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Private Wealth Newsletter

December 2020

Editors' note

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We are pleased to share with our clients, friends, colleagues, and readers across the world the December 2020 issue of the Private Wealth Newsletter, a publication of Baker McKenzie's Global Wealth Management Practice Group.

As you will notice, this edition of the newsletter is published in a unique and visually-pleasing format following other exclusive thought leadership efforts of the firm, and we are excited to launch the next generation of our newsletter on this platform. Special thanks go to our dedicated publications team, in particular Luk Zetrenne, Paolo Marco Restituto, Christina Magill, and Alfredo Escandon, as well as our in-house design team responsible for the internal and external features of the new format. While the newsletter look and feel has changed, our mission—to showcase our truly global and world class private wealth team—remains the same.

As we send this edition to publication, we see continued uncertainty and discord that will continue to impact families, private wealth, and the institutions that serve them. The US presidential and congressional elections have passed; however, the medium term impact on tax policy and the global markets remains unclear to say nothing of the short-term aftermath of the results and seemingly illegitimate disputing of those results.

We also see many of our clients, colleagues, and friends affected by extended or renewed measures to address the second (or third) wave of COVID-19 infections spreading across much of Europe, the Middle East, and North and South America. Governments everywhere are dealing with the effects in expected and novel ways, as our feature article on moves by Russia, India, and other countries to renegotiate double tax treaties.

Nevertheless, legislative, administrative, and regulatory developments at the national and global level continue apace with Brexit rapidly approaching and the OECD continuing its efforts to introduce global solutions to perceived deficiencies in national tax systems.

We hope you find something interesting, informative, or thought provoking in this edition, whether it be one of our representative articles or topical summaries of relevant and important cases or legislative developments from across the world.

Please feel free to reach out to us, or any of the authors listed throughout the newsletter, with any feedback or questions.

Elliot Murray
Partner
Geneva
Tel: +41 22 707 98 39
elliot.murray@bakermckenzie.com

David Berek
Partner
Chicago
Tel: +1 (312) 861 8184
david.berek@bakermckenzie.com

Russia, India, and Others Revise Tax Treaties to Fund COVID Relief

Feature:

Russia, India, and other countries revise popular tax treaties to fund COVID relief

Facing an economic recession due to the COVID-19 pandemic, national governments worldwide are looking for new sources to finance their increased budgetary costs. Consequently, a number of countries have taken an increasingly stronger approach to countering the abuse of double tax treaty benefits.

Russia revises popular DTTs with Cyprus, Luxembourg, and Malta

On 25 March 2020, the Russian president announced an increase in withholding tax from 5% and 0% to 15% on dividends and interest respectively payable abroad "to offshore jurisdictions." As the Russian Ministry of Finance clarified later, the proposed measures targeted Cyprus and other "transit" jurisdictions used to transit funds with simultaneous application of reduced withholding tax rates and were not intended to affect payments on eurobonds, the bonds of Russian issuers, or foreign bank loans.

Five days later, on 30 March 2020, Russia initiated the process of reviewing its existing double tax treaties in order to reduce the risk of tax benefits' abuse, with Cyprus being the first jurisdiction to receive the relevant notification from Moscow.

This action by Russia prompted the two countries to sign a protocol[1] to their tax treaty to increase withholding tax rates up to 15% on dividends and interest payments applying as of 1 January 2021.[2] The same process has been initiated with Malta, and has led to a new protocol also implementing 15% withholding tax rates.[3]

The examples of Cyprus and Malta are already serving as a basis for renegotiating tax treaties with other jurisdictions that enable Russian taxpayers to fully or partially exempt income from Russian taxation. The Russian Ministry of Finance has sent official notices to Luxembourg (the draft protocol has been published[4]) and the Netherlands; discussions are also underway to start negotiations with Hong Kong and Switzerland.

Treaties with Russian strategic partners, such as Germany, Italy, France, and China, would remain unchanged and retain the 5% rate for dividends.

[1]Agreement between the Government of the Republic of Cyprus and the Government of the Russian Federation for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed 5 December 1998.
[2]Press release of the Russian Ministry of Finance dated 8 September 2020. https://minfin.gov.ru/ru/press-center/?id_4=37175-rossiya_i_kipr_podpisali_protokol_ob_izmenenii_nalogovogo_soglasheniya_mezhdu_stranami
[3]Press release of the Russian Ministry of Finance dated 1 October 2020. https://minfin.gov.ru/ru/press-center/?id_4=37210-rossiya_i_malta_podpisali_protokol_ob_izmenenii_nalogovogo_soglasheniya_mezhdu_stranami
[4]Press release of the Government of the Russian Federation. http://government.ru/news/40555/

India and other countries revise DTTs with Mauritius

In other parts of the world, many tax treaties are also being amended or renegotiated to plug perceived revenue leakages. For example, the extensive network of tax treaties in Mauritius makes it an attractive jurisdiction for holding companies investing in Asian and African regions.

In July 2019, the International Consortium of Investigative Journalists published the Mauritius Leaks — an investigative report suggesting that multinational companies are using Mauritius to avoid paying taxes in developing countries.[5]

India[6] and the United Kingdom[7] were the first jurisdictions to revise their double taxation conventions with Mauritius. Their example was followed by Kenya. After the double tax treaty between Kenya and Mauritius was annulled by the High Court of Kenya on 15 March 2019, on the grounds that the ratification of the 2012 treaty was unconstitutional, both parties finalized the text of a new double tax treaty[8].

Against the background of the negative publicity surrounding Mauritius tax treaties, the withholding tax rates were increased, and the taxation of disposals of investments and the definition of permanent establishments were amended to increase home country taxation.

Senegal and Zambia have followed this trend. Senegal tore up its tax treaty with Mauritius in 2020[9] due to the negative impact that Mauritius's status as a tax haven was having on the developing economies of the region. Zambia also terminated its tax treaty with Mauritius; the two countries are currently renegotiating the treaty. It is expected that any new versions of the tax treaties between the respective jurisdictions and Mauritius will increase the withholding tax rates and will include anti-abuse provisions in order to prevent the benefits of the double tax treaties with Mauritius being used solely to avoid tax.

Conclusion

At first view, the current global trend to revise tax treaties reflects an understandable and predictable process of protecting the financial interests of source jurisdictions, as well as a means of raising funds to cover budgetary costs due to the coronavirus crisis.However, it may also have significant negative consequences. These measures may sharply increase the tax burden on payments to foreign companies, lead to the double taxation of certain types of passive income, and create the risk of dual tax residency for companies and individuals.Moreover, the increase in withholding tax rates in respect of any foreign resident contradicts the current practice of providing tax benefits to companies that have created real economic substance in the country of their residence.The revision of tax treaties may undermine the good faith expectations of foreign investors for stable tax laws in the source country, which is likely to increase the outflow of foreign investment.

[5]Treasure Island: Leak Reveals How Mauritius Siphons Tax From Poor Nations to Benefit Elites. https://www.icij.org/investigations/mauritius-leaks/treasure-island-leak-reveals-how-mauritius-siphons-tax-from-poor-nations-to-benefit-elites/
[6]Protocol to the Double Taxation Convention between Mauritius and India, signed 10 May 2016. https://www.mra.mu/download/GN156of2016-DTCIndiaAmendmentReg2016.pdf
[7] Protocol to the Double Taxation Convention between Mauritius and the United Kingdom, signed 28 February 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727483/2018_Mauritius-UK_Protocol_to_the_1981_Double_Taxation_Convention__in_force.pdf
[8] Press release of the Government of Kenya. http://www.govmu.org/English/News/Pages/Mauritius-Kenya-Expansion-of-the-Double-Taxation-Avoidance-Agreement-(DTAA)-network.aspx
[9]Press release of the Government of Mauritius. https://www.mra.mu/index.php/taxes-duties/international-taxation/double-taxation-agreements

Authors

Sergei Zhestkov
Partner
Moscow
sergei.zhestkov@bakermckenzie.com

Dina Aydaeva
Associate
Moscow
dina.aydaeva@bakermckenzie.com

Reggie Mezu
Special Counsel
Dubai
reggie.mezu@bakermckenzie.com

Artem Toropov
Associate
Moscow
artem.toropov@bakermckenzie.com

OECD releases their 'blueprint' on Pillar One and Two

Pillar One

The Report on the Pillar One Blueprint regarding tax challenges arising from digitalization was approved by the member jurisdictions of the OECD/G20 Inclusive Framework on BEPS on 12 October 2020. It reflects extensive technical work that has been done to define a sustainable taxation framework to reflect the increasingly digitalized economy. However, no agreement has been reached by the members at this point and further significant work will be required to gain any consensus on many of the fundamental potential principles covered.

In summary, Pillar One seeks to expand the taxing rights of market/user jurisdictions where there is an "active and sustained participation of a business in the economy of that jurisdiction through activities in, or remotely directed at, that jurisdiction." It also seeks to improve tax certainty through dispute prevention and resolution measures. The three basic elements of Pillar One are a new taxing right for market/user jurisdictions based upon a share of a business's residual profits **("Amount A")**, a fixed return for certain distribution and marketing activities physically in a market/user jurisdiction **("Amount B")**, and dispute prevention and resolution processes to improve tax certainty.

Some of the particular issues that will need to be focused on at a political and technical level before Pillar One can be finalized and implemented include:

- what businesses should be in scope — the Blueprint proposes that certain automated digital services and consumer-facing businesses would be potentially impacted
- what size thresholds businesses should meet before they are impacted
- whether Pillar One should apply on a mandatory basis based upon activities tests or if it should be elective
- what portion of residual profit should be allocated to market/user jurisdictions as Amount A and the measures on which it should be calculated
- how to deal with businesses that have segments that are targeted by the new taxing rights but other segments that are not
- how to eliminate double taxation in a multilateral setting
- how to take into account and simply deal with the taxation of businesses that also have a physical or legal presence in market/user jurisdictions under Amount B
- how to achieve tax certainty over acceptance of Amount A in a simple and coordinated way
- how to implement the Pillar One solution, for example, potentially through a multilateral convention process that would supersede all bilateral treaties on the points covered in the convention

Pillar Two

The OECD also released the Blueprint for its Pillar Two proposal on 12 October as part of its two-pillar package to deal with the increasing digitalization of the economy. The premise behind the Pillar Two proposal is simple: if a state does not exercise their taxing rights to an adequate extent, a new network of rules will reallocate those taxing rights to another state that will.

This would be achieved through both of the following:

- **a new global minimum tax regime ("GloBE")** that aims to ensure a minimum effective tax rate across all jurisdictions
- imposing a minimum level of taxation on certain payments between connected persons **("Subject to Tax Rule")**

Pillar Two is the second prong of the OECD's Inclusive Framework plan to realign the international tax framework to adequately address the challenges of an increasingly digitalized economy **and the first thing you should know is that it has nothing to do with digitalization.**

Whereas Pillar One seeks to identify business models that are perceived to slip between the cracks of the existing international tax framework, Pillar Two is concerned about low-tax outcomes. How those low-tax outcomes are achieved is, on the whole, largely irrelevant.

