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Global Tax Alert

The Latest on BEPS and Beyond

October 2022

EY Tax News Update: Global Edition

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Highlights

Whoever thought that the last part of this year was going to be all about Pillar Two was not necessarily wrong. Indeed, all eyes are still on Europe to see whether the European Union (EU) can move forward as a single block and also on the Inclusive Framework on BEPS that is focused on the Implementation Framework. But the past month has shown that policy makers are also focusing on additional fronts they have opened against BEPS and beyond.

The OECD has presented a number of new reports on a wide range of topics. These reports include important steps made on transparency, by expanding the Common Reporting Standard with reporting requirements related to crypto-assets. The European Commission will follow-up in the next few weeks with a proposal to revise the Directive on Administrative Assistance (DAC8). Furthermore, the Inclusive Framework reported on its work on the BEPS 2.0 project.

In addition, the OECD Secretariat produced a report on developing countries in international tax. It will be interesting to learn the United Nation's Committee on Experts' thoughts on this report during their annual meeting in Geneva this week. The OECD Secretariat also shared its thoughts on the impact of Pillar Two on tax incentives. Whether Pillar Two will actually be implemented may also depend on the ability of the Inclusive Framework to agree on safe harbors and a workable implementation framework in the coming weeks.

EY

Building a better working world

Commentators can also address a new Pillar One consultation document focusing on tax certainty. Other Pillar One papers will be issued by the end of the year, which goes to show that agreement on Pillar One is not yet within reach.

At the EU level, policy makers have proven they can act much faster. In fact, the EU broke its own record by adoption of a windfall tax within a three-week time frame. Labeled as an emergency "solidarity contribution," the EU avoided the cumbersome unanimity procedure, as the EU Member States adopted the tax with a qualified majority of Member States while bypassing the European Parliament. Though some Member States stressed that this should not set a precedent for future EU tax measures, other Member States are keen to find alternative paths for closer fiscal cooperation in the EU. The latter group is particularly frustrated with the inability to adopt the Pillar Two Directive pending Hungary's veto. Soon we will see which path they will pursue at the EU level, or whether they are willing to adopt Pillar Two unilaterally.

As we analyzed the developments of this month, we couldn't help wondering how the policy makers deal with so many concurrent tax initiatives. Legislators may need to prioritize projects to avoid overloading tax administrations as well as taxpayers. However, until they do, it will be important to stay abreast of the latest developments on BEPS and our latest monthly digest is here to help with that.

BEPS 2.0

OECD

OECD Secretary-General tax report to G20

On 12-13 October 2022, the G20 Ministers of Finance and Governors of Central Banks met in Bali, Indonesia. Before the G20 meeting, the OECD issued the OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors, providing an overview of the latest international tax developments, including updates on Pillar One and Pillar Two.

The Tax Report announces the release of another public consultation document by the end of 2022 on the *Withdrawal and Standstill of Digital Services Taxes and Other Relevant Similar Measures*. By that point, and building on the ongoing work, the Multilateral Convention can be drafted and adopted by mid-2023. In parallel to Amount A, significant progress is being made on Amount B. A consultation document will be released by year end on Amount B with a view to complete the ongoing work in the first half of 2023.

With respect to Pillar Two, the Tax Report reaffirms the ongoing work of the Inclusive Framework on developing the Global Anti-Base Erosion (GloBE) Implementation Framework as well as a peer review process to assist implementing jurisdictions in reaching consistent and coordinated outcomes under the rules. The Inclusive Framework is also working on the development of safe harbors, simplifications and a standardized return and information exchange framework to facilitate compliance. According to the Tax Report, this work is expected to be completed by the end of this year.

In addition, the Tax Report confirms that work is still ongoing on the Subject to Tax Rule (STTR) draft model provision and related Commentary, as well as the draft multilateral instrument to facilitate the implementation of the STTR.

Public consultation on the Progress Report on certain aspects of Amount A of Pillar One

On 6 October 2022, the OECD released a public consultation on the Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One. The consultation document includes draft rules on the administration of process for Amount A, the tax certainty framework for Amount A, and tax certainty for issues related to Amount A, with procedures for in-scope Multinationals Enterprises (MNEs) to comply with the rules. The rules on administration are being released for a public consultation for the first time. Therefore, the draft rules on administration are supplemented with an explanatory note, providing in particular information on the interactions with domestic administrative procedures.

