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Global Tax Alert

The Latest on BEPS and Beyond

December 2020

Highlights

As the year 2020 comes to a close, many of us are looking forward to the arrival of 2021. As we eagerly wait for the COVID vaccines to make a change in day to day life, we hope to be able to do the normal things we so much enjoy, such as interacting with people at work, dinners, parties, or while traveling. With that, 2021 is predicted to become a remarkable year. A year of steep economic recovery after a deep dive. A year also where the new United States (US) Administration will come in and have its impact on the geopolitical landscape, bringing strong ambitions to the table and in the process looking for multilateral dialogue and cooperation.

The European Commission has already recognized the commonalities between the ambitions of the new administration and the ambitions of the European Union (EU). On 2 December 2020, the European Commission, together with the High Representative, published their forward looking transatlantic agenda. Ursula von der Leyen, President of the European Commission said:

We are taking the initiative to design a new transatlantic agenda fit for today's global landscape. The transatlantic alliance is based on shared values and history, but also interests: building a stronger, more peaceful and more prosperous world. When the transatlantic partnership is strong, the EU and the US are both stronger. It is time to reconnect with a new agenda for transatlantic and global cooperation for the world of today.

For tax experts the question of course is what this means for the tax landscape. A couple of things seem clear.

First of all, both the Biden Administration and the EU have great ambitions when it comes to greening. With the new United Nations Climate Change Conference (COP 26) coming up in Glasgow in November 2021, the EU and US will likely be looking for an ambitious global agreement to be reached at this meeting, replacing the Paris Agreement. Moreover, both the EU and the US will be developing their own path towards carbon neutrality, and tax measures will be instrumental to achieving that. In 2021, key tax proposals, such as the Carbon Border Adjustment Mechanism, are expected.

Secondly, cooperation is also being sought on trade and technology. The EU is looking to work closely with the US on solving bilateral trade irritants through negotiated solutions and the World Trade Organization (WTO) reform efforts. The EU is looking for a new EU-US Trade and Technology Council to help facilitate trade, develop compatible standards and promote innovation. The EU would also like to open a transatlantic dialogue on the responsibility of online platforms and Big Tech – starting by working together to find global solutions for fair taxation and market distortions in the digital economy. Developing a common transatlantic approach to protecting critical technologies in light of global economic and security concerns – starting by discussions on 5G- is also on their agenda. More generally, the EU is looking for alignment on regulation and standards. With the digital tax issue being part of this wider trade and technology agenda, it seems like the environment for negotiations on the digital tax issue will evolve, with tax being part of a bigger package. This may positively impact the chances of getting to an agreement between the EU and the US on digital tax issues, hopefully sometime in 2021.

As a last important point, both President-elect Biden and the EU have indicated they would like to work together to pursue common interests in relation to China. That means that while the trade issues between the EU and the US may soften, this may not be the case for the trade relationship with China. Also, with respect to technology and greening, the focus will also be on whether non-US and -EU businesses are meeting the regulatory standards in the US and EU markets.

Therefore, 2021 will be a year where geo-political dynamics will likely start to evolve. This will also have big impacts on tax. It is essential for businesses to keep monitoring tax policy developments, focus on the greening ambitions of the EU and US as well as the environmental taxes coming in. Also, businesses should watch whether a situation will develop where trade issues may soften between the US and the EU but could remain vivid between these economic blocks and China.

For now, we would like to wish you a very happy holiday season and a good start of the New Year!

OECD

On 27 November 2020, the OECD announced that Bahrain signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI), bringing the total number of jurisdictions to 95. At the time of signature, Bahrain submitted a list of its tax treaties in force that it would like to designate as covered tax agreements (CTAs). Together with the list of CTAs, Bahrain also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) with respect to the various provisions of the MLI. The definitive MLI positions for Bahrain will be provided upon the deposit of its respective instrument of ratification, acceptance or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Bahrain did not opt in for mandatory binding arbitration.

On 26 November 2020, Chile deposited its instrument of ratification of the MLI with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Chile removed the tax treaty with Japan from its list of CTAs and added a reservation on Article 16(5)(c) (Mutual Agreement Procedure). The MLI will enter into force for Chile on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Chile of its instrument of ratification, i.e., 1 March 2021.

