CFE's Tax Top 5

Key tax news of the week

Brussels, 11 December 2017

1. **EU list of non-cooperative jurisdictions adopted by EU finance ministers**

The Council of the EU sitting as ECOFIN (Economic and Financial Affairs Council) has approved Commission's list of non-cooperative jurisdiction for tax purposes. The list includes 17 countries that are failing to meet European tax good governance standards: American Samoa, Bahrain, Barbados, Grenada, Guam, Korea (Republic of), Macao, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia and the United Arab Emirates. The first European list is part of the EU's efforts to promote tax good governance, to dissuade external threats to EU Member states' tax bases and to address standards of third countries that refuse to cooperate in tax matters.

The EU listing criteria included transparency, BEPS implementation and commitment to fair tax competition. In addition, 47 countries have been 'grey' listed, and have committed to addressing the deficiencies in their tax systems and to meet the required criteria, following a dialogue with the EU. Work on the list started in July 2016 within the Council's working group responsible for implementing the EU Code of Conduct on business taxation. In November 2016 the Council reached conclusions on the process to be followed, setting the end of 2017 as a deadline for finalising the list. Since then, the working group has overseen a screening that included a technical dialogue with a number of third country jurisdictions.

Compliance

In order to ensure compliance with the EU measures, the EU has designed defensive measures in tax area could be taken by the Member States. Non-tax measures taken by the EU are also envisaged to effectively discourage non-cooperative practices in the jurisdictions placed on the list. Without prejudice to the competence of Member States to apply additional measures, the actions include:

? Non-deductibility of costs;
? CFC rules;
? Withholding tax;
? Limitation of participation exemption;
? Switch-over rule;
? Reversal of the burden of proof;
? Special documentation requirements;
? Mandatory disclosure of specific tax schemes with respect to cross-border arrangements.

The EU listing process will continue in 2018. As a first step, letters will be sent to all the blacklisted jurisdictions explaining the decision and the action required to be removed from the list. The Commission and the Code of Conduct Group for business taxation will continue to monitor the implementation of the criteria, with the first interim report expected mid-2018.

2. Council conclusions reached on taxation of the digital economy

The ECOFIN Council reached conclusions which highlight the urgency in agreeing globally accepted and tax policy response to the taxation of the digital economy. The adopted Council conclusions suggest revision of international tax rules, including appropriate nexus in the form of a virtual permanent establishment.

Revisiting the transfer-pricing and profit allocation rules in line with the arm's length principle forms part of the Council conclusions. The Council takes the view that the appropriate nexus in the form of a virtual permanent establishment, alongside any changes to the transfer pricing and profit-allocation rules should take into account how value is created within various business models. Furthermore, the Council urged the OECD to come up with appropriate solutions for the network of double tax treaties that are fit for purpose for the global challenges related to taxation of the digital economy. The Council conclusions also reiterate that unilateral solutions in the absence of international consensus can lead to double taxation disputes between Member states that could undermine the Single Market.

The Estonian presidency initiated a high-level discussion at EU level in July 2017. In September, ministers discussed the issue at an informal meeting in Tallinn. The Commission subsequently issued a communication in September 2017 outlining the challenges and possible solutions.

The EU finance ministers agreed that the EU should closely follow international response in particular at OECD level and consider appropriate responses. The OECD is expected to publish its report on the taxation of the digital economy in April 2018. The Bulgarian EU presidency intends to follow-up with an EU legislative proposal in spring 2018.

3. OECD seeks input on disclosure of CRS avoidance arrangements and offshore structures

Today the OECD published a consultation document inviting input on model mandatory disclosure rules. The model rules are intended to target promoters and intermediaries involved in the design, marketing or implementation of the common reporting standards (CRS) avoidance arrangements or offshore structures. The proposed rules would require the intermediaries to disclose information on the scheme to their national tax authority. The rules contemplate that information on those schemes (including the identity of any user or beneficial owner) would then be made available to other tax authorities in accordance with the requirements of the applicable information exchange agreement.

This consultation follows on the BEPS Action 12, which envisaged establishment of mandatory disclosure rules, albeit not as a minimum standard. Public input is sought on all aspects of these model rules. Interested parties are invited to send their comments by **15 January 2018** at the latest by email to MandatoryDisclosure@oecd.org in Word format. They should be addressed to the International Co-operation and Tax Administration Division, OECD/CTPA.

4. EU Commission announced Code of Conduct on withholding taxes

The EU Commission has today announced new guidelines on withholding taxes (WHT) to help Member States reduce costs and simplify procedures for cross-border investors in the EU. Today's recommendations, developed alongside national experts, form part of the EU' Capital Markets Union plan and should improve the system for investors and Member States alike. In particular, the Code of Conduct aims to reduce the challenges faced by smaller investors when doing business cross-border. It should result in quick, simplified and standardised procedures for refunding withholding taxes where appropriate.

The Code is a non-binding document which calls for voluntary commitments by Member States and should be considered as a compilation of approaches to improve the efficiency of current withholding WHT procedures, in particular for refunds of WHT to which Member States can add or adapt elements to meet national needs or contexts.

5. Apple has paid the State aid recovery assessment to Ireland

Media reports indicated that Apple had paid the amount of 13 billion EUR to Ireland in an escrow account, pending resolution of the appeal filed at the EU courts. The Irish government said in a statement that an agreement had been reached for the Apple recovery in the framework of the principles that govern the escrow arrangements.

The European Commission decided in October to refer Ireland to the ECJ in accordance with Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) for failing to recover the assessed back taxes worth up to €13 billion. The recovery was required by a Commission decision of 30 August 2016, which concluded that Ireland's tax rulings issued to Apple were illegal under the EU State aid rules. The deadline for Ireland to implement the Commission's decision on Apple's tax treatment was 3 January 2017.

Ireland has appealed the Commission's decision to the Court of Justice, which does not suspend the recovery but allows for the recovered amount to be placed in an escrow account, pending the outcome of the EU court proceedings.

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