According to the report, the work on the other building blocks of Amount A has continued and two other public consultation documents will be released by the end of 2022: (i) withdrawal and standstill of digital services taxes and other relevant similar measures; and (ii) Amount B. The work on Amount B is expected to be completed during the first half of 2023.

The consultation period on the discussion draft ends on 11 November 2022.

OECD releases report on Tax Incentives and Pillar Two

Also on 6 October, the OECD released the report Tax Incentives and the Global Minimum Corporate Tax. The report supports policymakers in reassessing tax incentives, building on the OECD's ongoing work in the area of tax incentives and Effective Tax Rates. The report also addresses the current use of tax incentives in developed and developing countries in the context of the GloBE Rules and shows how key aspects of these rules may impact different types of tax incentives differently.

The report suggests that the design of the GloBE Rules can provide new momentum for jurisdictions to engage in tax incentive reform that will make their incentive mix more effective in attracting real investments in a post-GloBE environment. At the same time, the OECD discourages the use of incentives that provide windfall gains to MNEs through low levels of taxation. The report concludes with several policy considerations for jurisdictions.

See EY Global Tax Alert, *OECD releases report on interaction of Tax Incentives and Pillar Two Country developments*, dated 13 October 2022.

Country developments

Australia releases consultation paper on BEPS 2.0 two-pillar global agreement

On 4 October 2022, the Australian Treasury released a consultation paper seeking input on how to design and implement the OECD/G20 BEPS 2.0 two-pillar global agreement in Australia. The paper poses 40 questions on how the two-pillar global agreement would operate in Australia, and how Australian stakeholders view the benefits, challenges and impacts.

The consultation paper includes 24 questions on implementation of the GloBE Model Rules (Pillar Two) in Australia, which address issues such as the potential mode of implementation, ways to minimize compliance costs and the implementation of a Domestic Minimum Tax. In addition, the consultation paper raises questions around implementation timing, administrative provisions and safe harbors.

The consultation will run until 1 November 2022.

See EY Global Tax Alert, *Australian Treasury releases consultation paper on BEPS 2.0 two-pillar global agreement*, dated 4 October 2022.

Ireland announces Budget 2023

On 27 September 2022, the Irish Minister for Finance presented Budget 2023. Among other items, the Minister:

- Reiterated Ireland's commitment to the OECD two-pillar agreement and separately noted Ireland's long-standing position that coordinated multilateral action is the best approach to ensuring that the international tax system keeps pace with the changes in how business today is conducted internationally.
- Announced that, in conjunction with work to develop the elements required to give effect to the Pillar Two rules, that serious ongoing consideration is being given to options for a move towards a territorial tax system of taxation.
- Announced that Ireland will introduce amendments to the payable element of the research and development tax credit scheme in *Finance Act 2022* (to be enacted in December 2022) to ensure the regime is regarded as a "qualifying refundable credit" for the purposes of the Pillar Two Model Rules to protect the value of the regime in an international context
- Announced that, in recognition of anticipated changes in the broader international tax environment (specifically under the OECD Pillar Two agreement), the effective rate under the Knowledge Development Box regime is to be increased from 6.25% to 10% (from a date to be set by a future commencement order)

See EY Global Tax Alert, *Ireland announces Budget 2023 dated 29 September 2022*.

Malaysia reaffirms commitment to implement Pillar Two

On 7 October 2022, the Minister of Finance tabled the Government's Budget 2023 proposals to Parliament. Among other items, the Budget proposals reaffirmed Malaysia's commitment to implement Pillar Two and revealed Malaysia's target to implement a Qualified Domestic Minimum Top-up Tax in 2024.

As Malaysia's Parliament was dissolved on 10 October 2022, the Budget will need to be re-tabled once a new Government is in place.

Further details on the introduction of Pillar Two are expected from the Malaysian Government over time.

BEPS and other developments

OECD

OECD updates CbCR guidance

On 13 October 2022, the OECD released additional guidance to give greater certainty to tax administrations and MNE groups on the implementation and operation of BEPS Action 13 Country-by-Country (CbC) Reporting (CbCR). As jurisdictions have moved into the implementation stage, some questions of interpretation have arisen. In the interests of consistent implementation and certainty for both tax administrations and taxpayers, the Inclusive Framework on BEPS has issued this updated guidance to address the following: (i) positive and negative figures in completing Table 1; (ii) reporting permanent establishment information; and (iii) short accounting periods/long accounting periods.

