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Private Wealth Newsletter

Second Quarter 2021

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Editor's note

By Elliott Murray & David Berek

Editor's note

We are pleased to share the Second Quarter 2021 issue of the Private Wealth Newsletter, a publication of Baker McKenzie's Global Wealth Management Practice Group.

In this edition, we feature an article addressing the growing concern of many high net worth (HNW) individuals regarding a current “tax the rich” trend among various countries. Given that many HNW individuals are increasingly mobile, our feature article reviews alternative personal tax systems commonly referred to as “res non dom” and “lump-sum tax” in the UK, Italy and Switzerland. We also continue the theme around the globe covering developing highlights impacting HNW individuals from the UK, France, Spain, China, Taiwan, Cayman, Brazil, the US and Canada. And finally, as part of our consistent tracking around the globe, we present updates by region from APAC, Americas, and EMEA.

As always, we hope you find these articles interesting and informative, and feel free to reach out to the editors, Elliott Murray or David Berek, or any of the authors listed throughout the newsletter with questions, commentsor feedback.

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Overview of alternative personal taxation regimes in the United Kingdom, Italy and Switzerland

> As life slowly returns to the pre-COVID-19 normal, more and more high net worth (HNW) individuals are starting to seriously consider relocation. In deciding where to relocate, some HNW individuals may be predominantly concerned with economic factors and may, therefore, wish to relocate to a country with a favourable tax regime. Others, however, may be troubled by the likelihood of a slow economic recovery, their government's intentions to increase taxes on the rich or have serious concerns about their safety or lack of an adequate healthcare system in their home country.

There is no "one size fits all" solution when it comes to the decision to relocate. Though economic factors often become the determining factor, reasons other than economics may influence the final decision. In this article, we focus solely on alternative personal taxation systems by describing the so-called "res non-dom" and "lump-sum tax" regimes in three specific jurisdictions, namely the UK, Italy and Switzerland. However, the jurisdictions mentioned in this article are not the only ones that may offer advantageous tax regimes and are provided as examples only.

Lump-sum taxation, also referred to as an expenditure-based taxation, is a simplified assessment procedure for foreign nationals. Each of the jurisdictions described below offers foreign nationals the advantage of beneficial taxation through lump-sum taxation or RND regimes.

United Kingdom

HNW individuals who consider relocating to the UK may be able to take advantage of the substantial tax benefits of the UK's RND regime. The regime is available to UK tax resident individuals who are not domiciled (or deemed domiciled) in the UK, in other words residents non-domiciled (RNDs). Whilst there has been a curtailing of the RND regime, it remains a very well-established and attractive regime for foreign HNW individuals. The RND regime is set to continue for the foreseeable future, with no further radical reform expected under the current UK government, which continues to seek to attract business, innovation and wealth to the UK, particularly after Brexit.

The UK RND regime has historically been subject to a number of reviews and consultations and is now restricted to non-UK domiciliaries. As a starting point, UK tax resident individuals[14] are generally taxable on their worldwide income and gains. However, RNDs may be able to claim the remittance basis of taxation pursuant to the RND regime (outlined below).

The remittance basis allows RNDs to pay UK tax on UK source income and capital gains on an arising basis and on certain foreign source income and capital gains to the extent that these are "remitted" to the UK. In addition, whilst an individual is not UK domiciled or deemed domiciled, they will be subject to UK inheritance tax on their UK[15], and not their worldwide, estates.

The remittance basis does not apply automatically and RNDs must claim the benefit in their self-assessment tax return if their unremitted foreign income and gains in a tax year exceed GBP 2,000. Such claims are required for each year in which the individual wishes to use the remittance basis and is generally time barred once four years have passed from the year to which the claim relates.

Additionally, with effect from 6 April 2017, a UK tax resident individual is considered "deemed domiciled" for all UK tax purposes once they have been a UK tax resident for 15 out of the 20 previous tax years. Once deemed domiciled, they will be taxable on the arising basis on their worldwide income and gains and estates, although their trusts established before they become deemed domiciled may continue to offer significant benefits of the RND regime, in many cases putting RNDs into a better position than under previous rules, provided they avoid certain traps and pitfalls.

The RND regime offers very significant tax benefits for non-UK domiciliaries wishing to reside in the UK, particularly those who undertake the key pre-arrival planning steps during the UK tax year prior to their arrival in the UK (or the non-resident part of a split year, if they qualify).

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14. The UK statutory residence test has applied since 6 April 2013.
15. This now also extends to Schedule A1 (Non-excluded overseas property) of the UK Inheritance Tax Act 1984 relating to overseas property with value attributable to UK residential real estate.

Italy

From 2017, the lump-sum tax regime became available to HNW individuals who relocate to Italy and acquire Italian tax residence, provided that they have not qualified as Italian tax residents for at least nine of the previous 10 years. According to the law regulating the lump-sum tax regime, qualifying individuals who successfully adhere to the regime ("New Italian Residents") will be subject, for up to 15 years starting from the first fiscal year of residence, to the following Italian tax treatment.

In the first instance, a New Italian Resident who elects for lump-sum tax regime treatment will be required to pay an annual EUR 100,000 lump-sum tax, which will replace the following:

a) Italian income taxation on any non-Italian-sourced income, irrespective of the actual amount of such foreign income and irrespective of its remittance to Italy.

The sole exception to the above principle is that capital gains arising from the sale of the so-called "qualified shareholdings"[16] during the first five years of validity of the beneficial tax regime are reportable on the Italian tax return and are taxable at a 26% flat tax rate.

b) The 0.2% annual tax on the value of foreign financial assets (IVAFE).

c) The 0.76% tax on the value of foreign real estate (IVIE).

Additional favorable consequences of election for the application of the flat tax regime are as follows:

a) New Italian Residents are exempt from gift and inheritance tax on the transfer of assets and rights located outside of Italy.

b) New Italian Residents are exempt from Italian reporting obligations with respect to their non-Italian assets, which would have been required otherwise. Pursuant to Italian tax law, individuals residing in Italy who do not qualify as New Italian Residents are required to report on their annual tax returns "any foreign asset of financial nature" or "investments abroad" that they held during the fiscal year and that may generate income taxable in Italy. The sole exception to the above exemption from reporting duties concerns qualified shareholdings.

Election for the special regime can be extended to one or more relatives of New Italian Residents, to the extent that such relatives also acquire tax residence in Italy. However, in such circumstances, the annual substitute tax will be increased by EUR 25,000 for each relative.

It should be noted that New Italian Residents can choose to withdraw from the lump-sum tax regime at any time.

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16. "Qualified shareholdings" are for: (i) companies listed on a stock exchange, a shareholding that carries more than 2% of the voting rights or represents more than 5% of the outstanding shares; and (ii) companies that are not listed on a stock exchange, a shareholding that consists of more than 20% of the voting rights or represents more than 25% of the outstanding shares.

Switzerland

The Swiss lump-sum taxation regime is a special tax regime available to i) non-Swiss nationals ("New Swiss Resident") who ii) relocate to Switzerland for the first time on or after an absence of at least ten years and iii) do not pursue any professional or commercial activity in Switzerland. The pursuance of a gainful activity abroad or of a non-gainful activity in Switzerland (including personal wealth management or charitable activities) is allowed under the regime. The lump-sum tax regime is available at the federal and cantonal levels in most of the cantons.

Determination of taxable income under the lump-sum tax regime:
Under the lump-sum tax regime, the income tax basis will be equivalent to the highest of the following:

a) the annual worldwide living expenses of the New Swiss Resident and their dependents, such as rental costs, costs of education, leisure, health care, food, clothing or other related costs

b) a minimum of CHF 400,000 at the federal level; the minimum on a cantonal level depends on the specific cantonal tax legislation

c) the equivalent of seven times the annual rental cost or a property's deemed rental value if the New Swiss Resident has acquired residential property in Switzerland, or three times the annual price for boarding and lodging

d) the total gross income coming from Swiss sources; for this purpose, a control calculation must be prepared annually and will include income from Swiss real estate, Swiss shareholdings and foreign income for which benefits are claimed under a double tax treaty

The taxable income (determined pursuant to the above) will then be taxable subject to ordinary income tax rates. The New Swiss Resident may withdraw from the lump-sum tax regime. However, under normal circumstances, once an individual decides to withdraw from the regime, the regime will no longer be available to that individual.

In addition to the lump-sum regime, a New Swiss Resident will also be eligible to benefit from double taxation treaties (DTTs). However, certain foreign jurisdictions may disallow the application of a DTT if income derived from certain sources becomes subject to taxation other than regular income taxation for such income[17]. If income is subject to only the ordinary taxation in Switzerland. The emphasis here is to ordinary income only, but not other time of income. In such circumstances, Switzerland may apply a modified lump-sum taxation regime under which the income from the respective state will be included in the control calculation, i.e., treated as a Swiss-source income enabling a New Swiss Resident to claim benefits under a DTT.

17. The double taxation treaties with USA, Norway, Austria, Italy, Canada, Belgium and Germany.

Net wealth tax

HNW individuals considering relocating to Switzerland should be aware of an additional tax liability, namely Swiss net wealth tax. The net wealth tax is due at the cantonal level. Under the lump-sum tax regime, taxable wealth is calculated as a multiple of the aforementioned income tax basis. The multiple varies from canton to canton. The taxable wealth then becomes subject to ordinary wealth tax rates at the cantonal level.

One of the benefits of the lump-sum tax regime in Switzerland is a significantly lower tax burden when compared to ordinary taxation. In addition, the lump-sum tax regime is attractive from an immigration perspective, especially to non-EU nationals, as it allows them to obtain a Swiss residence permit under simplified conditions. However, it is important to be aware of the tax rate differences, which will vary greatly on the cantonal and municipal level, with the highest rates of 40% to 45% in Geneva and Vaud and considerably lower rates of 22% to 27% in cantons such as Zug and Schwyz.

