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Contributions for Edition 23 of the EMEA Tax Bulletin should be with Sunny Rowley at sunny.rowley@bkremea.com by 5 July 2019.

EMEA TAX BULLETIN

APRIL 2019 - ISSUE 22

Dear Friends and Colleagues,

Welcome to the Spring edition of our EMEA Tax Newsletter. There is a lot to read in this edition concerning various tax updates from Austria, the UK and Italy as well as the report on Brexit tax implications for Ireland. Hopefully, there is something of interest for everybody! I will keep my introduction short accordingly, however, not without, as always, expressing the most sincere thanks to all those who have contributed by submitting articles to this edition, as well as to Tim, Sunny and Julia for putting everything together. Please continue to keep this newsletter alive by sending us your articles!

The EMEA Meeting in Porto is only a few weeks away now, and my fellow tax committee members and I look forward to catching up with many of you during the meeting which will no doubt give all attendees the wonderful chance again to share knowledge and experience, to strengthen ties and build new relationships.

If there is anything the tax committee can do for you, if you have any queries or concerns, please do feel free to contact us.

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Austria: Changes to the Registration Process for Cross-border Postings

Due to changes in legisation, in 2017 the registration process for cross-border postings of employees and hiring-out of employees, respectively has changed. Foreign employers established in an EU Member State, an EEA State or in Switzerland must report the employment of workers or quasi-subordinate workers who are posted or hired out to Austria on a cross-border basis PRIOR to the commencement of work to the Central Coordinating Agency. Subsequent changes must be communicated immediately.

As the reporting requirements for the posting and the hiring out of employees are different, and as the penalties for reporting incorrectly are not negligible, it needs to be defined carefully whether an assignment is qualified as posting or hiring out.

CARACTERISTICS OF THE POSTING OF WORKERS
The posting of workers exist in case of a cross-border employment of workers with their customary place of work outside of Austria, the desire to return to the posting country AND in case the focus of the employment relationship remains in the posting country (the authority to issue instructions lies with the contractor - employer). There is no integration of the employee into the operations of the Austrian client. There are several legal exceptions to the concept of posting of workers that have to be clarified on a case-by-case basis.

CARACTERISTICS OF THE HIRING-OUT OF WORKERS ON A CROSS-BORDER BASIS

The hiring-out of workers on a cross-border basis exists if an employer / a temporary work agency not established in Austria “makes employees available” for the provision of work to a user undertaking in Austria.

PARTY SUBJECT TO THE REPORTING DUTY

This reporting duty applies to employers / temporary work agencies that post workers to Austria (ZKO 3 report) or that hire out employees to Austria (ZKO 4 report) on a cross-border basis.

REPORTING DEADLINE

The report must be provided before the start of the posting (hiring-out). A separate report shall be filed each time a worker is posted (hired-out).
A framework report can only be provided for a period of up to three months in the case of service contracts and service procurement contracts, as well as in the case of postings within a group.

Furthermore, a framework report may be provided in case of repeated use of a worker who is posted to fulfil similar service contracts, provided that there is a close geographical and temporal connection between the service contracts.

The report must be provided prior to the start of work; for services in the transport sector, the report must be provided prior to entering Austria.

FORM

The report shall be submitted exclusively by filling in the electronic forms of the Federal Ministry of Finance.

CONTENT OF THE REPORTING DUTY

Employers established in an EU Member State, an EEA State or in Switzerland are required to report the employment of workers posted to Austria, regardless of their nationality.

Each posting must be reported separately and any subsequent changes to the information must be reported immediately (change report).

The reports (ZKO 3 in respect to postings and ZKO 4 in respect to cross-border-hiring-out) must be submitted PRIOR to the commencement of work, with no exceptions, by using the electronic forms, to the Central Coordinating Agency (ZKO) Charged with Investigating Illegal Employment, of the Federal Ministry for Finance. With regard to mobile workers in the transport sector (rail, overland, air or maritime transport of freight and/or passengers), the report must be submitted BEFORE entering Austrian territory. Mobile workers must keep the reporting documents readily available as soon as they enter Austrian territory (in the vehicle), except for transit traffic WITHOUT cabotage.

Posting reports regarding third-country nationals or Croatian citizens during transitional periods must be forwarded to the Public Employment Service [Arbeitsmarktservice (AMS)] for review in regard to whether work subject to authorization is involved.
In case of work performed by workers hired by an

Austria: Changes to the Registration Process for Cross-border Postings (contd.)

employer established in Croatia, in a protected sector in Austria, i.e. certain services in which restrictions on the freedom to provide services are permitted within the framework of the transitional arrangement, a posting permit, in the construction sector a work permit, must be applied for with the AMS.