Mongolia signs MLI

On 6 October 2022, the OECD announced that Mongolia signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI). At the time of signature, Mongolia 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, Mongolia 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 Mongolia 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. Mongolia did not opt in for mandatory binding arbitration.

Sixth annual progress report of the Inclusive Framework on BEPS

On 4 October 2022, the OECD published the sixth annual progress report of the OECD/G20 Inclusive Framework on BEPS. The Progress Report describes the progress made to deliver on the mandate of the OECD/G20 Inclusive Framework, covering the period from September 2021 to September 2022. The Progress Report contains four parts of substantive content: Part 1 reports on the implementation of the two-pillar solution to address the tax challenges arising from the digitalization of the economy. Part 2 focuses on the implementation of the BEPS minimum standards and Part 3 on the other BEPS Actions. Finally, Part 4 provides an update on activities undertaken to support the Inclusive Framework developing countries.

According to the progress report, notable progress has been achieved under Actions 5, 6, 13 and 14, which comprise the four BEPS minimum standards. Among other things, the Progress Report mentions that over 300 preferential tax regimes have been reviewed under Action 5 and over 41,000 tax rulings have been exchanged among members of the Inclusive Framework. As of September 2022, the MLI have been signed by 99 jurisdictions and effectively modified over 940 treaties concluded among the 77 jurisdictions, which have ratified, accepted or approved it. As for Action 13, over 100 jurisdictions have already introduced CbCR legislation. Finally, the work on the 2020 Action 14 review has been suspended temporarily to allow OECD/G20 Inclusive Framework members and the OECD Secretariat to give priority to implementation of the Two-Pillar Solution. The review of the BEPS Action 14 will be taken up after further progress on that work.

Fifth annual peer review on BEPS Action 13 released

On 4 October 2022, the OECD released the compilation of the outcomes of the fifth annual peer review (the Compilation) of the minimum standard on Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) of the BEPS project.

According to the executive summary accompanying the Compilation, over 100 jurisdictions have already introduced legislation to impose a filing obligation for CbCR on MNE groups, covering almost all MNE groups with consolidated group revenue equal to or exceeding €750 million. Where legislation is in place, the implementation of CbCR has been found to be largely consistent with the Action 13 minimum standard. However, 28 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework. Of the jurisdictions that have already introduced the legislation, 27 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Moreover, 82 jurisdictions have multilateral or bilateral

competent authority agreements in place, which results in more than 3,000 exchange relationships. In addition, 64 jurisdictions have provided detailed information about the appropriate use of CbC reports, enabling the Inclusive Framework to obtain sufficient assurance that measures are in place to ensure the appropriate use.

Further work will continue to monitor the implementation and operation of CbCR and to highlight progress made by jurisdictions to address the recommendations that have been made.

South Africa and Bulgaria deposit their respective instrument of ratification of the MLI

On 30 and 16 September 2022, South Africa and Bulgaria deposited, respectively, their 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, South Africa changed its preliminary positions by choosing to apply optional Article 9 (4) (capital gains from alienation of shares or interests) and Article 11 (application of tax agreements to restrict a party's right to tax its own residents). Likewise, Bulgaria changed its initial MLI positions, including: (i) Article 9 (i.e., capital gains); (ii) Articles 12, 13 and 15 (permanent establishment provisions); and (iii) Article 17 (corresponding adjustments). Also, Bulgaria added Saudi Arabia to its list of CTAs and removed Germany, Switzerland and Uzbekistan from its list of CTAs.

The MLI will enter into force for both jurisdictions on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of their instrument of ratification, i.e., on 1 January 2023.

OECD publishes Manual on Bilateral APAs

On 28 September 2022, the OECD published its Bilateral Advance Pricing Arrangement Manual approved by the Inclusive Framework on BEPS and all members of the OECD Forum on Tax Administration. The Manual is intended to provide an effective guide on Bilateral Advance Pricing Agreements (BAPAs) for both tax administrations and taxpayers, setting out the objectives of BAPAs and obstacles currently faced. The Manual also includes best practices and provides practical resources (e.g., sample BAPA timelines, template agreements).

The intention behind this Manual is to allow jurisdictions to work towards improving existing practices by adapting the agreed best practices based on their own timelines and order of priority, keeping in mind that jurisdictions have different levels of practice with respect to BAPAs at the outset. The best practices aim to streamline the BAPA process through: (i) mitigating delays by differences in BAPA processes in each jurisdiction; (ii) avoiding information asymmetries; (iii) increasing transparency between competent authorities; and (iv) ensuring that there are realistic expectations at each stage of the BAPA process.

