Contributions for Edition 22 of the EMEA Tax Bulletin should be with Sunny Rowley at sunny.rowley@bkremea.com by 5 April 2019

EMEA TAX BULLETIN

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Dear Friends and Colleagues,

Welcome to the first edition of the EMEA Tax Bulletin for 2019.

A new year, new hopes, ideas and aspirations, a new year full of things that have never been and maybe exciting tasks and challenges which we have not faced before. Whatever 2019 has in store for you, my warm wishes for happiness and prosperity to you and your families!
And amongst all the “new”, no doubt some of the “old” will lead us though this year as well – our joy in working with our BKR colleagues across our region (and beyond) and in sharing knowledge and experiences with each other. Let us continue to do so.

In this edition, you will find articles and information about various topics from Italy, Austria, the Netherlands and the UK, as well as a short report about the EMEA Tax Meeting which took place in Amsterdam in November last year.

Many thanks to all who have volunteered to contribute articles to this edition of the EMEA Tax Bulletin, as well as to Sunny, Julia and for putting it together.
Your contributions are much appreciated, and we are constantly looking for articles. Therefore, please continue to share your tax news with your colleagues from the region!

If there is anything the tax committee can do for you, please do not hesitate to get in touch.
In the meantime, may 2019 be a kind to you!

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Within this edition (click to jump to page):

Borioli & Colombo Associati, contributes to OECD public consultation on a discussion draft on financial transactions

Borioli & Colombo has recently contributed to the public consultation closed on 7 September on the TP issues related to financial transactions under a BEPS perspective (http://www.oecd.org/tax/transfer-pricing/oecd-releases-beps-discussion-draft-on-the-transfer-pricing-aspects-of-financial-transactions.htm).

In particular, the OECD discussion draft elaborated on the accurate delineation analysis and the issues related to the pricing of financial transactions such as treasury function, intra-group loans, cash pooling, hedging, guarantees, and captive insurance.

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European Commission surprisingly considers Austria's provisions on interest limitations non-compliant with Art 4 ATAD

EU Anti-BEPS Directive.
The EU Anti-Tax Avoidance Directive (ATAD) calls on member states to implement (among others) interest limitation rules into national law by 31 December 2018. According to Art 4 ATAD exceeding borrowing costs shall be tax-deductible only up to 30 percent of the EBITDA. Regarding the transposition of the ATAD into national law, the member states may choose between various options.

Member states, whose national interest limitation rules are considered “equally effective” by the EU commission to combat tax evasion and tax avoidance may apply these targeted rules until 1 January 2024 at the latest.

Austria's previous position.
Until previously, the Austrian Ministry of Finance considered the interest limitation clauses in the Austrian corporate income tax act (limitation on the deductibility of interest for intra-group leveraged participations or of interest and royalty payments to low-taxed group companies abroad) as “equally effective” to the interest limitation rules according to Art 4 ATAD. That is why Austria refrained from implementing Art 4 ATAD into national law by year-end 2018.

Information of the European Commission.
At the beginning of December, the European Commission announced that it considers the tax provisions of five member states (Greece, France, Slovakia, Slovenia and Spain) as “equally effective” to the interest limitation rule in Art 4 ATAD. These countries may continue to apply their rules until 1 January 2024 at the latest. The Commission assessed the legal similarity and economic equivalence of the member state's provisions compared to the estimated result under Art 4 ATAD.

As Austria's interest limitation rules are obviously not considered “equally effective” to the ATAD interest limitation rules, Austria generally should have transposed Art 4 ATAD into national law as of 31 December 2018.

Outlook.
It remains to be seen if and how the Austrian Ministry of Finance will react to the decision of the European Commission, which indeed came as a surprise. Legal consequences may also arise (infringement procedures due to non-implementation, constitutional questions in case of retroactive transposition, etc). At this point of time, the failure to transpose within the prescribed period does not have an effect on taxpayers as it is only binding on the member state. Against the background

European Commission surprisingly considers Austria's provisions on interest limitations non-compliant with Art 4 ATAD (contd.)

of the possible penalties, it is probable that Austria will soon take action, though. The transposition of Art 4 ATAD into national law may then require the quick adaption of tax structures/legal structures in Austria or involve significant changes in the calculation of the tax base.

