INTERNATIONAL CORPORATE INCOME TAX BRIEF

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INTRODUCTION

Welcome to this, the second issue of Moore Global's International Corporate Income Tax Brief, produced within Moore Global's ICIT Group in order to highlight selected tax news from a variety of countries. The intention of the ICIT Group is to bring you this brief on a regular basis in order to keep our clients up to date with relevant tax news.

In this issue we are focusing not only on developments in corporate taxes but also on personal income tax topics related to employees and natural persons. In addition, we also report on tax cases from France, Belgium and the Netherlands.

We hope that the articles will assist you to navigate your business decisions correctly across these complex tax areas.

Helping you thrive in a changing world!

MARTIN KIŇO

This brief contains general information only and is not a substitute for professional advice tailored to your specific situation.

If you have any specific questions or you would like to have your situation analysed, please do not hesitate to contact the experts whose names and contact details appear at the foot of each article.

The Moore Global network and its strong International Corporate Income Tax Group will be pleased to help and provide you with our professional services.

BELGIUM

WORKING ABROAD AND SALARY SPLIT

A Belgian employee working abroad for a foreign employer qualifies for a fiscally beneficial salary split. The foreign income is taxed separately in the country of employment. In Belgium, this professional income is exempt with maintenance of progressivity, providing factual proof can be provided of the time spent abroad for professional purposes.

When is an employee's income taxable abroad?

An employee who is a Belgian resident for tax purposes, but who works abroad and receives employment income from an employer who for tax purposes is a resident in the relevant country, is in principle taxed in the employee's country of residence (in this case, Belgium) in accordance with the progressive personal income tax rates.

Under a double tax treaty, the country in which the employment is carried out may also tax the income if any one of the following conditions is met:

- The employee works for at least 183 days in the country of employment or
- The employee's salary is paid by an employer based in the country of employment.

  This mainly concerns 'secondments', whereby a Belgian employer temporarily posts an employee to a foreign group company to work during this period on behalf of and on account of the group company. The Belgian company remains the individual's legal employer and the foreign company becomes the economic employer'. In such cases the Belgian employer will charge the employee's wages for this period to the foreign company.
- The employee's salary is paid by a permanent subsidiary of the Belgian employer in the country of employment.

  If a Belgian company conducts its core business abroad in the same way as it does in Belgium, there is a very good chance that the company will also be taxed abroad. If a Belgian company has a permanent subsidiary abroad, the wages of the employees whose activity actually gave rise to the existence of that permanent subsidiary are attributed, for tax purposes, to the foreign results of that permanent subsidiary. There is, therefore, a very real risk that these employees will be subject to non-resident income tax abroad.

Exemption with maintenance of progressivity in Belgium

Obviously, it is not the intention to tax the income of the person in question twice, i.e. in the country of employment and in the country of residence. In order to avoid this kind of double taxation, Belgium employs the principle of exemption with maintenance of progressivity. The foreign income is not taxed in Belgium. However, it is taken into account in determining the personal income tax rate of any income that is taxable in Belgium.

- The exemption applies if foreign employment income originates in a country with which Belgium has concluded a double taxation agreement.
- Local taxes are also calculated on the exempted foreign income.

Only if the foreign income is 100% exempt and the local taxes are 0% will a complete exemption apply to Belgian tax on foreign income.

Important condition

In order to benefit from exemption with maintenance of progressivity, the employment income must actually be taxable abroad. The applicable double taxation agreement will have to determine on a case-by-case basis whether the income is actually or only theoretically subject to tax.

How can an employee provide proof of time spent on employment abroad?

In order to avoid taxation in Belgium, an employee must provide actual proof that his or her day-to-day employment duties were actually carried on abroad. Recent case law has shed more light on the practical aspects of providing authentication.

First case – Liège Court, 19 March 2018

The fact that the individual in question was indeed providing services abroad, in this case in France, even though he was regularly sent on business trips to third countries, was substantiated by various facts: his diary, refuelling stops, use of public transport, credit-card statements, toll receipts, time records at the offices of the foreign employer etc. The judge in Liège consequently ruled that this part of the salary was taxable in France and would qualify for an exemption with maintenance of progressivity in Belgium. However, the time spent in third countries (not being Belgium or France) did not give rise to an exemption in Belgium for the corresponding part of the salary.

Second case - Brussels, 15 May 2019

The Belgian tax authorities initially adopted a particularly strict approach to exempt foreign employment income in Belgium. The people in question had to prove on a day-to-day basis that they were working abroad, in this case in Germany. They also had to provide proof of physical presence. In the absence of such proof, the salary would be taxable in full in Belgium.

The Court of Appeal in Brussels modified this strict interpretation as follows:

- Continuous and permanent presence is not required in order to prove time spent for carrying out duties of employment in the foreign country concerned.
- There is no need to keep a log of whereabouts on a day to day basis.
- Occasional business trips outside the country of employment may be considered as time spent on carrying out duties of employment in the country of employment. However, there has to be a link with the employment contract concluded with the employer based in the country of employment.
- An employment contract specifically stipulating a place of work in a particular country is a strong indicator of the time spent for professional purposes at this location.

Conclusion: be prepared for tax audits in Belgium

A salary split is a fiscally attractive concept.

- The net salary of the employee in question will be higher than if the employee were taxed solely in Belgium
- The employer's overall payroll costs are reduced because the employer can grant a lower salary increase in order to offer a competitive net wage.
- However, there is also a flip side to the coin.
- A salary split must never be a goal in itself for the sake of tax optimisation, i.e. be prepared for tax audits in Belgium.
- Tax settlements must always be the result of a structural and sound business case. The facts must demonstrate that on the whole the day-to-day activities of the employee in question are necessarily and effectively conducted abroad.

Would you like to find out more about international employment? If so, this article may also be of interest.

Do you have further questions or would you like advice? If so, please do not hesitate to contact our tax experts, who will be happy to help you.

AN LETTENS

Partner Tax & Legal Services | Business & International Tax

Moore Belgium
an.lettens@moore.be
https://www.moore.be/en

FRANCE

DEDUCTIBILITY OF INTEREST ON INTRA-GROUP LOANS

The deductibility of interest on intra-group loans is still a controversial and complex subject in France. The debate has evolved recently, with new case law and the official factsheets published by the French tax authorities.