OBLIGATION TO KEEP REPORTING DOCUMENTS READILY AVAILABLE

In the case of a posting of workers for the provision of work in Austria, employers established in an EU Member State, in an EEA State or in Switzerland must keep the following documents readily available at the place of work/employment in Austria during the entire posting period or make them accessible electronically on site at the time of the investigation:

- a copy of the posting report (ZKO3) and any reports regarding subsequent changes (change report), as well as
- documents regarding the employees' registration for social security (form A1), if there is no social security requirement for the posted workers in Austria
- If an official permit is required to employ the posted workers in the country where the employer is established, this permit or a copy thereof must also be kept readily available.

In the case of a hiring-out of workers on a cross-border basis, the obligation to keep all of the reporting documents (ZKO4, social security documents, required permits) readily available or to provide them applies to the user undertaking at the domestic place of work/ employment.

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'A brave new world' – The non-UK domicile regime

Just over four years ago, at the time of the 2014 Autumn Statement, the Government made the following statement regarding the non-UK domicile regime:

'We recognise the significant contribution that non-UK domiciled individuals make in the UK, creating jobs and inward investment. That is why we stand firmly behind the remittance basis of taxation, which is a unique way of taxing people. With the changes announced at Autumn Statement 2014, the UK will continue to offer a very competitive tax regime, allowing people who are not domiciled here to base themselves in the UK for a long time whilst maintaining a different tax status.'

Following the 2014 Autumn Statement, it was expected that there would be no substantial changes to the non-UK domicile regime for some years to come. However, the political events that followed completely changed the landscape for non-doms, and what followed was a period of unprecedented uncertainty, with announcements being regularly delayed and rules changing at the last minute. Only within the last 12 months can it be said that the rules have finally settled, but there still remain some areas of concern for non-doms.

Lessons from history

Looking back, the timeline of events to introduce the most dramatic changes to the non-UK domicile regime in the last decade makes uneasy reading for non-doms and their advisors. On 8 July 2015, at the 2015 Summer Budget – following the Conservatives' unexpected majority during the 2015 General Election, the then Chancellor, George Osborne, announced widespread changes to the taxation of non-doms and overseas trusts to be introduced from 6 April 2017. The Conservatives had promised to make changes to the non-UK domicile regime during their election campaign, mainly in response to Labour's pledge to abolish the regime completely. It was apparent that limited consideration had been given to the exact form of the new rules at the time, but the Government had given themselves just under two years to devise a final and workable set of rules. The opportunity to reform the regime was significant, and it could have established a regime that

‘A brave new world’ – The non-UK domicile regime (contd.)

was fit for purpose for a generation.

The first consultation document was published on 30 September 2015, but there was no mention of the changes to overseas trusts or Inheritance Tax (“IHT”) changes to UK residential property (which is not covered in this article and would require an entire item in itself.) It would be almost a year before the consultation response was published, on 19 August 2016, and a further consultation was announced. In this second consultation document, the proposals for overseas trusts were finally published, as well as details of the ‘rebasing’ and ‘cleansing’ reliefs. However, some of the key detail was still unknown, and it remained that way even when the final consultation response and draft legislation was published on 5 December 2016, as there were still gaps on some of the technical detail, especially regarding overseas trusts.

When the third draft version of the legislation was published on 20 March 2017, it completely removed a number of the specific anti-avoidance provisions relating to overseas trusts, with the Government commenting – ‘It has not been possible to make all of these changes in time and consequently, the Government has taken the view to defer publication of the provisions affected.’

However, more was to come, as following the ‘snap’ election announcement, the Finance Bill 2017 put forward to Parliament on 25 April 2017 removed all the provisions relating to the non-domicile changes, as the Government tried to rush through the Bill. At that time, non-doms were facing a period of limbo, waiting for the outcome of the election and left wondering if any of the changes that had been hanging over them for the last two years would actually be introduced. The majority of non-doms had planned for some time for the changes to be introduced, and were naturally frustrated that the decisions they had committed to may now be wasted.

On 13 July 2017, the Government confirmed that the nondomicile reforms would be re-introduced in a second Finance Bill 2017 and have effect from 6 April 2017. However, it was not until 8 September 2017 that the second Finance Bill 2017 was actually published. A few days later, on 13 September 2017, it was announced that the anti-avoidance provisions relating to overseas trusts (which were originally intended to take effect from 6 April 2017) would be introduced in a following Finance Bill that would apply from 6 April 2018.

How did it all end up?