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Riding the innovation curve in the face of the Fourth Industrial Revolution

As technological advances continue and the concept of blurring the physical with the technological world becomes more of a reality, it is clear that we are entering the Fourth Industrial Revolution. In an increasingly connected world, the way we live and work towards shaping the future will change dramatically but how are technology businesses across Europe, UK and US preparing for such disruption?

We would like to encourage you to share this short survey with your clients and contacts to allow us to gather views on the opportunities for expansion outside domestic markets, leveraging global cooperation as well as developing the right talent to manage in a changing economic environment. How are they preparing leadership and a global workforce to be more flexible, agile and mobile as a result of socioeconomic changes brought forward by Industry 4.0?

As a thank you for completing the survey we are giving away an Echo Dot (3rd Gen) Smart speaker with Alexa in a prize draw giveaway to one lucky participant. All participants will receive a copy of the whitepaper and summary results. All responses will be kept confidential and anonymous.

Click here to complete the short survey

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The Annual BKR EMEA Tax meeting 2018

The annual BKR EMEA Tax meeting got underway in the Hilton Amsterdam Airport Schiphol on Monday 26th November 2018. Some forty delegates attended with tax experts coming from all over the EMEA region, from Kenya to Austria and Portugal to the Lebanon. Petra Owen (Hansa Partner, Hamburg & Chair of the EMEA Tax Committee) chaired the very lively meeting.

Amongst the delegates at the meeting were two new members of the EMEA Tax Committee, James Dolan (Blick Rothenberg, London) and Amanda Couzi (Abou Nasr, Beirut).

Topics ranged from Taxation of Digital Economy to Permanent Establishments in Europe. Vanesha Kistoo (Blick Rothenberg, London) gave an update on the BKR Employment Tax Practice Group, whilst Marco Borioli, Giorgio Colombo (Borioli & Colombo Associati, Milan) and Alan Pearce (Blick Rothenberg, London) gave a very well received presentation on VAT – electronic invoices and VAT grouping.

The full range of topics discussed is available on the Agenda and the presentations are on the member's area at Tax Meeting. Next year's meeting is scheduled on Monday 25th November 2019 in the Hilton Amsterdam Airport Schiphol.

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Changing Landscape in the Netherlands

The Netherlands is well known for its high number of double taxation treaties and offers great possibilities for holding-, royalty- and finance companies. Up to now it was fairly easy to obtain an advanced tax ruling and trust companies were doing quite well to manage these companies.

The Netherlands have however, over the years, changed their way of thinking and are introducing new legislation to create a better image towards the general public. For trust companies it has become more and more difficult to maintain their licenses and costs are increasing. From January 1, 2019, new regulations will be in place eventually resulting in a decrease of trust companies in the Netherlands. Furthermore a new withholding tax will be implemented in the future on outgoing royalties and interest to certain (tbd) low-tax jurisdictions.

The Netherlands have made it quite clear that they are only interested in "real" companies with "real" activities in the Netherlands with economic substance. For this reason we are shifting more and more to provision of business support services through "Gateway Business Support" (Gateway) to assist new active companies in the Netherlands. Brexit will be one of our main attention points in the coming period but we realise that uncertainty over the outcome can change our strategy every day.

We will of course remain at your disposal through our trust services in MTM but are also following the market with the further development of Gateway as a boutique firm in the Netherlands. If you would like to find out more about Gateway, please visit our website www.businesssupport.amsterdam.

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What's wrong with a digital user tax?

It is a truth universally acknowledged that the taxation system is in need of a new way to tax digital businesses. It is far less clear that a digital user tax, or DUT, is the right solution.

The problem is that the global tax system was designed at a time when factories manufactured physical goods. The concept of a permanent establishment (PE) sets a threshold below which local activities will not be taxed: there needs to be a fixed place of business, through which the activities of the enterprise are carried on, before a local tax liability arises. But a digital business can make significant sales, and perhaps profits, in a country without having a physical presence there at all.

There is a strong perception that major digital businesses are not paying their 'fair share' of tax, and the public mood is that 'something must be done'. Politicians appear to agree.