Indeed, in January 2021, the French tax authorities published eight very helpful factsheets aimed at clarifying good practice and the way in which compliance with the market rate of interest on loans between related companies can be demonstrated.

In a decision dated 10 July 2019 *(CE, 10 July 2019, No. 429426, SAS Wheelabrator Group)*, the Conseil d'Etat (the French supreme administrative court) ruled on the possibility of using bond benchmarks to justify the normality of interest rates on an intra-group loan.

In this decision, the *Conseil d'Etat* rejected this restrictive approach and took a decision in accordance with the OECD's comments indicating that a *'realistic alternative to an intra-group loan may be a bond issue'*. The court stated that evidence of the arm's length principle in relation to an interest rate can be demonstrated by any appropriate means, including studies based on bond benchmarks provided by the taxpayer.

Until then, the law was that arm's length interest rates were equivalent, within the limit of the reference rate set in Article 39-1-3 of the CGI (the General Tax Code), to those that the company could have obtained from independent financial institutions or organisations in similar conditions, as provided by Article 212-1 of the CGI. This has led to disputes with the tax authorities for companies unable to provide the required evidence when they have contracted loans at rates higher than the reference rate. The tax authorities required the production of a firm bank offer for an intra-group financing loan, which is often impossible.

However, taxpayers have to ensure the relevance of the benchmark studies that they submit in a step-by-step approach:

- Identify the borrower's risk profile (scoring)
- Search for comparable bond data on the basis of the borrower's scoring
- Identify an arm's length interquartile range on the basis of the bond data obtained

In this respect, the Paris Administrative Court of Appeal admitted the possibility of relying on an offer of unsecured credit as a convincing and valid comparable bond benchmark
(CAA Paris 22 Oct. 2020 n° 18PA01026, Sté Studialis).

To justify the risk analysis of the borrower, recent decisions have admitted the use of the public methods proposed by rating agencies *(CE, 10 dec 2020, n°428522, Ste WB Ambassador and CE, 11 dec 2020, n° 433723, SA BSA)*. However, in the first decision referring to the recent factsheets from the French tax authorities, this was not confirmed *(CAA, Paris, 9 June 2021, n° 19PA02889).*

There is still progress to be made to achieve the goal of the recently published factsheets, i.e. avoiding exclusive recourse to the rate of Article 39-1-3°, when disconnected from the operational reality of groups, and which is used regardless of the nature of the operation to be financed.

Taxpayers must provide precise and relevant sets of clues as to the normality of the rate charged.

NEW MEASURES FROM THE DRAFT 2022 FRENCH FINANCE ACT

The French Finance Act for 2022 is currently being discussed by the National Assembly and the Senate. Here are some likely reforms.

Corporate income tax rate – confirmation of the decrease formerly decided

The 2022 Finance Act confirms the phased reduction of the rate of corporate income tax initially provided for by the 2018 Finance Act, amended in 2019. Thus, as of 1 January 2022, the standard rate of corporate income tax rate is likely to be set at 25% for all companies regardless of their revenue.

This tax rate will also apply, in principle, to withholding taxes on dividends (Article 119 *bis* CGI), to non-salary income (Article 182B CGI), to profits from real-estate activities (Article 224 *bis* CGI), and on sales of substantial shareholdings (Article 244 *bis* B CGI), since the alignment of the withholding rate with the rate of corporate income tax provided by the Finance Act 2020.

Temporary tax amortisation of goodwill for small companies

Accounting law provides, under certain conditions, for the possibility of recognising the permanent write-down of acquired goodwill for small companies (companies with no more than EUR 6 million of total assets, EUR 12 million of net sales and 50 employees) by means of accounting amortisation, but this depreciation is not deductible for tax purposes.

Section 6 of the Finance Act provides for the possibility of deducting this amortisation from taxable income for acquisitions between 1 January 2022 and 31 December 2023.

Additional measures to comply with EU law concerning withholding taxes applicable to non-resident companies

The law is to be amended to comply with the latest decision of the Conseil d'Etat *(a.o. CE of 11 May 2021, n° 438135, UBS Asset Management Life Ltd)*, which has ruled that certain withholding taxes payable by a non-resident legal entity or organisation are contrary to the principles of freedom of movement of capital and freedom to provide services guaranteed by the TFEU (Treaty on the Functioning of the European Union) insofar as they apply to a gross base whereas, in the same situation, a French legal entity or organisation would be taxable on a profit established after deducting the expenses incurred for the acquisition and conservation of such income.

In this respect, section 7 of the draft Finance Act provides that legal entities and organisations established in the European Union or the European Economic Area and whose results are not subject to income tax in France, and in receipt of income from French sources falling within the scope of Article 182B CGI should benefit from a flat-rate deduction of expenses of 10%, applied immediately at the time of withholding. Where the actually incurred expenses exceed the 10% flat deduction, the refund of the difference between the withholding tax levied and the withholding tax calculated on a net basis will be possible.

These changes would apply to withholding taxes for which the taxable event occurs on or after 1 January 2022.

FRENCH WITHHOLDING TAX ON SERVICES INVOICED BY DANISH ENTITIES

As the tax treaty between France and Denmark for the avoidance of double taxation has not been applicable since 1 January 2009, Danish companies that do not have any permanent establishment in France are subject to a French withholding tax when they provide services that are performed or used in France. The rate of the withholding tax is the standard rate of corporate income tax rate, i.e. 26.5% in 2021 and 25% in 2022.

The payment of the withholding tax to the French tax authorities must be made no later than the 15th of the month following the calendar quarter during which the income subject to the withholding tax is paid to the Danish company.

This withholding tax may be partially reimbursed if the payment of the withholding tax has been made regularly and if certain conditions are met. The amount that the French tax authorities agree to reimburse is the difference between the amount of the withholding tax paid and the amount of tax that would have been paid if the Danish company had been established in France.

Claims for repayment must be submitted by 31 December of the second year following the year during which the withholding tax was paid.

We can assist Danish companies, whether by providing further information on this possibility of reimbursement, or by preparing and filing a claim for repayment.

SIGNATURE OF A NEW DOUBLE TAX TREATY WITH BELGIUM

On 9 November 2021, the French and Belgian Finance Ministers announced the signing of a new double Tax treaty between their countries. The new treaty modernises the rules of the current treaty, signed on 10 March 1964, which were no longer in line with the latest international standards.

