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Indirect Tax Alert

USTR announces findings in Section 301 investigations on DSTs adopted by India, Italy, Turkey, suspends punitive tariff actions on French origin goods

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Executive summary

On 6 January 2021, the United States (US) Trade Representative (USTR) released the findings in its investigations of the Digital Services Tax (DST) regimes adopted by India, Italy, and Turkey, initiated under Section 301 of the *Trade Act of 1974* (Section 301). The USTR determined each DST to be discriminatory against US companies, inconsistent with prevailing principles of international taxation, and burdensome or restrictive to US commerce.[1] While the USTR is authorized to take action under Section 301 as a result of the findings, the USTR noted in the announcement that no specific actions in connection with the findings would be taken at this time.

The following day, 7 January 2021, the USTR announced the suspension of punitive tariffs on certain French origin goods in relation to the Section 301 investigation of France's DST that were set to take effect on 6 January 2021.

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Detailed discussion

USTR findings on India, Italy and Turkey DST regimes

US Actions

In June 2020, the USTR announced the initiation of multiple Section 301 investigations into certain jurisdictions relating to the adoption or contemplated adoption of a DST. The jurisdictions under investigation included: Austria, Brazil, the Czech Republic, the European Union[2] (EU), India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.[3]

The investigations are being conducted with the goal of determining if the adopted or contemplated DSTs are unreasonable or discriminatory and whether they burden or restrict US commerce. The DST investigations aim to assess if there is discrimination against US companies, retroactivity, and potentially unreasonable tax policy. Specifically relating to tax policy, the USTR will seek to determine whether the tax policy differs from the standards embodied within the US and international tax systems.[4] See EY Global Tax Alert, *USTR initiates investigations into digital services taxes either adopted, or under consideration, by certain jurisdictions*, dated 4 June 2020 for more information.

On 6 January 2020, the USTR issued the findings of the Section 301 investigations on the DSTs adopted by India, Italy and Turkey. The USTR investigations determined that in each instance, the DST adopted was discriminatory to US companies, inconsistent with prevailing principals of international taxation, and burdens or restricts US commerce. Under Section 301, the US is entitled to take appropriate, responsive action to address acts, policies, or practices that restrict US commerce. In the announcement, the USTR noted there is no intent to take action in connection with the findings of the three reports at this time, however, they will continue to review all available options.

The USTR continues the investigations into the DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the EU, Indonesia, Spain, and the UK, with the intention of announcing the progress or completion of the investigations shortly.

Information regarding the DSTs of India, Italy and Turkey are further noted in this Alert.

India DST

The Government of India, in response to the USTR findings, published a press release on 7 January 2021[5] to defend its position on the imposition of the country's DST, introduced in the form of an Equalization Levy (EL), which consists of a "2% tax on consideration received or receivable by a nonresident e-commerce operator from e-commerce supply or services if such receipts exceed INR20 million (approximately US$267,000) during the relevant tax year"). In the press release, the Government of India disputed the USTR's claims, asserting the EL is not discriminatory, but rather, seeks to level the playing field regarding e-commerce activities undertaken by residents and nonresidents, as resident e-commerce operators are currently subject to taxes in India that nonresident operators are not required to pay. Further, the press release noted that the EL applies equally to all e-commerce operators globally, irrespective of their country of residence.

India is unlikely to reconsider its steps on the EL and might continue its implementation as a compensatory mechanism until consensus on digital tax is reached at the Organisation for Economic Co-operation and Development (OECD).

Italy DST

Italy has implemented a DST on companies with global revenues generated by "digital interface" services provided to Italian users based on a rate of 3% as of 1 January 2020. The tax applies to companies that have global, annual revenues in excess of €750 million and that have €5.5 million of digital sales that are generated in Italy. The relevant first filing deadlines are 16 February 2021 for the tax payment and 31 March 2021 for the filing of the annual return related to fiscal year 2020.[6]

Turkey DST

Turkey imposed a DST on companies that generate revenues from prescribed digital services, including, but not limited to, digital advertising and digital platform services, of at least €2 million within Turkey and €750 million globally. Currently, the DST is set at 7.5%, however, the Turkish President has unilateral authority to increase the tax rate up to 15% or decease to 1%. The Turkish Revenue Administration submitted the final communique of the tax in March 2020.

Suspension of tariffs in relation to the French DST

In July 2019, France implemented a 3% DST on companies with global revenues generated by "digital interface" services provided to French users. The tax, retroactive to 1 January 2019, applies to companies that have global, annual revenues in excess of €750 million, or US$845 million at the current exchange rate, and that have €25 million, or US$28.15 million, of digital sales that are generated in France. The USTR initiated a subsequent Section 301 investigation into the DST. (See EY Global Tax Alert, *US initiates action against France's Digital Services Tax, issues additional exclusions on China-origin goods and supplements list of products under EU subsidies dispute*, dated 12 July 2019).

The USTR issued the findings of the investigation in December 2019 and proposed retaliatory actions in the form of punitive tariffs of up to 100% on targeted French-origin goods, such as cheeses, sparkling wine, cosmetics, handbags and porcelain, which totaled an estimated US$2.4 billion of import value.[7] In July 2020, the USTR announced the decision to impose a 25% punitive tariff on certain French-origin goods; primarily cosmetics and handbags, with a delayed implementation date of 6 January 2021.[8] See EY Global Tax Alert, *USTR formalizes duty actions regarding France's Digital Services Tax with deferred implementation to 2021*, dated 13 July 2020.

On 7 January 2021, the USTR announced the punitive tariffs previously announced would be suspended indefinitely. The announcement noted the decision to suspend the tariffs was in relation to the aforementioned Section 301 investigations on DSTs in Austria, Brazil, the Czech Republic, the EU, India, Indonesia, Italy, Spain, Turkey, and the UK, as the investigations involve similar DST measures, with the goal to implement a coordinated approach in all DST investigations and subsequent retaliation, if any.

Actions for business

US companies that import goods from any of the aforementioned jurisdictions subject to USTR investigations should closely monitor the incoming Biden Administration's approach and USTR investigations, results, and subsequent actions.

Past USTR actions have included targeting specific categories of goods in certain industry subsectors. If the respective DST is found to be discriminatory, similar actions may be taken with respect to each implicated jurisdiction. Consequently, as the investigations progress, companies should be sure to fully understand the extent of products, particularly, the Harmonized Tariff Schedule of the US (HTSUS) classifications and country of origin for trade flows between the impacted jurisdictions and the US.

Endnotes

1. See USTR press release "USTR Releases Findings in DST Investigations."
2. EU member countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.
3. https://ustr.gov/sites/default/files/assets/frn/FRN.pdf.
4. https://ustr.gov/sites/default/files/assets/frn/FRN.pdf.
5. https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1686865.
6. See EY Global Tax Alert, *Italian Tax Authorities issue draft guidelines on Digital Services Tax for public consultation*, dated 21 December 2020.
7. 84 FR 66956.
8. 85 FR 43292.

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