Also, on the same date, Indonesia and Russia made a notification confirming the completion of their internal procedures for the entry into effect of the provisions of the MLI with respect to 22 and 7 of their CTAs, respectively. Indonesia and Russia had reserved the right to delay the entry into effect of the provisions of the MLI in accordance with Article 35(7)(a) until they completed their internal procedures for this purpose. Now that Indonesia and Russia have notified the completion of their internal procedures with respect to the notified CTAs, the rule on entry into effect set out in Article 35(1) and (5) of the MLI would apply as from the date that is 30 days after the Depositary has received the notification from Indonesia and Russia that they have completed their internal procedures, i.e., as from 26 December 2020.

On 23 November 2020, the OECD released an update on the results of the peer reviews under BEPS Action 5 (harmful tax practices).

The update covers 49 regimes, which results in a total of 295 regimes that have been reviewed or are under review. The reviews were undertaken by the Forum on Harmful Tax Practices (FHTP). Out of the 49 regimes reviewed, 37 have been redesigned or abolished and 7 regimes are in the process of being amended. For the remaining five regimes, the FHTP has concluded that they do not currently pose any BEPS risk.

The Inclusive Framework on BEPS will continue its reviews and will provide updates from time to time.

Additionally, the FHTP identified 12 jurisdictions with no or only nominal tax jurisdiction.

See EY Global Tax Alert, *OECD releases 2020 update on peer review of preferential tax regimes and no or only nominal tax jurisdictions*, dated 1 December 2020.

On 18 November 2020, the OECD released a public Consultation Document on the review of the minimum standard on dispute resolution under Action 14 of the BEPS project. The Consultation Document seeks to get input on proposals for the 2020 review of BEPS Action 14 regarding the following items: (i) Experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with Mutual Agreement Procedures (MAP) in those jurisdictions that obtained a deferral within the peer review process; (ii) Additional measures that may strengthen the Action 14 minimum standard; and (iii) Additional measures that may strengthen the MAP Statistics Reporting Framework.

Interested parties need to submit their comments on the Consultation Document by 18 December 2020. In early 2021, a public consultation meeting will be held on the 2020 review of BEPS Action 14.

See EY Global Tax Alert, *OECD releases Consultation Document on 2020 review of BEPS Action 14*, dated 23 November 2020.

Also on 18 November, the OECD published the 2019 statistics on MAP, and the 2019 MAP awards. The 2019 statistics on MAP cover 105 jurisdictions and almost all MAP cases worldwide. The statistics are divided by "transfer pricing cases" and "other cases," with respect to the: (i) Opening inventory and ending inventory of MAP cases; (ii) Number of new MAP cases started; (iii) Number of MAP cases completed; (iv) Cases closed or withdrawn; and (v) Average cycle time for cases completed, closed or withdrawn.

Further, for the 2019 MAP Awards, the OECD gave recognition to the particular efforts of competent authorities in different areas, such as:

Category 1: Average time to close MAP cases

Category 2: Age of Inventory

Category 3: Caseload management

Category 4: Cooperation

See EY Global Tax Alert, *OECD releases 2019 mutual agreement procedure statistics and 2019 mutual agreement procedure awards*, dated 24 November 2020.

The OECD held its second Tax Certainty Day on 18 November 2020. The discussion focused on the improvement to dispute resolution programs and processes. The Tax Certainty agenda covered seven sessions including: (i) Session 1: Welcome and introduction to the meeting; (ii) Session 2: Introduction and release of 2019 MAP statistics; (iii) Session 3: MAP awards; (iv) Session 4: The current MAP landscape; (v) Session 5: The International Compliance Assurance Programme (ICAP); (vi) Session 6: Other tax certainty tools; and (vii) Session 7: Accelerating tax certainty through technology.

The conclusion of the event was that any progress on tax certainty will be the result of effective cooperation, which will favor the tax community, who is at the beginning of the process of gaining higher levels of tax certainty.

See EY Global Tax Alert, *OECD holds second Tax Certainty Day*, dated 3 December 2020.

European Union

On 1 December 2020, the Council of the European Union (the Council or ECOFIN) held a virtual meeting. During their meeting, the Ministers discussed the amendments to the Council directive on administrative cooperation in the field of taxation (DAC7), international tax (digital and minimum tax), the European Semester, a capital markets union, international debt relief and other topics. ECOFIN is the European Union (EU) institution where the EU Member States' competency to decide on tax matters with unanimity is executed.