Finally, it is important to note that income and net wealth tax bases are typically agreed between New Swiss Residents and the respective cantonal tax authorities by means of tax rulings prior to relocation. Once agreed upon, and as long as the New Swiss Resident's situation does not change considerably, the tax basis remains the same every consecutive year, which considerably reduces tax administration and compliance costs.

To summarize, each of the above regimes requires careful navigation and deep knowledge and understanding of the subject matter. However, with careful planning, these regimes may offer substantial tax benefits to HNW individuals interested in relocating. While the ultimate decision will belong to the individual, they should seriously consider contacting their attorneys for assistance in selecting the most appropriate and beneficial regime based on their personal circumstances.

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New criterion on the calculation of the inheritance tax in Spain

Recent resolutions from the Spanish Supreme Court and Central Economic-Administrative Court establish a new delimitation of "ajuar doméstico" (household items) and its calculation.

The *"ajuar doméstico"* concept has its origin in the Spanish Civil Code and it was related to personal goods such as clothing, furniture, and other belongings.

Nevertheless, in Spain the Inheritance Tax legislation provides a presumption on the household items, establishing a value of 3% on the decedent's estate (assets fewer liabilities). This presumption can be rebutted for those cases where the taxpayer assigns a higher or lower value. However, this valuation is generally difficult to prove and thus be accepted by the tax authorities.

In many cases, for instance, an inheritance composed of shares of a family business, funds, or bank deposits, this presumption is not related to the reality or essence of this concept because these assets did not include any personal goods or belongings, however, the presumption of 3% applies in the same way.

Before this uncertainty, the Spanish Supreme Court in its resolutions (342/2020, 490/2020, and 499/2020) determined the scope of household items of the above-mentioned presumption stating that these household items are comprised of movable assets on the usual dwelling or related to the regular use of the testator. Specifically, due to its nature, the concept of household items must be related to the frequent use of the deceased and not to all the assets on the estate, so shares, deposits, and any other intangible assets cannot be included in the concept.

Moreover, the Spanish Supreme Court confirmed that no evidence on the value of this *"ajuar doméstico"* is required from the taxpayer.

The Spanish Supreme Court resolutions in addition to the Central Economic-Administrative Court resolutions (14 July 2020 and 30 September 2020), which apply the Supreme Court approach, open the door to request a refund for the difference in the calculation of the household items for those taxpayers who filed their inheritance tax forms in the last four years.

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Cayman court decision removes sting in the tail of firewall legislation (re Stingray Trust)

In the latest judgment in the multijurisdictional litigation concerning the validity of a valuable Cayman trust, the court shines much-needed light on the extent of the Cayman "firewall" legislation and the principles that the courts will apply when determining whether to permit or restrain foreign proceedings in respect of Cayman law trusts.

Background

The Cayman-administered Stingray Trust **("Trust")** was allegedly settled by an Italian individual, who has been anonymised in court proceedings as "IDF" and who is also the sole individual beneficiary of the Trust. The Trust contains assets from IDF's husband as well as her late sister's husband.

By 2012, IDF had lost the capacity to manage her own affairs, and the Italian courts appointed a guardian — a distant relative of IDF who works as a primary school teacher in Italy — to take control of her financial and other affairs **("Guardian")**. The Guardian subsequently discovered the existence of the Trust in 2013 and became concerned that IDF did not approve the creation of the Trust and had been taken advantage of.

These concerns were heightened when the Guardian's attempts to obtain further details of the Trust from Geneva Trust Company **("Trustee")** were rebuffed. The Guardian also discovered that a charitable foundation had been added as a beneficiary of the Trust in 2015, without notice being given to the Guardian, and that those administering the Trust appeared to be financially benefitting from it while IDF did not.

The Guardian, therefore, brought proceedings against the Trustee in Switzerland seeking further information regarding the Trust's assets. Following that, she brought proceedings in Italy in 2017, seeking an order that the Trust was invalid **("Milan Proceedings")**. Following an unsuccessful attempt by the Trustee to strike out the Milan Proceedings due to the Italian courts' alleged lack of jurisdiction, the Trustee also brought the present proceedings directly in the Cayman Islands **("Cayman Proceedings")**, seeking a declaration that the Trust was valid and that any challenge to that validity was subject to the exclusive jurisdiction of the Cayman courts.

The application

In late 2020, the Guardian applied to stay the Cayman Proceedings on the basis that Cayman was not the appropriate forum to resolve the issues in respect of the Trust, as the courts of Milan were more convenient. In particular, the Guardian argued that Milan was more convenient than Cayman because IDF and the other beneficiaries of the Trust resided in Milan; the Trust was administered from Switzerland; the main factual witnesses were located in Milan and Switzerland, and most of the relevant documents were written in Italian rather than English.

The Trustee contested the Guardian's application on two principal grounds:

1. First, the Trustee argued that the Cayman courts have exclusive jurisdiction over a wide range of issues relating to Cayman law-governed trusts (including their validity), pursuant to section 90 of Cayman's Trusts Law. Although this provision deals only with issues of governing law, not jurisdiction, the Trustee argued that it should be treated as extending to jurisdiction as well, based on a number of cases from the last 20 years.

2. Second, the Trustee argued that, even if section 90 of Cayman's Trusts Law does not confer exclusive jurisdiction on the Cayman courts, the forum of administration clause in the Trust's deed itself does so.

The court's decision

The court granted the Guardian's application for a stay of the Cayman Proceedings, on the express condition that the Milan court would apply Cayman law when determining the Milan Proceedings.

The court expressed sympathy with both sides' construction of the relevant Cayman legislation but found in favor of the Guardian's contention that, because section 90 only deals expressly with the issue of governing law, the natural and ordinary reading of this section was that it does not implicitly extend beyond that. The court considered that the Trustee did not seriously challenge this reading of the legislation and relied more on its interpretation of relevant case law. However, after a thorough review of two decades of significant cases, the court concluded that none of the case law placed before it was either binding or persuasive enough to displace the natural interpretation of the relevant legislative provision. The court's message is clear: section 90 does not confer blanket exclusive jurisdiction on Cayman courts when it comes to questions relating to Cayman trusts, and other factors must be taken into account.

The court, therefore, turned to the Trustee's fall-back position that the Trust deed's forum of administration clause conferred exclusive jurisdiction on the Cayman courts. The court referred extensively to the important UK Privy Council decision in *Crociani v. Crociani*, from which it extracted the following key principles:

1. A trustee can, prima facie, enforce an exclusive jurisdiction clause against a beneficiary.

2. Whether a clause is a valid exclusive jurisdiction clause may depend on the wording of such clause.

3. Similarly, whether a particular dispute is caught by the clause will depend on the nature of the dispute.

4. A beneficiary can more easily oppose enforcement of an exclusive forum for administration clause than a contractual exclusive jurisdiction clause.

Applying these key principles, the court found that: (a) the clause in the Trust's deed did not refer to the exclusive jurisdiction and, therefore, did not confer it; and (b) the Guardian's challenge to the validity of the Trust was made in her capacity as a "stranger" to the Trust (effectively, a third party), rather than as a beneficiary to it, and in any event, the clause would therefore have been unenforceable against her.

The court also gave considerable weight to the factual background to the various proceedings, noting that the Trustee's position was made even more difficult by the fact that it had already submitted to the jurisdiction of the Italian courts in the Milan Proceedings and was now seeking to prevent the Guardian from pursuing those proceedings at a very late juncture, years after they had been commenced and shortly before a final hearing was due to take place. The court concluded that these factors also weighed heavily against allowing the relief sought by the Trustee on discretionary grounds.

Commentary

The court's ruling that section 90 of Cayman's Trusts Law does not act as an impenetrable firewall conferring on the Cayman courts the exclusive jurisdiction to resolve all disputes in respect of Cayman law trusts is one with significant implications for trustees, beneficiaries, and legal practitioners.A wide range of disputes relating to Cayman law-governed trusts may now be adjudicated in foreign courts if more convenient on the facts. Attempts by trustees to challenge foreign proceedings on jurisdictional grounds may also now be much more difficult. Further, given that many other offshore jurisdictions have firewall legislation with similar provisions to section 90 of Cayman's Trust Law, this case may well have implications stretching far beyond the Cayman Islands.Finally, the court helpfully distilled key principles on the forum of administration clauses from the Privy Council's decision in Crociani v. Crociani. Although trust deeds have since become more clearly drafted in light of that decision, this case serves as a reminder that practitioners should exercise due care when drafting jurisdiction/administration clauses, and — if seeking to rely on those clauses to thwart foreign proceedings — should ensure they do so sooner rather than later.