The OECD, following on from its base erosion and profit shifting (BEPS) project, has proposed a new definition of a 'digital PE'. However, as the current PE definition is embedded in almost all bilateral tax treaties, to change it would require global agreement. The big problem here is the US, which would be the main loser if its tech companies were to pay more tax elsewhere: why should the US play the role of a turkey voting for Thanksgiving?

More radical options, such as treating a global business as a single entity and apportioning its profits by reference to a formula (unitary tax, with formulary apportionment), or even taxing businesses by reference to where their cashflows arise (destination-based cashflow tax, or DBCFT) are likely to be even harder to agree on a global basis.

So a number of countries are starting to propose 'interim' solutions, which focus on taxing turnover (rather than profits) of digital businesses.

The EU suggestion is for a digital services tax (DST), which would tax the EU advertising sales of large businesses. This would impose costs on businesses such as Google and Facebook, but would not apply to the physical (or electronic) goods sold by Amazon. Levying a tax on turnover gets round the problem of needing to amend double tax treaties, but would bear more heavily on newer and less profitable businesses – so while Google could probably cope with a 3% tax, a newer competitor might struggle. It also assumes that the number of users per country can be tracked – but is a user with a laptop, a work computer and a mobile phone one user or three? And what if, for security or privacy reasons, a virtual private network (VPN) is being used, which makes it impossible to determine a user's true location? And what about the data protection (GDPR) issues? Even if these issues could be addressed, the measure requires unanimity across the EU, and currently at least six countries are not in favour – so it seems the EU DST is unlikely to make rapid progress.

Meanwhile, it seems increasingly likely that Philip Hammond will announce a UK version of a DST in the Budget on 29 October, or at least a detailed consultation on the form it should take. The government published a position paper, Corporate tax and the digital economy, in November 2017, and updated it in March 2018. The paper focuses on the concept of 'unrecognised user-created value' and suggests that a tax should be levied on 'the revenues of digital businesses deriving significant value from UK user participation' – a digital user tax.

Like the EU's DST, this would be a turnover tax, so would suffer from the same problems of falling more heavily on less profitable businesses, identification of users, and privacy concerns. But it would fall on a different subset of businesses, wider than mere online advertising; for example, an online platform such as Airbnb would clearly be within its scope.

The paper accepts that there will be challenges in: defining businesses that are within scope; determining the revenues of those businesses which should be taxed; the identification of user location; the problems of start-ups and loss-making businesses; and the practical difficulties of collecting tax from a business with no physical presence in the UK. It blithely assumes that these challenges can be overcome, although there is a wistful comment that it would be easier to implement a DUT on a multilateral basis.

So it seems we may well get a UK DUT from April 2020. It won't be simple; it won't be enough to satisfy public hunger for more to be done; and, in my view, it won't produce a 'fair' result – because turnover is an arbitrary and very imperfect way to tax profits.

What's wrong with a digital user tax? (contd.)

What could we do instead?

We could support the OECD BEPS project and seek to ensure that profits are taxed somewhere rather than nowhere, and accept that the allocation won't be perfect. We could work hard towards longer term reform through a digital PE concept, or even DBCFT. And we could reform business rates to charge more on large physical facilities (Amazon warehouses and the like). And if we want a turnover tax, we can use VAT and compensate for any regressive impacts through other measures such as the benefits system.

But we should not assume that there is a simple solution to the problem of digital businesses not paying enough tax.

Note - a DST was indeed included in the Autumn Budget.

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Italy - Law Decree No. 119/2018 – "TAX AMNESTY"

Law Decree No. 119/2018, converted into Law No. 136/2018 (published in the Official Gazette No. 293 of December 18, 2018), introduced several optional provisions for settling outstanding tax controversies, allowing in most cases the cancellation of penalties and interest by the "acceptance" of the contents of audit reports and assessment deeds – provided that they have been notified to the taxpayer within the entry into force of the Decree (24.10.2018).

The main measures contained therein are described below.