There were four main components to the new rules that were eventually introduced:

1. Non-doms who had been resident in the UK for 15 out of the previous 20 tax years would become ‘deemed’ domiciled for all personal taxation purposes.
2. Individuals born in the UK with a UK domicile of origin, who established a non-UK domicile of choice, would not be able to benefit from the non-domicile taxation regime if they are UK resident, and any overseas structures will not be afforded protection.
3. Non-doms becoming ‘deemed’ domiciled on 5 April 2017 could benefit from an automatic rebasing of their personally held overseas assets, and any non-dom that had elected to claim the remittance basis prior to 6 April 2017 could ‘cleanse’ their mixed accounts, up to 5 April 2019.
4. New rules were introduced to provide certain protections to overseas trusts established by non-doms.

The ‘15/20 year rule’

Under the previous non-domicile regime, a non-dom could assess their overseas income and capital gains under the remittance basis for an indefinite period. The only condition was that the individual had to have a non-UK domicile according to the general principles of law. Non-doms who had been resident in the UK for more than seven years had to pay an annual flat fee (known as the remittance basis charge) up to £90,000, the level of which was determined by the length of UK residence.

For IHT purposes only, once the non-dom had been resident in the UK for 17 out of the previous 20 tax years, they would have become ‘deemed’ domiciled and their worldwide estate would have come within the scope of UK IHT.

From 6 April 2017, a non-dom would become ‘deemed’ domiciled for all personal tax purposes if they had been resident in the UK for 15 out of the previous 20 tax years. The remittancebasis charge remained, but the maximum charge would be £60,000, and the £90,000 was made

'A brave new world' – The non-UK domicile regime (contd.)

redundant (after only being in place for two tax years). Under the new '15/20 year rule', a non-dom could 'break' their 'deemed' domicile if they become non-UK resident for six consecutive tax years.

The 'returning Brit'

The introduction of this measure was mainly in response to the case of Gulliver v HMRC. Mr Gulliver was born in the UK with a UK domicile of origin and left to work in Hong Kong, but later returned to the UK. When Mr Gulliver returned to the UK, he claimed he had acquired a domicile of choice in Hong Kong, and received written confirmation from the Inland Revenue. However, the ruling from the Inland Revenue was based on Mr Gulliver's intentions that he would remain in the UK for no more than two years, but he actually ended up staying in the UK much longer. HM Revenue & Customs ("HMRC") opened an enquiry into Mr Gulliver's later tax return, focused on his claim to be non-UK domiciled. Mr Gulliver contended that HMRC had previously accepted he was non-UK domiciled, referencing the earlier correspondence with the Inland Revenue. HMRC argued that they were not bound by the previous conclusions, and First Tier Tribunal agreed, and that Mr Gulliver would be required to prove that he was non-UK domiciled in the later year.

To avoid the issues associated with the case of Mr Gulliver, the Government introduced a specific rule stating that individuals born in the UK with a UK domicile of origin, but who subsequently claimed a domicile of choice outside the UK, will be treated as UK domiciled if they become UK resident. Essentially, the new rule would override the general law of domicile and prevent someone born in the UK with a UK domicile of origin to benefit from the non-domicile regime.

In order for the rule to be relevant, the individual must have been born in the UK and have a UK domicile of origin. It therefore follows that children born abroad (say on holiday), to UK domiciled parents fall completely outside the provision. The majority would see this completely illogical and anomalous from the policy.

For Income Tax and Capital Gains Tax ("CGT") purposes, affected individuals are taxed on their worldwide sources as soon as they resume UK residence. For IHT purposes, such individuals will be treated as UK domiciled after being resident for at least one of the two tax years prior to the year in question. This would provide a short 'grace period', but no longer term protection. In addition, any overseas structures that were established by such individuals would also be rendered largely ineffective for protection from UK taxation.

The giveaways

'Cleaning up'

The constant headache for a non-dom has been how to efficiently remit overseas monies to the UK. Despite best intentions, overseas accounts become easily mixed, and the dreaded mixed fund rules offer no concession to extract any available 'clean capital' once an account has become mixed.

The 'cleansing' relief was originally considered the most welcome measure as part of the reforms to the non-UK domicile regime. For the first, and possibly last time, non-doms could 'clean up' their overseas accounts and split out the component parts to ring-fence their available 'clean capital' for future use in the UK.

Non-doms had a window of two years until 5 April 2019 to complete the 'cleansing' process. The legislation itself was unnervingly short on detail as to how this process should be undertaken, and HMRC promised detailed guidance for nondoms and their advisors to follow. The majority of non-doms did not take any action until HMRC published their guidance (on 1 February 2018 almost half way through the window). HMRC's guidance left most non-doms disappointed as it was made clear that it would be necessary to identify the exact source of funds, meaning that overseas bank accounts would need to be analysed in detail. The smallest mistake could make any 'cleansing' exercise redundant, and potentially result in tax charges arising on future remittances.