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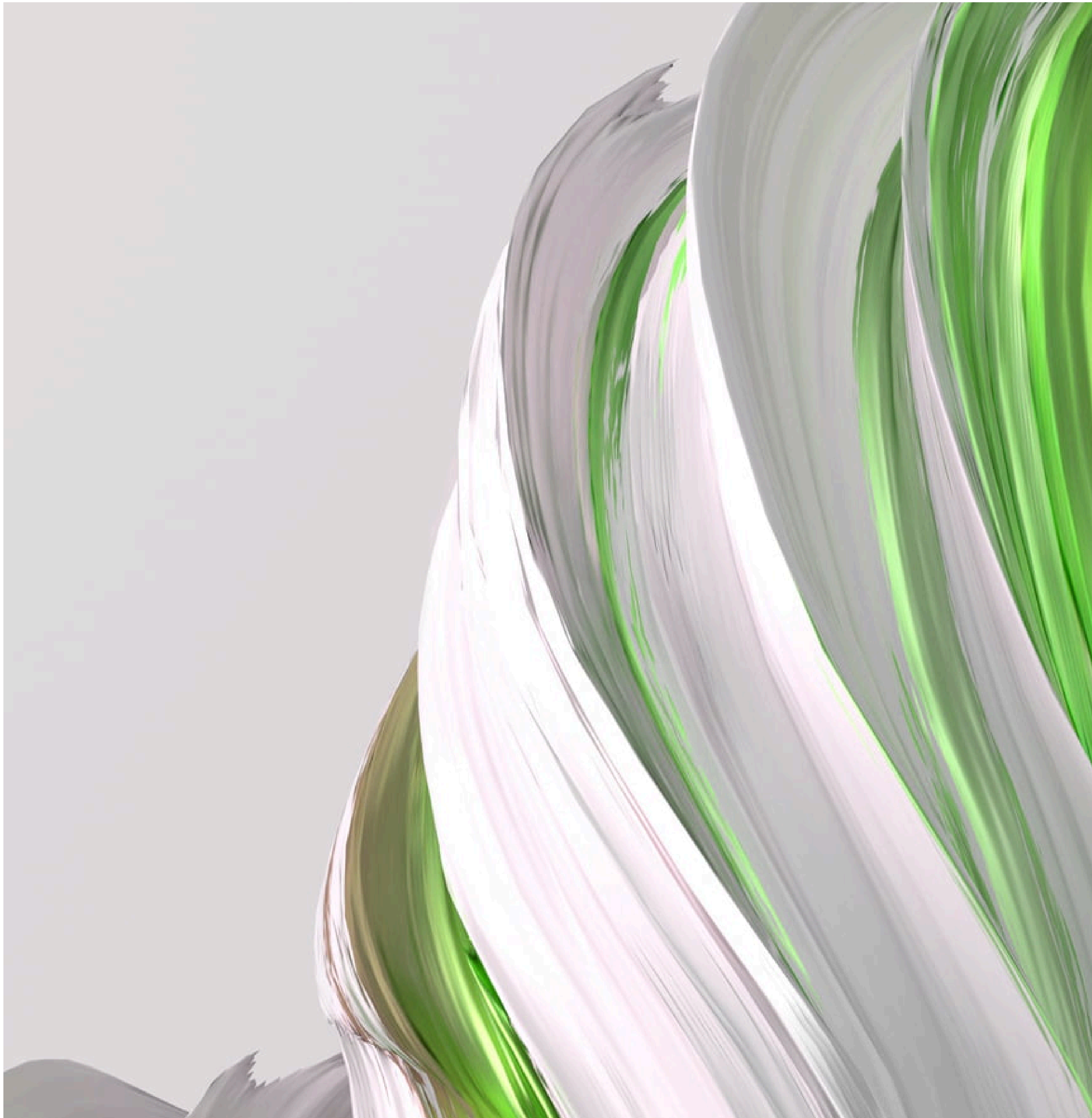
FCPA: US v. Ho



On 19 December 2020, the US Court of Appeals for the Second Circuit affirmed the conviction of Chi Ping Patrick Ho for violating the Foreign Corrupt Practices Act (FCPA) and US anti-money laundering laws in connection with his role in schemes to bribe African officials for the benefit of a Chinese conglomerate. The decision is significant for its ruling that a wire transfer "through" a US correspondent bank account can also be considered a transfer "to" and "from" the United States under US money laundering statutes.

At trial in the Southern District of New York, the government proved that Ho used his position as an officer or director of a US-based non-governmental organization (NGO) to engage in two bribery schemes in Chad and Uganda for the benefit of China CEFC Energy Company Limited ("CEFC Energy"), a for-profit conglomerate based in Shanghai. CEFC Energy funded a non-profit NGO in Hong Kong known as the China Energy Fund Committee, or CEFC Limited (CEFC NGO), which, in turn, funded a non-profit US entity, China Energy Fund Committee (USA) Inc. Ho served as an officer and the principal director of CEFC NGO, holding the title of secretary-general.

On appeal, Ho argued that the wire transfer underlying one of his money laundering convictions went from Hong Kong to Uganda through a correspondent account in the United States. Thus, it did not go "to" or "from" the United States, as required by the relevant statute, 18 U.S.C. 1956(a)(2), which makes it illegal, under certain circumstances, to "transport, transmit, or transfer ... funds from a place in the United States to ... a place outside the United States" (emphasis added)[1].

1 Ho challenged his conviction on various grounds, including that the evidence was not sufficient to support his conviction under the FCPA, that the court improperly instructed the jury on the elements of money laundering and that the court improperly admitted certain evidence. This article addresses only one issue raised by his appeal — whether the use of a US correspondent account is sufficient to subject a transaction to US jurisdiction.

The wire at issue involved the following steps:

a) HSBC Hong Kong debited CEFC NGO's account in Hong Kong.

b) HSBC Hong Kong sent a payment message to HSBC Bank US, asking it to debit USD 500,000 from HSBC Hong Kong's correspondent account in New York.

c) HSBC Bank US debited HSBC Hong Kong's same correspondent account.

d) HSBC Bank US and Deutsche Bank, New York settled a USD 500,000 transfer through a payment system.

e) Deutsche Bank credited Stanbic Bank's correspondent account.

f) Stanbic Bank credited an account in Uganda.

In light of this sequence, Ho argued that, because the transfer did not ultimately originate or terminate in the United States, but only went "through" the United States, it was not covered by 18 U.S.C. 1956(a)(2).

The Second Circuit rejected Ho's argument, concluding that a transfer "through" a US correspondent account could also fairly be characterized as going "to" and "from" the United States. The Second Circuit cited Ho's argument:

- [O]ne would not say that one was coming "from New York" when one's train from Boston to Washington stops along the way; rather, one would say that one was going "from" Boston, "to" Washington "through" New York.

The Second Circuit pointed out the following:

- Ordinary parlance would not necessarily **preclude** such a passenger from **also** saying that he traveled from New York to Washington ... especially ... if the passenger in question had to change trains at Penn Station (emphasis in original).

At the same time, the court cautioned that not every transfer that goes through the United States necessarily goes "to" or "from" it. For example, the court stated the following:

- [W]e do not [address] whether the transportation of cash from Hong Kong in an airplane over the United States to a final destination in Uganda would be would be properly said to have gone "through," "from" or "to" the United States — let alone whether more than one of those propositions could apply. We simply acknowledge that some schemes that colloquially go "through" the United States — in the sense that their origins and destinations are elsewhere — might also be said to involve transfers that go "to" or "from" the United States. They did so here.

Conclusion

While the decision in Ho's case addressed the very specific jurisdictional question of how to interpret "to" and "from" under the criminal money laundering statutes, it also stands for the broader point that participants in a financial transaction that has no US touch point other than the use of a correspondent bank account should expect to be subject to US jurisdiction.

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United Kingdom Freeports

Eight new freeports in England are due to enter operation in late 2021 or early 2022. Individuals and businesses may enjoy certain customs and tax benefits in connection with one of the eight designated freeports.

Key takeaways

The reintroduction of freeports in the UK is driven by an intention to encourage investment, trade, regeneration, and innovation. This does not appear to have been done with private clients in mind, although we may see private clients benefitting, who have used freeports in other jurisdictions.

Background

In the private client context, freeports have historically been used as areas — usually around ports or airports — where small, portable (e.g., art, antiques, wine, etc.) and bigger (e.g., yachts, planes, etc.) high-value goods can be imported, stored and re-exported without having to pay the relevant taxes (tariffs). These taxes only become payable if and when the goods leave the freeport and enter the domestic market.

Freeports can also be used to import raw materials, which can be transformed in situ into finished products ready to export.
Within the designated customs and tax sites in the bounds of any one of the eight new UK freeports, individuals and businesses will be able to access relief and/or favorable customs duties. Current proposals include customs deferrals, duty inversions, tax suspensions (e.g., VAT) and tax credits (e.g., R&D credits), business and duties relief, enhanced capital and other allowances, and simplified development rules.

Policy

The chancellor, Rishi Sunak, stated that the planned freeports would "unlock billions" in investment while the Treasury stresses that freeports will "benefit from simplified customs procedures and duty suspensions on goods". The UK proposal for freeports is very much targeted at business, regeneration, and innovation. The new designated freeport areas would put the UK "on the map" for low-tax zones alongside established industry leaders — like Switzerland, Monaco, and Singapore. Notably, this is not the first time freeports have been established in the UK. However, the latest legislation establishing the use of freeports in the UK expired in 2012 and, in any event, the post-Brexit landscape is likely to entail considerable change from any previous formats. Currently, only one designated freeport exists on the Isle of Man, which is a Crown Dependency.

For whom

Private clients may also benefit, although the UK government has made it clear that it is "designing an ambitious and attractive offer for businesses".

The introduction of freeports alongside other announcements in the UK Spring Budget 2021, e.g., enhanced relief for capital investments (a temporary "super deduction" regime available for expenditure qualifying for capital allowances incurred from 1 April 2021 to 31 March 2023), exemplify the corporate-focused policies framing the new Global Britain as "a hub for international trade and investment". To this end, the aim of the UK government appears to be to extend the benefits of freeports beyond the confines of the designated areas. This may involve facilitated investment initiatives and collaboration hubs, although this is still a developing area. Moreover, the government's response to the freeports consultation also contains some initial anti-avoidance measures. An example of this, in relation to the enhanced capital allowance, is that the 100% allowance will not be available where the plant or machinery is "partly" or "primarily" for use outside "freeport tax sites".
Generally, the government has stressed that it "does not want the introduction of UK freeports to lead to an increase in illicit activity" and confirmed that freeports will have to adhere to the OECD Code of Conduct for Clean Free Trade Zones.

Where

The eight new designated freeports in England will be in East Midlands Airport, Felixstowe and Harwich, Humber, Liverpool City Region, Plymouth, Solent, Thames, and Teesside.

Timeline

Nov 2020
Bidding prospectus and process kick-off

Jan 2021
Clarification Q&A

Feb 2021
Deadline for bid applications

Spring 2021
Successful bids announcement

Spring-autumn 2021
Business development plan and implementation

Late 2021-2022
Freeports become operational

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Expansion of mandatory disclosure rules proposed in Budget 2021

Canada's Federal Budget 2021 ("Budget 2021") proposes to expand the disclosure rules for certain transactions, which is in line with the measures recommended in the OECD's Base Erosion and Profit Shifting Project, Action 12: Final Report (BEPS Action 12 Report).