While maintaining the balance of the current treaty, especially for cross-border workers, the new treaty contains a new definition of residence as well as provisions on permanent establishments and general anti-abuse measures. It also preserves the right to tax capital gains on real estate located in both countries or in the case of a substantial participation in one of their companies.

This new agreement must be ratified by both countries before it can enter into force.

We will detail its consequences in a next ICIT Brief edition.

NIKOLAJ MILBRADT
Partner - International Tax
COFFRA
nmilbradt@coffra.fr
https://coffra.de/fr/

BELGIUM AND THE NETHERLANDS

BEWARE OF FOREX GAINS UPON DECLARATION OF A DIVIDEND

On 15 June 2021, the Amsterdam Court of Appeals delivered an interesting judgment on the tax treatment in the Netherlands of an exchange gain resulting from the declaration of a foreign-currency dividend by a company resident in the Netherlands. Without going into too much detail, the applicable Netherlands regulations seem to be in line with the Belgian regulations. In short, a good reason to analyse this judgment and to draw the parallel with Belgium.

The facts

The facts took place in 2011. They involved a Netherlands company (NLCo), part of an internationally operating group, which was primarily a holding company, with participations in various group companies, including a 100% participation in a Swiss SARL. NLCo was in turn held by a single – we suspect a US – shareholder.

The group was undergoing a global financial reorganisation and had prepared a debt-redemption plan, which had as its main objective the elimination of various intra-group loans.

One of the steps was the declaration on 1 July 2011 by SARL of a dividend of CHF 104 000 000 in favour of NLCo. However, it was only on 22 July 2011 that the Swiss tax authorities authorised the actual payment of this dividend with exemption from withholding tax.

Subsequently, on 4 August 2011, the Board of Directors and the Shareholders' Meeting of NLCo decided to declare an interim dividend of the same amount (CHF 104 000 000) to the shareholder of NLCo.

View of the Netherlands tax authorities

The Netherlands tax authorities took the view that NLCo realised a taxable exchange gain on the dividend, amounting to EUR 10 658 807, and also imposed a substantial penalty.

Their reasoning was as follows. The dividend from SARL to NLCo was not paid immediately, resulting in NLCo's having a 'claim' of CHF 104 000 000 against SARL. The tax authority concluded that this CHF claim was to be translated into euros at the EUR/CHF exchange rate as at 1 July 2011, i.e. the date on which the dividend was formally declared by SARL. By the time that NLCo's dividend to its shareholder came to be paid on 4 August, the exchange rate had moved in NLCo's favour, resulting in a taxable forex gain of EUR 10 658 807.

This gain does not fall within the scope of the Netherlands participation exemption (comparable with the dividend-received deduction in Belgium), because it involves a change in the value of a debt claim, on which corporation tax is payable.

View of the Netherlands company

NLCo did not agree with the interpretation of the Netherlands tax authorities and attempted to justify its use of the EUR/CHF exchange rate as at 4 August 2011 for both dividend transactions. Essentially, NLCo asserted that it had always been the intention to pay both dividends on economically the same day. This should have been apparent from the debt-redemption plan, and therefore the appropriate exchange rate applicable to both dividends, denominated in Swiss francs, was that of 4 August.

Basing its argument on longstanding case law, NLCo maintained that a dividend claim in the tax sense only arises at the time of payment. However, from a judgment of the Amsterdam Court of Appeals of 21 March 2017, NLCo equally deduces that the intentions of the parties must be taken into account when determining the moment at which a dividend becomes payable. Based upon the debt-redemption plan, the underlying documentation and the bookings of both dividends, NLCo continued to maintain that these show without a doubt that the group had the express intention to pay both dividends on the same date, in particular precisely to avoid forex gains or losses.

What was the judgment of the courts?

NLCo was unsuccessful in its appeal, both at first instance (before the Noord Holland District Court) and before the Amsterdam Court of Appeals ('the Amsterdam Court').

In its judgment, the Amsterdam Court gave extensive consideration to consistent Netherlands case law regarding 'good business practice', which gives rise to the main rule that income must be attributed to the year in which the claim on which that income (or 'receipt') is based comes to form part of the taxpayer's assets. This means that a shareholder (in this case NLCo) must in principle take into account a dividend received at the time that the shareholder's right to it arises.

The Amsterdam Court recognised that the intention was to carry out and process the transactions with as few exchange gains as possible. However, that intention was not relevant in this case, because the proper steps to achieve that goal had not been taken.

Both courts ruled that NLCo must take the dividend received of CHF 104 000 000 into account according to its value on 1 July 2011. This incoming dividend benefits from the participation exemption, but also immediately gives rise to a claim in Swiss francs, which falls outside the scope of the participation exemption. In other words, subsequent fluctuations in the value of this debt claim as a result of movements on the EUR/CHF exchange market will give rise to a taxable gain or deductible loss for the purposes of corporate income tax purposes on the part of NLCo.

Furthermore, the Netherlands courts emphasised that NLCo only incurred a legally enforceable obligation as a result of the CHF 104 million dividend payment by NLCo to its shareholder after the applicable requirements of Netherlands company law and NLCo's Articles of Association had been met. In short, the earliest that NLCo incurred a debt obligation (denominated in Swiss francs) to its shareholder was on 4 August. As a result, the exchange gain on the dividend claim could not be set off against the exchange loss in the same amount on the debt obligation.

The end result was that NLCo was liable to corporate tax on the gain in an amount of EUR 10 658 807.

THE PARALLEL WITH BELGIUM

It is interesting to test this Netherlands case against Belgian legislation and practice. Indeed, without going into details, the Netherlands and Belgian rules seem to be quite similar in this respect. The Amsterdam Court's judgment is therefore also applicable to Belgian tax practice.

Monetary vs. non-monetary items

Let us first recall the basic principles of exchange gains and losses under Belgian law. A basic text on this subject is a fairly old Advice Note of the Belgian Commission for Accounting Standards (CBN) of December 1987 (Opinion n° 152), which has subsequently been supplemented on certain points. As is generally known, Opinions of the CBN do not have the force of law, but are considered to be authoritative legal doctrines. In principle, they only have a fiscal impact if the findings of a CBN recommendation are adopted in a circular of the Belgian tax authorities.