It became apparent that the 'cleansing' process would require a large volume of data, some of which may not even exist, to carry out the necessary calculations to address HMRC's expectations set out in their guidance. The majority of non-doms became deterred by the complexity of the process, and after the initial excitement, relatively few non-doms would actually apply the provision. Some non-doms even felt the 'cleansing' opportunity was a 'Trojan Horse', which could open them up to a future HMRC enquiry.

‘A brave new world’ – The non-UK domicile regime (contd.)

‘Rebasing’

Whilst the ‘cleansing’ opportunity left many non-doms disappointed, the rebasing provision was considered incredibly generous.

The origins of the rebasing provision was that those non-doms who would become ‘deemed’ domiciled under the new rules were making plans to manually rebase their assets, most likely through an actual sale and subsequent repurchase of overseas assets. Given that affected non-doms would have taken such practical action in any case, HMRC agreed that an automatic rebasing would be sensible.

The rebasing provision was available to non-doms who became ‘deemed’ domiciled on 6 April 2017, and who had paid the remittance basis charge at some point since 2008.

The rebasing provision would not be available for those non-doms who become ‘deemed’ domiciled in subsequent tax years and therefore some non-doms may have just missed out. Furthermore, non-doms that were born in the UK with a UK domicile of origin (the ‘returning Brit’) were also not eligible.

Originally, HMRC stated that offshore funds assessed to Income Tax (i.e. non-reporting offshore funds) would not benefit from the rebasing, but they subsequently changed their mind.

Where assets were standing at a loss, the rules allowed for the rebasing to be disapplied so that the automatic rebasing did not have any adverse impact.

Most interestingly, the rebased gain was completely exempted from any taxation, meaning that the gain up to 5 April 2017 could be freely remitted to the UK. In order for such a strategy to be fully effective, the asset in question would need to be sold for cash and the ‘cleansing’ process applied to segregate the rebased gain into a separate account – this would need to be undertaken before 5 April 2019 when the ‘cleansing’ window closes. The interaction of the rebasing and ‘cleansing’ could produce very generous outcomes.

Overseas trusts - has it really gotten better?

Overseas trusts settled by a non-dom, before they become ‘deemed’ domiciled, would be given complete protection from Income Tax (in relation to non-UK source income) and CGT (UK and non-UK assets, other than UK residential property and carried interest capital gains). These protections remain indefinitely, and are irrespective of whether the person establishing the trust subsequently becomes ‘deemed’ domiciled. The overseas trust can accumulate non-UK income and realise capital gains without UK taxation for an indefinite period. From an IHT perspective, the value of the trust is also protected to the extent it only holds non-UK assets.

The protections afforded to overseas trusts were a mechanism to effectively allow non-doms to continue to benefit from the previous regime, but under a different guise.

More recently, an issue has arisen with the technical drafting of the legislation in relation to the protections, which has meant that an overseas trust realising an offshore income gain on the disposal of a non-reporting fund will not be afforded protection, and the amount would be taxable on the settlor. Although this was widely believed to be a technical defect with the legislation, HMRC confirmed that the Government did not intend to correct the position.

The protections for overseas trusts came with some caveats, in that additions to such protected trusts after the non-dom has become ‘deemed’ domiciled would taint the structure and the protections would be completely lost. Therefore, maintaining the protected status of the trust would require careful management going forward.

Also, new anti-avoidance provisions were introduced to where distributions were made directly or indirectly to non-UK residents. For example, a new rule was introduced to prevent a non-UK resident taking a distribution from an overseas trust, which would not be taxable in their hands, and subsequently gifting the monies to UK residents.

'A brave new world' – The non-UK domicile regime (contd.)

Where are we now?

It has been a challenging few years for non-doms, and some have taken the step to leave the UK as a consequence. The new rules would now appear to be in a settled form, albeit with some frustrations. The protections afforded to overseas trusts represent a significant relaxation to the previous rules, and individuals relocating to the UK for the first time can use structures to maximise tax efficiency and flexibility. The current thinking is that the non-domicile regime should remain in its current form for some years to come, but with the political uncertainty, no one would rule out a further radical change in the future.

* Article First published in International Tax Report

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First CFC-rule in Austria: Additional taxation for low-taxed passive income

Based on Art 7 and 8 EU Anti Tax Avoidance Directive (ATAD), Austria implemented a CFC rule for the first time ever. The provision leads to the inclusion of the low-taxed passive income of a foreign company on the level of the controlling company in Austria. This "CFC income" increases the tax base in Austria and needs to be calculated pursuant to Austrian tax provisions. The rule is also relevant for private trusts and permanent establishments (P/E). With the regulation issued by the Austrian Ministry of Finance in January 2019, the authorities gave – in accordance with suggestions from actual practice – further guidance for the concrete utilization of the CFC rule. The provision shall apply for business years starting after 31 December 2018.