The proposed expansion of mandatory disclosure rules contemplates: (i) changes to the Income Tax Act's (ITA) existing reportable transaction rules; (ii) a new requirement to report notifiable transactions; (iii) a new requirement for specified corporations to report uncertain tax treatments; and (iv) an extension of the reassessment period in respect of transactions that are subject to the new disclosure rules and addition of penalties for failure to comply.

Budget 2021 indicates that the amendments would apply to taxation years beginning after 2021 (for measures applied to taxation years) and transactions entered into on or after 1 January 2022 (for measures applied to transactions). However, the related penalties would not apply to transactions that occur before the date on which the enacting legislation receives Royal Assent.

Reportable transactions

Budget 2021 proposes to amend the existing reportable transaction rules under the ITA.

Currently, in order for a transaction to be reportable under these rules, the transaction must be an "avoidance transaction" (as defined by the general anti-avoidance rule) and bear at least two of the three generic hallmarks. In general, these three hallmarks are the following:

a) A promoter or tax adviser in respect of the transaction is entitled to contingent fees based on the tax benefits obtained from the transaction or number of taxpayers that participate in the transaction.

b) A promoter or tax adviser requires "confidential protection" with respect to the transaction.

c) The taxpayer (or the person who entered into the transaction for the taxpayer's benefit) obtains "contractual protection" in respect of the transaction, including insurance, indemnity or a guarantee against a failure to achieve the intended tax benefit.

A reportable transaction must be reported to the Canada Revenue Agency (CRA) on or before June 30 of the calendar year following the calendar year in which the transaction first became a reportable transaction.
Budget 2021 proposes to amend these rules as follows:

- Only one generic hallmark needs be present in order for a transaction to be reportable.

- Expanding the definition of "avoidance transaction" to include a transaction where it can reasonably be concluded that one of the main purposes of entering into the transaction is to obtain a tax benefit.

- A reportable transaction has to be reported to the CRA within 45 days of the earlier of the day that a taxpayer (or another person who entered into the transaction for the taxpayer's benefit) (i) becomes contractually obligated to enter into the transaction or (ii) enters into the transaction.

- Reporting of a scheme that, if implemented, would be a reportable transaction be required by a promoter or adviser within the same time limits (with an exception to the extent that solicitor-client privilege applies).

The proposed penalty for a taxpayer's failure to report is up to the greater of CAD 25,000 (or CAD 100,000 for a corporation with assets of total carrying value of CAD 50 million or more) and 25% of the tax benefit. The proposed penalty for a promoter's or adviser's failure to report is equal to the total of: (a) 100% of the fees charged to a person for whom a tax benefit results; (b) CAD 10,000; and (c) CAD 1,000 for each day during which the failure to report continues, up to a maximum of CAD 100,000.

Notifiable transactions

Budget 2021 proposes to introduce a new category of specific hallmarks known as "notifiable transactions." The minister of national revenue, with the concurrence of the minister of finance, would have the authority to designate a transaction as a notifiable transaction. Notifiable transactions would include both transactions that the CRA has found to be abusive and transactions identified as transactions of interest. The description of a notifiable transaction would set out the fact patterns or outcomes that constitute that transaction in sufficient detail and examples of notifiable transactions would be expected to be issued.

Similar to the reportable transaction measures, a taxpayer (or another person entering into the transaction for the taxpayer's benefit) entering into a notifiable transaction (or a transaction or series of transactions that is substantially similar to a notifiable transaction) would be required to report the transaction to the CRA within 45 days of the earlier of the day the taxpayer or the other person (i) becomes contractually obligated to enter into the transaction or (ii) enters into the transaction.

A promoter or adviser of a scheme that, if implemented, would be a notifiable transaction (or a transaction or series of transactions that is substantially similar to a notifiable transaction) would also be required to report within the same time limits (with an exception to the extent that solicitor-client privilege applies).

The proposed penalty for a taxpayer's failure to report is up to the greater of CAD 25,000 (or CAD 100,000 for a corporation with assets of total carrying value of CAD 50 million or more) and 25% of the tax benefit. The proposed penalty for a promoter's or adviser's failure to report is equal to the total of: (a) 100% of the fees charged to a person for whom a tax benefit results; (b) CAD 10,000; and (c) CAD 1,000 for each day during which the failure to report continues, up to a maximum of CAD 100,000.

Reporting uncertain tax treatments

Budget 2021 proposes a new requirement for specified corporations to report particular uncertain tax treatments to the CRA if the following conditions are met:

- The corporation is required to file a Canadian income tax return.
- The corporation has at least CAD 50 million in assets at the end of the year (based on carrying value).
- The corporation, or a related corporation, has audited financial statements prepared in accordance with International Financial Reporting Standards or other country-specific Generally Accepted Accounting Principles relevant for domestic public companies.
- Uncertainty in respect of the corporation's Canadian income tax for the taxation year is reflected in those audited financial statements (i.e., it is probable that the entity will receive or pay amounts relating to the uncertain tax treatment).

For each reportable uncertain tax treatment, the corporation would be required to provide prescribed information, such as the quantum of taxes at issue, a concise description of the relevant facts, the tax treatment taken (including the relevant ITA sections) and whether the uncertainty relates to a permanent or temporary difference in tax. The reporting of uncertain transactions is proposed to be due at the same time as the corporation's Canadian income tax return is due.

The proposed penalty for failure to report each particular uncertain tax treatment is CAD 2,000 per week, up to a maximum of CAD 100,000.

Reassessment period

In support of the new mandatory disclosure rules, Budget 2021 proposes that the normal reassessment period would not commence in respect of the transaction until the taxpayer has complied with the relevant reporting requirement. In other words, if a taxpayer does not comply with a mandatory disclosure reporting requirement in respect of a transaction, a reassessment in respect of the transaction would not become statute-barred.

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Sale of Brazilian real estate assets by a French resident

Be careful - the capital gain is not only taxable in Brazil, but also in France (Administrative Supreme Court, 11 December 2020, n°440307)

Under the French-Brazilian tax treaty, a French tax resident selling shares in a company that mainly holds properties in Brazil is taxable on the real estate capital gain in France as well as Brazil. Article 13.1, which specifies that the gains "are taxable in the Contracting State where such real estate properties are located," does not prevent taxation in the seller's state of residence as well.

In 2008, a French tax resident sold shares in a company whose assets mainly consisted of properties in Brazil. Following a tax audit, she was subject to additional income tax and social surtaxes.

The Administrative Court of Lyon rejected the taxpayer's request for tax relief, but the Administrative Court of Appeal accepted the cancellation of the challenged taxes.

As a reminder, Article 13.1 of the French-Brazilian tax treaty provides the following:

Gains resulting from the alienation of real estate properties [...] or from the alienation of shares or similar rights in a company whose assets consist mainly of real estate properties are taxed in the Contracting State where those real estate properties are located.

For the case at hand, this provision confirms that real estate capital gains are taxed in Brazil. However, it does not imply that the capital gains will not be taxed in France as well.

Indeed, the Administrative Supreme Court reminded parties of the distinction between a case where gains "are taxable" in a contracting state and a case where gains "are only taxable" in that state — a key distinction for the reading of bilateral tax treaties. Moreover, the judges specified that Article 22, "which refers in particular to Article 13," provides for ways to avoid double taxation on gains resulting from the sale of shares in predominantly real estate companies. Article 22 provides that France grants French tax residents realizing a real estate capital gain in Brazil a "tax credit corresponding to the tax levied in Brazil."

The Administrative Supreme Court rightly concludes that, by providing that gains are taxable in the state in which the real estate properties are located, i.e., in Brazil, the provisions of Article 13.1 "have neither the purpose nor the effect of excluding any possibility, for the State in which the taxpayer is resident," i.e., France, to tax such gains as well. Consequently, the Administrative Supreme Court canceled the decision of the Administrative Court of Appeal of Lyon, which had decided on the cancellation of the challenged taxes.

The French-Brazilian tax treaty is not an isolated case. Many other tax treaties provide that real estate capital gains are taxable both in the state in which the properties are located and in the seller's state of residence. This is the case, for example, in the tax treaties signed between France and the United States, the United Kingdom, and South Africa.

In practice and depending on the relevant tax treaty, this means that a taxpayer who realizes real estate capital gains in a country other than the taxpayer's country of residence will have to analyze the tax consequences and make sure to be compliant with their obligations in both states. They will therefore have to take into consideration and articulate the tax treatment and the possible tax exemptions applicable in each country while ensuring to apply the tax credit that enables them to avoid double taxation.

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Impact of Brexit on French social surtaxes

Are we heading toward new litigation regarding social surtaxes paid by taxpayers registered under the UK National Insurance system?

On 24 December 2020, the United Kingdom and the European Union (EU) signed an agreement providing the terms and conditions of the United Kingdom's exit from the EU. This agreement is still subject to ratification by the European Parliament by no later than 28 February 2021. As it stands, this agreement provides for social security measures that are quite similar to the ones set out in the European Regulation (EC) No 883/2004 on the coordination of social security systems, in particular with respect to the principle of paying social security contributions only in one country at the same time. However, the French tax authorities indicated in a public release dated 30 December 2020[2] that, as of 1 January 2021, social surtaxes will be calculated at the overall rate of 17.2% (instead of 7.5%) for taxpayers paying into the UK insurance contribution regime. Although this position is in accordance with the law if this agreement is ratified as it stands, could this position be challenged by the taxpayers who would claim a refund of contribution sociale généralisée (CSG)[3] and contribution pour le remboursement de la dette sociale (CRDS)[4]?

The social surtaxes have been the subject of many discussions in recent years and have given rise to two massive tax litigations. We may be at the beginning of a third wave of litigation if the French legislator or the tax authorities do not broaden the exemption from CSG and CRDS for taxpayers paying UK National Insurance contributions.

Already two landmark litigations!

