Contributions for Edition 21 of the EMEA Tax Bulletin should be with Sunny Rowley at sunny.rowley@bkremea.com by 4 January 2018

EMEA TAX BULLETIN

OCTOBER 2018 - ISSUE 20

Dear Friends and Colleagues,

Welcome to the autumn edition of the EMEA Tax Newsletter. After the long and hot summer which most of us have enjoyed - even in places where this is far from usual - the turning of the season (and in most places of weather as well, we have just seen the first storm tide here in Hamburg) invites us to turn our attention to more autumnal events and activities.

Those of you who attended the Worldwide Meeting in Shanghai have hopefully all returned safely, having enjoyed discussions and exchange of ideas with friends and colleagues from around the world. Next on the agenda for our region is the annual Tax Meeting which is coming up soon in Amsterdam on 26 November 2018. If you have not registered for the event yet, make sure you still do and bring your colleagues along, too! The agenda is packed with interesting subjects, there should be something for everybody. We will not miss out on our general update and discussion rounds, either. I look forward to seeing many of you in Amsterdam!

This newsletter features articles on tax and related matters from the UK, the Netherlands, Montenegro, Austria and Cyprus. As always, I would like to thank everyone who has contributed to this newsletter. Without your continuing support, this newsletter could not exist. Therefore please continue to send us articles, and maybe also encourage some of your colleagues to do so. Many thanks also to Sunny, Tim and Julia for putting the newsletter together again.

Last but not least - if there is anything the tax committee can do for you, if there is anything we can assist with, please do feel free to contact us!

Petra

Petra Owen
EMEA Tax Committee Chair
E: Petra.Owen@hansapartner.de

Within this edition (click to jump to page):

Repatriation tax and GILTI: Unintended Consequences

Over the years there have been numerous high profile examples of US multi-national corporations using offshore structures as a way of reducing the US taxation on their global profits.

A key political and economic intention of US tax reform was to make US corporations more competitive globally. To do so, the US corporation tax rate has been reduced to a flat 21% from a maximum 35%. A territorial tax system is also now in force, whereby profits subject to tax in other jurisdictions are not subject to US tax upon repatriation to the US. This brings the US into line with many other countries, including the UK.

As part of this new regime, the IRS introduced a number of anti-avoidance provisions as well as transition rules. In particular, a one-time "repatriation tax" attempts to deal with the transition. Thereafter the concept of Global Intangible Low Taxed Income (GILTI) is intended to discourage US corporations from using foreign subsidiaries in low tax jurisdictions to shift income derived from their intangible assets.

As we will discover, the process of legislating for these tax reform provisions have a number of unintended consequences.

Repatriation tax

The one-time repatriation tax charge applies to the accumulated foreign earnings of US controlled foreign corporations. The publicised intention was to draw a line in the sand for multinational corporations to repatriate their accumulated foreign earnings back to the US, at a favourable tax rate. The repatriation tax is applied retroactively to the 2017 US tax year at a rate of between 8% and 15.5%.

This change was rumoured for some time and media coverage specifically touched on how this would affect the big US tech giants. However, the scope and wording of the legislation unexpectedly encompasses all US "persons", rather than just US corporations. In particular, US citizens resident outside the US who are shareholders of a controlled foreign corporation are also exposed to repatriation tax.

Controversially, the legislation results in a repatriation tax rate of somewhere between 9% and 17.5% for individuals – somewhat higher than the rate US corporations pay. This tax rate is preferable when compared to the US ordinary rate (39.6% for 2017 and 37% from 2018) and qualified dividend rate (20%) on actual dividend distributions. Of course, business working capital requirements and the timing of local taxation of dividends means that the repatriation tax can have a more significant impact for individuals than corporations. Opportunities to mitigate the tax impact do exist, but require careful thought and advice.

Until recently and absent any election, repatriation tax was due on 17 April this year, or 15 June for an individual resident outside of the US. Initial detailed guidance was only published by the IRS on 2 April, with further updates on 13 April. Additional guidance was released on 4 June providing relief for certain taxpayers. With major tax reform hastily agreed and legislated in December 2017, this is just issue where taxpayers and practitioners have required IRS guidance to simply try and comply with the legislation as finalised.

GILTI

Going forward, the IRS have introduced GILTI – quite the acronym. From the definition, one would assume that this only affects US corporations such as Facebook and Google who have intangible property held in low tax jurisdictions. However, digging a little deeper reveals that GILTI has broader application.