A basic principle of Belgian accounting law is that balance-sheet items are booked at their historic cost (acquisition value). If economically justified, these balance-sheet items may later be revalued (upwards or downwards).

For balance-sheet items acquired in foreign currency (in this case, other than in euros), a distinction is made between 'monetary items' and 'non-monetary items'.

Non-monetary items are assets and liabilities of which the acquisition value is not subsequently affected by currency fluctuations. Typical examples are real estate or participations. They are translated into euros at the exchange rate on the transaction date. This is the date on which an established foreign currency debt or liability arose with the counterparty. Non-monetary items are not subsequently revalued for reasons of exchange-market fluctuations. Therefore, in principle, they do not affect the profit & loss account (and therefore the tax base). As an illustration, on 21 September 2006, the Brussels Court of Appeals confirmed that shares are indeed non-monetary items. Consequently, from neither an accounting nor a tax point of view can there be any question of a (fully disallowable for tax purposes) non-realised impairment on shares due to a latent exchange loss.

A monetary item, on the other hand, is an asset or liability that remains sensitive after the fact to everything that happens on the exchange market.

Typical examples are trade debtors (receivables) and trade creditors (payables). They too are initially translated into euros at the spot rate, but a revaluation is always necessary on the balance-sheet date and, broadly speaking, this works as follows:

- On the balance-sheet date, the monetary items recorded at that time are compared with the closing rate on the balance-sheet date, or the average rate for the month before the balance-sheet date, or the average rate for the period covering the last 15 days before the balance-sheet date and the first 15 days of the next financial year. Consistency is recommended.
- An unrealised exchange loss is immediately recorded in the profit & loss account (income statement) in accordance with the principle of prudence (and is generally tax-deductible).
- An unrealised exchange gain is deferred on the balance sheet when the prudence principle is applied (and therefore does not affect the tax base).

The Belgian tax authorities and case law are in line with this accounting interpretation of the CBN. Witness to this is a judgment of 3 February 1994 by the Antwerp Court of Appeal. In this case, a company had revalued its monetary items on the balance-sheet date based on the average EUR/USD rate for the entire financial year. In short, the tax authorities disagreed and corrected the taxable base of the Belgian company by adjusting its hidden reserves on the basis of the aforementioned valuation prescribed by the

CBN. On 9 September 2003, the Court of First Instance of Liège ruled along the same lines.

In line with Netherlands practice, any exchange gains arising in this way cannot benefit from the dividend-received deduction, i.e. the Belgium participation exemption.

Foreign exchange and share transactions

The dividend-received deduction, on the other hand, does come into play – as it does in the Netherlands – when we find ourselves in the sphere of pure dividend distributions. By way of illustration, we should like to refer to a judgment of the Court of First Instance of Leuven dated 11 October 2002 and to the answer given by the Minister of Finance on 21 January 2002 to Parliamentary Question No 880 by Senator Van Campenhout. On these occasions, it was confirmed that a foreign-exchange gain or loss included in a share transaction is to be considered as a capital gain or loss on shares and is therefore respectively exempt from corporate income tax or non-deductible if all conditions are met.

In view of the recent Netherlands judgment discussed above, it is extremely interesting also briefly to consider a judgment of the Court of First Instance in Liège of 14 April 2008. In June 1995, the foreign subsidiary of a Belgian company (BelCo) decided to distribute a USD dividend. BelCo recorded this dividend income in its financial year ended 31 December 1995. In January 1996, the dividend was effectively received. As there was an increase in the BEF/USD exchange rate in the intervening period, BelCo recorded a foreign-exchange gain.

The Belgian tax authorities sought to tax this foreign-exchange gain as ordinary financial income. However, BelCo argued that this foreign-exchange gain should benefit from the dividend-received deduction because it was inextricably linked to the corresponding dividend income, which did qualify for the deduction. In a nutshell: after a careful analysis of Belgian accounting law, the Liège court ruled that exchange differences must be booked as financial expenses or financial income, unless they are specifically linked to other items in the profit and loss account. In the latter case, the exchange difference may be booked against these items (applying the principle that 'ancillary items' should follow the same treatment as 'main items'). In this case, as BelCo was able to demonstrate convincingly that the currency difference was indeed inextricably linked to the USD dividend, it was allowed to apply the deduction.

This (old) Belgian case law seems to run counter to the (recent) judgment of the Amsterdam Court. We do not know the detailed facts of both cases, which of course makes a strict comparison difficult. However, a not unimportant nuance may lie in the fact that in the case considered by the Amsterdam Court, the dividend payments were part of a worldwide debt rescheduling within a group. Possibly, the intention there was to offset debts and claims resulting from earlier dividend distributions. If that is the case, we can better understand the conclusion of the Amsterdam Court – i.e. an exchange gain on a debt/claim that does not qualify for the Netherlands participation exemption – and see a factual difference with the case of Liège that cannot be ignored.

In a broader context, on 7 November 2001, the German Bundesfinanzhof concluded that an exchange loss incurred between a dividend distribution and its effective payment is a separate (and therefore in that case) deductible expense that is independent of the dividend distribution.

CONCLUSION

The judgment of the Amsterdam Court was no doubt an unpleasant outcome for NLCo. Although it must be said that this is not entirely justified. The essence of this judgment, from a Belgian perspective, lies in the fact that, when judging cases like this, the intentions of the parties do not really matter from a strictly legal point of view. What matters is a meticulous execution in accordance with the applicable rules of the game and – and this is all the more fundamental and therefore more important – the conclusive furnishing of proof on the matter. Given the comparable legislation in Belgium, Germany and the Netherlands, this Netherlands judgment is certainly also instructive for Belgian practice.

KURT DE HAEN

Tax Partner | Tax & Legal Services | Business & International Tax

Moore Belgium

kurt.dehaen@moore.be

https://www.moore.be/en

ERWINN MORRIEN

Tax lawyer

Moore /mth Amsterdam

E.Morrien@mth.nl

www.mth.nl

NEW ZEALAND

PAYING TAX ON YOUR SHARES

There's been a boom in direct share investments since the lockdowns of 2020 with platforms like Sharesies, Hatch and InvestNow seeing thousands of New Zealanders join up to buy shares.