1) SETTLEMENT OF AUDIT REPORTS

In case of Audit Report, ("Processo Verbale di Constatazione (PVC)"), notified within 24.10.2018, it is possible to avoid all penalties and legal interest if their full content is "accepted":

A. The violations ascertained must refer to taxable periods that can still be subject to assessment (ordinarily from 2013 to 2018) and refer to income taxes and additional taxes, social contribution and withholding taxes, substitute taxes, IRAP (regional tax on production activities), VAT, IVIE (tax on immovable property abroad) and IVAFE (tax on financial assets abroad).
B. The notice of assessment must have been notified within 24.10.2018.
C. In case of acceptance, only taxes must be paid within 31.05.2019, after having filed a specific return.
D. Instalment payment is allowed in up to 20 quarterly instalments.
E. Previous tax losses cannot be used.
F. No tax credit setting-off is admitted.
G. There is no protection in case of criminal charges.

2) SETTLEMENT OF ASSESSMENT DEEDS

It is possible to settle the following deeds:

A. Assessment notices, adjustment and liquidation notices, deeds of credit recovery notified within 24.10.2018, not challenged and still subject to challenge: the payment of taxes should have been carried out within 23.11.2018 or, if larger, within the term of proposal of the petition.
B. Calling for hearing with the Tax office notified within 24.10.2018: the payment of taxes should have been carried out 23.11.2018.
C. Tax settlements ("Accertamenti con adesione") underwritten within 24.10.2018: the payment of taxes should have been carried out within 13.11.2018.

The benefit of the settlement of the aforementioned deeds, consists in the cancellation of penalties and interest, being required only the payment of taxes, with a single payment or in a maximum of 20 quarterly instalments.

No tax credit setting-off is admitted and there is no protection in case of criminal charges.

Italy - Law Decree No. 119/2018 – "TAX AMNESTY" (contd.)

3) SETTLEMENT OF TAX DEBTS

It is possible to erase tax debts entrusted to collection agents from 1.01.2000 up to 31.12.2017, with cancellation of penalties (except for road regulation violations) and interest.

A. A special declaration must be submitted to the Collection Agent ("Agenzia delle Entrate-Riscossione" within 30.04.2019, with the forms that will be published on the website of the Agent.
B. Because of the submission of the application, no enforcement action can be started or new administrative retention procedure can be arranged.
C. The amounts due must be paid within 31.07.2019, with a single payment or a maximum of 10 instalments.
D. Within 30.06.2019, the Collection Agent will communicate the total amounts due, also for any instalments required by the taxpayer in the submission.
E. Instalments' deadlines are July 31 and November 30 of each year starting from 2019.
F. ongoing litigations must be abandoned.
G. The settlement procedure will be terminated in case of failure or delayed payment of the amounts due or of one of the instalments.
H. No tax credit setting-off is admitted.

The amounts entrusted to agents other than the Tax Office (Agenzia delle Entrate-Riscossione) and Collection office "Riscossione Sicilia S.p.A" are excluded.

Some special cases excluded from the cancellation, may still be valuated individually.

4) CANCELLATION OF DEBTS UP TO EURO 1.000

Debts recorded from 1.01.2000 up to 31.12.2010 that, as at 24.10.2018, are equal to residual amounts (including capital, interest for delayed recording and sanctions) lower than 1.000 Euro are automatically cancelled and no declaration is required.

Within 31.12.2018 the Collection Agent can withdraw the debts, but their cancellation will be effective from 24.10.2018.
This procedure concerns, with some exceptions, all types of debts, provided that they have been entrusted to Office (Collection office) and Collection office "Riscossione Sicilia S.p.A" (excluding those entrusted to local agents or collected by credit institutions).

5) FACILITATED SETTLEMENT OF TAX LITIGATIONS

Article 6 of the law decree provides for the possibility of a facilitated settlement of ongoing tax litigations, at any grade of judgement (Supreme Court included), where the Tax Office (Agenzia delle Entrate) is a counterparty.

A. For each controversy, an application must be presented by the taxpayer within 31.05.2019.
B. The petition on first degree must have been notified by the taxpayer within 24.10.2018 (it is not necessary that the appellant has appeared before the court within the same date).
C. The settlement is completed by the payment of an amount equal to the value of the litigation (i.e. the amount of the disputed taxes only: interest, sanctions or any supplementary amounts are excluded from the amount of such payment).
D. In case the first-degree judgement is against the Tax Office, the procedure can be fulfilled with the payment of 40% of the disputed taxes; in case the second-degree judgement is against the Tax Office, the amount to be paid is reduced to 15% of the value.
E. Disputes relative to specific EU's taxes and social security contributions are excluded.
F. The required payment shall be made with a single payment or a maximum of twenty quarterly instalments (for amounts exceeding 1.000 Euro) and the deadline for the payment is 31.05.2019 for both procedures.
G. Any setting-off with existing credits is excluded.
H. from the amounts due are discounted those already paid in the course of the legal proceeding; however, the refund of payments that have possibly exceed the final amount due in the settlement procedure is never allowed.
I. With reference to taxes due to Municipalities and other Local Governments, the latter can decide, within 31.03.2019, whether to adopt the previous regulation to the litigations where they are involved.