See EY Global Tax Alert, *OECD publishes Manual on Bilateral APAs*, dated 5 October 2022.

OECD publishes France's arbitration profile

On 16 September 2022, the OECD published the Arbitration Profile of France applying Part VI (mandatory binding arbitration) of the MLI. The arbitration profile contains the following: (i) references to a jurisdiction's MLI position, Mutual Agreement Procedure (MAP) profile and the synthesized texts obtainable from the MLI Matching Database; (ii) indication of the type of arbitration process that will apply to that jurisdiction as the default type of arbitration; (iii) reservations made; (iv) hyperlinks to the competent authority agreements concluded in respect to the Arbitration clause of the MLI; and (v) any further clarifications.

European Union

Public consultation on BEFIT

On 13 October 2022, the European Commission launched a public consultation on its "Business in Europe: Framework for Income Taxation" (BEFIT) initiative.

The consultation seeks the public's views on the various policy options to design BEFIT, such as:

- Scope: Align BEFIT as much as possible with the Pillar Two threshold or further broaden its scope through mandatory or optional application, for example, to cover Small and Medium-sized Enterprises.
- Calculation of the BEFIT tax base: Establish a comprehensive set of tax rules to determine taxable income, or start from companies' financial accounting statements and make limited adjustments for taxation.
- Distribution of the tax base across EU countries using a formula: Pillar One consensus on using a profit allocation formula could help pave the way for using a formula in BEFIT. The Pillar One formula only uses one factor, while the BEFIT should use at least three factors (tangible assets, staff numbers, payroll and sales by destination).

The public consultation consists of a questionnaire and the opportunity to submit a position paper. It also includes a document with the call for evidence for an impact assessment that is open for feedback in a free format.

The deadline for submitting input is 5 January 2023, and the Commission is expected to develop a concrete legislative proposal and release it during Q3 2023.

ECOFIN adopts revised list of non-cooperative jurisdictions for tax purposes

On 4 October 2022, the Council of the European Union (the Council) held an Economic and Financial Affairs Council (ECOFIN) meeting where Finance Ministers approved the Council Conclusions on the revised EU List. In this update, the Council decided to add Anguilla, the Bahamas, and the Turks and Caicos Islands to Annex I of the EU list (the so-called EU black list). The revised Annex I of the EU List now includes 12 jurisdictions: American Samoa, Anguilla, the Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, the Turks and Caicos Islands, the US Virgin Islands and Vanuatu.

With respect to Annex II (the so-called EU gray list) and the state of play of pending commitments, the Council decided to remove Bermuda and Tunisia from Annex II as they have fulfilled all their commitments. Armenia and Eswatini were added to the Annex II as they have received recommendations to amend their preferential tax regimes by the end of 2023. In addition, Costa Rica was not removed from this list as it did not remove its foreign-source income exemption regime. As a result, the revised Annex II now comprises 22 jurisdictions: Armenia, Barbados, Belize, Botswana, British Virgin Islands, Costa Rica, Dominica, Eswatini, Hong Kong, Israel, Jamaica, Jordan, Malaysia, Montserrat, North Macedonia, Qatar, Russia, Seychelles, Thailand, Turkey, Uruguay, and Vietnam.

The Council will continue to review and update the EU List biannually, with the next update due in February 2023.

See EY Global Tax Alert, *ECOFIN adopts revised list of non-cooperative jurisdictions for tax purposes; Pillar Two Directive not on the agenda*, dated 4 October 2022.

Country developments

Belgium Constitutional Court challenges provisions of MDR/DAC 6 implementation in Belgian Law

On 15 September 2022, the Belgian Constitutional Court issued a decision addressing a number of issues in relation to the Belgian Law transposing the Directive on Administrative Cooperation on cross-border tax arrangements (DAC6 or Mandatory Disclosure Rules (MDR)). These issues were introduced to the Court by the Belgian Bar Association and the Institute for Tax Advisors and Accountants with the aim of (partially) annulling the Law, mainly on the ground of incompatibilities between DAC6 provisions as implemented in Belgium and the possibility to invoke the legal professional privilege.

The Court ruled partially in favor of the party requesting the annulments, annulling four provisions related to the periodic reporting of marketable arrangements. According to these provisions, professional privilege/secrecy could not be invoked with respect to this kind of reporting. With the Court annulling these provisions, legal professional privilege can now be invoked in cases related to the obligation of periodically reporting marketable arrangements.