Following the famous De Ruyter case law (ECJ, 26 February 2015, Case C-623/13), taxpayers contributing on a mandatory basis to the social security system[5] of a state signatory to the European Regulation on the coordination of social security systems (other than France) had been able to claim a refund of French social surtaxes paid for the years 2012, 2013 and 2014.

Indeed, the Court of Justice of the European Union confirmed that social surtaxes should, because of their characteristics and in particular their allocation to the financing of the general branches of social security (CNAV, CNAF, etc.), be treated as social security contributions.

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2. https://www.impots.gouv.fr/portail/files/media/1_metier/5_international/brexit/20201230_faq_brexit_nid_13662_particuliers.pdf.

3. This translates as Generalized Social Contribution.

4. This translates as Contribution to the Refund of the Social Debt.

5. European Regulation (EC) No 883/2004 of 28 April 2004 and European Regulation (EEC) No 1408/71 of the Council of 14 June 1971.

Consequently, social surtaxes should have also been subject to the principle of unicity of the European Regulation (Article 11.1), which provides that European taxpayers can only pay compulsory social security contributions in one state.

In the social security financing Act for 2016[6], the legislator then decided to amend the allocation of social surtaxes to the financing of the old age solidarity fund (FSV[7]), the reimbursement fund for the social debt (CADES), and the national solidarity fund for autonomy (CNSA[8]). However, on 31 May 2018, the Administrative Court of Appeal of Nancy (decision then confirmed by the French Administrative Supreme Court on 1 July 2019) indicated that, despite this reallocation of the social surtaxes, they remained social security contributions subject to the principle of unicity provided for in the European Regulation on the coordination of social security systems. These court decisions allowed taxpayers to request the refund of social surtaxes paid for the years 2015, 2016, and 2017.
A second mass dispute then arose.

Exemption from CSG and CRDS, in particular for the British

To account for this new litigation, Article 26 of the Social Security Financing Act for 2019[10] has (i) abolished one of the social surtaxes and its additional contribution, (ii) increased the rate of the solidarity surtax from 2% to 7.5%, and (iii) above all, introduced an exemption from CSG (9.2%) and CRDS (0.5%) for taxpayers who are contributing on a mandatory basis to the social security system of a European state or of Switzerland.

Article L. 136-6 of the French social security Code, paragraph I ter, now provides the following:

By derogation from I and I bis, persons are not liable to pay the contribution when these persons, pursuant to the provisions of Regulation (EC) No 883/2004 of the European Parliament and of the Council dated 29 April 2004 on the coordination of social security systems, are subject to a social security legislation subject to those provisions and are not covered by a compulsory French social security regime.

As the solidarity surtax had already been reallocated to the budget of the state by the Social Security Financing Act for 2018[11], it could not be qualified as a social security contribution and it was not necessary to provide for an exemption in order to comply with the abovementioned European legislation.

Regarding passive income, the effect of these amendments was that taxpayers contributing to a European social security regime were, from 1 January 2019[12], only subject to the 7.5% solidarity surtax instead of the 17.2% social surtaxes. In such circumstances, this reform has therefore led to a significant decrease (9.7%) in the surtaxes applied.

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6. Law n° 2015-1702 of 21 December 2015.

7. Fonds de Solidarité Vieillesse.

8. Caisse d'amortissement de la dette sociale.

9. Caisse nationale de solidarité pour l'autonomie.

10. Law n° 2018-1203 of 22 December 2018, Article 26.

11. Article 28 of the Law n° 2017-1836 of 30 December 2017.

12. Applicable to passive income of 2018.

Impact of Brexit on social surtaxes: 17.2% instead of 7.5%?

Following Brexit, a transition period was implemented until 31 December 2020, the period during which EU rules continued to apply to the United Kingdom.

On 30 December 2020, the French tax authorities published FAQ regarding the tax consequences of Brexit for individuals. With respect to social surtaxes, the comment is as follows:

As of 1 January 2021, United Kingdom residents will no longer benefit from the exemption from the "contribution sociale généralisée" (CSG) and from the "contribution pour le remboursement de la dette sociale" (CRDS) based on passive income, as the United Kingdom will no longer be subject to the provisions of European Regulation (EC) No 883/2004 on the coordination of social security systems.

As a result, passive income will be subject to social surtaxes at the overall rate of 17.2%.

This position from the French tax authorities is indeed in line with French law, more specifically with the provisions of Article L. 136-6 I ter of the French Social Security Code, which provides an exemption only for persons subject to European social security legislation. It means that UK tax residents who continue to pay UK National Insurance contributions and rent out real estate in France will be subject to a 9.7% increase in French social surtaxes applied to income taxable in France.

However, one wonders whether French law is compliant with the agreement signed by the United Kingdom with the Member States of the European Union on 24 December 2020, which provides, similarly to the aforementioned European regulation, for rules in order to coordinate the social security systems.

Indeed, Article SSC.10 of the Protocol on the coordination of social security provides for a principle of unicity in the following terms: "The persons to whom this Protocol applies shall only be subject to the legislation of one State. Such legislation shall be determined in accordance with this Title."

Note the similarity of this text with the principle of unicity provided for in Article 11.1 of European Regulation (EC) No 883/2004 on the coordination of social security systems: "The persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title."

To the extent that, in recent years, claims for a refund of French social surtaxes were based on the principle of unicity of European regulations on the coordination of social security systems, it would be appropriate to analyze whether there are any arguments that French law is contrary to Article SSC.10 of the Protocol on the coordination of social security systems signed with the United Kingdom, and thus to claim a refund of CSG and CRDS for taxpayers paying UK National Insurance contributions, hoping for the quick introduction of a legal exemption.

In the absence of any tolerance granted by the French tax authorities to taxpayers paying UK National Insurance contributions or any update of the provisions of Article L. 136-6 of the French Social Security Code, new claims for a refund of social surtaxes could be considered. As many UK residents own properties in France, the French tax authorities may receive such claims in the near future.

Which taxpayers would be concerned?

Those concerned by this question relating to the exemption from CSG and CRDS would be all taxpayers who continue paying UK National Insurance contributions on a mandatory basis. In particular, this would include:

- French tax residents who pay UK National Insurance contributions on a mandatory basis, such as, for instance, managers and employees seconded to France: in this case, this question will arise for all their investment income (dividends, interests, capital gains, rental income, real estate capital gains, etc.)

- non-French tax residents who pay UK National Insurance contributions in respect of French-source rental income and real estate capital gains taxable in France.

It should be noted that paying agents with the obligation to withhold social surtaxes at source on the investment income of their clients, as well as notaries and tax representatives for real estate sales (the appointment of tax representatives became mandatory for real estate sales realized by UK tax residents on 1 January 2021), should also consider the possibility of only applying the 7.5% solidarity surtax. However, we have doubts as to whether these intermediaries would assume such a responsibility, which argues even more for the implementation of an administrative tolerance or a legislative amendment.

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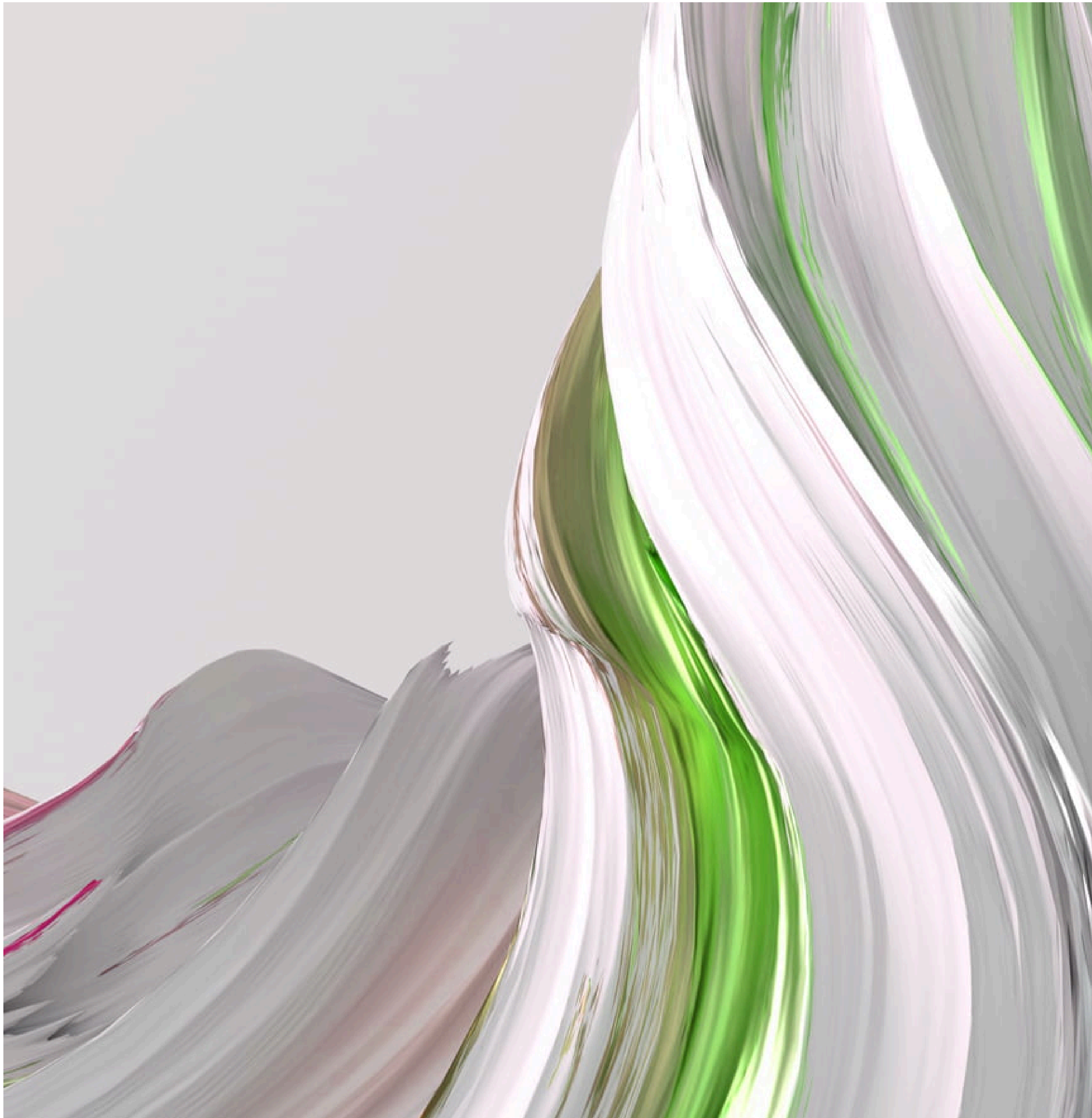
Transfer of assets through a trust

What was the taxable event that triggered inheritance tax before the tax reform of 29 July 2011? (Supreme Court, 18 November 2020, n°18-14.242)



Since the law of 29 July 2011, the legislator has been providing specific rules for assets held or transferred via a trust, notably one according to which the death of the settlor is a taxable event triggering inheritance tax, irrespective of whether the assets are effectively transferred on the settlor's death or remain in the trust. With regard to the rules in force prior to this reform, which were less clear, the Supreme Court has just confirmed that the taxable event is the transfer of ownership that occurs as a result of the distribution of the trust assets to the beneficiary, considering that it may take place after the death of the settlor.

