative strand of the anti-tax avoidance package, following earlier political agreement, on 25 May EU Amending Directive 2011/16/EU was adopted. This Directive will implement country by country reporting (CbCR) between tax authorities in the EU member states in line with the OECD's BEPS Action 13 (i.e. the non-public element of the EU's CbCR proposals).

Global update

Netherlands: proposed 'innovation box' changes

On 19 May, the Dutch government launched a consultation on proposed changes to the Dutch innovation box regime. The proposals follow the recommendations made in the OECD's final BEPS Action 5 report (countering harmful tax practices more effectively, taking into account transparency and substance) and recent evaluations on the working of the Dutch innovation box.

The proposed changes to the innovation box include a nexus approach and rules to narrow the definition of qualifying intellectual property (IP). The effective tax rate for income attributable to the innovation box is expected to remain unchanged at 5%.

The new innovation box rules are planned to take effect on 1 January 2017 and a grandfathering period will apply until 1 July 2021 for all IP which was developed before 1 July 2016. Therefore all IP developed after 1 July 2016 will automatically fall under the new rules although a specific rule is to be introduced for patented IP or breeder's rights developed before 1 January 2017 such that these will continue to qualify for the innovation box without a time limitation, even if they do not meet the narrowed definition of qualifying IP.

Netherlands: cooperatives and withholding tax on dividends

Based on current legislation, Dutch cooperatives are in principle not obliged to withhold tax on dividends, unlike NVs and BVs. This exemption applies even where the cooperative is not used as originally intended, but as a holding entity in international structures as has become reasonably common. However, recent letters from the Deputy Minister of Finance, Eric Wiebes, state that the Dutch Cabinet now believes there are no grounds for the different tax treatment and, in his latest letter of 27 May, Mr Wiebes says he wants to bring it to an end by 1 January 2018. Proposals are expected to be presented on Budget day.

In this letter Mr Wiebes does however state that the Netherlands is, and will continue to be, an advocate of the basic assumption of not levying dividend withholding tax on shareholding structures, provided there is a business chain (it is not clear if this is referring purely to cooperatives or a wider desire to remove withholding tax from business chains). A precondition for him is that real cooperative businesses are not affected.

Italy: new tax ruling procedure

Details on the implementation of Italy's new tax ruling procedure for substantial investments have been published in a series of releases from the Italian tax authorities over the last few weeks. The new procedure aims to provide both resident and non-resident enterprises that intend to make substantial investments in Italy (at least €30m) with a reliable and stable tax framework, based on their investment plan. The planned investment must have a significant impact on employment (by boosting the workforce or saving jobs) in the relevant industry.

Once an application has been submitted, the tax authorities must generally send a written ruling within 120 days and will be deemed to agree with the interpretation of tax legislation/ approach set out in the application if they do not reply within this time. The ruling is binding on the tax authorities unless the facts or circumstances change.

The new procedure came into effect on 20 May 2016.

Finland: interest expenses allocated to Finnish branch held non-deductible

On 19 May, the Supreme Administrative Court (SAC) of Finland issued two significant rulings regarding the deductibility of interest expenses allocated to a Finnish branch of a foreign company. In both rulings the SAC denied the branch's right to deduct the interest expenses in a debt funded acquisition structure where the shares in a Finnish group company were acquired in the name of a foreign company's branch registered in Finland. In the first ruling it was determined that the acquired shares to which the debt related could not be allocated to the branch's assets, and in the second ruling the arrangement was deemed to be tax avoidance caught by the general anti-avoidance rule.

Then on 27 May, the tax authorities issued guidance stating that these rulings would impact debt push down arrangements carried out through both branches and special purpose vehicles (SPVs). Transactions will be deemed to be tax avoidance where:

- the intra-group funding is organised through a Finnish branch or an SPV and;
- the legal form does not correspond with the true nature and purpose of the arrangement (substance-over-form) and;
- the objective of the arrangement is to avoid tax.

Although the legal position for SPVs is currently unclear, it would seem advisable at the moment to seek an advanced ruling from the tax authorities where a debt push down is envisaged.

Finland: proposed time limit changes

The Finnish government, in a draft bill, has proposed to shorten the limitation period for all tax matters to three years from the current five, starting in the 2017 tax year. This proposal would have implications for, amongst other things, overseas funds making claims for refunds of withholding tax.

It is not currently expected that the change will apply retroactively so refund claims for withholding tax levied by Finland in 2016 could be filed until the end of 2021, whereas refund claims for Finnish withholding levied in 2017 would be allowable until the end of 2020. ■

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