



# Tax Alert

## Issue 03 | February 2019

In this issue, we bring you our Quarterly Global Tax Disputes Update (January 2019 edition) highlighting the latest news in tax controversy around the world.

With tax audit and dispute activities rising in almost every country, keeping up with trends and developments is more important than ever. In this edition, you'll find briefings on key news, events and thought leadership submitted by Global Tax Dispute Resolution & Controversy professionals in KPMG member firms worldwide. Staying informed can be a crucial first line of defence as you manage your disputes around the globe.

### Insights from around the world:

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## Andorra

### **Country-by-country reporting and notification rules**

Country-by-country reporting and notification requirements for multinational entity groups have been enacted into tax law in Andorra.

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## Argentina

### **Country-by-country reporting guidance updated, modified**

Argentina's tax administration published guidance on country-by-country reporting and transfer pricing applications.

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## Asia Pacific

### **Transfer pricing review (2018)**

The September 2018 edition of Asia Transfer Pricing Review features 16 articles about the transfer pricing environment in countries across the Asia Pacific region.

[Read the article](#)

### **General tax update for financial institutions (October 2018)**

The October 2018 edition of this publication summarizes tax developments of interest to financial institutions in the Asia Pacific region from the third quarter of 2018.

[Read the article](#)

### **China, Japan sign AEO mutual recognition agreement**

Japan has become the thirty-sixth country to sign an Authorized Economic Operator mutual recognition agreement with China.

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## Australia

### **Court decides income is subject to Australian tax under tax treaty**

The Full Federal Court confirmed that the deemed source provision in the India-Australia tax treaty can operate to deem income to have a source in Australia for

purposes of Australia's domestic tax law.

[Read the article](#)

#### **ATO final guidance on diverted profits tax**

The Australian Taxation Office's (ATO) final guidance on the Diverted Profits Tax (DTP) clarifies how key elements of the DPT will be interpreted and how the ATO will apply the new measure.

[Read the article](#)

#### **Tax authority guidance on restructures of hybrid mismatch arrangements**

The Australian Taxation Office recently finalized its guidance for taxpayers who restructure out of hybrid arrangements. The guidance examines situations where an effort to redress a hybrid arrangement may result in the application of the anti-avoidance principle under Australian tax law.

[Read the article](#)

#### **Tax ruling on certain employee remunerations trusts**

Australia's Commissioner of Taxation released the final version of Taxation Ruling TR/2018/7, covering the Commissioner's view of how the tax law applies to certain employee remuneration trusts.

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#### **Tax implications for cryptocurrencies**

The KPMG member firm in Australia highlights current views from the Australian Taxation Office on cryptocurrencies, capital gains tax calculations, chain splits and other tax implications.

[Read the article](#)

#### **Transfer pricing: ATO internal distributor risk guidance, initial impressions**

The Australian Taxation Office (ATO) released new guidance outlining its compliance approach to inbound Australian distributors.

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## **Brazil**

#### **Brazilian IRS issues ruling on ICMS exclusion from PIS and COFINS basis**

The Brazilian Internal Revenue Service (IRS) issued Internal Tax Ruling No 13 on the exclusion of the state value added tax (ICMS) from the basis for calculating program of social integration (PIS) and contribution for the financing of social security (COFINS) taxes.

The ruling states that taxpayers must consider the paid amount of the ICMS after calculating their balance due, and not the amount on their invoices. This position potentially reduces the amount that taxpayers can exclude and/or recover, and it could be challenged in courts.

For more information, please contact:

[Marcos Matsunaga](#) or [Ricardo Sartorelli](#)

#### **CARF adopts STJ's input definition**

The Administrative Council of Tax Appeals (CARF) has begun applying Note No. 63 of the National Treasury Attorney General's Office on claims for PIS and COFINS credits on business inputs.

The note is based on a Superior Court of Justice (STJ) judgment<sup>1</sup> in, in which the court granted the right of taxpayers to claim credits on inputs "essential" and "relevant" to their business activities.

Although this position favors taxpayers, uncertainty remains. The STJ also decided that the "essentiality" and "relevance" of the input depend on the analysis of each company's core business and activities.

For more information, please contact:  
[Marcos Matsunaga](#) or [Ricardo Sartorelli](#)

### **New income tax regulation comprises 1,000+ articles**

The Brazilian Federal Government published a new Income Tax Regulation<sup>2</sup> comprising more than 1,000 articles on taxation, inspection, collection and tax administration.

For more information, please contact:  
[Marcos Matsunaga](#) or [Ricardo Sartorelli](#)



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## **Bulgaria**

### **Administrative procedural changes effective 2019**

New administrative procedural measures that generally took effect on 1 January 2019 include amendments relating to administrative appeals for tax and social security purposes.