The shipping industry appears to be the only sector that may be granted a carve-out as it is largely taxed through tonnage taxes that do not neatly align with corporate income tax principles upon which the GloBE regime is based (although it may still be within the scope of the separate Subject to Tax Rule). Likewise, the usual tax-advantaged investors with special status should also be carved out (sovereign wealth funds, pension funds, charities, etc.).

However, all other sectors are in the scope of Pillar Two.

Interaction with Pillar One

Pillar Two is essentially independent of Pillar One. The only real material interaction is that taxes borne by virtue of new taxing rights granted under Pillar One are taken into consideration when calculating the effective tax rates (ETRs) of the jurisdictions in which multinational enterprise groups **("MNE Groups")** operate.

Therefore, in theory, Pillar Two is capable of being implemented without agreement on Pillar One. Pillar One is arguably the more politically challenging as it entails states ceding existing taxing rights to so-called market jurisdictions, whereas Pillar Two would set a floor on acceptable ETRs (whether jurisdictions like it or not).

However, states keen to reach an agreement on Pillar One may play hardball on Pillar Two to ensure the two come together as a package. The political calculus may only be just the beginning.

GloBE and the Subject to Tax Rule

The initial public consultation on Pillar Two in late 2019 revealed that the proposal would be framed around four rules: an income inclusion rule (IIR), an undertaxed payment rule (UTPR), a switch-over rule (SOR), and a Subject to Tax Rule.

The OECD has now added substantial technical detail to the proposal and it has set out how the rules interact with one another. Though requiring 248 pages of detailed technical analysis and examples in its Blueprint document, once digested, the proposal is reasonably straightforward to understand at a high level (though it remains to be seen whether the details with be equally straightforward).

Pillar Two comprises two proposals that essentially operate independently of each other to ensure minimum levels of taxation of MNE Groups:

- a global minimum tax regime (the **"GloBE Rules"** applied through the IIR and UTPR, with support from the SOR as required)
- a minimum level of tax on certain payments between connected parties that are perceived to carry heightened base eroding potential (the Subject to Tax Rule)

The only interaction between the two is that the top-up tax imposed under the Subject to Tax Rule is taken into consideration in calculating ETRs under the GloBE Rules. As such, while the GloBE Rules take up the bulk of the Pillar Two Blueprint, the Subject to Tax Rule operates in priority to the GloBE Rules.

View the full OECD report on Pillar One and Two.

Authors

Antonio Russo
Partner
Amsterdam
antonio.russo@bakermckenzie.com

Clarissa Machado
Partner
Sao Paulo*
clarissa.machado@trenchrossi.com

Caroline Silberztein
Partner
Paris
caroline.silberztein@bakermckenzie.com

Marnin Michaels
Partner
Zurich
marnin.michaels@bakermckenzie.com

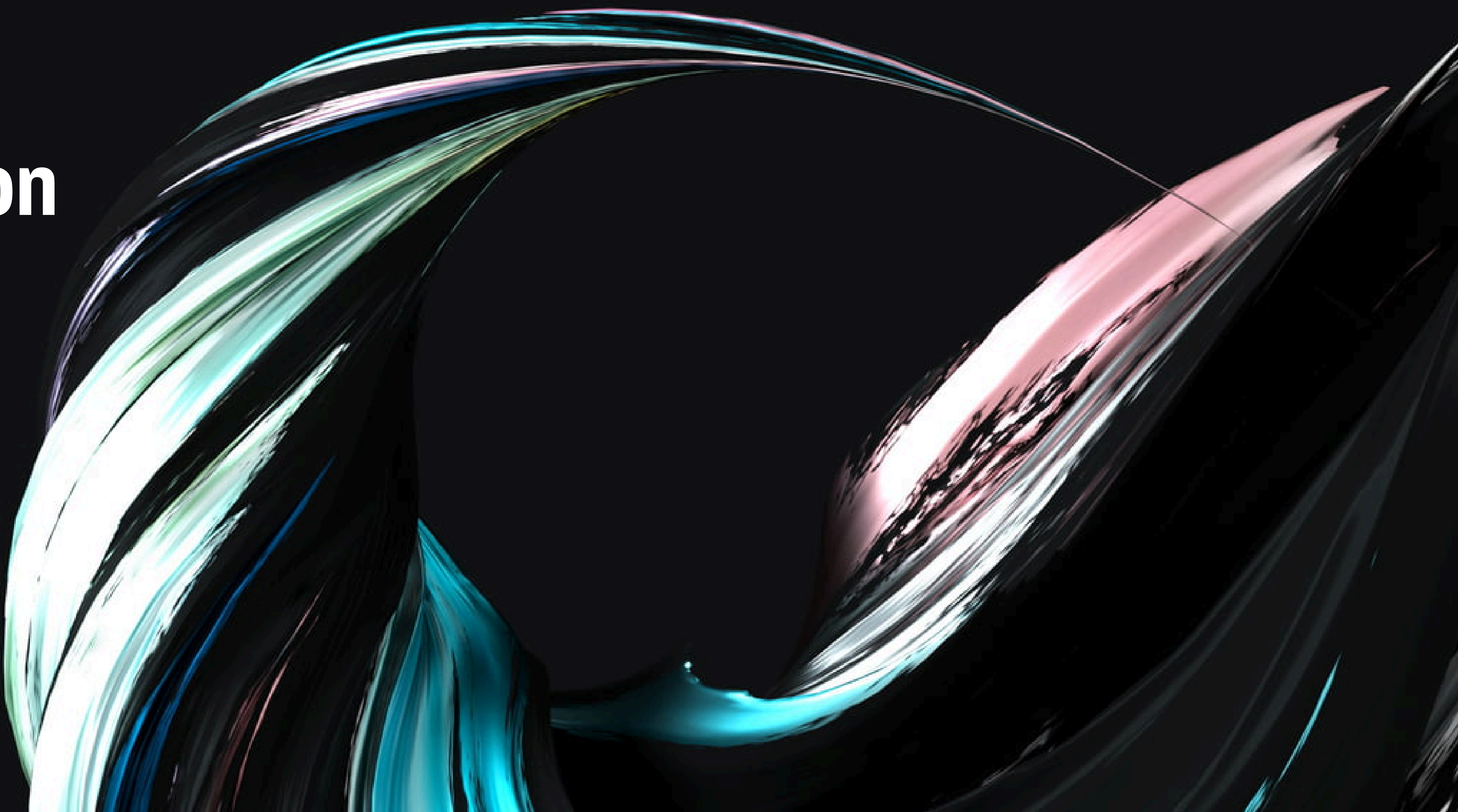
Brendan Kelly
Partner
Shanghai
brendan.kelly@bakermckenzie.com

Salim Rahim
Partner
Washington, DC
salim.rahim@bakermckenzie.com

Joshua Odintz
Partner
Washington, DC
joshua.odintz@bakermckenzie.com

*In cooperation with Trench Rossi Watanabe.

Brexit - last chance saloon



The completion of Brexit is imminent, with the end of the Brexit transition period on 31 December 2020. Regardless of the current uncertainty surrounding the possibility of a "no-deal" scenario, the implications for individuals looking to relocate to the UK will be great.

Given this looming deadline and the impact of COVID-19, individuals wishing to relocate should act now.

1. Immigration

Until 31 December 2020, EU, European Economic Area (EEA) and Swiss nationals will continue to be free to live and work anywhere in the EU (including the UK) without the need to obtain a visa or other permission. However, from 1 January 2021, the UK government intends to implement a new points-based system (PBS), which will treat both EU and non-EU migrants in the same way. As a result, EU, EEA and Swiss nationals (and their family members) arriving in the UK on or after 1 January 2021, with the intention of living and working in the UK, will need to obtain a work visa under the PBS. Further, the new system will require individuals coming to work in the UK to satisfy certain requirements to obtain points, with visas being provided to individuals who obtain a sufficient number of points. The government aims to create a system where "it is workers' skills that matter, not which country they come from." As a result, an individual's skill level will be one of the key criteria assessed under the new system. Further guidance from the Home Office on the new PBS is due to be released soon.

The new PBS should not apply to EU, EEA and Swiss nationals who are in the UK on or before 31 December 2020. These individuals will be able to continue working in the UK provided they apply under the EU Settlement Scheme for pre-settled or settled status by 30 June 2021. We recommend that any EU, EEA and Swiss individuals who have not already applied under the EU Settlement Scheme apply as soon as possible. Pursuant to the EU Settlement Scheme, EU, EEA and Swiss nationals (and their families) can live in the UK for up to five years with pre-settled status, following which they are able to apply for settled status. This scheme currently operates as an alternative route for EU, EEA and Swiss nationals to relocate to the UK without having to comply with the visa/immigration requirements applicable to non-EU nationals.

There are a number of options available for immigration to the UK. Typically, non-EU and non-EEA or Swiss high-net-worth nationals will apply for a Tier 1 (Investor) visa, should they wish to reside in the UK, provided they satisfy certain requirements, including having the funds available to invest at least GBP 2 million in the UK. The Tier 1 (Investor) visa allows temporary residency in the UK for the investor and their family for three years and four months, with the possibility of extending the visa for a further two years. After two, three or five years of remaining in the UK, the Tier 1 (Investor) visa provides the possibility of applying to settle or obtaining "indefinite leave to remain" in the UK provided an investment (of either GBP 10 million, GBP 5 million or GBP 2 million, respectively) is made. The position regarding the Tier 1 (Investor) visa should remain unchanged following the end of the Brexit transition period save that EU, EEA and Swiss nationals will now be able to take advantage of this option. There may be benefits to applying sooner rather than later as the UK, government previously announced a suspension of the Tier 1 (Investor) visa in December 2018. While this suspension was almost immediately revoked, the Home Office stated at the time that it remained committed to reforming this route.

There is also scope to apply for British citizenship under the various immigration options referred to above. If an individual remain in the UK for 12 months after obtaining indefinite leave to remain in the UK (for example, through the Tier 1 (Investor) visa route) or after obtaining settled status (through the EU Settlement Scheme), they may be eligible to apply for British citizenship. Further, the UK government has recently announced that it will create a visa for British National (Overseas) citizens (BNOs), allowing an additional route for some Hong Kong residents to work and study in the UK. After five years of residence in the UK, BNOs may be eligible to apply for settled status and, after a further 12 months, British citizenship (similar to the current route available to EU, EEA and Swiss nationals through the EU Settlement Scheme).