In particular, all foreign earnings of a controlled foreign corporation could be subject to GILTI especially for businesses without significant tangible assets. For example, those providing advisory or consultancy based services will have a large proportion of earnings which fall into the definition of GILTI.

The GILTI tax applies regardless of whether earnings are distributed. US corporations are able to utilise a deduction against GILTI, as well as foreign tax credits suffered by a non-US subsidiary, such that the tax only applies to income earned in low corporate tax jurisdictions. Again, a closer look at the legislation reveals that neither of these reliefs are available to individual taxpayers unless a complex election is made. From 2018 onwards, individual US shareholders of controlled foreign corporations could be faced with a 37% tax charge on income caught within the GILTI rules,

Repatriation tax and GILTI: Unintended Consequences (contd.)

regardless of whether that income is distributed. For the US citizen resident in the UK, this could result in real double tax exposure, notwithstanding the cashflow issues.

The IRS have, to date, been silent on guidance regarding GILTI. They have consistently said that they are aware of the issues and are considering them. Where there has been so much change and new laws written, the consequences of the drafting seem to be at odds with the policy intention. Guidance, likely in the form of regulations, is expected in late August and one can only hope they provide clarity and direction consistent with the intent of the legislation.

Based on current interpretation of the legislation there may be some planning options for business owners to attempt to minimize the impact of GILTI. This is, of course, dependent on their specific circumstances and the options could be particularly costly for some taxpayers. In the absence of any guidance from the IRS, taking action now could be premature.

Summary

These are not the only provisions where taxpayers and practitioners have required guidance regarding the new tax laws. With the tax reform rushed through, and most of the laws applicable to the 2018 tax year, there will no doubt be plenty of wrinkles and unforeseen consequences along the way that will need to be navigated carefully.

Alex Straight
Partner, Westleton Drake
E: alex.straight@westletondrake.com

The Netherlands must allow the "per element approach"

The Court of Justice of the EU (CJEU) concludes that the Netherlands may not favour domestic situations by allowing a benefit that is not open to cross-border groups.

Facts of the case

On 22 February 2018, the CJEU pronounced judgement on two cases. The Dutch Supreme Court had referred both cases to the CJEU for a preliminary judgment. One case concerned the Dutch anti-profit shifting rules (art. 10a Corporate Income Tax Act 1969) and the other was about the deduction of currency capital losses. The CJEU treated them as consolidated cases and the Court in essence ruled that the Netherlands is not allowed to favour domestic groups by creating a fiscal unity, while such a fiscal unity is not permitted in cross-border situations.

Interest deduction and capital losses

One of these cases concerned application of the limitation of interest deduction under art. 10a of the CIT 1969. In certain situations Dutch laws restrict deductions of interest to avoid base erosion. There is not difference between domestic and cross-border situations. However, in fully domestic situations taxpayers can avoid the application of the limitation of interest deduction by creating a fiscal unity with a Dutch group company. In these situations transactions between the parent company and the participation will become invisible for tax purposes and by doing so the limitation of interest deduction will not apply. The other case was about the rules for currency losses. In the Netherlands, positive currency results from participations are tax-exempt while exchange rate losses are non-deductible under the participation exemption. In this case the deduction of currency losses on a British participation of a Dutch parent company were not accepted with reference to the participation exemption. The losses could however have been deducted had the Dutch parent company and the British subsidiary been able to form a fiscal unity.

Use of the fiscal unity in domestic situations

The similarity between both cases is that in both situations national rules equally apply to domestic and

The Netherlands must allow the "per element approach" (contd.)

cross-border situations. However, these restrictive legislations can be easily avoided in domestic situations by forming a fiscal unity. This is not possible in crossborder situations and therefore the parties in these cases argued that a combination of these rules on the one hand and a fiscal unity on the other may constitute a violation of EU law.

Court decision

The CJEU judged that the Dutch rules basically constitute a violation of EU law in intra EU/EEA relationships. The Court particularly believes this is the case for the interest deduction limitations. This judgment does not imply that fiscal unities are also allowed in cross-border situations now, but that limitation of interest deduction may not be applied in these cross-border EU/EEA situations. The CJEU ruled otherwise with respect to the currency capital losses. The CJEU particularly seems to judge that a direct link between the rules on currency capital losses and fiscal unities is absent.