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## **Costa Rica**

### **Proposed changes to country-by-country reporting rules**

Costa Rica's tax administration issued a draft amendment that would modify its guidance relating to entities required to file a country-by-country report.

[Read the article](#)



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## **Czech Republic**

### **Transfer pricing issues in tax audits of individuals**

The Supreme Administrative Court held that the arm's length principle applies to individuals and intra-state transactions, and to corporate entities and cross-border transactions.

[Read the article](#)

### **High court interprets tax treaty provisions**

The Supreme Administrative Court held that where a tax treaty applies to a taxpayer's situation, the tax administrator cannot interpret the treaty's provision using domestic law or regulations. Rather, the tax administrator must apply international law principles and the commentaries to the Model Convention of the Organisation for Economic Co-operation and Development.

[Read the article](#)



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## European Union

### **ECOFIN considers proposals for digital services tax**

European Union (EU) finance ministers discussed the European Commission's recently proposed digital services tax at an informal meeting of the Economic and Financial Affairs Council (ECOFIN) in September 2018.

[Read the article](#)

### **Updates on EU tax developments, CJEU judgments and their implications for taxpayers**

New editions of E-News from KPMG's European Union (EU) Tax Centre feature updates on EU tax developments that can have both a domestic and a cross-border impact, as well as Court of Justice of the European Union (CJEU) decisions and other proceedings that could have implications in your country.

Recent editions:

- [December 7, 2018](#) edition
- [November 26, 2018](#) edition
- [November 9, 2018](#) edition
- [November 2, 2018](#) edition
- [October 16, 2018](#) edition
- [October 1, 2018](#) edition
- [September 17, 2018](#) edition

### **Assessing how Brexit could affect supply chains, warehouses**

Given the complexity and broad scope of the impact of Brexit across numerous industries and businesses, many Boards have questions about how their supply chains and warehouses might be affected.

[Read the article](#)

### **VAT and the digital economy; certain measures effective 1 January 2019**

In recent months, the European Commission has announced detailed proposals aimed at taxing digital services based on revenues generated in the country of consumption.

[Read the article](#)

### **Code of Conduct report on harmful tax practices, preferential tax regimes, blacklist**

The Code of Conduct Group released a report to the Economic and Financial Affairs Council of the EU on the group's work during the second half of 2018. Member states particularly welcomed the progress achieved on the monitoring of the commitments taken by third countries in the context of the European Union's blacklist.

[Read the article](#)



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## France

### **Compatibility with EU law, tax refunds paid by French companies receiving dividends from non-resident subsidiaries (CJEU judgment)**

The Court of Justice of the European Union (CJEU) recently ruled on the compatibility with EU law with the French Supreme Court's case law in the Accor case.<sup>3</sup> The CJEU concluded that this case law is contrary to the fundamental freedoms and that France failed to fulfil its obligations under the EU treaties because the French Supreme Court did not refer the matter to the CJEU.

[Read the article](#)

### **Withholding tax on dividends from French companies to non-resident loss-making companies (CJEU judgment)**

The Court of Justice of the European Union (CJEU) ruled that the French withholding tax levied on dividends paid by French companies to non-resident loss-making companies is contrary to the free movement of capital, and thus incompatible with EU law.

[Read the article](#)

### **Expanded anti-tax fraud procedures and CFC rules**

France's new anti-fraud law<sup>4</sup> introduces changes for a range of tax topics – including an updated list of non-cooperative jurisdictions and broadened controlled foreign corporation (CFC) rules.

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## Germany

### **Court's revised position, invoice requirement for input VAT deduction**

A claim for deduction of input value added tax (VAT) requires – among other things – an invoice that satisfies certain formal requirements of German VAT law.

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### **Participation exemption regime for dividends originating in third countries is contrary to EU law (CJEU judgment)**

The Court of Justice of the European Union (CJEU) held that the German participation exemption regime for dividends received from third countries is contrary to the free movement of capital.

[Read the article](#)



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## India

### **Renewal of APA — a first under the APA program**

A unilateral advance pricing agreement (APA) has been renewed – a first under India's APA program. The renewal demonstrates the continued interest of taxpayers in the APA program and the government's commitment to maintain it as a mechanism for resolving transfer pricing disputes.

[Read the article](#)



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## **Ireland**

### **VAT recovery also permissible for unsuccessful acquisition (CJEU judgment)**

The Court of Justice of the European Union (CJEU) rendered judgment in a case concerning an Irish airline (taxpayer) that had incurred costs – and related value added tax (VAT) – on its attempt to acquire a competing airline.

[Read the article](#)



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## **Israel**

### **Transfer pricing circular on business restructuring in MNE groups**

Israel's tax authority published guidance that presents its position on the identification and characterization of a business restructuring involving multinational entity (MNE) groups, the associated tax implications, and the specific valuation criteria for the functions, assets and risks of the business in question.