In the case at hand, an American resident had set up a trust in 1964 into which she had transferred financial assets to organize their management and transmission to the heirs. The deed provided that, upon her death, her three children would only inherit from the income of the trust and, with regard to her daughter, the assets held in the trust should be shared upon the death of her daughter between her own children, provided they have reached the age of 35.

The settlor died in December 1980 as a US tax resident and without having revoked the trust. Her daughter died in January 2009 as a French tax resident and, on this date, her own three children were all over 35. In the daughter's French inheritance tax return filed in December 2009, the financial assets held in the US trust had an approximate value of EUR 304,000 and were subject to inheritance taxes in France.

However, one of the settlor's grandchildren filed a claim for the reimbursement of EUR 41,356 corresponding, according to him, to the inheritance taxes due on the financial assets held in the US trust. He claimed that those assets were not taxable, as the settlor's daughter only had an usufruct on these assets, the bare ownership of which already belonged to her heirs (grandchildren). Indeed, he considered that, following the settlor's death in 1980 and considering the provisions of the trust deed, the settlor's daughter had been granted the usufruct of the financial assets and the three grandchildren had received the bare ownership of the assets. Therefore, he claimed that, upon the death of the settlor's daughter in 2009, the usufruct and bare ownership were joined and became the full ownership of the grandchildren without having to trigger taxation.[13]

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13 According to French inheritance tax rules, when the owner of the usufruct dies, the owner of the bare ownership becomes the full owner of the property rights without paying any inheritance taxes on the value of the usufruct.

The French Tax Administration and the first instance Court of Nanterre rejected the taxpayer's claim for a refund. However, the Court of Appeal of Versailles, in a decision dated 12 January 2018, accepted the arguments of the settlor's grandchild and cancelled the decision issued at the first trial.

However, in a decision dated 18 November 2020, the commercial chamber of the Supreme Court stated that, pursuant to the provisions of Article 750 ter of the French Tax Code:

The taxable event triggering inheritance tax is established by the transfer of ownership, which, concerning assets transferred into a trust, occurs as a result from the distribution of the assets of the trust to the final beneficiary, on the day of its termination, which may take place after the death of the settlor.

The Supreme Court then reminded the parties that, according to the Court of Appeal of Versailles, as a result of the trust deed the grandchild held, under condition, a portion of the assets since this provision could not be revoked after the settlor's death. The court of appeal concluded that the grandchild's right to these assets was certain, that he had therefore become the bare owner of this portion upon the settlor's death in 1980 and that the subsequent death of the daughter in 2009 had not led to a new transfer of the assets' ownership but only to the termination of the usufruct on these assets, which is a non-taxed event in France.

However, the Supreme Court stated that the trust deed provided for its termination upon the death of the daughter and not upon the death of the settlor, which only made the trust irrevocable, and that the court of appeal, with its decision, would have violated the provisions of Article 750 ter of the French Tax Code. Indeed, the transfer of ownership would not have taken place upon the death of the settlor in 1980, as the taxpayer claimed, but upon the death of her daughter in 2009 that led to the termination of the trust.

Note that this decision was issued on the basis of the rules in force prior to Law No. 2011-900 dated 29 July 2011. This latter law, which notably implemented the reporting obligations for trustees, also provided specific rules with regard to gift and inheritance taxes. Indeed, since 2011, there has been a kind of tax transparency for assets transferred into trusts, so that French inheritance taxes are in principle due upon the death of the settlor, regardless of whether the assets are effectively distributed to the beneficiaries or remain in the trust after the settlor's death. In this case, the tax consequences would therefore have been different under the current tax rules.

In any case, the transfer of assets via a foreign trust is a particularly sensitive issue in France that must be carefully analyzed by taxpayers, irrespective of whether they are trustees, settlors or beneficiaries. When the trust has a link with France, we recommend paying attention to the drafting of the various trust deeds establishing the trust in order to take into account the specific rules provided by French law.

The case is referred to the Court of Appeal of Paris, which will have to determine whether the grandchildren received the assets in the trust from their grandmother, the settlor of the trust or their mother. This point is not neutral to the extent that, in the first case, the provisions of the French-American tax treaty applicable to gift and inheritance tax may prevent a taxation of the assets in France.

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Strengthening tax compliance of HNWIs

On 24 March 2021, the General Office of the CPC Central Committee and the General Office of the PRC State Council jointly issued the Opinion to Further Reform the Tax Collection and Administration **("Opinion")**.

Of particular note, the Opinion requires the Chinese tax authority to "strengthen tax services and supervision for high-income and high-net-worth individuals in accordance with the law."

Specifically, the Opinion requires the Chinese tax authority to: (i) strengthen the risk prevention, control and supervision of tax evasion and avoidance, such as the concealment of income, inflation of costs, profit shifting, taking advantage of no/low tax jurisdictions/locations, dual contracts (also known as "yin-yang contracts") and related party transactions; and (ii) improve the tax audit enforcement force by increasing the investment of human resources in tax risk management and assessment and big data application.

The Opinion is a clear signal that the Chinese tax authority will strengthen its tax enforcement to focus on HNWIs. With effect from 1 January 2019, the introduction of the general anti-avoidance rule under the individual income tax (IIT) regime provides the requisite legal basis for the Chinese tax authorities to initiate anti-tax avoidance actions against individuals.

Further, the strengthened international cooperation in terms of information exchange and technology development provides the tax authority with greater visibility about individuals' income. As of December 2020, China, as an information-receiving jurisdiction, has activated exchange relationships for financial account information under the common reporting standard (CRS) with 100 jurisdictions. This covers almost all popular jurisdictions used by Chinese HNWIs, including Hong Kong, Singapore, Switzerland, British Virgin Islands, Cayman

Islands, etc. The receipt of CRS information will enable the Chinese tax authority to have access to information relating to Chinese HNWIs' offshore financial assets.

On the other hand, whether the Chinese tax authority can make effective use of such information to enhance tax collection and enforcement against HNWIs on a wide basis largely depends on the tax authority's ability to process and analyze the information, given the large volume of information received. In response to the Opinion, we expect that the Chinese tax authority will invest increasing resources to enhance its information processing and analytic technologies.

More generally, due to COVID-19 and the recent economic downturn, the Chinese tax authority is facing pressure to increase tax revenue. Against this background, the Chinese government is strengthening its tax collection efforts and increasing its scrutiny of HNWIs.

In summary, there is a clear trend of the Chinese tax authority becoming more active and aggressive in tax collection and enforcement actions against HNWIs. It is important for HNWIs and their advisers to monitor the implementation of the anti-avoidance provision of the PRC Individual Income Tax Law, review the sustainability of existing tax arrangements, identify potential tax risks in advance, and take necessary measures to address potential tax audit risks.

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Two cases relating to the determination of the PRC tax residency status of individuals

There have been two recent cases involving the determination of the PRC tax residency status of individuals. In one case, a PRC national holding a Hong Kong tax residency certificate was considered a PRC tax resident under the tie-breaker rule[18] **("Case I")**. In the other case, a foreign national was considered a PRC tax resident under the tie-breaker rule **("Case II")**.

Case I

The taxpayer **("Mr. S")** was a PRC national. In 2013, Mr. S signed an employment contract with a PRC company under which he would perform his duties within mainland China. In 2014, Mr. S was appointed an executive director of the PRC company's Hong Kong subsidiary, and thereafter performed his work in Hong Kong. Mr. S obtained a Hong Kong tax residency certificate issued by the Hong Kong Inland Revenue Department for the tax years of 2014 and 2015.

Mr. S initially paid PRC tax on his income from his work in Hong Kong for these tax years, but subsequently sought a refund by claiming that he had overpaid PRC tax because he had failed to claim the protection of the China-Hong Kong double tax arrangement.

The tax bureau identified the following facts: (i) Mr. S had a Chinese permanent household registration; (ii) he had a permanent home in both Hong Kong and mainland China; (iii) most of his income was derived from his employment

18. The tie-breaker rule is included in double taxation agreements (DTAs) to address dual tax residency issues. In cases where an individual constitutes a tax resident of both contracting jurisdictions, most of China's DTAs provide that the individual's tax residency should be determined based on the following factors in sequence: the permanent home (with reference to the center of vital interests), habitual abode, and nationality. If the individual's tax residency cannot be determined based on the above factor(s), the competent tax authorities are to determine this issue by mutual agreement.

with the PRC company; (iv) the PRC company made social security contributions in China on his behalf, whereas the Hong Kong company did not pay social security contributions for him in Hong Kong; and (v) most of Mr. S' relatives were living in China and most of his family's assets were located in China, despite the fact that Mr. S' wife and daughter had obtained non-permanent Hong Kong residency status and the daughter was studying in Hong Kong.