These straightforward platforms have democratised share-market investment, helping New Zealanders grow their wealth and save for the future.

One question though: If individuals are directly investing in shares, are they paying the right amount of tax?

Tax on dividends is paid 'up front'

Individuals need to pay tax on the income they make from dividends on their shares. Most share-trading platforms pay tax on investors' behalf to Inland Revenue (the NZ tax authority). When investors receive a dividend payment for shares in a company, the tax has already been deducted. Other types of shares have tax deducted by the fund provider, so once again, the dividends individuals receive already have the tax deducted. Investors should check with their trading platform for more details.

Tax on international shares

On international shares, New Zealand has double tax treaties with 40 other nations, so investors don't end up being taxed twice on the same investment. These nations include Australia, China, the UK and the US.

Getting the PIR right

Individuals may be taxed at different rates depending on which types of shares they have invested in. It's important to have the correct 'Prescribed Investor Rate' loaded into the share-trading platform, to ensure that they will be taxed at the right rate, which causes fewer issues later on.

Tax on capital gains

Individuals who own international shares in large quantities or Australian real-estate ETFs (exchange-traded funds) may face capital gains tax on the sale of some shares, so they should talk to us if they think this might apply.

Send us the annual tax statement

Clients should not ignore the annual tax statement that is e-mailed to them but send it to us. We'll keep it on file and use it when we perform their end-of-year tax calculations.

CRYPTOCURRENCIES – ARE THEY ON THE RADAR?

Cryptocurrencies have been garnering worldwide attention recently, particularly with Bitcoin's dramatic rise to over NZD 90 000 for a Bitcoin in April 2021, and its subsequent 50% crash through May and June.

Other cryptocurrencies, deemed 'altcoins', have also seen similar price volatility. These coins adopt the same principles as bitcoin, with slight changes and tweaks to differentiate them. 'Dogecoin', featuring a dog as its logo, saw a 12 000% increase this year, propelled by tweets from Tesla founder Elon Musk. Clearly, some people are making large amounts of money in this space, and New Zealand's Inland Revenue ('IR') does not want to miss out on its share.

IR has released various forms of guidance on the topic of 'cryptoassets', which encompasses cryptocurrencies. Cryptoassets are defined as 'cryptographically secured digital representations of value that can be transferred, stored or traded electronically'.

Effectively, cryptocurrencies provide a decentralised platform for transactions to take place. Each holder of the cryptocurrency has a ledger on his or her computer that updates as transactions take place. This network of ledgers is referred to as a 'blockchain'. There is no one central entity, as the system relies on agreement between each ledger in order to verify transactions. This bodes well for security, as hacking the ledger on one computer will not affect the blockchain as a whole.

This process allows for cryptocurrencies to be used as an alternative form of currency without the need for government monitoring or intervention. Bitcoin transactions are confirmed through a computationally intensive process called 'mining'. Those who are willing to invest in the hardware to 'mine', are rewarded with bitcoins over time, adding to the overall supply of bitcoins. The supply of bitcoins is limited to 21 million, with 18.7 million currently in circulation. The last bitcoin is expected to be mined in 2140.

The tax guidance on cryptoassets is varied and somewhat contradictory. In general, cryptoassets are treated as a form of property for tax purposes. Individuals are liable for tax in the following circumstances:

- acquiring cryptoassets for the purpose of disposal
- trading in cryptoassets
- using cryptoassets for a profit-making scheme.

However, when salary, wages or bonuses are paid to an employee in the form of cryptoassets, PAYE (tax deduction at source) applies. Furthermore, FBT (fringe benefit tax) may apply if employees are offered conditional cryptoasset payments by a company that issues cryptoassets. This leaves a situation where IR is treating cryptoassets as either property or currency depending on the situation. This is not surprising given the complexity and varied nature of cryptoassets, making an all-encompassing treatment near impossible. For this reason, IR is also proposing that GST and financial arrangement rules do not apply to cryptoassets.

This year El Salvador made bitcoin legal tender, and we are seeing more shops accept cryptocurrency as payment. However, the extreme volatility associated with cryptoassets makes their use as a currency unreliable for the time being. Clearly, the market is not to be underestimated and we can expect further guidance from IR as things evolve.

LATEST ON PROPERTY TAX RULES

On Tuesday 28 September, the NZ Government released the draft legislation outlining the details of the policy limiting the deductibility of interest costs for residential-property investments.

It should be remembered that these are still not the final rules but do give a good indication of what we could expect. The rationale behind the legislation is to stem investor demand for existing residential properties, instead encouraging investors to build new housing stock, leaving existing property for first-time home buyers.

As the current legislation is still in draft stage, we strongly advise contacting your Moore Markhams adviser before relying on this commentary.

The starting point of the legislation is that interest costs on loans applied to acquire residential property will receive restricted tax deductibility, unless the property is a 'new build'.

What defines a 'new build'?

1. Defined as a self-contained residence that receives a Code of Compliance Certificate ('CCC') confirming the residence was added to the land on or after 27 March 2020.
2. It will also include a self-contained residence acquired 'off plan' that will receive its CCC on or after 27 March 2020 confirming it has been added to the land.
3. The new build will not have to be made of new material or constructed onsite, so it can include modular or relocated homes.
4. Converting an existing dwelling into multiple new dwellings will also qualify as a new build.
5. The conversion of a commercial building into residential dwellings will also be deemed a new build.
6. The exemption applies from either:
   - The date the taxpayer acquires the new build – if it already has a CCC or is acquired 'off plan' or
   - The date the new build receives its CCC.

A residential rental property that is deemed a new build will have a five-year 'bright-line test' and any interest relating to the purchase will be deductible for the taxpayer.

Expiry of exemption for new builds

The exemption will expire 20 years after a new build receives its CCC or when the new build ceases to be on the land (for example, it is demolished or removed), whichever is earlier.

The exemption will apply to anyone who owns the new build within this 20-year fixed period, and the timing of the exemption will not reset when the property is sold.

Interest-limitation rules

How interest deductibility will be phased out for properties acquired before 27 March 2021.