The Court also questioned certain fundamental concepts and mechanics of DAC6, requesting the Court of Justice of the European Union (CJEU) whether the European Directive infringes the principle of equality and non-discrimination, the principle of legal certainty and the right to respect the private life.

Brazilian Administrative Court confirms that business profits article prevails over CFC regime

On 15 August 2022, an Administrative Court of Brazil upheld, on case º 1201-005.569, that profits of a foreign subsidiary, resident in a country that has a tax treaty with Brazil, cannot be taxed automatically under previous Controlled Foreign Company (CFC) rules. In this case, the Brazilian tax authorities issued a tax assessment, for 2013 and 2014, to a Brazilian company for failing to pay corporate income tax on income earned by a wholly-owned subsidiary resident in the Netherlands. According to the Brazilian CFC rules for the contended period, profits of any foreign subsidiary, despite their domicile or the nature of the income, would be allocated automatically to the Brazilian shareholders on 31 December of each year and, therefore, be subject to tax.

The taxpayer asserted that Article 7 (business profits) of the Brazil-Netherlands tax treaty, prevents the profits of companies resident in one contracting state (in this case the Netherlands) from being taxed by the other Contracting State (in this case Brazil). In addition, according to the Brazilian Tax Code, tax treaty provisions prevail over domestic law.

The Administrative Court had a tie vote where half of the judges vote in favor of the taxpayer and the other half against the taxpayer. According to the reasoning in favor, a tax treaty cannot be overridden by domestic law and the applicable provision of the tax treaty should prevail. The decisions against the taxpayer were supported on the reasoning that Brazilian law levies taxes on foreign profits made available to the Brazilian shareholder and not on profits of the foreign subsidiary. Therefore, this would be a domestic tax issue that cannot be subject to the tax treaty provisions.

The final decision of the Administrative Court was in favor of the taxpayer. This is in accordance with Brazilian law where in the event of a tie vote in the trial of administrative cases, the decision must be declared in favor of the taxpayer.

Denmark proposes taxation of dividends paid to foreign states

On 23 September 2022, the Danish Government published a draft bill proposing to introduce taxation of dividends paid to foreign states and institutions that are an integrated part of foreign states. Under the currently enacted legislation, foreign states and institutions that are an integrated part of foreign states are exempt from withholding tax on dividends. Separate corporate entities owned by foreign states are treated as corporates subject to the ordinary Danish tax regime.

Under the new proposed regime, foreign states and institutions that are integrated parts of foreign states will be subject to a 27% withholding tax on dividends distributed by Danish companies. In addition, a refund of 5% is granted, reducing the tax withheld to 22%. A higher refund can also be granted by application of relevant Double Tax Conventions, leading to a lower effective withholding tax rate. Finally, an exemption is provided for dividends paid by certain Danish investment funds and investment companies.

If enacted, the new rule will be applicable to dividends paid as of 1 March 2023 and thereafter.

See EY Global tax alert, *Denmark proposes taxation of dividends paid to foreign states*, published on 28 September 2022.

Dominican Republic releases MAP guidelines

On 30 August 2022, the Dominican Republic issued General Norm 10-2022, establishing the guidelines for applying the MAP. The guidance provides an overview of the formal and material conditions of the procedures in the Dominican Republic and is aiming at serving as a guideline for taxpayers applying for a MAP. Key items addressed in the guidelines include: (i) who is in scope; (ii) steps to file a MAP request; and (iii) review process of the MAP.

The guidelines entered into effect on 30 August 2022.

See EY Global Tax Alert, *Dominican Republic's General Directorate of Internal Taxes establishes guidelines for applying mutual agreement procedure*, dated 6 September 2022.

German Federal Council approves draft updating the Ordinance on cross-border transfer of functions rules

On 7 October 2022, the German Federal Council approved a draft Ordinance updating the existing Ordinance on the Transfer of Business Functions (the existing Law).

The draft, issued by the German Government on 31 August 2022, is intended to align the German legislation with recent legal changes to the cross-border transfer of function rules following the current OECD Transfer Pricing Guidelines in order to enhance legal certainty but also to provide clarification with respect to certain details of the existing Law.