2. Resident non-domiciled (RND) tax regime

Regardless of the Brexit outlook, the UK remains an attractive jurisdiction for high-net-worth individuals looking to relocate. In particular, where you or your clients have become UK tax resident or if you are considering obtaining UK tax residence, it is still possible to benefit from the advantageous RND regime. The default position for UK tax residents is that they are taxable on their worldwide income and gains. However, an individual who is UK tax resident but not domiciled in the UK can elect to be taxed on the remittance basis of taxation (pursuant to the RND regime) until they have been resident in the UK in 15 out of 20 tax years.

The remittance basis of taxation can be hugely beneficial to high-net-worth individuals holding assets and cash outside the UK, provided the correct planning is undertaken. Broadly, an RND individual will be taxable on money or other property remitted to the UK by them or a "relevant person" (i.e., spouse, civil partner, minor children or grandchildren, any company controlled by the aforementioned or the trustees of any trust of which they are a beneficiary and a body connected with such a trust). If you or your clients are considering becoming UK tax resident, it is important to consider the number of days spent in the UK for immigration purposes, as it may be necessary to evidence this when applying for pre-settled or settled status or British citizenship. However, the number of days spent in the UK should also be managed to defer UK tax residence to the following UK tax year. This provides a valuable opportunity to undertake key pre-arrival planning, including creating clean capital to fund living in the UK (without incurring an additional UK tax liability).

Authors

Ashley Crossley
Partner
London
ashley.crossley@bakermckenzie.com

Christopher Cook
Senior Associate
London
christopher.cook@bakermckenzie.com

Tony Haque
Senior Associate
London
tony.haque@bakermckenzie.com

Phyllis Townsend
Senior Associate
London
phyllis.townsend@bakermckenzie.com

Oliver Morgan-Crosby
Senior Tax Adviser
London
oliver.morgan-crosby@bakermckenzie.com

Richard Mills
Senior Associate
London
richard.mills@bakermckenzie.com

David Whittaker
Senior Associate
London
david.whittaker@bakermckenzie.com

Meghna Deo
Senior Tax Adviser
London
meghna.deo@bakermckenzie.com

Like father, like son:

The UK's largest ever divorce case continues with satellite litigation between family members (Akhmedova v. Akhmedov and others [2020] EWHC 1526 (Fam))

Summary

This judgment of the Family Division of the High Court of England and Wales is the latest development in the long-running and dramatic divorce case between Tatiana Akhmedova and her oligarch ex-husband Farkhad Akhmedov. In 2016, the English court ordered Farkhad to pay Tatiana approximately GBP 453 million upon their divorce — widely reported to have been the largest ever divorce award made by the English court.

Nevertheless, some four years later, Tatiana has recovered just GBP 5 million of the award due to a sophisticated web of structures created by Farkhad and his associates to obstruct and frustrate his ex-wife's enforcement of the court's judgment. The court's latest judgment in this ongoing saga contains important decisions regarding the participation of litigation funders in family court proceedings and the circumstances in which the court may restrict the media's ability to report on such proceedings.

The applications

As noted above, in 2016, the English court ordered Farkhad to pay Tatiana approximately GBP 453 million by way of financial remedies following their divorce. Farkhad's assets include a GBP 350 million superyacht, which he purchased from Roman Abramovich in 2014; modern art valued at approximately GBP 110 million; and cash and securities worth approximately GBP 490 million. Essentially, all of these assets have been dissipated through the use of trust structures and shell companies, such that Tatiana has recovered just GBP 5 million to date.

Following the original 2016 judgment, Tatiana joined her son Temur Akhmedov to the proceedings, alleging that he had acted as her former husband's "lieutenant" in devising and executing schemes to frustrate that judgment, including the transfer of substantial cash sums from father to son by way of an unspecified "generalised financial provision" and the transfer of beneficial ownership in valuable Moscow properties to Temur in 2018. Tatiana therefore sought relief directly against her son in respect of certain assets to which she said she was entitled to recover under the 2016 judgment.

Temur has denied any impropriety and has brought counterclaims against his mother. In particular, Temur brought a counterclaim that Tatiana should be injuncted from funding the proceedings with monies advanced by Burford Capital ("Burford"), a firm of litigation funders, on the ground that such funding arrangements were alleged to be contrary to the public policy against champerty.

Champerty is a somewhat unusual principle of English law that provides that a person may have acted improperly if they financially support litigation — in which they have no legitimate interest — without just cause or excuse (until 1967, champerty was a crime in England, but even today it remains a principle of public policy). Essentially, Temur alleged that allowing litigation funders to control the conduct of family proceedings, in which by necessity a litigation funder could never have a direct interest, would jeopardize the purity of justice.

This argument, if successful, would have profound implications on the litigation funding industry. Temur also sought ancillary disclosure of documents that would allow him to scrutinize his mother's funding arrangements.

Temur also applied for reporting restrictions to be imposed in respect of the proceedings and for an order preventing Tatiana from disclosing certain documents to her legal advisers, Burford and the press.

The court's decisions

Temur's litigation funding counterclaim and disclosure application

Tatiana applied to strike out Temur's counterclaim in relation to the funding of the proceedings, on the basis that: (a) there was nothing improper or champertous about her funding arrangements; and (b) even if there were, Temur had no standing to seek any relief in respect of those arrangements in any event. For the reasons explained below, the court granted Tatiana's strike out application.

First, the court found that Temur had failed to demonstrate that there were reasonable grounds to suggest that Tatiana's funding arrangements were champertous. Over recent years, the English courts have adopted a supportive attitude toward litigation funding, such that it is typically perceived by the courts to be in the public interest. In this case, although Burford was consulted on the conduct of the proceedings and unsurprisingly had a financial interest in its outcome, Tatiana expressly retained control of the proceedings and was the person giving instructions to her solicitors. The court also did not accept Temur's argument that the prohibition on solicitors entering into conditional fee arrangements for family law cases should apply by analogy to funding arrangements (in any event, the court took the view that these were no longer pure family law proceedings and they had shifted in emphasis to enforcement proceedings).

Second, the court accepted Tatiana's submission that — even if the funding arrangements were champertous — this would not entitle Temur to any relief on the basis that (even when champerty was a crime) the courts would not grant injunctive or other relief because of it and so there was no ground for the court to do so here either.

For these reasons, the court struck out Temur's counterclaim in relation to litigation funding. In light of this, Temur's funding-related disclosure application fell away.

The court has therefore delivered a firm endorsement of litigation funding and has indicated that there are no specific restrictions on the use of litigation funding in family proceedings (an argument that the court noted Temur's counsel had come "perilously close" to suggesting). The court also urged caution against: "undesirable satellite litigation to investigate funding arrangements in circumstances where the claim is bona fide and the inquiry into funding arrangements would afford no defence to the claim."

Temur's application for a Reporting Restriction Order

Temur also applied for an order preventing the press from reporting on a wide range of details relating to the case, including his home address, financial affairs, and related matters. This application was opposed by certain media organizations, including the Guardian, the BBC, the Financial Times, and the Press Association.

The court refused to grant the majority of the relief sought by Temur, noting that the public interest in reporting on proceedings taking place in open court (particularly proceedings relating to the use of complex structures to frustrate the enforcement of an English court order) outweighed the limited prejudice that would be suffered by Temur if the majority of the information he sought to restrict was published. However, the court did grant limited relief preventing the publication of Temur's home address, bank account details, and other similar information.

Temur's application to prevent the disclosure of documents to third parties

Temur also sought an order prohibiting the disclosure of various claim documents (including applications, pleadings and witness statements) to members of the parties' legal teams, to Burford and to the press on the basis that these materials contained Temur's private information.

The court rejected this application entirely. In respect of nondisclosure to the press, this would have represented a disproportionate interference with the principle of open justice and the media's ability to report proceedings in which there is a legitimate public interest. In respect of nondisclosure to legal teams, this would have been impractical and it should only be contemplated by the court in exceptional cases. In relation to Burford, the court noted that it would need to be able to review these documents to perform the duties expected of it as a reasonable litigation funder and so it should not be prevented from accessing them.

Commentary

The court has once again indicated its support for the participation of litigation funders in English proceedings and has rejected arguments that it would prima facie be improper for disputes in the family courts to be funded in such a manner. The court has also cautioned litigants against engaging in satellite disputes regarding funding issues in circumstances where those issues have no bearing on the substantive dispute before the court. The court's firm ruling on this issue will no doubt be of significant reassurance to practitioners in family law and litigation funding.

The court has also confirmed it will be slow to impose reporting restrictions or similar measures unless there is clear evidence that the public interest in open justice is outweighed by the prejudice that would be suffered by the party seeking such restrictions.

The saga of the Akhmedovs' divorce continues. Any further developments of note, of which there will doubtless be many, will be the subject of future articles in this newsletter.

Authors

Rosie Sells
Associate
London
rosie.sells@bakermckenzie.com

Jack Secunda
Associate
London
jack.secunda@bakermckenzie.com

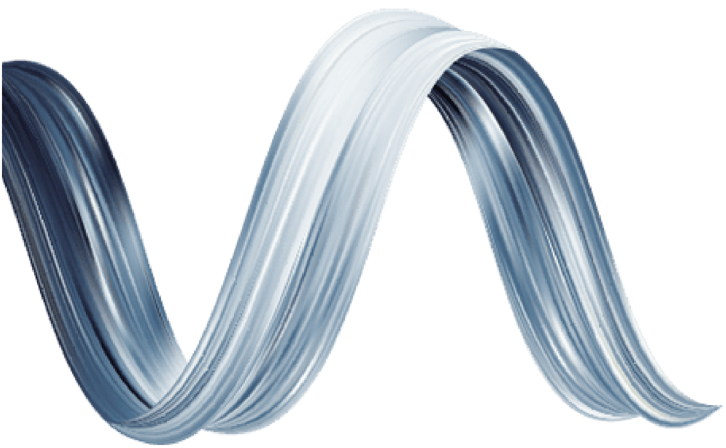
Kimberley Holder
Trainee Solicitor
London
kimberley.holder@bakermckenzie.com

How the ATO wins by losing

Considerations from Greig v. Commissioner of Taxation

On 8 July, the Australian Taxation Office (ATO) released its Decision Impact Statement (DIS) on the Full Federal Court (FFC) decision Greig v. Commissioner of Taxation [2020] FCAFC 25.

Andrew Greig was certain that his investment in Nexus Energy Limited **("Nexus")** was going to pay off. Despite declining share prices, he made 65 separate acquisitions of Nexus shares, expending over AUD 11.8 million, in the hope that the market would eventually recognize Nexus' value. Unfortunately for Greig, the market never would. In 2014, Nexus was placed into administration and his shares were transferred for nil consideration.



Although Greig's faith in Nexus may have been misplaced, his persistence in the ensuing dispute with the tax office was eventually rewarded. The FFC found that Greig, an ex-mining executive investing for his retirement, held Nexus shares on revenue account and he was entitled to deductions for their cost. Significant individual shareholders could be forgiven for their concern at this point, in particular, where hopes of claiming the capital gains tax discount are cast into doubt.