The key points of the CFC-rule in a nutshell

1. **Control.** A foreign company (or P/E) is considered to be "controlled" if the Austrian entity (company, P/E, private trust) holds or owns (in)directly > 50% of the capital or voting rights or is entitled to receive > 50% of its profits.

2. **Substance test.** Passive income of group companies that do not carry out substantial economic activities with regards to personnel, assets, business premises or facilities ("substance test") is directly taxed in Austria, even if it has not yet been transferred to Austria. In case the foreign entity carries out several activities, the economic activity is "substantial" in the sense of the provision if the facilities (incl personnel, etc) are used to at least 1/3 for this economic activity and 1/3 of the total income is generated from this activity. This proof of substance needs to be delivered by the controlling domestic company.

3. **Passive income** under the provision covers interest, royalties, dividends and income from the sale of equity participations (to the extent that these would be subject to tax on the level of the participating company), income from financial leasing, income from the disposal of shares, from banking and insurance activities (with derogations) and other financial activities. The foreign income relevant for the taxation in Austria under the CFC rule must be calculated in accordance with Austrian tax provisions. The passive income should not amount to more than 1/3 of the total income of the foreign entity. This 1/3-limit generally needs to be assessed separately every year. However, if the passive income does not exceed the 1/3-limit for more than 25% in a year (ie passive income of max. 41.67%) or in case the active income is negative, the two previous financial years can be included in the assessment. The CFC rule does not apply if the sum of the passive income does not exceed 1/3 of the total income.

First CFC-rule in Austria: Additional taxation for low-taxed passive income (contd.)

4. **Low taxation** in the sense of the provision is considered to exist if the effective tax rate abroad is 12.5% or less.

5. **Additional taxation.** If the above conditions are met, the passive income is subject to tax in Austria to the extent of the shareholding. The profit allocation, on the other hand, is primarily based on the profit entitlement or the (indirect) equity participation. If the shareholding thus does not match the profit allocation rate, the profit entitlement shall be the basis for the taxation of the passive income. The offset of losses is possible; active income must not be offset, though. Furthermore, if the negative passive income exceeds the positive passive income, the excess amount could be offset against positive passive income in the following year(s).

Outlook

Due to the definition of "low taxation" up to a tax burden of 12.5%, also EU-tax structures (incl countries such as Bulgaria, Hungary or Ireland) may fall under the CFC rule, leading to extensive tax consequences on the level of the controlling Austrian entity. What is more, the implementation of the new provision into practice may also tackle tax constructions that are not frowned upon under the BEPS Action Plan. If the effective tax rate is lowered to 12.5% or less due to different calculation methods, not only foreign financing or IP companies may fall under the provision, also intermediate holding companies and mixed companies (even in high-tax jurisdictions) could be affected. It is thus highly recommended conducting a detailed analysis of the participation structures potentially affected by the new CFC provision as of 1 January 2019.

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Italy: CODE OF CRISIS AND INSOLVENCY: NEW CRITERIA FOR LIMITED LIABILITY COMPANIES AND COOPERATIVE SOCIETIES IN THE APPOINTMENT OF THE CONTROL BODY

On February 14th the Legislative Decree No. 14 of January 12th, 2019 was published in the Official Gazette in implementation of Law No. 155/2019.

Article 379 of the Decree amended the Civil Code as for the thresholds foreseen for the mandatory appointment of the control body or statutory auditors for limited liabilities companies and cooperative societies.

The following chart compares the amended thresholds:

Current regulations (article 2477)	New regulations (article 2477) – from 16 March 2019
Compulsory appointment if the Company has – for two consecutive financial years – exceeded two of the following limits: 1. total assets of the balance sheet: EUR 4,400,000; 2. revenues from sales and services: EUR 8,800,000; 3. average number of employees during the financial year: 50 units. The obligation to appoint the control body or statutory auditors ceases if for two consecutive financial years the above-mentioned limits are not exceeded.	Compulsory appointment if the Company has – for two consecutive financial years – exceeded one of the following limits: 1. total assets of the balance sheet: EUR 2 million; 2. revenues from sales and services: EUR 2 million; 3. average number of employees during the financial year: 10 units. The obligation to appoint the control body or statutory auditors ceases if for three consecutive financial years the above-mentioned limits are not exceeded.

In order to evaluate an eventual first adoption of said body, the fiscal years reference must be made to while determining the thresholds are 2017 and 2018.