The discussion on taxation followed the Council conclusions of fair and effective taxation that were adopted on 27 November 2020. The conclusions outline the Council's priorities and provide guidance to the European Commission (the Commission) in different areas of EU action. Among others:

- The EU will assess in March 2021 how to proceed on digital tax.
- DAC7 is expected to be formally adopted during January 2021 and work on DAC8 (addressing the use of alternative means of payments and investment) has started with the proposal expected in mid-2021.
- Renegotiation of the Code of Conduct blacklisting criteria will continue no later than early 2022.

The next ECOFIN is scheduled for 17 December 2020.

See EY Global Tax Alert, *EU Finance Ministers consider tax priorities and expansion of DAC obligations*, dated 7 December 2020.

Austria

On 20 November 2020, a draft bill on COVID-19 tax measures (COVID-19-Steuermaßnahmengesetz) was submitted to the Austrian Parliament.

Among others, the draft bill provides for the implementation of article 4 of the EU Anti-Tax Avoidance Directive 1 (ATAD). The Commission had issued a reasoned opinion to Austria demanding the transposition into national law of the Earnings before Interest, Taxes, Depreciation and Amortization (EBITDA)-based limitations on interest deductibility provided for in article 4 of the ATAD in 2019.

According to the interest limitation rule in the draft bill, exceeding interest costs of corporations of one tax year shall only be deductible up to 30% of the taxpayers' EBITDA of that tax year from 2021 onwards. The interest limitation rule applies to all debt financing, including those with non-affiliates.

The exceeding interest costs are to be compared to 30% of the taxpayers' tax EBITDA. The exceeding interest costs will be tax deductible up to €3 million. Also, the draft bill provides the full deductibility for standalone entities and the equity escape (i.e., 2%) rule under article 4(5)(a) of the ATAD. The draft bill further includes that taxpayers will have the possibility to carry forward non-deducted interest (for an unlimited time) or unused interest capacity (for five years). Specific rules apply to tax consolidated groups.

The new interest deduction limitation rules are applicable as from 1 January 2021. The grandfathering rule of article 4(4)(a) of the ATAD relating to loans which were concluded before 17 June 2016 is included in the draft bill.

See EY Global Tax Alert, *Austria to enact new interest limitation rule in accordance with EU ATAD as of 2021*, dated 1 December 2020.

Austria-Switzerland

On 12 November 2020, the Austrian Tax Authorities published a memorandum of understanding (MoU), based on article 25(5) of the Austria-Switzerland Tax Treaty.

The MoU is effective as of 3 November 2020. Any competent authority may terminate the MoU by giving written notice to the competent authority of the other contracting state. The termination is to take effect on the first day of the month following a period of 12 months after the date of notification of the termination. Upon termination of the MoU, any ongoing arbitration proceedings must be completed in accordance with the rules of the MoU, unless the competent authorities agree on a different course of action.

Belarus

On 14 October 2020, the Council of Ministers of the Republic of Belarus published Resolution #590 which provides that Belarus will join the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) and the BEPS Inclusive Framework (the Inclusive Framework). The full impact of Belarus' joining the Global Forum and the Inclusive Framework will be determined through the peer review process.

It is expected that Belarus will join these initiatives starting 1 January 2021.

See EY Global Tax Alert, *Belarus joins BEPS Inclusive Framework and Global Forum on Transparency and Exchange of Information for Tax Purposes*, dated 1 December 2020.

Cameroon

On 20 November 2020, the National Assembly of Cameroon approved a draft bill authorizing the President of the Republic of Cameroon (the Cameroon President) to ratify the MLI. For the ratification process to be complete, the approved bill will have to be published in the *Official Gazette*, and then the Cameroon President will proceed with the ratification of the MLI by a Presidential Decree which will also be published in the *Official Gazette*. Cameroon submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the five CTAs it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

Croatia

On 25 November 2020, the Croatian Parliament approved a draft bill for the ratification of the OECD MLI. For the ratification process to be complete, the approved bill will have to be sent to the President for promulgation and then be published in the *Official Gazette (Narodne novine)*.

Croatia submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the 62 CTAs it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

Denmark

On 3 December 2020, the Danish Parliament enacted Bill No. L 28 including changes to: (i) transfer pricing (TP), (ii) permanent establishments (PE), and (iii) foreign losses.