Based on these facts, the tax bureau determined that Mr. S had his center of vital interests in mainland China, and thus should be considered a PRC tax resident under the tie-breaker rule.

Case II

The taxpayer ("Mr. A") was a foreign national who was employed as the general manager of a foreign-invested enterprise located in Xiamen. The tax bureau commenced a tax investigation into his affairs, during which Mr. A applied to the tax bureau for a PRC tax residency certificate.

While Mr. A had stayed in China for less than 183 days in each of the tax years concerned, the tax bureau considered Mr. A a PRC domiciliary tax resident based on the following factors: (i) Mr. A had been living in China since 2019 and expressed the intention of long-term residence in China; (ii) he owned a company in China and was responsible for the management of the company's operations; (iii) he had been duly filing tax returns and paying tax in China; and (iv) he had other investments in China.

Mr. A was a tax resident of the country of which he was a national. The tax bureau therefore considered the application of the tie-breaker rule under the applicable tax treaty:

Mr. A did not own any real property in his country of nationality, but had rented a house for long-term residence in Shanghai. Accordingly, the tax bureau concluded that Mr. A had a permanent home in China.
Mr. A only derived passive dividends income in his country of nationality, whereas he actively managed his Chinese company and derived active income in China. On this basis, the tax bureau considered that Mr. A had his center of vital interests in China.

Based on these facts, the tax bureau concluded that Mr. A was also a PRC tax resident for tax treaty purposes, and issued a PRC tax residency certificate to Mr. A. Meanwhile, the tax bureau required Mr. A to file and pay taxes in China with respect to his worldwide income, and collected RMB 500,000 in tax as well as late payment surcharges from him.

Observations

On the one hand, it is not surprising that the tax bureau considered Mr. S a PRC tax resident in Case I. In fact, it is common for the Chinese tax bureau to consider a Chinese national with a permanent PRC household registration as a PRC tax resident, even though the person has obtained permanent residence (e.g., a US green card) in a foreign jurisdiction or a foreign tax residency certificate. Chinese nationals who wish to surrender their PRC tax residency status should deregister their permanent Chinese household registrations for the sake of prudence.

On the other hand, it is not common practice for the Chinese tax authority to treat foreign nationals working in China as PRC domiciliary tax residents and to levy tax on their worldwide income. In fact, the PRC Ministry of Finance (MOF) and the PRC State Taxation Administration (STA) made it clear in a Q&A dated 2 April 2019 that foreign nationals who live in China due to reasons such as study and work and who will return offshore once they cease studying or working should not be considered to be habitually residing in China, and thus should not be considered PRC tax residents even if they have bought a residence in China.[19]

It is unclear from the news report whether the tax bureau in Case II initiated the tax residency assessment before Mr. A applied for the PRC tax residency certificate. We do not think this represents a general trend that the Chinese tax bureau would enforce the taxation of worldwide income against foreign nationals working/living in China. Nevertheless, it is prudent to closely monitor these tax enforcement activities.

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19 See http://www.chinatax.gov.cn/n810341/n810760/c4244390/content.html.

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Intestacy and inheritance rights of same-sex spouses

> In September 2020, the court of first instance published its judgment in the case of Ng Hon Lam Edgar v Secretary for Justice [2020] HKCFI 2412. It found that the exclusion of spouses in same-sex marriages from entitlements and benefits under the Intestates' Estates Ordinance (IEO) and the Inheritance (Provision for Family and Dependents) Ordinance (IPO) constituted unlawful discrimination on the ground of sexual orientation.

Edgar Ng was a male permanent resident of Hong Kong. He married another male Hong Kong permanent resident in London in January 2017. Ng was concerned that, if he died intestate, his assets would not pass to his spouse pursuant to the intestacy law.

Under the IEO, a surviving "husband" or "wife" of an intestate is generally entitled to take the personal chattels of the intestate as well as the whole or a portion of the intestate's residuary estate. "Husband" and "wife" are defined in the legislation to mean, in relation to a person, "a husband or wife of that person by a valid marriage". "Valid marriage" is defined under the legislation to include only opposite-sex marriages. Clearly, the marriage between Ng and his spouse did not fall within the scope of the ordinance as a matter of statutory interpretation.

On the other hand, the IPO empowers the court to make orders for financial provision out of the estate of a deceased for the benefit of the certain family members and dependents of a deceased person, including but not limited to the surviving "wife" or "husband" of the deceased, or any person who immediately before the death of the deceased was being maintained by the deceased. The definitions of the expressions "husband," "wife" and "valid marriage" in the IPO are materially the same as those in the IEO.

In June 2019, Ng sought clarification from the secretary for justice as to whether same-sex marriages performed according to the laws of foreign jurisdictions would be recognized as marriages for the purpose of probate, inheritance and intestacy. The secretary for justice refused to provide the clarification sought.

Mr. Ng then brought an application for leave to apply for judicial review at the CFI. One of the grounds put forward by him was that the definitions of "valid marriage," "husband" and "wife" under the IEO and the IPO did not recognize and make provision for same-sex marriages, and this failure violated the principle of equality[20], amounting to unjustified discrimination against Mr. Ng and his husband on the ground of sexual orientation.

Mr. Ng also sought a declaration that, for the purposes of the IEO and the IPO, references to "marriage" should be read to also include civil partnerships and civil unions between persons of the same sex.

The court agreed that these provisions constituted unlawful discrimination on the ground of sexual orientation.

In reaching its decision, the court followed the two-stage approach adopted in the earlier of Leung Chun Kwong v Secretary for Civil Service (2019) 22 HKCFAR 127:

(a) Stage 1 — whether there was a differential treatment on a prohibited ground under the IEO and IPO

(b) Stage 2 — whether the differential treatment could be justified
As to Stage 1, the court held that sexual orientation was a prohibited ground. Same-sex married couples and opposite-sex married couples are in a comparable position, and there was clearly differential treatment between the two under the legislation in question.

As to Stage 2, the court held that the legislative provisions pursued legitimate aims including (i) supporting and upholding the integrity of the traditional institution of marriage in Hong Kong, being the voluntary union of one man and one woman to the exclusion of others; (ii) encouraging heterosexual unmarried couples to marry to ensure their spouses will be afforded spousal status or priority under inheritance law; and (iii) maintaining the overall coherence, consistency and workability of the laws of Hong Kong involving the institution of marriage. However, the CFI considered it illogical to suggest that the denial of benefits under the IEO or IPO to same-sex couples could promote these legitimate aims.

20. As guaranteed by Article 25 of the Basic Law and Articles 1(1) and 22 of the Hong Kong Bill of Rights.

Hence, the differential treatment accorded to same-sex married couples and opposite-sex married couples under the IEO and IPO was not rationally connected to these legitimate aims, and could not be justified. They therefore constituted unlawful discrimination.

The court granted leave to apply for judicial review, and held that the proper remedy to be granted should be a declaration of these principles and remedial interpretation of the IEO and IPO.

However, because the applicant had not entered into a civil partnership or civil union, the judge refused to deal with the position of civil partnership or civil union for the purposes of the IEO and IPO. The decision therefore applies only to foreign same-sex marriages.

Despite the appearance of progress in Hong Kong in recognizing the rights of same-sex married couples, private clients should still be encouraged to have properly drafted wills and/or trusts in place in order to plan their succession ahead of any legislative or judicial developments.

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The Taiwan CFC rules are around the corner

Taiwan has a controlled foreign corporation (CFC) regime. The CFC legislation is scheduled to come into effect in 2022.

When will the CFC effect Taiwanese billionaires?

The CFC rules, which have been incorporated into Article 43-3 of the Income Tax Act since July 2016 and Article 12-1 of the Income Basic Tax Act since May 2017, has not come into effect yet. However, the status quo might change in the foreseeable future.

In October 2020, the Minister of Finance announced that the tax amnesty legislation to encourage fund repatriation back to Taiwan will expire in August 2021 as scheduled, and will not be extended. Pursuant to the ancillary resolution passed by the Legislative Yuan, the CFC rules are to come into effect within one year after the tax amnesty legislation expires. It is expected that the CFC rules will come into effect in 2022 at the earliest.

There is currently no scheduled effective date for the place of effective management regulations, which were introduced to prevent tax evasion.

How do the CFC rules impact on estate planning?

Once the CFC rules come into effect, the traditional method of shifting profits from a home jurisdiction and retaining them in a foreign company located in a jurisdiction with lower-tax burdens might become less viable from a tax-planning point of view.

Under the CFC rules, if a parent company holds 50% or more of shares in its foreign subsidiary, or has significant influence over the foreign subsidiary, the subsidiary may be deemed to be a conduit and be regarded as a look-through entity from a tax perspective unless the subsidiary satisfies the substantial activity test or its revenue is below the stipulated threshold.

Considering the potential CFC risks, we suggest conducting a comprehensive review of existing or planned structures, and making the necessary adjustments as early as possible.

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Around the World

APAC

Australia

ATO's data matching program with the Department of Home Affairs : The Australian Taxation Office (ATO) has access to data from the Department of Home Affairs on passenger movements from the 2016-17 to 2022-23 financial years (being 1 July 2016 to 30 June 2023). The passenger movement data-matching program will be used as part of the ATO's risk-detection models in determining and assessing the residency status of individuals for Australian tax and superannuation, and to address identity and residency compliance risks including registration, lodgment, reporting and payment obligations. Read more.

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Tax residency rules for individuals: In the 2021-22 Federal Budget, the government announced changes intended to simplify the tax residency rules for individuals.
Read more.

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Boxing our way out of recession - Australia's Federal Budget 2021-22: Federal Budgets come and go, but after these announcements, the government hopes that intellectual property will stay in Australia. The 2021-22 Federal Budget consists of a set of measures aimed at cementing Australia's place on the stage of the digital economy and providing certainty to Australian taxpayers in a period of unprecedented crisis.