Change of tax law

The CJEU follows the earlier opinion of the AG to the CJEU. Immediately after this opinion was delivered, the State Secretary for Finance wrote a letter announcing emergency remedial measures in order to avoid heavy losses for the Dutch State. These measures will be submitted in the form of a bill in the second quarter of 2018. The measures will take effect retroactively to 25 October 2017, 11.00 am. The result of these remedial measures will be that fiscal unities will be deemed not to exist for the application of a specific number of situations such as art. 10a (limitation of interest deduction), art. 13 (paragraphs 9 through 15 and paragraph 17; participation exemption), art. 13l (limitation of interest deduction for excessive participation interest) and art. 20a (limitation of loss set-off upon a change in the ultimate beneficial interest) CITA 1969. This will have a possible impact on the fiscal situation of domestic tax payers. For cross border situations things remain as they are at this time. In cross border situations it is still possible to claim the benefits of the CJEU decisions for situations before 25 October 2017, 11.00 am.

CJEU of 22 February 2018 consolidated cases C-398/16 (X)
en C-399/16 (X), ECLI:EU:C:2018:110

Andre Buijsman
Senior Auditor/ Tax Consultant, Flynth
E: Andre.Buijsman@flynth.nl

Citizenship by Investment in Montenegro

The recent geopolitical situation in the Middle East has motivated a significant number of Asian high net worth individuals to consider moving westward towards European markets, contributing considerably to the development of the so-called "rich immigration".

With the above in mind, the Montenegrin Government has been working on an attractive citizenship-by-investment program which is expected to provide a significant boost to the existing economy by allowing the expansion of various forms of business from abroad. Starting from October 2018, the Government of this NATO-member country will grant citizenship by investment to 2,000 qualifying entrepreneurs from non-EU Countries for a limited period of 3 years.

Per the scheme, foreign investors will be considered eligible for naturalization by exception if they meet one of the following investment criteria:

Invest €250,000 in projects located in non-developed areas of Montenegro (generally located in the north of the country), provided that such projects are previously approved by the Government of Montenegro; or
Invest €450,000 in projects located in developed areas of Montenegro (southern region), previously approved by the government of Montenegro;

Investors should note that an additional amount of €100,000 will be required by the Government for each submitted application. This amount (Government Fund Donation) will be used for regions under development

Citizenship by Investment in Montenegro (contd.)

in Montenegro. The Government has stated that application will be a speedy procedure, allowing for a permanent residence status within three weeks and a subsequent citizenship granted within six months.

We advise non-EU nationals thinking about investing in Europe to seriously consider the option of investing in strategically-located Montenegro which is expected to be a full EU member by 2025. Coupled with the skilled workforce, a stable tax system and general safety and stability, the new investment incentives make this small coastal country a very attractive European investment destination. Eurofast has been operating in Montenegro for over 10 years with fully fledged offices offering advisory services to foreign and local clients.
Feel free to contact our local advisors can for assistance with to assess whether your fulfill the program's eligibility criteria as well as assistance during the application process.

Eurofast, the longest presence Int'l consulting Company in Montenegro, with an office from the first day of Montenegro's independence can undertake every step of your application. You can contact our Montenegro office, at: Tel: + 382 20 228 490

Christodoulos (Lakis) Damianou
CEO, Eurofast Ltd
E: ceo@eurofast.eu

Jelena Zivkovic
Acting manager, Eurofast Ltd
E: jelena.zivkovic@eurofast.eu

New type of tax law in Austria

The Austrian legislator passed a new tax law in July 2018. It is called "Jahressteuergesetz 2018", which basically means "Annual Tax Act 2018".

The aim of this new law is to make it easier to follow the current tax changes in the future. For this reason, the law summarizes all tax changes on an annual basis.

In the Annual Tax Act 2018, the Federal Ministry of Finance primarily summarizes the necessary adaptations of national tax laws to EU legal requirements, Supreme Court rulings, as well as technical changes based on feedback from financial administration practice.
Some of the important changes concern income tax, corporate income tax and the federal fiscal code. For example:

Horizontal monitoring

The Annual Tax Act 2018 provides a new legal basis for the "Horizontal Monitoring". This instrument, known in Austria as "Accompanying Control", is to be available to companies with revenues exceeding €40m, credit institutions and insurance companies. It represents an alternative to external tax audits.

As part of the horizontal monitoring the company has to meet the necessary requirements and set up an internal tax control system. This control system has to be audited by a tax advisor or auditor. In conjunction with an extended disclosure obligation and ongoing contact with the tax authority, horizontal monitoring replaces the subsequent external tax audit and leads to more legal certainty for companies.