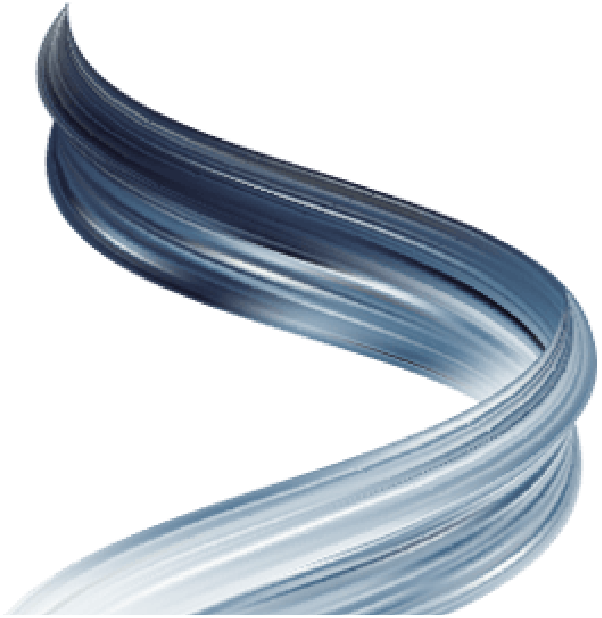
The FFC referred to the principle, articulated in Commissioner of Taxation v. Myer Emporium Ltd **("Myer")**, that gains from isolated business transactions constitute income where the property giving rise to the gain is acquired in a "business operation or commercial transaction" for the "purpose of profit-making" by the means actually giving rise to the gain. The corollary of this principle is that expenses will be deductible where incurred in the same circumstances.

Much of the FFC's decision was spent unpacking the meaning of the words used in Myer. This was a simpler task as it related to the condition that property might be acquired for the "purpose of profit making." The court was satisfied that Grieg was possessed of that intention when acquiring Nexus shares, largely because there was no evidence to suggest the he intended to derive gains otherwise than by sale at a profit. In particular, there was no evidence to suggest that he anticipated any dividend income. The potential for dividend income (or, rather, the lack thereof) was also viewed as significant in the later decision of XPQZ & Ors v. FCT in which the Administrative Appeal Tribunal (AAT), citing Greig v. Commissioner of Taxation, found proceeds from the sale of shares by a closely held trust to be ordinary income.

When addressing the meaning of the terms "business operation or commercial transaction," the court weaved its way back to 1985, the year in which Sydney University Emeritus Professor Ross Wait Parsons published "Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting." In it, Parsons discusses the expression "business deal" as used in a series of decisions that preceded Myer and that considered the former Section 26(a) (about profit-making undertakings). Ultimately, Parsons concluded that a transaction will qualify as a "business deal" if it is "the sort of thing a business person, or person in trade, might do."

The FFC equated the concept of a "business deal" with the concept of a "business operation or commercial transaction," as developed and referred to in Myer. Having established that Grieg was a sophisticated investor, with significant knowledge and experience of the mining industry, and having regard to the frequency of his share purchases, the FFC found that Grieg's investment in Nexus was the sort of thing a business person might do. As such, the FFC found that the conditions in Myer were satisfied and Grieg's investment was held on revenue account.

In one view, the court's conclusion is quite unremarkable; Greig certainly doesn't match the description of the average private investor. He even spent over AUD 500,000 in legal fees seeking to prevent that compulsory transfer of his Nexus shares under the Deed of Company Arrangement.



However, the commissioner's decision not to appeal to the High Court of Australia could be motivated by more than just the strength of Greig's arguments. Exposing a greater number of private investors to revenue taxation has the potential to restrict the availability of the capital gains tax discount, which could mean more tax dollars collected from share trading and other investment activities.

As if still deciding whether to mourn or celebrate the Commissioner's loss, the ATO's DIS on Greig v. Commissioner of Taxation is relatively ambiguous. The DIS notes that the FFC's decision is not "inconsistent with existing advice and guidance" but that, despite this preliminary view, the ATO will be reviewing TR 92/3 Income tax: whether profits on isolated transactions are income and TR 92/4 Income tax: whether losses on isolated transactions are deductible. In the interim, founders, significant individual shareholders and those applying industry skill and experience to undertake share trading on a periodic basis should seek advice regarding the availability of the capital gains tax discount and carefully consider whether investment expenses are deductible.

Authors

John Walker
Partner
Sydney
john.walker@bakermckenzie.com

Miles Hurst
Partner
Sydney
miles.hurst@bakermckenzie.com

William Malouf
Associate
Sydney
william.malouf@bakermckenzie.com

Major development in the UAE tax litigation landscape

On 14 October 2020, the United Arab Emirates (UAE) Federal Supreme Court passed its judgment on an appeal filed by the UAE Federal Tax Authority (FTA) in relation to the Court of Appeal's judgment concerning the imposition of penalties resulting from a voluntary disclosure. The case was handled by a UAE local law firm on behalf one of the UAE's largest financial institutions.

The Court of Appeal's decision had followed the established position (since the beginning of 2019) that the UAE Tax Procedures Law distinguishes penalties for late payment of tax as shown in submitted returns or notified assessments, from fines and penalties applicable to voluntary disclosures.

However, and in a very significant twist, the Federal Supreme Court took a different position and decided the following:

i. Late payment penalties should also apply to voluntary disclosures (up to 300% of the tax due).

ii. Late payment penalties apply from the due date of the tax return and not from the date of the voluntary disclosure.

iii. The voluntary disclosure penalties specified under Item 11 of the Schedule of Penalties attached to Cabinet Resolution No. 40 of 2017 apply to voluntary disclosures (in addition to late payment penalties: 50% or 30%, or 5% of the tax due (depending on the timing of the submission of the voluntary disclosure)).

For ease of reference, the full reasoning of the court is set out in the Annex hereto.

In brief, based on this judgment, taxpayers submitting voluntary disclosures could be subject to penalties of up to 356% of the tax due. The Federal Supreme Court's judgment reverses the position that had been established over the past 18 months, by virtue of which the penalties payable by taxpayers had been adjudged by the courts to be limited to administrative penalties as mentioned in point (iii) above. The Federal Supreme Court takes the view that voluntary disclosures are merely amended tax returns in nature.

It is also worth noting that the Federal Supreme Court's judgment also decided, **"to refer the lawsuit to the Abu Dhabi Federal Court of Cassation for adjudication de novo (anew) with a different panel."** We will continue to observe how the Court of Appeal will handle the case based on the Federal Supreme Court's direction.

This is a major development in the UAE tax landscape, as the Federal Supreme Court's judgment may affect upcoming decisions to be issued by the various tax dispute resolution committees (TDRCs) and federal courts. We expect that this judgment will have a significant impact on critical business sectors involved in transactions in respect of which the interpretation of VAT or excise tax under the UAE law and regulations is at best unclear and uncertain, resulting in huge financial exposures.

The UAE Constitution states that Federal Supreme Court judgments are binding and conclusive. However, this does not preclude the Federal Supreme Court's position to change or offer more flexibility in the interpretation/application of certain law provisions.

This latest judgment confirms the necessity for taxpayers to adequately consider appropriate strategies to adopt before or when pursuing tax challenges before the TDRCs and federal courts.

Authors

Dr. Habib Al Mulla
Partner
Dubai
habib.almulla@bakermckenzie.com

Mohamed El Baghdady
Senior Associate
Dubai
mohamed.elbaghdady@bakermckenzie.com

Reggie Mezu
Special Counsel
Dubai
reggie.mezu@bakermckenzie.com

SEC adopts amendments to the 'accredited investor' definition

On 26 August 2020, the US Securities and Exchange Commission (SEC) adopted amendments that expand the definition of "accredited investor" under the Securities Act of 1933, as amended **("Securities Act")**. These amendments are designed to modernize the definition of "accredited investor" and, among other things, open private offers under Regulation D to a wider group of sophisticated investors.

Changes to Regulation D, Rule 501(a)

Individuals: Previously, individuals had to have a net worth of at least USD 1 million excluding the value of their primary residence or income of at least USD 200,000 (USD 300,000 for couples). The adopted changes now allow individuals to qualify based on their credentials, which include professional knowledge, certain certification or the individual's relationship with the issuer. Some of the types of individuals now meeting the accredited investors definition include, but are not limited to the following (regardless of income or assets):

- **Knowledgeable employees:** anyone who is a "knowledgeable employee" of a private fund. For a definition of this term, the SEC reached through to the Investment Company Act of 1940 (ICA). Employees of private funds will qualify if they are:

  - an executive officer, director, trustee, general partner, advisory board member or person serving in a similar capacity of the private fund or an affiliated management person of the private fund

  - an employee of the private fund or an affiliated management person of the private fund (other than an employee performing solely clerical, secretarial or administrative functions with regard to the fund or its investments) who, in connection with their regular functions or duties, participates in the investment activities of the private fund, other private funds or investment companies the investment activities of which are managed by such affiliated management person of the private fund, so long as this person has been doing this for at least 12 months

- **Spousal equivalents:** Joint income and assets may be included as spousal equivalents when calculating qualification under the accredited investor financial tests described above. The SEC views a spousal equivalent as a cohabitant occupying a relationship generally equivalent to that of a spouse.

- **Entities:** With this amendment, the SEC adjusts the accredited investor definition to add several categories of entities, including, but not limited to:

  - **Limited liability companies:** Regulation D Rule 501(a)(3) allows partnerships, Internal Revenue Code Section 501(c)(3) organizations, Massachusetts or similar business trusts and corporations to qualify for accredited investor status if they have total assets in excess of USD 5 million and were not formed for the specific purpose of acquiring the securities being offered. The amendment adds limited liability companies to this list.

- **Foreign and other entities:** Native American tribes, labor unions, governmental bodies and funds, and entities organized under the laws of a non-US jurisdiction have not been previously addressed as accredited investors. To remedy this the SEC has adjusted the definition to include entities that own "investments" in excess of USD 5 million, which is not formed for the purpose of acquiring the securities being offered. Again, the SEC is pulling a definition from the ICA, so in this context "investments" will include real estate, commodity interests, physical commodities and non-security financial contracts held for investment purposes, cash and cash equivalents

- **Family offices and family clients:** Family offices are entities established by families to manage their assets, plan for their families' financial future and provide other services to family members. Family clients generally are family members, former family members and certain key employees of the family office, as well as certain charitable organizations, trusts and other types of entities. Both of these definitions largely mirror their counterparts in the Investment Advisers Act of 1940. For a family office to qualify as an accredited investor, it must: (i) have at least USD 5 million in assets under management; (ii) not be formed for the specific purpose of acquiring the securities offered; and (iii) be directed by a person who has such knowledge and experience in financial and business matters that the family office would be capable of evaluating the merits and risks of the prospective investment. Family clients of a family office that meet the requirements above are also considered accredited investors.