6) REGULARIZATION OF INFRINGEMENTS AND NON-COMPLIANCE WITH FORMAL OBLIGATIONS

Irregularities, infringements and non-compliance with obligations or formal requirements that do not affect the determination of the tax base for income tax, VAT and IRAP purposes or tax payments, committed up to 24

Italy - Law Decree No. 119/2018 – "TAX AMNESTY" (contd.)

October 2018, can be settled by paying € 200 for each tax period to which the violations refer, in two equal instalments, by 31 May 2019 and 2 March 2020.

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VAT recovery on transaction costs: CJEU rules on aborted transactions

In two recent cases, Ryanair (C-249/17) and C&D Foods (C-502/17), the Court of Justice of the European Union (CJEU) had to rule on the recoverability of input tax. Both businesses sought to reclaim input tax incurred on costs in relation to a share transaction which subsequently did not happen.

It is worth remembering that, in simplified terms, there are two important criteria that must be met to allow input tax recovery.

- The business claiming the input tax deduction must carry on an economic activity; and
- The cost on which input tax is claimed must have a direct and immediate link
  - to a specific taxable supply (directly attributable input tax), or
  - to the business's economic activities in general (residual input tax).

Ryanair had launched a takeover bid for all the shares of another airline with the intention to supply management services to that company after the acquisition. Although that bid had to be aborted for regulatory reasons and Ryanair was only able to acquire a part of the shares, the court ruled that Ryanair had the right to fully deduct as input tax the VAT it had paid on the consultancy services relating to the takeover bid. This was because these consultancy costs related to its intended economic activity, the provision of management services. This confirms previous case law.

Interestingly, the Advocate General had argued the case for the economic activity differently. In her view, a strategic takeover of another airline with the intention of thereby bringing about a direct, permanent and necessary extension of Ryanair's taxable activity was already sufficient to constitute an economic activity. This is an argument that will hopefully be further developed through the courts. For the time being care should be taken to provide evidence of the intention to provide taxable services once the transaction has taken place.

C&D Foods was about an aborted sale of shares in a subsidiary to which the company, which was the holding company of the group, had provided taxable IT and management services. As the company had been unable to repay a loan, a bank had assumed ownership of the group and sought to recover the loan via the proceeds of the share sale. In this context, a range of consultancy services were requested and C&D Foods was denied the input tax recovery on these services.

Whilst the Advocate General confirmed that the provision of the IT and management services constituted an economic activity, she concluded that there could be no input tax recovery if the direct and immediate link was with an exempt sale of shares.

Again, the court took a slightly different view. The court observed that the share disposal with the aim to repay

VAT recovery on transaction costs: CJEU rules on aborted transactions

a debt did not relate to C&D Foods' economic activity in the first place and therefore, there was no direct and immediate link at all. As a consequence, the input tax was irrecoverable.

It is good news that the CJEU confirmed in both cases that the fact an intended transaction did not take place does not affect the right to input tax recovery provided the above mentioned criteria of "economic activity" and "direct and immediate link" are met. However, given the complexity in this area, specialist VAT advice should be sought from the outset.

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BKR Employment Tax Practice group

The next topic for the BKR Employment Tax Practice group is - Are there risks for a company to engage an individual as a contractor instead of as an employee?
It is becoming popular for some businesses to engage an individual (onshore and offshore) for services. So:

- What are the risks associated with this business model?
- Can a contractor be a deemed employee?
- What are the penalties on a company for not being compliant?

Tell us what happens in your jurisdiction. The webinar is on 5th February and will be chaired by Yadvinder Rihal (Blick Rothenberg, London). Details from Sunny (Sunny.Rowley@bkremea.com) at the Executive office London.

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