Date intrest incurred	Percentage of the interest that can be claimed
1 April 2020 to 31 March 2021	100%
1 April 2021 to 30 September 2021	100%
1 October 2021 to 31 March 2022	75%
1 April 2022 to March 2023	75%
1 April 2023 to 31 March 2024	50%
1 April 2024 to 31 March 2025	25%

The above table confirms what was previously released regarding the phasing-out of interest for properties acquired before 27 March 2021. It should be noted that there is an 18-month period from 1 October 2021 to 31 March 2023 during which only 25% of the interest will be deemed non-deductible.

From a landlord's perspective this provides a reasonable time during which the increased tax is not too cumbersome and allows a less rushed approach to selling existing residential investment properties if that is the landlord's intention.

In short, landlords need not rush to sell these properties if the increased tax cost is the sole motivator.

Properties that will be excluded from the interest limitation rules

Among the exclusions are the following:

- Properties used as business premises (except for an accommodation business), like offices and shops. This includes residential properties to the extent they are used as business premises (for example, a house converted into a doctor's surgery)
- Farmland
- Commercial accommodation such as hotels, motels, and hostels (but not short-stay accommodation provided in a residential dwelling)

Exemptions from the interest limitation rules

Persons holding land as part of a developing, subdividing, or land-dealing business, or a business of erecting buildings on land will qualify for the land business exemption , and interest will be deductible as usual.

Persons who do not qualify for the land-business exemption may still qualify for the development exemption for land that they develop, subdivide, or build on to create a new build. The exemption applies from the time the development begins and will end when either the land is sold or receives the CCC for a new build. Once the new build receives its CCC, the new-build exemption will apply instead.

Notable points regarding current loans and structures

- Refinancing properties acquired prior to 27 March 2021 will allow phased-out deductibility up to the level of the original loan
- Variable loans, such as a revolving credit or overdraft will be phased out and capped at debt levels as of 27 March 2021
- Borrowing for other purposes will not be affected as the tracing rules apply and security against a residential property does not affect the purpose of the loan
- Property rented out and also used privately, as is the case for holiday homes, will be affected by these rules
- Changes in how property is held may not deny an interest deduction if certain rollover relief applies.
- Mixed-use loans will need to be analysed and traced to determine deductible and non-deductible portions

Disallowed Interest not lost forever if sale of property taxable

If a property where interest has been disallowed under these rules is sold and the gain on the sale is taxable under the 'bright-line rules', the previously disallowed interest may be added to the cost base of the property.

For example:

- John buys an existing residential rental property in October 2021;
- The interest-limitation rules apply and no interest deductions are allowed;
- John then sells the property within the relevant bright-line period for a taxable gain of NZD 45 000;
- The total non-deductible interest from when John owned the investment property was NZD 15 000;
- Therefore, John will pay tax on the NZD 30 000 only, being the taxable gain less the previously disallowed interest.

Note – that if the disallowed total interest exceeds the taxable gain, any excess is carried forward for off-set against any other land-sale gains of the taxpayer.

The Bright-Line Test

The bright-line test applies to residential properties (other than private homes) purchased after 1 October 2015.

Where the bright-line test applies, the taxpayer will be taxed on any capital gains arising on the disposal of such properties.

If the property is acquired after 26 March 2021, capital gains on a disposal within 10 years of acquisition are taxable.

If the property was acquired between 29 March 2018 and 26 March 2021, capital gains on a disposal within five years of acquisition are taxable.

If the property was acquired between 1 October 2015 and 28 March 2018, capital gains on a disposal within two years of acquisition were taxable.

Changes to the bright-line property rules

When the property was acquired	The bright-line period that applies
On or after 27 March 2021	10 Years
Between 29 March 2018 and 26 March 2021 inclusive	5 Years
Between 1 October 2015 and 28 March 2018 inclusive	2 Years

Changes to the main-home exclusion

Predominant land use

The current rules ensure that if more than half the land is used as a main home, the bright-line property rules do not apply.

However, this exclusion does not apply if less than half the land is used for a main home. Currently, if more than half the land is used as a residential rental property the total gain on sale is taxable.

The proposed change is to allow apportionment of the gain where the main home is less than half the land. Therefore, if 60% of the land relates to rental land and 40% to the main home, only 60% of the gain is taxable. Under the current rule this would be 100% taxable.

Change-of-use rule

For any property purchased on or after 27 March 2021 which is a main home but is not used as the taxpayer's main home for any continuous period or periods of more than 12 months during the bright-line period, the main-home exemption will not apply to the period(s). Tax will be payable on the portion of profit that relates to the period(s). This is the 'change-of-use' rule.

Rollover relief for certain changes of ownership

Rollover relief allows the original owner to transfer property to the new owner without triggering a deemed bright-line sale. The new owner will be treated as having acquired the land when it was acquired by the original owner. The Government has proposed that in limited circumstances some transfers of ownership may receive rollover relief.

KIRAN BHIKHA
Partner
Moore Markhams Auckland
admin.akl@markhams.co.nz
https://www.markhams.co.nz

SLOVAKIA

INTRODUCTION OF NEW RULES REGARDING REVERSE-HYBRID MISMATCHES

With the implementation of the Second EU Anti-Tax Avoidance Directive (Council Directive (EU) 2016/1174, as amended by Council Directive (EU) 2017/952), new rules have been introduced on hybrid mismatches with the aim of preventing the non-taxation of income which occurs with reverse-hybrid entities. According to the Directive, an entity is deemed to be an independent taxpayer if the state where the entity was established will consider such an entity to be transparent and this perception will be shared by the country of the non-resident founder of the company. These rules apply to income that would otherwise not be taxed in either country.

From 1 January 2022, section 17j containing a definition of the terms 'transparent entity' and 'reverse-hybrid entity' is inserted into the Slovak Republic's income Tax Act (ITA). Within the meaning of this provision, a transparent entity refers to a public company or a general partnership with a registered office in the territory of the Slovak Republic, an entity with legal personality and an entity without legal personality, established or constituted in the territory of the Slovak Republic whose income (revenue) is taxed only at the level of partners or recipients of income (revenue) received from an entity with legal personality or recipients of income (revenue) received from an entity without legal personality.

A 'reverse-hybrid entity' is defined as an entity that:

- from the point of view of the state in which it is located is considered to be transparent – its income is taxed at the level of the partner or member and
- from the point of view of the state of its founder is considered to be an independent tax entity (non-transparent) – whose income is taxed at the level of the entity

thereby creating the risk of double non-taxation.