- **Qualification through owner status:** Under Regulation D Rule 501(a)(8), an entity can qualify as an accredited investor so long as all of the owners are accredited investors. In some cases, the entity seeking to be an accredited investor is owned by another entity. The SEC has added language clarifying that for the purposes of this test all of the entities in the chain may be looked through to the ultimate owners to determine accredited investor status.

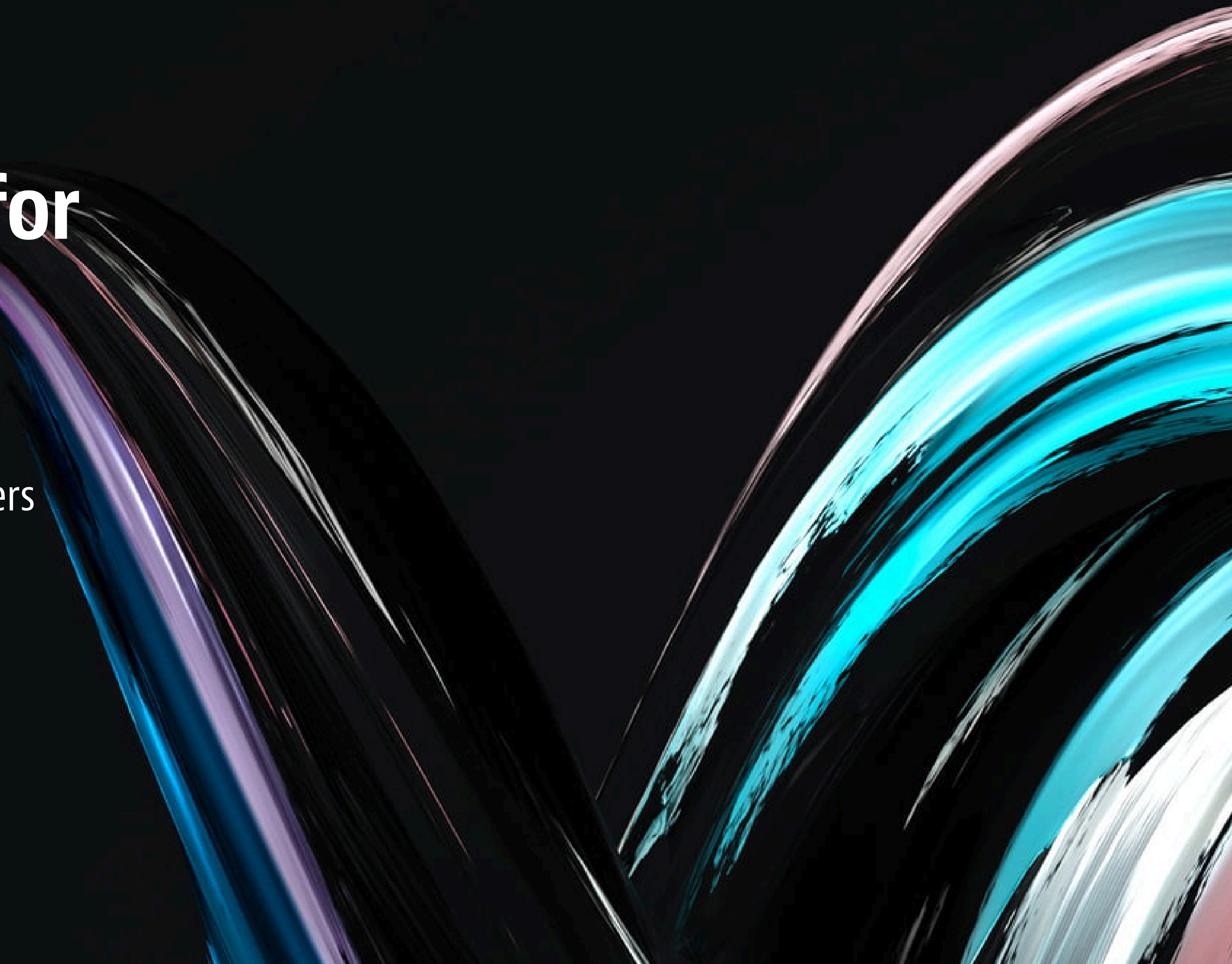
Author

Kristin E. Rice-Gonzalez
Partner
Chicago
kristin.rice-gonzalez@
bakermckenzie.com

Baker McKenzie.

Final and proposed regulations issued for GILTI and Subpart F high-taxed income:

Observations for individual US shareholders



Introduction

On 23 July 2020, the US Department of the Treasury **("Treasury")** and the Internal Revenue Service (IRS) published final regulations providing guidance with respect to the high-tax exception, which excepts certain 'high-taxed' income from being otherwise taxed as global intangible low-tax income (GILTI). In conjunction with these final regulations, the Treasury and the IRS issued new proposed regulations conforming aspects of the Subpart F high-tax exception with the newly finalized GILTI high-tax exception, and providing for a single high-tax exception election.

Additionally, on 9 July 2020, the Treasury and the IRS released final regulations under Section 250 related to the deductions offsetting income that is taxed as foreign-derived intangible income (FDII).

Background

Subpart F: an overview. Every person who is a "US shareholder" (i.e., a US person who owns (directly, indirectly or constructively) 10% or more of the vote or value) of controlled foreign corporation (CFC) must include in gross income the US shareholder's pro rata share of the corporation's Subpart F income for such year **("Subpart F Regime")**. A CFC is any foreign corporation where more than 50% of the vote or value is owned (directly, indirectly or constructively) by US Shareholders. Subpart F income generally includes insurance income and foreign base company income, the latter of which generally includes passive income as foreign personal holding company income. However, insurance income and foreign base company income does not include any item of income received by a CFC if a taxpayer establishes that the income was subject to an effective rate of income tax imposed by a foreign country greater than 90% of the maximum US corporate income tax rate **("Subpart F High-Tax Exception")**.

Prior to the Tax Cuts and Jobs Act of 2017 (TCJA), if income earned by a CFC fell outside the Subpart F Regime (i.e., it was not Subpart F income), such income generally would not be currently includable to a US shareholder and instead would be deferred until said income was actually distributed as a dividend by the CFC to the US shareholder.

GILTI: basic mechanics and individual tax planning considerations

The TCJA, introduce GILTI as a new category of taxable income earned by US Shareholders - of a CFC **("GILTI Regime")** and at the same time added Section 250, which permits domestic corporations a deduction with respect to their GILTI and FDII. Effectively, the GILTI Regime seeks to currently tax income that previously fell outside of the Subpart F Regime. Although GILTI frequently affects multinational corporations, individual US shareholders of CFCs can also be impacted and should be aware of the rules and planning opportunities that can mitigate unnecessary US tax liabilities.

In general, GILTI functions as an anti-base erosion measure to discourage multinational enterprises from shifting income out of the US. Under these GILTI provisions, a US shareholder is taxed on the active operating income of a CFC that otherwise would have been deferred income under pre-TCJA law. Corporate and individual shareholders are taxed on their share of GILTI at applicable US federal income tax rates, which currently are 21% for corporations and up to 37% for individuals. In addition, domestic corporations are entitled to a 50% deduction for GILTI under Section 250 and, furthermore, domestic corporations may offset any US federal income tax liability with indirect foreign tax credits. Thus, with the benefit of the Section 250 deduction and foreign tax credits, domestic corporations can potentially eliminate any US federal income tax attributable to GILTI. Individual shareholders, on the other hand, are not eligible for the Section 250 deduction or the indirect foreign tax credits. In this way, Congress has put individual US shareholders at a distinct and significant disadvantage under the GILTI Regime.

To achieve some US tax parity, individuals may own their interest in a CFC through a domestic corporation. Alternatively, an individual may file a Section 962 election to be treated as a domestic corporation for the purposes of the Subpart F and GILTI Regimes. Specifically, Section 962 allows an individual to be treated as a domestic corporation for the purposes of: (i) including Subpart F income and GILTI at corporate tax rates; and (ii) claiming foreign tax credits for corporate taxes paid or accrued by the CFC. With a Section 962 election in place, the final regulations under Section 250 now makes clear that the individual becomes eligible to offset GILTI income with the Section 250 deduction and eligible to offset any residual US federal tax liability with indirect foreign tax credits.

Similarly, by owning shares of a CFC through a domestic corporation, an individual US shareholder can ensure that their share of GILTI qualifies for the favorable deductions and credits afforded only to corporations. Note, however, that a thorough comparison between filing a Section 962 election and interposing a domestic corporation involves additional US tax and compliance considerations, which are beyond the scope of this discussion.

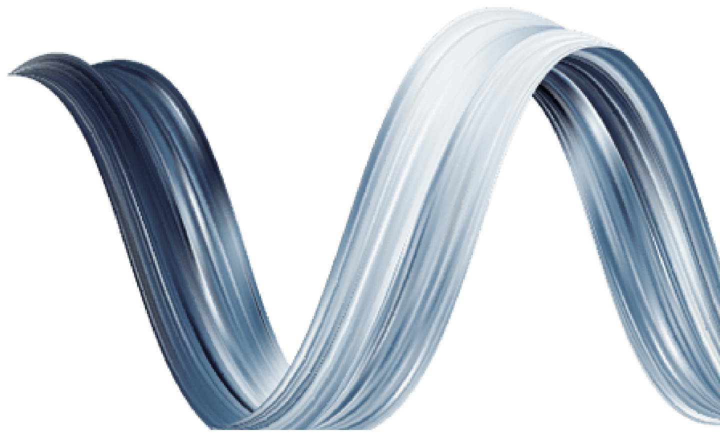
GILTI high-tax exception and final regulations

In 2019, the IRS and the Treasury released proposed regulations establishing rules for an elective high-tax exception to GILTI **("GILTI High-Tax Exception").**

Similar to the Subpart F High-Tax Exception, individual and corporate taxpayers may exclude from GILTI certain high-taxed income earned by a CFC. For this purpose, GILTI is deemed to be high-taxed if it is subject to an effective foreign tax rate in excess of 90% of the maximum US corporate income tax rate. With a current US corporate income tax rate of 21%, this equates to an 18.9% threshold for high-taxed income. The final regulations maintain the same 90% threshold for the GILTI High-Tax Exception but notably revise other rules applicable to the election and for determining the effective foreign tax rate imposed on the tested income earned by a CFC.

For instance, if a CFC is a member of a domestic controlling shareholder group **("CFC Group")**, a high-tax election or revocation of election made with respect to that CFC would apply to **all members** of the CFC Group or **no members** of the CFC Group.