Law foresees the companies will have to provide for the appointment within December 16th, 2019, i.e. nine months starting from March 16th, 2019, date of entry into force.

The appointment is the responsibility of the Shareholders' Meeting; shouldn't this provide for, the Court shall, upon request of any among the interested subjects or following the recommendation of the Registrar of Companies.

The following cases, the obligation of the appointment is already foreseen for, remain unamended:

- Preparation of the consolidated financial statements;
- Control of a company subject to the legal audit of the financial accounts.

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UK: VAT Alert

Welcome to Blick Rothenberg's VAT:alert. This briefing contains timely information on VAT issues that may affect your business.

Brexit and customs update

In view of the current uncertainty around Brexit and the amount of announcements on this subject from HM Revenue & Customs ("HMRC"), we recommend that you visit our Brexit and Customs & Excise Duty pages for more information. However, we would highlight two points that businesses should consider in case of a no-deal scenario:

- VAT refunds from other EU member states for the year ending 31 December 2018 should be submitted as early as possible and before 11pm on 29 March 2019 at the very latest.
- UK and EU businesses moving goods between the UK and the EU should consider applying for an Economic Operator Registration and Identification number as soon as possible.

Making Tax Digital for VAT update

With Making Tax Digital ("MTD") being introduced with effect from 1 April 2019, HMRC has updated its guidance to confirm that businesses that are not established in the UK, but make taxable supplies in the UK only need to comply with the MTD requirements if their taxable turnover exceeds the current UK registration threshold of £85,000.

HMRC has further confirmed that the 12 month 'softlanding period' in relation to the digital link between software applications applies to all businesses, i.e. also to those which have been deferred from 1 April to 1 October 2019.

In addition, HMRC has provided more details on the circumstances under which businesses can be exempt from the MTD requirements. Businesses which believe they are exempt from MTD on the grounds that it would not be reasonably practicable, or would be incompatible with religious beliefs, or because the business is subject to an insolvency procedure, should approach HMRC who will subsequently issue a decision in writing.

More insights on MTD can be found on our website.

Spring Statement 2019

No major VAT changes were announced but it may be worth noting the following:

- MTD - The Government has confirmed its light touch to penalties in the first year of implementation.
- Isle of Man - The Treasury will publish the findings and recommendations following its review of the Isle of Man's VAT administration processes in relation to the importation of aircraft and yachts in the coming months.
- Partial exemption methods and Capital Goods Scheme - The Government will publish a call for evidence with a view to make the system as simple and efficient as possible for taxpayers. VAT:alert March 2019 Welcome to Blick Rothenberg's VAT:alert. This briefing contains timely information on VAT issues that may affect your business.
- Public Sector - The Government will explore a potential reform to VAT refund rules for central government to reduce administrative burdens and improve public sector productivity.

Hire purchase agreements with final optional payment

The Court of Justice of the European Union ("CJEU") clarified in a recent decision (Mercedes Benz Financial Services) when a hire purchase contract for a car needs to be treated as a supply of goods and when it falls to be treated as a supply of services. HMRC has now released Revenue and Customs Brief 1 (2019) stating that the VAT treatment of personal contract purchases and similar contracts depends on the level at which the final optional payment is set.

Under the rules that apply to new contracts from 1 June 2019, hire purchase contracts will continue to be treated as a taxable supply of goods and a separate exempt supply of credit where, at the start of the contract, the final optional payment is set below the anticipated market value at the time the option is exercised. Where, at the start of the contract the final optional payment is set at or above the anticipated market value, the contract will be regarded as a taxable supply of leasing services from the outset.

The Brief also contains information on how to correct errors for past periods, how to deal with error correction notices submitted with a view to the outcome of the CJEU judgment and how to make related input tax adjustments for suppliers and customers.

UK: VAT Alert (contd.)

VAT groups and bought-in services

As announced in the Budget, HMRC has revised its guidance to clarify which services received from overseas need to be regarded as 'bought-in services' (as opposed to services provided in-house) and are therefore subject to UK VAT under the reverse charge when supplied cross border. The guidance includes clarifications and examples of how to calculate the reverse charge on such services.

HMRC also says it has clarified "existing policies" and it is well worth noting that this includes HMRC's "protection of the revenue" powers. One explicitly stated example of when these powers may be applied is in relation to supplies from an overseas establishment to other VAT group members. This is likely to be the case where the supplies in the UK between the UK establishment and the other VAT group companies are 'disproportionately small' compared to the supplies between an overseas establishment and the other VAT group companies. The changes apply from 1 April 2019 and we recommend any VAT group with an overseas establishment immediately review their arrangements in light of HMRC's guidance.