[Read the article](#)



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## **Italy**

### **Bill to transpose EU anti-tax avoidance directives into Italian law**

Provisions to transpose the European Union directives on anti-tax avoidance into Italian tax law are pending before the Italian parliament.

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### **Tax rulings, court decision address tax issues in M&As**

Recent court cases and guidance from the Italian Revenue Agency offer clarification on tax issues arising in merger and acquisition (M&A) transactions.

[Read the article](#)



## Luxembourg

### **Non-taxation of US multinational corporation not illegal state aid (EC investigation)**

The European Commission (EC) found that the non-taxation of certain profits of a US multinational corporation in Luxembourg did not lead to illegal state aid because the treatment was in line with national tax laws and the Luxembourg-US tax treaty.

[Read the article](#)

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## Netherlands

### **Dutch Supreme Court follows "per element" approach**

The Supreme Court of the Netherlands (*Hoge Raad*) rendered a final judgment in two corporate income tax cases on whether taxpayers, despite being unable to enter into a fiscal unity with subsidiaries established elsewhere in the European Union (EU), are nevertheless eligible for benefits from separate elements of the fiscal unity regime as if a fiscal unity with foreign subsidiaries could be entered into — i.e. the "per element" approach.

[Read the article](#)

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## OECD

### **OECD discussion draft, transfer pricing aspects of financial transactions**

The Organisation for Economic Co-operation and Development (OECD) released a discussion draft on the transfer pricing aspects of financial transactions.

[Read the article](#)

### **Updated country-by-country reporting guidance, dividends received, employee numbers**

The Organisation for Economic Co-operation and Development (OECD) released new guidance on the implementation of country-by-country reporting pursuant to Action 13 of the base erosion and profit shifting project.

[Read the article](#)

### **Multilateral instrument ratified by Australia, France, Japan, Slovak Republic**

The Organisation for Economic Co-operation and Development (OECD) announced that the governments of Australia, France, Japan, and the Slovak Republic have deposited their instruments of ratification or acceptance of the multilateral instrument (MLI) under the base erosion and profit shifting project.

[Read the article](#)

### **Post-BEPS issues concerning cost sharing arrangements in transfer pricing**

With the Organisation for Economic Co-operation and Development (OECD) updating the rules on cost sharing arrangements through its base erosion and profit shifting (BEPS) project, what changes might organizations need to make in order to remain compliant?



[Read the article](#)

### **Global mutual agreement procedure statistics for 2017**

The Organisation for Economic Co-operation and Development's (OECD) report on global mutual agreement procedure (MAP) statistics for 2017 covers 85 jurisdictions and "almost all MAP cases worldwide".

[Read the article](#)

### **Evaluation of OECD's final guidance, transactional profit split method**

The Organisation for Economic Co-operation and Development (OECD) released final guidance in June 2018 on the application of the transactional profit split method.

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### **Report clarifies effect of MLI on tax treaties**

The Organisation for Economic Co-operation and Development (OECD) released a report that provides an overview of changes to tax treaties resulting from application of the multilateral instrument (MLI).

[Read the article](#)

### **Peer review of dispute resolution (MAP); BEPS Action 14**

The Organisation for Economic Co-operation and Development (OECD) issued a request for comments and input on a peer review of the tax treaty dispute resolution process under Action 14 of the base erosion and profit shifting (BEPS) project.

[Read the article](#)



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## **Poland**

### **Mandatory disclosure rules, cross-border tax planning arrangements**

New tax law<sup>5</sup> in Poland includes mandatory disclosure rules that generally reflect the European Union directive (known as "DAC6") for disclosing cross-border tax planning arrangements.

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## **United Kingdom**

### **Partial VAT recovery, costs related to hire-purchase agreements (CJEU judgment)**

The Court of Justice of the European Union (CJEU) concluded that in a hire-purchase agreement, the supply of a vehicle and supplies of credit can be treated as separate supplies for value added tax (VAT) purposes.

[Read the article](#)

### **Digital services tax proposal in Autumn Budget 2018**

As the uncertainty of Brexit looms, the Chancellor's Autumn Budget 2018 took decisive action on several significant tax changes, including the introduction of a UK digital services tax, with effect from April 2020.

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### **HMRC updates ‘no deal’ guidance; practical considerations for businesses**

HM Revenue & Customs (HMRC) publish updated guidance to help businesses plan for a ‘no deal’ exit of the UK from the European Union.

[Read the article](#)

### **Updated profit fragmentation rules affecting UK business (Finance Bill)**

The UK’s rules on profit fragmentation have been updated to remove the additional notification requirements and introduce a new reasonableness test.

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### **Impact of Brexit on business**

The fourth Financial Times Brexit and Beyond Summit was held in November 2018, with KPMG in the UK continuing to take part as its founding partner.