Under Section 17j of the Income Tax Act, income accruing to foreign (non-resident) partners or members who meet the condition of owning 50% or more of the shares in a transparent company will be taxed at the level of the transparent company, at a corporate tax rate of 21%, provided that this income cannot be taxed through a permanent establishment, either in the state of residence of the relevant transparent company or abroad.

Following the new rules, a new obligation to notify is imposed on foreign partners or members of transparent companies under section 49a ITA is introduced from 1 January 2022. Foreign partners or members meeting the criteria for participation in the share capital or voting rights or those entitled to at least a 50% share in the profits of the entity are required to declare the status of a transparent company in order for the correct tax to be applied.

EXTENSION OF CFC RULES TO NATURAL PERSONS

Rules regarding controlled foreign companies (CFC rules) refer to measures intended to prevent the diversion of profits to tax havens. The Income Tax Act has been amended with effect from 1 January 2022 to apply CFC rules to entities owned by natural persons, whereas hitherto they have applied solely to corporate owners. These entities are most often shell companies established in countries with minimal or no tax burden whose activities affect Slovak natural persons. Income from these companies is not taxed in the territory of the Slovak Republic as dividends, and in their country of residence the entities are taxed at a minimal rate or not at all.

A controlled foreign company (CFC) now also exists where:

- natural persons by themselves or together with dependent persons have a direct, indirect, or an indirectly derived share in the capital or voting rights of the company or are entitled to at least a 10% share in its profits, or have effective control over the company;
- the controlled foreign company is established in a non-cooperating jurisdiction or is established in a jurisdiction where the effective rate of taxation on its income is less than 10%.

The effective rate of taxation is calculated as the ratio of demonstrably paid tax on the CFC's income to the economic outturn of the CFC.

New section 51h ITA provides that the CFC's profit shares (dividends) will be taxed on its Slovakian-resident participators who are natural persons at the moment that their claim to those profits arises and not when the dividends are paid. Dividends that have not yet been paid are taxed on a special tax base at a rate of 25% or 35% (where the CFC is established in a non-cooperating jurisdiction). The situations of direct and indirect participation in the CFC, as well as the tax credit, are regulated separately.

The above procedure does not apply if:

- the total amount of income attributable from the CFC does not exceed EUR 100 000
- the share in the foreign entity is included in the Slovak corporate tax base (if, for example, a Slovak natural person is a person dependent on a Slovak legal person, where both own a share in the CFC) or
- the CFC is a taxpayer from an EU Member State or from a country that is a contracting party to the EEA (European Economic Area) Agreement and the taxpayer can prove that the company's income actually resulted from the business activities in said country and the taxpayer can support the statement by the real existence of the company's premises, the employees' activities, material equipment etc. This exemption does not apply to CFCs from a non-cooperating jurisdiction.

ANNOUNCEMENT OF THE AMOUNT AND MATURITY OF ADVANCE PAYMENTS OF INCOME TAX

From 2022, the tax authorities will inform all taxpayers who have submitted their income-tax returns of the amount and due date of payments on account of income tax no later than five days prior to the due date (section 42(13) ITA).

MARTIN KIŇO
Partner
Moore BDR
martin.kino@bdrbb.sk
https://www.moore-bdr.sk/en/

UNITED KINGDOM

RESIDENTIAL PROPERTY DEVELOPER TAX

On 27 October, the final details of the new Residential Property Developer Tax (RDPT) were announced. The new tax, which will have effect from April 2022, aims to raise at least GBP 2000 million to contribute towards the cost of cladding remediation. This follows the findings of an inquiry investigating the causes of a serious fire that destroyed the Grenfell Tower block in London in 2017.

The proposed RDPT was originally announced in February 2021, followed by two rounds of consultation and the publication of draft legislation.

The new tax will apply to companies with profits from UK residential-property development activities in excess of a group-wide annual profits allowance of GBP 25 million.

There are no reporting requirements for groups with profits below the threshold. The tax will be administered by means of extension to the existing corporation tax self-assessment (CTSA) regime.

The rate of RDPT will be 4% on RDPT activity profits in excess of the GBP 25 million allowance.

CORPORATE REDOMICILIATION CONSULTATION

On 27 October, the UK Government launched a consultation into the possibility of a UK corporate redomiciliation regime. This would aim to enable companies to change their place of incorporation to the UK, without the need for a new legal entity. The consultation ends on 7 January 2022.

REPEAL OF RULES ON INTEREST AND ROYALTY PAYMENTS TO CONNECTED COMPANIES IN THE EUROPEAN UNION

Prior to 1 June 2021, there was an exemption from UK withholding tax on payments of interest and royalties made to associated companies resident in EU Member States. The legislation had been made to give effect to the EU Interest and Royalties Directive in UK law.

On 3 March 2021, it was announced that the Government would repeal this legislation with effect from 1 June 2021. This will mean that the treatment of interest or royalty payments made from the UK to a connected company in an EU Member State is now treated no differently from payments to an associated company in any other foreign jurisdiction, i.e. according to the relevant double tax treaty.

CROSS-BORDER GROUP RELIEF ABOLISHED

On 27 October 2021, the UK Government announced that the cross-border loss-relief rules relating to EEA-resident companies will be aligned with those for non-UK companies resident elsewhere in the world. To achieve this, the rules that enable non-UK resident companies established in the EEA to surrender losses as group relief to UK companies in certain situations will be abolished.

Loss-relief rules that apply to EEA-established companies trading in the UK through a permanent establishment (PE) will be amended so that non-UK-resident companies may only surrender losses of a UK PE as group relief if the loss cannot be deducted from non-UK profits of any person for any period.

These changes will take effect for company accounting periods ending on or after 27 October 2021. Transitional rules will apply for companies with accounting periods spanning that date.

RESEARCH AND DEVELOPMENT (R&D) TAX RELIEF

SME-scheme limit on payable tax credit

For accounting periods beginning on or after 1 April 2021, the amount of payable R&D tax credit which a company may claim under the Small and Medium-sized Enterprise (SME) scheme will by default be limited to a cap of GBP 20 000 plus 300% of its total payroll (Pay As You Earn (PAYE) and national insurance contribution) liability for the period.