For the purposes of calculating the effective foreign tax rate on tested income, gross tested income is determined for each "tested unit," which is a welcome change from the



proposed regulations that applied a qualified business unit (QBU) by QBU approach. A tested unit can include a CFC, certain interests held by a CFC or certain branches (or portions thereof) whose activities are carried on by a CFC. All tested units of a CFC that are located within the same country, other than certain nontaxed branch tested units, are treated as a single tested unit.

Separate books and records generally must be maintained for each tested unit. If such records are not maintained, however, then the taxpayer can simply determine any items that would otherwise be reflected on separate books and records of the tested unit.

An election into the GILTI High-Tax Exception is filed by the controlling domestic shareholder(s) of the CFC for each applicable inclusion year, whereas the earlier proposed regulations provided that such an election was binding on all shareholders for at least five years. A revocation of an election is also filed by the controlling domestic shareholder(s) of the CFC. An election into the GILTI High-Tax Exception (and revocation of an election) is binding on all US shareholders of a CFC, and the controlling domestic shareholders must provide notice of election or revocation to each US shareholder that is not a controlling US shareholder.

Effective dates. The final regulations for the GILTI High-Tax Exception under Section 951A apply to taxable years of foreign corporations beginning on or after 23 July 2020, and to taxable years of US shareholders in which or with which such taxable years of foreign corporations end. However, taxpayers may choose to apply the new rules retroactively to taxable years of corporations that begin after 31 December 2017, provided they consistently apply the new rules to all following years. If taxpayers wish to apply the new rules retroactively, they may file an election or revocation of election on an amended federal income tax return that is filed within 24 months of the unextended due date of the original return **only** if all US shareholders of the CFC file amended returns.

Observations. Although the Treasury and the IRS declined to reduce the 90% high-tax threshold as hoped, the GILTI High-Tax Exception remains a useful planning tool for US individuals who directly own operating CFCs in high-tax jurisdictions. With this exception, individuals may relieve their US tax burdens without having to interpose a US corporation as a holding company for the CFC or make a Section 962 election. Nevertheless, in circumstances where the GILTI High-Tax Exception does not apply, individuals still have the option to make a Section 962 election with respect to their ownership of CFCs or they may contribute their interests in such CFCs to a domestic corporation.

As compared to the proposed regulations, the final regulations offer more flexibility by allowing US shareholders to elect into the high-tax exception on an annual basis, rather than locking in shareholders for five years. Moreover, the final regulations ease the documentation burden by giving taxpayers a workaround to maintaining separate books and records, which is especially helpful for individual shareholders who otherwise would have to deal with exhaustive and cumbersome records.

Ultimately, some key planning points for US individuals are as follows:

- The GILTI High-Tax Exception applies to GILTI earned by a CFC that is subject to foreign income tax at a rate greater than 18.9%.

- Individual US shareholders of CFCs located in high-tax jurisdictions can use the GILTI High-Tax Exception as a means to eliminate GILTI income without having to file a Section 962 election or add a domestic holding corporation to their structure.

- In circumstances where the GILTI High-Tax Exception does not apply, individuals should consult their tax advisers to determine whether a Section 962 election or a domestic corporation can help reduce their US federal income tax liability with respect to GILTI.

- With respect to the all-or-nothing rule for CFC Groups, individuals with interests in multiple CFCs that comprise a CFC Group should carefully analyze whether an election into the GILTI High-Tax Exception will provide an overall benefit.
- Individuals who are domestic controlling shareholders should be cognizant of the US shareholder notice requirements that apply with an election or revocation.

Subpart F High-Tax Exception and proposed regulations

In response to the June 2019 proposed GILTI regulations, many taxpayers and practitioners commented that the GILTI High-Tax Exception should better conform to the long-standing Subpart F High-Tax Exception. Instead, in a clear case of "be careful what you wish for," the Treasury and the IRS did the exact reverse and issued proposed regulations bringing the Subpart F High-Tax Exception closer to the GILTI High-Tax Exception discussed above.

For instance, whereas the prior Subpart F High-Tax Exception generally allowed a US shareholder to exclude from Subpart F income of a CFC income that was high-taxed on an item-by-item basis, the proposed regulations requires that the Subpart F High-Tax Exception be applied on a "tested unit" basis akin to the GILTI High-Tax Exception. Further, under the proposed regulations, the GILTI and Subpart F High-Tax Exceptions will be a single election under Section 954(b)(4) that must be made (or not made) for all CFCs in a CFC Group annually and on a consistent basis. Under the proposed regulations, there are other additional technical changes that would be made to the Subpart F High-Tax Exception, including requirements to have certain contemporaneous documentation, alteration of the earning and profits limitation, and changes in the application of the full inclusion rule.

The proposed regulations are to be effective for taxable years of CFCs being after the date the proposed regulations are finalized and taxpayers may not currently rely on the proposed regulations.

Conclusion

Overall, the final regulations under the GILTI High-Tax Exception provided a mixed bag of changes from the proposed regulations. On the one hand, the "all-or-nothing" election for an entire CFC Group and the link between the GILTI and Subpart F High-Tax Exception to make it a single election are generally viewed as unwelcome changes. In addition, the changes under the proposed regulations making the Subpart F High-Tax Exception more akin to the GILTI High-Tax Exception, as opposed to the other way around, are not well received by most.On the other hand, the change from the QBU-by-QBU method of calculation to the tested unit method for the purposes of the GILTI High-Tax Exception and the reduced documentation requirements are both favorable modifications. Further, the clarification under final regulations for Section 250 that an individual making a Section 962 election becomes eligible to offset GILTI income with the Section 250 deduction and eligible to offset any residual US federal tax liability with indirect foreign tax credits is also very welcome guidance for US individuals.

US individuals with interests in CFCs should discuss these changes with their.

US tax advisers to better understand how to optimize the tax efficiency of their structures under these new regulations.

Authors

Jeffrey Rubinger
Partner
Miami
jeffrey.rubinger@bakermckenzie.com

Daniel Hudson
Associate
Miami
daniel.hudson@bakermckenzie.com

Simon Beck
Partner
New York
simon.beck@bakermckenzie.com

Robert Moore
Partner
Miami
robert.moore@bakermckenzie.com

Megan Ferris
Associate
Miami
megan.ferris@bakermckenzie.com

Baker McKenzie.

Reform of Japanese Inheritance Law

Reform of the Inheritance Law

To solve issues related to inheritance, the Civil Code stipulates basic rules, including on who will be the heir, what the legacy will be and how the rights and obligations of the decedent will be succeeded. The part in the Civil Code that contains these provisions is referred to as the Inheritance Law (Sozoku Ho).

There has been no major reform to the Inheritance Law since 1980. Recently, the law was amended for the first time to address issues related to the aging population in Japan and other changes in social circumstances.

The main elements of this amendment to the Inheritance Law are as follows.

- the new spousal residence right
- relaxation of the requirement to write by hand the assets lists attached to a holograph will
- retention of holograph wills by the Legal Affairs Bureau
- compensation for family members who contributed to the care or nursing of the decedent

a. Spousal residence right (effective from 1 April 2020)

The spousal residence right allows the spouse of the deceased to use a house owned by the deceased free of charge for the spouse's entire life or for a certain period of time if the spouse was living in the house at the time of the death of the deceased.

Where there is more than one heir with regard to a house, the regime enables a spouse to acquire the spousal residence right and an heir other than the spouse to acquire onerous ownership rights at the time of division of the estate. The spousal residence right does not give rise to full ownership rights; the spouse will not have a right to dispose the house or lend the house to others at their discretion. As the value of a spousal residence right is lower than that of a full ownership right, the spouse may be entitled to more assets at the time of division of the estate, ensuring their subsequent financial stability.

b. Relaxation of the requirement to write by hand the assets lists for holograph wills (effective from 13 January 2019)

Previously, for a holograph will, it was necessary for the testator to prepare the assets list in handwriting. The assets list may now be prepared in other ways, (e.g., using a personal computer or attaching a copy of a bankbook).

c. Retention of holographic wills at the Legal Affairs Bureau (effective from 10 July 2020)

Holograph wills are often kept at home, where they may be lost, abandoned or rewritten. In order to prevent inheritance disputes arising from these problems and to make it easier to use holograph wills, the Legal Affairs Bureau will retain holograph wills.

d. Compensation for family members who contributed to the care or nursing of the decedent (effective from 1 July 2019)

In some cases, non-heir relatives (e.g., a spouse of a child) may have been involved in taking care of or nursing the decedent. Before the reform of the Inheritance Law, it was not possible to distribute inherited property to such non-heir relatives.

In order to eliminate such inequities, non-heir relatives can now claim compensation from the heirs if the non-heir relatives contributed to the care and nursing of the decedent free of charge or made a special contribution to the maintenance or increase in value of the decedent's property.

Authors

Akihiro Kawasaki
Senior Associate
Tokyo
akihiro.kawasaki@bakermckenzie.com

Edwin T. Whatley
Partner
Tokyo
edwin.whatley@bakermckenzie.com

New Canadian trust reporting and disclosure rules are coming into force in 2021

New Canadian trust reporting and disclosure rules will come into effect in 2021. In brief, the new rules will impose a filing obligation on certain trusts that currently do not have a filing requirement.

They apply to nonresident trusts that currently have to file a T3 Return (defined below) and certain trusts that are resident in Canada. Such trusts will be required to report the identity of all trustees, beneficiaries and settlors of the trust, as well as anyone with the ability to exert control or override trustee decisions over the appointment of income or capital of the trust (e.g., a protector).

Background

The new rules were introduced in the 2018 federal budget with the aim to improve the collection of beneficial ownership information in relation to trusts and to help the Canada Revenue Agency assess the tax liability for trusts and its beneficiaries.

Currently, a trust is generally required to file an annual income tax return — T3 Trust Income Tax and Information Return ("**T3 Return**") — if the trust has tax payable or if it has distributed any of its income or capital to its beneficiaries. A trust that has no activity during the year and no tax payable is generally not required to file a T3 Return.

The new rules

Starting from the 2021 taxation year, the new rules will require nonresident trusts that currently have to file a T3 Return and certain express trusts (generally a trust created with the settlor's express intent) that are resident in Canada to file a T3 Return to provide additional information, including the name, address, date of birth (for individuals), jurisdiction of residence and taxpayer identification number (TIN) of the following:

- the settlor of the trust
- each of the trustees
- each of the beneficiaries
- anyone with the ability to exert control or override trustee decisions over the appointment of income or capital of the trust (e.g., a protector)

The required information has to be filed as a new schedule along with the T3 Return. It cannot be filed on its own.

The following Specific trusts (including mutual fund trusts, trusts that are pension plans or savings plans, and trusts that qualify as non-profit organizations or registered charities) may be exempt from the new disclosure obligations.

Failure to file the T3 Return including the new schedule could result in a penalty of CAD 25 per day of delinquency (with a minimum penalty of CAD 100 and maximum penalty of CAD 2,500). If such failure is made knowingly, or if there is gross negligence, an additional penalty of 5% of the maximum fair market value of the trust's assets (with a minimum penalty of CAD 2,500) could be imposed. Existing penalties in relation to the T3 Return will continue to apply.