UK VAT refunds for businesses established outside the EU

Following Revenue and Customs Brief 12 (2018) HMRC has now updated its guidance in relation to clarifying the details required to be shown on a 'certificate of status proving your business activity' and in particular the business address. HMRC also confirm under which circumstances electronic certificates will be accepted.

Partial exemption: Input tax recovery for branches providing cross-border services to head office

In Morgan Stanley (C-165/17) the CJEU had to rule on how to determine input tax recovery where a branch in one member state uses local overhead costs not only for its own supplies but also for transactions to its head office located in another member state. Complexity not only arose from partial exemption and the fact that transactions between branch and head office are disregarded for VAT purposes, but also from different VAT rules in the respective Member States including the option to tax financial services. Businesses in a similar position may want to review their input tax recovery in light of this decision.

VAT treatment of commodities

Despite Brexit being just around the corner, the European Commission has nevertheless referred the UK to the CJEU over extending the original scope of the zero-rate under the Terminal Markets Order. The Treasury has confirmed that during the infraction procedures the tax treatment of commodity derivatives remains unchanged.

Property: Sale and leaseback constitutes a 'change of use'

In Balhousie, a company acquired a new care home free of VAT under the zero-rated relief for residential accommodation. As obtaining bank finance was considered difficult at the time, the decision was made to sell and lease back the property whilst there was no change to the actual use of the property as a care home. The Court of Session, however, confirmed that the sale and the leaseback were two distinct transactions and that the sale therefore led to a disposal of the entire interest in the property. This triggered a self-supply charge of VAT on the original purchase price which had been zero-rated at the time. Businesses acquiring zero-rated property should ensure they are aware of the VAT implications before restructuring its financial arrangements.

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BREXIT – TAX IMPLICATIONS FOR IRELAND

Overview:

When the UK voted to leave the EU on the 23rd June 2016, no one could have imagined that the details of the exit would still be unknown and undecided almost three years later.

What was also not envisaged at the time was that the main stumbling block for the UK to leave the EU in an agreed manner would be the implications that Brexit would have on the Island of Ireland. The term “Backstop” is now a common word in the vocabulary of every EU politician and this term refers to a potential solution to the difficult political situation that Brexit creates for Northern Ireland and its relationship with Great Britain and the Republic of Ireland.

While many may wonder why this political issue with a small island in Europe could be one of the reasons for the delay in implementing an orderly Brexit, one must consider the significant historical links between the UK and Ireland and the current political situation concerning Northern Ireland.

In respect to the impact from a trading perspective, it is widely accepted that a no deal Brexit would have major detrimental implications for the Republic of Ireland due to the fact that the UK is its largest trading partner and export market. However it must also be considered that the Republic of Ireland is the 8th largest trading partner for the UK and its 7th largest export market. UK exports to the Republic of Ireland are more than double what they are to larger countries such as Italy & Spain.

Tax & Economic Implications for Ireland:
Brexit presents many tax and economic challenges and opportunities for Ireland. Purely from a tax perspective, Brexit could have widespread implications such as:

Customs Duties:

- Tariffs and customs may be applied on the sale and acquisition of goods and services to the UK and Northern Ireland. The issue of Customs and Excise Duties is particularly complicated for Ireland given the political issues surrounding Northern Ireland.
- Due to Ireland’s geographical location, the majority of imports into Ireland must travel through UK ports. Any complications arising from Customs Duties could provide major obstacles in the smooth transportation of goods to Ireland.

VAT:

- Brexit could result in the loss of VAT zero rating on business to business supplies within the EU.
- Irish businesses which incur UK VAT may no longer reclaim that VAT through the Electronic VAT Refund (EVR) mechanism. Instead they may have to revert to the paper claim through the 13th EU Directive claims. This could create significant cash flow problems for Irish businesses.
- The Distance Sales rules may no longer apply to the UK. Irish suppliers to UK consumers have to register for VAT in the UK in order to avoid UK customers becoming liable for VAT and duty.

BREXIT – TAX IMPLICATIONS FOR IRELAND (contd.)

- The UK may fall out of the scope of the Mini One Stop Shop (MOSS) for Telecommunications, Broadcasting & Electronic (TBE) supplies. UK suppliers of TBE to EU consumers may have to register for MOSS in another EU country. Ireland would be an obvious choice for many UK suppliers in which to register for MOSS.

- UK Travel Agents may have to register for VAT in Ireland if they are making supplies of accommodation in Ireland as the Tour Operator Margin Scheme may no longer apply to UK Travel Agents.

- Traders who imports or exports goods into or out of the EU will need a unique EORI number (Economic Operator Identification & Registration system). This number is valid throughout the EU. It is used as a common reference number for interactions with the customs authorities in any Member State. If the UK leaves the EU then an EORI number may be required for Irish businesses trading with the UK.