A company is exempt from the cap if:

- its employees are creating, preparing to create or managing intellectual property and
- it does not spend more than 15% of its qualifying R&D expenditure on subcontracting R&D to, or the provision of externally provided workers by, connected persons

This change is intended to prevent misuse of the SME scheme and has been consulted on since 2019.

Qualifying expenditure

On 27 October 2021, the Government announced changes to the definition of qualifying expenditure

for R&D tax reliefs. From April 2023, the definition of qualifying expenditure will be expanded to include cloud computing and dataset purchase costs. This follows a consultation that was launched at the Spring Budget earlier this year and the aim is to modernise and better to target R&D tax relief towards truly innovative activities.

UK activities

On 27 October, the UK Government also announced that it would make changes to focus UK R&D tax relief on innovative activities taking place in the UK. Further changes will also be made to tackle perceived abuse and improve compliance. These changes are set to take effect from April 2023 and further details will be announced at a later date.

ANNUAL INVESTMENT ALLOWANCE LIMIT EXTENSION

The Annual Investment Allowance limit of GBP 1 million had been set to reduce to GBP 200 000 from 1 January 2021. This date has been extended so that the GBP 1 million limit will now finish on 31 March 2023.

The Annual Investment Allowance takes the form of an immediate 100% write-down of investment in certain types of new plant and machinery.

HYBRID AND OTHER MISMATCHES

The hybrid and other mismatches rules were originally introduced with effect from 1 January 2017 and seek to address arrangements that exploit the difference in tax treatment between two jurisdictions. Such mismatches typically arise where financing arrangements are involved, for example where a tax deduction for interest is claimed in one jurisdiction without a matching liability to tax on the interest receipt in the other jurisdiction.

A number of technical changes have been introduced to the hybrid and other mismatches regime. A consultation was announced at Budget 2020 to consider whether certain aspects of the rules, in particular the 'double-deduction' and 'acting-together' rules, operate as intended. Draft legislation was published on 20 July 2021.

NOTIFICATION OF UNCERTAIN TAX TREATMENT FOR LARGE BUSINESSES

Following two rounds of consultation, draft legislation was published on 20 July 2021 for a new 'Uncertain tax treatment' notification requirement for large businesses. An amended version of the legislation is now contained in the Finance Bill, currently under consideration by Parliament. The measure will come into effect from 1 April 2022.

Businesses with a turnover of more than GBP 200 million per annum or a balance-sheet total of over GBP 2000 million must notify HMRC where they take an 'uncertain tax position' in their VAT, corporation tax or income tax returns.

There are two triggers for the requirement: where the tax treatment adopted is not in accordance with HM Revenue and Customs' known view, and where a provision has been made in the accounts for the uncertain tax position.

TRANSFER-PRICING DOCUMENTATION

On 23 March 2021, the Government published a consultation on increasing requirements for businesses to maintain transfer-pricing documentation. Currently, this is governed by generic record-keeping requirements, which are less onerous and less specific than in many other jurisdictions.

The Government is now specifically considering whether businesses subject to country-by-country (CbC) reporting rules should be required to maintain 'master' and 'local' files, and whether all businesses within the scope of transfer-pricing rules should be required to report to HMRC specific information on cross-border transactions with connected parties. The second of these proposals may ultimately be more onerous for a larger number of businesses.

The outcome of the consultation has not yet been published.

DAC6 UPDATE

The 2018 amendment to the EU Directive on Administrative Cooperation, or 'DAC 6', aims to give the tax authorities of EU Member States additional information to enable them to close perceived loopholes in tax legislation and harmful tax practices more quickly.

A number of changes have now been made to the implementation of DAC6 in the UK following the end of the Brexit transition period and the conclusion of the Trade and Cooperation Agreement between the EU and the UK.

The key points are as follows:

- DAC6 will (subject to the point below) apply as it would if the UK were still an EU Member State.

- Reporting will now be required in the UK only for arrangements that meet 'Category D' hallmarks. In the UK we therefore no longer need to consider arrangements that meet hallmarks under Categories A, B, C, or E. The Category D hallmarks concern the automatic exchange of information and beneficial ownership.
- In the coming year, the UK will consult on and implement the OECD's Mandatory Disclosure Rules as soon as practical, to replace DAC6.

It is now possible to submit DAC6 reports to HMRC where applicable, and the following reporting deadlines apply:

- Reports in respect of arrangements that were begun between 25 June 2018 and 30 June 2020 had to be filed by 28 February 2021.
- Reports in respect of arrangements that were made available/ready for implementation/begun between 1 July 2020 and 31 December 2020 had to be filed by 30 January 2021.
- The standard 30-day reporting deadline applies for arrangements that were made available/ready for implementation/begun on or after 1 January 2021.

NON-RESIDENT SURCHARGE ON STAMP DUTY LAND TAX

Stamp duty land tax (SDLT) is the tax payable by purchasers of real property in England and Northern Ireland. From 1 April 2021, a two percentage-point surcharge, on top of existing rates, is applied to all non-residents purchasing residential property in England and Northern Ireland. As a result, the maximum rate of SDLT payable by such purchasers is now 17%. Different definitions of what constitutes non-residence apply as between individual and corporate purchasers. Broadly, if a company is considered non-resident for the purposes of corporation tax, it will also be non-resident for the purposes of the SDLT surcharge.

BREXIT

The EU-UK Trade and Cooperation Agreement

The Trade and Cooperation Agreement concluded between the European Union and the United Kingdom in late December 2020, which entered into force provisionally on 1 January 2021, was ratified by the European Parliament in late April 2020 and applies permanently from 1 May 2021

The Agreement includes provisions on:

- trade and other economic aspects of the relationship, such as aviation, energy, road transport, and social security;
- cooperation on law enforcement and criminal justice;
- issues termed 'thematic' issues, in particular health collaboration;
- participation in EU programmes, principally scientific collaboration through Horizon;
- dispute settlement.

See 'Brexit agreement finally reached – key points summarised' for Moore Kingston Smith's summary of the agreement.

RUTH BRENNAN
Tax Partner
Moore Kingston Smith LLP
RBrennan@mks.co.uk
https://mooreks.co.uk/

ELOISE BROWN
Senior manager, Tax Knowledge
Moore Kingston Smith LLP
ebrown@mks.co.uk
https://mooreks.co.uk/

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marketing@moore-global.com

For more information please go to:
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