With respect to TP, the law significantly strengthens the current TP rules to require TP documentation to be submitted to the tax authorities no later than 60 days after the deadline for the filing of the annual corporate income tax return and provides for penalties in the case of late submission. Moreover, if the TP documentation is not contemporaneous nor submitted within the 60-day deadline, the burden of proof will be reversed and the tax authorities will be entitled to assess a taxpayer on an estimated basis for TP purposes.

With respect to the PE definition, the law amends and aligns the domestic PE definition with the new definition in Article 5 of the OECD model tax convention 2017.

With respect to the deduction for final losses in foreign entities, the enacted law provides that a Danish company is entitled to claim a tax deduction for a final loss suffered by a foreign subsidiary, PE or real estate subject to certain conditions.

The new rules with respect to transfer pricing are applicable for income years starting on 1 January 2021 or thereafter. The new PE rules are applicable from 1 January 2021. With respect to the deduction for final losses in foreign entities, the new rule is applicable for income year 2019 and onwards.

See EY Global Tax Alert, *Denmark enacts new rules on international taxation*, dated 3 December 2020.

Estonia

On 10 November 2020, the Estonian Parliament approved Bill No. 286 SE that amends the ratification law for the MLI. For the amendments to be complete, the approved bill will have to be announced by the President and then be published in the *Official Gazette*.

After the approval by the Estonian Parliament on 4 December 2019, Estonia ratified the MLI on 13 December 2019. Estonia submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the 58 CTAs it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

France

On 25 November 2020, the French Tax Authorities published the final guidance for the Mandatory Disclosure Rules (MDR), which covers the following: (i) the definitions of the terms and reporting process under French MDR; and (ii) the hallmarks.

The final guidance provides more details on the participants in the arrangement, the intermediaries (including those subject to Legal Professional Privilege), the reporting (with respect to deadlines, content and method) and further clarifications on multiple hallmarks.

See EY Global Tax Alert, *France publishes final guidance on Mandatory Disclosure Rules*, dated 2 December 2020.

Germany

On 22 November 2020, Germany ratified the MLI, via publication of the ratification law in the Federal Gazette Part II (Bundesgesetzblatt Teil II) No. 20 of 27 November 2020. Germany submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the 35 CTAs it identifies to be covered by the MLI. The instrument of ratification still needs to be deposited before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

Greece

On 13 October 2020, the Greek Tax Authorities published a decision at the official *Government Gazette*, providing an updated framework of the MAP as set forth in the double tax treaties concluded by Greece.

According to the updated framework, the taxpayer must file an application for the initiation of the MAP in the contracting state of which it is a tax resident. If it has moved its tax residence, the taxpayer must apply for MAP in the contracting state where it was a resident at the time of the double taxation. If the application is related to the non-discrimination provision, the taxpayer must file the application in the contracting state of which it is a national.

Additionally, the tax authorities determine, among other issues, the competent authority to consider the taxpayer's application, the content of taxpayer's application and the assessment of such application.

It is restated that the standard five-year statutory limitation period of the right of the Greek State to impose taxes is extended for as long as a MAP procedure is pending but only for the subject matter filed for MAP.

The correlation of the MAP procedure under double tax treaties and the MAP procedure under EU Directive 2017/1852 recently transposed into Greek legislation by virtue of L. 4714/2020 is also regulated under this decision.

Finally, the decision lists the double tax treaties that Greece has concluded. The table also includes the deadline for filing a MAP request for each tax treaty. In most tax treaties, the deadline is three years with the exception of the tax treaties concluded with Cyprus, France, Germany, Sweden, and the United States (for which MAP requests can be submitted without time limitation) and with Belgium, Italy, and Portugal (for which MAP requests can be submitted within two years). It is clarified that, when the double tax treaty does not provide a deadline for filing a MAP, there would be no time limitation; however, it is suggested that said filing is made as soon as possible and within five years.

The updated framework applies to MAP requests filed as of the publication of the tax authorities' decision as well as to pending requests for which no MAP decision has been issued. The previously applicable framework provided under decision POL. 1049/2017 is revoked.

Guernsey

On 17 November 2020, the State of Guernsey Revenue Service issued an updated version of the Guidelines for requesting MAP assistance in Guernsey.

The latest version is Issue 4 of the guidelines and mainly includes clarifying adjustments of the text in various parts of the guidelines, as well as additional references to the MLI and synthesized texts of tax treaties as modified by the MLI.