Takeaway

As a result of the new trust reporting and disclosure rules, trusts that had no reporting and disclosure obligations on the basis that they had no tax payable and no activity during the year will soon be caught under the new rules and required to file a T3 Return. Trustees should be prepared for the new rules with a full understanding of the scope and reporting obligations.

These new additional reporting requirements should also be taken into account in determining whether and how a new trust should be set up, as well as any variation of an existing trust from a Canadian perspective. Finally, the penalty of 5% of the value of the trust's assets for the deliberate failure or grossly negligent failure to disclose is significant. Trustees would be well advised to take appropriate steps to ensure that this penalty does not apply to any trusts under their administration.

Authors

Peter Clark
Partner
Toronto
Tel: +1 416 865 6943
peter.clark@bakermckenzie.com

Josephine Chuk
Knowledge Lawyer
Toronto
Tel: + 1 416 863 1221
josephine.chuk@bakermckenzie.com

Baker McKenzie.

Court in *Steuer* affirms California taxation impacted by residency of trustee

California, full of riches yet isolated by the Pacific Ocean and the deserts and mountains of the American West, is not shy about taxing those connected to its fair lands.

California has some of the most aggressive residency laws and enforcement in the 50 states. Trusts are unsurprisingly subject to California income tax on California source income. Less well known is that the California residency of a trustee or non-contingent beneficiary subjects a trust to worldwide, and not simply source, taxation in California.

In *Steuer v. Franchise Tax Board*, a California appellate court had to resolve the question of California's share of taxation of the Paula Trust, a discretionary trust with a sole California resident beneficiary and one California resident trustee and one Maryland resident trustee. Overruling a trial court's decision endorsing a confused reading of the California Revenue and Taxation Code, the appellate court held that the trust was subject to California taxation on California source income and on one-half of non-California source income, as an apportionment based on the number and residence of trustees. The appellate court also held that a contingent beneficiary resident in California would not subject the trust to worldwide taxation in California.

The court in *Steuer* did not break new ground, but did flag an issue that is sometimes overlooked. Imagine a trust without any California source income, and an individual trustee resident in Reno, Nevada or a non-contingent beneficiary resident in northern Mexico. If the trustee or beneficiary is careless about spending time in California (or record keeping!), California might assert that the individual is a California resident and thus the trust is subject to California taxation on all its income. Alternatively, imagine if a trustee's son or daughter enrolls in a public university in California and establishes and claims California residency to get a tuition break. Residency of one's children is one of many soft factors in determining California tax residency.

Author

James Gifford
Associate
Zurich
Tel: + 41 44 384 14 38
james.gifford@bakermckenzie.com

Around the World

Asia Pacific

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Japan: 2015 exit tax law applicable to both expatriating Japanese nationals and certain long-term foreign residents became effective in 2020 for non-Japanese nationals, who will now be subject to an exit tax on the deemed gain where: (a) the individual has financial assets with a total aggregate value of JPY 100 million or more; and (b) the individual has maintained their place of residence or place of abode in Japan for five years or more during the 10-year period immediately prior to departure from Japan. **Read More**

Singapore: Court of Appeal decides one of the largest trust law cases in Singapore clarifying the circumstances in which a defendant can rely on the Trustees Act and the court's inherent jurisdiction to withdraw funds seized under a proprietary injunction for living, legal and other expenses. **Read More**

Taiwan: District Court case reveals how a court enquires into the capacity of a testator and how it weighs the evidence of the testator's medical history and the testimony of witnesses, serving as a reminder that executing a will, while important, is by itself sufficient. **Read More**

EMEA

Oman: The fourth GCC country to introduce a VAT, as Oman announces plans for 5% tax to come into effect in April 2021. **Read More**

Russia: Newly signed protocol to the treaty between Russia and Cyprus increases withholding tax rates to 15% on dividends and interest payments effect 1 January 2021. **Read More**

Russia: Amendments to federal law allow individuals who have been outside of Russia during the COVID-19 pandemic to voluntarily obtain Russian tax resident status, as long as they have already spent or will spend at least 90 days in Russia in 2020 and file a letter of request to the Russian tax authorities by 30 April 2021. **Read More**

Russia: New bill grants Russian tax resident individuals with the option to pay tax on an imputed "fixed amount" of income, resulting in an annual tax of RUB 5 million regardless of the number of CFCs or their performance, instead of prior rules requiring a tax determination based on the CFC's financial statement profits. **Read More**

Saudi Arabia: New measures exempt certain real estate transactions from VAT while also levying a real estate transaction tax of 5% on the value of alienated real estate. **Read More**

Spain: New amendments to regulations alter the tax regime for calculating the surrender value of a life insurance contract where the policyholder does not have the power to exercise the full surrender right. **Read More**

Spain: Presentation of anti-tax evasion bill to Parliament marks another step in the nearly three decade long effort to regulate "tax havens". **Read More**

Americas

Argentina: Exceptional annual filing dates for reporting Argentine and foreign trusts established by General Resolution. **Read More**

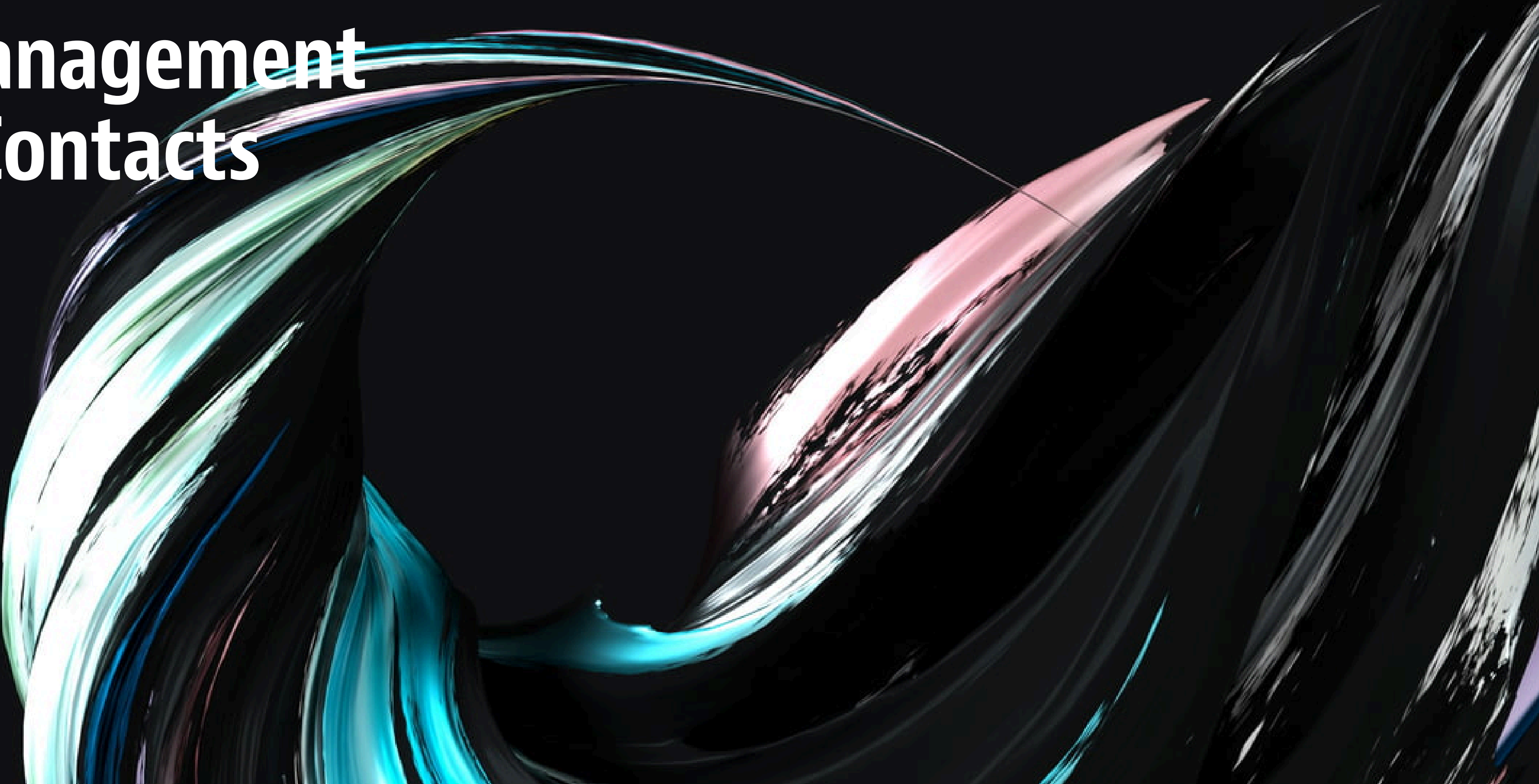
Mexico: Following the lead of the EU's DAC6 and the Mandatory Disclosure Rules under Action 12 of the OECD's BEPS Project, the Treasury introduced new provisions into domestic tax law that starting 1 January 2021 will require tax advisers or, alternatively, taxpayers to disclose information about "reportable schemes" to the Tax Administration Service (SAT) in cases where such schemes, when entered into by taxpayers, directly or indirectly, result in a tax benefit in Mexico. **Read More**

United States: DOJ releases Cryptocurrency Enforcement Framework, which provides a comprehensive overview of what the DOJ considers to be emerging threats and enforcement challenges associated with cryptocurrencies and details the collaboration that the DOJ has built with regulatory and enforcement partners. **Read More**

Venezuela: Tax administration modifies the guidelines for filing the tax return for the high-net-worth tax. **Read More**

Baker McKenzie.