The Budget leverages tax policy from foreign counterparts and existing recommendations to modernize small parts of the tax system.
Read more.

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Victorian 2021-22 State Budget handed down: On 20 May 2021, the 2021/22 State Budget for Victoria was announced. The budget makes significant increases to stamp duty, land tax, and payroll tax. It also allows some concessions.
Read more.

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China

Proposed legislative reform for family trusts: China's HNWI population has significantly increased in the last decade, making family trusts an increasingly important tool for wealth management and succession planning. Despite the increasing need for family trusts, in practice, China has not introduced specific legislation to deal with family trusts, even though the PRC Trust Law has been in place for more than 20 years. As a result, there is much uncertainty about the taxation of trusts.
Read more.

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New SAFE guidelines on cross-border payments for transfer adjustments: The State Administration of Foreign Exchange (SAFE) recently released the Service Trade Foreign Exchange Management Policy Q&A (part 2). SAFE provided clarifications on the bank procedures for processing foreign exchange payments and receipts for transfer pricing adjustments.
Read more.

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Hong Kong

Consultation paper on enhancing regulation and supervision of trust business in Hong Kong: In July 2020, the Hong Kong Monetary Authority (HKMA) launched a consultation paper foreshadowing a Code of Practice for Trust Business. The code will contain general principles and practical standards to govern the conduct of authorized institutions (AIs, being principally banks) and their subsidiaries that conduct trust business in Hong Kong.
Read more.

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Japan

Changes to Japanese cryptocurrency rules: The Financial Action Task Force (FATF) amended FATF Recommendations in October 2018. As a result of the amendments, crypto assets exchangers, custodians of crypto assets, etc. will be required to implement anti-money laundering and countering the financing of terrorism controls. Amendments to the Payment Service Act were made on 1 May 2020, which takes into account such FATF recommendations.
Read more.

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Malaysia

Audits following disclosure under the 2018 Special Voluntary Disclosure Program (SVDP): Earlier this year, there were reports of the IRB initiating probes and audits against a number of SVDP participants in relation to the periods for which the voluntary disclosures were made.
Read more.

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Philippines

Bill extending the estate tax amnesty: On 24 May 2021, the Philippine Senate passed Senate Bill No. 2208, amending the Tax Amnesty Act to extend the estate tax amnesty for two years or until 14 June 2023. The bill will be passed once it is signed into law by the president.
Read more.

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Taiwan

CFC rules are around the corner - Is any planning already too late?: In October 2020, the Minister of Finance announced that tax amnesty legislation to encourage fund repatriation back to Taiwan will expire in August 2021 as scheduled and will not be extended.
Read more.

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Thailand

The first inheritance tax case: On 23 December 2020, the central tax court of Thailand released its judgment in the first ever inheritance tax case in Thailand.
Read more.

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Family Business Series: Baker McKenzie Family Business Series will guide viewers through important issues in a family business, touching on related problems and legal issues, and advising on the solution to the sustainability of Thai family business. The six episodes contain insights and tips from our family business experts. Read more.

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Vietnam

Continued deferral of tax payment and land rent in 2021 due to impact of COVID-19 pandemic: On 19 April 2021, the government issued Decree No. 52/2021/ND-CP to provide continued support to business by granting deferral of tax and land rent payments in 2021. Read more.

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Americas

Latin America Wealth Management: What to expect after one year of COVID-19?: The three-part webinar series, in which our Wealth Management experts from seven key Latin American jurisdictions (Argentina, Brazil, Chile, Colombia, Mexico, Peru, and Venezuela) and the US, will guide you through the most recent and significant developments in the region.
Read more.

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Argentina

Law No. 27,617 incorporates modifications regarding income tax for employees, retirees, and pensioners: On 21 April 2021, Law No. 27,617 was published in the Official Gazette. It incorporates modifications to the Income Tax Law regarding the income obtained by employees, retirees, and pensioners.
Read more.

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United States

Hurry Up and Wait - Impact of Proposed Tax Law changes in the US on Wealth Planning: There have been several tax reform proposals released to the public, including those contained in President Biden's "American Families Plan." It is premature to assume any of the recent proposals will be passed by Congress, as they will likely be subject to significant debate and modifications. Read more.

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Bills aimed at coordinating the SEC and CFTC positions on Cryptocurrency passes the US House: Depending on the particular branch of the US government one is talking to, cryptocurrency can be property (IRS), security (SEC), or a commodity (CFTC). On 20 April 2021, the US House of Representatives passed a bill aimed at remedying this situation. Read more.

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IRS continues its Cryptocurrency push: On 1 April 2021, a federal court in the District of Massachusetts entered an order authorizing the IRS to serve a John Doe summons on Circle Internet Financial Inc. seeking information about U.S. taxpayers who conducted at least the equivalent of USD 20,000 in transactions in cryptocurrency during the years 2016 to 2020. Read more.

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Russia

Withdrawal from tax treaty with the Netherlands: On 19 May 2021, the upper chamber of the Russian parliament approved the corresponding law. If Russia notifies the Netherlands of the denuciation by 30 June 2021, the Tax Treaty between the Russian Federation and the government of the Kingdom of the Netherlands will be terminated as early as 1 January 2022.
Read more.

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Spain

New tax convention with China: On 30 March 2021, the new double taxation treaty signed by Spain and China was published in Spain's Official State Gazette.
Read more.

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Tax refunds for foreign Pension, Sovereign, and some Private Funds: Recent resolutions from the Spanish Supreme Court open the possibility to request a full refund of Spanish withholdings borne by foreign Pension Funds and Sovereign Funds in Spain. Other private funds can also request partial refunds considering certain requirements are met.
Read more**.**

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Ukraine

Ukraine considers tax amnesty: On 30 March 2021, the Parliament of Ukraine voted on the Bill in the first (of three) readings, making the prospects of being voted into law within the coming months quite likely. Read more.

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United Kingdom

Updated guidance on Crypto-asset taxation clarifies the treatment of staking activity in the UK: On 31 March 2021, the UK tax authorities (HMRC) consolidated their existing guidance on crypto-asset taxation for businesses and individuals and published new guidance on the taxation of "staking" activities.
Read more.

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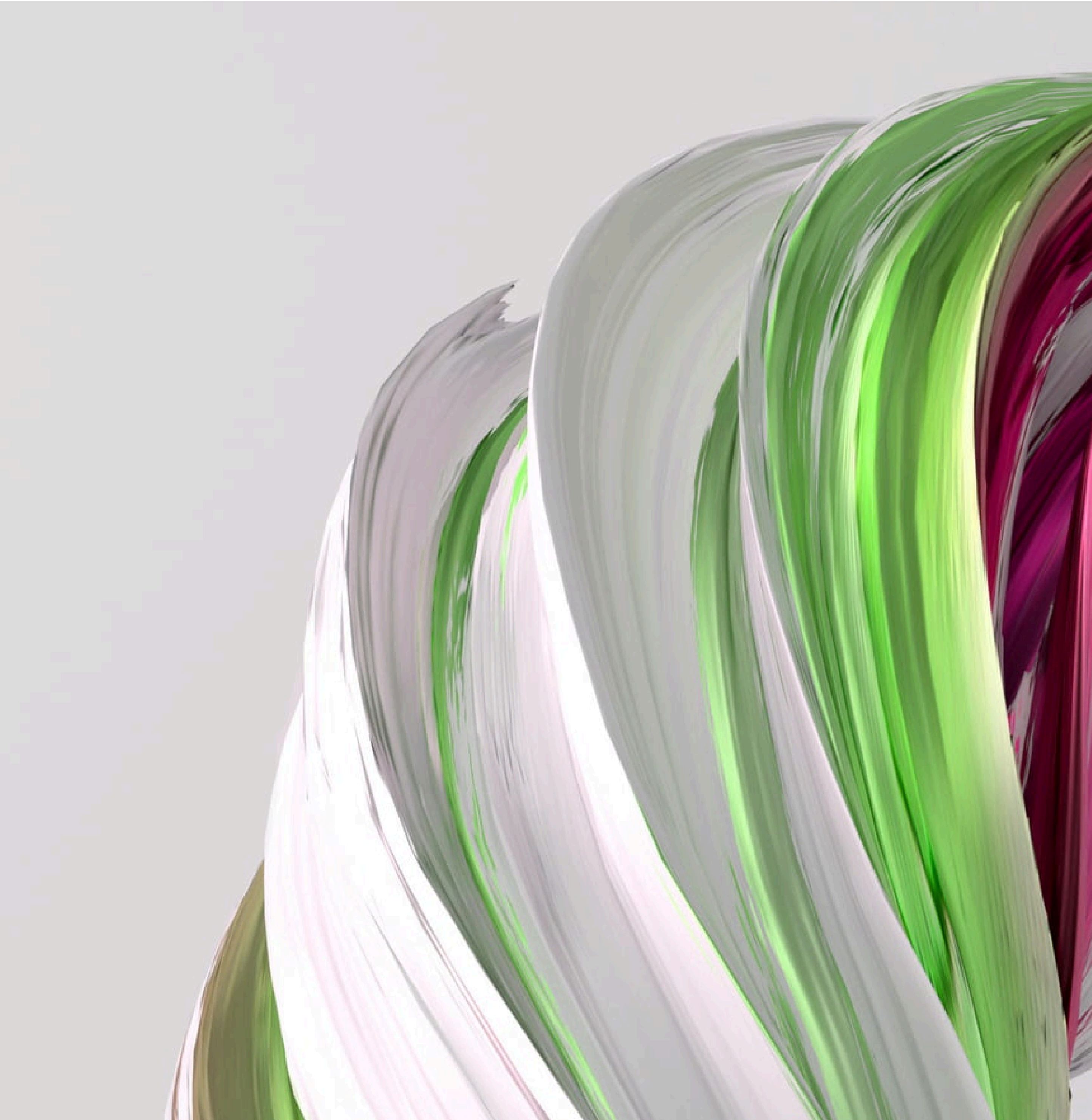

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Thank you for reading

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