By setting specific requirements for a tax control system, the financial administration sets new standards that will probably also have to be taken into account in the medium term by companies that do not participate in the accompanying control.

Exit taxation

In the case of a cross-border movement of companies' assets or businesses, unrealized profits are taxed by the Austrian tax authorities. Currently, in certain cases, an

New type of tax law in Austria (contd.)

instalment payment over a period of 7 years is foreseen. This installment payment period is to be adapted to the requirements of the EU Directive (Anti Tax Avoidance Directive) and reduced to 5 years. A two-year installment arrangement continues to apply to current assets.

Extension of advanced ruling
Binding legal advice (advanced ruling) is now to be extended to the areas of international tax law, VAT law and the existence of abuse according to the federal fiscal code. Until now, it was only possible for questions in connection with reorganizations, groups of companies and transfer prices.

Hans Baumgartlinger
Partner, Artus
E: H.Baumgartlinger@artus.at

Business travellers global survey

It is the norm now for organisations with international presence to have employees who are required to travel as part of their role. It can be challenging to understand the tax, payroll and social security treatment of international business travellers as each country has its own rules and regulations.

Blick Rothenberg recently conducted a global survey to understand what those differences are and to identify and share best practice. Some of the questions asked were about the requirement to file a tax return, concessions available as well ideas on what can be done to improve the global approach to the reporting for business travellers.

We held a webinar on 2nd October, chaired by Vanesha Kistoo, where we discussed the outcome of the survey and our view on the international reporting and treatment of business travellers.

If you would like to access a recording of the webinar, please click here.

Vanesha Kistoo
Global Mobility Director,
Blick Rothenberg
E: vanesha.kistoo@blickrothenberg.com

Cyprus: New Alternative Investment Funds Legislation

On 10th July 2018, the Cyprus parliament approved the new alternative investment funds (AIF) legislation which will replace the existing law and which enables, for the first time in Cyprus, the establishment of Registered Alternative Investment Funds (RAIF) in Cyprus. This is a major advancement in the field as it will significantly reduce the time and cost for establishing an AIF in Cyprus.

The details of the law will become available once the legislation is published in the official Government Gazette, at which point the law will also come into effect. From the information currently available the following criteria and characteristics in relation to RAIFs are expected:

- Not regulated by CySEC. Supervision at the level of the registered Fund Manager
- Appointment of local depository
- No minimum capital requirements
- Can be either open or closed ended
- Contains the option for an umbrella structure
- Addressed to professional and/or well-informed investors
- Can be structured as a common fund, investment company (variable or fixed capital), or limited partnership
- CySEC will register all RAIFs in the Register of RAIFs
- Within one month of receipt of all required documents in accordance with the Directive, the CySEC shall inform in wiring the applicant for its decision to accept or reject the application

In addition to the introduction of RAIFs, the below new provisions in the Cyprus tax legislation have also been introduced in relation to investment funds.

- No permanent establishment will be deemed to arise in Cyprus in the case of investment into Cyprus tax-transparent funds by non-resident investors and/or in the case of management from Cyprus of non-Cyprus investment funds. As a result, income earned on such investments will be taxed in the country of residence of the investor.
- Introduction of a special mode of taxation at the flat rate of 8% and a minimum annual tax payable of €10.000 (subject to specific criteria) for chief executives (new tax residents of Cyprus) of alternative investment funds, alternative investment fund managers and companies to which the alternative investment fund manager has delegated the portfolio management or risk management. This new mode of taxation will be available for a total period of ten years.
- Persons who are both Cyprus tax resident and Cyprus domiciled will be subject to special defense contribution at a rate of 17% (instead of 3% which was applicable up to date) on profits deemed to be received from Cyprus investment funds.

Further updates will be published by our Firm upon the publication of the law in the Official Gazette of Cyprus.

Maria Nicolaou
Director, Eurofast Ltd
E-mail: maria.nicolaou@eurofast.eu

BKR EMEA Tax Meeting 2018

The BKR EMEA Tax Meeting will be held in the Hilton Amsterdam Airport Schiphol on Monday 26th November 2018. If you have any questions please contact either Tim Morris, EMEA ED at tim.morris@bkremea.com or Sunny Rowley, EMEA PA at sunny.rowley@bkremea.com . Registrations closes on 10th November 2019. Details are on EMEA Website at Latest Events.