The updated Ordinance includes some aspects where the rules get further tightened beyond the recent legal changes and the existing Law. Among others, the updated Ordinance extends the definition of a "transfer of function" and includes changes to the calculation of the transfer package while it also eliminates certain provisions of the existing Law without replacing them. Additionally, while the existing Law only required a taxpayer to provide prima facie evidence, the updated Ordinance now shifts the burden of proof to taxpayers by requiring a taxpayer to provide evidence under certain provisions.

The updated Ordinance will enter into force after its publication in the *Official Gazette*, and the rules are intended to apply with retroactive effect for all completed transfers of functions for the tax period beginning after 31 December 2021.

See EY Global tax alert, *German Government issues draft order decree law on cross-border transfer of function rules*, published 29 September 2022.

New Zealand case of tax avoidance on interest deductions

On 30 September 2022, the Supreme Court of New Zealand delivered a verdict in the case *Frucor Suntory New Zealand Limited v. Commissioner of Inland Revenue [2022] NZSC 113*. The decision upheld the Court of Appeal's earlier finding of tax avoidance but overturned the Court of Appeal's finding that abusive tax position penalties should not apply. In this case, a company in New Zealand entered into a financing arrangement with a bank which was partially funded by the parent company of the New Zealand company in New Zealand. The company in New Zealand claimed interest deductions on the entire loan granted by the bank. The Commissioner of Inland Revenue (CIR) contended that the funding arrangement was a tax avoidance arrangement and therefore void. The CIR was of the opinion that the company in New Zealand was only entitled to a smaller amount than that claimed (i.e., the amount of the loan to the bank net of the funding the bank received from the parent).

The Supreme Court found, in a majority decision, that, in economic substance, the payments in respect of which the company in New Zealand sought the disallowed deductions were repayments of the principal. The arrangements on which the company in New Zealand relied to categorize these principal repayments as interest were contrived and artificial. Deductibility for such repayments is not within the purpose of allowing deductibility for "interest incurred" according to domestic law.

Poland proposes changes to the "shifted profits tax"

On 7 October 2022, a draft bill providing changes in the *Corporate Income Tax (CIT) Act* was passed by the Polish Parliament and waits for the President's signature. This draft bill contains some significant amendments, among others, to the shifted profits tax.

According to the currently applicable rules, the 19% shifted profits tax applies to Polish entities and to entities with a permanent establishment in Poland and is levied on certain categories of costs (such as financing costs, royalties payments, payments for selected services) incurred in a tax year by a Polish CIT payer towards (directly or indirectly) a related entity applying a low effective tax rate (ETR).

The adopted draft provides for the following modifications to the shifted profits tax provisions:

- Clarification that the condition regarding a low ETR (lower than 14.25% or exemption from taxation) should be verified with respect to income earned from the qualified categories of costs and not with respect to the entire income of the foreign recipient.
- Introduction of the rule shifting the burden of proof to the Polish taxpayer. The Polish taxpayer will be required to prove that the conditions for triggering the shifted profit tax are not met.
- Automatic application of the tax on shifted profits to payments made to related entities in jurisdictions with which Poland or the EU has not ratified an international agreement, in particular, a tax treaty constituting the basis for obtaining tax information from the tax authorities of this jurisdiction.

See EY Global Tax Alert, *Poland proposes change to shifted profits tax that places burden of proof on the Polish taxpayer*, dated 3 October 2022.

Spain releases a report on abusive transactions

On 1 September 2022, the Spanish Tax Authority released a report concluding that consecutive transfers of a shareholding in a Spanish subsidiary between group companies are abusive, and relevant taxpayers may be subject to penalties.

In the case at hand, the interest in the Spanish subsidiary was initially held via a United States (US) company and transferred as such to another US group company. Subsequently, the US company, which acquired the interest of the Spanish subsidiary, transferred it to the general partner of a Dutch company, who then transferred it to another Dutch company.

None of the abovementioned transactions were subject to tax in Spain since, in the first case, the US companies were part of the same consolidated tax group meeting the requirements under the Protocol of the Spain-US Income Tax Treaty. In the second, the acquiring US company held the interest for less than 1 year, failing to meet Article 13 (4) (capital gains) under the Spain-US Income Tax Treaty.

Despite the claims of the taxpayers that the transfers were justified in light of avoiding differences in exchange rates and formal US corporate law requirements, the Spanish Tax Authority concluded that avoiding taxation was the sole purpose of these transactions.

See EY Global tax alert, *Spanish tax authorities deem a series of consecutive intra-group share transfers as abusive and potentially subject to penalties in binding report*, published 14 October 2022.

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