Wealth Management Regional Contacts



Asia Pacific

Bangkok
25th Floor
Abdulrahim Place
990 Rama IV Road
Bangkok 10500
Thailand
Tel: +66 2636 2000
Fax: +66 2636 2111
Kitipong Urapeepatanapong

Beijing
Suite 3401, China World Office 2,
China World Trade Center
1 Jiamguomenwai Dajie
Beijing 100004,
People's Republic of China
Tel: +86 10 6535 3800
Fax: +86 10 6505 2309; 6505 0378
Jinghua Liu

Hong Kong
14th Floor, One Taikoo Place,
979 King's Road, Quarry Bay,
Hong Kong SAR
Tel: +852 2846 1888
Fax: +852 2845 0476; 2845 0487; 2845 0490
Richard Weisman
Steven Sieker
Pierre Chan
Michael Olesnicky
Noam Noked
Lisa Ma

Kuala Lumpur Manama Manila
Level 21, The Gardens South
Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur
Tel: +60 3 2298 7888
Fax: +60 3 2282 2669
Adeline Wong
Yvonne Beh
Lim Tien Sim

Manama
18th Floor, West Tower
Bahrain Financial Harbor
PO Box 11981, Manama
Kingdom of Bahrain
Tel: +973 1710 2000
Fax: +973 1710 2020
Ian Siddell
Julie Alexander

Manila
12th Floor, Net One Center
26th Street Corner 3rd Avenue
Crescent Park West,
Bonifacio Global City, Taguig,
Metro Manila 1634 Philippines
Postal Address: MCPO Boc 1578
Tel: +63 2 819 4700
Fax: +63 2 816 0080, 728 7777
Dennis Dimagiba

Melbourne
Level 19 CBW
181 William Street
Melbourne Victoria 3000
Melbourne GPO Box 2119T
DX 334 Melbourne
Tel: +61 3 9617 4200
Fax: +61 3 9614 2103
John Walker

Singapore
8 Marina Boulevard #05-01
Marina Bay Financial Centre
Tower 1 Singapore 018981
Tel: +65 6338 1888
Fax: +65 6337 5100
Dawn Quek
Enoch Wan

Sydney
Level 27, A.M.P. Centre
50 Bridge Street
Sydney, NSW 2000
Postal Address:
P.O. Box R126, Royal Exchange
Sydney, N.S.W. 2000
Tel: +61 2 9225 0200
Fax: +61 2 9225 1595
John Walker

Taipei
15th Floor, Hung Tai Center
No. 168, Tun Hwa North Road
Taipei, Taiwan 105
Tel: +886 2 2712 6151
Fax: +886 2 2716 9250; 2712 8292
Michael Wong
Dennis Lee
Peggy Chiu

Tokyo
The Prudential Tower, 13-10
Nagatacho 2-Chrome,
Chiyoda-Ku, Tokyo 100-0014
Japan
Tel: +81 3 5157 2700
Fax: +81 3 5157 2900
Edwin Whatley

Europe, Middle East & Africa

Abu Dhabi
Level 8, Al Sila Tower
Sowwah Square, Al Maryah Island
Abu Dhabi, United Arab Emirates
Tel: +971 2 612 3700
Fax: +971 2 658 1811
Borys Dackiw

Amsterdam
Claude Debussylaan 54
1082 MD Amsterdam
P.O. Box 2720
1000 CS Amsterdam
The Netherlands
Tel: +31 20 551 7555
Fax: +31 20 626 7949
Maarten Hoelen
Isabelle Bronzwaer

Barcelona
Avda. Diagonal, 652, Edif. D, 8th Floor
08034 Barcelona, Spain
Tel: +34 93 206 08 20
Fax: +34 93 205 49 59
Bruno Dominguez
Esteban Raventos
Davinia Rogel
Meritxell Sanchez

Berlin
Friedrichstrasse 779-80
10117 Berlin, Germany
Tel: +49 30 22 002 810
Fax: +49 30 22 002 811 99
Wilhelm Hebing

Brussels
Avenue Louise 149 Louizalaan
11th Floor
1050 Brussels, Belgium
Tel: +32 2 639 36 11
Fax: +32 2 639 36 99
Alain Huyghe
Julie Permeke

Budapest
Dorottya utca 6.
1051 Budapest
Hungary
Tel: +36 1 302 3330
Fax: +36 1 302 3331
Gergely Riszter
Timea Bodrogi

Doha
Al Fardan Office Tower
8th Floor, Al Funduq 61
Doha, Qatar
Tel: +974 4410 1817
Fax: +974 4410 1500
Ian Siddell

Dubai
Address 1:
O14 Tower, Level 14
Business Bay, Al Khail Road
Dubai, United Arab Emirates
Tel: +971 4 423 0000
Fax: +971 4 423 9777
Address 2:
Level 3, Tower 1
Al Fattan Currency House, DIFC
Dubai, United Arab Emirates
Mazen Boustany
Reggie Mezu

Frankfurt
Bethmannstrasse 50-54
60311 Frankfurt/Main, Germany
Tel: +49 69 29 90 8 0
Fax: +49 69 29 90 8 108
Sonja Klein
Ludmilla Maurer

Geneva
Esplanade Pont-Rouge 2
1212 Grand-Lancy/Geneva
Switzerland
Tel: +41 22 707 98 00
Fax: +41 22 707 98 01
Elliott Murray
Michael Jaffe
Jacopo Crivellaro
Beth Kerwin

Istanbul
Esin Attorney Partnership
Ebulula Mardin Cad.,
Gül Sok. No.2, Maya Park
Tower 2, Akatlar-Beşiktaş
Istanbul 34335, Turkey
Tel: +90 212 339 8100
Fax: +90 212 339 8181
Erdal Ekinci
Gunes Helvaci

Jeddah
Legal Advisers (Abdulaziz I. AlAjlan & Partners
in association with Baker & McKenzie Limited)
Bin Sulaiman Center, 6th Floor,
Office No. 606
Al Khalidiyah District,
P.O. Box 40187
Prince Sultan St. and Rawdah St. Intersection
Tel: +966 12 606 6200
Fax: +966 12 692 8001
Julie Alexander
Basel Barakat

Johannesburg
1 Commerce Square
39 Rivonia Road
Sanhurst
Sandton
Johannesburg, South Africa
Tel: +27 11 911 4300
Fax: +27 11 784 2855
Denny Da Silva

Kyiv
Renaissance Business Center
24 Bulvarno-Kudriavska (Vorovskoho) St.
Kyiv 01601
Ukraine
Tel: +380 44 590 0101
Fax: +380 44 590 0110
Hennadiy Voytsitskyi
Roman Koren

London
100 New Bridge Street
London EC4V 6JA, United Kingdom
Tel: +44 20 7919 1000
Fax: +44 20 7919 1999
Ashley Crossley
Anthony Poulton
Gemma Willingham
Yindi Gesinde
Phyllis Townsend
Megna Deo
Christopher Cook
Oliver Crosby
Vadim Romanoff
David Whittaker
Rachael Cederwall

Luxembourg
10-12 Boulevard Roosevelt
L-2450 Luxembourg
Tel: +352 26 18 44 1
Fax: +352 26 18 44 99
Diogo Duarte de Oliveira
Amar Hamouche
Elodie Duchene
Delphine Danhoui
Olivier Dal Farra
Miguel Pinto de Almeida
Lionel Ancion
Tiphanie Grzeszezak

Prague
Praha City Center, Klimentská
46
110 02 Prague 1, Czech
Republic
Tel: +420 236 045 001
Fax: +420 236 045 055
Eliska Kominkova

Riyadh
Legal Advisers (Abdulaziz I. AlAjlan & Partners
in association with Baker & McKenzie Limited)
Olayan Centre – Tower II
Al-Ahsa Street, Malaz
P.O. Box 4288
Riyadh 11491
Tel: +966 11 291 5561
Fax: +966 11 291 5571
Karim Nassar

Rome
Viale di Villa Massimo, 57
00161 Rome, Italy
Tel: +39 06 44 06 31
Fax: +39 06 44 06 33 06
Aurelio Giovannelli

Stockholm
P.O. Box 180
SE-101 23 Stockholm
Sweden
Visiting address:
Vasagatan 7, Floor 8
SE-111 20 Stockholm
Sweden
Tel: +46 8 566 177 00
Fax: +46 8 566 177 99
Linnea Back

Vienna
Schottenring 25
1010 Vienna, Austria
Tel: +43 1 24 250
Fax: +43 1 24 250 600
Christoph Urtz

Warsaw
Rondo ONZ 100-124 Warsaw,
Poland
Tel: +48 22 445 31 00
Fax: +48 22 445 32 00
Piotr Wysocki

Zurich
Holbeinstrasse 30
P.O. Box
8034 Zurich, Switzerland
Tel: +41 44 384 14 14
Fax: +41 44 384 12 84
Marnin Michaels
Lyubomir Georgiev
Tobias Rohner
Gregory Walsh
Richard Gassmann
Thomas Salmon
Andrea Bolliger
Caleb Sainsbury
Christopher Murrer
John Cacharani
James Gifford
Bruna Barbosa
Chelsea Hunter
Ida Varshavsky
Jonathan Gomer
Nathan Bouvier

Latin America

Bogota
Avenida 82 No. 10-62, piso 6
Apartado Aereo No. 3746
Bogota, D.C., Colombia
Tel: +57 1 634 1500; 644 9595
Fax: +57 1 376 2211
Ciro Meza
Ana María Lopez

Bueno Aires
Avenida Leandro N. Alem 110,
Piso 13, C1001AAT
Bueno Aires, Argentina
Tel: +54 11 4310 2200; 5776
Fax: +54 11 4310 2299; 5776 2598
Martin Barreiro
Gabriel Gomez-Giglio
Alejandro Olivera

Caracas
Centro Bancaribe, Interseccion
Av. Principal de Las Mercedes
Con inicio de Calle Paris
Urbanizacion Las Mercedes
Caracas 1060, Venezuela
Postal Address: P.O. Box 1286
Caracas 1010-A, Venezuela

US Mailing Address:
Baker & McKenzie M-287
c/o Jet International
P.O. Box 2200
Greer, SC 29652
USA
Tel: +58 212 276 5111
Fax: +58 212 264 1532
Ronald Evans

North America

Chicago
300 East Randolph Street
Suite 5000
Chicago, Illinois 60601
United States
Tel: +1 312 861 8800
Fax: +1 312 861 2899
David Berek
Debra M. Doyle
John W. Newlin III
Kerry Weinger
Spencer Guillory
Daniel Meier

Dallas
1900 North Pearl Street
Suite 1500
Dallas, Texas 75201
United States
Tel: +1 214 978 3000
Fax: +1 214 978 3099
Bobby Albaral

Houston
700 Louisiana
Suite 3000
Houston, Texas 77002
United States
Tel: +1 713 427 5000
Fax: +1 713 427 5099
Rodney Read

Miami
1111 Brickell Avenue
Suite 1700
Miami, Florida 33131
United States
Tel: +1 305 789 8900
Fax: +1 305 789 8953
James Barrett
Bobby Moore
Michael Melrose
Pratiksha Patel
Paul O'Quinn

New York
452 Fifth Avenue
New York, New York 10018
United States
Tel: +1 212 626 4100
Fax: +1 212 310 1600
Simon Beck
Paul DePasquale
Glenn Fox
Rebecca Lasky
Olga Sanders

Palo Alto
600 Hansen Way
Palo Alto, California 94304
United States
Tel: +1 650 856 2400
Fax: +1 650 856 9299
Scott Frewing

Toronto
181 Bay Street
Suite 2100
Toronto, Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275
Peter Clark

Washington, DC
815 Connecticut Avenue, N.W.
Washington, District of Columbia 20006
United States
Tel: +1 202 452 7000
Fax: +1 202 452 7074
George Clarke
Joshua Odintz

Baker McKenzie.

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