Italy

On 23 November 2020, the Italian Tax Authorities issued new instructions regarding the content and validity of the elective TP documentation available to Italian resident enterprises and Italian PEs of foreign entities to provide administrative penalty protection in the case of a TP assessment.

The new instructions introduce significant changes to the mandatory contents of the TP documentation as defined under the previous instructions (2010 Instructions), in order to adopt the BEPS Action 13 deliverable and the associated revisions to the OECD TP Guidelines (OECD TPG) guidance on documentation. The new instructions introduce the possibility to cover only certain intercompany transactions and a window for amending the TP policy/documentation for earlier financial years (FYs) – upon certain conditions – without any penalty or interest.

See EY Global Tax Alert, *Italy issues new transfer pricing documentation requirements and proposes changes to APA procedure*, dated 1 December 2020.

Mexico

On 18 November 2020, the Mexican Tax Administration published in the *Official Gazette* regulations on MDR as established in the Mexican Federal Tax Code as part of the 2020 tax reform. Mexico's MDR are effective 1 January 2020 and the initial reporting is due in 2021 for transactions that occurred in 2020 as well as for transactions that may have occurred before 2020 and have a tax effect in 2020 and subsequent years. The recently published regulations provide guidance on general reporting requirements such as: rules for transactions involving more than one advisor, information to support the reported transaction as well as the information to support that the arrangement is not reportable. Also, the regulation provides the content to be provided when reporting a transaction, including a list of the required information for each of the applicable hallmarks.

For each reportable arrangement, the Mexican Tax Administration requires the submission of an official tax form via electronic filing. The information to be included in the official tax form depends on the applicable hallmark.

See EY Global Tax Alert, *Mexico's Tax Administration publishes regulations on reporting under mandatory disclosure rules*, dated 2 December 2020.

New Zealand

On 19 November 2020, The New Zealand Minister of Revenue outlined the Government's immediate tax agenda including the consideration of introducing a digital services tax (DST). The Government's preference remains to be an OECD-led multilateral solution to the taxation of multinational enterprises (MNE's) who provide digital services. Although the Government supports the OECD's current policy design as it related to the taxation of the digital economy, there are concerns around the complexity and potential compliance costs. The Government will therefore consider implementing a DST if the OECD project does not reach an agreement within a reasonable timeframe.

On 7 September 2020, New Zealand's Inland Revenue updated their guidance on the tax treatment of cryptoassets to clarify the application of the tax rules for business and individuals who are buying, selling, trading or mining cryptoassets. The Inland Revenue has confirmed that digital assets should be treated as a form of property for tax purposes, as opposed to currency. Given that New Zealand does not have a broad capital gains regime, this means that, generally, cryptoassets will be taxable only when the taxpayer either: (i) acquires the cryptoasset for the purpose of resale; (ii) trades or deals in cryptoassets with sufficient effort and time-investment; or (iii) uses cryptoassets in a coherent and pre-planned scheme with the purpose of making a profit. The Inland Revenue has also advised that income earned from mining cryptoassets will typically be taxable both for the service provided through mining, and on the later sale of those cryptoassets.

See EY Global Tax Alert, *New Zealand introduces new tax guidance for cryptoassets*, dated 1 December 2020.

Poland

On 30 November 2020, Poland published Law no. 2123/2020 to incorporate certain changes to the *Corporate Income Tax Act*. Among others, the law contains the following measures: (i) Limited partnerships (pol. spółka komandytowa) will be treated as taxpayers in Poland (that is, eliminating tax transparency of such entities). In a similar manner, general partnerships (pol. spółka jawna) will be subject to Corporate Income Tax in Poland where partners (who are not exclusively natural persons) in such a partnership are not disclosed to the tax authorities on time; (ii) The threshold for the application of the reduced corporate income tax rate of 9% is increased from €1.2 million to €2 million; and (iii) An obligation for taxpayers whose revenue in the preceding year exceeded €50 million and tax capital groups (form of tax consolidation in Poland) to publish on their website annual information on the execution of their tax policy, including broad scope of sensitive information.

The Law will come into effect on 1 January 2021 with certain exceptions, i.a., for limited partnerships which can decide to become taxpayers only as of 1 May 2021.

See EY Global Tax Alert, *Poland implements significant changes to corporate income tax law – final bill published in Journal of Laws*, dated 1 December 2020.