Corporate Tax:

- If the UK leaves the EU, then it is expected that the UK may reduce its Corporate Tax rate even further. This will lead to increased competition with Ireland in respect to attracting foreign investment. Ireland may come under increased pressure from the EU in respect to its low 12.5% Corporate Tax rate as the UK was traditionally an ally of Ireland in objecting to a minimum EU Corporate Tax rate and common consolidated tax base.

- There may be implications where a UK company forms part of a Group Structure. It is possible that tax reliefs may be lost due to the fact that a UK company in the Group will not be resident in the EU. With Ireland's close economic ties to the UK, many Irish companies will have UK branches or subsidiaries and vice versa. Irish Groups with UK entities will have to review how Brexit affects the structure from a tax perspective.

- It may no longer be possible to make dividend payments between EU parent and subsidiaries free of DWT if one of the entities is resident in the UK. This could have implications for many Irish or UK companies that have subsidiaries in the other country.

- Some UK headquartered groups may consider relocating to another EU country if it is no longer possible to pay interest and royalties free of withholding tax between group companies. There is an opportunity for Ireland to attract many of these companies due to the close ties between Ireland and the UK.

- Various other reliefs may be affected such as Capital Gains Tax and Stamp Duty on asset transfers, reorganisation reliefs and transfer of losses. UK companies may have to give serious consideration to their residency if Brexit adversely affects their tax exposure. Again, this is an area where Ireland may benefit if it can attract such companies to relocate to Ireland.

Personal Taxes:

- From a personal tax perspective Brexit is not expected to have as large an impact as it has on customs, VAT and Corporate Tax. There have been signs that some High Net Worth UK individuals are looking at moving some of their income base to Ireland and avail of Irish non-Domicile rules in respect to the remittance basis of taxation. However there does not yet appear to be a large exodus of UK HNW individuals leaving the UK as a result of Brexit but they are exploring other options in preparation for a no deal Brexit.

- Brexit may affect the agreements in place in respect to Temporary Assignees such as PAYE Exclusion Orders and A1/E101 Social Insurance arrangements. Due to the close economic and geographical links between Ireland and the UK the issue of Temporary Assignees and Cross Border Workers is a significant one and Brexit could have a negative impact on such arrangements.

- In respect to personal tax one of the main issues may be the freedom of movement of people into and out of the UK. Air & Sea Travel routes between Ireland and the UK are amongst the busiest in the world and any disruption to the flow of people between both countries would have negative economic consequences for both countries. There is also the issue of travel between the Republic of Ireland which will remain in the EU and Northern Ireland which will be outside the EU.

- It is expected that the Double Tax Agreement between

BREXIT – TAX IMPLICATIONS FOR IRELAND (contd.)

Ireland and the UK will continue to provide guidance in respect to the issue of personal taxes between both jurisdictions.

Summary:

- It is widely agreed that after the UK, Ireland is the country that will be most affected by Brexit. While Ireland remains a fully committed member of the EU it also has intrinsic historical, cultural, economic and social links to the UK. It also shares a land border with the UK in Northern Ireland.

- It is in Ireland's best interests that the UK's exit from the EU is part of an agreed exit that maintains close economic and financial links between the EU and the UK.

- The Irish Government is issuing guidance to Irish businesses on the implications of a no deal Brexit and how businesses should prepare for such an event.

Brexit also presents some opportunities for Ireland to attract UK businesses that wish to establish a presence in an EU country and for non-EU businesses looking to locate to an EU country in order to avail of the EU Single Market.

- It is hoped in Ireland that the new deadline date for the conclusion of Brexit negotiations on the 31st October 2019 will result in an agreed deal that paves the way for the UK to leave the EU in an orderly manner that creates the least amount of disruption possible for both Ireland, the EU and the UK. Otherwise we may have a “Nightmare on Downing Street” on Halloween Night 2019!

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Accountancy Europe's Tax Policy Update

The latest Accountancy Europe's Tax Policy Update is now available on their website, at Tax Policy. As always there are a wide range of articles in the update.

Highlights in this edition include:

- European Parliament adopts TAX3 report, including recommendation on audit firm rotation
- European Parliament votes on public CBCR to bring the file to second reading stage
- Over 100 countries agree at OECD to involve online platforms in VAT/GST collection
- European public opinion sees tax as one of the top priorities ahead of EU elections
- GRI: investor community expresses support for voluntary public CBCR standard

Next EMEA Tax Meeting

The annual BKR EMEA Tax Meeting for this year has been confirmed for Monday 25 November 2019. The meeting will once again be held the Hilton Amsterdam Airport Schiphol.

More details will be made available later in the year.

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