[Read the article](#)

### **UK amends Diverted Profits Tax**

The UK’s Diverted Profits Tax (DPT) rules have been amended to:

- Address planning opportunities arising from the interaction of transfer pricing rules and the diverted profits calculation
- Extend the end of the charging notice review period to 15 months after the relevant DPT charge due date (subject to commencement provisions)
- Change the period during which a preliminary DPT notice may be issued<sup>6</sup> to 6 months after the last day on which the company tax return can be amended (subject to commencement provisions).

For further information, please contact:

[Kevin Elliot](#)



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## **United States**

### **US Tax Court: Statute of limitations if unreported PFIC gains**

The US Tax Court issued an opinion addressing the interaction of the statute of limitations for an assessment<sup>7</sup> under section 6501 with the rules for passive foreign investment company (PFIC) gains.<sup>8</sup>

[Read the article](#)

### **SECA tax audits underway as part of IRS compliance campaigns**

The Internal Revenue Service’s (IRS) Large Business & International division continues to expand its list of compliance campaigns, with 40 campaigns identified and selected to date. An increase in IRS activity related to the Self-Employment Contributions Act (SECA) tax campaign has been observed.

[Read the article](#)

### **US Tax Court: CFC’s distribution not qualified dividend income but taxable at ordinary rates**

The U.S. Tax Court granted motions for summary judgment for the Internal Revenue Service, finding the taxpayers’ controlled foreign corporation (CFC) in Hong Kong was not a domestic corporation or a qualified foreign corporation. Thus the CFC’s

distribution to the taxpayers was not qualified dividend income but was taxable to them at ordinary income tax rates.

[Read the article](#)

**Ninth Circuit: Inconsistency between S corporation's and shareholder's returns**

The US Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part a judgment of a federal district court in a taxpayer's suit for refund of individual income tax.

[Read the article](#)

**Second Circuit: Taxable gain from modified variable prepaid forward contracts**

The US Court of Appeals for the Second Circuit issued a decision that reversed and remanded a case in which the US Tax Court had found for the taxpayer on all issues concerning the treatment of variable prepaid forward contracts that were modified.

[Read the article](#)

**Sixth Circuit: Split-dollar life insurance, economic benefit treated as distribution of property to shareholder**

The US Court of Appeals for the Sixth Circuit – in a case of first impression – reversed a memorandum opinion of the US Tax Court in which that court concluded that the taxpayers had to treat as income the economic benefits resulting from their S corporation's payment of a premium on the taxpayer-spouse's life insurance policy under a compensatory split-dollar arrangement.

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**Initial impressions: Penalty relief "de minimis error" safe harbor; information returns, payee statements and the proposed regulations**

The US Treasury Department and Internal Revenue Service published proposed regulations<sup>9</sup> on penalties for failure to file correct information returns or furnish correct payee statements.

[Read the article](#)

**Proposed regulations: Modification of discounting rules for insurance companies**

The US Treasury Department and Internal Revenue Service released proposed regulations<sup>10</sup> that provide guidance on new rules<sup>11</sup> for discounting insurance companies' unpaid losses and estimated salvage recoverable for federal income tax purposes.

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**Proposed regulations: Foreign tax credit provision under new US tax law**

The US Treasury Department and Internal Revenue Service released proposed regulations as guidance under the foreign tax credit provision enacted under the new US tax law.<sup>12</sup>

[Read the article](#)

**US Tax Court: Medical-marijuana dispensary operator deficiency challenge denied**

The US Tax Court issued an opinion in a case involving a taxpayer that operated a medical-marijuana dispensary in California.

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<sup>1</sup> Special Appeal n° 1.221.170.

<sup>2</sup> Decree No. 9,580, of 22 November 2018. The publication of this regulation revokes the previous regulation, which was established by Decree No. 3000 and has been in force since 1999.

<sup>3</sup> C 310/09.

<sup>4</sup> Ref 2018-898, 23 October 2018.

<sup>5</sup> Published 23 November 2018 in the journal of laws.

<sup>6</sup> Under sections 80 and 81 (Part 3 of FA 2015).

<sup>7</sup> Under section 6501.

<sup>8</sup> Under section 1291.

<sup>9</sup> REG-118826-16.

<sup>10</sup> REG-103163-18.

<sup>11</sup> As enacted by section 13523 of the new U.S. tax law (Pub. L. No. 115-97 enacted December 22, 2017).

<sup>12</sup> Pub. L. No. 115-97, enacted December 22, 2017.



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The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

## Key links

- [Past issues of Tax Alert](#)
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National Transfer Pricing Firm of the Year and National Tax Disputes & Litigation Firm of the Year - Asia Tax Awards 2018, *International Tax Review*

Asia Tax Firm of the Year – Asia Tax Awards 2017 & 2018, *International Tax Review*

Best Advisor in Real Estate Tax Globally – Real Estate Awards 2017, *EuroMoney*

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