Spain

On 4 December 2020, the Spanish Senate approved the ratification of the OECD MLI.

Spain submitted its MLI positions at the time of signature, listing its reservations and notifications and including 86 tax treaties that it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited before the MLI will enter into force with respect to its CTAs.

A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

On 30 November 2020, the Spanish Ministry of Finance released a draft Bill to implement the EU ATAD (Council Directive 2017/952 of 29 May 2017, "EU ATAD 2") into the Spanish Corporate Income Tax and Nonresident Income Tax provisions.

The draft rules published by the Spanish Ministry of Finance are generally in line with the EU ATAD 2 provisions and do not significantly deviate from the wording of the Directive.

This draft Bill is now subject to public consultation until 23 December 2020. Consequently, the final wording may undergo changes as a result of this process, although it is expected to continue to be in line with the Directive.

See EY Global Tax Alert, *Spain releases* *Spain releases draft Bill implementing ATAD 2 for public consultation*, dated 2 December 2020.

On 28 October 2020, the Spanish Government released the Budget Bill for Fiscal Year (FY) 2021 (the Budget Bill).

Among other measures, the Budget Bill contains amendments to the participation exemption regime for dividends and capital gains, which would be reduced from 100% to 95% of the income. This 5% reduction is achieved by treating 5% of the income as non-deductible expenses.

See EY Global Tax Alert, *Spain releases 2021 State Budget Bill*, dated 29 October 2020.

On 13 October 2020, the Spanish Government announced that the anti-tax evasion Bill would be presented to the Parliament for its approval. This Bill includes certain amendments to Spanish exit tax and the controlled foreign companies (CFC) rules with the aim of entirely aligning them with the EU ATAD 1.

Also, among other additional measures aimed at targeting situations of potential tax evasion or base erosion, the Bill introduces very significant changes to the Spanish list of tax haven jurisdictions.

For further details, see EY Global Tax Alert, *Spain sends anti-tax evasion Bill to Parliament for approval*, dated 28 October 2020.

On 23 September 2020, the Spanish Supreme Court (Tribunal Supremo) issued a decision confirming the limits on the dynamic interpretation of tax treaties. In this case, a Spanish company was deemed to pay royalties to a Swiss related party. The Spanish tax authorities considered that the 5% withholding tax rate applicable on royalty payments under the Spain-Switzerland Tax Treaty, signed in 1966, did not apply because the income recipient was not the beneficial owner. However, article 12 of the Spain-Switzerland Tax Treaty does not require that the recipient of the royalty income is the beneficial owner.

The Spanish Supreme Court ruled in favor of the taxpayer, whereby it held that the Commentaries cannot apply retroactively to a case where a prior rule was applicable. With respect to beneficial ownership, the Spanish Supreme Court rejected the approach that beneficial ownership is always applicable (as if it was "embedded" in the taxation system). The Spanish Supreme Court stressed that under no circumstance may the interpretation of the Spanish tax authorities and courts go against the proper interpretation of the tax treaties without previously assessing the effective taxation in the other jurisdiction and the routes available to avoid it under a MAP.

See EY Global Tax Alert, *Spanish Supreme Court confirms case law on limits to dynamic interpretation of tax treaties*, dated 21 October 2020.

Sweden

Recently, the Swedish Tax Agency published updated guidance on selected topics with respect to the interpretation and application of the mandatory disclosure rules of the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6) as implemented by Sweden.

The updated guidance covers among others the following topics: (i) marketable and standardized arrangements; (ii) the cross-border element in the case of PEs; (iii) cash pooling; (iv) conversion of income; and (v) transfer pricing.

United Kingdom

On 12 November 2020, the United Kingdom (UK) Government published its response to a consultation document for certain changes proposed to the UK hybrid and other mismatches regime. Some of the changes will have retroactive effect from 1 January 2017 and other changes will have prospective effect from the date that the *Finance Act 2021* receives Royal Assent.

The consultation response document further addresses the imported mismatch rules, US Global Intangible Low-Taxed Income (GILTI), relief for US limited liability companies under hybrid payee rules, US dual consolidated loss rules, illegitimate overseas deductions and the interaction of hybrid mismatch rules and transfer pricing.

See EY Global Tax Alert, *UK proposes to amend hybrid and other mismatches regime – implications for US multinationals*, dated 17 November 2020.

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